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CIVIL MINUTES-GENERAL

Case No. Civ. 99-10518-GHR (AJW) Date: May 2, 2001

Title: Chang, Wen-Wan, et al. v. United States of America

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CENTRAL DISTRICT OF CALIFORNIA
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PRESENT: Hon. George H. King, United States District Judge

Beatrice Herrera
Deputy Clerk

None Present
Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFF:

ATTORNEYS PRESENT FOR DEFENDANT:

None Present

None Present

PROCEEDINGS: Defendant's Motion to Dismiss, or, in the Alternative, for Judgment on the Pleadings

This matter is before the court on Defendant's motion to dismiss, or in the alternative, for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c). After fully considering the briefs and papers pertaining to this matter, and hearing the parties' October 16, 2000 and March 27, 2001 oral arguments, we rule as follows:

I. Background

Plaintiffs filed their First Amended Complaint ("FAC") on March 8, 2000, which asserts seven claims against the United States: (1) violation of the Administrative Procedure Act, 5 U.S.C. § 500, et seq. ("APA") (2) abuse of discretion, (3) action exceeding statutory authority, (4) violation of due process and equal protection, (5) uncompensated taking (claim made only by the Partnership Plaintiffs), (6) estoppel, and (7) improper retroactive application of regulations. Defendant filed its Answer on March 22, 2000, and then filed this Motion on June 27, 2000.

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A. The Immigrant Investor Law

Plaintiffs' FAC challenges the Immigration and Naturalization Service's ("INS") implementation of 8 U.S.C. § 1153(b)(5)(A) (Supp. IV-1998), a provision that was added to the immigration statute in 1990 and confers preferred visa status on "qualified immigrants seeking to enter the United States for the purpose of engaging in a new commercial enterprise . . . which the alien has established," and "which will benefit the United States economy and create full-time employment for not fewer than 10 United States citizens" or lawful aliens. This is the fifth preference within the "employment-based" visa preference category and, for that reason, the immigrant investor law is commonly referred to as the "EB-5" program.

In order to achieve the statute's employment creation goals, Congress required an alien to have invested or be "actively in the process of investing" at least \$1,000,000 in the new commercial enterprise, or at least \$500,000 if the investment is made in a "targeted employment area." *Id.* at § 1153(b)(5)(C)(i) - (iii). Congress subsequently created the "Immigrant Investor Pilot Program," to permit aliens seeking to qualify for EB-5 preferred visa status to do so by investing in a "regional center," and to demonstrate by "reasonable methodologies" their compliance with the job creation requirements. Pub. L. No. 102-395, § 610(a), 110 Stat. 1874 (1992). The term "reasonable methodologies," is not defined, but the minimum of ten full-time jobs may include "jobs which are estimated to have been created indirectly through revenues generated from increased exports. . ." *Id.*

An alien seeking to obtain lawful permanent residence in the United States under the EB-5 statute must first file an I-526 petition setting forth information about himself and his proposed qualifying investment. If the I-526 petition is approved, the alien (and his dependents, if any) is admitted for permanent residence on a conditional basis. 8 U.S.C. § 1186b(a)(1) (Supp. IV 1998). Within the 90-day period before the second anniversary of his lawful admission for permanent residence, he must file an I-829 petition to have the conditional status removed. *Id.* at § 1186b(c)(1), (d)(2). The I-829 is granted if the INS determines that the alien has sustained the required investment and entrepreneurial activities during the period of his conditional residency. *Id.* at § 1186b(d)(1).

The INS issued regulations in 1991 that are codified at 8 C.F.R. § 204.6 (1999). See Morton v. Ruiz, 415 U.S. 199, 231 (1974) (administrative agency tasked with administration of a congressionally created and funded program has authority to "formulat[e] policy and [make] rules to fill any gap left, implicitly or explicitly, by Congress").

Petitions were submitted at a rate of 356 to 513 petitions a year for the first four years of the program (FY 1992-95). See R.L. Investment L.P. v. INS, 86 F. Supp. 2d 1014, 1017 (D. Haw. 2000) (citing statistics) ("R.L. Investment"). The number of I-526 petitions filed annually then increased, beginning in FY 1996 when 801 petitions were filed and increasing to 1,290 in FY 1997, and 1,368 in FY 1998. Id. As in this case (FAC ¶¶ 34-61, 77-83), many of the I-526 petitions did not set forth proposals by individual aliens to invest in a business that they would start up and run themselves, but rather reflected efforts by U.S.-based organizations such as American Immigration Services ("AIS"), to recruit aliens to invest in them, typically as limited partners, and who proposed to use the aliens' capital in projects that would be controlled, not by the aliens, but by the organizations' general partners. R.L. Investment, 86 F. Supp. 2d at 1017-18. The INS approved some of these petitions. Id.; see 8 C.F.R. § 204.6(j)(5)(iii) (1999).

In late 1997, the INS became aware that some of the proposals set forth in the I-526 petitions contained features, including "buy-back" or redemption provisions that gave the alien the right to ask for the return of his investment after a designated period of time, that appeared to be contrary to the regulations. R.L. Investment, 86 F. Supp. 2d at 1018.; see FAC ¶ 81. In order to prevent any more approvals that might be contrary to the EB-5 statute and its regulations, the INS placed an administrative hold on the adjudication of all EB-5 petitions with problematic features so that it could review the situation. Id., 86 F. Supp. 2d at 1018.; FAC ¶ 99.

As a result of its review, and seeking to address a number of substantive issues that had arisen under the EB-5 program, the INS published four decisions in the summer of 1998: In re Soffici, Int. Dec. 3359, 1998 WL 471519 (Exam. Comm. June 30, 1998); In re Hsiung, Int. Dec. 3360, 1998 WL 483978 (Exam. Comm. Jul. 13, 1998); In re Izumii, Int. Dec. 3361, 1998 WL 483977 (Exam. Comm. Jul. 31, 1998); In re Ho, Int. Dec. 3361, 1998 WL

483979 (Exam. Comm. Jul. 31, 1998) (the "Precedent Decisions").¹ These decisions were designated as precedent pursuant to 8 C.F.R. § 103.3(c) (1999), and, "except as [they] may be modified or overruled by later precedent decisions," are binding on all INS employees in the administration of the EB-5 statute. *Id.* Following the issuance of the Precedent Decisions, the administrative hold was lifted, and the EB-5 petitions that were subject to that hold were adjudicated under the guidance of the Precedent Decisions.

