INS Sued Over Investor Rules

Agency Illegally Changed Policy, Foreign Applicants Allege

By BEN WHITE
Special to The Washington Post

A group of 200 foreigners filed suit against the federal government yesterday, alleging that the Immigration and Naturalization Service illegally changed the rules governing a controversial policy that grants legal immigrant status to foreigners who promise to invest at least $500,000 in the United States and create at least 10 jobs here.

The suit, filed in U.S. District Court in San Francisco, contends that INS exceeded its authority by changing the policy in late 1997 and again last year, making it harder for some foreign investors to get final approval for their business plans and thus have their temporary resident status changed to permanent.

The INS contends that the basic requirements of the program remain the same and the changes simply clarified the rules to preclude a rash of complex financial plans that may have met the letter of the original law but in reality did not invest any money or create jobs.

Congress passed the controversial immigration program in 1990 to spur foreign investment and job creation in the United States. It created a new visa category conferring resident status on foreigners who submitted business plans promising to create at least 10 U.S. jobs by investing at least $1 million—or $500,000 in some high-unemployment areas—in new or existing businesses.

To have their resident status changed from temporary to permanent, foreign investors must demonstrate that they actually invested the money and created the jobs.

It is that verification process that the plaintiffs—and the American marketing and investment firm that put together their business plans—contend INS has illegally changed without public review or comment, leaving the investors and their family members in danger of deportation.

"These people can't go forward, they can't go backward and they can't go side to side," said Bill Cook, a former INS counsel who now represents the Greenbelt firm American Immigration Services (AIS), which assembled the business plans for the 200 plaintiffs.

> "All INS is saying is: 'Show me the money.' "
>
> **— spokesman Russ Bergeron,**
> Immigration and Naturalization Service

"They are basically stuck in limbo," Cook said. "What you have here is the people at [INS] don't understand these complex transactions and, automatically, anything that they don't understand becomes fraud and abuse."

INS spokesman Russ Bergeron, however, said the agency began to see a dramatic rise in applications for the foreign investor visas in 1997. That increase, he said, prompted the agency's general counsel to review the plans being put together by AIS and other firms and to rule that they did not meet the visa program's requirements.

In 1998, according to Bergeron, the INS's Administrative Appeals Office issued four "precedent" rulings further clarifying what criteria investors would have to meet to have their plans approved and ultimately have their temporary resident status made permanent.

"On the surface, they appeared to meet the requirements of the law," Bergeron said. "But [INS] examiners were raising questions and basically what they were saying was, while these plans on the surface created the appearance of investing $500,000, they were so complicated and convoluted in their structure that it was difficult to ascertain if that was actually the case."

Bergeron said the plaintiffs in the San Francisco lawsuit—and any other foreign investors—are free to draft new business plans to clarify that they have actually invested at least $500,000 and created at least 10 jobs.

"All INS is saying is: 'Show me the money. Where is the money?' " Bergeron said.

Cook, however, argues that INS is changing the rules without informing the foreign investors, making compliance impossible.

"The sad commentary here is the refusal of [INS] to sit down and tell [the investors] what they want. We've been reduced to trying to guess," Cook said.

The Washington Post

WEDNESDAY, AUGUST 25, 1999

Green-Card Blues

A Visa Program to Spur Foreign Investments Creates Grief for Some

The Rich Were the Targets, Then Lawyers Got Clever; Now, INS Clamps Down

Why the Heuers Face the Boot

A1

By BARRY NEWMAN
Staff Reporter of THE WALL STREET JOURNAL

FREDERICKSBURG, Texas—The letter that has ruined Doris and Wilfried Heuer's lives arrived on Oct. 22 at their little white house on College Street. It came from a company called AIS, and it told the Heuers, who are German, that the Immigration and Naturalization Service had changed its mind about having let them into the country.

"It is unprecedented," the letter said, "that INS would cancel benefits that it had previously granted over the last seven years to thousands of individuals." But the INS was canceling benefits now, and the Heuers' visa would almost certainly be among them.

The letter presented the couple with three options: Run to Canada, fly home to Germany, or fork up $500,000. It asked the Heuers for an "immediate response."

An Extraordinary Visa

AIS was in the business of procuring green cards for its customers—permanent U.S. residence—by using a special visa meant for the rich. Congress created the visa in 1990, believing rich people might like moving to America. Congress was wrong. The poor may mob the Golden Door, but the rich often don't appreciate the long reach of America's tax collectors. They generally steer clear.

With its new visa, the U.S. offered to swap 10,000 green cards for investments of $1 million, or $500,000 in depressed areas. Each investment would be expected to give 10 Americans jobs. That adds up to over $5 billion and 100,000 jobs a year, if 10,000 investors would only immigrate. In 1992, they numbered exactly two dozen.

But then AIS came along. It was born as American Immigration Services; the name, which seemed a mouthful, has been cut to its initials. The founders, a group of bankers and developers, took on some prominent help: Diego Ascencio, still AIS president, was a former ambassador who once spent 61 days as a hostage in Colombia. A board member, Prescott Bush Jr., was a brother of the former president and chairman of the USA-China Chamber of Commerce. Mr. Bush, who recently stepped down, was recruited for his China contacts by Gene McNeary, who became an AIS lawyer. Under President Bush, Mr. McNeary had been INS commissioner, the top dog. He now has also distanced himself from AIS, but the investor visa was set in motion—slow motion—on his INS watch.

AIS set out to get the visa moving. Its method was the classic American response to a sluggish market: It discounted.

Focusing on East Asia but covering the globe, an AIS sales force charged out, promising to [illegible]ver an American green card in a matter of months—not for $1 million or even $500,000, but for a bargain price of $125,000. To accomplish that, AIS used a set of devices that might have been familiar to bankers and tax attorneys, but took the INS years to understand. Thanks to these maneuvers, the investor visa would no longer be for the rich, but for the middle class—for people like the Heuers.

Who went for it. They quit their jobs, sold their house in Bavaria and all but 18 boxes of their worldly goods, took their young son out of school, plunked down the money and moved. A year ago January, they started over in Fredericksburg, this old German enclave in the Texas hill country. Four months ago, AIS told the Heuers that they had, in fact, landed in the middle of a flap between INS lawyers and former INS lawyers over the investments AIS had been offering. Their cut-price green cards look like anything but bargains now.

"It seemed 100% safe," Doris Heuer says, standing at her kitchen stove. On a warm winter's afternoon, she is fixing Wilfried a chicken-and-rice lunch before he goes to work. She is 36 years old, with a ready smile and fluent English. "When we got our visas, we were so glad," she says. "We thought we'd made it."

Her husband sits at the table, his son's drawings on the wall behind him. Daniel, who is nine, is at school. Mr. Heuer is 40 years old; the hair on his head has turned to fuzz. "It's a pretty bad way to get a green card," he says as his wife sets a plate in front of him. "But the reputations of these AIS people could really raise no doubts." He reaches for a plastic ketchup bottle and gives his rice a squirt. "When I learned that INS had been approving these visas for years, I thought: This must be fine."

