Fixing the Wheel: A Critical Analysis of the Immigrant Investor Visa

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In 1990, Congress attempted to fill a long-standing void in the United States immigration laws by providing an updated immigrant investor visa codified as section 203(b)(5) of the Immigration and Nationality Act. The old, obsolete immigrant investor visa had only required a $40,000 investment. The new visa generally requires a $1,000,000 investment. The demand for this new higher priced version has, however, been exceedingly low. Although this immigrant investor visa category allows for 10,000 visa issuances per year, only 78 were issued in fiscal 1992 and no more than 500 are expected to be issued in fiscal 1993. This Article examines negative factors suppressing demand for the immigrant investor visa and recommends constructive changes designed to allow the visa to reach its full potential as a vehicle for attracting foreign investment and creating American jobs.

INTRODUCTION

The highly anticipated Alien Entrepreneur Immigrant Investor Visa Category[1] was expected to deliver significant benefits to the United States economy, including huge amounts of capital flowing into the United States, jobs being created, and a vital new source of

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1. Immigration and Nationality Act (INA) § 203(b)(5), 8 U.S.C. § 1153(b)(5) (1988), *amended by* 8 U.S.C. § 1153(b)(5) (Supp. II 1990).

equity financing becoming available to American business developers. Those high hopes soon turned into profound disappointment. To date, the United States immigrant investment program has been a major failure. What went wrong? And more importantly, what can be done to fix it?

The answer to the first question is manyfold. In strict business terms, America overestimated its market value. Congress examined the programs offered by Canada and Australia. Canadian permanent residence cost $250,000[2] and Australian status cost $365,000.[3] Accordingly, the American green card should come at a premium, America being the greatest recipient of immigration from around the world,[4] the ultimate destination for the dislocated, the promised land. Thus, the figure of $1,000,000 was set.[5] This sum was deemed to be a sufficient investment to generate the required ten new jobs.[6]

The $1,000,000 price tag was almost four times the price of competing foreign programs. The $500,000 option available for investments into rural and high unemployment zones[7] was still twice the investment required for Canada and substantially more than the Australian program. More importantly these figures did not consider a critical hidden cost factor of United States permanent residency, namely additional taxes following from United States tax residency status.[8]

2. Canadian permanent residence status is granted pursuant to Immigration Regulation, section 2 of the Canada Immigration Act (1978), to foreign investors with the requisite business experience who invest $250,000 Canadian dollars in government approved funds.

3. The Australian Business Skills Migration Visa requires an investment of $500,000 Australian dollars, or roughly the equivalent of $365,000 United States dollars at current exchange rates. DEPARTMENT OF IMMIGRATION, LOCAL GOVERNMENT AND ETHNIC AFFAIRS, MIGRATING TO AUSTRALIA: BUSINESS SKILLS MIGRATION REQUIREMENTS (1992). The Australian investment program is again in operation after having been suspended due to a rash of fraudulent applications, particularly from Hong Kong.

4. The United States receives more immigrants per year than all of the rest of the world combined. 136 CONG. REC. H12366 (daily ed. Oct. 27, 1990) (statement of Rep. Bryant of Texas regarding the Immigration Act of 1990).

5. INA § 203(b)(5)(C)(i), 8 U.S.C. § 1153 (1988), *amended by* 8 U.S.C. § 1153(b)(5)(C)(i) (Supp. II 1990).

6. INA § 203(b)(5)(A)(iii), 8 U.S.C. § 1153 (1988), *amended by* 8 U.S.C. § 1153(b)(5)(A)(iii) (Supp. II 1990). This act requires creation of full-time employment for no fewer than 10 United States workers. *Id.*

7. INA § 203(b)(5)(c)(ii), 8 U.S.C. § 1153 (1988), *amended by* 8 U.S.C. § 1153(b)(5)(C)(ii) (Supp. II 1990). The Attorney General is given discretion to lower the required amount of capital investment for targeted employment areas. The figure may not, however, be lowered less than one-half of the $1,000,000 figure. *Id.* The Attorney General designated $500,000 as being the required capital investment for targeted employment areas. INS Immigration Regulations, 8 C.F.R. § 204.6(f)(2) (1991).

8. I.R.C. § 7701(b)(1)(A)(i) allows a lawfully admitted permanent resident of the United States to become a United States resident for tax purposes upon such admission provided he meet other tests. *See generally* I.R.C. § 7701(b)(1)(A) (1992).

I. EFFECTS OF UNITED STATES TAXES ON IMMIGRATION INVESTOR VISAS

Unlike most industrialized countries, the United States taxes its citizens with residences abroad on income earned from foreign sources. Significantly, Canada, its main competitor in the safe-haven residency market, does not impose such a tax burden.[9] The difference can be dramatic. For example, suppose a wealthy Hong Kong entrepreneur is considering the options in light of the uncertainty stemming from a takeover of the Crown Colony by the People's Republic of China in 1997. For purposes of illustration assume that the entrepreneur's Hong Kong business interests provide an annual income of $1,000,000. The effective tax rate in Hong Kong on this income is 17.5%.[10] Accordingly, the entrepreneur would pay $175,000 in taxes on this income. If this person simultaneously held Canadian citizenship, but resided in Asia, the yearly tax bill on the Hong Kong based income would still only be $175,000 per year because Canada does not tax offshore income. Yet with United States permanent resident or citizenship status (and hence United States tax resident status), then the entrepreneur's annual tax bill on this same income would be $410,000[11] regardless of where the person actually lived. Thus, the Hong Kong entrepreneur would effectively be paying an annual license fee of $235,000 per year for the privilege of having United States permanent residence or citizenship status. Coupled with the additional investment initially required, the effective cost of United States permanent residency has understandably been deemed prohibitive by many potential foreign investors.

The launch date for this new program was also unfortunate. A similar investor immigrant visa was originally proposed in Congress in the early 1980s.[12] Between that original proposal and the effective

9. *See* Nathan Boidman, *Tax Havens Encyclopaedia*, *in* 29 CAN. L. & PRAC. 8 (Butterworth & Co. ed., 1990).

10. HONG KONG INLAND REVENUE SERVICE PROFITS TAX-CORPORATE RATE TAX SCHEDULE (1992). This example assumes that the Hong Kong entrepreneur's business is being conducted in a corporate form. Types of income other than profits from an operating business may be taxed at a different rate. It is significant to note that there are no capital gain taxes in Hong Kong.

11. The 41% effective tax rate applied in this example is a typical blended tax rate for corporations located in states such as California where the 34% federal corporate tax rate is supplemented by an effective 7% state corporate tax rate. Interview with Simon Lee, Certified Public Accountant, Managing Partner, Lee, Quan, Ho, and Le, in San Francisco, CA (1992).

12. Several attempts to include an immigrant investor visa into legislation were defeated in Congress during the early and mid 1980s. The most significant example was

enactment date of section 203(b)(5) of the Immigration and Nationality Act, significant amounts of capital had been invested into Canada by individuals participating in their residency program.[13] Thus arises the question of whether the best pools for potential foreign investors, such as Hong Kong and other wealthy countries facing political instability, had already been exhausted by the time Congress enacted the program.

Another chilling effect upon potential immigrant investment from these markets was the profound recession which struck the United States at the time that the program was introduced.[14] The difference between potential return on investment was striking. For example, a major investment into a hotel enterprise in Hong Kong during these years was likely to yield a higher return on investment than a similar investment into the troubled United States hotel industry due to a significant disparity in occupancy rates.[15] Hotels are a good yardstick investment as they involve real estate, which is preferred by foreign investors, and supply a significant amount of jobs, which is critical to meeting the section 203(b)(5) job creation requirements. Therefore, the immigrant investor program threw three economic strikes against the foreign investor: higher initial capital investment requirements, lower return on investment, and higher effective taxes on overall business operations.