B. Plaintiffs' Challenges to the INS's Application of the Immigrant Investor Law

Plaintiffs currently consist of seven individual aliens (and their dependents) and 28 limited partnerships. The individual plaintiffs invested in five of the partnership plaintiffs, had their I-526 petitions approved, and were granted conditional permanent residency sometime in either 1996 or 1997, before the four Precedent Decisions were issued. FAC ¶¶ 11-17.

Plaintiffs claim that they relied on the INS's interpretation of the statute, as established by unpublished decisions, letters, and an unpublished General Counsel opinion, when they applied for their conditional residency under the EB-5 program. FAC ¶ 96. They further claim that because the Precedent Decisions represented a sharp departure from this previous interpretation and imposed new requirements, the changes that the INS sought to impose through these decisions could only be made through notice-and-comment rulemaking. FAC ¶¶ 113-126.

Plaintiffs, including the seven individual Plaintiffs and the Partnership Plaintiffs, ask the court to declare the four Precedent Decisions invalid because the INS's issuance of the

¹Appellate jurisdiction over petitions for immigrant investor status has been delegated to the Associate Commissioner for Examinations, 8 C.F.R. § 103.1(f) (3) (iii) (B) (1999), who exercises this authority by supervising the Director of Administrative Appeals, *id.* at § 103.1(f) (3) (i). See also *id.* at § 103.3(a) (1) (iv) (stating that the Administrative Appeals Unit (now the Administrative Appeals Office) "is the appellate body which considers cases under the appellate jurisdiction of the Associate Commissioner, Examinations"); *id.* at §§ 103.3(a) (2), (b)) (describing applicable AAU procedures).

Precedent Decisions amounts to rulemaking without notice and comment and is a violation of the Administrative Procedure Act ("APA"), constitutes an abuse of discretion, exceeds statutory authority, and violates the Due Process Clause, including the implied Equal Protection component, of the Fifth Amendment (claims 1-4). They further argue that application of the Precedent Decisions to the adjudication of the individual Plaintiffs' I-829 petitions would be "retroactive" and that the INS should be estopped from denying the individual Plaintiffs lawful permanent residency (claims 6-7). The Partnership Plaintiffs, in addition, seek an estimated \$17.5 million in damages under the Takings Clause of the Fifth Amendment (claim 5).

II. Discussion

A. Legal Standard

A motion for a judgment on the pleadings under Fed. R. Civ. P. 12(c) is directed at the legal sufficiency of a party's allegations and "is properly granted when, taking all allegations in the pleading as true, the moving party is entitled to judgment as a matter of law." McGann v. Ernst & Young, 102 F.3d 390, 392 (9th Cir. 1996). The standard applied on a Rule 12(c) motion is essentially the same as that applied on Rule 12(b)(6) motions, that is, judgment on the pleadings is appropriate when, even if all material facts in the pleading under attack are true, the moving party is entitled to judgment as a matter of law. Hal Ranch Studios v. Richard Feiner & Co., 896 F.2d 1542, 1550 (9th Cir. 1990). However, we need not "assume the truth of legal conclusions merely because they are cast in the form of factual allegations." Western Mining Council v. Watt, 643 F.2d 618, 624 (9th Cir. 1981).

B. Standing of the Partnership Plaintiffs

In order to maintain standing under Article III, the Partnership Plaintiffs ("Partnerships") must demonstrate: (1) an injury in fact, (2) a causal connection between the injury and the conduct complained of and (3) that it is likely and not merely speculative that the injury will be redressed by a favorable decision. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992). A plaintiff bringing suit pursuant to the APA must also meet additional standing requirements specific to the APA. Douglas County v. Habbitt, 48 F.3d 1495, 1499 (9th Cir.

1995).² Beyond the traditional standing requirements, a plaintiff bringing suit under the APA must show that the injury that he suffered falls within the "zone of interests" that the relevant statute at issue was designed to protect. See Nevada Land Action Assoc. v. U.S. Forest Service, 8 F.3d 713, 715-16 (9th Cir. 1993). The zone of interests test helps to ensure that only those suits that would further the statutory objectives are allowed, and that those that would frustrate it are halted. Clarke v. Securities Indus. Ass'n, 479 U.S. 388, 397 n.12 (1987). The Supreme Court explained that the purpose underlying the zone of interest test is "to ensure that the [plaintiff in an APA suit] would be a 'reliable private attorney general to litigate the issues of the public interest in the present case.'" Id. (quoting Assoc. of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150, 154 (1970)).

The Ninth Circuit has articulated that, "[t]o find the [plaintiff's interests] do not fall inside the "zone of interests" protected by the [relevant statute], we would have to find that (1) the [plaintiff's] interests are inconsistent with the purposes of the [relevant statute], and that (2) the interests are so inconsistent that it would be unreasonable to assume that Congress intended to permit the suit." Presidio Golf Club v. National Park Service, 155 F.3d 1153, 1158 (9th Cir. 1998) (quoting Douglas County v. Habbitt, 48 F.3d 1495, 1500 (9th Cir. 1995)).