What the Heuers didn't know was that INS clerks were approving visas based on

Please Turn to Page A8, Column 1

investments the agency now admits they couldn't comprehend—plans clothed in the financial finery of promissory notes, guaranteed returns, balloon payments, pools, reserve funds, puts and calls. It was 1997 before the consuls at several U.S. embassies in Asia became alarmed. Only then did the INS wake up, scratch its head, and bring down the curtain on the whole show.

Last year, with the visa suspended, it took a stern look at a bunch of complex investments and introduced new standards of clarity and simplicity. It has also started a probe of AIS, and of one other company in the business, for possible fraud. But the INS didn't issue new regulations or hold hearings. And it announced that its new standards would apply retroactively—to plans, like the one the Heuers signed onto, that its own clerks had blessed.

"What the INS did was totally unconstitutional," says Mr. McNeary, the former INS head who still represents AIS clients. "You can't change the rules without changing the regulations, which requires public comment. The INS never did that."

AIS denies any wrongdoing. And even lawyers not connected to AIS consider the INS decision odd.

"Once people's rights are set, what, the INS can go back years and tell them their petitions shouldn't have been approved?" says Theodore Ruthizer, a past president of the American Immigration Lawyers' Association. "We've changed our view of what the law is? We were too liberal? People acted in reliance. I don't accept it."

But the a[illegible]ciation's director, Jeanne Butterfield, detects a pattern: In [illegible] Congress authorized the INS to deport immigrants who committed crimes decades ago, a law that has led to both roundups and constitutional challenges. "This is a tendency in the immigration area," Ms. Butterfield says. So now the INS is chasing down confused investors along with reformed robbers.

Clearing dishes after lunch, Mrs. Heuer says, "We read articles about people being deported who have been here for years."

"I have nightmares," says Mr. Heuer. "I see myself being put into handcuffs and taken to the airport."

He goes into the bedroom to put on his work clothes and comes out in a candy-striped shirt with "Heuer" stitched above the pocket. Snagged between AIS and INS—between a difficult deal and a hard-nosed government—the Heuers are living frugally this winter. To save on health insurance, Mr. Heuer has taken a job at his son's school. He is earning $6.28 an hour—as a janitor.

Original Intent

This isn't quite what Congress expected of immigrant investors 10 years ago, as Hong Kong's wealthy made tracks for New Zealand, Australia and Canada ahead of Britain's pullout. Canadian provinces were hawking residency for under $200,000. Watching money like that rebuild Vancouver, the U.S. went for a piece of it. Just then, the Germanys reunited, and the Heuers started itching to get out, too.

Easterners, they felt, were befouling Germany with nasty taxes and nasty manners. Most of all, Mr. Heuer, an agricultural technician for Bavaria's government, saw his hopes of owning a business crumbling with the Berlin Wall. "At a certain point you get tired of working for somebody else," he says. "The best country for becoming self-employed and staying self-employed—that's America."

So the Heuers took to playing the U.S. green-card lottery, and lost four years in a row. Meantime, Mr. Heuer staked out a claim in America: He spent his mother's legacy—$495,000—on eight-tenths of an acre on a busy highway in North Carolina with a Chick-Fil-A chicken restaurant on it. But it was 1996 before he read about AIS and its cheap-visa program. The Heuers sent a fax, and soon they were in the Hofbrauhaus in Munich, eating *weiss wurst* and listening to Mike Meier, an AIS representative, deliver his spiel.

"We asked questions, we made a list," says Mr. Heuer. "What I really couldn't figure out was how you can get this kind of visa, which costs $500,000, when you only have to pay $125,000. Mike Meier said the law of this visa allowed very much . . ."

"Creativity," Mrs. Heuer interjects.

"No, flexibility," says Mr. Heuer. "Very much flexibility."

A Complex Arrangement

Pared down to basics by lawyers in and out of the INS, here is a generic sketch of the way the investments worked:

Anywhere from 10 to 100 foreigners join a limited partnership, each chipping in $125,000 in cash. The visa company lops a fee off the top—about 15%—and flushes out a young American enterprise (or a dying one) in need of investors. The foreigners sign promissory notes, pledging the enterprise another $375,000 over time. The INS endorses the arrangement and dispenses the green cards.

But the cards carry conditions. In two years, the INS will look again, to see if the enterprise is still on its feet—just as it does when a foreigner marries a U.S. citizen; the INS checks back two years later to make sure the marriage was real.

1/3

THE WALL STREET JOURNAL
FRIDAY, FEBRUARY 26, 1999

For two years, then, the foreigners make small payments into their partnership every few months, keeping their involvement active. The terms of the agreement also guarantee them small, regular returns. The returns typically happen to equal the payments. The partnership, meanwhile, doesn't just shovel money into its enterprise. The terms require it to keep cash reserves to pay off any partners who want to sell back their shares.

Two years go by. The INS lifts its conditions on the partners' green cards. Then one huge final installment on the promissory note comes due—the "balloon payment." At that very moment, the partners exercise their option to sell their shares back to the partnership, popping the balloon. Depending on the visa company's fees and how much money it took to keep the enterprise going, the partners might even get some money back.

As legal permanent residents, they can then go on with their lives. It's exactly as if they married Americans, made the best of it for two years, got past the infamous INS green-card interview, and went straight out and got a divorce.

After the Heuers left the Hofbrauhaus, they joined an AIS partnership with the similar profile. They never learned much about the company it bought into, except that it was someplace in Louisiana. They never expected it to net them a cent of profit. "What we wanted to get out of it," Mrs. Heuer says, "was a green card."

A Matter of Disclosure

The Heuers weren't naive, and neither were AIS nor its imitators. An AIS vice president, Andrew Palmer, freely admits that its strategy was to find feeble American companies and put them on a slow cash drip. If they expired after two years, fine.

"This was an effort to provide a service, make an investment and get people green cards," he says. "Normally, the investment is liquidated." As one lawyer defending the technique later told an administrative panel: "If anybody suggests that this is a wonderful investment" with a goal beyond getting them lawful, permanent residence, "they're lying and they're crazy; they're brain damaged, all right?"

Brain damaged may not be a fair way to describe the INS, but naive could fit. Its staff folded most of these features into the official rules, including balloon payments and promissory notes. A 1993 INS opinion said it was "entirely appropriate" to let investors sell out the instant their green cards went permanent. Technically, it was possible to apply for the visa while ponying up less than $125,000, even no cash at all.

"AIS filed cases to see what was acceptable to the INS," says William Cook, an AIS lawyer and himself a former INS general counsel. "When things were approved, they would redesign their program to fit. Much has been made about how aggressive the programs were, and the implication was that as they got more aggressive, they got more fraudulent. The reality is it was not the companies leading the INS. It was the other way around. They took their lead from the INS. Everything criticized by the service was approved by the service before it was widely marketed."

"Did it make business sense?" asks David Hirson, a California lawyer unrelated to AIS. "No. Was it disclosed up front to all parties concerned? Yes."

Have Visas, Will Award Them

In a famously close-fisted agency, having 10,000 visas lying around may have led to an uncommon laxity. In any case, the prospect of nailing a green card fast and cheap made the investor visa newly appealing. For AIS and others, business took off. AIS clinched two dozen deals for about 600 investors plus their families. Some promoters did market direct investments of the full $500,000 to $1 million. Others, however, jumped in with even deeper discounts than AIS offered. In 1997, the INS approved 1,110 new petitions—and then the State Department called time out.

