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Federal Courts Rule Against Unreasonable EB-5 Processing Times

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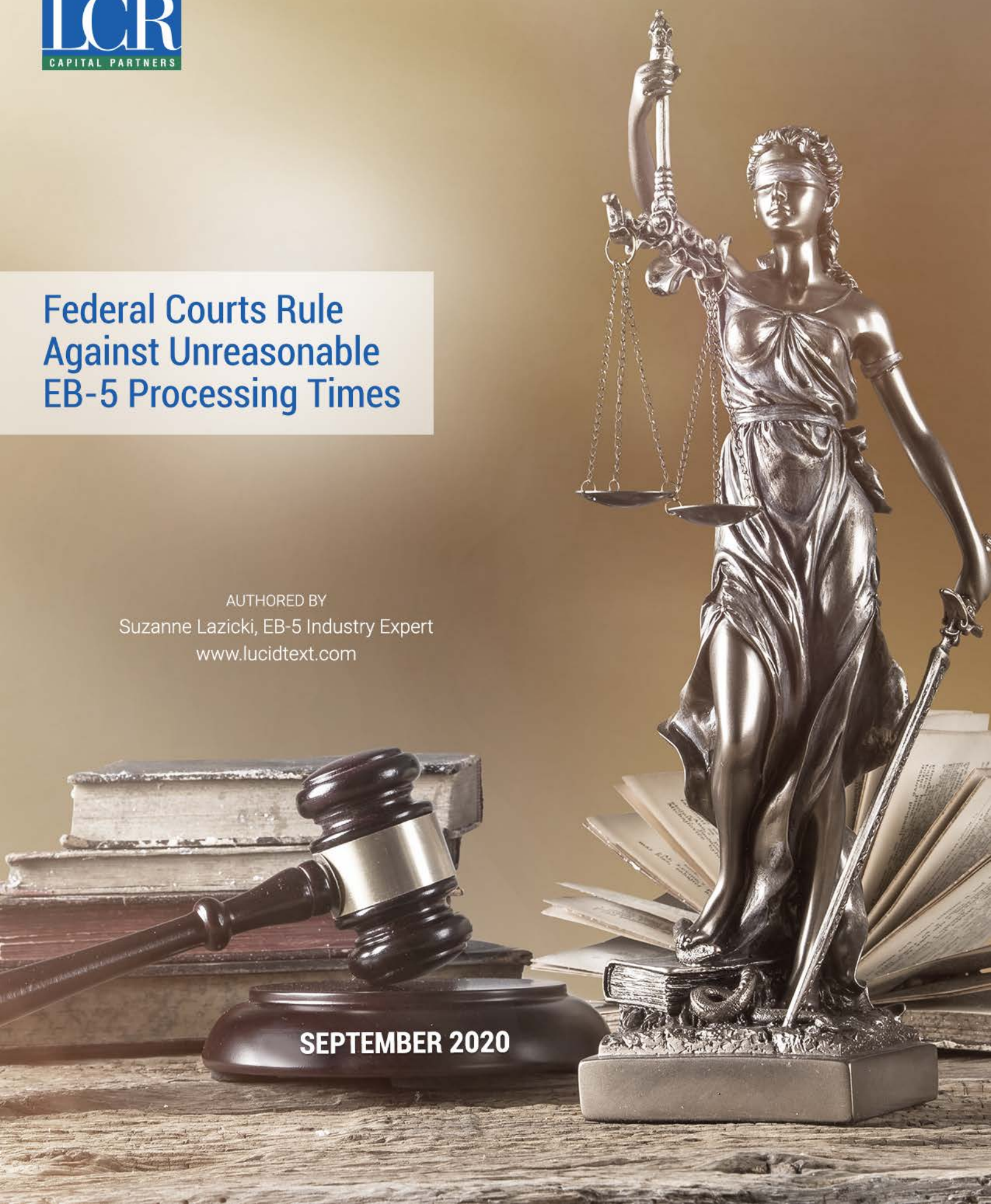

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Legal victories have put pressure on USCIS for normal EB-5 processing

Processing times of three to six years are not normal for EB-5 forms, despite what recent USCIS processing times reports try to suggest. Such protracted processing times are not normal in practice, from what we can see anecdotally. And they are not normal in theory, according to recent opinions from Federal Court judges on mandamus actions by EB-5 investors.

Keller Wurtz v. USCIS et al. (3:30-cv-02163) and Raju et al v. Cuccinelli (20-cv-01386-AGT) are recent cases in which EB-5 investors sued USCIS over unreasonably delayed adjudication. The cases collectively involve 11 investors who had filed I-526 petitions 29 months ago. All of the investors brought claims under the Administrative Procedures Act, which permits federal courts to compel agency action "unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). Keller Wurtz additionally brought a claim under 28 U.S.C. § 1361, which provides for mandamus: an order to compel the agency to do its duty.

> *When met with a mandamus action, USCIS has two options: just process the investor petitions so that the case can be dismissed, or fight the lawsuit.*

When met with a mandamus action, USCIS has two options: just process the investor petitions so that the case can be dismissed, or fight the lawsuit. USCIS chose to fight Keller Wurtz, hoping that the court would agree that a two-year processing time is not an unreasonable delay. In fact, USCIS tried to argue for a four-year rule, under which delays of four years or less would be presumptively reasonable. But the court (U.S. District Court, Northern District of California, in these cases) took a different view, and issued decisions in August 2020 that deny the USCIS motions to dismiss the investors' claims.

