COMMENTS

REFORMING THE IMMIGRANT INVESTOR PROGRAM OF THE IMMIGRATION ACT OF 1990

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1. INTRODUCTION

Immigration once again is the focus of heated political debate in the United States. Illegal immigration to the United States is increasing rapidly, straining the budgets of states such as Texas and California, which are forced to increase expenditures on social services to support illegal immigrants.¹ Unemployment remains high in many of these states, especially among unskilled workers, and some people blame illegal immigrants for these high unemployment rates.² Governor Pete Wilson of California, long unpopular because of the dismal condition of his state's economy, nevertheless was reelected recently to another term as governor, in part because of his attacks on illegal immigration.³ President Clinton also

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¹ See Jennifer Bojorquez, Strangers in a Strange Land: As Immigrants, They're at the Center of a Bitter and Hot Debate, as Children, They Don't Understand, Sacramento Bee, Dec. 3, 1993, at SC1. The office of the governor of California estimates that illegal immigrants cost the state nearly $3 billion per year. Id.

² See Jaclyn Fierman, Is Immigration Hurting the U.S.?, Fortune, Aug. 9, 1993, at 76.

³ See Bojorquez, supra note 1, at SC1. Governor Wilson has sued the federal government in an effort to force it to pay for the cost of providing services to California's illegal immigrants and has called for a constitutional amendment denying citizenship to children of illegal immigrants who are born in the United States. Id. Governor Wilson's strong stance on illegal immigration is considered to be one of the reasons he was reelected. See
has called for a crackdown on illegal immigration. This renewed focus on illegal immigration has led to calls for a reevaluation of current U.S. immigration policy generally.

Although illegal immigration arguably drains U.S. resources, legal immigration can stimulate economic growth. In order to achieve this goal, Congress recently revised the immigration laws by passing the Immigration Act of 1990 ("the Act"). One of the programs created by the Act that was expected to bring immediate benefit to the U.S. economy is the Immigrant Investor Program ("the Program"). The Program makes 10,000 visas available to immigrants who invest at least $1 million in a new business that creates at least ten full time jobs. Commentators expected the Program to attract nearly $8 billion annually and to create nearly 100,000 jobs each year. So far, however the results of the Program have been disappointing: only 725 people have applied for permanent residency under this program during its first two years and only 296 applications have been approved. Compared to the success that other countries, particularly Canada, have had with similar programs, the results of the U.S. program have been a major disappointment.

This Comment examines why the Program failed and suggests several reforms that could help it reach its potential. Section 2 of this Comment examines the origins of the Program and discusses both the Act and the regulations that govern the Program. Section 3 critiques the Program and analyzes Congressional efforts to increase support for the Program. Section 4 suggests reforms that may increase

Wilson In; Senate Tight, Governor Scores Big Victory, SACRAMENTO BEE, Nov. 9, 1994, at A1.


5 See Fierman, supra note 2, at 76.

6 Id. (noting that legal immigrants benefit the economy by creating jobs and income).


8 See Fierman, supra note 2, at 76.

9 See id. One hundred forty applications have been rejected and the Immigration and Naturalization Service ("INS") has not acted on the rest. Id.
participation in the Program.

This Comment concludes that the primary reasons for the Program's failure are that Congress overestimated the amount that aliens would pay for U.S. visas and that it failed to specify exactly what the goals of the Program should be. This Comment suggests that the two main goals of the Program should be attracting entrepreneurs and increasing foreign investment in the United States. Towards that end, this Comment recommends that two different options be made available to immigrant investors under the Program: either creating a new business or investing in a closely-regulated capital fund that will create new job opportunities. This Comment also argues that the Program should be revised to reduce by half the amount of capital required to participate in the Program. These suggested revisions, and others, would have the effect of lowering the economic threshold for participation in the Program, as well as expanding the range of investment options available under the Program, which, in turn, should increase interest and participation in the Program.

2. THE IMMIGRANT INVESTOR PROGRAM

2.1. Origins of the Program

Since the 1965 reform of the U.S. immigration laws, the primary emphasis of U.S. immigration policy has been on the reunification of families. The 1965 reforms rejected the national quota system established in 1924 and the discriminatory principles upon which it was based. Since 1965, the basic policies underlying U.S. immigration law have not changed. Immigration policy during the early 1980s focused on refugees and illegal immigrants, not on legal

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12 See Marianne Grin & Miguel Lawson, The Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978, 33 HARV. INT'L L.J. 255, 255-6 (1992). The 1924 Immigration Act created a system of national quotas based on the percentage of that nationality in the population of the United States in the 1920 census. Immigrants from some areas, such as Asia, were barred entirely. The 1965 Immigration Act set an annual ceiling of 170,000 immigrants, with no more than 20,000 to come from any one country. This dramatically increased Asian and Hispanic immigration. Id.
immigrants, and culminated in reforms to the immigration laws in 1986 that were intended to exclude illegal immigrants. Throughout this period, there was little call for change in the laws governing legal immigration.

In the late 1980s, however, the United States grew anxious about its position in the global economy. Pressure to improve the international competitiveness of U.S. businesses and workers led Congress to propose legislation intended to aid U.S. businesses competing in the global economy. Congress proposed changes to the U.S. immigration laws relating to legal immigrants as part of its broader effort to improve the U.S. position in the global marketplace.