In the present case, it may reasonably be said that the Partnerships' interests fall outside the zone of interests. The Partnerships have asserted that their interests are consistent with the purposes of the Immigrant Investor Law, to enhance the economy and create jobs. However, the Partnerships have only spoken to the aims of the EB-5 statute in very general terms and did not cite any case law or legislative history whatsoever to support their position. The EB-5 statute was designed to provide immigrant visas to qualified investors who were to create jobs

²Since the constitutional claims are based upon alleged violations of the APA, including a failure to comply with notice and comment rulemaking procedures, all of the Partnership Plaintiffs' claims except the Takings claim (claim 5) are subject to the additional standing requirements imposed by the APA. Thus, a failure to satisfy APA-specific standing requirements would result in an overall failure to demonstrate standing on all claims but claim 5.

and economic opportunities through their investments." The aim of the Immigrant Investor Law is to bring people to the United States who have "skills and talents, and can help [] create jobs, growth, and opportunity." 135 Cong. Rec. S7749-02, *7771 (daily ed. July 12, 1989). Thus, the statute was not created to benefit business entities.

Further, as we discuss *infra*, we conclude that the Precedent Decisions were validly issued. Because they are valid, we may consider the Precedent Decisions in our analysis of the Partnerships' standing. Where, as here, the INS has determined in the Precedent Decisions that the structure of these business entities does not fulfill the purposes of the statute, then it can fairly be said that the Partnerships' interests are inconsistent with the purposes of the EB-5 statute. This being the case, and particularly since Congress did not provide for any administrative remedy for business entities such as the Partnerships, it is unreasonable to assume that Congress intended to permit this suit on behalf of the Partnerships. As such, their alleged injury does not fall within the zone of interests sought to be protected by the EB-5 statute, and the Partnerships' suit must fail for lack of standing. Therefore, we conclude that the Partnerships have not made the requisite showing to confer standing upon them with respect to the APA claims in this case.

C. Ripeness

The INS contends that, unless and until the individual Plaintiffs have their I-829 petitions adjudicated, we lack subject matter jurisdiction to consider the individual Plaintiffs' claims, as they are not ripe for review. Presently, six of the seven named Plaintiffs³ are in this position, as their I-829 petitions are currently pending. Only Plaintiff Yi Yuan Chiang has actually received a denial of his I-829 petition.

The Supreme Court has specifically held that, in the immigration law context, plaintiffs' claims must still satisfy the ripeness requirement described in Abbott Laboratories v. Gardner, 387 U.S. 136, 148-49 (1967). See Reno v. Catholic Social Servs., Inc., 509 U.S. 43, 56-57 (1993). See also Naranjo-Aguilera v. INS, 30 F.3d 1106, 1111-12 (9th Cir. 1994). The Court then held that although an agency's promulgation of

³Those six Plaintiffs are Wen-Wan Chang, Hsien-Ming Hsieh, Sung Duck Kong, Yeh-Chien Lai, Yoon Sik Lee and Cheng-Hsiung She.

regulations will, in some cases, itself be enough to create a ripe controversy,' that was not true in Catholic Social Servs. Id. The Court stated,

the promulgation of the challenged regulations did not give each class member a ripe claim; a class member's claim would ripen only once he took the affirmative steps that he could take before the INS blocked his path by applying the regulation to him.

Id. at 58-59. The Court found that the class members in the case before it had not taken such "affirmative steps" and thus forced

'For example, in Abbott Laboratories, the very existence of the challenged regulation automatically imposed some consequence on the challenging party, to change prescription drug labels to comply with the regulation. 387 U.S. at 1510-11. Other instances where the Supreme Court has recognized ripeness include those plaintiffs in Catholic Social Servs. whose applications had never been accepted (under the Immigration Reform and Control Act of 1986 ("IRCA")), due to alleged "front-desking." Those plaintiffs could bring claims in district court because their applications had never formally been filed, and they would have no recourse to administrative review and no way of building an administrative record. Catholic Social Servs., 509 U.S. at 62-64. In McNary v. Haitian Refugee Center, Inc., 498 U.S. 479 (1991), the Court held that challenges to the INS's practices and policies in processing Special Agricultural Worker applications under IRCA were ripe for review because they presented procedural or collateral challenges (i.e., failing to allow applicants the opportunity to rebut adverse evidence, denying applicants the opportunity to present witnesses on their own behalf). Id. at 487-88. The Ninth Circuit has applied this principle in numerous cases, including Gorbach v. Reno, 219 F.3d 1087 (9th Cir. 2000), where naturalized citizens who had been served with a notice of intent to revoke naturalization by the INS brought an action alleging that the Attorney General lacked statutory authority to promulgate a regulation permitting revocation through administrative proceedings. The Ninth Circuit concluded that the action was collateral in nature, and ripe for review because it challenged the Attorney General's very authority to denaturalize the plaintiffs, that is, to even put them through the administrative proceedings. Id. at 1091-92.

the INS to "block" their path, and therefore held that the plaintiff's claims were not ripe." *Id.* at 58-60.

The Court went on to note that a plaintiff's challenge to the INS regulations would ordinarily become ripe "when the INS formally denied the alien's application on the ground that a regulation rendered him ineligible for legalization." *Id.* at 60. But in Catholic Social Servs., the plaintiff still faced the further hurdle of the IRCA's exclusive review provision, which clearly precluded district court review of substantive challenges to INS regulations or policies interpreting IRCA's substantive eligibility criteria, except on appeal from an order of deportation. *Id.*

The present case is similar to Catholic Social Servs. in that, as to six of the seven named Plaintiffs, the INS has not yet "blocked" their path to attaining permanent residency status by denying their I-829 petitions. Thus, Plaintiffs' APA claims are not ripe until completion of the administrative proceedings. Refusing to review Plaintiffs' cases until their I-829 petitions are actually denied does not foreclose all avenues of review, as Plaintiffs may once again raise their claims if and when those I-829 petitions are denied. Moreover, it is appropriate that an administrative record be compiled so that if and/or when Plaintiffs' claims become ripe, a court can properly review them. As such, Defendant's Motion for Judgment on the Pleadings is hereby GRANTED as to the six individual Plaintiffs whose I-829s have not yet been adjudicated, as their claims are not ripe for review.

