

B. The Restaurant Defendants

3. Defendant Schiller Del Grande Restaurant Group, LLC is a Texas limited liability corporation with a registered place of business at 5858 Westheimer Rd., Suite 110, Houston, Texas 77057. It may be served through its registered agent for service of process: Lonnie Schiller at 5858 Westheimer Rd., Suite 110, Houston, Texas 77057.

4. Defendant Lonnie Schiller is a resident of Texas and may be served at his place of employment at 5858 Westheimer Rd., Suite 110, Houston, Texas 77057.

5. Defendant Robert Del Grande is a resident of Texas and may be served at his place of employment at 5858 Westheimer Rd., Suite 110, Houston, Texas 77057.

6. Defendant Larry Seelig is a resident of Texas and may be served at his place of employment at 5858 Westheimer Rd., Suite 110, Houston, Texas 77057.

7. Augusta Foods, LLC is a Texas limited liability corporation with a registered place of business at 5858 Westheimer Rd., Suite 110, Houston, Texas 77057. It may be served through its registered agent for service of process: Stephen D. Lerner, 109 N. Post Oak Lane, Suite 200, Houston, Texas 77024.

8. Defendant Café Express, LLC is a Delaware limited liability company with a registered place of business at P.O. Box 256, Attention: Tax Department, Dublin, Ohio 43017-0256. It may be served through its registered agent for service of process: CT Corporation System, 350 N. St. Paul Street, Dallas, Texas 75201. Café Express, LLC is the successor in interest to Augusta Foods, LLC.

9. Defendant Wendy's International, Inc. is an Ohio corporation with a registered place of business at Wendy's International, Inc., One Dave Thomas Blvd,

Dublin, Ohio 43017. It may be served by serving its registered agent of process: CT Corporation System, 350 N. St. Paul Street, Dallas, Texas 75201.

C. The Attorney Defendants

10. Defendant Boyar & Miller, P.C. is a law firm with its principal place of business at 4265 San Felipe Street, Suite 1200, Houston, Texas 77027-2917. It may be served through its registered agent for service of process Gary W. Miller, 4265 San Felipe Street, Suite 1200, Houston, Texas 77027.

11. Defendant Jay William Boyar is an attorney licensed to practice law in the state of Texas. He may be served at his business address which is 4265 San Felipe Street, Suite 1200, Houston, Texas 77027-2917.

12. Defendant E. Michelle Bohreer is an attorney licensed to practice law in the state of Texas. She may be served at her business address which is the Rivianna Building, 2777 Alan Parkway, Suite 865, Houston, Texas 77019.

III. FACTS

13. The LIFE Act Amendments of 2000 allowed an undocumented alien physically present in the United States on the date of enactment to file for and receive permanent residency in the United States. The process involved the following steps:

- a. Employer files an *Application for Alien Employment Certification* (hereinafter *Application(s)*) with the Department of Labor (or the state appointed agency, in this case, the Texas Workforce Commission or "TWC"). The *Application* must have been received by the DOL/TWC on or before April 30, 2001.

- b. Employer completes a “recruitment phase” involving advertising and interviewing for the position. (This is the critical step that was missed at issue in this lawsuit).**
- c. The DOL issues the employee a Labor Certification.
- d. The employer files the Labor Certification with a Form I-140 with the Department of Justice (DOJ).
- e. The employee files a Form I-485 to adjust status from undocumented worker to permanent resident.
- f. The employee goes through the normal interview process for adjusting status and was issued a permanent residency card.
- g. The employee is eventually eligible to apply for U.S. Citizenship.

14. Mr. Cebrian began working at a Café Express restaurant in 1997. He continued to work at the restaurant until he was fired in 2007. Mr. Cebrian was an undocumented worker when he was hired by the Café Express chain of restaurants in 1997. In early 2001 his employer agreed to sponsor him for permanent residency under the LIFE Act.