Proponents of changing the U.S. immigration laws in order to benefit the economy identified both Canada and Australia as models. In 1986, Canada initiated a program that granted visas to foreign investors who had a net worth of at least $500,000 and who had invested at least $250,000 in the Canadian economy. This program was designed primarily to attract wealthy Hong Kong residents, who were anxious about the future of the colony following the 1989 Tiananmen Square massacre and in light of the Chinese government's pending takeover of the colony in 1997. The Canadian program has been a great success: an estimated $2 to $4 billion per year has been invested in Canada by immigrants from Hong Kong and more than 10,000 jobs have been

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13 Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (amending scattered sections of 8 U.S.C.). Congress intended to curb illegal immigration primarily by imposing sanctions on employers who did not verify that the employees they hired were legal residents of the United States. In addition, the law extended amnesty to those illegal immigrants who could prove they were in the United States before 1982 and had remained in the country since that time.

14 All dollar amounts in this Comment are in U.S. currency unless otherwise indicated.


IMMIGRANT INVESTOR PROGRAM

created. Australia also has had success in luring wealthy immigrants with a similar program; over thirty percent of the visas Australia issued in 1990 were to immigrants from Hong Kong. The success of the Canadian and Australian programs led Congress to include the Program as part of the reforms contained in the Act. The Act tripled the number of visas allocated for employment-related immigrants and created the visa category of immigrant investor. The goal of the

18 Anne Swardson, Visas for Sale! (Count Your Fingers): Canadian Migrant Program Under Fire From Some Who Got Burned, WASH. POST, Aug. 30, 1993, at A12. Over 110,000 residents of Hong Kong have immigrated to Canada over the past seven years, and Canadian officials expect the number will increase as the 1997 Chinese takeover of Hong Kong approaches. The western city of Vancouver has had particular success in attracting wealthy Hong Kong immigrants. Twenty-seven percent of the inhabitants of Vancouver are ethnic Chinese and they are credited with revitalizing the city and contributing to the growing importance of Canada’s Pacific coast. See Claiborne, supra note 16, at H1.


20 8 U.S.C. § 1151(a). The 1990 Act creates five categories of employment-based relationships: 1) priority workers; 2) professional workers; 3) skilled, professional workers; 4) certain special immigrants; and 5) investors. 8 U.S.C. § 1153(b)(1)-(5). This Comment is concerned primarily with the last category.

21 Previously, the law allowed immigrants to enter the United States under the E-1 and E-2 treaty immigrant provisions. These two categories allowed an alien of a country with whom the United States had a treaty to enter the United States either to carry on trade between the United States and the alien’s country of origin, or to manage a business in the United States in which the alien had invested a substantial amount of money. These two categories, however, only allowed the alien to remain within the United States so long as the alien was carrying on business activity, and it was very hard to change the alien’s status to permanent residency. See 8 U.S.C. § 1101(a)(15)(E). For a general discussion of immigration provisions available for aliens entering the United States for business purposes, see Gittel Gordon, Immigration Visas Strategies for Foreign Business People Entering the U.S., 25 BEVERLY HILLS B. A. J. 90 (1991); Steven J. Klearman, Nonimmigrant Business Visas After the Immigrant Act of 1990, 28 GONZ. L. REV. 53 (1992-93). For an example of an immigrant in the E-2 category being denied permanent residency, see Han v. Hendricks, No. 90-16164, 1991 U.S. App. LEXIS 29991 (9th Cir. Dec. 10, 1991).

In addition, under the old immigration laws, an investor could immigrate under a nonpreference category, if the investment was at least $40,000 and if the investor hired one U.S. citizen or permanent resident. This nonpreference category, however, was part of a larger pool open to other immigrants in addition to investors and it generally has been filled by
Program was simple: to boost the U.S. economy.22 Through the Program, Congress hoped to lure both capital investment and skilled workers to the United States from abroad while at the same time creating jobs for U.S. workers.

Some members of Congress took exception to the Program because it would admit individuals to the United States whose motives for emigrating were solely economic, rather than patriotic.23 Dale Bumpers of Arkansas, the Program's most ardent critic in the Senate, stated:

I abhor the thought of somebody having a million dollars and sailing right by the Statute of Liberty, whether he cares anything about the country or not. He may be on the lam from the law. He may be anything. But he is not necessarily coming here because he loves Uncle Sugar [sic] and our wonderful flag.24

Senator Bumpers also was concerned that drug dealers or other criminals might use the Program as a means of entering the United States. Finally, Senator Bumpers expressed his belief that increased foreign investment in the United States was dangerous.25

Advocates of the Program, however, noted its economic benefits. They argued that the Program could attract up to $8 billion in capital and create up to 100,000 new jobs each year.26 Members of Congress who supported the Program27


22 See S. REP. No. 55, 101st Cong., 1st Session 22 (1989) ("[The Program] is intended to create new employment for U.S. workers and to infuse new capital into the country, not to provide immigrant visas for wealthy individuals.").

23 These critics failed to recall, however, that immigrants arriving in the early 20th century came to the United States because they perceived an abundance of opportunity. Thus, their motives were primarily economic as well.


25 Id. See also infra section 2.2.


emphasized that immigrant investment was intended to "benefit the U.S. economy." Senator Bumper's attempt to delete the Program from the immigration reform bill ultimately failed.

2.2. Details of the Program

The Act makes up to 10,000 visas available per year for immigrant investors. An applicant for an immigrant investor visa must meet two main criteria. First, the applicant must establish a commercial enterprise that will create no less than ten new, full-time jobs for U.S. citizens or permanent residents, exclusive of the applicant and the applicant's spouse and children. Second, the applicant must invest at least $1 million in the enterprise, although the attorney general may lower this requirement to $500,000 if the enterprise is located in a "targetted [sic] employment area," for which 3,000 of the visas available under the Act are reserved. A "targetted employment area" is defined as any area that has a high unemployment rate (at least 1.5 times the national average) or is a rural area. The attorney general is directed to designate targeted employment areas in consultation with state and local officials.