D. Exclusivity of Review

Plaintiff Chiang, however, has received an actual denial of his I-829 petition. Thus his claims are ripe for review. The question we must then confront is whether we can review his claims in this court pursuant to the APA, or whether Congress has evidenced an intent to preclude district court review of challenges to the Immigrant Investor Program's statutory and regulatory scheme. As the Supreme Court stated in Abbott Laboratories, "we must . . . inquire whether in the context of

"While the Court concluded in Catholic Social Servs. that the majority of plaintiffs' claims lacked ripeness, the Court recognized ripeness as to those plaintiffs' claims challenging the practice of alleged "front-desking."

the entire legislative scheme the existence of [a] circumscribed remedy evinces a congressional purpose to bar agency action not within its purview from judicial review." 387 U.S. at 141. Further, "[t]he mere fact that some acts are made reviewable should not suffice to support an implication of exclusion as to others." *Id.* (citation omitted).

In the present case, the only reference to judicial review in the governing statutory scheme of the Immigrant Investor Program is found in 8 U.S.C. § 1156b(c)(3)(D), which provides that, "[a]ny alien whose permanent resident status is terminated under subparagraph (C) may request a review of such determination in a proceeding to remove the alien." This provision contains no language that explicitly limits review of an adverse decision to removal proceedings. Such a lack of limiting language is especially notable when juxtaposed with IRCA's exclusive judicial review provision, which provides that, "[t]here shall be no administrative or judicial review of a determination respecting an application for adjustment of status under this section except in accordance with this subsection." 8 U.S.C. § 1160(e)(1). Section 1160(e)(3)(A) then specifically limits review to exclusion or deportation: "There shall be judicial review of such a denial only in the judicial review of an order of exclusion or deportation under section 1105a of this title (as in effect before October 1, 1996)." Thus Congress has chosen to explicitly limit jurisdiction for review in certain administrative schemes, but it has not done so with respect to the Immigrant Investor Program. As such, we conclude that we may exercise jurisdiction over Plaintiff Chiang's APA claims.

E. Counts One, Two, Three and Four: Violation of the APA, Abuse of Discretion, Action Exceeding Statutory Authority and Violation of Due Process and Equal Protection

1. The Precedent Decisions Amount to an Interpretive, Rather than a Legislative, Rule

Plaintiff Chiang's (hereinafter "Plaintiff") claims in Counts One, Two, Three and Four assert that "new rules" were announced through the four Precedent Decisions published by the INS in the summer of 1998, and as such should have been implemented through the formal rulemaking procedures of the APA, 5 U.S.C. § 500, *et seq.* Plaintiff argues that since the Precedent Decisions contradicted prior unpublished decisions

issued by the INS's Administrative Appeals Office ("AAO") and internal General Counsel opinions, we should find that they amount to a reversal in previous policy that required the INS to go through a formal notice and comment period.

Defendant counters that until the Precedent Decisions were issued, the only published law applying the Immigrant Investor Program was found in the federal regulations at 8 C.F.R. § 204.6 and that rather than creating "new requirements," the Precedent Decisions simply explained, through adjudication, something that the statute already required. Therefore, the Precedent Decisions were the first binding interpretation of the immigrant investor regulations and are not contradictory of anything. Defendant states that unpublished decisions issued by the INS's AAO and internal General Counsel Opinions never created any binding authority and further, that the Immigrant Investor Program has always required equity investment."

Plaintiff does not challenge the merits of the decisions issued by the AAO, but rather argues that they make the type of agency pronouncements that, in order to be binding, the APA requires to be the product of formal rulemaking procedures. See 5 U.S.C. § 553 (b,c). Defendant counters that these types of determinations are best made in the context of adjudication rather than a general rule and the agency was within its authority to opt for adjudication in announcing its authoritative interpretations of the statute and regulations. See Patel v. INS, 638 F.2d 1199, 1204 (1980) (adjudication is appropriate if "the problem may be so specialized and varying in nature as to be impossible of capture within the boundaries of a general rule") (citation omitted). Put simply, the parties disagree as to whether the Precedent Decisions amounted to a legislative rule with all the attendant APA procedural requirements, including

Plaintiff has also argued that the Precedent Decisions amount to invalid rulemaking because the AAO is not an independent body. However, the Board of Immigration Appeals and the INS are separate entities within the Department of Justice and both are delegates of the Attorney General in whom Congress has vested both rulemaking and adjudicatory powers. Immigration and Naturalization Act, § 103(a), 8 U.S.C. § 1103(a). See also Patel v. INS, 638 F.2d 1199, 1203 n.4 (9th Cir. 1980). Since the AAO is a component of the INS, it is vested with rulemaking power.

notice and comment rulemaking, or an interpretive rule, in which case the procedural requirements would be less stringent.

a. Legal Standard: *Guernsey* and *Chief Probation Officers*

The determination of whether the Precedent Decisions amount to a legislative or interpretive rule depends on an application of *Shalala v. Guernsey Memorial Hospital*, 514 U.S. 87 (1995), as delineated by the Ninth Circuit in *Chief Probation Officers of California v. Shalala*, 118 F.3d 1327, 1332-36 (9th Cir. 1997). *Guernsey* involved a challenge to the validity of a Medicare reimbursement guideline adopted without notice and comment. The Supreme Court recognized that APA rulemaking would be required if the rule at issue adopted a new position inconsistent with any of the appropriate agency's (there the Department of Health and Human Services) existing regulations. *Guernsey*, 514 U.S. at 99. However, in *Guernsey*, the Court concluded that the rule at issue did not effect a change in the existing regulations and ruled that it was a prototypical example of an interpretive rule "issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers." *Id.* (quoting *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 n.31 (1979) (internal citation omitted)). Furthermore, the Court also said that the rule at issue reasonably implemented the commands of the statute and the regulations. *Id.* at 97-99.