15. Mr. Cebrian was eligible to take advantage of the LIFE Act Amendments of 2000, P.L. 106-544, 8 U.S.C. §1255,¹ which changed the date in Section 245(i)(1)(B)

¹ 8 U.S.C. §1255: **Adjustment in status of certain aliens physically present in United States.** (1) Notwithstanding the provisions of subsections (a) and (c) of this section, an alien physically present in the United States – (A) who – (i) entered the United States without inspection; or (ii) is within one of the Classes enumerated in subsection (c) of this section; (B) who is the beneficiary (including a spouse or child of the principal alien, if eligible to receive a visa under section 203(d)) of – (i) a petition for Classification under section 204 that was filed with the Attorney General on or before April 30, 2001; or (ii) an application for a labor certification under section 212(a)(5)(A) that was filed pursuant to the regulations of the Secretary of Labor on or before such date; and (C) who, in the case of a beneficiary of a petition for Classification, or an application for labor certification, described in subparagraph (B) that was filed after January 14, 1998, is physically present in the United States on the date of the enactment of the LIFE Act Amendments of 2000; may apply to the Attorney General for the adjustment of his or her status to that of

to April 30, 2001 and also added a paragraph (1)(C). This section allows persons physically present in the United States on the date of the enactment of the LIFE Act Amendments of 2000 to apply to the Attorney General for the adjustment of their status to that of an alien lawfully admitted for permanent residency, if an *Application* was filed by April 30, 2001 with the Department of Labor. A decision was made by the Restaurant Defendants² at the corporate level to take advantage of the LIFE Act Amendments of 2000.

16. Defendants established a program for sponsorship with the INS.³ in exchange for deducting \$25.00 or more from each of Mr. Cebrian's paychecks, the

an alien lawfully admitted for permanent residence. The Attorney General may accept such application only if the alien remits with such application a sum equaling \$1,000 as of the date of receipt of the application, but such application shall not be required from a child under the age of seventeen, or an alien who is the spouse or unmarried child of an individual who obtained temporary or permanent resident status under section 210 or 245A of the Immigration and Nationality Act or section 202 of the Immigration Reform and Control Act of 1986 at any date, who (i) as of May 5, 1988, was the unmarried child or spouse of the individual who obtained temporary or permanent resident status under section 210 or 245A of the Immigration and Nationality Act or section 202 of the Immigration Reform and Control Act of 1986; (ii) entered the United States before May 5, 1988, resided in the United States on May 5, 1988, and is not a lawful permanent resident; and (iii) applied for benefits under section 301(a) of the Immigration Act of 1990. The sum specified herein shall be in addition to the fee normally required for the processing of an application under this section. (2) Upon receipt of such an application and the sum hereby required, the Attorney General may adjust the status of the alien to that of an alien lawfully admitted for permanent residence if - (A) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence; and (B) an immigrant visa is immediately available to the alien at the time the application is filed.

² All of the Defendants in this lawsuit except the Attorney Defendants held an ownership or controlling interest in the restaurant chain known as Café Express during the periods relevant in this suit. This includes Lonnie Schiller, Robert Del Grande, Larry Seelig, Augusta Foods, LLC, Café Express, LLC, and Wendy's International, Inc. These Defendants are collectively referred to as the "Restaurant Defendants" at times in this petition.

³ On November 25, 2002, the President signed the Homeland Security Act of 2002 into law. This law transferred INS functions to the new Department of Homeland Security (DHS). Immigration enforcement functions were placed within the Directorate of Border and Transportation Security (BTS), either directly, or under Customs and Border Protection (CBP) (which includes the Border Patrol and INS Inspections) or Immigration and Customs Enforcement (ICE) (which includes the enforcement and investigation components of INS such as Investigations, Intelligence, Detention and Removals). On March 1, 2003, services formerly provided by the Immigration and Naturalization Service (INS) transitioned into the Department of Homeland Security (DHS) under U.S. Citizenship & Immigration Services (USCIS). With the acknowledgment of these changes, the entity is referred to herein as "INS" for convenience.

Restaurant Defendants⁴ and the Attorney Defendants assumed the duty to properly and competently prosecute the *Applications*. The Defendants breached this duty by failing to properly complete the “recruitment phase” of the process.

17. On or around January 5, 2001, Café Express sent an email to its stores noting that Café Express would be sponsoring their employees for the alien certification program discussed above.

18. Augusta was the original sponsor of the alien certification program regarding the Plaintiffs. As part of the program, Augusta and the Plaintiff entered into an agreement whereby \$25.00 or more per pay period was deducted from Mr. Cebrian’s paycheck. This money was delivered for safe keeping to Augusta and was segregated. Likewise, the specific deductions were substantially kept in the form in which they were received (automatic deduction), and they were not the subject of a title claim by Augusta. This money was specifically held back and segregated for safe keeping - to be used for the processing of Mr. Cebrian’s application for permanent residency.