Simon) (noting that many of the criteria for immigration to the United States under the old law are economic and suggesting there was nothing wrong with imposing economic criteria in the Program); 135 Cong. Rec. S7771 (daily ed. July 12, 1989) (statement of Sen. Kennedy) ("We are talking about new jobs."); 135 Cong. Rec. S7770 (daily ed. July 12, 1989) (statement of Sen. Gramm) ("If people have been successful in business... they then have a right to come here and to practice that business.").


28 See 135 Cong. Rec. S7775 (daily ed. July 12, 1989) (noting that the Bumpers Amendment was defeated by a vote of 43-56, with one abstention).

29 Id.

30 Id.

31 Id.

A "rural area" is defined as "any area other than an area within a metropolitan statistical area or within the outer boundary of any city or town having a population of 20,000 or more (based on the most recent decennial census of the United States)." 8 U.S.C. 1153(b)(5)(B)(iii) (Supp. V 1993). The attorney general may raise the amount of investment required in non-rural areas of high employment to up to $3 million, though this has not yet been done. See 8 U.S.C. § 1153(b)(5)(C)(iii) (Supp. V 1993).
During the debate over the Program, Senator Bumpers expressed concern about the possibility of fraud by drug dealers or other criminals. In part to alleviate this concern, the Act states that when permanent resident status is granted to an immigrant investor, his or her spouse, and/or his or her children under the Program, that status is conditional for the first two years. Within ninety days of the termination of the initial two-year period, the investor must submit a petition to the Department of Justice to convert his or her status to permanent status. The petition must demonstrate that: 1) the immigrant invested the required capital in the established commercial enterprise; and 2) the investor continued to be associated with the enterprise for at least two years. The duty to file the petition rests with the investor; the attorney general is directed to provide notice of the ninety-day period, but failure to do so does not affect the enforcement of this provision. The law imposes criminal penalties on immigrants who fraudulently establish an enterprise in order to enter the United States under the Program.

Although the Act passed and was signed by then-President George Bush on November 29, 1990, the INS did not issue final regulations governing the Program until November 29, 1991, exactly one year after the Act was signed. This delay resulted in uncertainty over the details of the Program and may have contributed to the poor response the Program has received.

The INS regulations generally parallel the requirements set forth by Congress in the Act. The regulations require that the immigrant invest at least $1 million in capital in a

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35 Id.
36 Id.
37 Id.
38 8 U.S.C. § 1325(c) (Supp. V 1993). The law provides for a maximum punishment of five years imprisonment and a $250,000 fine.
40 See infra section 3.1.
41 See 8 C.F.R. § 204.6 (1993).
commercial enterprise. "Capital" is defined as:

- cash, equipment, inventory, other tangible property, cash equivalents, and indebtedness secured by assets owned by the alien entrepreneur, provided that the alien entrepreneur is personally and primarily liable and that the assets of the new commercial enterprise upon which the petition is based are not used to secure any of the indebtedness.42

The regulations initially excluded intangible property, leases, or other forms of indebtedness from the definition of capital. Criticism from commentators led the INS to add these categories to the final regulations, so that a wider variety of capital could be used as an initial investment.43 Under the regulations, the investor also must disclose the sources of his or her capital to prove that the capital was not obtained illegally.44

The commercial enterprise created must be a for-profit activity.45 "For-profit" status can be achieved in one of three ways: 1) creating a new business; 2) purchasing an existing business and reorganizing it "such that a new commercial enterprise results;" or 3) investing in an existing business with a forty percent net increase in either revenues or jobs resulting from the investment.46 The immigrant must show that the

42 8 C.F.R. § 204.6(e) (1993).
43 For an example of such criticism, see Endelman & Hardy, supra note 19, at 673.
44 8 C.F.R. § 204.6(j) (1993).
45 8 C.F.R. § 204.6(e) (1993). Commercial enterprises specifically include: "sole proprietorship, partnership (whether limited or general), holding company, joint venture, corporation, business trust, or other entity which may be publically [sic] or privately owned . . . . This definition shall not include noncommercial activity such as owning and operating a personal residence." Id. This definition, which includes almost all commercial activity, appears consistent with the statute. The definition is, however, subject to criticism on other grounds. See, e.g., DeMoss, supra note 39, at 445 (suggesting that it was not Congress' intent to regulate excessively what type of investments should qualify); Endelman & Hardy, supra note 19, at 674 (suggesting that the regulations actually inhibit job creation).
46 8 C.F.R. § 204.6(h) (1993). If the immigrant invests in an existing business, he or she may avoid the 40% requirement by purchasing the business outright but still must comply with the capital and job-creation requirements of the statute. See Leon Wildes, Obtaining Permanent Residence in the United States Through Investment, at *4 (PLI Litig. &
capital actually has been invested. The investor also may combine his or her resources with other investors, so that the minimum requirements are met for each individual.

Finally, the investor must show that the commercial enterprise will create at least ten jobs for U.S. citizens or authorized permanent residents. This requirement is relaxed when the immigrant invests in a "troubled business." For instance, if a business had a net loss for accounting purposes for at least two years and the immigrant invests enough money so that ten jobs that otherwise would have been lost are maintained at pre-investment levels for at least two years, then this will satisfy the job-creation requirement.

Investors seem generally to be satisfied with these regulations. The INS, however, still has not issued regulations detailing exactly what must be done to remove the two-year conditional status. In 1992, the Department of Justice announced that it was working on regulations detailing how immigrant investors could become permanent residents. Since the INS still has not issued these regulations, the INS has not issued regulations detailing exactly what must be done to remove the two-year conditional status.

