No. 19-

IN THE

Supreme Court of the United States

ROBERT T. CHIU,

Petitioner,

v.

JUI-CHIEN LIN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION TWO

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED (RULE 14.1(a))

Is an Agreement whose main purpose is to allow someone to circumvent and violate Federal law legal and enforceable under State law?

PARTIES TO THE PROCEEDING AND RELATED CASES

United States Supreme Court Rules, Rule 14.1(b)(i)-(iii)

The parties to the proceeding in the court whose judgment is sought to be reviewed are the parties in the caption of the case, Jui-Chien Lin and Robert T. Chiu.

The following is a list of all proceedings in other courts that are directly related to the case in this Court:

1. Jui-Chien Lin v. Robert T. Chiu, et. al., Case No: KC066675J, the Superior Court of the State of California for the County of Los Angeles. Judgment entered August 10, 2017.

2. Jui-Chien Lin v. Robert T. Chiu, et. al., Case No: B285053, the Court of Appeal for the State of California, Second Appellate District, Division Two. Judgment affirmed on March 7, 2019.

3. Jui-Chien Lin v. Robert T. Chiu, et. al., Case No: S255143, in the Supreme Court of California En Banc. Petition for review denied on June 12, 2019.

TABLE OF CONTENTS

Table of Contents

Table of Contents

TABLE OF APPENDICES

TABLE OF CITED AUTHORITIES

Page

CASES

Page

FEDERAL ADMINISTRATIVE IMMIGRATION PRECEDENT DECISIONS

STATUTES

CONSTITUTIONAL PROVISIONS

Page

MISCELLANEOUS AUTHORITIES

Petitioner, Robert T. Chiu, an individual, respectfully asks that a writ of certiorari issue to review the judgment and Opinion of the California Court of Appeal, Second Appellate District, Division Two, filed on March 7, 2019, and then granting certiorari, vacating the judgment of the California Court of Appeal, and remanding the case for further proceedings below consistent with the Court's ruling and entry of judgment on the cause of action for breach of contract in favor of Petitioner, Robert T. Chiu.

INTRODUCTION

Congress established the EB-5 Visa Program in 1990 to bring new investment capital into the country and create new jobs for U.S. Workers. The EB-5 Program is based on our nation's interest in promoting the immigration of people who **invest** their capital in new, restructured, or expanded businesses and projects in the United States and help create or preserve needed jobs for U.S. workers by doing so. The Agreement at the center of this case is not an **investment**. It is an illegal **redemption agreement**, that is specifically prohibited from use as support for the issuance of an EB-5 visa, and a subsequent grant of permanent residency in the United States.

Since the inception of the program in 1990, approximately 85% of EB-5 visas and "green cards" have been issued to Chinese nationals. California is home to hundreds of thousands of Chinese-Americans, many of whom still have deep ties to their homeland, people in their homeland, and a strong desire to have friends and relatives join them here in the United States where they can enjoy heightened personal and economic freedom and have access to our world renowned university system (such as

was the case here). Therefore, issues related to the EB-5 visa program are of particular interest to the Chinese-American community, as well as Chinese nationals who continue to aggressively seek opportunities to obtain an EB-5 visa, and subsequent permanent residency. Issues regarding Chinese nationals, the Chinese government, immigration from China, and overall immigration policy are front and center in our national debate.

There has been rampant fraud in the EB-5 program over the years. In 2013, the U.S. government's securities enforcement agency published an Investor Alert and Bulletin officially titled "Investment Scams Exploit Immigrant Investor Program." The alert highlighted multiple scams and lawsuits in the EB-5 area. Since then, the problem has not stopped, and has actually become worse. In the last three years, the U.S. Securities and Exchange Commission has brought hundreds of millions of dollars' worth of actions against perpetrators of EB-5 fraud, including a $350 million assets freeze against a Vermont ski resort, a $79 million charge against an unregistered Boca Raton, Florida broker-dealer, a $125 million asset freeze against a Seattle skyscraper developer, a $68 million judgment against a U.S. energy company, and an $89 million fraud case against a Chicago immigration attorney. EB-5 visa fraud has become something close to a national crisis.

The Court should grant review to decide whether or not the main purpose of the "Agreement" that is at the heart of this case, which Federal law clearly states is illegal for use in support of an EB-5 petition, should be considered legal and enforceable under State law, including in California, which is at the center of many of these controversies.

Because of the popularity, use, and rampant misuse of the EB-5 program amongst businesspeople, legal practitioners, and petitioners (many of whom are Chinese and/or Taiwanese nationals like the Appellant in this case), review of the lower court's decision is necessary to decide an important legal question that contains an issue of legal and public policy significance likely to affect the rights of other parties in other cases, and which has a far reaching effect on regulated industries, specifically the practice of immigration law. As such, this matter involves a legal issue of continuing public interest which can be clarified and extremely instructive to all of those involved with the EB-5 process, especially EB-5 applicants, businesspeople, and immigration law specialists and practitioners. It also gives this Court the opportunity to discourage conduct seeking to circumvent and/or violate federal law through the use of documents and agreements that would otherwise be legal under State law. As such, it is an appropriate vehicle for the Court to provide guidance on the issue presented.

OPINIONS BELOW

The Opinion of the California Court of Appeal, which was unpublished, was issue on March 7, 2019 and is attached as Appendix A. The California Supreme Court's one page order denying review on June 12, 2019 is attached as Appendix B. The trial court's Statement of Decision is attached as Appendix C.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a). The decision of the California Court

of Appeal for which petitioner seeks review was issued on March 7, 2019. The California Supreme Court order denying Petitioner's timely petition for discretionary review was filed on June 12, 2019. This Petition is filed within 90 days of the California Supreme Court's denial of discretionary review, under Rules 13.1 and 29.2 of this Court.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Article VI, Clause 2

This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

This matter also has several Federal and California statutory provisions, regulations, and court rules that are relevant to this petition. They are reprinted in full in Appendix D.

STATEMENT OF THE CASE

A. THE AGREEMENT TO FORM A LIMITED LIABILITY COMPANY

Respondent Jui-Chien Lin signed an "Agreement to Form a Limited Liability Company" with Petitioner Robert T. Chiu and his former business partner Charles

Cobb on September 18, 2004. (1 CT 000217 – 000220; 1 RT 19-20; 2 RT 59; 3 RT 133; Appendix E; all references to "CT" refer to the "Clerk's Transcript," which consists of the case file in the California Superior Court action.)

The Agreement was brokered by Respondent's immigration attorney, Cecilia Yu. (1 RT 13, 23; 2 RT 110; all references to "RT" refer to the "Reporter's Transcript," which is the stenographic record of the proceedings during the trial of the action in the Los Angeles County California Superior Court.) The "Agreement" clearly and unambiguously states the following:

(1) That "Investor [Respondent] wishes to invest to the LLC the amount of One Million Dollars ($1,000,000.00) for the purpose of obtaining permanent residency in the United States for himself, and immediate member(s) of his family under the Investor provision of Immigration and Nationality Law of the United States." (1 CT 000217.) Respondent's main, primary, and overriding goal in this transaction was to obtain permanent residency or "green cards" for him and family. (1 RT 21-23, 25; 2 RT 82 - 83, 109 – 110; Appendix E, page 1, ¶ 3.) There is no dispute that this was accomplished. Respondent and his family obtained their "green cards," and Respondent's wife and children are full time residents of the United States with the future opportunity to apply for the sacred right of citizenship. Respondent's son graduated from UC Riverside and works as a real estate agent in Irvine. Respondent's daughter graduated from UC San Diego and works in the health care industry. (3 RT 141 - 143.)

(2) "All net profits derived from the business of the LLC shall be considered the management fee of the

franchisees. Franchisees shall also bear the loss of the business of the LLC, if any. Investor [Respondent] shall have no right to claim any of the revenues derived from the business of the LLC…Franchisees [Petitioner and Cobb] shall be responsible for the taxes of the LLC, including but not limited to the tax based on ordinary income of the LLC." (1 CT 000218.)

It was not disputed that the Agreement gave Petitioner and Cobb all of the "incidents of ownership" control, and management of the business, including the opportunity for profit, and the risk of loss. This also included the unilateral authority to dispose of the business. However, Petitioner and Cobb kept operating the business, at great personal sacrifice and loss, so Respondent and his family could receive their "green cards." (1 RT 24, 27, 28; 2 RT 66 – 69, 81 – 82, 109 – 110; Appendix D, page 2, ¶ 4.) Ultimately, Petitioner and Cobb lost $770,000.00 of their own funds keeping the business open until Respondent and his family received their green cards.

(3) "…At the end of the five (5) years [sic] term, Franchisees [Petitioner and Cobb] are obligated to purchase all of Investor's [Respondent's] interest for a fixed price of $1,000,000.00." (1 CT 000218; Appendix E, page 2, ¶ 3.) There was obviously no dispute as to the meaning of the term "obligated." It does not mean "optional." Chiu and Cobb were "obligated" to buy back Respondent's interest in exchange for $1,000,000.00. (1 CT 000218; 2 RT 84, 86 - 87.) It is the reason Respondent filed a lawsuit and the basis of the Statement of Decision and Judgment by the Superior Court and Opinion by the Court of Appeal.

(4) "The LLC shall be managed by the Franchisees [Petitioner and Cobb]." (1 CT 000218.) Again, it is undisputed that the Respondent agreed to give Petitioner and Cobb complete control over the management of the LLC. (1 RT 24, 27, 28; 2 RT 66 – 69, 81 – 82, 109 – 110; Exhibit 1, page 2, ¶ 6.)

(5) "Franchisees [Chiu and Cobb] agree to indemnify and hold Investor [Respondent] and the property of Investor [Lin], including the Restaurant, free and harmless from any Liability for any debts, obligations, or claims arising for [sic] or connected with the operation of the Restaurant managed by Franchisees [Petitioner and Cobb]." (1 CT 219; Exhibit 1, page 3, ¶ 8.)

On the other hand, Petitioner has been left "holding the bag" for everything else, including the failed business that Respondent supposedly "invested" in as the basis for his family's application for permanent residency, which Petitioner and Cobb kept operating for 6 years to insure the subsequent approval of the same. Respondent never intended to be an "owner" of the business as contemplated by United States Immigration Law. He merely wanted to be a "creditor with benefits," with the "benefits" being a chance to apply for permanent residency in the United States for himself and his family. There was no claim, and there was no evidence, that Respondent is or was subject to any claim, or anticipates being liable for, any "debts, obligations, or claims" arising from or connected to the operation of the restaurant. This includes any claims from the buyers of the restaurant, any vendors of the restaurant, or any taxing authorities. As will be argued later on, this lack of "risk" is what makes this Agreement illegal pursuant to United States Immigration Law, and

contrary to the law and public policy of the United States and the State of California.

Immigration attorney Cecilia Yu (hereinafter referred to as "Yu") contacted Petitioner on behalf of Respondent for the purpose of using Chiu and Cobb, and their expertise in the restaurant industry, as a vehicle for Respondent to obtain an EB-5 investor visa, and later, permanent residency in the United States. (1 RT 13, 23; 2 RT 110.) Respondent and Yu knew each other socially and did business together on another EB-5 transaction on behalf of another of Yu's immigration clients, who also happened to be a personal friend of Respondent's. (1 RT 5; 2 RT 82-83.) It is undisputed that Respondent was represented by Yu throughout the entirety of this transaction. Yu, an experienced attorney, served as Respondent's counsel, and as such, she negotiated the terms of this transaction on his behalf. She also handled all aspects of Lin's EB-5 petition and "green card" application. (2 RT 127, 130, 144.) She continued to serve as Respondent's attorney and agent through the filing and litigation of the instant action. (2 RT 81-87.) The fact that Petitioner was not an attorney was not in dispute, and there was no evidence that Petitioner or Cobb had any idea that the "Agreement" was illegal at the time it was made. (1 RT 170; 2 RT 59.) Petitioner and Cobb also relied on Yu to some extent to deal with the legalities of the Agreement, and she prepared the other documents pertaining to the transaction, such as the LLC formation documents. (1 RT 15, 17, 25 – 27; 2 RT 59.) Petitioner and Cobb were not formally represented by counsel in this transaction. (1 RT 27.) The only attorney that was involved with this transaction was Yu.

B. THE COURT TRIAL

Respondent filed his lawsuit against Petitioner, his wife Anita, Charles Cobb, The Anita L. Chiu Qualified Residence Trust, the Robert T. Chiu Qualified Personal Residence Trust, and Golden Restaurant, LLC (collectively referred to as the "Defendants") in the California Superior Court on February 21, 2014. The original Complaint sought $702,000.00 in damages, "…plus interest from November 17, 2012," the date of the last payment to Respondent by Petitoner, primarily for breach of contract among other issues. (1 CT 000012 - 000027.)

The case proceeded to trial before the Honorable Dan T. Oki on May 18, 2017 and concluded on May 22, 2017. After 3 days of trial, Judge Oki rendered his tentative decision in Respondent's favor on May 22, 2017, and against Petitioner only, on the cause of action for breach of contract, awarding Respondent $702,000.00 in damages and interest at the legal rate from November 17, 2012 forward. He found for in favor of all of the Defendants, including the Petitioner, on all of the remaining causes of action. (3 RT 256 – 259.)

In its' Statement of Decision, the Superior Court stated that the Agreement had two purposes. The first was to qualify Respondent and his family for EB-5 visas and subsequent permanent residency in the United States, and the second purpose was to provide $1,000.000.00 to fund a new fast food restaurant business with the promise of repayment in five (5) years along with the payment of two (2) $40.000.00 dividend payments along the way. The court did not find either of these purposes unlawful, despite the later finding that the "buyback"

provision in the Agreement would likely disqualify the EB-5 application under applicable federal immigration law. (8 CT 001853 - 001854.)

Petitioner filed his Notice of Appeal from the Judgment against him on the cause of action for breach of contract on September 11, 2017. (8 CT 001861 - 001863.)

C. THE COURT OF APPEAL OPINION

In the state Court of Appeal, Petitioner argued that the Agreement (1) was illegal under Federal law for the purpose of supporting a petition or application to obtain permanent residency (thus making it illegal under California law); (2) the respondent committed "document fraud" under Federal law by failing to submit the Agreement with his application or petition; and, (3) the Agreement itself was a "sham." (AOB pp. 26-50; references to "AOB" are to the Appellant's Opening Brief on appeal.)

On March 7, 2019, the Court of Appeal issued its' Opinion affirming the Judgment of the Superior Court in all respects. The Opinion became final on April 6, 2019. Appendix A. A petition for rehearing was not filed. It is contended that the Court of Appeal mistakenly applied California state law in a way that made the judicial system complicit in enforcing an illegal Agreement that clearly violated Federal immigration law and that circumvents, and even preempts, Federal law and policy.