⁴At all times Mr. Cebrian was working for the same restaurant chain at the same location. This restaurant has, at all times since its inception, been marketed to the public as “Café Express.” While keeping the same concept, the restaurant has gone through different owners. Robert Del Grande, Mimi Del Grande, Lonnie Schiller and Candice Schiller founded the restaurant chain (Robert’s wife Mimi and Candice are sisters). Prior to the events in this suit, the restaurant was owned in whole or in part by Defendant Augusta Foods, LLC and Defendant Schiller Del Grande Restaurant Group, LLC which were owned and controlled by Robert Del Grande and Lonnie Schiller. Wendy’s purchased a 45% interest in the chain of restaurants on or about February 28, 2002 through a joint venture. At that time, Defendant Café Express, LLC was formed and Robert Del Grande, Lonnie Schiller and Larry Seelig were named as officers and directors. Defendant Café Express, LLC acquired Defendant Augusta Foods, LLC during this February 2002 transaction involving Defendant Wendy’s. Defendant Wendy’s International, Inc. bought approximately 70 – 75% of the restaurant chain in February 2004. During this time, Defendants Larry Seelig, Lonnie Schiller and Robert Del Grande continued to exert some decision making control over the restaurants. Defendant Wendy’s bought 100% of the restaurant chain in February 2007. On or about July 29, 2007 Wendy’s sold the restaurant chain back to Defendant Schiller Del Grande Restaurant Group, LLC and Redstone. (Redstone financed the transaction and owns a percentage of the restaurants. Stephen Lerner, a principal at Redstone, is listed as the registered agent for service for Augusta Foods, LLC). The Defendants Robert Del Grande, Lonnie Schiller, Larry Seelig, Schiller Del Grande Restaurant Group, LLC, Augusta Foods, LLC, Café Express, LLC, and Wendy’s International, Inc. had an ownership interest in the chain of restaurants and/or exerted control over the chain of restaurants during the relevant time periods in this petition. For convenience, these Defendants are sometimes referred to herein as the “Restaurant Defendants.”

19. The first step in the process was to obtain a labor certification from the Department of Labor. To accomplish this, Café Express had to file an Application for Alien Employment Certification with the Texas Workforce Commission (the "TWC"). This Application had to be received by April 30, 2001. Augusta Foods, LLC took on the duty to file the Application. The Application was received on April 26, 2001.⁵

20. The next step was for the employer to work with the Texas Workforce Commission in order to satisfy the Department of Labor that there was a need to employ a non-U.S. worker.

21. The human resources professionals for the Restaurant Defendants and its lawyers, Boyar and Miller, failed to complete this crucial step in the process. The TWC notified Café Express in February 2004 that it was required to contact a list of U.S. applicants for the job.⁶ Michelle Diaz, Lori Neal and Ramon Rodriguez were human resources professionals who worked in the HR department for the Café Express restaurant chain. They failed to contact the applicants, and failed to keep good records of the contacts that were made. Peggy Ricks, the Boyar and Miller paralegal assigned to the project, failed to keep or require documentation of what contacts had and had not been made.

22. This failure occurred in February and March of 2004. During this time the Café Express restaurant chain was owned by Defendants Wendy's, Café Express, LLC, and the Schiller Del Grande Restaurant Group, LLC. Lonnie Schiller, Robert Del Grande and Larry Seelig were officers and directors in the restaurant chain during this period and failed to properly oversee the recruitment phase of the project, or staff the project with

⁵ See Exhibit "A."

⁶ See March 8, 2004 letter from the TWC to Boyar and Miller and Michelle Bohreer.

competent personnel with immigration experience, or hire competent immigration attorneys.

23. The law firm of Boyar and Miller had oversight of the project.⁷ The law firm had no experience in immigration matters. J. William Boyar and Michelle Bohreer (neither of which had immigration experience) assigned the job to a paralegal, Peggy Ricks, who was left unsupervised during most of the project. Peggy Ricks had no prior knowledge or experience with immigration law and procedure.

24. Despite this lack of experience and knowledge of immigration law and procedure, Peggy Ricks often provided legal advice to the applicant-employees at Café Express. Peggy Ricks gave her cell phone and home number to the applicant-employees and encouraged them to call her at home or the office. When she did not know an answer to a legal question, she was instructed by attorneys at Boyar and Miller to look it up on the internet. Her frustration and inexperience are clear from her e-mails, such as the one sent from her to her supervising attorney, Michelle Bohreer, on July 6, 2005:

*"I have been on the phone with the IRS and and National Customer Service Center and reading stuff on line for literally four hours today.. I think I'm going to need to go down to the Nat'l Customer Service Center (by IAH) to meet with an officer about our employees going thru the 245 (i) procedure. . . . , we once again did not have a full understanding as to what the program was about . . . "*⁸

25. Café Express Human Resources Director Michelle Diaz, submitted a report to the TWC stating regarding the recruitment efforts by the Restaurant Defendants:

*"The above applicants were listed on the TWC's Recruitment Activity Report but did not contact Café Express."*⁹ [emphasis added]

⁷ See Exhibits "D" and "E."