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Admin. Practice Course Handbook Series No. 331, 1992), available in WESTLAW, TP-ALL Database.

47 8 C.F.R. § 204.6(j)(2) (1993). The regulations state that:
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 . . . will not suffice to show that the petitioner is actively in the process of investing.

Id. Commentators have noted, however, that the immigrant need not show that the investment actually has been completed—a binding commitment is enough, even when the contract is contingent on the issuance of the visa. See Wildes, supra note 46, at *3.

48 8 C.F.R. § 204.6(g) (1993). This statutory interpretation seems to mean that there is no "one investor, one investment" rule. See DeMoss, supra note 39, at 446.

49 8 C.F.R. § 204.6(j)(4)(ii) (1993). It is unlikely that a foreign investor will take advantage of this category, however, because it would probably take a much larger amount of money to "rescue" a failing business. An investor probably will not buy a company and pay 10 employees for two years simply to obtain a visa, especially when he or she can spend less money and invest in a new business.

50 See Dunn, supra note 26, at A12. One immigration attorney in Hong Kong praised the regulations as "a great liberalization of [previous] regulations." Id. Interest in the Program seems to have increased since the final regulations were approved. Id.

51 See Jane Applegate, Slow INS Response Thwarts Foreign Investment
regulations, investors understandably are nervous about participating in the Program because there is no guarantee that they will be permitted to remain in the United States after the statutory two-year probationary period expires.\(^{52}\)

### 3. Implementation of the Program

#### 3.1. Expectations and Results

When Congress created the Program, many immigration lawyers greeted it with great excitement. Many expected the demand for visas under the Program to exceed the 10,000 available per year.\(^ {53}\) One policy analyst claimed that: \textit{"a lot of people have thought of this as a mini-gold mine."}\(^ {54}\) Anticipating that many people would apply for immigrant investor visas, commentators expected that significant amounts of capital would be raised in the United States. The success of the Canadian immigrant investor program,\(^ {55}\) and particularly the experience of British Columbia,\(^ {56}\) further fueled the optimism in the United States. Many immigration lawyers were eager to establish investment opportunities for the thousands of immigrants whom they assumed would be clamoring to enter the United States.\(^ {57}\) Many individual

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\(^{52}\) See supra section 2.1.

\(^{53}\) Id.

\(^{54}\) Id.

\(^{55}\) See supra section 2.1.

\(^{56}\) See Joel Connelly, \textit{Vancouver Model for Pacific Boom}, \textit{Plain Dealer} (Cleveland), Nov. 25, 1993, at 31. Foreign investment in British Columbia, particularly in Vancouver, has helped the province ride out the recession that severely impacted the rest of Canada. Asian investment also has created a huge real estate boom in the province. Ironically, in the recent Canadian elections, the Conservative Premier of British Columbia was replaced by a candidate of the Reform Party, who supports a curb on immigration. \textit{Id.}

states also prepared to welcome foreign investors. In China, Taiwan, and Hong Kong, U.S. states, businesses, and attorneys attempted to lure potential foreign investors with newspaper advertisements, seminars, and trade shows.

In contrast to these high expectations, the results of the Program so far have been disappointing. Only 177 foreigners applied for immigrant investor visas during the Program’s first year and only 500 applied in its second year. As of July 31, 1993, a total of only 1,036 applications had been filed. In contrast, nearly nineteen million applications for a lottery program that offered 40,000 visas to citizens of thirty-four countries were submitted during that program’s first year. The Program’s failure is glaring, particularly when compared to the relative success of the Canadian immigrant investor program.

that attempted to identify rich overseas investors who would be interested in the program. The governor and his partner, Pari Sabety, made trips to Hong Kong and Taiwan and spent approximately $120,000 on their efforts. They did not end up with a single client. See Ted Wendling, Visa Venture No Ticket to Success: Information Expert Calls Celeste’s Claims to Investors Untrue, PLAIN DEALER (Cleveland), Sept. 26, 1993, at 16A.

58 See Leung, supra note 17, at A1. The lieutenant governor of California, Leo McCarthy, headed an effort by California to attract investors to the state. California was mired in a deep recession at the time and already had attracted a large number of Asian immigrants. The effort primarily targeted Hong Kong. Id.

59 See Su, supra note 21, at 64.


61 See Bizjak, supra note 60, at A1.


63 See Mydans, supra note 60, at 18. The lottery program was enacted to achieve greater diversity in immigration, as the 1965 changes to the U.S. immigration laws dramatically reduced the number of visas available to immigrants from certain countries, particularly in Europe. See Grin & Lawson, supra note 12, at 269-73.

64 See Fickle Investors Return to Canada, S. CHINA MORNING POST, Dec. 15, 1993, at 6a (Supp.).
Criticisms of the Program

The Program's failure surprised many observers in the field of immigration law. Other commentators, however, recognized from the outset that the Program was flawed. For instance, many believed that Congress wildly overestimated the desire of foreign investors to come to the United States. Evidently, many legislators thought that foreign investors would seize the opportunity to obtain a U.S. passport, particularly since a U.S. passport is considered the "Rolls-Royce" of passports. But, as one newspaper article put it, "[f]or wealthy investors, the symbolism of the American flag apparently carries less weight than the dynamics of the marketplace."