The Ninth Circuit applied *Guernsey* to a challenge to a rule that terminated federal matching funds for state juvenile justice programs in *Chief Probation Officers of California v. Shalala*, 118 F.3d 1327 (9th Cir. 1997). In that case, plaintiffs contended that the rule was void for failing to comply with the APA's notice and comment requirement. Beginning in 1993, the Department of Health and Human Services ("HHS") reimbursed the State for benefits and services provided in the juvenile justice system. *Id.* at 1330. In September, 1995, the Administration For Children and Families ("ACF"), a component of HHS, issued a rule, AT-95-9, which advised that the agency would no longer approve federal funding for benefits or services provided in the juvenile justice system, and would terminate funding for previously approved costs as of December 31, 1995. *Id.* The ACF did not engage in notice and comment before issuing this rule. *Id.*

The plaintiffs did not argue that AT-95-9 was a substantively invalid construction of either the statute or

regulations relating to it, but rather, argued that the rule was procedurally void for failing to comply with the APA's notice and comment requirement. *Id.* The Ninth Circuit denied plaintiffs relief, and held that AT-95-9 was an "interpretive" rule exempt from the APA's notice and comment mandate. *Id.* at 1329.

In so holding, the Ninth Circuit concluded that AT-95-9, like the rule in Guernsey, was issued to advise the public of the agency's construction of the statute and rules which it administers. *Id.* at 1333. Also as in Guernsey, HHS asserted that AT-95-9 was following the congressional edict of the governing statute and its own regulations in interpreting that statute. *Id.*

Second, the Ninth Circuit held that AT-95-9 is not inconsistent with a regulation having the force of law. *Id.* at 1334. The previous approvals of funding for benefits and services in the juvenile justice system themselves did not go through formal rulemaking procedures, and were not regulations having the force of law. *Id.* According to the Ninth Circuit, those prior approvals "simply represented the Agency's prior (short-lived) interpretation of that statute", and the ACF was free to change that interpretation. *Id.* citing Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 517-18 (1994) (Secretary not estopped from changing legal interpretations that she believes to be erroneous) (further citations omitted).

b. Application to the Present Case

The present case fits the Ninth Circuit's application of Guernsey's articulation of an interpretive rule that need not be published for comment. First, the INS chose to publish the Precedent Decisions in order to address a number of substantive issues that had arisen under the Immigrant Investor Program. The decisions were designated as precedent pursuant to 8 C.F.R. § 103.3(c). Thus, like AT-95-9 in Chief Probation Officers, the Precedent Decisions were issued to advise the public of the agency's construction of the statute and rules which it administers. The INS was following the congressional edict of the EB-5 statute and its own regulations interpreting the statute.

Second, the Precedent Decisions did not change or add to any requirements of the EB-5 statute as set forth in the federal

regulations. See 8 C.F.R. § 204.6. Rather, the Precedent Decisions furthered the congressional intent behind the EB-5 statute. The Precedent Decisions affirmed that the Immigrant Investor Program requires equity investment, and that redemption and interest agreements between an alien and the enterprise receiving his investment are debt arrangements not permitted by the regulations.

For example, the essential holding of *Izumii* is that, for purposes of meeting the statutory and regulatory definition of "invest" (or "contribution of capital"), an alien may not condition his investment (whether it be \$300,000 or \$1 million) on a promise from the enterprise receiving his money that the alien will get his money back after a set period of time. 1998 WL 483977 at 9-20 (printed version). The AAC concluded that such an arrangement is a loan and therefore contrary to the governing regulation, which bars debt arrangements from qualifying as the required investment. 8 C.F.R. § 204.6(e). This conclusion rationally advances the job-creation purpose of the statute (see S. Rep. No. 55, 101st Cong., 1st Sess. 5, 21 (1989)) to require that a qualifying EB-5 investment be in the nature of equity rather than a loan. If an alien places his money fully at risk with no expectation of reimbursement, he is more likely to be involved in the enterprise (even if he is only a limited partner, since a limited partner can at least suggest strategies for the enterprise) and his entrepreneurial talents are more likely to be brought to bear on advancing the enterprise's success, with the concomitant creation of jobs that Congress wanted. See *R.I. Investment Limited Partners v. INS*, 86 F. Supp. 2d 1014, 1024 (D. Haw. 2000).

Thus, the Precedent Decisions were not inconsistent with a regulation having the force of law. Plaintiff argues that by issuing the Precedent Decisions, the INS contradicted what in effect had become a regulation by the INS's past practice of approving I-526 and I-829 petitions allowing certain kinds of investment arrangements to qualify under the Immigrant Investor Program. In support of his argument, Plaintiff cites *Patel v. INS*, 638 F.2d 1199, 1204 (9th Cir. 1980), *Ruangawang v. INS*, 591 F.2d 39 (9th Cir. 1979) and *Bahat v. Sureck*, 637 F.2d 1315, 1319 (9th Cir. 1981) for the proposition that an agency may not add a requirement to a regulation thereby announcing a broad, generally applicable requirement without engaging in notice and comment rulemaking.

While we recognize and agree with the principles announced in those cases, we disagree with the extent to which they are applicable to the present case. The prior decisions cited by Plaintiff as representing a previous interpretation of the statute in the present case are either unpublished dispositions which carry no precedential weight or are advisory General Counsel opinions which are not binding on the INS. See 8 C.F.R. § 103.3(c) (only a decision designated as precedent can bind future decisions). Thus, whatever the weight of the prior approvals of I-526 and I-829 petitions, they cannot be regulations having the force of law. They represented a prior administration of the EB-5 statute that the INS was free to change, not any prior published or announced interpretive rule. Further, as noted above, the Precedent Decisions did not add any new requirements to the EB-5 statute as set forth in the federal regulations.

Finally, as the Ninth Circuit stated in Chief Probation Officers, the fact that the Precedent Decisions will have a substantive impact on Plaintiff is not a basis for finding a rule not to be interpretive. 118 F.3d at 1335.