The INS routinely passes approved petitions to U.S. consulates; consulates issue the visas. In the spring of 1997, AIS noticed that three petitions were stuck in Tokyo. An AIS memo, furnished by the company, says a vice consul there was alleging "that AIS may be engaged in criminal activity and facilitates illegal conduct." AIS demanded a retraction and an apology. Instead, more challenges flew in from consuls in Taiwan, Hong Kong and China.

No strangers to deceit, the consuls first wanted to know if the foreigners truly had the capital to back their notes—and if so, could it be cashed and carried to the U.S. to deliver on a $375,000 promise. Promoters, the consuls sensed, had pushed every INS concession to its limit; green cards were going for too little money, and too little of that was going into American businesses. Mostly, though, they were as dazed as the clerks at the INS by what struck many as legalistic gobbledygook.

"We would get 6-inch stacks of documents," says an official overseas who asks not to be named. "We're not accountants. We're trying to apply practical standards. So the lawyer comes in and says there's promissory notes, there's this, there's that. Yeah? So? What's your point?"

The only point clear to the consuls was how to react: Refuse the visas, and ship those stacks of paper back to America.

A Rough Landing

Where they finally landed on David Martin's desk. Mr. Martin, a law professor, was then INS general counsel. He took a close look at the plans, and what he saw weren't, to him, capital investments. They looked to him like bonds: Fixed interest over a fixed period with a money-back guarantee. Only a fraction of the $500,000 was forked up; parked in banks and dribbled into job creation, only a fraction of that was ever placed at real risk.

Mr. Martin wrote a memo. The INS, it said, "lacked sufficient empirical or theoretical knowledge of business practice" to realize that it had been taken for a ride. Its clerks "simply failed" to see that the investment plans were debts posing as equities. "With its increased knowledge," Mr. Martin wrote, "it is now clear to the service that the programs discussed above violate existing law."

In December 1997, the memo was issued for internal INS use. In January 1998, on visas granted by a less-particular American consul in Germany, the Heuers arrived in Fredericksburg.

Another party of Germans founded the town in 1846, having been flimflammed out of an investment by a fake French nobleman. The Heuers had heard that Fredericksburg was still German. At a 153-year distance, it's as German as a cow town gone touristy can be. On Main Street, stores selling wind chimes alternate with beer halls. The German Heritage Commission supplies them all with German signs.

"They bread their *jagerschnitzel* here and you never bread a jagerschnitzel in Germany," Doris Heuer says, but she and Wilfried were content to rent a frame house under a pecan tree, down the street from the Hagels, the Jenschkes and the Jeunkes. In February, AIS sent them a "welcome letter" that said, "We hope your journey to your new life is a pleasant one . . ."

The family settled in to wait two years before the INS lifted the conditions on their green cards. They would live on the $43,000 a year Chick-Fil-A paid to rent their patch in North Carolina. Then they would sell it, buy a campground or a bed-and-breakfast, and at last go into business for themselves. It would be 10 months before the Heuers learned what the INS had concluded a month earlier: that the conditions on their green cards would never be lifted.

THE WALL STREET JOURNAL
FRIDAY, FEBRUARY 26, 1999

2|3

After the general counsel filed his memo, U.S. consuls kicked back every INS-approved petition they hadn't acted on. An INS team reviewed them, denied 170, and sent several to its appeals office for full-length opinions. Handed down last summer, they banned fixed returns, reserve funds, redemption guarantees and off-the-top fees. Foreign investors, the opinions said, must show that they have the money up front, acquired it legally, and can convert it to dollars easily. They must present "comprehensive and credible" plans to create jobs. Partnerships, in effect, were through. Visas would be awarded solely to direct investors, pure and simple.

And the INS also claimed the right to revoke every green card its clerks had issued because they didn't have a clue what they were doing. Investors who had cleared the two-year hurdle would be spared. But when it came time to review conditional green cards, the Heuers and those like them would get no mercy.

"It was a lot easier to deal with people who hadn't moved," David Martin says now; he has left his job as INS general counsel and gone back to teaching. "After I left, there was a lot of discussion on whether room could be found for people who'd moved and were still in the conditional period. I don't know how that came out." Mr. Martin is told. "Well," he says. "It's a genuine human dilemma."

Home, But for How Long?

In their 1991 Jeep, Doris Heuer has driven her husband across town to work. Fredericksburg Elementary stands a story high, facing a hay field. Mr. Heuer follows the school's wide, waxed halls to the nurse's office; Judy Mayo has something for him: a sheaf of letters from the staff, addressed to the governor.

"We all want him to stay," says Ms. Mayo after Mr. Heuer takes the sheaf to the copier. "He gets down on his hands and knees and scrubs a commode like a jeweler would shine a precious jewel." She shakes a thermometer and slips it under a child's tongue. "Why is it that a man like this, who pays to come here, has to fight so hard to stay? Any student in this school would understand. Why the INS has such a difficult time with it is beyond me."

Mr. Heuer returns with an amazed grin. In one letter, language teacher Susie Jaksik has written: "Wilfried is the epitome of the type of immigrant who helped build our country to its present great stature. . . . Help my students to keep their sense of pride when they say every day, 'with liberty and justice for all.'"

"So much help," says Mr. Heuer, hurrying along the hall. "We have never experienced such a thing." At the custodian's closet, he says, "Please excuse me now. I must prepare my vacuum cleaner."

The Heuers are passing this winter pondering their choices. They won't run to Canada, or join an AIS lawsuit against the INS, or risk $500,000 on a home-building deal, as AIS has proposed. AIS has lost their trust. They aren't even sure what it did with their money.

"We believe there is a business," says Mrs. Heuer, but her husband says, "The jobs, the real jobs—that's our concern."

They needn't worry about that.

According to AIS, the Heuers' partnership invested in Corporate Personnel Services Inc., or CPSI, on Bayou Lafourche in Larose, La. Lyle Degelos, a small-business consultant who introduced the companies, picks up a phone in New Orleans.

"They do recruitment," Mr. Degelos says of CPSI's business. "They provide environmental personnel—the bottom side of the waste-management-employment requirement." Garbage collectors. CPSI hires out over 1,000 of them on contract in "eight or 10 states," says Mr. Degelos. "They're large. Getting larger."

It turns out that AIS didn't invest only in failures. CPSI is in the black, Mr. Degelos says. "Its growth was greatly assisted by money received from AIS." How much money? "A substantial amount. Over $100,000. It was just a godsend. My word, it's a success story, and AIS had a very significant part to play in it."

Despite several requests and written permission from the Heuers, AIS has not provided documentation for the investment. However, it did tell the Heuers that their partnership has 10 members. Mr. Cook, the AIS lawyer, says it follows the usual pattern. That would mean, he says, it took in $1.25 million in cash, plus $3.75 million in promissory notes. Each investor would have wound up contributing all of $10,000 to an agency that "creates" jobs by recruiting garbage collectors on contract for sanitation companies. The rest of the money would have gone for AIS fees, Mr. Cook says, or is sitting in a trust account.