D. CALIFORNIA SUPREME COURT DENIAL OF REVIEW

Petitioner sought discretionary review of the issue in the California Supreme Court, making the same argument and citing the same authorities that were made before the Court of Appeal. (PR pp. 11-28; references to "PR" are to Petitioner's Petition for Review filed with the California Supreme Court.) The California Supreme Court summarily denied review without opinion. Appendix B.

REASONS FOR GRANTING THE PETITION

I. THE COURT SHOULD GRANT THE WRIT TO DECIDE WHETHER AN AGREEMENT WHOSE MAIN PURPOSE IS TO ALLOW SOMEONE VIOLATE FEDERAL LAW IS LEGAL AND ENFORCEABLE UNDER STATE LAW.

The considerations that govern the Court's exercise of its certiorari jurisdiction are concisely set forth in the Court's Rule 10, which states, in pertinent part, as follows:

> "Review of a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following although neither controlling nor fully measuring the Court's discretion, indicate the character of reasons the Court considers:
>
> (c) a state court…has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided

> an important federal question in a way that conflicts with relevant decisions of this Court.

In this case, the California Court of Appeal took an Agreement that was clearly illegal under Federal immigration law for its' main intended purpose, and incorrectly applied California state law in a way that allows people to circumvent, preempt, and usurp well-established Federal law (which should be controlling on this issue). See, United States Constitution, Article VI, Clause 2.

II. THE AGREEMENT WAS ILLEGAL UNDER FEDERAL LAW FOR ITS' INTENDED PURPOSE (TO OBTAIN PERMANENT RESIDENCY IN THE UNITED STATES).

The United States Immigration and Naturalization Service (USCIS) explained Congress' original purpose in enacting the EB-5 program in a policy memorandum:

> Congress established the EB-5 Program in 1990 to bring new investment capital into the country and create new jobs for U.S. Workers. The EB-5 Program is based on our nation's interest in promoting the immigration of people who invest their capital in new, restructured, or expanded businesses and projects in the United States and help create or preserve needed jobs for U.S. workers by doing so.
>
> In the EB-5 program, immigrants who invest their capital in job creating businesses and projects in the United States receive conditional

> permanent resident status in the United States for a two year period. After two years, if the immigrants have satisfied the conditions of the EB-5 Program and other criteria of eligibility, the conditions are removed and the immigrants become unconditional lawful permanent residents of the United States. Congress created the two-year conditional status period to help ensure compliance with the statutory and regulatory requirements and to ensure that the infusion of investment capital is sustained and the U.S. jobs are created.
>
> The 1990 legislation that created the EB-5 Program envisioned lawful permanent resident status for immigrant investors who invest in and engage in the management of job-creating commercial enterprises.

See, USCIS Memorandum, "EB-5 Adjudications Policy,' PM-602-0083 (May 30, 2013) at 1-2 (a true and correct copy of this memorandum is located at 3 CT 000539 – 000565.)

> *Invest* means to contribute capital. A contribution of capital in exchange for a note, bond, convertible debt, obligation, or any other debt arrangement between the alien entrepreneur and the new commercial enterprise does not contribute a contribution of capital for the purposes of this part.

See, 8 C.F.R. § 204.6(e) (a true and correct copy of this regulation is part of the Clerk's Transcript at 3 CT 000567 – 000573 with the specific definition of the word "invest"

located at 3 CT 000568. It is also attached as part of Appendix D. See also, 8 U.S.C.A § 1153(5)(C)(1) for the amount of "capital" to be invested. It is also attached as part of Appendix D.

Per the terms of the Agreement in this case, Lin purportedly purchased a 30% interest in a "California Limited Liability Company" to be formed for "One Million Dollars ($1,000,000.00) for the purpose of obtaining permanent residency in the United States for himself, and immediate member(s) of his family, under the investor provision [sic] of Immigration and Nationality Law of the United States." (1 CT 000217; Appendix E, page 1, ¶ 4.)

If the Agreement stopped there, it would have been perfectly legal as a "qualifying investment" under Federal law. However, the Agreement had several other provisions that convert what looks to be a visa and "green card" qualifying "investment" into a disqualifying "loan" with absolutely no evidence that Plaintiff's capital was ever "at risk" as is required to qualify for an EB-5 immigrant investor visa, and later permanent residency, under United States immigration law. (1 CT 000217 – 000220; 3 RT 211 – 214; Appendix E.)

The leading precedent decision and controlling authority on the issue of whether or not an "infusion of capital" is actually an "investment" under United States Immigration law is the decision issued by the Administrative Appeals Office (AAO) of the United States Customs and Immigration Service (USCIS) entitled *In Re Izummi* 22 I&N Dec. 169 (Comm.1998) (a true and correct copy of this decision is contained in several volumes of the Clerk's Transcript, including 3 CT 000575 – 00060.)

As testified by Petitioner's immigration expert, Angelo Paparelli at trial, *In Re Izummi* is a "precedent decision" that one that has the effect of being "made" by the Attorney General of the United States and binding upon the USCIS. (3 RT 221.)

The classification of *In Re Izummi* as a "precedent decision" was also agreed to by Respondent's immigration law expert Howard Hom. (3 RT 176-177.) Mr. Papparelli is a leading figure nationally in immigration law and specifically on issues relating to EB-5 investments and visas. (3 RT 206 – 209; Mr. Paparelli's Curriculum Vitae or Resume is located at 3 CT 000608 – 000610, and his other credentials are discussed at 2 CT 000454 - 000456.)

Also, unlike Respondent's immigration law expert Howard Hom, Mr. Paparelli was unequivocal in his opinion that Respondent's purported "investment" was not "at risk" and that the Agreement was illegal for the benefits sought under United States Immigration Law. (3 RT 205 – 232.) This in turn, as will be explained later, makes the Agreement illegal and unenforceable pursuant to Federal law, and California law and public policy.

In Re Izummi stands for the proposition that to enter into a redemption agreement (such as the "agreement" at issue here) at the time of making an "investment" evidences a preconceived intent to unburden oneself of the "investment" as soon as possible after unconditional permanent resident status is attained.

This is conceptually no different than a situation in which an alien marries a U.S. citizen and states, in writing, that he or she will divorce him or her in two years. For the

alien's money to truly be at risk, the alien (Respondent) cannot enter into a partnership knowing that he already has a willing buyer in a certain number of years, nor can he be assured that he will receive a certain price. Otherwise, the arrangement is loan, albeit an unsecured one. See, *In Re Izummi* 22 I&N Dec. 169 (Comm.1998). (3 CT 000575 – 000606.) (3 RT 213.)

In Re Izummi could not be any more "on point" when it comes to the Agreement at the heart of this matter. The bottom line is that the Agreement turns what appears to be an "investment" into a "redemption agreement." This makes the Agreement illegal, void, and otherwise against public policy, as it was entered into by the Respondent for the apparent purpose of obtaining "permanent residency" in a manner that violates United States immigration law (by way of a undisclosed side transaction undisclosed, and likely shielded from, the authorities), and as such, it is a "sham," and pursuant to Federal and California law, it should not be enforced. (*In Re Izummi* 22 I&N Dec. 169 (Comm.1998); 3 CT 000575 – 000606; 2 CT 000458 – 000459; see also, Civil Code §§ 1550, 1596 and 1598; 3 RT 209 – 223.)

A. RESPONDENT'S "INVESTMENT" WAS NOT "AT RISK" AS REQUIRED BY FEDERAL LAW.

In order to qualify as an investment in the EB-5 program, the immigrant investor's capital must actually be placed "at risk" for the purpose of generating a return and evidence of such risk must accompany the EB-5 petition. While the law does not specify what the degree of risk must be, but the entire amount of capital must

be at risk to some degree. If the immigrant investor is guaranteed the return of a portion of his or her investment, or is guaranteed a rate of return on a portion of his or her investment, then that portion of the capital is not "at risk." (*In Re Izummi* 22 I&N Dec. 169 (Comm.1998) (3 CT 000575 – 000606.)

For the capital to be considered "at risk," there must be a risk of loss and a chance for gain. In *In Re Izummi*, the immigrant investor's capital was deemed to not be "at risk' because the investment included a "redemption agreement" that protected against the risk of loss of the capital, and constituted an impermissible debt arrangement under 8 C.F.R. § 206.6(e) because it was no different from the risk any business creditor incurs. In addition, an investment with a promise to return any portion of the immigrant investor's minimum required capital would also not be considered "at risk" capital. If an agreement states that the investor may demand return of, or redeem some portion of capital after obtaining conditional lawful permanent residence status, that portion of capital is also not at risk. (*In Re Izummi* 22 I&N Dec. 169 (Comm.1998) 3 CT 000575 – 000606.)

Respondent's infusion of capital was never "at risk" as contemplated by *In Re Izummi*, which is required under United States Immigration law, and also carried a "guaranteed return', which was also discussed in the case. "All Profits derived from the business of the LLC shall be considered the management fee of the Franchisees [Petitioner and Cobb]. Franchisees [Petitioner and Cobb] shall also bear the risk of loss of the business of the LLC, if any…LLC agrees to pay Investor [Lin] the sum of $40,000.00 per year to be paid quarterly, during 4th and 5th year [sic] of this agreement…

Franchisees [Petitioner and Cobb] shall be responsible for all taxes of the LLC, including but not limited to the tax based on ordinary income of the LLC. (See, 1 CT 000217 - 000220; Exhibit 1; 8 C.F.R. § 204.6(e); and, *In Re Izummi* 22 I&N Dec. 169 (Comm.1998) 3 CT 000575 – 000606.) These provisions removed the "risk" element from Respondent's infusion of capital.

Adding further credence to the fact that Respondent's capital was not "at risk" is the following language: "Franchisees agree to [i]ndemnify and hold Investor [Respondent] and the property of Investor [Respondent]… free and harmless from all [l]iability for any debts obligations, or claims arising for or connected with the operation of the Restaurant…" (1 CT 219; Exhibit 1; 8 C.F.R. § 204.6(e); and *In Re Izummi* 22 I&N Dec. 169 (Comm.1998).

When coupled with the language above, this removed all of the "risk" from Respondent's infusion of capital. According to face of the Agreement, and as testified by Mr. Paparelli at trial, these provisions removed the legally required risk from Respondent's alleged "investment." As Mr. Paparelli clearly testified, the Agreement in this case did not have a possibility or chance of gain or a risk of loss. Therefore, the "investment" failed to be "at risk, and was illegal for its' stated purpose. (1 CT 000217 – 000220; 7 CT 001411 – 001412; 3 RT 212 – 215, 221 – 222.) Again, as will be explained later, this means that the illegal Agreement did not have a lawful object or purpose, and it should not be enforceable or enforced pursuant to Federal law and California law and public policy. (3 RT 213 – 214.)

Mr. Hom also attempted to distinguish *In Re Izzumi* on the basis that Respondent paid his money up front and the Izummi applicants paid their money over time. Mr. Paparelli stated that this was not a valid distinction. (3 RT 212.)

Contrary to Mr. Hom's assertions, Mr. Paparelli stated that the USCIS does not apply *In Re Izummi* only in cases where the minimum required investment amount is not fully paid; rather, USCIS applies the decision to cases where the investment amount has been paid in full. For example, see the USCIS Administrative Appeals Office decision, Quartzburg Gold LP, WAC1290511771 (applying *In Re Izummi* where the petitioner had invested $500,000 into the EB-5 new commercial enterprise, and finding that a sell option constituted nothing more than an ineligible loan and not an at-risk contribution of capital). (7 CT 001482 – 001487.)

In addition to agreeing that *In Re Izummi* is a "precedent decision," Mr. Hom also agrees with Mr. Paparelli that *In Re Izummi* requires that, in order for capital to be "at risk," there has to be a risk of loss and a chance for gain. (3 RT 176 – 177, 181.) That being said, throughout the rest of his testimony, Mr. Hom took great pains to try to distinguish *In Re Izummi* from the facts of this case, often trying to argue that the opinions of "commentators" should have greater weight than a well-established "precedent decision" that USCIS employees and adjudicative bodies are required to follow. (3 RT 182 – 184.)

However, according to Mr. Paparelli, Mr. Hom's characterization of *In Re Izummi*, as "distinguishable"

from the facts of this case is completely inapplicable here. (3 RT 212 – 213, 220 – 222.)

No matter how tortured the attempt to distinguish *In Re Izummi's* requirement that the investment be "at risk" from the facts of his case, it is clear that *In Re Izummi* applies to this "investment," and that the alleged "investment" in this case was not "at risk". And if the Agreement would have been either shared with USCIS, or uncovered by USCIS, it is clear that they would have deemed the Agreement illegal for its' intended purpose and rejected Respondent's visa petition and his subsequent application for permanent residency on behalf of himself and his family.

B. THE FAILURE TO SUBMIT THE AGREEMENT TO THE USCIS RISES TO THE LEVEL OF DOCUMENT FRAUD.

During cross-examination, Mr. Hom admitted that he only reviewed portions of the deposition transcripts of Yu and Lin as selected for him by counsel when forming his opinions regarding the EB-5 application that was prepared by Yu and signed by Respondent under penalty of perjury. (3 RT 166.) Mr. Hom went on to opine that the EB-5 application was "lawful." (3 RT 166.)

On the other hand, Mr. Paparelli testified that he reviewed Yu's deposition, the I-526 petition and attachments (the EB-5 application), and the I-496 application for permanent residency prior to forming his opinions in this case. (3 CT 000642 – 000696; 4 CT 000697 – 000849; 3 RT 210 – 211.)

The petition and the application both require the applicant to certify, under penalty of perjury, that the information contained within the petition and application, and the evidence submitted in support of those documents, is true and correct.

The petition and application also require the attorney preparing the documents to certify that the petition and application are "...based upon all information on which I have knowledge." Both documents were signed under penalty of perjury by Yu and Lin. (3 CT 000648, 000651; 2 RT 148 - 149.)

There is an affirmative duty under 8 U.S.C.A. § 1324c to disclose the clearly relevant and material Agreement as part of the I-526 petition and therefore, Plaintiff violated immigration law at the time the I-526 petition was filed, thus making him, and his family, ineligible for the approval of his investor petition, and his family's grant of permanent residency, which they still enjoy today.

Therefore, based on his review, Mr. Paparelli opined that the failure to submit the Agreement with either the EB-5 application or the application for permanent residency was an omission of a material fact that was relevant to the consideration of the immigration benefit sought (the investor visa and subsequent permanent residency). See, 8 U.S.C.A. § 1324c (Penalties for Document Fraud). (A true and correct copy of the statute is located at 7 CT 001445 – 001447 and as part of Appendix D.) (3 RT 215 – 216.) In Mr. Paparelli's opinion, this omission rose to the level of "document fraud" pursuant to 8 U.S.C.A. § 1324c. (3 RT 215 – 216.) In Mr. Paparelli's further opinion, if the USCIS had known about the Agreement, which constituted a "side

transaction," they would have denied the EB-5 petition and the application for permanent residency. (3 RT 215 – 216, 231.) Therefore, Respondent and Yu had an affirmative duty to include the Agreement with the EB-5 petition and/or the later application for permanent residency.