A comparison of the Program with similar programs in other countries illuminates the reasons the U.S. program has not been particularly successful. For example, Canada requires that its immigrant investors have a net worth of $500,000 and make an investment of only $250,000, or even $150,000 in certain cases. Rather than requiring the investor to hire ten employees, as does the U.S. program, the Canadian program requires investors to hire only one employee. Australia's program requires an investment of only $260,000 for an immigrant under forty years of age. For those who want only to purchase a visa and do not desire a return on their investment, a visa from the island nation of Tonga is available for only $17,500.
The Program is flawed in another important respect. Many critics of the Program, such as Senator Bumpers, argued that the Program would do no more than permit wealthy foreigners to buy their way into the United States. This criticism is not literally true, since the money that the immigrant is required to invest goes into a new company, not to the federal government. There is a vast difference between paying money without any expectation of a return and investing money in a business with the expectation of earning a return on your investment. What Senator Bumpers' criticism actually reveals is that immigrant investors are interested both in earning a return on their money and in obtaining a visa. For those aliens who want to enter the United States simply to invest money, there already is a way into the country—the E-1 and E-2 treaty investment visas allow an immigrant to stay in the United States indefinitely, provided that the immigrant is managing a business in which he or she has invested money.

It is extremely difficult, however, to convert E-1 or E-2 status into permanent residency status. For immigrants who want both to invest and to attain permanent residency in the United States, the Program is intended to be their primary avenue. An additional problem with the Program, however, is that it does not provide a mechanism for most E-1 and E-2 treaty investors to become permanent residents. There are many immigrants who already have entered the United States under the E-1 and E-2 treaty investor programs and have created new businesses. Any E-1 or E-2 investor whose original investment was made before passage of the Act cannot participate in the Program and therefore cannot become a permanent resident under its auspices, even by investing more money in an already-existing business.

The employment mandate of the Program may not produce the types of jobs that Congress envisioned when it created the Program. Because the Program requires the investor to create

74 If a foreigner only wants to buy a visa, the island of Tonga is recommended. See supra note 73 and accompanying text.
75 See supra note 21.
76 See Bulk Farms, Inc. v. Martin, 963 F.2d 1286 (9th Cir. 1992).
a large number of jobs for only $1 million, most of the jobs created are likely to be low paying, minimum wage jobs in the service sector, not the sort of high-wage, high-technology jobs that can provide a good living for U.S. citizens.\footnote{7} The types of business opportunities that have been devised for immigrant investors, such as car washes and hot dog stands,\footnote{8} though they actually may create jobs in the short term, likely will have only a nominal impact on the U.S. economy in the long term.

Another reason for the failure of the Program is not related to the Program itself, but to the U.S. tax code. Once an immigrant becomes a permanent resident, he or she becomes a U.S. national for tax purposes. This means that all of the immigrant’s income worldwide is subject to U.S. taxation—not just income from U.S. sources. Other countries, such as Canada, only tax income that the immigrant receives within that country. This tax policy is another reason why potential investors might choose to invest in a country other than the United States. According to one commentator, this tax issue is the biggest problem with the Program.\footnote{9}

The regulations governing the Program also have been the subject of criticism. A one-year delay in issuing these regulations may have dissipated any momentum generated by the passage of the Act. Although the final regulations were revised to avoid some problems that were identified in the interim rules,\footnote{80} complaints persist. Many commentators argue that the complexity of the regulations, especially the

\footnote{7} This is important because in devising the Program, Congress was motivated primarily by economic concerns, such as creating jobs and increasing investment in the United States. See, e.g., Endelman & Hardy, supra note 19, at 671.

\footnote{8} See Dunn, supra note 26, at A12.

\footnote{7} For a comprehensive analysis of this problem, see Ronald R. Rose, \textit{Fixing the Wheel: A Critical Analysis of the Immigrant Investor Visa}, 29 \textit{SAN DIEGO L. REV.} 615, 617. Even with an E-2 treaty investor visa, an immigrant may be subject to taxation if he or she resides for a certain period of time within the United States.

\footnote{80} The proposed regulations were issued at 56 Fed. Reg. 30,703 (1991). Under the interim rules, there was no provision for investors to combine resources with other investors or to buy and maintain a business, rather than start a new enterprise. INS added these provisions to the final regulations. See Endelman & Hardy, supra note 19, at 673-74; Dunn, supra note 26, at A12.
detailed requirements regarding how capital must be invested under the Program, have discouraged would-be investors.\(^{81}\) Furthermore, the INS has been very slow in processing the few applications that it has received.\(^{82}\)

Finally, the INS's detailed disclosure requirements also have discouraged investors. The disclosure requirements are very burdensome, as the immigrant must reveal the source of all of the capital that is to be invested.\(^{83}\) Also, the information on the investor's application may be disclosed to his or her home country—because of the U.S.'s liberal information sharing policies—thus exposing the investor to new tax liabilities in his or her home country.\(^{84}\)

3.3. The "Regional Center" Pilot Program

Congress itself is aware of the disappointing results of the Program. In 1992, as part of the Fiscal Year 1993 Appropriations Act for the Department of Justice, Congress enacted a pilot program designed to make it easier for certain immigrants to obtain visas under the Program. The pilot program directs the INS to designate approved "regional centers," which are to promote economic growth, increasing both productivity and exports. If an immigrant investor participates in the pilot program, the job-creation requirements of the Program are relaxed; for instance, the immigrant may show that the required ten jobs were created indirectly through increased exports.\(^{85}\)

The statute creating the pilot program did not define "regional center." The INS defines a "regional center" as "any economic unit, public or private, which is involved with the promotion of economic growth, including increased export sales, improved regional productivity, job creation, and

\(^{81}\) See Dunn, supra note 26, at A12.

\(^{82}\) See Applegate, supra note 51, at F9. One application, submitted on Sept. 30, 1991, was not approved by the INS until Feb. 1, 1992. The INS has defended its processing delays by pointing out that it did not initiate the Program and was caught off-guard when Congress enacted the Program. Id.