The regulatory purgatory that existed for the program during the critical initial launch period of November 1990 to November 1991 only compounded the shaky start of the program. The failure of the

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its deletion from the Simpson-Mazzoli bill originally sponsored in 1981 and finally passed in an evolved form as the Immigration Reform and Control Act of 1986, Pub L. No. 99-603, 100 Stat. 335a.

13. *See* Gary Endelman & Jeffrey Hardy, *Uncle Sam Wants You: Foreign Investment and Immigration Act of 1990*, 28 SAN DIEGO L. REV. 671, 680 (1991). This article indicates that two billion dollars have been invested into Vancouver alone by Hong Kong investors. *Id.*

14. While the United States economy has been languishing, Hong Kong has had positive economic growth. The economic growth of the Colony recently surged to a 4.7% increase in the first quarter of 1992 alone. HONG KONG GOVERNMENT INFORMATION SERVICES, HONG KONG: THE FACTS (1992). The same publication indicates a 2.7% positive growth for 1989 and 2.8% growth rate for 1990 in the gross domestic product of Hong Kong. *Id.*

15. Hotel occupancy rates averaged 64% in the United States for 1991 according to the San Francisco Convention & Visitors Bureau. The occupancy rate in Hong Kong for the same period was 75%. HONG KONG TOURIST ASSOCIATION, A STATISTICAL REVIEW OF TOURISM (1991). Further information from these sources indicates that room rentals decreased in the major United States tourist destination city of San Francisco by 2.5% in 1991 while room rentals increased 5.4% during the same time in Hong Kong. Annual profits for Hong Kong hotels averaged a striking 19.6% in 1991. *Id.* Four more hotels with a total of 3,000 rooms are scheduled to open by 1994 in Hong Kong. This building is cited as an indication of continuing confidence by investors in the Hong Kong hotel industry. HONG KONG TOURIST ASSOCIATION, HONG KONG INFORMATION NOTE (Aug. 1992).

Immigration and Naturalization Service (INS) to publish final regulations for this extended time period effectively killed any momentum generated by initial interest in the program. For twelve months all potential projects were on hold due to the uncertainty. No one would invest into a program where the rules were not in place.

After surviving this difficult incubation period, the immigrant investor period is now finally showing signs of life. The final regulations are in place.[16] The new forms have been printed and are available for use.[17] Applications have been approved and immigrant investors are actually entering the United States under the program.[18] This could have a significant breaking-the-dam effect. The fact that green cards are being issued to the initial investors will help to break down the reluctance of other potential immigrant investors to participate in the program.

The economic performance of these initial investments will also be a critical factor in the long-term success of the immigrant investor program. The otherwise successful Canadian program was plagued by instances in which the investor lost money on the required investment or was the victim of outright fraud by unscrupulous promoters. If the initial capital infusions into the United States program turn out to be bona fide, relatively safe investments with a reasonable, if not spectacular, return on investment, then the stigma that tainted the Canadian program will not develop. This could be a key competitive advantage for the American program.

Whether such desired initial investment results will come to pass is an open question. The structure of the United States immigrant investment program as contrasted to the Canadian model contains a free-market mechanism. Whereas Canada supported certain projects based upon the perceived benefits to the economic interests of the country, or a particular province, the United States program does not precertify specific projects. In other words, specific projects are not evaluated in order to determine at a bureaucratic level whether the project will yield the economic results contemplated in the legislation. The only concession to such a central economic planning

16. INS Immigration Regulations, 8 C.F.R. § 204.6 (1991).

17. The new updated I-526 Immigrant Petition by Alien Entrepreneur was released on December 2, 1991.

18. There had been 330 § 203(b)(5) immigrant investor applications filed and 30 cases approved as of June 1992. Edward Skerrett, INS Central Office Representative, Report at the Annual Meeting of the American Immigration Lawyer Association (June 1992).

approach is the provision in the program to allow reduced investments into rural or high unemployment areas, and the guarantee of 3,000 of the 10,000 available immigrant visas to these targeted zone investments.[19]

The United States program otherwise generally takes a hands-off economic approach. Thus, a project can generally be evaluated on strictly economic criteria. Unlike Canada, however, the United States government probably will not have any input into the structuring of a project, nor self-interest in furthering the success of an individual project, because Congress gave the foreign investors participating in the United States program the freedom to choose their own economic fate as long as ten employed Americans share the investor's destiny.[20] This means that some investments will inevitably fail as the natural result of economic Darwinism. Such failures are bound to occur due to poor business judgement, inadequate management skills, undercapitalization, unexpected economic trends, or one-time fatal financial setbacks.

Nonetheless, the INS and other federal agencies such as the Securities Exchange Commission (SEC), as well as appropriate state regulatory agencies,[21] can use their compliance and enforcement powers to ensure that needless business failures do not result from fraudulent actions of overreaching United States business promoters. The legislation itself provides mechanisms to prosecute individuals who attempt to obtain permanent residency status through fraudulent means. It does not, however, contain any express provisions that would empower the INS or the Attorney General to prosecute unscrupulous American promoters who might prey on unsuspecting foreign investors. The desire for United States permanent residency status or the ignorance of accepted American business practices may act as blinders to foreign investors who are attracted by the spectacular returns promised in a highly promoted project. Such projects might be merely a facade to a fraudulent operation or a nonfraudulent but dubious economic venture based upon inflated financial projections. In either case, the likelihood of a happy ending for the immigrant investor is slim. In order to safeguard the integrity and marketability of the immigrant investor program, the INS must

19. INA § 203(b)(5)(B)(i), 8 U.S.C. § 1153 (1988), *amended by* 8 U.S.C. 1153(b)(5)(B)(i) (Supp. II 1990).

20. INS Immigration Regulations, 8 C.F.R. § 204.6(e) (1992). The employment must be at least 35 hours per week. The 10 full-time workers must be employed at the enterprise by at least the two-year anniversary of the approval of the initial I-526 petition. Skerrett, *supra* note 18.

21. Many of the new commercial enterprises acting as vehicles for § 203(b)(5) related investments will be issuing securities in a manner that will probably fall under the jurisdiction of the Securities Exchange Commission pursuant to the Securities Act of 1933, as well as state securities regulation.

coordinate with other relevant federal and state agencies in weeding out these economic predators. The long-term viability and success of the United States immigrant investor program will significantly depend upon how well the integrity of the program is protected by timely and aggressive enforcement actions by the appropriate regulatory bodies. The perception of the program as a fair, straight-forward investment proposition may counter-balance the negative economic factors, such as higher investment requirements, because it is human nature to be willing to pay more for a product with a reliable name. In this regard, keeping the program free of fraudulent projects is within the power of the INS[22] and the government in general. In a program generally left to the vagaries of the economic jungle, this is one of the few active roles in which the INS and other agencies can further the legislative intent of creating new United States jobs and attracting capital investments. Accordingly, the INS, the SEC, and other federal and state agencies should take this role seriously.

Enforcement, however, is not the only action to be taken. Several structural defects in the program should be remedied. Less than ten percent of the available visas are being issued.[23] This means that 90% of the potential new section 203(b)(5) related United States jobs, up to 90,000 jobs, are not being created. Given the inauspicious start of the immigrant investor program, there should be no false optimism that in its present state, section 203(b)(5) will be able to create a significant number of United States jobs.

Professionals involved with this program agree that the biggest problem with the immigrant investor visa is the worldwide taxation

22. The Immigration Act of 1990 provides that it is unlawful for any person or entity to forge, counterfeit, alter, or use a falsely made document in order to satisfy any requirement of the Act. INA § 274C, 8 U.S.C. § 1324(a)(1) (Supp. II 1990). The Act also allows for civil penalties up to $5,000 for each fraudulent document pursuant to the penalties specified in the INS Immigration Regulations, 8 C.F.R. § 270.3. INA § 274, 8 U.S.C. § 1324C(d)(3)(a)(B) (Supp. II 1990). The INS itself is now in a position to assess substantial civil fines against fraudulent promoters who supply inaccurate financial or legal documents about an enterprise or project in which those documents become part of an immigrant investors application. Anyone, including an agent who works directly or indirectly on behalf of an entity, *e.g.*, new commercial enterprise for § 203(b)(5) purposes, can be fined for submitting a false document. INS Immigration Regulations, 8 C.F.R. § 270.1 (1992). Accordingly, if a project promoter submits false information regarding future job creation or viability of the enterprise then the promoter would appear to be liable. INA § 274C.