The withholding from USCIS of the Agreement in this case led directly to the agency's unwittingly mistaken approval of Respondent's EB-5 visa petition, the grant of adjustment of status to conditional permanent residence, and the subsequent removal of conditions on Plaintiff's "green card" resident status. (3 RT 215 – 217.)

Mr. Paparelli also opined that this type of material omission, or document fraud, if discovered, would have subjected Respondent and his family to removal proceedings and the preclusion of readmission to the United States for a period of five (5) years. (3 RT 219 – 220.)

Therefore, Respondent (through his attorney Yu) had ample motive to willingly keep the Agreement out of the hands of the USCIS as it would have been a basis for the denial of his EB-5 petition and/or the denial of an adjustment to permanent residency status on behalf of himself and his family. This is further evidence that the Yu (Respondent's agent) knew that the Agreement was illegal and otherwise had an improper purpose.

It is clear that the Agreement had an improper purpose (the circumvention of Federal immigration law and policy) and was used in manner that violated Federal law. This makes it illegal and unenforceable under both Federal law and California law and public policy.

C. THE AGREEMENT IS A "SHAM," THUS MAKING IT AN ILLEGAL UNENFORCEABLE CONTRACT.

On the issue of whether or not the Agreement is a "sham" or otherwise illegal and unenforceable, *Casa Del Caffe Vergnano S.P.A. v. Italflavors, LLC* 816 F.3d 1208 (9th Cir. 2016) is instructive and applicable to the present case. (A true and correct copy of the case is located at 7 CT 001617 – 001624, 8 CT 001625 – 001632.)

There, the Ninth Circuit Court of Appeals determined that a commercial contract intended solely for the purposes of obtaining a U.S. Visa and a companion hold harmless agreement should be read as one "agreement." Thus, the Court refused to enforce an arbitration provision in the commercial contract, stating in relevant part:

> Looking to their external expression of intent, the parties did not manifest their intent to be bound by the Commercial Contract containing the arbitration clause. Reading the Commercial Contract and the contemporaneously executed Hold Harmless Agreement side by side, it is plain that the Commercial Contract was nothing more than a sham agreement Designed as a ploy to aid Hector Rabellino's visa application.
>
> …
>
> Moreover, it is appropriate to read the Commercial Contract and the Hold Harmless Agreement together because:

> [w]hat appears to be a complete and binding integrated Agreement may be…a sham…or it may be illegal. Such Invalidating clauses need not and commonly do not appear on the face of the writing.
>
> Restatement (Second) of Contracts § 214 cmt.c. (Emphasis added.)
>
> …
>
> The declaration in the Hold Harmless Agreement signed contemporaneously with the Commercial Contract proves that the latter was a mere sham to help Hector Rabellino obtain a visa. Thus, we conclude that the Commercial Conract was not a contract and is thus unenforceable.

The withholding from USCIS of the Agreement in this case led directly to the agency's unwittingly mistaken approval of Respondent's EB-5 visa petition, the grant of adjustment of status to conditional permanent residence, and the subsequent removal of conditions on Respondent's "green card" resident status. (3 RT 215 – 217.)

Since there was an affirmative duty under 8 U.S.C.A. § 1324c to disclose the clearly relevant and material Agreement as part of the I-526 petition and, Respondent violated immigration law at the time the I-526 petition was filed, thus making him, and his family, ineligible for the approval of his investor provision, and his family's grant of permanent residency, which they still enjoy today.

It is clear that the Agreement had an improper purpose (the circumvention of Federal immigration law and policy) and was used in manner that violated Federal law. This makes it illegal and unenforceable under California law and public policy, and as such the judgment for breach of contract against Petitioner must be reversed.

II. SINCE THE AGREEMENT VIOLATES FEDERAL LAW, IT IS AN ILLEGAL CONTRACT THAT CANNOT BE ENFORCED IN CALIFORNIA, AND THE JUDGMENT OF THE COURT OF APPEAL MUST BE REVERSED.

Civil Code § 1550 states as follows:

ESSENTIAL ELEMENTS OF CONTRACT. It is essential to the existence of a contract that there should be:

(1) Parties capable of contracting;

(2) Their consent;

(3) **A lawful object**; and,

(4) A sufficient cause or consideration. (Emphasis added.)

See also, California Civil Jury Instructions, CACI No. 302. The absence of any of these elements will preclude any action for breach of the purported contract.

Civil Code § 1596 states that the object of a contract must be lawful when the contract is made, and possible

and ascertainable by the time the contract is performed. Civil Code § 1598 states that where a contract has but a single object, and such object is unlawful, whether in whole or in part, or wholly impossible of performance, or so vaguely expressed as to be wholly unascertainable, the entire contract is void.

Mr. Hom (Lin's expert) and Mr. Paparelli (Petitioner's expert), testified that the primary "object" of the Agreement was to obtain permanent residency for Lin and his family. (3 RT 201, 214.)

The other facts, documents, and testimony in the matter also make it clear that the primary "object" or "purpose" of the entire transaction was for Respondent and his family to obtain permanent residency through the EB-5 program. Respondent had no interest in anything other than getting himself and his family their "green cards," and in getting his money back at the end of the five (5) year term.

So in reality, there really was only one "purpose" to the Agreement, and that "purpose" was to obtain permanent residency for Respondent and his family, which makes the Agreement illegal under United States Immigration law. And if the Agreement was illegal to support the benefits sought under United States Immigration Law, then it should be illegal and unenforceable under State law and public policy, including, but not limited to, California.

As discussed previously, the Agreement was clearly a transaction which was used inappropriately by the Respondent to establish permanent residency in the United States by illegal means. (See, 1 CT 000217 -

000219; 8 C.F.R. § 204.6(e); *In Re Izummi* 22 I&N Dec. 169 (Comm.1998).

As such, it is an illegal "contract" with an "unlawful object." Civil Code § 1550; see also, California Civil Jury Instructions, CACI No. 302.

Further, given the nature of the agreement, Respondent violated Federal law when he and his attorney (Yu) chose not to submit the document as an exhibit to his I-526 application for an EB-5 investor visa. (See, 8 U.S.C.A. § 1324c(f) (Penalties for Document Fraud).

The Agreement is clearly illegal and should not be enforced in California. (See, Civil Code §§ 1550, 1596 and 1598; *Smith v. Simmons* (E.D.Cal.2009) 638 F.Supp.2d 1190; *MKB Management, Inc. v. Melikian* (2010) 184 Cal.App.4th 796; *Brenner v. Haley* (1960) 185 Cal.App.2d 183; *Yoo v. Jho* (2007) 147 Cal.App. 4th 1259; *Abramson v. Juniper Networks, Inc.* (2004) 115 Cal.App.4th 638; *Kashani v. Tsann Kuen China Enterprise Co., Ltd.* (2004) 118 Cal.App.4th 531.)

Under California law, an agreement may be held unenforceable whether evidence of illegality is produced by plaintiff or by defendant. (*Smith v. Simmons* (E.D.Cal.2009) 638 F.Supp.2d 1190.) If the central purpose of a contract is tainted with illegality, then the contract as a whole cannot be enforced. (*MKB Management, Inc. v. Melikian* (2010) 184 Cal.App.4th 796.) It is clear that the "central purpose" of this Agreement was to illegally obtain permanent residency status on behalf of Respondent and his family on the basis of a "loan" as opposed to an "investment."

Where a contract has as its object the violation of the law, no recovery may be had by either party and a party to an illegal contract cannot set up a claim with such contract as its' basis. (*Brenner v. Haley* (1960) 185 Cal.App.2d 183.) The Agreement clearly had, as its' object, a violation and/or circumvention of well-established United States Immigration law such as 8 C.F.R. § 204.6(e) and *In Re Izummi* 22 I&N Dec. 169 (Comm.1998). (See, Appendix E.)

"No principle of law is better settled than that a party to an illegal contract cannot come into a court of law and ask to have his illegal objects carried out." (*Yoo v. Jho* (2007) 147 Cal.App. 4th 1249 quoting *Wong v. Tenneco* (1985) 39 Cal.3d 126, 1335 quoting *Lee On v. Long* (1951) 37 Cal.2d 499, 502, cert. denied, 342 U.S. 947 (1952) (quoting Corpus Juris Secundum).

Also, a contract that contravenes public policy is illegal. (*Abramson v. Juniper Networks, Inc.* (2004) 115 Cal.App.4th 638.)

A violation of federal law is a violation of law for purposes of determining whether or not a contract is unenforceable as contrary to the public policy of California. (*Kashani v. Tsann Kuen China Enterprise Co., Ltd.* (2004) 118 Cal.App.4th 531 (Emphasis added.)

It is clear that this action is based on an illegal Agreement and/or a transaction with an illegal purpose that is clearly in violation of Federal law, California law, and California public policy. Therefore, the contract ultimately should be considered void and unenforceable.

No matter how one chooses to look at it, the primary "object" of the "Agreement" was to obtain "green cards" for Respondent and his family at no risk to him. The injection of $1.000,000.00 into Golden Restaurant, LLC was simply a means to that end. Respondent clearly had no interest in owning or running the business, or in taking on any of the risk associated with it.

"Investing" in a new business that is going to open a new restaurant in an effort to obtain a "green card" is a "lawful object." "Loaning" money to a couple of individuals and characterizing it as a $1,000,000.00 investment in a new business in an effort to obtain a "green card" is not. (1 CT 000217 – 000219; Appendix E.)

The Judgment by the Superior Court and the Opinion of the Court of Appeal have the unintended consequence of providing future immigrants, and unscrupulous immigration professionals, with a roadmap on how to circumvent United States Immigration law in order to obtain permanent residency, and possibly future citizenship. The encouragement of this type of conduct is clearly against the law and public policy of the State of California and ultimately merits review and reversal by this Court as it circumvents well established Federal law and policy in a way that is adverse to the United States Constitution, Article VI, Clause 2 and adverse to the interests of our government with respect to immigration and naturalization.

CONCLUSION

For the foregoing reasons, the Court should grant this Petition for Writ of Certiorari.

Dated: September 4, 2019

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION TWO, FILED MARCH 7, 2019

IN THE COURT OF APPEAL OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

B285053
(Los Angeles County Super. Ct. No. KC066675)

JUI-CHIEN LIN,

Plaintiff and Appellant,

v.

ROBERT T. CHIU,

Defendant and Appellant.

March 7, 2019, Opinion Filed

APPEAL from a judgment of the Superior Court of Los Angeles Count. Dan T. Oki, Judge. Affirmed.

An investor signed a contract agreeing to contribute $1 million toward opening a fast food restaurant franchise, and was promised full repayment plus $80,000 by the end of five years. The franchisees accepted the money but did not fully repay it. The investor sued to recover the shortfall, and the trial court ruled in his favor. On appeal, one of the franchisees argues that the contract was illegal

(and hence unenforceable) because the investor later went on to use the contract to apply for lawful permanent residency in the United States as an "alien entrepreneur" when the contract did not meet the prerequisites for that program. On cross-appeal, the investor argues that the trial court should have invalidated the franchisee's post-default transfer of assets as a fraudulent transfer. Neither the appeal nor cross-appeal has merit, so we affirm.

FACTS AND PROCEDURAL BACKGROUND

I. Facts

In September 2004, plaintiff Jui-Chien Lin (Lin) entered into an "Agreement to Form A California Limited Liability Company [(LLC)]" (Agreement) with Robert Chiu (Chiu) and Charles Cobb (Cobb). Pursuant to that Agreement, Chiu and Cobb agreed to form an LLC to acquire and operate a fast food restaurant in California. Lin agreed to contribute $1 million for five years in exchange for becoming a 30 percent owner in the LLC. The Agreement obligated Chiu and Cobb to "buy back" the $1 million contribution from Lin "[a]t the end of the five year[] term" and to pay Lin an additional $80,000—$40,000 by the end of the fourth year, and another $40,000 by the end of the fifth. Otherwise, Chiu and Cobb were to retain all of the "revenues derived" from the LLC's restaurant and to indemnify and hold Lin harmless from any of the LLC's debts and other losses. After signing the contract, Chiu formed the Golden Restaurant, LLC (LLC) and Lin wired $1,000,130 to the LLC.

Lin had sought out and signed the Agreement because he wanted to qualify as an "alien entrepreneur" under federal immigration law. Federal immigration law authorizes a foreign investor to apply for permanent residency in the United States if he has (1) invested "capital" of, in most geographic areas, at least $1 million (2) "in a new commercial enterprise" (3) "that creates" "not fewer than 10" jobs for persons lawfully in the United States. (U.S. Citizenship and Immig. Services, Policy Mem., (May 30, 2013) p. 2); 8 U.S.C. § 1153(b)(5); 8 C.F.R. §§ 100.1, 204.6.) Lin told Chiu and Cobb about his desire to seek alien entrepreneur status. Indeed, "facilitating" Lin's "interest in obtaining U.S. permanent residency" was listed as the second "purpose" of the Agreement; the first was to "form a California [LLC] . . . [to] construct[] and operat[e] [a] [r]estaurant." Lin applied for permanent residency seven months after signing the Agreement, and his application was thereafter granted.

Chiu and Cobb were unable to pay Lin either of the $40,000 payments or to buy back the $1 million contribution at the end of the five-year period. Lin waived his entitlement to the $80,000 payments and granted Chiu additional time to repay the contribution. Between March 2011 and November 2012, Chiu eventually made payments totaling $298,000 to Lin. This left a balance of $702,000 unpaid.

In May 2011, Chiu and his wife transferred their respective 50 percent interests in the family home into separate qualified personal residence trusts (the trusts).

II. Procedural Background

In 2014, Lin sued Chiu, Cobb, the LLC, Chiu's wife and the trusts. In the operative, Second Amended Complaint, Lin sued (1) Chiu for breach of contract (and, in particular, the Agreement's buyback provision)[1] and (2) Chiu, Chiu's wife and the trusts for transferring their home into the trusts, in violation of the Uniform Voidable Transactions Act (Civ. Code, § 3439 et seq.).[2]

Chiu moved for summary judgment on the ground that the Agreement was illegal (and hence unenforceable). More specifically, Chiu argued that Lin's "contribution" under the Agreement was simply a loan and that loans do not qualify as "investments" under the alien entrepreneur provisions (*In re Izummi*, 22 I. & N. Dec. 169 (BIA 1998); 8 C.F.R. § 204.6(e)), such that the Agreement violated federal immigration law. The trial court rejected the argument and denied the motion.

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1. Lin also sued Cobb, but later dismissed him after Cobb declared bankruptcy.