\(^{83}\) See Rose, supra note 79, at 634-36.

\(^{84}\) Id.

\(^{85}\) See INS Implements New Pilot Program for Immigrant Investors, supra note 62, at 1130.
increased domestic capital."\textsuperscript{86} INS officials have indicated that a "regional center" may be nearly any entity that is organized to benefit a particular geographic region, "ranging from a state government agency to a consortium of exporters."\textsuperscript{87}

In order to qualify as a "regional center," an entity must meet four criteria. First, the entity must describe how the center focuses on a geographic region of the United States and how it will promote economic growth through improved productivity, job creation, and increased domestic capital investment.\textsuperscript{88} Second, the entity must detail how jobs will be created indirectly through increased exports.\textsuperscript{89} Third, the entity must disclose the amount and source of all capital that has been committed to the center, as well as any promotional activities it is engaged in.\textsuperscript{90} Fourth, the entity must show that it will have a positive impact on "the regional or national economy in general as reflected by such factors as increased household earnings, greater demand for business services, utilities, maintenance and repair, and construction both within and without the regional center."\textsuperscript{91} Finally, the proposal must be supported by "economically or statistically valid forecasting tools."\textsuperscript{92} The INS has indicated that it will allow several regional centers to qualify for participation in the pilot program, although it is not clear from the statute whether Congress intended for multiple regional centers to be created, or only one.\textsuperscript{93}

An immigrant participating in the pilot program also must file a petition showing how his or her investment in the regional center will create the required ten jobs, which may include jobs created indirectly through increased exports. The petition can show job creation by "reasonable methodologies," which include "multiplier tables, feasibility studies, analysis of foreign and domestic markets for the goods or services to be

\textsuperscript{86} Id.
\textsuperscript{87} Id.
\textsuperscript{88} See 8 C.F.R. § 204.6(m) (1993).
\textsuperscript{89} Id.
\textsuperscript{90} Id.
\textsuperscript{91} Id.
\textsuperscript{92} Id.
\textsuperscript{93} Id.
exported, and other economically or statistically valid forecasting devices." The immigrant's petition additionally must comply with all of the other requirements of the original Program. If a petition is successful, the INS will grant the investor permanent residency on a conditional basis but if the regional center's approval is withdrawn, the investor's permanent residency also will be terminated, unless the investor can establish continued eligibility under the original Program.

This pilot program is unlikely to increase interest in the Program for two reasons. First, the application for participation in the pilot program is just as complicated as the one required for participation in the original Program. The requirement that ten jobs be created indirectly through exports by using "reasonable methodologies" is complex and subjective and investors are unlikely to feel that obtaining a U.S. visa is worth the effort of trying to meet this requirement. The ten-job requirement in the original Program, although onerous, had the virtue of being a "bright line" test: if ten jobs were created (and other conditions were met), then the application for a visa was approved. Second, apart from a slight relaxation of the job-creation requirement, all of the other problems with the Program still exist. Also, even if the pilot program is popular with investors, there are only 300 visas available under it and demand quickly may outstrip supply. In addition, the effect of the pilot program on the U.S. economy will be minimal, since at most 3,000 jobs will be created under its auspices.

There are, however, some aspects of the pilot program that are encouraging. By approving entities as regional centers, the INS guarantees that an investment in the regional center will be approved, so long as the investor meets the other criteria under the original Program. The regional centers, as part of their effort to attract investment, could streamline the application process by providing a ready-made investment

94 Id.
95 Id.
96 Id.
97 See Rose, supra note 79, at 627.
98 For an analysis of the defects of the original Program, see supra section 3.2.

https://scholarship.law.upenn.edu/jil/vol15/iss4/3
opportunity. Close regulation of the regional centers also could protect investors from fraudulent promoters, which has become a significant problem with Canada's investment program.99

The regional center pilot program is a worthy attempt to increase the number of investors participating in the Program. The scope of the pilot program is too small, however, to increase significantly the number of immigrants who will apply for visas under the Program. More radical solutions are necessary.

4. REFORM OF THE PROGRAM

4.1. What is the Objective of the Program?

One of the main problems with the Program is that it has no clear objective. Is the Program's goal to create jobs, to attract foreign investment, or to encourage foreign investors to emigrate to the United States? One commentator has called the Program "schizophrenic,"100 and another has noted that "Congress has failed to recognize that the twin policy goals of increasing new employment and infusing new capital [into the United States] are separate and not necessarily overlapping."101

An analysis of the legislative history of the Program illustrates this confusion over the proper goals of the Program. In the debate over the Bumpers Amendment, which would have eliminated the Program from the Act, senators cited different purposes for the Program, including job creation,102 encouraging entrepreneurs to emigrate,103 and increasing capital investment.104 The Senate committee report states

99 See infra section 4.2.
100 Wildes, supra note 46, at *1.
101 Lee, supra note 69, at 148-49.
102 135 CONG. REC. S7771 (daily ed. July 12, 1989) (statement of Sen. Kennedy) ("If you are able to get individuals with certain types of skills, that is going to mean more employment for Americans . . . .").
103 135 CONG. REC. S7771 (daily ed. July 12, 1989) (statement of Sen. Gramm) ("We need to bring people to this country who have [entrepreneurial] skills and talents, and can help us create jobs, growth, and opportunity.").
104 135 CONG. REC. S7773 (daily ed. July 12, 1989) (statement of Sen. Simpson) ("What we are doing here is intending to . . . infuse new capital
that the Program "is intended to create new employment for U.S. workers and to infuse new capital into the country."\(^{105}\)