"We were counting on $280,000 more," says Mr. Degelos. "We're apparently not going to get it, for reasons not known to me."

On Main Street in Fredericksburg, the Heuers are about to eat a meal at a place called the Auslander. They have hired their own lawyer now, exploring ways to stay in the U.S. temporarily.

"I don't think we can be happy again in Germany, knowing how it is here," Mrs. Heuer says. "It's so exciting. It's real life."

She glances at the menu.

"*Sauerbraten* sandwich? Have you ever heard of that?"

"For heaven's sake," says Mr. Heuer.

She orders chicken salad. He takes the "Mexican Fiesta."

3|3

THE WALL STREET JOURNAL
FRIDAY, FEBRUARY 26, 1999

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EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
Washington, D.C. 20503-0001

Tuesday, February 16, 1999

LEGISLATIVE REFERRAL MEMORANDUM

TO: Legislative Liaison Officer - See Distribution below

FROM: Richard E. Green (for) Assistant Director for Legislative Reference

OMB CONTACT: Jeffrey A. Weinberg
PHONE: (202)395-3457 FAX: (202)395-3109

SUBJECT: **JUSTICE Report on EB-5 Investor Visa Program**

DEADLINE: **10AM Tuesday, February 23, 1999**

In accordance with OMB Circular A-19, OMB requests the views of your agency on the above subject before advising on its relationship to the program of the President. **Please advise us if this item will affect direct spending or receipts for purposes of the "Pay-As-You-Go" provisions of Title XIII of the Omnibus Budget Reconciliation Act of 1990.**

COMMENTS: The Report contains legislative recommendations on pages 8 and 9.

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REPORT TO CONGRESS ON THE EB-5 INVESTOR VISA PROGRAM

INTRODUCTION

The Omnibus Consolidated and Emergency Supplemental Appropriations Act for Fiscal Year 1999, Public Law 105-277, directs the Immigration and Naturalization Service (INS) to report to Congress "to propose any legislative remedies that may be necessary to provide the INS with the tools to ensure that a person gaining citizenship pursuant to the EB-5 program has actually made, and is personally liable for, the required investment and is sufficiently involved in the management of the business invested in, consistent with the intent of Congress when the EB-5 program was created."

Accordingly, this report discusses the need for amendments to sections 203(b)(5) and 216A of the Immigration and Nationality Act (the Act) that establish specific standards designed to ensure that the EB-5 employment creation program promotes investments in U.S. businesses and creates and preserves employment in the United States in the manner that Congress intended.

Preliminarily, the INS notes that Public Law 105-277 states "[I]t is understood that serious allegations have been made concerning fraudulent activities designed to aid persons in gaining U.S. citizenship pursuant to the EB-5 program without making the contributions to U.S. business that Congress intended." Although the INS maintains data on the total number of EB-5 petitions that are denied for failure to comply with statutory and regulatory requirements, there is not consistent or complete data available on denials that are due, wholly or in part, to fraud. For this reason, the INS is unable to quantify the incidence of fraudulent activity in the EB-5 program. Where appropriate, INS initiates investigations of suspected fraudulent activity and seeks prosecution under applicable statutes. Ongoing investigations are not subject to public disclosure and, therefore, are not discussed in this report.

BACKGROUND

From 1965 to 1978 investors were eligible to immigrate to the United States in the nonpreference category. The INS regulations exempted applicants for nonpreference immigrant visas from the general labor certification requirement based on an investment of at least $40,000 (initially $10,000) in a U.S.-based business employing at least one U.S. worker.

Because investors were not differentiated from other nonpreference immigrants, data on the number of investors entering as nonpreference immigrants or any information about their investments is not available. In late 1978, nonpreference visas became permanently unavailable, effectively ending this means of immigration for investors.

The Immigration Act of 1990 created the immigrant investor program as the fifth preference within the employment-based category (EB-5), marking the first time a category specifically facilitating the admission of investors as lawful permanent residents was included in U.S. law. This preference category allots up to 7.1 percent of the worldwide level of immigration (approximately 10,000 visas annually) to qualified investors and their spouses and children. At least 3,000 of the visa numbers are reserved for investments in targeted areas, defined as rural areas or areas of high unemployment. An investment of at least $1 million in a new commercial enterprise that is established by the immigrant investor and that employs at least 10 U.S. workers is required; the required investment is lowered to $500,000 in targeted areas.

Immigrant investors are admitted for 2 years in conditional permanent resident status. During that time they must invest the required capital and create the required employment. Section 216A of the Act provides that, at the end of the 2-year period, the conditions may be removed if the investment was sustained throughout the period of the investor's residence in the United States. Final regulations providing requirements for petitions for employment creation were published at 8 CFR 204.6 on November 29, 1991, effective immediately. Final regulations providing requirements for petitions to remove the conditional basis of lawful permanent resident status were published at 8 CFR 216.6 on May 23, 1994.

Prospective immigrant investors petition for themselves on INS Form I-526, "Immigrant Petition by Alien Entrepreneur," which is filed with the required fee and supporting documentation with the INS' Texas or California Service Center, depending on which office has jurisdiction over the area where the commercial enterprise will principally be doing business. The required documentation must show that the immigrant investor has invested, or is investing, the required lawfully-gained capital in a qualifying new commercial enterprise within the United States that the investor has established and that will create full-time jobs for at least 10 workers. At the end of the 2-year period, the investor must file INS Form I-829, "Petition by Entrepreneur to Remove the Conditions," and demonstrate that the investment has been completed and sustained for the conditions to be removed.

Under current INS regulations, the investment must be in a for-profit commercial enterprise for the conduct of lawful business. The business may be a sole proprietorship, a limited or general partnership, a holding company, a joint venture, a corporation, a business trust, or other public or privately owned entity. A new commercial enterprise may be established through the creation of an original business, purchase of an existing business and restructuring and reorganizing it into a new commercial enterprise, or the expansion of an existing business through a 40 percent net increase in its net worth or in the number of employees.

The Immigrant Investor Pilot Program was created by Section 610 of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1993 (Pub. L. 102-395, October 6, 1992, 106 Stat. 1874) as an adjunct to the employment creation immigrant investor classification. Under this pilot program, immigrant investors may invest the required capital in INS-designated regional centers, which use the investment capital to create jobs indirectly through revenues generated from increased exports resulting from the pilot program. The pilot program originally authorized up to 300 visas annually for investors whose required capital is invested in approved regional centers established to promote economic growth, export trade, job-creation and increased domestic capital investment on a regional basis. Interim regulations governing this pilot program were published on August 24, 1993.

The pilot program includes a modified job-creation requirement that enables investors in regional centers to credit their investment with indirect job-creation through revenues generated from increased exports. This policy expanded opportunities for investor participation in the immigrant investor program. On November 13, 1997, an amendment to Section 610 of the Departments of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriations Act, 1993, changed the number of visas to be authorized annually in the pilot program from 300 to 3,000, and extended the pilot program for an additional 2 years, until October 1, 2000.