Plaintiff also relies on Alcaraz v. Block, 746 F.2d 593 (9th Cir. 1984), Linoz v. Heckler, 800 F.2d 871 (9th Cir. 1986), and Jean v. Nelson, 727 F.2d 957 (11th Cir. 1984), to argue that the Precedent Decisions constitute a legislative rule. We find Plaintiff's authority to be distinguishable. In Alcaraz, the Ninth Circuit specifically rejected the argument that, for the purposes of imposing the notice and comment requirement on an agency for a particular rule, it should look to the "substantial impact" of the rule. Alcaraz, 746 F.2d at 613. In so doing, the court concluded that the regulations at issue setting forth a social security number collection requirement (in the administration of the school lunch program) constituted an interpretive rule, as it merely tracked a requirement set forth in the relevant enabling statute. Id. That the regulations may have altered administrative duties or other hardships did not make them substantive. Id. This is directly analogous to the regulations at issue in the present case, as the Precedent Decisions merely clarify requirements already set forth in the EB-5 statute and accompanying regulations.

In Linoz, the Ninth Circuit concluded that the ambulance rule at issue was a substantive rule that was neither required nor specifically authorized by the enabling legislation. 800

F.2d at 877. As such, the agency was required to conform with the notice and comment procedure of section 553 of the APA. *Id.* at 878. Again, this is distinguishable from the present case, as we have concluded that the requirements outlined in the Precedent Decisions were specifically authorized by the enabling legislation.

Finally, Plaintiff's reliance on *Jean v. Nelson* is also misplaced. In that case, the plaintiffs contended that the government improperly failed to comply with the notice and comment provisions of the APA when it adopted a new practice of detaining aliens who could not establish a *prima facie* claim of admission to this country, rather than paroling them pending a hearing on their petitions for admission to asylum. 727 F.2d at 961. The government argued that it was exempt from the APA requirements on the grounds that the new approach was not a "rule" within the meaning of the APA, and, alternatively, even if it did constitute a rule, it was an interpretive rule. *Id.* at 962. However, after the district court rendered its decision and before the Eleventh Circuit heard the appeal, the government promulgated new regulations in accordance with the APA. *Id.* Thus, the APA issue as originally presented was rendered moot, and the Eleventh Circuit dismissed the appeal as to that count of plaintiffs' complaint and remanded with instructions that the judgment be vacated. *Id.* Therefore, *Jean v. Nelson* provides little support for Plaintiff's argument, particularly in light of the fact that we have concluded that the Precedent Decisions did not constitute the adoption of a "new practice," and thus would not be analogous to the procedures at issue in *Jean v. Nelson*.⁷

Thus, we conclude that the Precedent Decisions constitute an interpretive rule and the fact that the INS did not engage in notice and comment rulemaking was not a violation of the APA, an abuse of discretion, an action exceeding statutory authority or a violation of Due Process and Equal Protection.

⁷Plaintiff also relies on *Ford Motor Company v. FTC*, 673 F.2d 1008, 1009-10 (9th Cir. 1982), which is distinguishable in that the Ninth Circuit concluded that the FTC adjudication at issue changed existing law, and we have concluded that the Precedent Decisions did not change existing law. *Pfaff v. HUD*, 88 F.3d 739, 748 (9th Cir. 1996), is similarly distinguishable in that the Ninth Circuit concluded that the standard adopted by HUD in adjudication was new, broad and general in scope and inconsistent with prior interpretation.

2. The Precedent Decisions Were Properly Issued

Plaintiff, in citing and relying on Paralyzed Veterans of America v. D.C. Arena, 117 F.3d 579 (D.C. Cir. 1997) and Alaska Professional Hunters Ass'n, Inc. v. FAA, 177 F.3d 1030 (D.C. Cir. 1999), seems to be making the argument that, even if we conclude that Precedent Decisions did not independently constitute a legislative rule, a rule is a legislative rule if it amends a prior agency interpretation of a legislative rule. Paralyzed Veterans, 117 F.3d at 586. According to this argument, the Precedent Decisions would constitute a legislative rule if we were to conclude that they somehow amended a prior interpretive rule. Under the standard set forth by the D.C. Circuit, agencies can change interpretive rules only by using the notice and comment procedure to issue a legislative rule. Id. Plaintiff argues that this was the case with the Precedent Decisions and therefore the INS should have engaged in notice and comment rulemaking. The success of Plaintiff's argument hinges upon the characterization of the unpublished rulings issued prior to the Precedent Decisions as a prior agency interpretation of a legislative rule.³

The present case, however, is more analogous to Hudson v. FAA, 192 F.3d 1031 (D.C. Cir. 1999), and "does not fit within the Paralyzed Veterans/Alaska Professional Hunters line for the simple reason that it does not involve an [official] interpretation of a regulation." Id. at 1036. "Interpretive rules and policy statements are quite different agency instruments. An agency policy statement does not seek to impose or elaborate or interpret a legal norm. It merely represents an agency position with respect to how it will treat -- typically enforce -- the governing legal norm." Id. (internal quotations and citation omitted). Plaintiff argues that Alaska Professional Hunters is relevant because it, like the present case, "involved a long-term agency practice which constituted an implicit interpretation or application of the relevant regulation." We disagree. In Alaska Professional Hunters, a formal adjudication

³As discussed above, in Section One, we disagree with Plaintiff's characterization of the INS's unpublished rulings prior to the Precedent Decisions and have concluded that they do not constitute a prior official agency interpretation, but rather merely represented the agency's former administration of the EB-5 statute. Thus, our analysis of this aspect of Plaintiff's challenge proceeds from that conclusion.

by an associate agency had adopted an interpretation of the regulation in accord with the informal practice. See Alaska Professional Hunters, 177 F.3d at 1031. In the present case, analogous to Hudson, neither the General Counsel opinions nor the prior AAO decisions had ever been published. They had not been held out to be a precedential interpretation of the regulation. Therefore, the Precedent Decisions could not be construed to amend a prior interpretive rule. The prior unpublished decisions and the General Counsel's opinions represent the INS's policy statement of how it will enforce the EB-5 statute. Thus, notice and comment was not required even under an application of Paralyzed Veterans.