⁸ Exhibit "H."

⁹ *Summation of Recruitment Compliance*, Exhibit "G."

Peggy Ricks, paralegal for Boyar and Miller, notarized the submission.

26. The law related to the recruitment phase of the labor certification process, and the notices from the TWC were clear. It was the employer's duty to contact the TWC applicants. However, Michelle Diaz, Roman Rodriguez (Café Express, LLC employees) and Peggy Ricks (Boyar and Miller employee) failed to contact the TWC applicants, and failed to keep any documentation of any efforts made to contact the applicants.

27. Because Café Express and Boyar and Miller did not contact the TWC applicants, Mr. Cebrian's application was denied by the Department of Labor on August 17, 2006. Specifically, the Department of Labor found:

"However, there is no evidence in the case file addressing any efforts made to contact them. When the employer has the addresses and telephone numbers of applicants, the employer cannot state that the applicants did not contact him/her. An initial attempt at phone contact, and, if unsuccessful, following-up with a certified letter, is a minimally acceptable effort. A failure to contact applicants at all is essentially considered an untimely contact."¹⁰

28. While Mr. Cebrian could have overcome the other objections in the Department of Labor's *Notice of Findings*, Michelle Diaz', Ramon Rodriguez' and Peggy Ricks' failure to contact the applicants and/or keep good records could not be corrected. The Defendants' negligence kept Mr. Cebrian's application from being approved.

29. The result to Mr. Cebrian can only be described as disastrous. Mr. Cebrian remains at risk for deportation, a result that would have been avoided if Café Express had competently completed the duty they took on in sponsoring him.

¹⁰ *Notice of Findings, page 4, Exhibit "J."*

30. Ironically, Mr. Cebrian was fired from his job at Café Express because of the Defendants' incompetence. In August 2007, after Lonnie Schiller and Robert Del Grande re-gained control of the restaurant, the owners of the restaurant chain fired Mr. Cebrian because he had not completed the LIFE Act process successfully. The reason he was unable to complete the process was because of the incompetence and negligence of the Defendants.

31. Mr. Cebrian was not told that there was a problem with this Application until after he was fired – a year after the Defendants received the *Notice of Findings* from the Department of Labor.

A. Additional Facts Related to the Fiduciary Relationship Between the Restaurant Defendants and the Plaintiffs.

32. The Plaintiff's relationship with the Restaurant Defendants was not only contractual, there was also a fiduciary relationship among the parties. A fiduciary duty existed between Plaintiff and the Restaurant Defendants because the Restaurant Defendants were holding the funds deducted in trust for the Plaintiff. The Restaurant Defendants, as trustees, owed Plaintiff, among other things, a duty to disclose all material facts known to it that might affect the Plaintiff's rights. This duty was breached and Plaintiff suffered damages as a result.

33. Once the duty was undertaken by the Defendants they had a duty to complete the project in a responsible and correct manner. The Defendants began the recruitment process, but failed to complete it by contacting the applicants supplied by the Texas Workforce Commission.

34. The Restaurant Defendants chose to take on the obligation of making sure that any and all of its employees that qualified under the LIFE Act Amendments of 2000

applied for permanent residency. The Restaurant Defendants stood to benefit if Mr. Cebrian obtained amnesty under the program. This would help each of the Restaurant Defendants to move from their long held position of employing illegal workers to a position of operating legally. As an added benefit, from May 2001 until September 2006 the Restaurant Defendants were able to keep a stable work force in an industry with a historically high turnover rate, and pay the 245(i) applicants less than they paid similarly situated employees who were legally working. The Restaurant Defendants, with the aid of the Attorney Defendants, were able to do this by failing to tell Mr. Cebrian that his *Application* could not be completed because the restaurant had not contacted the applicants as instructed by the TWC.