STATISTICS

As discussed above, the Immigration Act of 1990 allocated approximately 10,000 visa numbers annually to the immigrant investor category. As shown in the following table, participation in the investor program has been far below the numerical limit since the inception of the program, both in terms of petitions received for investor status and immigrants admitted as investors.

Fiscal Year	Investor Petitions Received	Investor Petitions Approved	Investor Petitions Denied	Investors Admitted as Conditional Immigrants[1]
1992	474	240	40	24
1993	436	384	170	196
1994	513	407	82	157
1995	356	291	109	174
1996	801	616	122	295
1997	1,290	1,110	141	436
1998	1,368	358	290	N/A

[1] Excludes spouses and children of investors who are also subject to the numerical restrictions.

Close to half (45 percent) of the investors admitted during Fiscal Years 1994 through 1996 were admitted based on investments in targeted rural or high unemployment areas where a minimum $500,000 investment was required. The remaining 55 percent made their investments in businesses in non-targeted areas that require a minimum $1 million investment.

Participants in the investor program have come primarily from Asia, with countries from that continent accounting for 81 percent of all immigrant investor admissions during Fiscal Years 1994 through 1996. During that period, an additional 9 percent of investors came from Europe, and 5 percent came from South America. Approximately three-quarters of immigrant investors are males.

Immigrant investors, like other immigrants, tend to concentrate in certain parts of the United States. During Fiscal Years 1994 through 1996, 44 percent of all immigrants admitted as investors reported that they intended to live in California, followed by 9 percent destined to Florida, 7 percent to the State of Washington, 6 percent to Texas, and 5 percent to New York.

INITIAL LOW PARTICIPATION IN THE EB-5 PROGRAM

The following characteristics of the immigrant investor program may help explain why participation in the program has been below authorized levels.

- **Investor uncertainty over removal of conditions**. The statute provides for a 2-year conditional residence period, but does not guarantee investors that they will obtain lawful permanent resident status at the end of that period. The required investment and the required employment creation must be established to the satisfaction of the INS prior to the removal of conditions. Potential investors may be deterred out of concern that they will be unable to create the 10 or more jobs, or that other factors may impede their ability to sustain their investment over the 2-year period, resulting in their failure to meet the terms of the program and loss of status. In this regard, the INS has received comments from the domestic and international business community that the average commercial enterprise may not be able to create 10 full-time, permanent jobs with the minimum required amounts of capital in a 2-year period.

- **Investor worldwide income subject to U.S. taxation**. During the 2-year conditional period, the immigrant investor is subject to U.S. taxation of his or her worldwide income. This policy may serve as a disincentive to investors who have substantial holdings outside the United States.

- **Availability of alternative nonimmigrant classifications**. Potential immigrants may have other routes to achieve lawful permanent resident status that are less expensive and more certain. If an immigrant wishes to enter the United States by means of an investment, he or she may choose an alternative nonimmigrant classification, such as the B, E, or L nonimmigrant classifications, provided in sections 101(a)(15), (B), (E), and (L) of the Act.

- **Availability of attractive investor programs in other countries**. Investor programs in other countries may be more attractive to investors than the U.S. program in that they may require a lower capital investment and lower standards for job-creation. (See Appendix for information on the Australian and Canadian programs.)

- **Limited program information and outreach**. Participation in the EB-5 program depends on the availability of information to potentially interested persons overseas. While U.S. embassies generally make information on EB-5 requirements available to interested parties, the U.S. Government has not engaged in significant outreach and promotional activity. This role has been filled in some instances by the private sector without Government oversight.

INCREASE IN PARTICIPATION IN THE INVESTOR PROGRAM IN 1996

Increased participation in the program occurred in 1996 and 1997 for two primary reasons. First, the Immigrant Investor Pilot Program attracted investors because of its modified employment creation requirements. After 1996, the INS saw a rise in investments in approved regional centers. Second, private sector promoters began to market the immigrant investor program overseas. However, this was not without problems.

Many of these private sector entities promoted pooled investment arrangements formalized in complex financial agreements. Initially, such arrangements appeared to be carefully tailored to meet the statutory requirements, and to enable companies to amass large, pooled amounts of capital for the purposes of undertaking more extensive employment creation. Accordingly, the INS approved certain of these complex financial arrangements. Closer scrutiny of these agreements, however, revealed terms that failed to comport with the statutory requirements. These arrangements often contained one or more of the following elements.

- **Passive investment**. Regulatory language authorizing passive investments grew out of INS' response to public comments proposing passive investments to expand interest in the EB-5 program. Technical financial agreements that appeared to ensure compliance with regulatory requirements enabled increasing numbers of passive investors to participate in the program with little involvement in the company and in ways that ensured the company received little or no investment capital for purposes of employment creation.

- **Debt investment**. After 1996, INS saw a rise in the use of debt investments. These were often presented as financial arrangements that initially appeared to comport with the statutory requirements. For example, loans, guaranteed buy-back or redemption agreements, promissory notes, and other notes are debt investment mechanisms that do not constitute the long-term commitment of equity capital to new commercial enterprises in the United States so that jobs can be created with that capital. Many of these debt investment mechanisms included provisions that relieved the immigrant investor of the burden of the investment immediately upon achieving lawful permanent resident status.

- **Investment for which the immigrant was not at risk.** After 1996, INS saw an increase in investments involving capital that was not the immigrant investor's own, but rather that of a limited partnership, bank, the new commercial enterprise itself, or another party participating through complicated debt arrangements. Such arrangements effectively transformed an immigrant's investment into an investment by the third party or new commercial enterprise for which the investor bore little or no liability.

INS ACTIVITIES IN 1998

The sharp rise in the use of investment arrangements containing features that appeared not to comport with the requirements of section 203(b)(5) and section 216A of the Act prompted a legal review by the INS that was completed in December 1997. Pending completion of the review and determination of the appropriate means of dealing with the fact that many pending EB-5 petitions did not meet the requirements of the Act, the INS placed a hold on certain petitions for immigrant investor classification.

Over the summer, the INS issued four precedent decisions providing guidance on these complex financial arrangements. These precedent decisions clarified many fundamental statutory and regulatory requirements, including that:

- The INS immigrant investor program is an equity investment program and, therefore, loans and redemption agreements between the investor and the new commercial enterprise are unacceptable;

- Only capital that is the investor's own, and that is legitimately obtained may be counted as capital;

- Only capital placed at risk for purposes of job-creation within the 2-year period will be counted as part of the investment funds; accordingly, fees and expenses paid to attorneys and funds in reserve funds or corporate accounts will not be counted as investment capital;

- Promissory notes must meet specific standards in order to qualify as capital; for example, the assets used to secure the note must be specifically identified and must be the investor's own;

- An investor must establish the job-creating new commercial enterprise;

- An investor's business plan must be comprehensive, credible, and detailed, and

- Investments in regional centers and targeted areas of high unemployment must be in job-creating businesses located within those specific areas if the investor is to take advantage of the modified statutory provisions for those areas.