The Program as currently implemented will satisfy none of these goals. If the Program’s primary objective is to create jobs, then the $1 million investment floor actually may impede that objective, either by discouraging creation of businesses that could generate the required number of jobs for a lower initial investment,\(^{106}\) or by encouraging creation of businesses that generate low-technology, minimum-wage jobs, which likely are not the kinds of jobs that Congress sought to create under the Program.\(^{107}\) If the Program’s primary goal is to attract foreign entrepreneurs, then the $1 million investment floor will keep individuals out of the Program who do not have $1 million to invest, but who may, nevertheless, be astute businesspersons.\(^{108}\) Further, the Program does not require immigrants to show that they actually possess any business experience or to demonstrate any past success as an entrepreneur. Finally, if the Program’s goal is to attract foreign capital to the United States, the United States actually may lose money as immigrants who do not have as much as $1 million to invest take their capital and invest in other countries at a much lower entry cost.\(^{109}\)

The primary goals of the Program should be to attract capital and to attract those who know how to use it—in other words, entrepreneurs. Additional jobs would be the inevitable by-product of subsequent economic expansion. Senator Paul Simon of Illinois has stated that "we do not want or need excessive or arbitrary industrial policy tests about what constitutes a worthwhile investment."\(^{110}\) An arbitrary job creation requirement (such as the Program’s ten job requirement) is a form of industrial policy, because it narrows into our economy . . . "}.\(^{105}\) S. REP. No. 55, 101st Cong., 1st Sess. 22 (1989).

\(^{106}\) See Lee, supra note 69, at 162. Lee refers to a franchise developer who states that certain fast-food franchises could be developed for less than $150,000 and employ at least 10 people.

\(^{107}\) See supra notes 78-79 and accompanying text.

\(^{108}\) See Lee, supra note 69, at 162.

\(^{109}\) See supra section 3.2.

the type of investments that an immigrant may make. Also, a worthwhile investment might not generate jobs directly but may create them indirectly, as the regional center pilot program recognizes. One commentator has advocated that two separate investment categories be created within the Program to take into account the dual objectives of increasing foreign investment in and attracting immigrant entrepreneurs to the United States.\footnote{111} This argument underlies the reforms suggested in section 4.3.

4.2. The Canadian Example

Canada's immigrant investor program has been very successful in attracting foreign investment, although estimates of the number of jobs created and the amount of capital invested recently have been revised downward.\footnote{112} Notwithstanding its apparent success, there have been serious problems with this program, which have prompted the province of Manitoba to withdraw from the program\footnote{113} and have led one Canadian newspaper to state, "[b]y all accounts, Canada's immigrant-investor program is a shambles."\footnote{114} By examining these problems, the United States can avoid making the same mistakes.

Under the Canadian program, immigrants can invest their capital in one of two ways: 1) either create their own businesses; or 2) invest in an immigrant investor fund that invests in the Canadian economy.\footnote{115} Problems have resulted from both methods. Many businesses created by immigrant investors actually exist only on paper, with no actual economic

\footnote{111} See \textit{Lee, supra} note 69, at 163-65.  
\footnote{112} See Philip \textit{Lee, Many Asians Abuse Canada's Migrant Investor Scheme, THE STRAITS TIMES, Dec. 23, 1993, World Section, at 9} (hereinafter Lee, \textit{Asians Abuse Investor Scheme}). According to a Canadian audit carried out in 1992, only 5,500 jobs were created from 1986 to 1989 instead of the estimated 8,000, and only $333 million was invested instead of the $833 pledged. Id.  
\footnote{113} See John \textit{Gold, Immigration Door Closes in Canada, S. CHINA MORNING POST, May 30, 1993, at 2.}  
\footnote{114} If It's Broke, Fix It, \textit{CALGARY HERALD}, Oct. 27, 1993, at A4.  
\footnote{115} See Cecil \textit{Foster, Cash-for-Visa Program Takes Heat: Critics Cite Inadequate Regulation, THE FINANCIAL POST (Toronto), Feb. 9, 1993, § 1, at 50.}
activity taking place. Furthermore, the immigrant investor funds are created and policed by the provinces, not the national government, and there have been allegations of corruption and mismanagement of these funds. These allegations have led Canada to issue new regulations requiring prospectuses for foreign investors and annual audits of the funds. Fund managers who disobey these new regulations are subject to criminal penalties.

There also is evidence that criminals have abused the Canadian program. Some observers suspect that the program has been used to launder foreign money. Members of Asian organized crime gangs, particularly the infamous triads that control extortion, prostitution, gambling, drug trafficking, and other illegal activities in Hong Kong, have used the immigrant investor program to gain entry into Canada. They are particularly eager to leave Hong Kong before China takes over in 1997. Canadian law makes it difficult for Canadian immigration officials to reject the applications even of known triad figures, requiring extensive paperwork to deny admission to an applicant.

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117 Canada is a federal nation, composed of 11 provinces and two territories. The provinces are the equivalent of U.S. states.
118 See Foster, supra note 115, at 50. One fund solicited capital from Asian immigrants, promising to invest the money in strip malls. Instead, the $34 million in investments were put in an unsuccessful gold mine in northern Saskatchewan. Id. Eventually, the investors filed suit against the manager of the fund. See Dann Rogers, 'Citizenship for Sale' Programme Criticism Grows, S. CHINA MORNING POST, Sept. 30, 1993, Business Section, at 4; Swardson, supra note 18, at A12.
119 See Rogers, supra note 118, at 4.
120 Id.
121 See Ben Tierney, Dragons At Our Door: Triad Leaders Want to Reside in Canada Before China Takes Over Hong Kong, OTTAWA CITIZEN, Sept. 26, 1992, at B1.
122 Id. Under U.S. law, an immigration official has the authority to exclude any alien who the official has reason to believe seeks to enter to engage in criminal activity, or to exclude any suspected drug trafficker. See Rose, supra note 79, at 637.
4.3. Suggested Reforms