23. The Act provides for approximately 10,000 annual visas under the immigrant investor category. INA § 203(b)(5)(A), 8 U.S.C. § 1153, *amended by* 8 U.S.C. § 1153(b)(5)(A) (Supp. 1992). The projected use of § 203(b)(5) immigrant visas for fiscal 1992 is unlikely to exceed 1,000 or 10% of the available quota. Skerrett, *supra* note 18.

effect. Pursuant to section 7701(b) of the Internal Revenue Code (IRC), as an alien lawfully admitted for permanent residence status, a foreign national becomes a United States resident for tax purposes.[24] Along with the desired green card status, *any* of the alien's income streams are subject to taxation by the Internal Revenue Service (IRS). Limited pre-immigration tax planning measures can to some degree soften the blow of this new United States tax bite on the alien's worldwide income.[25] These steps, however, are only damage control. The tax planning options pale in comparison to those available for the immigrant investors into Canada.[26] Thus, making a foreign national a United States resident for tax purposes cuts off many significant tax planning measures. Indeed, for some foreign nationals the best tax planning approach is to give up United States permanent residence status.[27]

If the tax laws are such a deterrent to potential participants in the immigrant investor program then an obvious solution is to change the tax laws. Yet, this course of action is politically charged. Why should the United States give preferential tax treatment to foreign investors over United States citizens? The tax issue will continue to dissuade foreign investors from coming. If investors do not come to America, then they will not create new United States jobs. Further, they will not pay taxes to the United States Treasury on income generated from their United States investments. If their places were filled in sufficient numbers by other foreign investors willing to accept these added tax liabilities for United States permanent residency status, then tax would be a non-issue.

But as long as the quota for section 203(b)(5) is undersubscribed, the number of new United States jobs anticipated by Congress from this legislation will not be created.[28] The expected investments into United States enterprises will not occur. The alien entrepreneurs who have helped spawn the economic miracles of the Five Little Tigers[29] and other surging overseas economies will stay at home or

24. I.R.C. § 7701(b) (1988).

25. *See* Ronald E. Rose, *U.S. Investor Visa Opens for Business*, 20 INT'L BUS. LAW. 4 (Apr. 1992) (citing typical pre-immigration tax planning methods such as accelerating receipt of ordinary income, realizing gain on highly appreciated capital assets, and using foreign situs trusts for sheltering of assets and income).

26. Boidman, *supra* note 9, at 9-14.

27. William Norman, *Foreign Investment into U.S. Real Estate*, CALIFORNIA CPA SOCIETY HANDBOOK (1991). Chapter 1 sets forth tax and financial planning strategies for foreign investors and advises strict avoidance of United States tax residency status. *Id.*

28. Endelman & Hardy, *supra* note 13 (citing 136 CONG. REC. S17112 (daily ed. Oct. 26, 1990) (statement of Sen. Simon predicting that § 203(b)(5) would create 100,000 new jobs for Americans)).

29. The Five Little Tigers are a group of five Asian countries with significant economic growth over the last two decades. They include Hong Kong, Taiwan, Korea, Singapore, and Malaysia.

go to Canada. The promise of section 203(b)(5) will not be fulfilled. A slight modification of section 7701(b) of the IRC to exclude from United States tax resident status those individuals who obtained United States lawful permanent residence status under section 203(b)(5) of the Immigration and Nationality Act would be a good start toward solving this problem.

This statutory change would also have to deal with the substantial presence issue.[30] Even if foreign nationals are not United States permanent residents they can still be United States tax residents, by virtue of being physically present in the United States for a substantial period of time in a given year. Generally, an average stay in the United States of more than 122 days per year will lead to a United States tax resident status for a foreign national, even without green card status. Individuals investing from $500,000 to $3,000,000 into a United States enterprise will probably be in the United States for more than 122 days a year in order to manage their investment. Indeed, their active participation in the management of the United States enterprise is required by law.[31] Absence from the United States for more than 243 days a year on a continuing basis will cause an immigrant investor significant problems in maintaining his permanent residence status.[32] Therefore, a comprehensive approach

30. I. R. C. § 7701b(3) sets out the test for determining United States resident tax status by virtue of substantial presence in the United States. The test spans three years, counting all days in the present year, ⅓ of all days in the preceding year, and 1/6 of all days in the final year. If the foreigner has spent 183 days of the current year in the United States then he is generally a United States tax resident. Further, if his cumulative total over the last three years using the above cited allocation test is 183 days then he is also a United States resident for tax purposes. I.R.C. § 7701(b)(3)(1988). Statistically, a foreigner will become a United States resident for tax purposes if he averages more than 122 days a year in the country. There are limited exceptions to this general rule based upon specific visa status, *e.g.*, student, trainee, etc., as specified in § 7701(b)(5) of the Internal Revenue Code. I.R.C. § 7701(b)(5) (1988). Also a closer connection "tax home" exception is available in limited circumstances. I.R.C. §§ 162(a)(2), 911(d)(3) (West Supp. 1992).

31. INS Immigration Regulations, 8 C.F.R. § 204.6(j)(5) (1992) (requiring that the alien is engaged in the management of the commercial enterprise, either through the exercise of day-to-day managerial control or through policy formulation, as opposed to maintaining a purely passive role in the investment).

32. 8 U.S.C. § 1101(a)(27)(A) (1988) requires that a returning permanent resident must be returning from a "temporary visit abroad" to be readmitted to the United States. Substantial absence abroad, *e.g.*, 243 days a year on a consistent basis, could lead to a factual determination that the alien is "residing" abroad as opposed to "visiting" abroad. Accordingly, pursuant to the requirements of § 101(a)(27)(A) the alien could be refused admission to the United States.

to removing worldwide taxation as a deterrent for potential immigrant investors is to modify the definition of United States tax resident under section 7701(b) of the IRC to completely exempt section 203(b)(5) immigrants under both the immigration-status and physical-presence tests.

A compromise approach would be to keep immigrant investors as United States residents for tax purposes, but insert special language in the IRC to limit the tax rate for offshore income. For example, in relation to Hong Kong investors, a specific change in title 22, section 42.72(e)(1)(iii) of the Code of Federal Regulations, could expand the "back pocket" immigrant visa option to immigrant investors from the colony. Under this program, certain classes of immigrants can essentially complete all immigrant visa processing, but are provided until January 1, 2002 to enter the United States as lawfully admitted permanent residents. This special concession for the people of Hong Kong was added by section 154 of the Immigration Act of 1990.[33] At present, section 203(b)(5) immigrant investors do not qualify for this option. Because United States tax resident status does not attach until such admission, the Hong Kong investor, if provided this option, could have the security of at-will United States permanent residency, but avoid United States worldwide tax until she takes that step.

Historically, the appropriate planning strategy to balance these competing tax and immigration residency issues was to obtain an E-2[34] or L-1[35] nonimmigrant visa for the foreign investor. The investor would then stay out of the United States the requisite period of time to avoid United States tax residency status.[36] This approach, however, is not a perfect solution. First, although there is considerable flexibility built into both the E-2 and L-1 visas in terms of splitting time between the United States and abroad,[37] a pattern of spending two-thirds of the year outside of America could jeopardize the investor's visa status. The specific problem with using the L-1 is that it has a maximum duration of seven years. It is therefore not a long-term solution.

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33. INA § 154.