B. Additional Facts Related to Legal Malpractice By The Attorney Defendants.

35. To accomplish the 245(i) filing and legal process, the Restaurant Defendants arranged for the Attorney Defendants to represent the Plaintiff and to satisfy the filing requirements and ongoing procedures required by the INS and the LIFE Act Amendments of 2000. The Restaurant Defendants worked closely with the Attorney Defendants to provide the undocumented workers at Café Express with the proper paperwork, instructions and directions on how to complete the paperwork, and generally oversaw the process.

36. The Attorney Defendants accepted the attorney/client representation of the Plaintiffs. They accepted legal fees in exchange for applying for and prosecuting the steps in the 245 (i) program for the workers.

37. Defendant Attorney J. William Boyer and Defendant Boyar & Miller filed I-140 forms with the Department of Justice. This was not the correct procedure under the

LIFE Act and the INS rules. I-140's cannot be filed with the Department of Justice until the Department of Labor issues a Labor Certificate. Of course, the Department of Justice denied the Plaintiffs' I-140 applications.

38. Damages in this lawsuit must include the money stolen from the Plaintiff's paychecks each pay period, plus money they would have earned but for the termination. But damages must also include sufficient funds to compensate the Plaintiff for the loss of permanent residency, and the likelihood that he would have eventually qualified to apply for citizenship in the United States. Damages must be sufficient to compensate the Plaintiff for what that loss means to them and their family. Under the clear and strict laws relating to immigration status, there is very little likelihood that the Plaintiff will ever obtain permanent residency or U.S. citizenship because of the Defendants' failures. At best, the Plaintiff may expect to be deported from the United States and must begin the application process anew, complete with the long delays and improbabilities that accompany this process.

IV. ESTOPPEL AND TOLLING STATUTE OF LIMITATIONS

39. Defendants are estopped from asserting any statute of limitations defense to the claims alleged herein by virtue of their acts of failing to disclose material facts, suppressing their wrongful conduct, and taking express, regular, knowing and intentional acts of deception and misrepresentation towards the Plaintiff.

V. CAUSES OF ACTION

A. Count One – Legal Malpractice

40. Plaintiff re-alleges and incorporates by reference all paragraphs contained in this petition, as if fully set forth herein.

41. The Attorney Defendants had an attorney/client relationship with the Plaintiff because: (1) the Plaintiff was their client; (2) the Attorney Defendants agreed to take on the representation; (3) the Attorney Defendants agreed to take whatever legal action necessary to properly and timely submit the *Applications* on behalf of the Plaintiff; (4) the Attorney Defendants charged the Plaintiff for performance of legal services; (5) the Attorney Defendants were paid for this legal service (6) the Plaintiff reasonably believed that the Attorney Defendants were working on his behalf; (7) the Plaintiff periodically received updates from the Attorney Defendants. Further, the Attorney Defendants represented themselves as the Plaintiff's attorney. There is no doubt that the Attorney Defendants engaged in the practice of law on behalf of the Plaintiff in taking steps to complete the 245(i) program on the Plaintiff's behalf. Failure to correctly complete the recruitment process properly, once started, directly led to the failure of the Plaintiff to receive a labor certificate. The Attorney Defendants' actions described throughout this complaint were below the standard of care owed by an attorney to his or her clients. These breaches proximately caused the Plaintiff's injuries, and substantial damages were incurred.

B. Count Two – Breach of Contract – Legal Malpractice

42. Plaintiff re-alleges and incorporates by reference all paragraphs contained in this petition, as if fully set forth herein.

43. The Attorney Defendants entered into a contractual relationship to provide legal services to the Plaintiffs for a fee that was deducted from Mr. Cebrian's paychecks. The Attorney Defendants breached this contract by failing to properly and timely supply competent legal services to the Plaintiffs. The failure to perform competently the

services required by the Plaintiff proximately resulted in substantial damages to the Plaintiff.

C. Count Three – Breach of Contract – Restaurant Defendants

44. Plaintiff re-alleges and incorporates by reference all paragraphs contained in this petition, as if fully set forth herein.

45. The Restaurant Defendants entered into a contract with the Plaintiff to oversee and process the *Application* on behalf of the Plaintiff. This agreement began when the Restaurant Defendants, the owners of the Café Express chain of restaurants, initially offered and promised to assist the Plaintiff in the filing and prosecuting requirements under the LIFE Act in exchange for the Plaintiff's continuation of employment in a field where high turnover's are the norm. These promises and offers were made repeatedly by each of the Restaurant Defendants and Attorney Defendants working on behalf of the Restaurant Defendants from 2001 through 2007. The Plaintiff accepted the Restaurant Defendants' offers and promises and expected the obligations of this agreement to be performed by the Restaurant Defendants. The Restaurant Defendants breached this contract by failing to properly complete the process.