The INS ended the hold placed on the immigrant investor visa petitions that were found to be problematic. In July 1998, the INS provided extensive supplemental training on legal and financial matters to 25 Service officers, including 19 adjudicators and supervisors from all INS Service Centers. A team of adjudicators that were trained in July adjudicated most of the petitions in September and October; remaining petitions were returned to the Service Center where they were originally filed for priority processing. A second training session was held in October that also included INS investigators. On December 4, 1998, the INS published a notice in the Federal Register announcing the consolidation of processing of all EB-5 petitions at the Texas and California Service Centers.

CURRENT ACTIVITIES

The INS continues to consider ways to improve the program within the current statutory framework.

- **Evaluation of the Immigrant Investor Pilot Program.** The INS has approved 25 regional centers to undertake a wide range of economic activities with immigrant investor capital. The Immigrant Investor Pilot Program is intended to assess whether immigrant investor capital can stimulate job-creation, economic growth, export trade, and domestic capital investment in approved regional centers. The pilot program has been in existence for 6 years and is now ready for a full evaluation.

  Accordingly, the INS intends to announce in the Federal Register its plan to evaluate the Immigrant Investor Pilot Program. One issue that the evaluation will focus on is the indirect job-creation requirement that has posed significant administrative challenges for the INS. At the conclusion of the evaluation, the INS may recommend regulatory and/or legislative changes.

- **Guidance on removal of conditions.** The INS expects to issue detailed guidance for adjudicating officers on procedures and requirements for petitions on Form I-829 seeking the removal of conditions at the end of the 2-year conditional period. In particular, this guidance will address cases where INS has since determined the initial investment may not have comported with the requirements of the Act.

- **Backlog reduction.** The INS has made EB-5 backlog reduction a priority, and expects that by March 31 the backlog will be significantly reduced, if not eliminated. All trained adjudicators are being utilized in this effort, and additional special training is planned in order to reduce the backlog.

- **Consideration of Federal agency involvement**. The INS is studying existing Federal and State programs that, as part of their mission, work with commercial firms to use equity capital for economic growth and employment creation. In particular, INS is interested in programs that provide financial controls, monitoring, and oversight after the capital is committed to job-creation purposes. In preliminary discussions with the Small Business Administration and the Maritime Administration, INS is exploring ways that the equity investment capital of immigrant investors might be used for job-creation purposes in small businesses and shipyards under the Small Business Investment Company Program and Title XI of the Merchant Marine Act, 1936, as amended.

ISSUES AND LEGISLATIVE RECOMMENDATIONS

1. **Need for affirmation that the immigrant investor program is an equity investment program**. The statutory language should be amended to make explicit the requirement that investors make equity investments and to adopt INS' interpretation of the existing statutory language.

> **Recommendation**: The INS recommends legislation at 203(b)(5)(A)(ii) providing that immigrant investors must make an equity investment in the new commercial enterprise, clearly precluding debt investments.

2. **Lack of capital invested for job-creation purposes**. Under the current statutory authority, the required capital may be invested in the new commercial enterprise over the 2-year conditional period. The statute does not provide a fixed date by which the immigrant investor must have invested the required capital.

> **Recommendation**: The INS recommends that legislation require that the full amount of equity capital be invested prior to petition approval. The words "or, is actively in the process of investing," should be deleted from both section 203(b)(5) and 216A of the Act. In this way, the full amount of the equity capital is actually committed to the new commercial enterprise, is immediately available for use in its operations for job-creation purposes, and remains available for the 2-year conditional period.

3. **Direct and passive investment**. The current statutory authority is broad enough to encompass both passive investors and entrepreneurs directly involved in the operations of the business. However, the current statutory structure has not provided for the strict financial controls, monitoring, record-keeping, and auditing necessary to track the capital of passive investors and determine whether it is managed and used for job-creation purposes, or whether job-creation is actually occurring. Passive investments have made the program more difficult for INS to administer.

Recommendations: The INS recommends that Congress consider whether it intended for passive investors to participate in the immigrant investor program. If Congress did not intend to permit passive investment, the statute needs to be amended to reflect this. If Congress determines to limit access to the EB-5 program to immigrant entrepreneurs directly involved in the day-to-day management of the enterprise and its operations, Congress may wish to consider providing guidance on the level of direct involvement in the operations of the enterprise necessary for an investor to qualify to immigrate under section 203(b)(5) of the Act.

Similarly, if Congress determines that passive investment should remain an option, Congress may want to consider providing guidance on the requirements for passive investment. In such a case, the INS recommends that legislation create a dual system, authorizing participation in the EB-5 program as either an immigrant entrepreneur or a passive investor, and providing a separate set of criteria for each track.

In setting criteria for participation as a passive investor, the statute should address the financial controls necessary to ensure that the required capital from each of the pooled investors is genuinely available to the new commercial enterprise for job-creation purposes. Congress may want to consider the opportunities offered by the Federal and State programs discussed earlier to attract the foreign equity capital of passive investors and, at the same time, to provide necessary monitoring and oversight of financial management and the job-creation requirements.

4. **Need for clarification of application of section 275(d) of the Act.** This section currently provides penalties for an individual who knowingly establishes a commercial enterprise in order to evade the immigration laws, but provides no penalties for commercial promoters or other firms or organizations that may use the EB-5 program to evade immigration laws.

Recommendation: The INS recommends legislation clarifying that this section is applicable to any person, enterprise, or entity that intends to evade the immigration laws by knowingly misrepresenting the EB-5 program, either orally or in writing, by advising, marketing, promoting, or arranging access to it through any other means.

Immigrant Investor Program
REGULATORY IMPACT ANALYSIS STATEMENT

(This statement is not part of the Regulations)

Description

The Immigrant Investor Program (the Program) provides an opportunity for experienced business persons to immigrate to Canada after making a substantial investment in a provincial government-administered venture capital fund.

Quebec operates its own immigrant investor program under the authority of the *Canada - Quebec Accord Relating to Immigration and Temporary Admission of Aliens*. Quebec undertakes in the *Accord* to administer its investor program in a manner consistent with the spirit and objectives of the federal Program.

On March 31, 1999, the federal Program will close for new investment by immigrant investors. These regulations establish a redesigned Program to replace the current Program on April 1, 1999. All provinces and territories will be eligible to participate in the redesigned Program.

1. Immigrant Investor Program

The investor class is part of Canada's economic stream of immigration, which comprises investors, entrepreneurs, self-employed persons and skilled workers. The Program seeks to promote economic growth in all regions of Canada by attracting experienced business persons and new investment capital to Canada. Investors must have successful business experience and a net worth (accumulated by their own endeavours) of at least $500,000. Since the Program began in 1986, over $4.22 billion have been invested by 16,417 investors participating in the Program.

Current regulations require investors to make a minimum investment for five years in a provincial government-administered venture capital fund. Each fund pools investor money and invests in other businesses as permitted by federal regulations and provincial guidelines. Funds are aggressively marketed outside Canada as they compete to attract investors.

CIC approval is required before a fund can participate in the Program. Once approved, a fund may solicit investment from investors for a specific marketing period. CIC monitors the funds and may take enforcement action to obtain compliance with the regulations.

Three minimum investment amounts are offered to encourage investment in all provinces. In British Columbia, Ontario and Quebec (Tier II) the [illegible] investment is $350,000 in the remaining provinces (Tier I) the minimum investment is $250,000. In all provinces, if the return of an investor's money is guaranteed by a third party, the minimum investment is $500,000 (Tier III).