34. Issued pursuant to § 101(a)(15)(E)(ii) of the INA. 8 U.S.C.A. § 1101(a)(15)(L) (West Supp. 1992).

35. Issued pursuant to § 101(a)(15)(L)(i) of the INA. 8 U.S.C.A. § 1101 (a)(15)(E)(II) (West Supp. 1992).

36. The requisite period of time is less than 122 days a year. *See supra* note 32.

37. An L-1 visa holder need not be in the United States on a full time basis. *See supra* note 35. The E-2 principal investor must be coming to the United States to "develop and direct" the enterprise. *See supra* note 34. The "develop and direct" requirement, however, deals primarily with the issue of ownership control of the treaty enterprise. *In re* Lee, 15 I. & N. Dec. 187 (Reg. Comm'r 1975). Frequent trips in and out of the United States are generally considered to be within the allowable terms and conditions of E-2 visas.

The E-2 can be renewed indefinitely. Yet, the E-2 visa is limited only to nationals of treaty countries. The biggest drawback to the E-2 solution, however, is the extreme difficulty in converting the E-2 to permanent residency when the foreign investor is the majority or significant owner of the United States enterprise. In order to qualify for an E-2 visa, the foreign investor must demonstrate sufficient ability to "develop and direct" the enterprise.[38] The State Department interprets this to mean that the foreign investor has controlling interest in the enterprise. While such a degree of ownership interest is essential to get the original E-2 visa status, it is the kiss of death for permanent residency purposes. The United States Department of Labor has consistently held that such an ownership interest by the alien renders the United States enterprise unable to conduct the recruitment efforts required in the permanent labor certification process.[39]

The Department of Labor's hand in this position was considerably strengthened by the recent decision of the Ninth Circuit Court of Appeals in *Bulk Farms Inc. v. Martin.*[40] The opinion in that case specifically held that Congress intended for section 203(b)(5) to be used by foreign investors seeking to immigrate to the United States.[41] Accordingly, anyone seeking permanent residence status through investment into the United States needs to have deep pockets. An E-2 labor certification and permanent residency conversion is not an option even if no qualified American will be displaced in the

38. *In re* Lee, 15 I. & N. Dec. at 189 (establishing that controlling interest in the enterprise must be demonstrated in order to be qualified to develop and direct the business as contemplated in § 101(a)(15)(E)(ii)). Under Foreign Affairs Manual § 41.51, note 5.5, less than 51% interest in the enterprise will usually mean that the alien does not have requisite control to develop and direct the enterprise, especially in relation to small companies. A 50% share interest may, however, qualify as requisite control, especially in cases involving major foreign corporations in which effective operational control can be demonstrated through means other than direct controlling ownership interest.

39. *See, e.g., In re* Lignomat USA Ltd., 88 I.N.A. 276 (BALCA 1988); *In re* Amger Corp., 87 I.N.A. 5456 (BALCA 1987); *In re* Edelweiss Mfg. Co., 87 I.N.A. 562 (BALCA 1987); *In re* Keyjoy Trading Co., 87 I.N.A. 592 (BALCA 1987). In 1989, a federal court set down a two-prong test to determine whether good faith recruitment could be conducted in cases in which the alien had an ownership in the sponsoring entity. The test requires that the employer demonstrate that (1) the business is not merely a "sham and a scheme" designed to obtain a labor certification for the alien investor and (2) the business has not come to rely so heavily on the alien investor that it would cease to exist without him. Hall v. McLaughlin, 864 F.2d 868 (D.C. Cir. 1989). With at least 50%, and most likely 51%, ownership required for the initial E-2 visa a foreign investor could probably not meet either the test in *Hall v. McLaughlin* or the BALCA standards.

40. 963 F.2d 1286 (9th Cir. 1992).

41. *Id.* at 1288.

process. At the same time, foreign investors who have invested sums up to $499,999 will be limited to E-2 status for the rest of their lives unless they can obtain permanent residence status through collateral means.[42]

Up-front structuring of the United States investment enterprise to eventually qualify the alien for intra-company transfer labor certification exempt permanent residence processing is a favorite planning mechanism that survived the Immigration and Naturalization Act of 1990 and was made even more important by *Bulk Farms*. The first step is in place if the new United States enterprise is structured as either a subsidiary or affiliate of a pre-existing foreign company. The second factor is present if the foreign investor owns a majority interest in the foreign company or is able to substantially influence its business decisions. The investor almost invariably holds executive or managerial level status with the foreign company and likely has been with that company for at least one year.[43] Further, the investor has the absolute power or sufficient bargaining power within the organization to swing a majority ownership vote to set up and operate a United States subsidiary or affiliate business.

Such a structure allows for an initial L-1 visa for the foreign investor and also an E-2 visa if the investor is a treaty national. Conversion to permanent residency could later be made by utilizing the statutory exemption to avoid the labor certification problem. This procedure is now incorporated into the employer-sponsored first-preference priority worker immigrant visa category.[44] This option, however, is not available to all foreign investors, especially those who gained their wealth through working for others as opposed to through their own entrepreneurial activities. Senator Paul Simon was probably referring to this planning mechanism when in the Congressional debates he quoted Senator Bumpers' observation that "anybody with a million bucks and a good immigration lawyer can stay down."[45] If anything, this planning mechanism was made more desirable by the changes in the L-1 and priority worker definitions

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42. Collateral means indicates other traditional forms of obtaining United States permanent residence either through sponsorship by a close family relative who is a United States citizen or permanent resident, sponsorship as an employee in a position where qualified United States workers cannot be found, or through other means such as diversity immigration pursuant to § 203(c) of the Immigration and Nationality Act.

43. INA § 203(b)(1)(c) (requiring that in order to qualify as a priority worker category immigrant the alien must have been employed by the foreign company in at least one of the preceding three years).

44. INA § 203(b)(1)(c) (allowing for immigrant status for certain multinational executives and managers without the need for a prior labor certification).

45. 135 CONG. REC. S7772 (daily ed. July 12, 1989) (statement of Sen. Simon).

that added the concept of functional managers.[46]

Although the functional manager has helped this planning structure by exempting labor certification for the foreign investor, it is still not ideal. The number of employees required in United States enterprise in order for an individual to be characterized as a manager or executive remains elusive despite express statutory language that the reasonable needs of the organization must be taken into account when the number of employees are used as a factor in determining whether an individual is acting in a managerial or executive capacity. Further, the INS determination shall not be based merely on the number of employees that the individual will supervise or direct.[47] The INS adjudicator, however, may still perceive the overall management responsibilities and duties of the priority worker immigrant visa applicant according to the number of employees in the enterprise. Thus, the number of employees could remain the essential basis for a denial dressed in other statutorily permissible language.

One of the great advantages of the immigrant investor visa is that it provides bright-line tests. Ten full-time employees is the brass ring. Such certainty is not available to foreign investors using the labor certification exemption green card route. In this respect, the labor certification exemption is an inferior option to the new immigrant investor visa, especially for many typical investments in the $1,000,000 and under range in which the need for a foreign transferred executive or manager is often seriously questioned by the INS (*e.g.*, motels, restaurants, retirement homes, and small markets). Those with less than $500,000 who cannot qualify for section 203(b)(5) and are not likely to qualify as a labor certification beneficiary due to *Bulk Farms*[48] must still face the uncertainties of the labor certification exemption if they desire United States permanent

46. INA § 101(a)(44), 8 U.S.C. § 1101(a)(44) (1992). This section lists the definitions of managerial capacity for both L-1 visa and priority worker immigrant visa issuance purposes and significantly includes management of an essential function of an organization or essential function of a department or subdivision of the organization. Further, the definition specifically states that if no other employee is directly supervised, the alien will qualify for visa issuance if the alien "functions at a senior level within the organizational hierarchy or with respect to the function managed." *Id.* This statutory language was primarily designed to remedy situations in which an executive of a large organization directs substantial business activity but directly supervises no employees. *See In re* Irish Dairy Bd., No. A28845421 (Administrative Appeals Unit, Nov. 16, 1989). The statute represents a departure from the traditional Immigration and Naturalization Service (INS) requirement of significant numbers of directly supervised employees as a condition of visa issuance, which can be helpful to the foreign investor's case.