46. In addition, Augusta Foods and Café Express undertook the recruitment process required under the 245(i) program. Wendy's continued the recruitment process. However, Augusta Foods, Café Express, and Wendy's did not correctly and competently complete the process, thus causing Mr. Cebrian to be barred from receiving a labor certification.

D. Count Four: Fraudulent Inducement to Contract

47. Plaintiff re-alleges and incorporates by reference all paragraphs contained in this petition, as if fully set forth herein.

48. The Defendants induced Mr. Cebrian to enter into the contract made the basis of this litigation upon representations that they could competently prosecute the Plaintiff's Application.

49. When Defendants made the foregoing representations, they (a) knew the representations were false, or (b) made the representations recklessly, as a positive assertion, and without knowledge of their truth. Defendants made the representations with the intent that the Plaintiff would act on them. Plaintiff relied upon these representations in entering into the contract.

50. As a direct and proximate cause of Defendants' conduct, Plaintiff has been damaged in an amount in excess of the minimum jurisdictional limits of this Court and requests an order from this Court awarding Plaintiff all damages allowed by law.

51. Plaintiff further seeks exemplary damages and treble damages in an amount to be determined by the trier of fact.

E. Count Five – Negligence

52. Plaintiff re-alleges and incorporates by reference all paragraphs contained in this petition, as if fully set forth herein.

53. The Defendants accepted the duty to competently and correctly file and process the Plaintiffs' *Applications*. After accepting this duty and taking steps to complete this duty, the Defendants breached this duty by negligently failing to properly complete the task and breached the duty owed to the Plaintiff. This breach proximately led to the substantial damages incurred by the Plaintiff. These damages go far beyond the \$25.00 or more that was deducted from the Plaintiff's paychecks. For instance, the damages include an amount necessary to compensate Plaintiff for the fact he will not

have the opportunity to become a permanent resident and ultimately a United States citizen. Plaintiff has also suffered mental anguish as a result of the Defendants' negligence.

54. The Defendants were also negligent in the following:

- a. Failing to correctly, competently and promptly inform the Plaintiff of the status of the immigration process after affirmatively accepting this duty;
- b. Withholding funds from the Plaintiff's paychecks;
- c. Sending correspondence to the Plaintiff with inaccurate information related to the immigration process and the Plaintiff's Application status;
- d. Filing incorrect paperwork with the Department of Justice;
- e. Incorrectly prosecuting the relief allowed by the LIFE Act Amendment;
- f. Failing to correctly complete the forms necessary for relief under the 245(i) program;
- g. Failing to contact the applicants given by the TWC;
- h. Failing to properly document the efforts made in the recruitment process;
- i. Failing to follow the instructions of the TWC;
- j. Conducting meetings from 2001 to 2007 in which incorrect information was given to the Plaintiff;
- k. Beginning the recruitment process, but failing to correctly complete the steps necessary to finalize the recruitment process; and,

1. Other acts of negligence that will be shown at the trial of this matter.

F. Count Seven – Unjust Enrichment, Restitution

55. Plaintiff re-alleges and incorporates by reference all paragraphs contained in this petition, as if fully set forth herein.

56. The Defendants collected fees by deducting money from the Plaintiff's paychecks. This was done by automatic deductions of \$25.00 or more per pay period for several years. By receiving these funds, the Defendants were unjustly enriched and the Plaintiff was substantially damaged.

57. The Restaurant Defendants took steps to establish and maintain a captured work force by not telling Mr. Cebrian that his application had been denied for over a year. The Restaurant Defendants who owned and operated the Café Express chain of restaurants benefited tremendously from this indentured work force. The Restaurant Defendants were able to establish and maintain a work force that would not leave regardless of the conditions, and would work for less wages than similarly situated employees working for the Café Express chain of restaurants. Because of this the Restaurant Defendants were enriched. The Café Express chain of restaurants was more profitable and more valuable than it otherwise would have been. This enrichment came at a cost and to the detriment of the Plaintiffs.