2. The SAC alleged ten other claims, including for (1) breach of the LLC's operating agreement, (2) fraud and misrepresentation, (3) negligent misrepresentation, (4) breach of fiduciary duty, (5) conspiracy, (6) rescission of the Agreement, (7) rescission of the LLC's operating agreement, (8) an accounting, (9) unjust enrichment, and (10) declaratory relief. Lin voluntarily dismissed three of these claims. The trial court ruled against him on the remainder, and neither Lin nor Chiu appeals those rulings.

All further statutory references are to the Civil Code unless otherwise indicated.

The matter proceeded to a bench trial. At trial, Chiu testified and conceded that he owed Lin the outstanding balance of $702,000 if the Agreement was valid. Lin and Chiu each called experts on immigration law who offered differing opinions on whether Lin's contribution of $1 million under the Agreement would qualify as an "investment" under the alien entrepreneur rules. Chiu's expert also opined that Lin's failure to include the Agreement with his application for lawful permanent residency constituted document fraud.

The court ruled that Chiu had breached the Agreement by not repaying the $702,000 still owing. The court rejected Chiu's argument that the Agreement was illegal. The court found that the Agreement had two stated purposes—(1) to have Chiu and Cobb "benefit" from Lin's $1 million investment into the LLC, and (2) "to qualify . . . Lin and his family" as alien entrepreneurs. To the court, neither of those purposes was illegal. Even if Lin's alien entrepreneur petition should have been denied because the Agreement amounted to a loan and not an investment, the court continued, that fact "does not equate in mak[ing] the [Agreement] and [underlying loan] transaction unlawful."

The court ruled that Chiu and his wife had not fraudulently conveyed their home to the trusts. More specifically, the court ruled that Lin had not "met his burden of proof" in showing that "the transfer rendered [Chiu or his wife] insolvent."

After the court entered judgment, Chiu filed a timely notice of appeal and Lin filed a timely notice of cross-appeal.

DISCUSSION

On appeal, Chiu argues that the trial court erred in ruling that he breached the Agreement (because the Agreement was unenforceable and because Lin had "unclean hands"). On cross-appeal, Lin argues that the trial court erred in ruling that he had not proven Chiu's insolvency (because the court mis-assigned the burden of proof). We independently review issues of illegality, the applicability of the unclean hands doctrine to a particular situation, and the proper assignment of the burden of proof. (*Kashani v. Tsann Kuen China Enterprise Co.*, (2004) 118 Cal.App.4th 531, 540, 13 Cal. Rptr. 3d 174 [illegality]; *Brown v. Grimes* (2011) 192 Cal.App.4th 265, 274, 120 Cal. Rptr. 3d 893 [unclean hands]; *Crocker National Bank v. City and County of San Francisco* (1989) 49 Cal.3d 881, 888, 264 Cal. Rptr. 139, 782 P.2d 278 [questions of law, such as mis-assignment of burden of proof].) We review any factual findings for substantial evidence. (*Steiner v. Thexton* (2010) 48 Cal.4th 411, 417, fn. 7, 106 Cal. Rptr. 3d 252, 226 P.3d 359.)

I. Appeal of Breach of Contract Ruling

Chiu contends that the Agreement is unenforceable on two interrelated but distinct theories—namely, that (1) the Agreement itself is illegal, and (2) Lin has unclean hands. In invoking each theory, Chiu more specifically

asserts that (1) the Agreement has an illegal purpose, and (2) Lin used the Agreement to commit a fraud upon the immigration authorities by not disclosing the full Agreement when applying for alien entrepreneur status (in order to conceal that the Agreement really only provided for a loan, and not an investment).

A. Is the Agreement itself unenforceable?

A contract is valid only if its "object" is "lawful." (§ 1550, 1596; *Hill v. San Jose Family Housing Partners, LLC* (2011) 198 Cal.App.4th 764, 774, 130 Cal. Rptr. 3d 454 (*Hill*) ["A contract must have a lawful object."]; cf. § 1599 [contract with a "single," "unlawful" "object" is "void"].) Courts generally refuse to enforce a contract with an unlawful object because enforcing such a contract would make the "judicial system" complicit in enforcing an "illegal bargain." (*Yoo v. Jho* (2007) 147 Cal.App.4th 1249, 1255-1256, 55 Cal. Rptr. 3d 243 (*Yoo*).)

A contract is not unenforceable simply because it is somehow "connected with an illegal transaction." (*Robertson v. Hyde* (1943) 58 Cal.App.2d 667, 672, 137 P.2d 703 (*Robertson*).) It is not enough that "there may be some illegal[ity] . . . indirectly connected with a transaction." (*Hill, supra*, 198 Cal.App.4th at p. 776.) A contract is unenforceable only if """the central purpose of the contract is tainted with illegality."" (*MKB Management, Inc. v. Melikian* (2010) 184 Cal.App.4th 796, 803, 108 Cal. Rptr. 3d 899 (*MKB*), quoting *Marathon Entertainment, Inc. v. Blasi* (2008) 42 Cal.4th 974, 996, 70 Cal. Rptr. 3d 727, 174 P.3d 741.) Illegality is central to the purpose of the

contract if "'"the plaintiff requires the aid of the illegal transaction to establish his case [for relief in court]."'" (*Homami v. Iranzadi* (1989) 211 Cal.App.3d 1104, 1109, 260 Cal. Rptr. 6 (*Homami*); *Brenner v. Haley* (1960) 185 Cal.App.2d 183, 187, 8 Cal. Rptr. 224; see *Yoo, supra*, 147 Cal.App.4th at pp. 1252-1253 [illegality is central to contract to sell counterfeit goods].) And if a contract has "*several* distinct objects," the courts will endeavor to enforce those portions of the contract having a lawful object if those portions may be feasibly severed and "'"the interests of justice . . . would be furthered"' by severance." (§ 1599, italics added; *MKB*, at p. 804; see also § 1643 ["A contract must receive such an interpretation as will make it lawful . . ."].)

In this case, the buyback provision of the Agreement that Lin is seeking to enforce is enforceable for two reasons.

First, the "central purpose" of the Agreement is not tainted with illegality. Even if we assume that Lin was seeking to defraud the federal immigration authorities by trying to use the Agreement to support his application when the "buyback" was really a loan (and hence not a qualifying "investment"), that illegal purpose is not central to the Agreement. That is because Lin's entitlement to repayment of his full $1,000,000 contribution under the Agreement depends solely on proof that Lin paid Chiu $1,000,000 and did not get all of it back. Put differently, Lin does not "'"require[] the aid of the illegal transaction to establish his case."'" (*Homami, supra*, 211 Cal.App.3d at p. 1109.)

In this respect, this case is akin to *Robertson, supra*, 58 Cal.App.2d 667 and *C.I.T. Corp. v. Breckenridge* (1944) 63 Cal.App.2d 198, 200, 146 P.2d 271 (*Breckenridge*).) *Robertson* declined to excuse a homebuyer from his duty to repay a loan just because the seller-lender unlawfully put title to the house in her son's name so she could qualify for "old age relief." (*Robertson*, at pp. 670-671.) And *Breckenridge* declined to excuse a borrower from his duty to repay a loan just because the loan was used to fund construction by an unlicensed contractor. (*Breckenridge*, at p. 200.) Here, Chiu should not be excused from his duty to repay his loan from Lin just because Lin might have presented, in a misleading way, the nature of the Agreement to immigration authorities to obtain an immigration benefit. Neither Lin's motives in making the loan nor Chiu's knowledge of Lin's motive adds any further weight to the scales. (*Powis v. Moore Machinery Co.*, (1945) 72 Cal.App.2d 344, 354, 164 P.2d 822 [party's "motive d[oes] not make [a] contract illegal"]; *People v. Brophy* (1942) 49 Cal.App.2d 15, 30, 120 P.2d 946 [contract remains "enforceab[le] . . . even though one of the parties thereto has knowledge of an intended purpose of the other party, by means of the contract . . . to violate some law or public policy"].)

Chiu points us to *Casa Del Caffe Vergnano S.P.A. v. Italflavors, LLC* (9th Cir. 2016) 816 F.3d 1208 (*Casa*). But *Casa* is inapt. In *Casa*, the court refused to enforce a contract when the parties had simultaneously entered into a second agreement declaring that the first contract did not have "any validity or effectiveness between the parties." (*Id.* at p. 1210, 1212-1214; see also *Homami,*

supra, 211 Cal.App.3d at p. 1112 [court refuses to enforce provision negated by an oral side agreement].) Here, Lin and Chiu signed only one contract; that contract was meant to be effective; and the parties treated it as effective by creating the LLC and exchanging $1 million. Thus, the Agreement is in no sense a "sham." (Cf. *Young v. Hampton* (1951) 36 Cal.2d 799, 805-806, 228 P.2d 1 [first contract not enforceable where second contract declared that first was designed to evade the requirements of the G.I. Bill and obtain its benefits].)

Second, the object of the Agreement in facilitating Lin's contribution of money and Chiu's buyback of the same is distinct from—and, critically, severable from—the object of the Agreement in facilitating Lin's application for lawful permanent residency. Severance of a contract serves the interests of justice when it (1) would "'prevent parties from gaining undeserved benefit or suffering undeserved detriment as a result of voiding the entire agreement,'" or (2) would "'not be condoning an illegal scheme' [citations]." (*MKB, supra*, 184 Cal.App.4th at pp. 803-804.) If we declared the entire Agreement invalid due to illegality in Lin's subsequent use of the Agreement for immigration purposes, Chiu would get to keep the remaining balance of the loan—$702,000—free and clear. This is an undeserved benefit. Allowing Lin to enforce the monetary portion of the Agreement would also not condone an illegal scheme because any illegality goes at most to *why* Lin handed over $1 million, but not the terms of the exchange itself or its expected repayment. Chiu's argument that allowing Lin to enforce his loan will create "horrible precedent" by giving wealthy foreign investors

a "road map" on "how to . . . circumvent[] well-established United States Immigration Law" is, in our view, little more than a speculative bugaboo that would itself create horrible precedent by giving debtors a road map on how to circumvent their admitted debts.

B. Does Lin have unclean hands?

"'The defense of unclean hands arises from the maxim: "'He who comes into Equity must come with clean hands.'"'" (*East West Bank v. Rio School Dist.* (2015) 235 Cal.App.4th 742, 751, 185 Cal. Rptr. 3d 676, quoting *Blain v. Doctor's Co.* (1990) 222 Cal.App.3d 1048, 1059, 272 Cal. Rptr. 250 (*Blain*).) Whether the doctrine bars relief in any particular case "depends upon . . . [(1)] analogous case law, [(2)] the nature of the misconduct, and [(3)] the relationship of the misconduct to the claimed injuries." (*Blain*, at p. 1060.) With respect to the third element, "[t]he misconduct that brings the unclean hands doctrine into play must relate directly to the transaction concerning which the complaint is made" and "must infect the cause of action involved and affect the equitable relations between the litigants." (*Kendall-Jackson Winery, Ltd. v. Superior Court* (1999) 76 Cal.App.4th 970, 984, 90 Cal. Rptr. 2d 743.) Because, as explained above, any illegality regarding Lin's use of the Agreement is peripheral to the contribution and buyback of the $1 million at issue in this litigation, the two are not "directly" "relate[d]" and the unclean hands doctrine is not a bar.

II. Cross-Appeal of Fraudulent Conveyance Ruling

Lin contends that the trial court was wrong to reject his fraudulent conveyance claim. Before a transfer will be voided under the Uniform Voidable Transactions Act (Act), the *plaintiff-creditor* must prove that (1) the defendant-debtor "made" a "transfer . . . without receiving a reasonably equivalent value in exchange for the transfer . . .," and (2) "the debtor was insolvent at the time or the debtor became insolvent as a result of the transfer . . . ." (§ 3439.05, subds. (a) & (b) [burden of proof on plaintiff-creditor].) The trial court concluded that Lin did not prove that Chiu or Chiu's wife were insolvent while or after they transferred their house to the trusts, and Lin does not challenge this conclusion *as a matter of evidence*. Instead, Lin argues that the trial court made a *legal* error in not assigning the burden of proof to Chiu and Chiu's wife.

Lin is wrong. To be sure, the Act provides that "[a] debtor [who] is generally not paying [his] debts as they become due other than as a result of a bona fide dispute is presumed insolvent" and thereafter bears the "burden of proving the nonexistence of insolvency." (§ 3439.02, subd. (b).) But this presumption only applies if the debtor is "not paying [his] debts as they become due." The Legislative Committee Comment to this provision explains that a "court should look at more than the amount and due dates of the indebtedness" and should "also take into account such factors as [(1)] the number of the debtor's debts, [(2)] the proportion of those debts not being paid, [(3)] the duration of the nonpayment, and [(4)] the existence of bona fide disputes or other special circumstances alleged to

constitute an explanation for the stoppage of payments." (Assem. Com. on Finance and Insurance, com. on Sen. Bill No. 2150 (1985-1986 Reg. Sess.) reprinted at 12A pt. 2 West's Ann. Civil Code (2016 ed.) foll. § 3439.02, pp. 260-262.)

Substantial evidence supports the trial court's implicit finding that Lin did not prove Chiu's failure to pay his debts as they became due (and hence its implicit finding that the statutory presumption was not triggered). The record contains evidence that, after the December 2009 due date, Chiu was unable to repay the loan to Lin, but Lin waived Chiu's duty to pay the $80,000 in additional payments and extended the buyback date for the $1 million contribution, and Chiu went on to make four different payments totaling $298,000. Lin did not present evidence of the parties' ultimately agreed-upon due date, so we do not know whether Chiu was not paying his debt to Lin as it was coming due. What is more, even if we assume that Chiu was in arrears with respect to his payments to Lin, Chiu owns interests in several different franchises run by different LLCs and Lin did not establish that Chiu was not paying any debts of those LLCs or his own personal debts as they were coming due. To the contrary, Chiu indicated that some of the other LLCs remained profitable. A defendant-debtor's insolvency looks at *all* of his assets; the statutory proxy for such insolvency should accordingly look at whether the defendant-debtor is keeping up with *all* of his debts.

Because Lin is appealing the trial court's finding that he failed to prove a fact necessary to invoke the burden-

flipping presumption, he is entitled to relief on appeal only if "'the evidence compels a finding in [his] favor . . . as a matter of law.'" (*Almanor Lakeside Villas Owners Assoc. v. Carson* (2016) 246 Cal.App.4th 761, 769, 201 Cal. Rptr. 3d 268.) Given the ambiguity in the record as to whether Chiu was not paying his debts as they were coming due, the record does not compel the finding that Chiu was not doing so as a matter of law.

DISPOSITION

The judgment is affirmed. The parties are to bear their own costs on appeal and cross-appeal.