47. INA § 101(a)(44)(c).

48. 963 F.2d at 1286.

residence.

Another drawback to the intracompany transferee approach is that the foreign investor must continue to operate the overseas business until the investor obtains final permanent residence status.[49] Some investors intend to cash out of the foreign enterprise and concentrate their money and time on the United States venture. Many times they are the driving force behind the foreign business and their absence leaves the economic fate of the operation to inexperienced hands or indifferent minds. Accordingly, the requirement presents a risk that the foreign investors may incur business losses from their overseas operations until they have obtained United States permanent residence status.

In summary, changes in the tax code eliminating or sufficiently softening the worldwide taxation problem could attract more foreign investors under section 203(b)(5) and greatly simplify the immigration planning process. The section 203(b)(5) requirements of ten jobs and $1,000,000 investment (or $500,000 for targeted zones) are objective tests and provide certainty for the investor, attorneys, and the INS. Taking steps in the tax area to steer foreign investors into section 203(b)(5) would be the best single step that Congress could take to realize the original promise of job creation and to provide a more straight-forward procedure for obtaining United States immigrant status through personal investment.

Failure to act on the tax issue will mean that the complicated, imperfect intracompany planning approach will still be used. Substantial foreign investors will have orders from their United States tax advisers to stay a nonimmigrant as long as possible and to stay in the United States no more than 121 days a year. More and more foreign entrepreneurs will make gifts of $1,000,000 to their spouses or children who will then invest the money in a United States enterprise and obtain immigrant investor status in the process. In the meantime, the actual entrepreneur in the family stays clear of United States taxes on the business holdings abroad but secures future stability for the family by obtaining United States residence status for the children or spouse. The entrepreneur can then come to the United States on a B-1 or B-2 visa to visit the family. Absent tax changes, such a planning approach is likely to become widespread. This approach has two distinct disadvantages for America. First, it virtually forces family dislocations due to the requirements for maintenance of permanent residence status imposed upon the children or

49. 8 C.F.R. § 214.2(l)(1)(ii)(6), as amended in 1987, requires that during the duration of the visa status the foreign entity must be doing business. This regulation overturned prior case law allowing the visa status to remain valid even if the foreign entity ceased business operations. *In re* Thompson, 18 I. & N. Dec. 169 (Comm'r 1981).

spouse immigrant investors.[50] Meanwhile, the tax rules require the substantial absence of the entrepreneur from the United States to prevent becoming a United States tax resident by staying too long.[51] The use of re-entry permits by the spouse or child may be a bandage on this problem, but it is not a long-term solution.[52] Second, this next-generation approach means that the real entrepreneur in the family, the individual with the proven business track record, stays abroad while the inexperienced come to America. The law should be structured to attract the best overseas entrepreneurs available. Unless changes are made, the people who have demonstrated the talent to build businesses and create jobs will remain in their own countries. America and its employment picture will be the worse for it.

II. AT-RISK PROVISIONS AND SECOND-STAGE INVESTMENTS

A troubling issue that arises time after time in the structuring of deals aimed at the immigrant investors is how far the foreign investor must ultimately be at risk in order to meet the at-risk provisions of section 203(b)(5). Congress and the INS essentially incorporated the at-risk provisions of the E-2 visa into the immigrant investor visa. The E-2 visa requires that the foreign investor's investment into the United States enterprise be at risk in the commercial sense.[53] To show that the petitioner has invested or is actively in the process of investing the required 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 is not sufficient. The petitioner must show actual commitment of the

50. INA § 101(a)27(A). *See also supra* note 32. To be readmitted, an alien must be returning to the United States from a "temporary" absence abroad. INS Immigration Regulations, 8 C.F.R. § 211.1(b)(2) (1992). Additionally, case law, including *In re* Kane, 15 I. & N. Dec. 258 (BIA 1975), has found returning permanent residents excludable from the United States due to insufficient time spent in the United States and lack of adequate ties.

51. *See supra* note 30.

52. A permanent resident may apply for a re-entry permit to use as an entry document to re-enter the United States after a "temporary absence" abroad of up to two years. It is possible to apply for multiple re-entry permits, but by doing so the INS may seriously evaluate whether the individual continues to have an intention to remain a permanent resident. Accordingly, abuse of re-entry permits could lead to deportation or exclusion proceedings based upon a finding that the individual has abandoned their residency in the United States. INA § 223; 8 C.F.R. § 223.1 (1992).

53. U.S. Department of State Foreign Affairs Manual, 22 C.F.R. § 41.51 n.5-1-1 (1992).

required amount of capital.[54] Acceptable evidence includes: deposits into the United States enterprise bank account by the investor; stock issuances by the United States enterprise in exchange for money transfers from the alien; invoices or receipts for assets purchased for the United States enterprise by the alien; evidence of property transferred to the United States enterprise by the alien investor such as bills of lading, commercial entry documents, or transit insurance policies; loan or mortgage agreements in which the funds are secured by the assets of the alien investor, but not those of the United States enterprise, and in which the alien investor is personally and primarily liable on the loan.[55]

At first glance, the typical investor would seem not to have a problem meeting the at-risk requirements. Such compliance also should be easily documented. The real complexity, however, comes into play in two-stage immigrant investments. In many contemplated major investments under the immigrant investor program the initial company will be set up as a limited partnership, limited liability company, or corporation, and the foreign investors will make the necessary amount of investment into this new United States enterprise. At this stage, the requirement that the alien investor has actually committed the funds and made the investment into the United States enterprise will seem to have been met. Indeed, a strict reading of the regulations implies that this should be the end of the at-risk inquiry.[56] How the company then utilizes the money would arguably not affect the alien investor as he is at risk with respect to his investment into the United States enterprise.

This may not, however, be the end of the inquiry in certain two-stage investments. For example, alien investors may fund the United States enterprise with the intent that the enterprise will invest a substantial part of those monies into a venture, such as an existing or new hotel, in which the monies invested by the enterprise are guaranteed a minimum return on the investment. The guaranteed return for the enterprise from the venture by extension should not make the original investment of the alien into the enterprise not at risk. The potential scope of the at-risk requirement becomes a concern under circumstances when $20,000,000 or more is invested by a pool of alien investors who ultimately expect United States permanent residency status and a relatively risk-free, minimum return on investment. On one hand, the regulations require that the aliens'

54. INS Immigration Regulations, 8 C.F.R. § 204.6(j)(2) (1992).
55. INS Immigration Regulations, 8 C.F.R. § 204.6(j)(2)(i-v) (1992).
56. INS Immigration Regulations, 8 C.F.R. § 204.6(j) (1992). The alien must submit evidence that he has invested or is in the process of investing lawfully obtained capital in a *new commercial enterprise*. No further showing is required under the regulations. *Id.*

investment be at risk in the commercial sense. On the other hand, the aliens want a guaranteed return.

Do these interests conflict with no hope of co-existing under section 203(b)(5)? The answer lies in the word guarantee. A third-party guarantee of a second-stage investment does not really remove commercial risk for the immigrant investor. In this situation, many potential risks are still present. These remaining risks arguably suffice to preserve the entrepreneurial nature of the investment.

Solvency of the guarantor is the first major uncertainty in such an investment structure. These guarantees, even if made by banks, would not be supported by a Federal Deposit Insurance Corporation (FDIC) guarantee or any other full faith and credit guarantees by federal or state government.[57] Therefore, the security of the immigrant investors capital depends soley on the financial solvency of the private guarantor. Such a guarantee would be rendered meaningless if the guarantor filed for bankruptcy. In an era when major financial institutions have been closed by federal regulators, prominent real estate developers and retailers have filed for bankruptcy, and the State of California has paid debts with I.O.U.-styled registered warrants, nothing is guaranteed.

