UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

INVEST IN THE USA, et al.,
Plaintiffs,

v. **Case No. 24-CV-992**

ANTHONY BLINKEN, et al.,
Defendants.

ORDER

Plaintiffs are ten EB-5 regional centers and the trade association for EB-5 regional centers. They allege that their businesses will suffer due to the loss of approximately 4,170 "set-aside" EB-5 visas and an unknown number of unreserved EB-5 visas at the end of fiscal year ("FY") 2024 as a result of defendants' allegedly erroneous interpretation and unlawful implementation of the EB-5 Reform and Integrity Act of 2022. Plaintiffs seek a preliminary injunction. For the reasons stated below, plaintiffs' motion is denied.

I. BACKGROUND

A. EB-5 Visas and the Reform and Integrity Act of 2022

The EB-5 visa program provides a path to permanent residency for immigrants who invest a certain amount of money in commercial enterprises within the United States. *See* 8 U.S.C. § 1153(b)(5). Under this program, foreign nationals may be eligible for an employment-based, fifth preference ("EB-5") immigrant visa if they have invested, or are actively in the process of investing, at least $1,050,000 in a new commercial enterprise ("NCE") that creates at least 10 full-time jobs in the United States. 8 U.S.C. § 1153(b)(5)(A). If a foreign national invests in an NCE located in a Targeted Employment

Area ("TEA"), which includes certain rural areas and areas of high unemployment, or in an infrastructure project, the minimum required investment is reduced to $800,000. *See* 8 U.S.C. § 1153(b)(5)(C)(ii).

In March 2022, Congress passed the Reform and Integrity Act ("RIA"), which, among other changes to the EB-5 program, added "set-aside visas," which are reserved visas within the general pool of EB-5 visas for those who invest in areas in especially acute need of investment. Specifically, the RIA provides that, "[o]f the visas made available" under the EB-5 program:

> **(aa)** 20 percent shall be reserved for qualified immigrants who invest in a rural area;
>
> **(bb)** 10 percent shall be reserved for qualified immigrants who invest in an area designated by the Secretary of Homeland Security under clause (ii) as a high unemployment area; and
>
> **(cc)** 2 percent shall be reserved for qualified immigrants who invest in infrastructure projects.

8 U.S.C. § 1153(b)(5)(B)(i)(I). Unlike other visas, set-aside EB-5 visas that go unused in a given fiscal year are held in the same reserved category for an additional year. 8 U.S.C. § 1153(b)(5)(B)(i)(II)(aa). After the second fiscal year in the reserved category, any unused set-aside visas "carry over" to the unreserved EB-5 immigrant visa category. 8 U.S.C. § 1153(b)(5)(B)(i)(II)(bb).

B. This Action and the Instant Motion for Preliminary Injunction

Plaintiffs commenced this action on August 6, 2024, challenging defendants' implementation of the RIA. On August 29, 2024, plaintiffs filed an amended complaint seeking relief under the Administrative Procedure Act and the Declaratory Judgment Act. ECF No. 3. Plaintiffs request that this court: (1) hold unlawful and set aside the defendants' interpretation of the RIA, (2) enjoin defendants from allowing unused,

unreserved EB-5 immigrant visas to "roll up" into other immigrant visa categories in this fiscal year or any other, (3) enjoin defendants from allowing unused set-aside EB-5 visas from FY 2023 from carrying over to the unreserved EB-5 category at the end the fiscal year, and (4) order defendants to use good faith efforts to implement the program and process EB-5 petitions in a timely manner.

On August 30, 2024, plaintiffs filed a motion for preliminary injunction seeking a court order enjoining defendants from (1) allowing unused set-aside EB-5 visas from FY 2023 to "carry over" to the unreserved EB-5 category, and (2) allowing unused, unreserved EB-5 immigrant visas to "roll up" into other immigrant visa categories at the end of the fiscal year. ECF No. 5. Plaintiffs request urgent action on these issues, as FY 2024 ends on September 30, 2024.