Further, this outcome conforms with Ninth Circuit law. The Ninth Circuit, in interpreting Guarnsey, stated that in order to be considered legislative such that notice and comment was required, a rule would have to be inconsistent with another rule having the force of law, not just any agency interpretation regardless of whether it had been codified. Chief Probation Officers, 118 F.3d at 1337. Thus because the previous approvals had not been held out as having the force of law, the issuance of the Precedent Decisions was not an act inconsistent with any rule having the force of law, and the notice and comment procedure was not required. Therefore, we conclude that the issuance of the Precedent Decisions was proper, and was not a violation of the APA, an abuse of discretion, an action exceeding statutory authority or a violation of Due Process and Equal Protection. As such, Defendant's Motion for Judgment on the Pleadings on Counts One, Two, Three and Four except to the extent Counts Two and Four may incorporate the Improper Retroactive Application Claim which essentially constitutes Count Seven, is hereby GRANTED.

F. Count Seven: Improper Retroactive Application

Plaintiff Chiang's Improper Retroactive Application claim arises out of his relatively unique procedural situation. The INS adopted the Precedent Decisions after it had approved Plaintiff Chiang's I-526 petition, but before the adjudication of his I-829 petition. In denying Plaintiff Chiang's I-829 petition, the INS relied largely on the principles announced in the Precedent Decisions. In effect, having already approved Plaintiff Chiang's investment program by virtue of its approval of his I-526 petition, the INS effectively changed the rules of the game by judging Plaintiff Chiang's I-829 petition under the Precedent Decisions even though Plaintiff Chiang had not altered

his previously approved investment program, and had not acted in a way which would otherwise justify denial of the I-829, but for the Precedent Decisions. Although we conclude that the Precedent Decisions did not generally alter prior official action so as to require notice and comment rulemaking, there has been an official ruling as to Plaintiff Chiang, when his I-526 petition was approved. Accordingly, we conclude that a retroactivity analysis is required to determine whether application of the Precedent Decisions to Plaintiff Chiang is permissible. Plaintiff Chiang argues that the application of the Precedent Decisions to the adjudication of his I-829 petition when his I-526 petition had been approved without utilizing those principles results in an improper retroactive application of law.

In our March 27, 2001 hearing, we informally asked for Defendant's position on whether it would voluntarily accept a remand of Plaintiff Chiang's I-829 denial in order to supplement the record with consideration of the factors enumerated in Montgomery Ward & Co. v. FTC, 691 F.2d 1322, 1333 (9th Cir. 1982) for a retroactivity analysis. Defendant responded that it would not voluntarily accept such a remand, stating that it did not believe that Congress had authorized it to consider "hardship factors" in evaluating I-829 petitions, but instead such arguments should be brought, if at all, in removal proceedings.

Defendant's position is not well taken. Defendant is mistaken that Congress has not authorized it to consider the Montgomery Ward factors. These factors do not require Defendant to analyze the same type of "hardship" to which Defendant refers in discussing its lack of authority to grant "hardship waivers" under the EB-5 statute. In fact, the Montgomery Ward factors require a wholly different analysis, one that examines the "degree of burden," on the parties. We conclude that Congress has not precluded Defendant's consideration of these factors. As such, we hereby REMAND Plaintiff Chiang's I-829 denial to the INS for it to consider and compile an administrative record as to whether application of the Precedent Decisions to Plaintiff Chiang's I-829 petition would result in an improper retroactive application of law under the Montgomery Ward five factor analysis.

G. Count Six: Estoppel

Plaintiff Chiang argues in Count Six that the INS's approval of his I-526 petition based on the Partnership Plaintiffs

investment program, as well as I-829's of other aliens with similar investment structures, created a legally enforceable reliance interest that warrants an order by the court estopping the INS from denying the I-829 petition on any of the grounds announced in the Precedent Decisions.

1. Legal Standard for Estoppel

The Supreme Court has expressly left open the issue whether estoppel may run against the government, declining to hold that there are no cases in which the public interest in ensuring that the Government can enforce the law free from estoppel might be outweighed by the countervailing interest of citizens in some minimum standard of decency, honor, and reliability in their dealings with their Government." Heckler v. Community Health Services of Crawford County, Inc., 467 U.S. 51, 60-61 (1984). It is well settled, however, that the government may not be estopped on the same terms as a private litigant. *Id.* at 60; Watkins v. United States Army, 875 F.2d 699, 707 (9th Cir. 1989).

The Ninth Circuit has held that "where justice and fair play require it," estoppel will be applied against the government...." Watkins, 875 F.2d at 706-07, quoting Johnson v. Williford, 682 F.2d 868, 871 (9th Cir. 1982) (citation omitted). Before the government will be estopped, however, two additional elements must be satisfied beyond those required for traditional estoppel. First, "[a] party seeking to raise estoppel against the government must establish 'affirmative misconduct going beyond mere negligence'; even then, 'estoppel will only apply where the government's wrongful act will cause a serious injustice, and the public's interest will not suffer undue damage by imposition of the liability.'" Watkins, 875 F.2d at 707, quoting Wagner v. Director, FEMA, 847 F.2d 515, 519 (9th Cir. 1988) (citation omitted).

2. Application to the Present Case

According to the Ninth Circuit, there is no single test for detecting the presence of affirmative misconduct; each case must be decided on its own particular facts and circumstances. Watkins, 875 F.2d at 707. While affirmative misconduct does require an affirmative misrepresentation or affirmative concealment of a material fact by the government, it also does not require that the government intend to mislead a party. *Id.*

Plaintiff argues that he has demonstrated a reasonable reliance on what he deems to be a longstanding policy maintained by the INS with regard to the Immigrant Investor Program, and that he has shown affirmative misconduct by the INS in the intentional violation of its own rules and alleged singling out of investors involved in AIS programs. However, as described in detail above, we have determined that the INS acted within its authority when it adopted the Precedent Decisions as an interpretive rule. As such, the INS has in no way violated its own rules, nor has it made any affirmative misrepresentations or concealments. Therefore, the INS's adoption of the Precedent Decisions and any subsequent use of them in adjudicating I-526 or I-829 petitions does not constitute affirmative misconduct.³

Since Plaintiff Chiang has failed to show one of the essential elements in raising estoppel against the government, affirmative misconduct, his estoppel claim fails. As such, we hereby GRANT Defendant's Motion for Judgment on the Pleadings as to Count Six.