Examination of other areas of the law dealing with at-risk issues in the commercial sector support the finding that third-party guarantees do not remove risk for the immigrant investor. The FDIC has set its own at-risk criteria to provide guidelines on how much capital a bank must keep on hand to get or maintain the FDIC guarantee.[58] The required amount of capital on hand increases under the guidelines depending upon the risk factors present in their loan portfolios. The criteria creates four broad risk categories that focus on the obligor, the guarantor, and the nature of the collateral. Significantly, this criteria assigns commercial loans a 100% risk weight. The guarantors or obligors on these types of loans will be the same types of persons who would issue third-party guarantees to immigrant investors. Under the FDIC criteria, this 100% risk factor can be reduced if the collateral or guarantor have special characteristics, almost none of which would be present in an immigrant investor situation.[59]

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57. The Federal Deposit Insurance Corporation guarantees apply only to deposits in a savings institution. Deposits are not involved in situations in which the savings institution is a partner in a business venture or has offered a buy-back option at a guaranteed rate of return if the foreign investors will take a foreclosed business off its hands then. Accordingly, no government-backed guarantees would apply.

58. 12 C.F.R. pt. 325, app. A (statement of policy on risk-based capital).

59. The characteristics indicated involved loans backed by specified governmental

Accordingly, under the FDIC's risk assessment criteria, an immigrant investor would usually be 100% at risk that the guarantee by a private third-party guarantor could fail.

The "risk capital" test developed in the securities area also strengthens the case for immigrant investors. In *International Brotherhood of Teamsters v. Daniel*,[60] the United States Supreme Court held that the critical factor in differentiating a security from a loan is whether there is a reasonable expectation of profits from the entrepreneurial or managerial efforts of others. A third-party guarantee differs from a loan because the guarantee only protects the low-end of the immigrant investment, in other words, provides a guaranteed minimum return, but provides for an unlimited high-end in profits. Furthermore, because limited partnership status qualifies under section 203(b)(5), the expectation and amount of profits can be dependent upon the entrepreneurial and managerial efforts of a general partner.

This also holds true in second-stage investments in which the immigrant investor invests in the new United States commercial enterprise, which in turn invests into a further venture. The profitability of that second-stage venture depends upon the management decisions and input of members of several participating entities. Therefore, the immigrant investor, whatever his or her role in the initial United States enterprise, will see profits rise and fall depending to some extent on the managerial and entrepreneurial skills of others. The third-party guarantee only provides a floor for determining how far the profits can fall. Whether the profits will fall through the floor and become losses then depends upon the contractual compliance and financial solvency of the guarantor. Thus, the risk test under *International Brotherhood of Teamsters v. Daniel* seems to have been met.

The Ninth Circuit Court of Appeals has also developed a risk capital test in the securities area.[61] Their criteria as stated in *Great Western Bank & Trust v. Kotz* examined factors including: (1) time, (2) collateral, (3) form of obligation, (4) relationship between amount borrowed and the size of the borrower's business, and (5) intended use of the funds. Under these tests, the two-stage immigrant investment backed by a third-party guarantee should qualify as risk capital because the form of the obligation, time for repayment, collateral (or lack thereof), and other relevant factors would mitigate against a finding of nonrisk loan-type transaction.

The risk capital test in *Elson v. Geiger*[62] also supports the at-risk

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units or lending institutions backed by government guarantees.

60. 439 U.S. 551, 558 (1979).

61. Great W. Bank & Trust v. Kotz, 532 F.2d 1252, 1257-58 (9th Cir. 1976).

62. 506 F. Supp. 238 (E.D. Mich. 1980).

nature of these investments. Investment rights and an emphasis on capital appreciation were key factors in distinguishing a security from a loan. Certainly one of the major investment goals of the immigrant investors is the eventual reaping of capital gains based upon appreciation of the properties held by the United States enterprise or second-stage venture. Additionally, the immigrant investor has significant rights to control and direct the investment as compared to a lender. Therefore, the *Elson* test for risk capital would be met.

The Ninth Circuit in *United States v. Carman*[63] also used risk capital criteria in a slightly unusual securities fraud application. In *Carman*, the owner of a vocational school sold federally insured student loans owed to him by students to credit unions at full face value. The credit unions expected to receive a set rate of return on the fixed interest loans. The court, however, held that the value and the ultimate return on the acquired loans received by the credit unions depended upon the managerial and entrepreneurial skills of the school owner because eventual repayment of the full loan amounts depended upon all students completing their studies. Additional conditions of receiving full loan repayment included that the school stay in business and continue to have eligibility for FDIC loan guarantees.

If students dropped out, their amount owed on the promissory note held by the credit union would be reduced, and thus the total interest income on that loan would be reduced. Further, if the school were improperly managed and went out of business, all of the loans would be significantly devalued as the credit union would have to give reductions in principal to the students to reflect courses not taken due to the school's demise. Finally, if the school lost the accreditation required to allow its students to get FDIC-backed loans to pay for tuition then the prospects of repayment would be significantly lessened. Thus, the credit unions relied to some extent on the managerial and entrepreneurial skills of the school owner.

Similarly, a section 203(b)(5) immigrant investment would be considered risk capital under the *Carman* holding because his total return on investment would be subject to the second-stage venture and to the guarantor remaining in business and remaining profitable. In *Carman*, the court considered an investment involving such a seemingly secure instrument as an FDIC-backed student loan to be

63. 577 F.2d 556 (9th Cir. 1977).

risk capital. Such a holding establishes that monies invested by alien entrepreneurs into a United States enterprise, even if re-invested into second-stage third-party guaranteed ventures, should be considered at risk in the commercial sense.

Additional risk factors present for the immigrant investors include liability suit judgments or creditor judgments being enforced against either the United States commercial enterprise or the second-stage venture. Furthermore, uninsured or uninsurable casualty losses such as earthquake damages or environmental hazards could deal a financial blow to the United States enterprise or the second-stage venture that would render the third-party guarantee meaningless. The totality of risks facing the immigrant investor, even in a second-stage third-party guaranteed investment structure, leave the investor ultimately at risk in the commercial sense, especially in light of federal court decisions involving risk in the commercial area and regulatory criteria established by the FDIC and other federal agencies. Such a conclusion is also consistent with previously reported E-2 cases involving at-risk issues.[64]

III. Financial Disclosure Requirements and Fraudulent Promoters

A final significant chilling factor in the immigrant investor program is the financial disclosure requirements contained in the INS regulations.[65] The statute itself was silent on the need for such disclosures. Apparently the genesis for disclosures was the defeated amendment introduced by Senator Dale Bumpers attempting to eliminate section 203(b)(5) immigrant investors from the Immigration and Nationality Act of 1990.[66] The question raised is whether the Congressional record provides a sufficient basis for the INS to promulgate regulations requiring detailed financial disclosures from immigrant investor applicants when the statute itself is silent on the matter.

Senator Bumpers declared on the floor of the Senate that section

64. *In re* Heitland, 14 I. & N. Dec. 563 (BIA 1974). *Heitland* as well as almost all previously reported immigration at-risk cases only dealt with the issue of whether funds had been committed to the United States enterprise. In *Heitland*, uncommitted funds held in a bank account were not considered at risk. Neither *Heitland* nor any other prior E-2 case addressed the issue of second-stage third-party guaranteed investments.

65. INS Immigration Regulations, 8 C.F.R. § 204.6(j)(3) (1992). The documents that must be disclosed to show that the money invested into the United States was obtained through lawful means include corporate, partnership, and personal tax returns filed anywhere within the last five years, other evidence identifying any other source of capital and certified copies of judgements or evidence of pending civil or criminal proceedings against the petitioner within the past 15 years.

66. Amendment No. 246 to Public Law 101-649, cited as the Immigration Act of 1990, 135 CONG. REC. S7768 (daily ed. July 12, 1989).