2. The need for Program redesign

The Immigrant Investor Program began in 1986 with a simple structure and the objective of putting immigrant investor money to work in Canadian small and medium sized businesses. The Program was primarily controlled by administrative guidelines. Within a few years, hundreds of millions of dollars were raised annually and the Program became vulnerable to abuse. Independent studies and internal reviews identified a number of flaws in the design and operation of the Program, while non-compliance with Program rules reduced economic benefit. In response, changes were introduced to the Program that made it both highly regulated and technically complicated. Substantial federal and provincial resources are now required to administer the Program.

Originally, investors could invest directly in eligible businesses or in venture capital funds administered either privately or by provincial governments. In November 1994, CIC announced its intention to redesign the Program and imposed a moratorium on the approval of new businesses and funds (private or government-administered). Businesses and funds approved before the moratorium were permitted to continue to accept new immigrant investors until June 30, 1996. On July 1, 1996, the current Program, which is restricted to provincial funds, was introduced as an interim measure while work on the redesign continued.

Allowing only provincial funds has eliminated the worst financial abuses in the Program, but more needs to be done to simplify Program administration and increase economic benefit. These objectives are difficult to realize with the current structure. Investors are reluctant to invest in the small and medium sized businesses the Program was intended to benefit. To attract investors, funds have been driven to low risk investments with little economic benefit. Considerable federal and provincial resources are expended to analyse and monitor complicated financing and investment schemes that test the limits of the regulations.

3. The redesigned Immigrant Investor Program

The broad objectives in redesigning the Program were to:

a. increase the economic benefit;
b. further reduce the potential for abuse;
c. reduce the level of government resources required to administer the Program; and to
d. offer provinces the opportunity to use investor money according to provincial economic priorities.

The redesigned Program addresses these objectives while retaining the fundamental intent of the original Program: experienced business people are provided with a vehicle to immigrate to Canada and to create economic benefit by making substantial investments in Canada.

A simpler Program is introduced by these regulations. Investors will deposit $500,000 in a single federal window, (i.e. CIC), which will act as agent for approved provincial funds. CIC will subsequently distribute the money among the funds. The funds will invest their allocations to create or continue employment in order to develop their economies without the current federally imposed restrictions. After five years, the funds will repay CIC, and CIC will repay investors. Participating provinces will enter into agreements whereby they will ultimately be responsible for their own fund's repayment to investors.

The major changes in the regulations are:

- the investment is increased to $500,000 for all investors, regardless of province of investment (no Tier system);
- investor minimum net worth is increased to $1 million;
- a single federal window to accept investors' money is created; investments are subsequently allocated to approved provincial funds;
- detailed federal rules regarding uses of investors' money are eliminated;
- the federal selection process is applied exclusively to those who invest in the federal program; and,
- the Quebec selection process is applied exclusively to those who invest in the Quebec program.

4. Overview of the redesigned Program

The regulations require CIC to act as agent on behalf of provincial funds and make changes to the "investor" definition. The extensive regulations governing the current Program are repealed but continue to apply to previously approved businesses and funds.

(a) The single window investment model

Under the new regime, CIC will act as agent on behalf of provincial funds. A single federal window will replace the numerous funds currently available to investors. Prior to visa issuance, all immigrant investors will pay $500,000 to the Receiver General for Canada. CIC will prepare and deliver to the investor a debt obligation in the amount of $500,000, repayable (without interest) 30 days after the expiry of the allocation period. The allocation period will commence on the first business day of the second month following the month the investor lands in Canada. The security is not refundable after landing.

The $500,000 will be refunded to the investor before landing if:

i. the investor is refused an immigrant visa (within 60 days of the decision);
ii. the application for an immigrant visa is withdrawn (within 60 days of the investor advising the visa office); and
iii. neither the investor nor dependents use any immigrant visas issued as a consequence of the investment (within 60 days of all such immigrant visas being returned to the visa office)

After the investor's landing in Canada, CIC will allocate immigrant investment to provincial funds according to an allocation formula: 50

percent divided equally among approved funds and 50 percent distributed according to provincial gross domestic product. Investors will be informed of the share of their investment allocated to each province via the debt obligation prepared and delivered to them by CIC.

(b) Investors

An investor's required minimum net worth (accumulated through their own endeavours) is increased to $1,000,000 (currently $500,000 or $700,000 for Tier III investments).

The Tier system is eliminated and the investment is increased to $500,000 for all investors regardless of the province of investment. Guaranteed investments (Tier III) are also eliminated.

The current regulations regarding an *investor in a province* (meaning a province that has signed an immigration agreement with the federal government respecting the selection of immigrants pursuant to section 108(2) of the *Immigration Act)* are unchanged. An investment by an *investor in a province* continues to be subject to the rules established by the province. Quebec is the only province with such an agreement.

Investors must now invest in the federal Program in order to be selected federally. Previously, investors could invest in the Quebec Program and be selected federally. This regulatory amendment harmonizes federal requirements with Quebec's regulations, which require all investors assessed under its requirements to invest exclusively in its program.

(c) The Quebec Program

Quebec has agreed to harmonize its regulations in terms of the increased investment amount of $500,000 and the investor net worth of $1 million.

(d) Consequential amendments and transitional rules

To simplify the regulations and minimize the confusion between the current Program and the redesigned Program, regulations applicable only to the current Program are repealed. The regulations provide that the repealed regulations still apply to businesses and funds approved prior to April 1, 1999. Some of these businesses and funds will operate for at least five more years until investors' hold periods expire.

Alternatives

(a) Alternatives to regulating

There are no workable alternatives to a regulatory framework for the Immigrant Investor Program. Prior to 1993, most Program rules were contained in administrative guidelines. Guidelines proved to be ineffective and were consequently converted to enforceable regulations. The simpler structure of the redesigned Program requires substantially fewer regulations than the current Program.

(b) Alternatives to the redesigned Program

In redesigning the Program a number of options were considered:

(i) Cancel the federal Program

Closing the federal Program would leave only the Quebec program open for new investment by immigrant investors. This is undesirable because the Program is an important source of investment capital, particularly in provinces that might otherwise have difficulty attracting new investment and do not directly benefit from immigration. Continuing the Program offers all provinces an opportunity to participate and share in the economic benefits of immigration.

(ii) Implement the Program pre-published on March 22, 1997

Changes to the current Program were proposed in regulatory amendments published in Part I of the *Canada Gazette* on March 22, 1997. Under those regulations, an investor would have directed a private fund manager to place the investor's money in a business selected by the investor. Only fund managers meeting specified standards would have been eligible to participate. Investments would have been subject to a few federal minimum standards with provinces adding their own requirements. A modified tier system was suggested. Critics said it would have unfairly transferred the administrative burden of the Program to the provinces and was unlikely to increase economic benefits. The proposed redesign model was not supported by any of the provinces.

Benefits and Costs

Benefits

The regulations ensure that the Immigrant Investor Program continues to provide an opportunity for experienced business persons with substantial investment capital to immigrate to Canada.

Economic benefit will increase. Provinces may now use investor money according to provincial economic priorities in order to create or continue employment without the need to compete with investment products offered by other funds.