_____, J.
HOFFSTADT

We concur:

_____, P. J.
LUI

_____, J.
CHAVEZ

APPENDIX B — STATEMENT OF DECISION OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF LOS ANGELES FOR THE EAST DISTRICT, POMONA COURTHOUSE, DATED AUGUST 10, 2017

SUPERIOR COURT OF THE
STATE OF CALIFORNIA
COUNTY OF LOS ANGELES, EAST DISTRICT—
POMONA COURTHOUSE

Case No.: KC066675

JUI-CHIEN LIN,

Plaintiff,

vs.

ROBERT T. CHIU, AN INDIVIDUAL; *et al.*,

Defendants.

Assigned for All Purposes to:
Judge: Hon. D. Oki
Dept: J

(~~PROPOSED~~) STATEMENT OF DECISION

Trial Dates: 05/18/2017–05/22/2017
Time: 8:30 a.m.
Dept: J

Pursuant to *Code of Civil Procedure* § 632 and *California Rules of Court*, Rules 3.1590 the Court issues this Statement of Decision on the funding of fact and conclusions of law.

Appendix B

Although the Plaintiff's Complaint was pled with twelve distinct cause of action (some pled in the alternative) the central issue in dispute at trial was the First Cause of Action for Breach of Written Contract - specially the rights and liabilities of the parties related to a written Agreement to Form a California Limited Liability Company dated September 18, 2004 (hereinafter the "Contract"). (Exhibit 4). In his testimony, Defendant Robert T. Chiu stated that as of the final payment of $188,000 to plaintiff, he understood and believed that he still owed the plaintiff $702,000 unless his obligation was extinguished by reason of immigration law. The defense contended that the provisions of the "Agreement to Form a California Limited Liability Company" removed the required 'risk' from the 'investment,' thereby making the contract 'illegal' under federal immigration law.

California law and specifically Civil Code section 1550 requires among the other elements of a contract, a lawful purpose. Examining the purpose of the Contract, the Court finds it to be twofold. The first stated purposes for the Contract was for the investment to qualify Mr. Lin and his family to obtain EB5 Visas ultimately leading to permanent residence in the United States. The second purpose was for the defendants to have the benefit of the plaintiffs $1 million investment for a period of five years to fund Golden Restaurant, LLC and a new fast food restaurant business. In return, the defendants promised the Plaintiff a $40,000 dividend, in the fourth year and an additional $40,000 dividend in the fifth year concurrent with their promise of the repayment of the entire $1 million principal at the end of five years.

Appendix B

The Court does not find that either of the two purposes of the contract in and of themselves rendered the Contract one with an unlawful purpose. There is a substantial question of whether or not the Contract and plaintiff's 'investment' would qualify plaintiff and his family for an EB-5 visa under federal immigration law. But the fact that under further scrutiny by the users the visa application would probably have been denied does not render the purposes of the Contract unlawful and therefore unenforceable.

There was disputed testimony concerning the origin and responsibility for drafting the Contract. Evidence was submitted indicating that the same contract form has been previously used by defendants and at least one prior investor several years earlier. (Exhibit 2) There was also evidence showing that the proposed "blank" form agreement and the execution ready agreement were both generated by the defendants and sent to Attorney Cecilia Yu for approval and execution by the Plaintiff. (Exhibits 1 and 3) Ultimately, the Court does not find it necessary to determine who exactly drafted the Contract. More important to the Court's funding of fact, the Court did not find any evidence suggesting that the plaintiff participated in the drafting of the Contract. Instead, the plaintiff, unable to comprehend the English language of the Contract, necessarily relied upon the representations of his counsel concerning the content of the Contract and the appropriateness of its terms for the intended purposes. Whether the Contract was drafted by Attorney Yu or Mr. Chiu or both of them, it is the finding of this Court that the buyback provision in paragraph 5 would likely disqualify

the EB-5 application under applicable federal immigration law. But the fact that the EB-5 application perhaps should have been denied does not equate in make the Contract and transaction unlawful.

There's no evidence that plaintiff had any decision-making role in what documentation would be submitted with the immigration application. There's no evidence that USCIS subsequently requested all back up documentation supporting the application such as the Contract. There is no evidence that any document was requested by the USCIS and refused plaintiff or Ms. Yu. Therefore, the Court does not find that the purpose of the Contract was unlawful thereby rendering the contract unenforceable.

Therefore, on the Second Amended Complaint, the Court finds in favor of the plaintiff Jui-Chien Lin and against the defendant Robert T. Chiu, an individual, on the first cause of action for breach of written contract and award damages of $702,000. In accordance with the language and request in the Second Amended Complaint, the Court awards interest thereon at the legal rate from November 17, 2012, which is what is prayed for and which is the day following the final payment of $188,000 that has been acknowledged.

The Second, Third and Tenth causes of action having been dismissed without prejudice before the start of trial, the Court finds in favor of all other remaining defendants on all the remaining causes of action, which are the fourth through ninth causes of action for negligent misrepresentation, breach of fiduciary duty, setting aside

fraudulent transfers, conspiracy, rescission of contract, and rescission of operating agreement, the 11th and 12th causes of action for unjust enrichment and declaratory relief.

On plaintiff's Sixth cause of action to set aside allegedly fraudulent transfer of the Chiu defendants into a Qualified Personal Residence Trust, there was undisputed testimony that the transfer was done for estate and tax planning purposes. There was no evidence to demonstrate that the transfer rendered the defendants insolvent and unable to meet their obligations. The court therefore finds that plaintiff has not met his burden of proof and finds in favor of defendants on this cause of action.

The Court finds that the plaintiff, Jui-Chien Lin is the prevailing party in this action.

Dated Aug 10, 2017

/s/_____
Dan T. Oki,
Judge of the Superior Court

APPENDIX C — DENIAL OF REHEARING OF THE SUPREME COURT OF CALIFORNIA, FILED JUNE 12, 2019

IN THE SUPREME COURT OF CALIFORNIA

S255143

En Banc

JUI-CHIEN LIN,

Plaintiff and Appellant,

v.

ROBERT T. CHIU,

Defendant and Appellant.

Court of Appeal, Second Appellate District,
Division Two - No. B285053

The petition for review is denied.

The request for an order directing partial publication of the opinion is denied.

CANTIL-SAKAUYE
Chief Justice

APPENDIX D — RELEVANT STATUTORY PROVISIONS

8 U.S.C. § 1153

§ 1153. Allocation of immigrant visas

(a) Preference allocation for family-sponsored immigrants. Aliens subject to the worldwide level specified in section 201(c) [8 USCS § 1151(c)] for family-sponsored immigrants shall be allotted visas as follows:

(1) Unmarried sons and daughters of citizens. Qualified immigrants who are the unmarried sons or daughters of citizens of the United States shall be allocated visas in a number not to exceed 23,400, plus any visas not required for the class specified in paragraph (4).

(2) Spouses and unmarried sons and unmarried daughters of permanent resident aliens. Qualified immigrants—

(A) who are the spouses or children of an alien lawfully admitted for permanent residence, or

(B) who are the unmarried sons or unmarried daughters (but are not the children) of an alien lawfully admitted for permanent residence,

shall be allocated visas in a number not to exceed 114,200, plus the number (if any) by which such worldwide level exceeds 226,000, plus any visas not required for the class specified in paragraph (1); except that not less than 77 percent of such visa numbers shall be allocated to aliens described in subparagraph (A).

(3) Married sons and married daughters of citizens. Qualified immigrants who are the married sons or married daughters of citizens of the United States shall be allocated visas in a number not to exceed 23,400, plus any visas not required for the classes specified in paragraphs (1) and (2).

(4) Brothers and sisters of citizens. Qualified immigrants who are the brothers or sisters of citizens of the United States, if such citizens are at least 21 years of age, shall be allocated visas in a number not to exceed 65,000, plus any visas not required for the classes specified in paragraphs (1) through (3).

(b) Preference allocation for employment-based immigrants. Aliens subject to the worldwide level specified in section 201(d) [8 USCS § 1151(d)] for employment-based immigrants in a fiscal year shall be allotted visas as follows:

(1) Priority workers. Visas shall first be made available in a number not to exceed 28.6 percent of such worldwide level, plus any visas not required for the classes specified in paragraphs (4) and (5), to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

(A) Aliens with extraordinary ability. An alien is described in this subparagraph if—

(i) the alien has extraordinary ability in the sciences, arts, education, business, or athletics

which has been demonstrated by sustained national or international acclaim and whose achievements have been recognized in the field through extensive documentation,

(ii) the alien seeks to enter the United States to continue work in the area of extraordinary ability, and

(iii) the alien's entry into the United States will substantially benefit prospectively the United States.

(B) Outstanding professors and researchers. An alien is described in this subparagraph if—

(i) the alien is recognized internationally as outstanding in a specific academic area,

(ii) the alien has at least 3 years of experience in teaching or research in the academic area, and

(iii) the alien seeks to enter the United States—

(I) for a tenured position (or tenure-track position) within a university or institution of higher education to teach in the academic area,

(II) for a comparable position with a university or institution of higher education to conduct research in the area, or

(III) for a comparable position to conduct research in the area with a department, division, or institute of a private employer, if the department, division, or institute employs at least 3 persons full-time in research activities and has achieved documented accomplishments in an academic field.

(C) Certain multinational executives and managers. An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and the alien seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

(2) Aliens who are members of the professions holding advanced degrees or aliens of exceptional ability.

(A) In general. Visas shall be made available, in a number not to exceed 28.6 percent of such worldwide level plus any visas not required for the classes specified in paragraph (1), to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or

educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

(B)

(i) Subject to clause (ii), the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

(ii)

(I) The Attorney General shall grant a national interest waiver pursuant to clause (i) on behalf of any alien physician with respect to whom a petition for preference classification has been filed under subparagraph (A) if—

(aa) the alien physician agrees to work full time as a physician in an area or areas designated by the Secretary of Health and Human Services as having a shortage of health care professionals or at a health care facility under the jurisdiction of the Secretary of Veterans Affairs; and

(bb) a Federal agency or a department of public health in any State has previously determined that the alien physician's work in such an area or at such facility was in the public interest.

(II) No permanent resident visa may be issued to an alien physician described in subclause (I) by the Secretary of State under section 204(b) [8 USCS § 1154(b)], and the Attorney General may not adjust the status of such an alien physician from that of a nonimmigrant alien to that of a permanent resident alien under section 245 [8 USCS § 1255], until such time as the alien has worked full time as a physician for an aggregate of 5 years (not including the time served in the status of an alien described in section 101(a)(15)(J) [8 USCS § 1101(a)(15)(J)]), in an area or areas designated by the Secretary of Health and Human Services as having a shortage of health care professionals or at a health care facility under the jurisdiction of the Secretary of Veterans Affairs.

(III) Nothing in this subparagraph may be construed to prevent the filing of a petition with the Attorney General for classification under section 204(a) [8 USCS § 1154(a)], or the filing of an application for adjustment of status under section 245 [8 USCS

§ 1255], by an alien physician described in subclause (I) prior to the date by which such alien physician has completed the service described in subclause (II).

(IV) The requirements of this subsection do not affect waivers on behalf of alien physicians approved under section 203(b)(2)(B) [subsec. (b)(2)(B) of this section] before the enactment date of this subsection. In the case of a physician for whom an application for a waiver was filed under section 203(b)(2)(B) [subsec. (b)(2)(B) of this section] prior to November 1, 1998, the Attorney General shall grant a national interest waiver pursuant to section 203(b)(2)(B) [subsec. (b)(2)(B) of this section] except that the alien is required to have worked full time as a physician for an aggregate of 3 years (not including time served in the status of an alien described in section 101(a)(15)(J) [8 USCS § 1101(a)(15)(J)]) before a visa can be issued to the alien under section 204(b) [8 USCS § 1154(b)] or the status of the alien is adjusted to permanent resident under section 245 [8 USCS § 1255].

(C) Determination of exceptional ability. In determining under subparagraph (A) whether an immigrant has exceptional ability, the possession of a degree, diploma, certificate, or similar award from a college, university, school, or other institution of

learning or a license to practice or certification for a particular profession or occupation shall not by itself be considered sufficient evidence of such exceptional ability.

(3) Skilled workers, professionals, and other workers.

(A) In general. Visas shall be made available, in a number not to exceed 28.6 percent of such worldwide level, plus any visas not required for the classes specified in paragraphs (1) and (2), to the following classes of aliens who are not described in paragraph (2):

(i) Skilled workers. Qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least 2 years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

(ii) Professionals. Qualified immigrants who hold baccalaureate degrees and who are members of the professions.

(iii) Other workers. Other qualified immigrants who are capable at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

(B) Limitation on other workers. Not more than 10,000 of the visas made available under this paragraph in any fiscal year may be available for qualified immigrants described in subparagraph (A)(iii).

(C) Labor certification required. An immigrant visa may not be issued to an immigrant under subparagraph (A) until the consular officer is in receipt of a determination made by the Secretary of Labor pursuant to the provisions of section 212(a)(5)(A) [8 USCS § 1182(a)(5)(A)].

(4) Certain special immigrants. Visas shall be made available, in a number not to exceed 7.1 percent of such worldwide level, to qualified special immigrants described in section 101(a)(27) [8 USCS § 1101(a)(27)] (other than those described in subparagraph (A) or (B) thereof), of which not more than 5,000 may be made available in any fiscal year to special immigrants described in subclause (II) or (III) of section 101(a)(27)(C)(ii) [8 USCS § 1101(a)(27)(C)(ii)(II) or (III)], and not more than 100 may be made available in any fiscal year to special immigrants, excluding spouses and children, who are described in section 101(a)(27)(M) [8 USCS § 1101(a)(27)(M)].

(5) Employment creation.

(A) In general. Visas shall be made available, in a number not to exceed 7.1 percent of such worldwide level to qualified immigrants seeking to enter the

United States for the purpose of engaging in a new commercial enterprise (including a limited partnership)—

(i) in which such alien has invested (after the date of the enactment of the Immigration Act of 1990 [enacted Nov. 29, 1990]) or, is actively in the process of investing, capital in an amount not less than the amount specified in subparagraph (C), and

(ii) which will benefit the United States economy and create full-time employment for not fewer than 10 United States citizens or aliens lawfully admitted for permanent residence or other immigrants lawfully authorized to be employed in the United States (other than the immigrant and the immigrant's spouse, sons, or daughters).

(B) Set-aside for targeted employment areas.

(i) In general. Not less than 3,000 of the visas made available under this paragraph in each fiscal year shall be reserved for qualified immigrants who invest in a new commercial enterprise described in subparagraph (A) which will create employment in a targeted employment area.

(ii) Targeted employment area defined. In this paragraph, the term "targeted employment area" means, at the time of the investment, a

rural area or an area which has experienced high unemployment (of at least 150 percent of the national average rate).

(iii) Rural area defined. In this paragraph, the term "rural area" means any area other than an area within a metropolitan statistical area or within the outer boundary of any city or town having a population of 20,000 or more (based on the most recent decennial census of the United States).