203(b)(5) is a "a drug dealers dream."[67] Senator Ted Kennedy, the sponsor of the legislation, responded to Mr. Bumpers characterization by stating:

> The idea that is suggested by the Senator from Arkansas' argument that with the passage of their bill we are somehow aiding and assisting drug users, those involved in drug trafficking, facilitating their coming to the United States, is unworthy of a response. . . . The Senator from Arkansas understands that, or certainly should understand. And to try and suggest otherwise either demonstrates he has not read the bill or does not know about the enforcement procedures or the procedures which are required under the immigration bill.[68]

Senator Kennedy, who is involved in immigration legislation to a greater degree than almost any member of the Congress, has a better grasp of the options available to the INS in dealing with alien drug dealers. The INS has a plethora of legal grounds upon which to stop drug traffickers from immigrating to the United States. The provisions of the Immigration and Nationality Act of 1990 only strengthen their hand in that regard. Still, Senator Bumpers in his rebuttal to Senator Kennedy continued to sound the alarm about section 203(b)(5) creating a beachhead for drug dealers. He replied:

> He [Senator Kennedy] said drug dealers do not have anything to do with this. I divinely hope he is right. But I can tell you one thing. There is not anything to keep a drug dealer out. . . . [I]n this category you may be getting a bank robber instead of a drug dealer. You may be getting someone who is on the lam from the law. . . . I am not trying to stop investment in this country. I am trying to stop what I see as an outrageous opportunity for fraud and evasion of the law.[69]

The same issue is raised in the Judiciary Committee Report submitted by Senator Joseph Biden. The relevant passage reads: "Finally the committee intends that processing of an individual visa not continue under this Section if it becomes known to the Government that the money invested was obtained by the alien through other than legal means (such as money received through the sale of illegal drugs)."[70]

No one advocates that drug dealers or other criminals should be admitted as section 203(b)(5) immigrants by investing unlawfully obtained money. The practical questions are whether the regulatory imposed financial disclosures are necessary to deter such activity and whether the disclosure requirements do more harm than good. The concern of potential immigrant investors is not so much what the

67. 135 CONG. REC. S7769 (daily ed. July 12, 1989) (statement of Sen. Bumpers).
68. 135 CONG. REC. S7771 (daily ed. July 12, 1989) (statement of Sen. Kennedy).
69. 135 CONG. REC. S7773 (daily ed. July 12, 1989) (statement of Sen. Bumpers).
70. S. REP. No. 55, 101st Cong., 1st Sess. 21 (1989).

INS will do with the information but who else will have access to the information. The model United States tax treaty with other governments includes an information exchange clause.[71] In comparison, neither the United Nations model treaty nor the Organization for Economic Cooperation and Development (OECD) model treaty have such a clause. Thus, the United States has a relatively liberal approach to information sharing. Accordingly, information given to the INS is likely to wind up with the home country government. Potential investors are genuinely concerned with how that government will utilize the information. This concern has to date been an additional factor discouraging potential immigrant investors.

The position of Senator Bumpers is that error should be on the side of disclosure. If some legitimate investors are scared off, then so be it, as long as the regulations have the desired effect of weeding out drug dealers or other criminals. Nevertheless, the role of the INS is not to rewrite the statute. These regulations are arguably ultra vires. They exceed the rule making powers of the INS. If Congress wanted such disclosures then it could have inserted language to that effect.

The Congressional record indicates that Senator Bumpers asserted his positions about the potential of section 203(b)(5) being used by criminals as a justification for passing his amendment to delete the immigrant investor category from the Immigration and Nationality Act of 1990.[72] His amendment was voted down.[73] Senator Kennedy, the sponsor of the Immigration and Nationality Act of 1990, stated on the Senate Floor that section 203(b)(5) was not a vehicle for foreign criminals to invest illicitly earned money into the United States. Senator Kennedy further indicated that there were adequate enforcement procedures available to keep this from happening both generally and in the Immigration and Nationality Act of 1990 itself.[74] The other sponsor of the Immigration and Nationality Act of 1990, Senator Alan Simpson, also voted against the Bumpers amendment, as did key Senate Judiciary Committee member Senator Paul Simon.[75]

Arguably, the views expressed by Senator Kennedy, who was the sponsor of the overall bill and the victor in the showdown on the Bumpers amendment, accurately reflected the intent of Congress on this point. In other words, Congress felt that sufficient procedural

71. U.S. MODEL TAX TREATY, Art. 26, ¶ 3 (1981).

72. 135 CONG. REC. S7773 (daily ed. July 12, 1989) (statement of Sen. Bumpers).

73. 135 CONG. REC. S7775 (daily ed. July 12, 1989) (on a roll call vote the Bumpers amendment was voted down 56 to 43 with one abstention).

74. 135 CONG. REC. S7771 (daily ed. July 12, 1989) (statement of Sen. Kennedy).

75. 135 CONG. REC. S7775 (daily ed. July 12, 1989) (listing Senators voting for and against Bumpers amendment).

safeguards existed to stop criminals from funneling money from illicit activities into the United States and getting permanent residency in the process. Further safeguards imposed by the INS were not only unnecessary, but unwanted, especially if those new safeguards impeded the goal of increased United States job creation by means of foreign capital investments.

The language in the Judiciary Committee Report could conceivably be used as a basis for the INS disclosure regulations.[76] The passage, however, indicates that the Committee intended that the processing of a visa should *not continue if it becomes known* that the money invested was obtained through illegal means. This implies that if, in the course of normal visa processing, it becomes known that the money used is illicit funds then the case should be denied.

As mentioned by Senator Kennedy, several procedures presently in force can derail applications by criminals trying to immigrate under section 203(b)(5). The primary existing procedural safeguard is that anyone attempting to immigrate to the United States must submit police certificates from any country that he or she has lived in for more than six months.[77] If the prospective immigrant investor has ever been arrested or convicted then it would "become known" to the United States Consular Officer abroad and the immigrant visa would not be issued.[78] Accordingly, the drug dealer or other criminal would never make it to America.

This begs the question of a drug dealer who has never been arrested or convicted. Section 212(a)(2)(c) of the Immigration and Nationality Act allows the consular officer abroad or the immigration inspector at the port of entry to exclude any alien who they know or have reason to believe is or has been an illicit trafficker in any controlled substance (or is or has been a knowing assister, abettor, conspirator, or colluder with others in the illicit trafficking in any controlled substance). This provides a very wide legal net to ensnare and exclude from the United States any foreign national who has connections with drug trafficking.

Given recent events, the assumption that foreign drug dealers will try to immigrate to the United States under section 203(b)(5) using their ill-gotten gains seems almost ludicrous. In a recent case, the

76. S. REP. No. 55, 101st Cong., 1st Sess. 16 (1989).
77. U.S. Department of State Foreign Affairs Manual, 22 C.F.R. § 42.65 (1992).
78. Aliens convicted of crimes of moral turpitude or of crimes relating to controlled substances are generally excludable pursuant to § 212(a)(2) of the Immigration and Nationality Act.

United States Supreme Court authorized kidnapping by the Drug Enforcement Agency to drag a drug trafficker into the United States.[79] In the case of Manuel Noriega, the United States government sent troops into a foreign country to apprehend him and escort him back for prosecution. Other notorious Colombian drug dealers, including Pablo Escobar have made no extradition to the United States a condition of their surrender to local police authorities.[80] Apparently, the absolute last thing that foreign drug dealers want is to have contact with the United States. Immigrating to America would be the equivalent of signing their own arrest warrant.

In addition, section 212(a)(3)(A)(ii) of the Immigration and Nationality Act allows the consular officer or the Attorney General to exclude any alien who they have reason to believe seeks to enter the United States to engage solely, principally, or incidentally in unlawful activity. This section could be used to exclude anyone who is reasonably suspected of being involved in illicit activities in their home country because taking money derived from illegal activities and investing it into a legitimate United States business would constitute a violation of money laundering statutes.

Furthermore, many drug dealers or other criminals could be excluded from the United States as terrorists under section 212(a)(3)(B) of the Immigration and Nationality Act. Terrorist activity is defined in section 212(1)(3)(B)(ii)(II) as the seizing or detaining and threatening to kill, injure, or to detain another individual in order to compel a third person, including a governmental organization, to do or abstain from doing any act as an explicit or implicit condition for release of the individual seized or detained. This section could be used to exclude anyone reasonably suspected of being involved in terrorist activities in their home country.