To meet the recommended goals of attracting both foreign investment and immigrant entrepreneurs to the United States, Congress should reform the Program. First, the amount of capital required to participate in the Program should be lowered to $500,000 and to $250,000 for a targeted employment area.\footnote{123} This change would make the Program more competitive with the Canadian and Australian immigrant investor programs,\footnote{124} which vie with the U.S. program in attracting foreign investors. The INS should be given the authority to lower this threshold amount further if the Program continues to be unsuccessful.\footnote{125}

Second, the U.S. program should emulate the Canadian program by permitting an immigrant to invest his or her capital in either of two ways: 1) by creating a new business; or 2) by investing in a government-approved fund that, in turn, would invest the money in job-creating businesses. These two options would fulfill different goals: the former would operate to attract true entrepreneurs and the latter would operate primarily to increase the level of foreign investment in the United States. Certain safeguards, however, should be maintained in order to prevent the type of problems that have plagued the Canadian immigrant investor program.

For immigrants desiring to establish a new business, the current job-creation requirement of the Program should be lowered substantially. This, coupled with a lower initial investment threshold, would attract true entrepreneurs and the types of businesses they could create no longer would be circumscribed by arbitrarily-established requirements. The Program should require, however, that investors show some past business success, or some experience in managing a business, as does Australia’s immigrant investor program.\footnote{126} Additionally, the Program should continue to make an investor’s residency under the Program conditional for two

\footnote{123} For the definition of a “targeted employment area,” see 8 C.F.R. § 204.6(e) (1993).
\footnote{124} See Mydans, supra note 60, at 18.
\footnote{125} Of course, some floor should be set by Congress—perhaps $200,000, half of that in a targeted employment area.
\footnote{126} See Endelman & Hardy, supra note 19, at 682.
years in order to ensure not only the creation but the continuing operation of a bona fide business, thus avoiding the problem of "paper businesses" such as those that have proliferated under the Canadian program.

If an immigrant chooses to invest in a fund, rather than to create a new business, the immigrant should not be required to prove that the fund creates jobs directly. Only investments in funds that are authorized by the U.S. government would qualify under the Program. To receive authorization, the managers of the fund themselves would have to show that the fund is investing primarily in financial activity that creates jobs. This is similar to the job-creation requirements of the regional center pilot program. In order for an immigrant to be able to invest a lower amount of capital ($250,000), the fund would be required to show that it invests primarily in targeted employment areas. Annual audits of the funds should be conducted to prevent fraud and mismanagement. Once the immigrant has proved that he or she has invested the required amount of capital in an approved fund and that the capital came from legitimate sources, he or she should immediately be granted full permanent residency, with no requirement that this residency be conditional for two years. Furthermore, by approving funds ahead of time, the INS will reduce the amount of paperwork and documentation required of immigrant investors participating in the Program.

These changes may not address all of the problems with the Program, but other changes that have been suggested by commentators either are unrealistic or would subject the Program to abuses. For example, changing the federal tax code so that an immigrants' income from U.S. sources only would be taxed in the United States, as one commentator has suggested, is politically unrealistic. Abolishing the

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127 See supra section 3.3.
128 See Rogers, supra note 118, at 4.
129 Although this disclosure requirement may discourage some potential investors, on balance it is necessary to prevent criminals from entering the United States, a problem that has plagued the Canadian program. See supra section 3.2 and infra note 134.
130 Criminals could still be excluded and the residency could be revoked if the immigrant's application is discovered to be fraudulent.
131 See Rose, supra note 79, at 617-29.
disclosure requirements, as the same commentator also has suggested, 133 would increase the likelihood of criminals entering the country through the Program. 134

5. CONCLUSION

To date, the Immigrant Investor Program has not been successful. As it has been shown that foreign investment actually benefits the U.S. economy, efforts to attract foreign investment through the Program should be renewed by reforming the Program. First, the Program's goals should be articulated clearly to reflect dual objectives: attracting both foreign investment and immigrant entrepreneurs. Second, the structure of the Program should be reformed, most importantly by providing the immigrant with two prospective investment options: creating a business that will generate economic activity or investing in an INS-approved investment fund that will generate jobs.

Canada's experience with its immigrant investor program indicates that such programs can be successful. The United States should learn from the Canadian example, however, and ensure that its reforms are not implemented haphazardly and in such a way that they subject the Program to potential fraud and abuse. At a time when sixty-one percent of the public thinks that the United States' open immigration policy should be reexamined, 135 the Program still has the potential to demonstrate that immigrants can be a vital and productive force within the U.S. economy.

132 During the 1992 Presidential campaign, Bill Clinton attacked then-President George Bush for supposedly giving tax breaks to foreign companies operating within the United States. This generally was agreed to be a "powerful image." A tax break for immigrants is likely to be just as unpopular, particularly in the current anti-immigrant climate. See Richard L. Berke, The 1992 Campaign: The Ad Campaign; Clinton: Attacking Policy on Foreign Businesses, N.Y. TIMES, Oct. 23, 1992, at A21.

133 See Rose, supra note 79, at 634-41.

134 Triad leaders in Hong Kong often have large amounts of money, most of it obtained from illegal sources. Canada's experience with its immigrant investor program reveals that foreign criminals will use such a program to try to legitimize their entry into the country. Requiring immigrant investors to disclose the source of their capital may discourage criminals from entering the United States. See Tierney, supra note 121, at B1.

135 See Fierman, supra note 2, at 76.