(C) Amount of capital required.

(i) In general. Except as otherwise provided in this subparagraph, the amount of capital required under subparagraph (A) shall be $1,000,000. The Attorney General, in consultation with the Secretary of Labor and the Secretary of State, may from time to time prescribe regulations increasing the dollar amount specified under the previous sentence.

(ii) Adjustment for targeted employment areas. The Attorney General may, in the case of investment made in a targeted employment area, specify an amount of capital required under subparagraph (A) that is less than (but not less than ½ of) the amount specified in clause (i).

(iii) Adjustment for high employment areas. In the case of an investment made in a part of a metropolitan statistical area that at the time of the investment—

(I) is not a targeted employment area, and

(II) is an area with an unemployment rate significantly below the national average unemployment rate,

the Attorney General may specify an amount of capital required under subparagraph (A) that is greater than (but not greater than 3 times) the amount specified in clause (i).

(D) Full-time employment defined. In this paragraph, the term "full-time employment" means employment in a position that requires at least 35 hours of service per week at any time, regardless of who fills the position.

(6) Special rules for "K" special immigrants.

(A) Not counted against numerical limitation in year involved. Subject to subparagraph (B), the number of immigrant visas made available to special immigrants under section 101(a)(27)(K) [8 USCS § 1108(a)(27)(K)] in a fiscal year shall not be subject to the numerical limitations of this subsection or of section 202(a) [8 USCS § 1152(a)].

(B) Counted against numerical limitations in following year.

(i) Reduction in employment-based immigrant classifications. The number of visas made available in any fiscal year under paragraphs (1), (2), and (3) shall each be reduced by $^1/_3$ of the number of visas made available in the previous fiscal year to special immigrants described in section 101(a)(27)(K) [8 USCS § 1101(a)(27)(K)].

(ii) Reduction in per country level. The number of visas made available in each fiscal year to natives of a foreign state under section 202(a) [8 USCS § 1152(a)] shall be reduced by the number of visas made available in the previous fiscal year to special immigrants described in section 101(a)(27)(K) [8 USCS § 1101(a)(27)(K)] who are natives of the foreign state.

(iii) Reduction in employment-based immigrant classifications within per country ceiling. In the case of a foreign state subject to section 202(e) [8 USCS § 1152(e)] in a fiscal year (and in the previous fiscal year), the number of visas made available and allocated to each of paragraphs (1) through (3) of this subsection in the fiscal year shall be reduced by $^1/_3$ of the number of visas made available in the previous fiscal year to special immigrants described in section 101(a)(27)(K) [8 USCS § 1101(a)(27)(K))] who are natives of the foreign state.

Appendix D

(c) Diversity immigrants.

(1) In general. Except as provided in paragraph (2), aliens subject to the worldwide level specified in section 201(e) [8 USCS § 1151(e)] for diversity immigrants shall be allotted visas each fiscal year as follows:

(A) Determination of preference immigration. The Attorney General shall determine for the most recent previous 5-fiscal-year period for which data are available, the total number of aliens who are natives of each foreign state and who (i) were admitted or otherwise provided lawful permanent resident status (other than under this subsection) and (ii) were subject to the numerical limitations of section 201(a) [8 USCS § 1151(a)] (other than paragraph (3) thereof) or who were admitted or otherwise provided lawful permanent resident status as an immediate relative or other alien described in section 201(b)(2) [8 USCS § 1151(b)(2)].

(B) Identification of high-admission and low-admission regions and high-admission and low-admission states. The Attorney General—

(i) shall identify—

(I) each region (each in this paragraph referred to as a "high-admission region") for which the total of the numbers determined under subparagraph (A) for states in the region is greater than $^1/_6$ of the total of all such numbers, and

(II) each other region (each in this paragraph referred to as a "low-admission region"); and

(ii) shall identify—

(I) each foreign state for which the number determined under subparagraph (A) is greater than 50,000 (each such state in this paragraph referred to as a "high-admission state"), and

(II) each other foreign state (each such state in this paragraph referred to as a "low-admission state").

(C) Determination of percentage of worldwide immigration attributable to high-admission regions. The Attorney General shall determine the percentage of the total of the numbers determined under subparagraph (A) that are numbers for foreign states in high-admission regions.

(D) Determination of regional populations excluding high-admission states and ratios of populations of regions within low-admission regions and high-admission regions. The Attorney General shall determine—

(i) based on available estimates for each region, the total population of each region not including the population of any high-admission state;

(ii) for each low-admission region, the ratio of the population of the region determined under clause (i) to the total of the populations determined under such clause for all the low-admission regions; and

(iii) for each high-admission region, the ratio of the population of the region determined under clause (i) to the total of the populations determined under such clause for all the high-admission regions.

(E) Distribution of visas.

(i) No visas for natives of high-admission states. The percentage of visas made available under this paragraph to natives of a high-admission state is 0.

(ii) For low-admission states in low-admission regions. Subject to clauses (iv) and (v), the percentage of visas made available under this paragraph to natives (other than natives of a high-admission state) in a low-admission region is the product of—

(I) the percentage determined under subparagraph (C), and

(II) the population ratio for that region determined under subparagraph (D)(ii).

(iii) For low-admission states in high-admission regions. Subject to clauses (iv) and (v), the percentage of visas made available under this paragraph to natives (other than natives of a high-admission state) in a high-admission region is the product of—

(I) 100 percent minus the percentage determined under subparagraph (C), and

(II) the population ratio for that region determined under subparagraph (D)(iii).

(iv) Redistribution of unused visa numbers. If the Secretary of State estimates that the number of immigrant visas to be issued to natives in any region for a fiscal year under this paragraph is less than the number of immigrant visas made available to such natives under this paragraph for the fiscal year, subject to clause (v), the excess visa numbers shall be made available to natives (other than natives of a high-admission state) of the other regions in proportion to the percentages otherwise specified in clauses (ii) and (iii).

(v) Limitation on visas for natives of a single foreign state. The percentage of visas made available under this paragraph to natives of any single foreign state for any fiscal year shall not exceed 7 percent.

(F) "Region" defined. Only for purposes of administering the diversity program under this subsection, Northern Ireland shall be treated as a separate foreign state, each colony or other component or dependent area of a foreign state overseas from the foreign state shall be treated as part of the foreign state, and the areas described in each of the following clauses shall be considered to be a separate region:

(i) Africa.

(ii) Asia.

(iii) Europe.

(iv) North America (other than Mexico).

(v) Oceania.

(vi) South America, Mexico, Central America, and the Caribbean.

(2) Requirement of education or work experience. An alien is not eligible for a visa under this subsection unless the alien—

(A) has at least a high school education or its equivalent, or

(B) has, within 5 years of the date of application for a visa under this subsection, at least 2 years of

work experience in an occupation which requires at least 2 years of training or experience.

(3) Maintenance of information. The Secretary of State shall maintain information on the age, occupation, education level, and other relevant characteristics of immigrants issued visas under this subsection.

(d) Treatment of family members. A spouse or child as defined in subparagraph (A), (B), (C), (D), or (E) of section 101(b)(1) [8 USCS § 1101(b)(1)(A), (B), (C), (D), or (E)] shall, if not otherwise entitled to an immigrant status and the immediate issuance of a visa under subsection (a), (b), or (c), be entitled to the same status, and the same order of consideration provided in the respective subsection, if accompanying or following to join, the spouse or parent.

(e) Order of consideration.

(1) Immigrant visas made available under subsection (a) or (b) shall be issued to eligible immigrants in the order in which a petition in behalf of each such immigrant is filed with the Attorney General (or in the case of special immigrants under section 101(a)(27)(D) [8 USCS § 1101(a)(27)(D)], with the Secretary of State) as provided in section 204(a) [8 USCS § 1154(a)].

(2) Immigrant visa numbers made available under subsection (c) (relating to diversity immigrants) shall be issued to eligible qualified immigrants strictly in a random order established by the Secretary of State for the fiscal year involved.

(3) Waiting lists of applicants for visas under this section shall be maintained in accordance with regulations prescribed by the Secretary of State.

(f) Authorization for issuance. In the case of any alien claiming in his application for an immigrant visa to be described in section 201(b)(2) [8 USCS § 1151(b)(2)] or in subsection (a), (b), or (c) of this section, the consular officer shall not grant such status until he has been authorized to do so as provided by section 204 [8 USCS § 1154].

(g) Lists. For purposes of carrying out the Secretary's responsibilities in the orderly administration of this section, the Secretary of State may make reasonable estimates of the anticipated numbers of visas to be issued during any quarter of any fiscal year within each of the categories under subsections (a), (b), and (c) and to rely upon such estimates in authorizing the issuance of visas. The Secretary of State shall terminate the registration of any alien who fails to apply for an immigrant visa within one year following notification to the alien of the availability of such visa, but the Secretary shall reinstate the registration of any such alien who establishes within 2 years following the date of notification of the availability of such visa that such failure to apply was due to circumstances beyond the alien's control.

(h) Rules for determining whether certain aliens are children.

(1) In general. For purposes of subsections (a)(2)(A) and (d), a determination of whether an alien satisfies the age requirement in the matter preceding subparagraph (A) of section 101(b)(1) [8 USCS § 1101(b)(1)] shall be made using—

(A) the age of the alien on the date on which an immigrant visa number becomes available for such alien (or, in the case of subsection (d), the date on which an immigrant visa number became available for the alien's parent), but only if the alien has sought to acquire the status of an alien lawfully admitted for permanent residence within one year of such availability; reduced by

(B) the number of days in the period during which the applicable petition described in paragraph (2) was pending.

(2) Petitions described. The petition described in this paragraph is—

(A) with respect to a relationship described in subsection (a)(2)(A), a petition filed under section 204 [8 USCS § 1154] for classification of an alien child under subsection (a)(2)(A); or

(B) with respect to an alien child who is a derivative beneficiary under subsection (d), a petition filed under section 204 [8 USCS § 1154] for classification of the alien's parent under subsection (a), (b), or (c).

(3) Retention of priority date. If the age of an alien is determined under paragraph (1) to be 21 years of age or older for the purposes of subsections (a)(2)(A) and (d), the alien's petition shall automatically be converted to the appropriate category and the alien shall retain the original priority date issued upon receipt of the original petition.

(4) Application to self-petitions. Paragraphs (1) through (3) shall apply to self-petitioners and derivatives of self-petitioners.

Appendix D

8 USCS § 1324c

§ 1324c. Penalties for document fraud

(a) Activities prohibited. It is unlawful for any person or entity knowingly—

(1) to forge, counterfeit, alter, or falsely make any document for the purpose of satisfying a requirement of this Act or to obtain a benefit under this Act,

(2) to use, attempt to use, possess, obtain, accept, or receive or to provide any forged, counterfeit, altered, or falsely made document in order to satisfy any requirement of this Act or to obtain a benefit under this Act,

(3) to use or attempt to use or to provide or attempt to provide any document lawfully issued to or with respect to a person other than the possessor (including a deceased individual) for the purpose of satisfying a requirement of this Act or obtaining a benefit under this Act,

(4) to accept or receive or to provide any document lawfully issued to or with respect to a person other than the possessor (including a deceased individual) for the purpose of complying with section 274A(b) [8 USCS § 1324a(b)] or obtaining a benefit under this Act, or

(5) to prepare, file, or assist another in preparing or filing, any application for benefits under this Act, or any

document required under this Act, or any document submitted in connection with such application or document, with knowledge or in reckless disregard of the fact that such application or document was falsely made or, in whole or in part, does not relate to the person on whose behalf it was or is being submitted, or

(6) (A) to present before boarding a common carrier for the purpose of coming to the United States a document which relates to the alien's eligibility to enter the United States, and (B) to fail to present such document to an immigration officer upon arrival at a United States port of entry.

(b) Exception. This section does not prohibit any lawfully authorized investigative, protective, or intelligence activity of a law enforcement agency of the United States, a State, or a subdivision of a State, or of an intelligence agency of the United States, or any activity authorized under chapter 224 of Title 18, United States Code [18 USCS §§ 3521 et seq.].

(c) Construction. Nothing in this section shall be construed to diminish or qualify any of the penalties available for activities by this section but proscribed as well in Title 18, United States Code.

(d) Enforcement.

(1) Authority in investigations. In conducting investigations and hearings under this subsection—

(A) immigration officers and administrative law judges shall have reasonable access to examine evidence of any person or entity being investigated,

(B) administrative law judges, may, if necessary, compel by subpoena the attendance of witnesses and the production of evidence at any designated place or hearing, and

(C) immigration officers designated by the Commissioner may compel by subpoena the attendance of witnesses and the production of evidence at any designated place prior to the filing of a complaint in a case under paragraph (2).

In case of contumacy or refusal to obey a subpoena lawfully issued under this paragraph and upon application of the Attorney General, an appropriate district court of the United States may issue an order requiring compliance with such subpoena and any failure to obey such order may be punished by such court as a contempt thereof.

(2) Hearing.

(A) In general. Before imposing an order described in paragraph (3) against a person or entity under this subsection for a violation of subsection (a), the Attorney General shall provide the person or entity with notice and, upon request made within a reasonable time (of not less than 30 days, as established by the Attorney General) of the date of the notice, a hearing respecting the violation.

(B) Conduct of hearing. Any hearing so requested shall be conducted before an administrative law judge. The hearing shall be conducted in accordance with the requirements of section 554 of Title 5, United States Code. The hearing shall be held at the nearest practicable place to the place where the person or entity resides or of the place where the alleged violation occurred. If no hearing is so requested, the Attorney General's imposition of the order shall constitute a final and unappealable order.

(C) Issuance of orders. If the administrative law judge determines, upon the preponderance of the evidence received, that a person or entity has violated subsection (a), the administrative law judge shall state his findings of fact and issue and cause to be served on such person or entity an order described in paragraph (3).

(3) Cease and desist order with civil money penalty **[Caution: For inflation-adjusted civil monetary penalties, see 8 CFR 270.3(b)(1)(ii).]**. With respect to a violation of subsection (a), the order under this subsection shall require the person or entity to cease and desist from such violations and to pay a civil penalty in an amount of—

(A) not less than $250 and not more than $2,000 for each document that is the subject of a violation under subsection (a), or

(B) in the case of a person or entity previously subject to an order under this paragraph, not less than $2,000 and not more than $5,000 for each document that is the subject of a violation under subsection (a).

In applying this subsection in the case of a person or entity composed of distinct, physically separate subdivisions each of which provides separately for the hiring, recruiting, or referring for employment, without reference to the practices of, and not under the control of or common control with, another subdivision, each such subdivision shall be considered a separate person or entity.