58. The Attorney Defendants billed the Plaintiff indirectly through withholdings. The Plaintiff paid the Attorney Defendants for costs and fees related to the filing and processing of the Application. Because the Defendants failed in the recruitment process, the Plaintiff received nothing of value from the Attorney

Defendants. The money belonged to the Plaintiff. The money was kept by the Attorney Defendants. The Attorney Defendants were enriched by the Plaintiff. The Plaintiff was injured. As such, the Attorney Defendants were unjustly enriched to the Plaintiff detriment.

G. Count Eight – Conversion

59. Plaintiff re-alleges and incorporates by reference all paragraphs contained in this petition, as if fully set forth herein.

60. Defendants collected money from the Plaintiff's paychecks on a bi-monthly basis beginning in 2001 and continuing through 2006 or 2007. The Plaintiff received no value for this money. The funds were never returned. As such, money that belonged to the Plaintiff was wrongfully converted for the use of the Defendants.

61. Defendant Augusta Foods and its attorneys first arranged for the money to be deducted. Augusta continued to deduct the money bi-monthly from the Plaintiff's paychecks until Augusta Foods changed its name to Café Express. This money rightfully belonged to the Plaintiff. The money has never been returned by Augusta Foods.

62. After Defendant Augusta Foods changed its name to Café Express, Café Express and its attorneys continued to withhold money from the Plaintiff's paycheck. This money rightfully belonged to the Plaintiff. The money has never been returned by Café Express.

63. After Defendant Wendy's bought a stake in Café Express, Defendant Wendy's and its attorneys continued to withhold money from the Plaintiff's paychecks. This money rightfully belonged to the Plaintiff. The money has never been returned by Wendy's.

64. The Attorney Defendants instructed Augusta Foods, Café Express and Wendy's to make the wrongful deductions from the Plaintiffs paychecks. The Attorney Defendants received and are still holding at least some of the money, despite the fact that the Plaintiffs received no benefit from the Attorney Defendants.

65. The acts set forth above and in other places throughout this petition constitute conversion on the part of the Attorney Defendants, Augusta, Café Express and Wendy's.

H. Count Nine – Breach of Fiduciary Duty

66. Plaintiff re-alleges and incorporates by reference all paragraphs contained in this petition, as if fully set forth herein.

67. There was a fiduciary relationship among the parties. The Defendants breached this fiduciary duty. This breach caused injury to the Plaintiff and a benefit to the Defendants.

68. An informal fiduciary duty arises from a moral, social, domestic, or purely personal relationship of trust and confidence.¹¹ A fiduciary duty based on an informal relationship may arise when a high degree of trust, influence, or confidence has been acquired.¹² In this case, a relationship of trust, confidence and dependence was developed because the Restaurant Defendants, including members of their human resources department and their managers and supervisors, regularly gave the Plaintiff legal advice, advice on immigration matters and instructions on the consequences of leaving the employment of the restaurant. This was done in both formal and informal meetings held from 2001 through 2006, and in writing between the Restaurant

¹¹ *Meyer v. Cathey*, 167 S.W.3d 327, 331 (Tex.2005); *Schlumberger Tech. v. Swanson*, 959 S.W.2d 171, 176 (Tex.1997);

¹² *Crim Truck & Tractor v. Navistar Int'l Transp. Corp.* 823 S.W.2d. 591, 594 (Tex. 1992).

Defendants and the Plaintiff during the same period. The Plaintiff depended on the Restaurant Defendants to give him accurate advice and counsel. The Restaurant Defendants encouraged and fostered a relationship of trust and confidence above and beyond a normal employer-employee relationship. This trust resulted in a fiduciary relationship. The Restaurant Defendants breached this fiduciary relationship and that breach injured the Plaintiff. In addition, the Restaurant Defendants benefited by the breach by capitalizing on a captured, low-paid work force over a long period of time.

69. In addition, a fiduciary relationship existed between the Plaintiff and the Restaurant Defendants because the Restaurant Defendants held the funds it deducted from the Plaintiff's paychecks in trust for the Plaintiff. The Restaurant Defendants, as trustees, owed Plaintiff, among other things, a duty to disclose all material facts known to it that might affect the Plaintiff's rights. This duty was breached and Plaintiffs suffered damages as a result.

70. Defendants owe the highest duty to the Plaintiff and failed to fulfill this fiduciary duty by failing to, among other things, timely inform Plaintiff of his *Application* status and continuing to deduct money from his paycheck. These actions were directly in breach of the fiduciary duties owed by the Defendants to the Plaintiff. In addition, Augusta Foods, Wendy's and Café Express undertook the recruitment process required under the 245(i) program. However, Augusta Foods, Café Express, and Wendy's did not correctly complete the process, thus causing Mr. Cebrian to be barred from receiving a labor certification.