II. DISCUSSION

A. Unused "Set-Aside" EB-5 Visas

Plaintiffs seek to prevent defendants from allowing the approximately 4,170 unused set-aside EB-5 visas from FY 2023 to carry over to the unreserved EB-5 category at the end of the fiscal year. Plaintiffs concede that the plain language of the RIA explicitly mandates the carryover of unused set-aside visas to the unreserved category at the end of the following fiscal year. *See* 8 U.S.C. § 1153(a)(5)(B)(i)(II)(bb) (set-aside visas "that are not issued by the end of the succeeding fiscal year . . . shall be made available to qualified immigrants" in the unreserved category). Despite this, plaintiffs seek a court order preventing the unused FY 2023 set-aside EB-5 visas from carrying over to the unreserved category as a "corrective measure" due to defendants' alleged arbitrary and capricious implementation of the RIA. Pls.' Reply Br. at 10, ECF No. 11. Plaintiffs argue

that, had defendants properly implemented the RIA, a substantial number of these set-aside visas would have already been issued, and thus would not carry over at the end of the fiscal year. *Id.*

I conclude that plaintiffs lack standing to pursue this particular relief. Article III of the Constitution limits the jurisdiction of federal courts to "Cases" and "Controversies." U.S. Const. art. III, § 2, cl. 1. To have establish Article III standing, plaintiffs must have "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016), *as revised* (May 24, 2016) (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992)). As the party invoking federal jurisdiction, plaintiffs bear the burden of establishing standing for each type of relief sought. *Laurens v. Volvo Cars of N.A., LLC*, 868 F.3d 622, 625 (7th Cir. 2017) (citing *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009)). Plaintiffs cannot establish causation or redressability, and therefore do not have standing to seek the requested relief.

Plaintiffs allege an injury of decreased demand for their services due to visa backlogs. They allege that if the unused set-aside visas are allowed to carry over into the unreserved category at the end of this fiscal year, it will cause a backlog which will cause imminent harm. Assuming arguendo that plaintiffs' allegations demonstrate an injury-in-fact, plaintiffs do not establish that such an injury is fairly traceable to the challenged conduct of defendants. Plaintiffs seek to prevent the carryover of unused set-aside visas into the unreserved EB-5 pool. But this is not accomplished by any act of defendants; it occurs automatically per the language of the statute. The RIA unambiguously states that set-aside visas "that are not issued by the end of the succeeding fiscal year . . . shall be

made available to qualified immigrants" in the unreserved category. 8 U.S.C. § 1153(a)(5)(B)(i)(II)(bb). Thus, on October 1, the unused set-aside EB-5 visas from FY 2023 will carry over to the unreserved category, with or without any action by defendants.

Plaintiffs also cannot establish that their alleged injury is likely to be redressed by a favorable judicial decision. In *Taylor v. McCament*, 875 F.3d 849, 855 (7th Cir. 2017), the Seventh Circuit considered redressability and standing in a very similar context involving a different type of immigrant visa. In 2000, Congress passed the Victims of Trafficking and Violence Protection Act establishing the "U-visa", a nonimmigrant visa classification for victims of a qualifying crime who assist law enforcement in the investigation or prosecution of that crime. The Act explicitly limited the number of U-visas that may be issued each fiscal year to 10,000. The Department of Homeland Security ("DHS") subsequently failed to implement regulations establishing procedures for victims seeking U-visas until 2008, and thus issued zero U-visas in those eight years. The plaintiff, an Irish national on an extremely long waitlist for a U-visa, sued the United States Citizenship and Immigration Services ("USCIS"), arguing that because it was authorized to issue 10,000 U-visas per year between 2000 and 2008 but failed to do so, the agency wrongfully withheld a total of 80,000 U-visas. 875 F.3d at 852. He sought an injunction compelling the USCIS to immediately issue 80,000 U-visas to those who are currently on the waiting list as a corrective measure. *Id.* The Seventh Circuit concluded that the plaintiff did not possess standing to pursue such an injunction because a favorable judicial decision would not redress his injuries. The court first noted that the statute unambiguously stated that "[t]he number of aliens who may be issued visas or otherwise provided [U-visas] . . . in any fiscal year shall not exceed 10,000." *Id.* at 854 (citing 8

U.S.C. § 1184(p)(2)(A)). Because the statutory cap had been reached for the fiscal year, the court concluded that even if it ordered USCIS to immediately issue 80,000 U-visas, the agency would lack the statutory authority to do so. *Id.* Thus, the plaintiff's injury was not redressable, and his case must be dismissed for lack of subject-matter jurisdiction. *Id.*

Though the details here differ from *Taylor*, the result is the same. Redressability "hinges on whether a court can effectively give [the plaintiff the] relief" requested, and when a plaintiff seeks relief that the relevant agency lacks the statutory authority to award, the plaintiff lacks standing. *Id.* at 855. Defendants lack the authority to provide the relief that plaintiffs request. The RIA mandates that unused set-aside visas "shall" carry over at the end of the fiscal year. *See Iddir v. INS*, 301 F.3d 492, 499 (7th Cir. 2002). ("The term 'shall' denotes a clear directive, a command, as opposed to the terms 'may' or 'at his discretion' as used in a statute such as [the Immigration and Nationality Act]"). By operation of the statute, the unused set-aside EB-5 visas carry over to the unreserved category at the end of the fiscal year. Thus, even if I ordered the defendants to prevent the unused set-aside EB-5 visas from carrying over to the unreserved category, they could not comply with the order because the statute mandates that the visas carry over to the unreserved category at the end of the fiscal year.