(4) Administrative appellate review. The decision and order of an administrative law judge shall become the final agency decision and order of the Attorney General unless either (A) within 30 days, an official delegated by regulation to exercise review authority over the decision and order modifies or vacates the decision and order, or (B) within 30 days of the date of such a modification or vacation (or within 60 days of the date of decision and order of an administrative law judge if not so modified or vacated) the decision and order is referred to the Attorney General pursuant to regulations, in which case the decision and order of the Attorney General shall become the final agency decision and order under this subsection.

(5) Judicial review. A person or entity adversely affected by a final order under this section may, within

45 days after the date the final order is issued, file a petition in the Court of Appeals for the appropriate circuit for review of the order.

(6) Enforcement of orders. If a person or entity fails to comply with a final order issued under this section against the person or entity, the Attorney General shall file a suit to seek compliance with the order in any appropriate district court of the United States. In any such suit, the validity and appropriateness of the final order shall not be subject to review.

(7) Waiver by Attorney General. The Attorney General may waive the penalties imposed by this section with respect to an alien who knowingly violates subsection (a)(6) if the alien is granted asylum under section 208 [8 USCS § 1158] or withholding of removal under section 241(b)(3) [8 USCS § 1251(b)(3)].

(e) Criminal penalties for failure to disclose role as document preparer.

(1) Whoever, in any **(2)** Whoever, having been convicted of a violation of paragraph (1), knowingly and willfully prepares or assists in preparing an application for immigration benefits pursuant to this Act, or the regulations promulgated thereunder, whether or not for a fee or other remuneration and regardless of whether in any matter within the jurisdiction of the Service, shall be fined in accordance with Title 18, United States Code, imprisoned for not more than 15 years, or both, and prohibited from preparing or assisting in preparing any other such application.

(f) Falsely make. For purposes of this section, the term "falsely make" means to prepare or provide an application or document, with knowledge or in reckless disregard of the fact that the application or document contains a false, fictitious, or fraudulent statement or material representation, or has no basis in law or fact, or otherwise fails to state a fact which is material to the purpose for which it was submitted.

Appendix D

8 CFR 204.6

§ 204.6 Petitions for employment creation aliens.

(a) General. An EB-5 immigrant petition to classify an alien under section 203(b) (5) of the Act must be properly filed in accordance with the form instructions, with the appropriate fee(s) , initial evidence, and any other supporting documentation.

(b) [Reserved]

(c) Eligibility to file and continued eligibility. An alien may file a petition for classification as an investor on his or her own behalf.

(d) Priority date. The priority date of a petition for classification as an investor is the date the completed, signed petition (including all initial evidence and the correct fee) is properly filed. The priority date of an immigrant petition approved for classification as an investor, including immigrant petitions whose approval was revoked on grounds other than those set forth below, will apply to any subsequently filed petition for classification under section 203(b) (5) of the Act for which the alien qualifies. A denied petition will not establish a priority date. A priority date is not transferable to another alien. In the event that the alien is the petitioner of multiple immigrant petitions approved for classification as an investor, the alien shall be entitled to the earliest qualifying priority date. The priority date of an immigrant petition approved for classification as an investor shall not

be conferred to a subsequently filed petition if the alien was lawfully admitted to the United States for permanent residence under section 203(b) (5) of the Act using the priority date of the earlier-approved petition or if at any time USCIS revokes the approval of the petition based on:

(1) Fraud or a willful misrepresentation of a material fact by the petitioner; or

(2) A determination by USCIS that the petition approval was based on a material error.

(e) Definitions. As used in this section:

Capital means cash, equipment, inventory, other tangible property, cash equivalents, and indebtedness secured by assets owned by the alien entrepreneur, provided that the alien investor is personally and primarily liable and that the assets of the new commercial enterprise upon which the petition is based are not used to secure any of the indebtedness. All capital shall be valued at fair market value in United States dollars. Assets acquired, directly or indirectly, by unlawful means (such as criminal activities) shall not be considered capital for the purposes of section 203(b) (5) of the Act.

Commercial enterprise means any for-profit activity formed for the ongoing conduct of lawful business including, but not limited to, a sole proprietorship, partnership (whether limited or general) , holding company, joint venture, corporation, business trust, or other entity which may be publicly or privately owned. This definition

includes a commercial enterprise consisting of a holding company and its wholly-owned subsidiaries, provided that each such subsidiary is engaged in a for-profit activity formed for the ongoing conduct of a lawful business. This definition shall not include a noncommercial activity such as owning and operating a personal residence.

Employee means an individual who provides services or labor for the new commercial enterprise and who receives wages or other remuneration directly from the new commercial enterprise. In the case of the Immigrant Regional Center Program, "employee" also means an individual who provides services or labor in a job which has been created indirectly through investment in the new commercial enterprise. This definition shall not include independent contractors.

Full-time employment means employment of a qualifying employee by the new commercial enterprise in a position that requires a minimum of 35 working hours per week. In the case of the Immigrant Regional Center Program, "full-time employment" also means employment of a qualifying employee in a position that has been created indirectly through revenues generated from increased exports resulting from the Regional Center Program that requires a minimum of 35 working hours per week. A job-sharing arrangement whereby two or more qualifying employees share a full-time position shall count as full-time employment provided the hourly requirement per week is met. This definition shall not include combinations of part-time positions even if, when combined, such positions meet the hourly requirement per week.

Appendix D

High employment area means a part of a metropolitan statistical area that at the time of investment:

(i) Is not a targeted employment area; and

(ii) Is an area with an unemployment rate significantly below the national average unemployment rates.

Invest means to contribute capital. A contribution of capital in exchange for a note, bond, convertible debt, obligation, or any other debt arrangement between the alien investor and the new commercial enterprise does not constitute a contribution of capital for the purposes of this part.

New means established after November 29, 1990.

Qualifying employee means a United States citizen, a lawfully admitted permanent resident, or other immigrant lawfully authorized to be employed in the United States including, but not limited to, a conditional resident, a temporary resident, an asylee, a refugee, or an alien remaining in the United States under suspension of deportation. This definition does not include the alien investor, the alien entrepreneur's spouse, sons, or daughters, or any nonimmigrant alien.

Regional center means any economic unit, public or private, which is involved with the promotion of economic growth, including increased export sales, improved regional productivity, job creation, and increased domestic capital investment.

Appendix D

Regional Center Program means the program established by Public Law 102-395, Section 610, as amended.

Rural area means any area other than an area within a standard metropolitan statistical area (as designated by the Office of Management and Budget) or within the outer boundary of any city or town having a population of 20,000 or more based on the most recent decennial census of the United States.

Targeted employment area means an area that, at the time of investment, is a rural area or is designated as an area that has experienced unemployment of at least 150 percent of the national average rate.

Troubled business means a business that has been in existence for at least two years, has incurred a net loss for accounting purposes (determined on the basis of generally accepted accounting principles) during the twelve- or twenty-four month period prior to the priority date on the alien investor's EB-5 immigrant petition, and the loss for such period is at least equal to twenty percent of the troubled business's net worth prior to such loss. For purposes of determining whether or not the troubled business has been in existence for two years, successors in interest to the troubled business will be deemed to have been in existence for the same period of time as the business they succeeded.

Appendix D

(f) Required amounts of capital.

(1) General. Unless otherwise specified, for EB-5 immigrant petitions filed on or after November 21, 2019, the amount of capital necessary to make a qualifying investment in the United States is one million eight hundred thousand United States dollars ($1,800,000). Beginning on October 1, 2024, and every five years thereafter, this amount will automatically adjust for petitions filed on or after each adjustment's effective date, based on the cumulative annual percentage change in the unadjusted All Items Consumer Price Index for All Urban Consumers (CPI-U) for the U.S. City Average reported by the Bureau of Labor Statistics, as compared to $1,000,000 in 1990. The qualifying investment amount will be rounded down to the nearest hundred thousand. DHS may update this figure by publication of a technical amendment in the Federal Register.

(2) Targeted employment area. Unless otherwise specified, for EB-5 immigrant petitions filed on or after November 21, 2019, the amount of capital necessary to make a qualifying investment in a targeted employment area in the United States is nine hundred thousand United States dollars ($900,000) . Beginning on October 1, 2024, and every five years thereafter, this amount will automatically adjust for petitions filed on or after each adjustment's effective date, to be equal to 50 percent of the standard minimum investment amount described in paragraph (f) (1) of this section. DHS may update this figure by publication of a technical amendment in the Federal Register.

(3) High employment area. Unless otherwise specified, for EB-5 immigrant petitions filed on or after November 21, 2019, the amount of capital necessary to make a qualifying investment in a high employment area in the United States is one million eight hundred thousand United States dollars ($1,800,000). Beginning on October 1, 2024, and every five years thereafter, this amount will automatically adjust for petitions filed on or after each adjustment's effective date, based on the cumulative annual percentage change in the unadjusted All Items Consumer Price Index for All Urban Consumers (CPI-U) for the U.S. City Average reported by the Bureau of Labor Statistics as compared to $1,000,000 in 1990. The qualifying investment amount will be rounded down to the nearest hundred thousand. DHS may update this figure by publication of a technical amendment in the Federal Register.

(g) Multiple investors —

(1) General. The establishment of a new commercial enterprise may be used as the basis of a petition for classification as an alien investor by more than one investor, provided each petitioning investor has invested or is actively in the process of investing the required amount for the area in which the new commercial enterprise is principally doing business, and provided each individual investment results in the creation of at least ten full-time positions for qualifying employees. The establishment of a new commercial enterprise may be used as the basis of a petition for

classification as an alien investor even though there are several owners of the enterprise, including persons who are not seeking classification under section 203(b)(5) of the Act and non-natural persons, both foreign and domestic, provided that the source(s) of all capital invested is identified and all invested capital has been derived by lawful means.

(2) Employment creation allocation. The total number of full-time positions created for qualifying employees shall be allocated solely to those alien investors who have used the establishment of the new commercial enterprise as the basis for a petition. No allocation must be made among persons not seeking classification under section 203(b)(5) of the Act or among non-natural persons, either foreign or domestic. USCIS will recognize any reasonable agreement made among the alien investors in regard to the identification and allocation of such qualifying positions.

(h) Establishment of a new commercial enterprise. The establishment of a new commercial enterprise may consist of:

(1) The creation of an original business;

(2) The purchase of an existing business and simultaneous or subsequent restructuring or reorganization such that a new commercial enterprise results; or

(3) The expansion of an existing business through the investment of the required amount, so that a substantial change in the net worth or number of employees results from the investment of capital. Substantial change means a 40 percent increase either in the net worth, or in the number of employees, so that the new net worth, or number of employees amounts to at least 140 percent of the pre-expansion net worth or number of employees. Establishment of a new commercial enterprise in this manner does not exempt the petitioner from the requirements of 8 CFR 204.6(j) (2) and (3) relating to the required amount of capital investment and the creation of full-time employment for ten qualifying employees. In the case of a capital investment in a troubled business, employment creation may meet the criteria set forth in 8 CFR 204.6(j)(4)(ii) .

(i) Special designation of a high unemployment area. USCIS may designate as an area of high unemployment (at least 150 percent of the national average rate) a census tract or contiguous census tracts in which the new commercial enterprise is principally doing business, and may also include any or all census tracts directly adjacent to such census tract(s) . The weighted average of the unemployment rate for the subdivision, based on the labor force employment measure for each census tract, must be at least 150 percent of the national average unemployment rate.

(j) Initial evidence to accompany petition. A petition submitted for classification as an alien entrepreneur must

be accompanied by evidence that the alien has invested or is actively in the process of investing lawfully obtained capital in a new commercial enterprise in the United States which will create full-time positions for not fewer than 10 qualifying employees. In the case of petitions submitted under the Immigrant Investor Pilot Program, a petition must be accompanied by evidence that the alien has invested, or is actively in the process of investing, capital obtained through lawful means within a regional center designated by the Service in accordance with paragraph (m) (4) of this section. The petitioner may be required to submit information or documentation that the Service deems appropriate in addition to that listed below.

(1) To show that a new commercial enterprise has been established by the petitioner in the United States, the petition must be accompanied by:

(i) As applicable, articles of incorporation, certificate of merger or consolidation, partnership agreement, certificate of limited partnership, joint venture agreement, business trust agreement, or other similar organizational document for the new commercial enterprise;

(ii) A certificate evidencing authority to do business in a state or municipality or, if the form of the business does not require any such certificate or the State or municipality does not issue such a certificate, a statement to that effect; or

(iii) Evidence that, as of a date certain after November 29, 1990, the required amount of capital for the area in which an enterprise is located has been transferred to an existing business, and that the investment has resulted in a substantial increase in the net worth or number of employees of the business to which the capital was transferred. This evidence must be in the form of stock purchase agreements, investment agreements, certified financial reports, payroll records, or any similar instruments, agreements, or documents evidencing the investment in the commercial enterprise and the resulting substantial change in the net worth, number of employees.

(2) To show that the petitioner has invested or is actively in the process of investing the required amount of capital, the petition must be accompanied by evidence that the petitioner has placed the required amount of capital at risk for the purpose of generating a return on the capital placed at risk. Evidence of mere intent to invest, or of prospective investment arrangements entailing no present commitment, will not suffice to show that the petitioner is actively in the process of investing. The alien must show actual commitment of the required amount of capital. Such evidence may include, but need not be limited to:

(i) Bank statement(s) showing amount(s) deposited in United States business account(s) for the enterprise;

(ii) Evidence of assets which have been purchased for use in the United States enterprise, including invoices, sales receipts, and purchase contracts containing sufficient information to identify such assets, their purchase costs, date of purchase, and purchasing entity;

(iii) Evidence of property transferred from abroad for use in the United States enterprise, including U.S. Customs and Border Protection commercial entry documents, bills of lading, and transit insurance policies containing ownership information and sufficient information to identify the property and to indicate the fair market value of such property;

(iv) Evidence of monies transferred or committed to be transferred to the new commercial enterprise in exchange for shares of stock (voting or nonvoting, common or preferred) . Such stock may not include terms requiring the new commercial enterprise to redeem it at the holder's request; or

(v) Evidence of any loan or mortgage agreement, promissory note, security agreement, or other evidence of borrowing which is secured by assets of the petitioner, other than those of the new commercial enterprise, and for which the petitioner is personally and primarily liable.

(3) To show that the petitioner has invested, or is actively in the process of investing, capital

obtained through lawful means, the petition must be accompanied, as applicable, by:

(i) Foreign business registration records;

(ii) Corporate, partnership (or any other entity in any form which has filed in any country or subdivision thereof any return described in this subpart) , and personal tax returns including income, franchise, property (whether real, personal, or intangible) , or any other tax returns of any kind filed within five years, with any taxing jurisdiction in or outside the United States by or on behalf of the petitioner;

(iii) Evidence identifying any other source(s) of capital; or

(iv) Certified copies of any judgments or evidence of all pending governmental civil or criminal actions, governmental administrative proceedings, and any private civil actions (pending or otherwise) involving monetary judgments against the petitioner from any court in or outside the United States within the past fifteen years.