The potential for abuse is greatly reduced. Money will be paid directly to CIC and then allocated for provincial investment. Provincial funds will be responsible for repayment back to CIC for subsequent repayment to investors.

The simpler structure will require significantly fewer federal and provincial resources to administer. Overseas processing of investor applications is also simplified. Visa officers will be able to quickly verify if the investment has been made, to ensure that immigrant visas are issued only after the money has been received.

Increasing investors' minimum net worth will ensure that investors have sufficient capital to participate in the Canadian economy beyond their initial investment.

Costs

Immigrants' investment choices in the federal program will be limited in that only one option is available. Direct investment in a business or provincial fund will not be possible. The cost of investment will increase to $500,000 for immigrant applicants. This is offset, however, by the commitment of provincial funds to repay investors' principal after five years.

Consultation

The provinces have been consulted throughout the redesign process through the Federal-Provincial Business Immigration Working Group. The responses to the March 22, 1997 proposal provided insight into the concerns of a wide range of interested parties and were also considered in the redesign.

In January, 1998 the report of the Immigration Legislative Review Advisory Group, *Not Just Numbers*, was released. The report included recommendations for the redesign of the Immigrant Investor Program. The Minister of Citizenship and Immigration held public meetings to receive comments on the report. Written submissions were also received from numerous interested parties. These regulations are consistent with the Advisory Group's recommendations.

Compliance and Enforcement

Provincial funds will be responsible for investment of investor money. Agreements between CIC, provincial funds and participating provinces will define responsibilities and obligations. Funds will report annually to CIC on the use of investor money.

Visa officers will ensure that the $500,000 investment is made prior to visa issuance. The Immigration Act provides enforcement powers and penalties to ensure compliance with the legislation.

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MCA

MIGRATION TO AUSTRALIA AS AN INVESTOR (131 visa)

In 1995, Australia introduced a class of permanent residence visa especially designed for professional investors. The Investment Linked Migration Category is a sub-class of the Australian Business Skills Migration Scheme and is known as a Sub-Class 131 visa. To be eligible for this kind of permanent entry visa, applicants will need to show that they are:

- owners or part-owners of successful businesses; or
- professional investors who can demonstrate a track record of managing an investment portfolio.

Professional persons such as doctors, dentists and lawyers who have successfully operated their own practice and can demonstrate that they have invested their surplus assets may be eligible for this type of visa. Professional persons were generally precluded from applying previously under the Business Skills Category.

Key Requirements

- Overall, a successful record of business or investment activity;
- A total of three years experience in the active management of a business or portfolio of eligible investments;

In at least one of the preceding five years the applicant should *either*

- have maintained direct and continuous involvement in the management of a qualifying business in which the applicant has held a minimum of a 10% ownership share; ***or***
- have maintained direct and continuous involvement in the management of an investment portfolio to a value of at least AUD1 million; ***and***
- be prepared to invest for three years in a capital guaranteed designated investment in Australia **and**
- For the two fiscal years immediately preceding the date of application, the applicant (and spouse together) should be able to demonstrate net assets worth at least 50% more than the capital to be placed in the designated investment.

Language Ability & Language Charges

If either you or any adult member of your family unit is assessed as being less than functional in English you will have to pay an English Language Education charge before your visa is granted. Payment of this charge will entitle you to have upto 512 hours of subsidised English language tuition at an Australian Migrant Education Centre after your arrival in Australia. There are centres in most major urban areas of Australia.

Children under the age of 18 years are not subject to a language charge.

DESIGNATED INVESTMENTS

Before your visa is approved as an investment linked migrant you will have to place the nominated investment amount in a 3 year capital guaranteed fund.

A number of Australian state governments have been authorised to offer bonds specifically designed for investor migrants.

State bonds are government guaranteed which means that **payment of interest and repayment of capital is guaranteed by the state government issuing the bond.**

Interest rates may vary from fund to fund and will, in any event, be determined on the day funds are transmitted to the account.

Such bonds are issued in the form of inscribed stock rather than as bearer securities. The bonds are issued at par which means that each A$1000 buys A$1000 face value of bonds.

The issue date is the date on which the investment funds are credited to the registry account and final interest rates - fixed for the duration of the bond - can only be determined on the date funds are received.

Interest is payable every six months and the principal is repayable in full upon maturity (or the next working day thereafter).

The Taxation Implications of Making a Designated Investment

The Australian Taxation Office has advised that income earned from designated investments in Australia are subject to tax under Australian taxation law.

The ATO advises people arriving in Australia for the first time as permanent residents to contact the ATO and apply for a Tax File Number.

As a non-resident (or prior to taking up residence), interest earned on a designated investment will normally be subject to 10% with-holding tax. After taking up residence, interest income will become part of total assessable income for tax purposes.

While there are legal means of minimising tax payable there are also severe penalties in Australia for tax avoidance. All investor migrants should consider seeking professional advice from a qualified accountant about their specific obligations and circumstances. MCA can provide these introductions, at no obligation, as part of its post arrival service to its clients through our Australian offices.

MCA

ELIGIBLE INVESTMENTS UNDER THE INVESTMENT LINKED MIGRATION CATEGORY

Eligible investments which may be considered in determining whether you meet the profile of an investor under the *investment linked migration* category include one or more of the following:

- An ownership interest in an active business;
- commercial loans made to a business (provided they are properly documented);
- cash held on deposit;
- stocks and bonds;
- real estate (excluding your personal residence) which is income producing or which you can show has been purchased for capital gain;
- gold and silver bullion.

Other forms of investment such as antiques, paintings etc cannot be included as eligible investments for purposes of meeting the background requirements of this visa category.

In order to qualify as an eligible investment, you must be able to demonstrate that it is:

- Owned in whole or in part by you and/or your spouse;
- Actively managed by you during the investment period under consideration; and
- An investment in which you are actively involved in decision making concerning its evaluation, the selection of investment options, and its disposal.

Last updated: June 18, 1997

LRM ID: JAW15 SUBJECT: JUSTICE Report on EB-5 Investor Visa Program

RESPONSE TO
LEGISLATIVE REFERRAL
MEMORANDUM

If your response to this request for views is short (e.g., concur/no comment), we prefer that you respond by e-mail or by faxing us this response sheet. If the response is short and you prefer to call, please call the branch-wide line shown below (NOT the analyst's line) to leave a message with a legislative assistant.

You may also respond by:

(1) calling the analyst/attorney's direct line (you will be connected to voice mail if the analyst does not answer); or

(2) sending us a memo or letter

Please include the LRM number shown above, and the subject shown below.

TO: Jeffrey A. Weinberg Phone: 395-3457 Fax: 395-3109
Office of Management and Budget
Branch-Wide Line (to reach legislative assistant): 395-3457

FROM: 2/23/99 (Date)
IRENE BUENO (Name)
DPC (Agency)
456-6558 (Telephone)

The following is the response of our agency to your request for views on the above-captioned subject:

_____ Concur

_____ No Objection

✓ No Comment

_____ See proposed edits on pages _____

_____ Other: _____

_____ FAX RETURN of _____ pages, attached to this response sheet