In summary, the United States government has broad powers to stop anyone who is in any way engaged in criminal activity from immigrating to the United States. The basis for the exclusion can either be prior convictions or reasonable suspicion or belief of criminal activity. A potential criminal immigrant investor would come to the attention of either the INS or the consular officer prior to his admission into the United States as a lawful permanent resident with the intelligence resources the United States government has at its disposal through the Drug Enforcement Agency, Central Intelligence Agency, Federal Bureau of Investigation, United States Customs Service, INS, Interpol, and information sharing arrangements with

79. United States v. Alvarez-Machain, 112 S. Ct. 2188 (1992).

80. *See Colombia, The Escobar Escapade*, THE ECONOMIST, Aug. 1, 1992, at 35. The article lists conditions for surrender of Pablo Escobar and states: "Above all, he was guaranteed against extradition to face trial in the United States, where the verdict would have been sure and the punishment condign." *Id.*

foreign police and other intelligence services.

Provided that the disclosure requirements contained in the INS regulations were not envisioned by Congress and are overreaching in that their net effect is contrary to legislative intent, the question becomes whether there is a sufficient legal basis to strike them down. The answer likely lies somewhere in the opinion of the United States Supreme Court in *Chevron USA v. Natural Resources Defense Counsel.*[81] *Chevron* has become the leading case in determining the validity of agency regulations when the statute itself does not speak plainly on the issue.

Chevron seemingly sets a high hurdle for those who wish to strike down the INS disclosure requirements. If the statute is silent on an issue, but there is an express delegation by Congress to a federal agency to fill in the gap, then the agency interpretation can only be struck down if it was arbitrary, capricious, or manifestly contrary to the statute.[82] Arguably no gap exists in this statute. Congress was opposed to disclosure requirements, as evidenced by Senator Kennedy's statement on the Senate floor. Further, Congress made no express delegation to create such disclosure requirements. If anything, the delegation was implicit. Under *Chevron*, in an implicit delegation the court may not substitute its own construction of a statutory provision for a *reasonable* interpretation made by an agency.[83] This hurdle is much lower than arbitrary, capricious, or manifestly contrary to the statute. The question then is was it reasonable for the INS to insert the disclosure requirements in the regulations in light of the wording and intent of the statute.

The INS has previously argued justification for a regulation under *Chevron* and lost.[84] *Cardoza-Fonseca v. INS* dealt with the issue of whether the standards for adjudicating political asylum under section 208(a) differed from those used in adjudicating withholding of deportation under section 243(h) of the Immigration and Nationality Act. The precedental value of *Cardoza-Fonseca* in an attack against the INS disclosure regulations may, however, be of limited value as that case concerned the direct comparison and interpretation of two separate statutes. The case involved clear reference points that

81. 476 U.S. 837 (1984).
82. *Id.* at 843 (citing United States v. Morton, 467 U.S. 822, 834 (1984); Schweiker v. Gray Panthers, 453 U.S. 34, 44 (1981); Batterton v. Francis, 432 U.S. 416, 424-26 (1977)).
83. *Id.* (citing INS v. Jong Ha Wang, 450 U.S. 139, 144 (1981); Train v. Natural Resources Defence Council, 421 U.S. 60, 75 (1975)).
84. Cardoza-Fonseca v. INS, 480 U.S. 421 (1987).

allowed the court to exercise pure statutory construction. In a challenge to the present INS regulations, the court would have to speculate as to whether section 203(b)(5) contemplated such disclosure requirements. This requires the court to some extent to get inside the head of Congress, which it may not be willing to do. *Cardoza-Fonseca* does however remain a case in which the INS asserted the *Chevron* shield and lost. In that respect alone, the case may hold some value in a challenge to the regulations.

Beyond this, the United States Supreme Court in *NLRB v. United Food and Commercial Workers Union*[85] cited *Cardoza-Fonseca* in holding that agency interpretations that are not long standing are afforded substantially less deference by the courts.[86] The INS disclosure regulations are relatively new and have not produced any significant detrimental reliance, thus, they would presumably not be given the respect afforded other long-standing regulations. The holding of the Supreme Court in *Department of Transportation v. Paralyzed Veterans of America*[87] cited such long-standing interpretation as a major factor in refusing to overturn a challenged regulation. Longevity, therefore, is a factor.

Another factor the courts consider in deferring to agency interpretation of the statute is whether the issue involves technical areas in which significant expertise is held by the agency.[88] Yet, the immigrant investor disclosure requirements are not based upon any scientific or technical expertise, in contrast with the Environmental Protection Agency in *Chevron* and the Federal Reserve Board in *Security Industries Ass'n v. Board of Government of the Federal Reserve Board.*

The Supreme Court in *United States v. Alaska*[89] also cited *Chevron* to uphold a broad interpretation of the Army Corps of Engineers of the Rivers and Harbors Act. This recent holding bodes badly for any challenge to the INS disclosure regulations as it broadly interpreted *Chevron* to give wide latitude to the agency. Significant differences, however, exist between this case and a potential challenge to the INS disclosure requirements. The statute in *Alaska* gave very broad, express delegation to the Army Corps of Engineers to decide under what conditions an obstruction to any navigable waters of the United States would be allowed. Secondly, the statute was very old, passed in 1899, and the Corps of Engineers interpretation of the statute had been consistent for almost 100 years. Therefore,

85. 484 U.S. 112 (1987).
86. NLRB v. United Food and Commercial Workers Union, 484 U.S. 112 (1987).
87. 477 U.S. 597 (1986).
88. Securities Indus. Ass'n v. Board of Gov't of the Fed. Reserve Bd., 468 U.S. 137 (1983).
89. 112 S. Ct. 1606 (1992).

although *United States v. Alaska* generally supports deference to agency interpretation, the facts are distinguishable. Accordingly, any weight given to traditional evidence of legislative intent would weigh out on the side of striking down the disclosure regulations.

Notwithstanding, if Professor Maureen Callahan correctly reads Justice Scalia's leanings in statutory construction and his influence over the court in this area, then this may be a false hope.[90] As an advocate of a broad interpretation of *Chevron*, and a disbeliever in most, if not all, uses of congressional records to establish a legislative intent contrary to agency interpretation, Scalia would probably uphold the INS regulations. In his concurring opinion in *Wisconsin Public Intervenor v. Mortimer*,[91] Scalia totally discounted the validity of traditional tools of determining legislative intent such as committee reports or floor debates. He remains convinced that all members of the Congress do not read the committee reports. Accordingly, their vote for a bill does not mean they subscribe to all statements in the committee reports.

If, however, more moderate heads prevail, then the disclosure requirements could be struck down. Any factual evidence displaying an adverse impact upon legitimate potential immigrant investors due to these disclosure requirements would likely be helpful in supporting a challenge to the regulations. A successful challenge would streamline the application process and, more importantly, would increase the number of the applicants and create more United States jobs.

CONCLUSION

The recommended changes to make section 203(b)(5) a vital, job-creating provision of the Immigration and Nationality Act include the following.

First, modify the Internal Revenue Code to eliminate the global tax effect of participation in the United States immigrant investor program in line with the Canadian model. Second, clarify the at-risk provisions to specifically qualify second-stage third-party guaranteed investments. Third, rigorously enforce existing regulatory safeguards to weed out fraudulent promoters. Fourth, remove the financial disclosure requirements from the regulations.

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90. Maureen Callahan, *Judicial Deference to Agency Interpretations of Statutes: The Current Status of* Chevron v. NDRC, 2 IMMIGRATION & NATIONALITY LAW HANDBOOK 482 (1991-92).
91. 111 S. Ct. 2476 (1991).

Failure to take these actions will condemn section 203(b)(5) to a stunted existence. Both the quality and quantity of investors will fall below expectations unless the needed changes are made.