71. The Attorney Defendants had an attorney/client relationship with the Plaintiff. Attorneys owe a fiduciary duty to their clients. The Attorney Defendants

breached this duty by writing, editing and authorizing correspondence to the Plaintiff that contained incorrect legal advice and recommendations; billing and accepting money from the Plaintiff for legal services that had no value to the Plaintiff; failing to properly complete the recruitment phase; and other acts described herein. The Attorney Defendants benefited from these acts by receiving payment for legal services that had no value, and actually harmed, the Plaintiff. The Attorney Defendants' breach of fiduciary duties injured the Plaintiff.

VI. INTEREST

72. Plaintiff is entitled to receive, and hereby request, pre- and post- judgment interest.

VII. ATTORNEYS' FEES

73. Plaintiff is entitled to recover attorneys' fees and hereby request the same.

VIII. CONDITIONS PRECEDENT

74. All conditions precedent to Plaintiff's claim for relief have been performed have occurred.

IX. REQUESTS FOR DISCLOSURE

75. Pursuant to TEX. R. CIV. P. 194, Plaintiff requests that Defendant disclose, within fifty (50) days of service of this request, the information or material described in Rule 194.2(a) through (l) to be produced at the offices of Howie, Broome & Bobo, 105 Decker Court, Suite 850, Irving, Texas 75062.

X. PRAYER

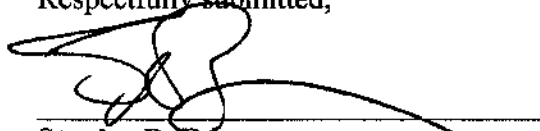
WHEREFORE, Plaintiff Pedro Cebrian prays that the Defendants be cited to appear and answer, and that the Plaintiff has judgment entered in his favor and against the Defendants as follows:

- a. All actual damages arising from the acts set forth herein;
- b. All general damages arising from the acts set forth herein;
- c. All special damages that were foreseeable and resulted naturally but not necessarily from the Defendants' wrongful acts;
- d. Expectancy damages sufficient to put the Plaintiff in as good a position as he would have been in if the contract had been performed properly. This includes any consequential losses the Plaintiff incurred because of the breach of contract. Consequential damages include all foreseeable damages naturally arising from the fact that the Plaintiff lost his opportunity to become permanent residents and U.S. Citizens;
- e. Special damages arising out of the possibility that the Plaintiff will be deported;
- f. Special damages arising out of the possibility that the Plaintiff may be separated from family members because of the acts of the Defendants;
- g. Special damages to compensate the Plaintiff for his inability to sponsor family members for immigration to the U.S.;
- h. Reliance damages including all funds withheld from the Plaintiff's paychecks and all money paid to any Defendant for services related to the filing or prosecution of the 245(i) Applications.
- i. Restitution damages;

- j. Unjust enrichment, equitable and quantum meruit damages including an amount sufficient to compensate the Plaintiff for the additional value added to the Café Express chain of restaurants because the Defendants were able to establish and maintain an indentured work force, thus reducing turnover and requiring the Plaintiff to work for wages below that of similarly situated workers employed by Café Express;
- k.. Lost profits;
- l. Loss of past and future earning capacity;
- m. Past and future pain and suffering;
- n. Past and future mental anguish;
- o. Past and future loss of the value of permanent residency and U.S. Citizenship;
- p. Past and future loss to family members who would have qualified for permanent residency under the LIFE Act Amendment;
- q. Exemplary damages sufficient to penalize each individual Defendant for the outrageous, malicious, or morally culpable conduct set forth herein and sufficient to deter such conduct in the future;
- r. Punitive damages;
- s. For compensatory damages including actual damages consisting of the amount of money that was taken out of the Plaintiff's paychecks, the amount of money that the Plaintiff would have earned during a lifetime of employment as a permanent resident and U.S. Citizen with

- regular rates of increase both for inflation, cost of living and advancement in the corporation;
- t. Damages to compensate the Plaintiff for the fact that he will not qualify as a permanent resident of the United States and will not have the opportunity to become a Citizen of the United States;
 - u. Awarding Plaintiff such other and further relief that this court deems just and proper under the circumstances;
 - v. Pre-judgment and post-judgment interest;
 - w. Court costs; and,
 - x. Attorneys' fees and costs of this action.

Respectfully submitted,



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