H. Count Five: Takings Claim

In Count Five, the Partnership Plaintiffs allege that the issuance of the Precedent Decisions and their alleged retroactive application has resulted in an uncompensated taking of their economic worth, in violation of the Fifth Amendment. Plaintiffs have named the United States as the sole defendant in this action, and ask that we award them damages amounting to over \$17 million.

Defendant argues, first, that Plaintiffs cannot overcome the bar of sovereign immunity to their suit. None of the bases for jurisdiction upon which Plaintiffs rely, 28 U.S.C. § 1331 (federal question jurisdiction), 28 U.S.C. § 2201 (Declaratory Judgment Act), 28 U.S.C. § 1346 (United States as defendant) and 5 U.S.C. §§ 701 et seq. (APA), provides for a waiver of the Federal Government's sovereign immunity in damages suits.

Defendant further argues, and Plaintiffs concede, that Plaintiffs' damages claim is expressly forbidden by the Tucker

³Despite some commonality, our analysis of the estoppel claim is not co-extensive with our analysis of the retroactivity issue inasmuch as the factors to be considered differ to some extent between estoppel and retroactivity.

Act, 28 U.S.C. § 1491 (1976), which confers jurisdiction in the United States Court of Federal Claims in actions "founded upon either the Constitution or any Act of Congress, or any regulation of an executive department . . . or for liquidated or unliquidated damages in cases not sounding in tort."¹⁸ Plaintiffs have requested that we exercise supplemental jurisdiction over this claim, citing City of Chicago v. Intern. College of Surgeons, 522 U.S. 156, 164 (1997). However, as referenced above, the Court of Federal Claims has exclusive jurisdiction over claims under the Tucker Act where the amount in controversy exceeds \$10,000. Thus, we lack jurisdiction over Count Five to grant Plaintiffs' request for monetary damages, and Defendant's Motion for Judgment on the Pleadings on Count Five is GRANTED. Count Five is hereby DISMISSED without prejudice.

III. Disposition

As to all parties except Plaintiff Chiang (the other six named Plaintiffs and the Partnership Plaintiffs), Defendant's Motion for Judgment on the Pleadings is hereby GRANTED without prejudice as to Counts One through Four, Six and Seven because these claims are not ripe for adjudication as to the six named individual Plaintiffs and because the Partnership Plaintiffs lack standing to assert such claims. As to Plaintiff Chiang, Defendant's Motion for Judgment on the Pleadings is hereby GRANTED with regard to Counts One, Three, Six and those parts of Counts Two and Four which do not involve the retroactivity claim, with prejudice. Defendant's Motion for Judgment on the Pleadings is GRANTED without prejudice as to Count Five. As to Plaintiff Chiang, Defendant's Motion for Judgment on the Pleadings is DENIED without prejudice as to Counts Two, Four (insofar as they implicate the improper retroactive application claim) and Seven, and Plaintiff Chiang's Improper Retroactive Application claim is REMANDED to the INS for due consideration and compilation of an administrative record consistent with this order. In light of

¹⁸District Courts have concurrent jurisdiction with the Court of Federal Claims in suits against the United States where the amount in controversy does not exceed \$10,000. 28 U.S.C. § 1346 ("The Little Tucker Act"). Partnership Plaintiffs' reliance on this statute to establish jurisdiction in this court is therefore misplaced, as they seek damages exceeding \$10,000. See Amalgamated Sugar Co. v. Bergland, 664 F.2d 818, 823 (10th Cir. 1981) ("Court of [Federal] Claims has exclusive jurisdiction where the amount in controversy exceeds \$10,000.").

our ruling, Plaintiffs' Motions for Class Certification and to
Set a Discovery Schedule are **NOTED**.

IT IS SO ORDERED.

MINUTES FORM 11
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AS REQUIRED BY FRCP, RULE 77(d).

Priority
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JS-5/JS-6
JS-2/JS-3

FILED
CLERK, U.S. DISTRICT COURT
MAY 2001
MAY - 4 2001
CENTRAL DISTRICT OF CALIFORNIA
BY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

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WEN-WAN CHANG, et al.

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

99-10518

CV 99-10518

JUDGMENT

FILED
CLERK, U.S. DISTRICT COURT
ENTERED
MAY - 7 2001
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

Docketed
Copies / NTC Sent
JS-5 / JS-6
JS-2 / JS-3

By separate minute order dated ~~May~~ 2, 2001, Defendant's motion for judgment on the pleadings was granted in part and denied in part.

It is hereby ADJUDGED, DECREED and ORDERED that as to all parties except Plaintiff Chiang (the other six named Plaintiffs and the Partnership Plaintiffs), Defendant's motion for judgment on the pleadings is granted without prejudice as to Counts One through Four, Six and Seven because these claims are not ripe for adjudication as to the six named individual Plaintiffs and because the Partnership Plaintiffs lack standing to assert such claims. As to Plaintiff Chiang, Defendant's motion for judgment on the pleadings is granted.

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1 with regard to Counts One, Three, Six and those parts of
2 Counts Two and Four which do not involve the retroactivity claim, with
3 prejudice. Defendant's motion for judgment on the pleadings is
4 granted without prejudice as to Count Five. As to Plaintiff Chiang,
5 Defendant's motion for judgment on the pleadings is denied without
6 prejudice as to Counts Two, Four (insofar as they implicate the
7 improper retroactive application claim) and Seven, and Plaintiff
8 Chiang's improper retroactive application claim is remanded to the INS
9 for due consideration and compilation of an administrative record
10 consistent with the May 2, 2001 order.

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12 IT IS SO ORDERED.

13 DATED: May 3, 2001

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George H. King
United States District Judge

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