Two Recent Decisions

In the Order Denying Motions to Dismiss in *Raju et al v. Cuccinelli*, Judge Alex Tse reminded USCIS that Congress has defined reasonable processing in terms of days, not years:

> Although there is no statutorily mandated timeline for USCIS to process EB-5 petitions, "[i] t is the sense of Congress that the processing of an immigration benefit application should be completed not later than 180 days after the initial filing of the application[.]" 8 U.S.C. § 1571(b). And repeatedly, courts in this and other circuits have concluded that a reasonable time for agency

> action is typically counted in weeks or months, not years." In re Nat. Res. Def. Council, Inc., 956 F.3d 1134, 1139 (9th Cir. 2020) (internal quotation marks omitted). On these grounds alone, it is plausible that USCIS's delays here—of approximately two years in length, per plaintiff—are unreasonable. There may be legitimate reasons for these delays, but only after discovery can that be judged.

In *Keller Wurtz v. USCIS*, Judge Joseph Spero likewise references the 180-day metric for a "normal" processing time based on Congressional intent.

> Congress has stated, in codified statute, its "sense . . . that the processing of an immigration benefit application should be completed not later than 180 days after the initial filing of the application." U.S.C. § 1571(b). USCIS is correct that this timeline is not mandatory, but it nevertheless weighs in favor of finding the delay here—approximately four times Congress's stated goal—to be unreasonable. See Islam v. Heinauer ("Islam II"), 32 F. Supp. 3d 1063, 1073 (N.D. Cal. 2014)

Judge Joseph Spero likewise references the 180-day metric for a "normal" processing time based on Congressional intent.

The judges noted that an extended timeline may be justified in some cases, but that this would be fact-specific. They demolished USCIS's attempt to pose an arbitrary "four year rule" as a matter of law on the pleadings, regardless of the facts of the case.

USCIS further tried to justify the two-year processing delay by pointing to the USCIS Check Case Processing Times page, which was variously reporting an "estimated time range" between 29.5 and 74.5 months for Form I-526. USCIS told the court that these times represent "typical processing times," and indicate that a two-year processing time is still "within the norm". But the judges did not accept the USCIS processing times report as a generally-applicable definition of normal or reasonable processing.

- "The fact that USCIS takes equally long or longer to adjudicate other applicants' petitions does not in itself show that such delay is reasonable." (Judge Spero)
- "USCIS's rate of review appears to have stalled significantly in the time its motion has been pending, without any explanation for that decline available in the current record." (Judge Spero)
- "The median processing time for all applications sheds little light on a reasonable time to process an application prioritized under USCIS's new system [visa availability approach], and where the investment project on which the application is based was already approved by USCIS as an exemplar." (Judge Spero)
- "Although these ranges provide context, they don't prove that the delays at issue are reasonable as a matter of law. For depending on the grounds for the delays, even processing times at the low

> end of the range could be unreasonable. As another district court explained in rejecting the same argument, "an unreasonable delay that applies to every applicant is still unreasonable." Camarena v. Cuccinelli, No. 19-CV-5643, 2020 WL 550597, at *3 (N.D. Ill. Feb. 4, 2020)." (Judge Tse)

Reference to Past Cases Reinforce Judges Decision

The citation to *Camarena v. Cuccinelli* is interesting, because in that case USCIS tried to justify long processing times as a function of a large backlog. However, Judge John Lee noticed that the agency "does not seem to have taken any significant steps to reduce the backlog since August 2016," and references Rodriguez v. Nielsen, No. 16-CV-7092 "rejecting the argument that 'any delay in waiting list adjudications is reasonable in light of the high volume of applications the agency receives.'" Camarena v. Cuccinelli involves the U-Visa context, but the EB-5 context similarly involves a backlog that is significant today simply because USCIS stopped, after 2018, taking significant steps to reduce it. Processing times resulting from an unreasonably-accrued backlog are hardly reasonable.

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When USCIS argued in Camarena v. Cuccinelli that "the delay in adjudication is not unreasonable as Plaintiff is still well within the [average] processing times," Judge Lee responded firmly:

> But this argument deserves little, if any, weight. An unreasonable delay that applies to every applicant is still unreasonable. Otherwise, the Agency could defer review of petitions for years or even decades. The APA requires more. See 5 U.S.C. § 555(b).

Judge Spero considered the question of whether compelling USCIS to adjudicate Keller Wurz's I-526 would merely serve to mix up the wait line, and delay the adjudication of other applications that might have been pending longer. However, looking at the evidence before him, Judge Spero could not see an ordered process that would be confused by adjudicating a two-year-old petition. "The pleadings do not show that USCIS is working at a reasonable pace to process the applications pending before it, or that it has prioritized those applications in a reasonable way." Judge Spero also gave weight to personal considerations: that lack of action by USCIS was causing Keller Wurtz to miss important business travel and preventing her from visiting an elderly father who recently had surgery.

Conclusions

The judges' opinions in *Raju et al v. Cuccinelli* and *Keller Wurtz v. USCIS* offer hope for EB-5 investors.

The opinions sent strong messages to USCIS and the industry:

- the law requires government agencies to do their duty
- a reasonable time for agency action is typically counted in weeks or months, not years
- a processing times report for all applicants is not necessarily applicable to an individual applicant, considering fact-specific circumstances
- a reasonable delay must have a reason – the courts will ask "why" instead of merely accepting USCIS reports of across-the-board delays

EB-5 investors can feel helpless looking at the USCIS Check Case Processing Times page, with its constantly-changing and usually-worsening definition of "normal processing" for EB-5 forms. The "receipt date for case inquiry" tries to suggest that investors must wait many years to inquire about delayed processing. But lawsuits over I-526 pending for two years remind us that USCIS cannot unilaterally define how long is "normal," and that investors can have ground and means to fight processing delay.