(4) Job creation —

(i) General. To show that a new commercial enterprise will create not fewer than ten (10) full-time positions for qualifying employees, the petition must be accompanied by:

(A) Documentation consisting of photocopies of relevant tax records, Form I-9, or other similar documents for ten (10) qualifying employees, if such employees have already been hired following the establishment of the new commercial enterprise; or

(B) A copy of a comprehensive business plan showing that, due to the nature and projected size of the new commercial enterprise, the need for not fewer than ten (10) qualifying employees will result, including approximate dates, within the next two years, and when such employees will be hired.

(ii) Troubled business. To show that a new commercial enterprise which has been established through a capital investment in a troubled business meets the statutory employment creation requirement, the petition must be accompanied by evidence that the number of existing employees is being or will be maintained at no less than the pre-investment level for a period of at least two years. Photocopies of tax records, Forms I-9, or other relevant documents for the qualifying employees and a comprehensive business plan shall be submitted in support of the petition.

(iii) Immigrant Investor Pilot Program. To show that the new commercial enterprise located within a regional center approved for participation in the Immigrant Investor Pilot Program meets the

statutory employment creation requirement, the petition must be accompanied by evidence that the investment will create full-time positions for not fewer than 10 persons either directly or indirectly through revenues generated from increased exports resulting from the Pilot Program. Such evidence may be demonstrated by reasonable methodologies including those set forth in paragraph (m) (3) of this section.

(5) Petitioner engagement. To show that the petitioner is or will be engaged in the new commercial enterprise, either through the exercise of day-to-day managerial control or through policy formulation, the petition must be accompanied by:

(i) A statement of the position Title that the petitioner has or will have in the new enterprise and a complete description of the position's duties;

(ii) Evidence that the petitioner is a corporate officer or a member of the corporate board of directors; or

(iii) Evidence that the petitioner is engaged in policy making activities. For purposes of this section, a petitioner will be considered sufficiently engaged in policy making activities if the petitioner is an equity holder in the new commercial enterprise and the organizational documents of the new commercial enterprise provide the petitioner with certain rights, powers, and duties normally

granted to equity holders of the new commercial enterprise's type of entity in the jurisdiction in which the new commercial enterprise is organized.

(6) If applicable, to show that the new commercial enterprise has created or will create employment in a targeted employment area, the petition must be accompanied by:

(i) In the case of a rural area, evidence that the new commercial enterprise is principally doing business within an area not located within any standard metropolitan statistical area as designated by the Office of Management and Budget, nor within any city or town having a population of 20,000 or more as based on the most recent decennial census of the United States; or

(ii) In the case of a high unemployment area:

(A) Evidence that the metropolitan statistical area, the specific county within a metropolitan statistical area, the county in which a city or town with a population of 20,000 or more is located, or the city or town with a population of 20,000 or more outside of a metropolitan statistical area, in which the new commercial enterprise is principally doing business has experienced an average unemployment rate of at least 150 percent of the national average rate; or

(B) A description of the boundaries and the unemployment statistics for the area for which designation is sought as set forth in paragraph (i) of this section, and the reliable method or methods by which the unemployment statistics were obtained.

(k) Decision. The petitioner will be notified of the decision, and, if the petition is denied, of the reasons for the denial. The petitioner has the right to appeal the denial to the Administrative Appeals Office in accordance with the provisions of part 103 of this chapter.

(l) [Reserved]

(m) Immigrant Investor Pilot Program —

(1) Scope. The Immigrant Investor Pilot Program is established solely pursuant to the provisions of section 610 of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriation Act, and subject to all conditions and restrictions stipulated in that section. Except as provided herein, aliens seeking to obtain immigration benefits under this paragraph continue to be subject to all conditions and restrictions set forth in section 203(b) (5) of the Act and this section.

(2) Number of immigrant visas allocated. The annual allocation of the visas available under the Immigrant Investor Pilot Program is set at 300 for each of the five fiscal years commencing on October 1, 1993.

(3) Requirements for regional centers. Each regional center wishing to participate in the Immigrant Investor Pilot Program shall submit a proposal to the Assistant Commissioner for Adjudications, which:

(i) Clearly describes how the regional center focuses on a geographical region of the United States, and how it will promote economic growth through increased export sales, improved regional productivity, job creation, and increased domestic capital investment;

(ii) Provides in verifiable detail how jobs will be created indirectly through increased exports;

(iii) Provides a detailed statement regarding the amount and source of capital which has been committed to the regional center, as well as a description of the promotional efforts taken and planned by the sponsors of the regional center;

(iv) Contains a detailed prediction regarding the manner in which the regional center will have a positive impact on the regional or national economy in general as reflected by such factors as increased household earnings, greater demand for business services, utilities, maintenance and repair, and construction both within and without the regional center; and

(v) Is supported by economically or statistically valid forecasting tools, including, but not limited to,

feasibility studies, analyses of foreign and domestic markets for the goods or services to be exported, and/or multiplier tables.

(4) Submission of proposals to participate in the Immigrant Investor Pilot Program. On August 24, 1993, the Service will accept proposals from regional centers seeking approval to participate in the Immigrant Investor Pilot Program. Regional centers that have been approved by the Assistant Commissioner for Adjudications will be eligible to participate in the Immigrant Investor Pilot Program.

(5) Decision to participate in the Immigrant Investor Pilot Program. The Assistant Commissioner for Adjudications shall notify the regional center of his or her decision on the request for approval to participate in the Immigrant Investor Pilot Program, and, if the petition is denied, of the reasons for the denial and of the regional center's right of appeal to the Associate Commissioner for Examinations. Notification of denial and appeal rights, and the procedure for appeal shall be the same as those contained in 8 CFR 103.3.

(6) Continued participation requirements for regional centers.

(i) Regional centers approved for participation in the program must:

(A) Continue to meet the requirements of section 610(a) of the Appropriations Act.

(B) Provide USCIS with updated information annually, and/or as otherwise requested by USCIS, to demonstrate that the regional center is continuing to promote economic growth, including increased export sales, improved regional productivity, job creation, and increased domestic capital investment in the approved geographic area, using a form designated for this purpose; and

(C) Pay the fee provided by 8 CFR 103.7(b) (1) (i) (XX) .

(ii) USCIS will issue a notice of intent to terminate the designation of a regional center in the program if:

(A) A regional center fails to submit the information required in paragraph (m) (6) (i) (B) of this section, or pay the associated fee; or

(B) USCIS determines that the regional center no longer serves the purpose of promoting economic growth, including increased export sales, improved regional productivity, job creation, and increased domestic capital investment.

(iii) A notice of intent to terminate the designation of a regional center will be sent to the regional center and set forth the reasons for termination.

(iv) The regional center will be provided 30 days from receipt of the notice of intent to terminate to rebut the ground or grounds stated in the notice of intent to terminate.

(v) USCIS will notify the regional center of the final decision. If USCIS determines that the regional center's participation in the program should be terminated, USCIS will state the reasons for termination. The regional center may appeal the final termination decision in accordance with 8 CFR 103.3.

(vi) A regional center may elect to withdraw from the program and request a termination of the regional center designation. The regional center must notify USCIS of such election in the form of a letter or as otherwise requested by USCIS. USCIS will notify the regional center of its decision regarding the withdrawal request in writing.

(7) Requirements for alien entrepreneurs. An alien seeking an immigrant visa as an alien entrepreneur under the Immigrant Investor Pilot Program must demonstrate that his or her qualifying investment is within a regional center approved pursuant to paragraph (m) (4) of this section and that such investment will create jobs indirectly through revenues generated from increased exports resulting from the new commercial enterprise.

(i) Exports. For purposes of paragraph (m) of this section, the term "exports" means services or goods which are produced directly or indirectly through revenues generated from a new commercial enterprise and which are transported out of the United States;

(ii) Indirect job creation. To show that 10 or more jobs are actually created indirectly by the business, reasonable methodologies may be used. Such methodologies may include multiplier tables, feasibility studies, analyses of foreign and domestic markets for the goods or services to be exported, and other economically or statistically valid forecasting devices which indicate the likelihood that the business will result in increased employment.

(8) Time for submission of petitions for classification as an alien entrepreneur under the Immigrant Investor Pilot Program. Commencing on October 1, 1993, petitions will be accepted for filing and adjudicated in accordance with the provisions of this section if the alien entrepreneur has invested or is actively in the process of investing within a regional center which has been approved by the Service for participation in the Pilot Program.

(9) Effect of termination of approval of regional center to participate in the Immigrant Investor Pilot Program. Upon termination of approval of a regional center to participate in the Immigrant Investor Pilot

Program, the director shall send a formal written notice to any alien within the regional center who has been granted lawful permanent residence on a conditional basis under the Pilot Program, and who has not yet removed the conditional basis of such lawful permanent residence, of the termination of the alien's permanent resident status, unless the alien can establish continued eligibility for alien entrepreneur classification under section 203(b) (5) of the Act.

(n) Offering amendments or supplements. Amendments or supplements to any offering necessary to maintain compliance with applicable securities laws based upon changes to this section effective on November 21, 2019 shall not independently result in denial or revocation of a petition for classification under section 203(b) (5) of the Act, provided that the petitioner:

(1) Filed the petition for classification under section 203(b) (5) of the Act prior to November 21, 2019;

(2) Was eligible for classification under 203(b) (5) of the Act at the time the petition was filed; and

(3) Is eligible for classification under 203(b) (5) of the Act, including having no right to withdraw or rescind the investment or commitment to invest into such offering, at the time of adjudication of the petition.

Appendix D

Cal Civ Code § 1550

§ 1550. Essential elements of contract

It is essential to the existence of a contract that there should be:

1. Parties capable of contracting;

2. Their consent;

3. A lawful object; and,

4. A sufficient cause or consideration.

Appendix D

Cal Civ Code § 1596

§ 1596. Requisites of object

The object of a contract must be lawful when the contract is made, and possible and ascertainable by the time the contract is to be performed.

Appendix D

Cal Civ Code § 1598

§ 1598. When contract wholly void

Where a contract has but a single object, and such object is unlawful, whether in whole or in part, or wholly impossible of performance, or so vaguely expressed as to be wholly unascertainable, the entire contract is void.

APPENDIX E — AGREEMENT TO FORM A CALIFORNIA LIMITED LIABILITY COMPANY

AGREEMENT TO FORM A CALIFORNIA LIMITED LIABILITY COMPANY

This Agreement made the 18th day September, 2004 by and between Robert T. Chui and Charles D. Cobb, individuals and franchisees of Burger King Corporation, (hereafter referred to as Franchisees), and Jui-Chien Lin, individual, (hereafter referred to as Investor).

WHEREAS, Franchisees are in the business of owning and operating Burger King restaurants in Southern California;

WHEREAS, Franchisees and Investor desire to pool their financial resource, expertise, capabilities and investments in the form of a California Limited Company, (hereafter referred as to LLC), to construct and operate a Burger King or similar concept of fast food restaurant (hereafter to the Restaurant), located in San Bernardino County, California.

WHEREAS, Investor wishes to invest to the LLC in the amount of One Million Dollars ($1,000,000.00) for the purpose of obtaining permanent residency in the United State for himself, and immediate member(s) of the family, under the investor provision of Immigration and National Law of the United States;

Appendix E

The parties agree as follows:

1. Purpose

Franchisees and Investor agree to form a California Limited Liability company for the purpose of constructing and operating the Restaurant, located in San Bernardino County, California and also for the purpose of facilitating Investor's interest in obtaining U.S. permanent residency.

2. Investment Plan

Each party shall contribute to the capital of the LLC as the party's capital contribution. The money and/or services contributed as follows:

Name	Contribution	Percentage
Jui-Chien Lin	$1,000,000.00	30%
Robert T. Chiu	Franchise right; Operating experience	35%
Charles D. Cobb	Franchise right; Operating experience	35%

3. Term

The term of this Agreement shall be for five (5) years starting when Investor deposits the funds of $1,000,000.00 into the bank account of the LLC. Thereafter, the term of this Agreement may be extended only upon mutual consent and agreement of both parties. Terms and conditions of extension may only be made upon mutual consent and agreement of both parties.

4. Profit and Loss of the LLC

All net profits derived from the business of the LLC shall be considered the management fee of Franchisees. Franchisees shall also bear the loss of the business of the LLC, if any. Investor shall have no right to claim any of the revenues derived from the business of the LLC, however, LLC agrees to pay Investor the sum of $40,000.00 per year, to be paid quarterly, during 4th and 5th year of this agreement. Franchisees shall be responsible for taxes of the LLC, included but not limited to the tax based on ordinary income of the LLC.

5. Buy Back Term

Unless otherwise provided in this agreement, Investor agrees to sell or transfer his interest in the LLC at the end of this Agreement and may only sell or transfer his interest to Franchisees at a fixed price of $1,000,000.00. Investor may not sell or transfer his interest in the LLC during the terms of this Agreement. Any attempted transfer of any portion or all of such interest is in violation of the prohibition contained in this Article, and shall be deemed invalid, null and void, and of no force or effect. At the end of the five (5) years term, Franchisees are obligated to purchase all of Investor's interest for a fixed price of $1,000,000.00. Such payment shall be made by check or money order on the fifth anniversary of the date of actual funding of Investment. Upon mutual consent and agreement of both parties, the Franchisees may delay to buy the Investor's interest back at the end

of this Agreement, however, the Franchisees shall bear then legal interest upon tender of $1,000,000.00 payment.

6. Management of the LLC

The LLC shall be managed by Franchisees. Franchisees shall provide quarterly Financial and Profit/Loss statements of the LLC to the Investor for review purpose.

7. LLC shall, at its own cost and expenses, during the entire term, secure and maintain a comprehensive coverage policy of public liability insurance to insure the Restaurant against loss and liability cause by or connected with restaurant operation and use of its premises.

8. Franchisees agree to indemnify and hold Investor and the property of Investor, including the Restaurant, free and harmless from all Liability for any debts, obligations, or claims arising for or connected of Restaurant managed by Franchisees. Franchisees any not use the Restaurant as collateral to obtain any kind of loans during the term of the Agreement.

Should any litigation be commenced between the parties concerning the Agreement, or the rights and duties of either in relation thereto, the party, prevailing in such litigation shall be entitled, in additional to such other relief as may be granted in the litigation, to a reasonable sum as and for

his attorney's fees in such litigation which shall be determined by the Court in such litigation or in a separate action brought for this purpose.

9. The Agreement shall be binding on the shall intre to the benefit of the heirs, executors, administrators, successors, and assigns of the parties hereto.

IN WITNESS WHEREOF, the parties have executed, or caused the Agreement of the executed as of the date first above written.

Investor	Franchisees and Individual
/s/ Jui-Chien Lin	/s/ Robert T. Chui
	/s/ Charles D. Cobb
Witness /s/ Cecilia Yu Attorney at Law	