In *Taylor*, the Seventh Circuit acknowledged that the defendants' delay had adversely impacted the plaintiff and those similarly situated, but explained that "only Congress can provide the relief they seek." 875 F.3d at 855. The same is true for plaintiffs here. Because I am unable to provide the requested relief, plaintiffs cannot demonstrate that their alleged injury would be redressed by a favorable judicial decision. Plaintiffs thus

do not possess standing to pursue the injunction they seek. I will therefore deny plaintiffs' motion insofar as it seeks to enjoin defendants from allowing unused FY 2023 set-aside EB-5 visas from carrying over to the unreserved category at the end of fiscal year.

B. Unreserved EB-5 Visas

Plaintiffs also seek to enjoin defendants from allowing unused, unreserved EB-5 immigrant visas to "roll up" into other immigrant visa categories at the end of the fiscal year. On this issue, the parties offer conflicting interpretations of the RIA. It is defendants' position that pursuant to 8 U.S.C. § 1153(b), at the end of the fiscal year, all unused unreserved EB-5 visas "roll up" into other employment-based categories. Defs.' Br. in Opp'n at 12, ECF No. 10. Plaintiffs, however, disagree with defendants' interpretation. Plaintiffs note that the RIA mandates that unused set-aside visas "remain available" in the same category in the second fiscal year, and then are "made available to qualified immigrants described under subparagraph (A)." Pls.' Mot. for Prelim. Inj. at 19, ECF No. 5 (citing 8 U.S.C. § 1153(b)(5)(B)(i)(II)). According to plaintiffs, these visas remain in the unreserved EB-5 category until they are used. *Id.*

I will not resolve the parties' dispute at this time because plaintiffs' motion, insofar as it seeks to enjoin defendants from allowing unreserved EB-5 immigrant visas to "roll up" at the end of the fiscal year, is moot. A corollary to the Article III case-or-controversy requirement is that "an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed." *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 71–72 (2013) (citing *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997)). Thus, if intervening circumstances deprive the plaintiff of a personal stake in the outcome, the issue becomes moot. *Id.*

Defendants produce evidence that all EB-5 visas in the unreserved category for FY 2024 have been issued. Defs.' Br. in Opp'n at 16, ECF No. 10; *see also* U.S. Department of State (Aug. 16, 2024), *Annual Limit Reached in the EB-5 Unreserved Category*, https://travel.state.gov/content/travel/en/News/visas-news/annual-limit-eb5.html. Thus, there will be no "roll up" of any unused EB-5 visas into other immigrant visa categories come October 1. Plaintiffs dispute that defendants have issued all the unreserved EB-5 visas, but they offer no persuasive evidence in support of their contention. Because no unreserved EB-5 visas will "roll up" into other employment-based visa categories at the end of the fiscal year, plaintiffs have no personal stake in the outcome of the dispute at this time, and the issue is thus moot.

Plaintiffs assert that even if defendants have issued all unreserved EB-5 visas in FY 2024, "there is by no means any guarantee that they will do so in FY 2025." Pls.' Reply Br. at 10, ECF No. 11. To the extent plaintiffs seek to prevent the "roll up" of unreserved EB-5 visas next year, the issue is not ripe for review at this time. I will therefore deny plaintiffs' motion insofar as it seeks to enjoin defendants from allowing unused, unreserved EB-5 immigrant visas to "roll up" into other employment-based visa categories at the end of this fiscal year.

III. CONCLUSION

For the reasons stated above, plaintiffs' motion for a preliminary injunction is denied. Because it would be premature to do so, I take no position as to whether plaintiffs possess standing to pursue their remaining claims challenging defendants' interpretation of the RIA under the Administrative Procedure Act and the Declaratory Judgment Act.

THEREFORE, IT IS ORDERED that plaintiffs' motion for preliminary injunction (ECF No. 5) is **DENIED**.

Dated at Milwaukee, Wisconsin, this 26th day of September, 2024.

/s/ Lynn Adelman
LYNN ADELMAN
District Judge