THE TREATY INVESTOR VISA: CURE OR BAND-AID FOR THE ILLS OF FOREIGN INVESTORS?

INTRODUCTION

United States immigration policy has historically been concerned with family unification, refugee assistance, and curtailing the entrance of undocumented aliens.[1] The alien investor who wishes to start, or purchase, and personally manage a business in this country on a permanent basis has received little serious attention in Congress until recently.[2] While there has been some quarrel with the proposition that increased direct foreign investment is in the national interest,[3]

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1. The preference system controlling visa availability illustrates these immigration priorities of Congress. Excluding "special immigrants" under 22 C.F.R. § 42.37, there are seven classifications of immigrants subject to numerical limitations placed on visas. These include six "preference" categories and one big "nonpreference" category. The six preference categories, in order of preference, are (1) unmarried sons or daughters of American citizens; (2) spouses and unmarried children of legal aliens having permanent residence in the United States; (3) professionals and others of exceptional ability and merit who would substantially benefit the United States economy, culture, and general welfare and are sought by an employer in this country; (4) married children of United States citizens; (5) brothers and sisters of United States citizens; (6) workers who will perform tasks for which American labor cannot be found. 8 U.S.C. § 1153(a)(1)-(6)(1982). Each of these preference categories receives a certain percentage of the 270,000 visa numbers made available each year by the State Department. Immigration and Naturalization Act (herein cited as I.N.A.) § 201(a). The lower numbered categories receive higher preference in distribution of the numbers. Only after the requirements of the preference categories have been satisfied may the remaining visa numbers be distributed to those in the nonpreference category. 8 U.S.C. § 1153(a)(f)(1982).
2. The sponsor of Senate bill 529, which sought to eliminate visas provided for independent immigrants in H.R. 5872, expressed his displeasure with the granting of preference to "fat cat[s]" who want to buy their way into the United States. 129 CONG. REC. S6811 (daily ed. May 17, 1983) (statement of Sen. Dale Bumpers (D-Ark.)). The validity of this perception was questioned by immigration attorney Austin T. Fragomen during a House hearing on consular operations in 1986. "I have never really understood the legitimacy of this issue. Basically, if we divide the law between immigrants and nonimmigrants, the way the law is structured right now, if you want to immigrate to the United States you have to be poor. You know, it's a liability if you're attempting to immigrate to the United States based upon investment—there is no [functioning] category. . . .I suggest to you that anybody who is concerned about people buying their way into the United States merely has to look at the statistics. Virtually all immigrants are basically poor or from limited means." *Consular Operations: Oversight Hearings Before the Subcomm. on Imm., Refugees, and Int'l Law of the House Comm. on the Judiciary,* 99th Cong., 1st Sess. 75 (1986). It is important to note that while over 61% of the immigrants admitted to the United States in 1985 were housepersons, children, or reported no occupation upon entry, IMM. AND NATIONALIZATION SERVICE, 1985 STATISTICAL YEARBOOK 47 (1985), even these immigrants were required to prove they had some means of support and, therefore, would not become public charges upon admission. I.N.A. § 212(a)(15) (1982). Refugees are exempt from this requirement. 8 C.F.R. § 207.3(a) (1988).
3. There are those who posit that increased foreign investment would be harmful to the United States. These concerns were voiced most vociferously during the early 1970's when fears of aggressive investing by newly wealthy oil exporting countries were at their height. *See Current and General Policy Considerations: Hearings Before the Subcomm. on Int'l Finance of the Senate Comm. on Banking, Housing and Urban Affairs,* 93d Cong., 2d Sess. (1974). *See also* INT'L TRADE ADMIN., U.S. DEPT. OF COMMERCE, INT'L DIRECT INVESTMENT: GLOBAL TRENDS AND THE U.S. ROLE 20 (1984). In a 1974 hearing to consider restraints on foreign direct investment in the United States, the executive director of the Council on International Economic Policy stated, "The Administration's review of foreign investment in the United States has led

given the substantial benefits to be derived from these investments,[4] the federal government's attitude toward its promotion through favorable immigration policy is puzzling.

As nonpreference immigrant visas[5] for investors are no longer available,[6] and the ability of investors to immigrate under third or sixth preference categories[7] is limited,[8] many foreign businesspersons have been forced to look to nonimmi-

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us to conclude that there is no sound economic or national security ground for additional restrictions at this time." *Hearings Before the Subcomm. on Int'l Finance of the Senate Comm. on Banking, Housing, and Urban Affairs,* 93d Cong., 2d Sess. 20 (1974) (statement of Peter M. Flanigan). Recent criticism has centered on foreign investors who are increasing imports to the United States, without increasing their companies' consumption within the United States in the form of reinvestment, and worsening this country's trade deficit. *See The Costs of Foreign Debt for the United States and the Third World: Hearings Before the Subcomm. on Economic Stabilization of the House Comm. on Banking, Finance, and Urban Affairs,* 99th Cong., 1st Sess. 61 (1985) (statement of Robert Ortner, Chief Economist, U.S. Dept. of Commerce).

4. In 1985, direct foreign investment in the United States totaled, at the very least, $20.9 billion, or .53% of the United States' gross national product. This figure is believed to be quite below actual investment since it represents dollar amounts of only 350 of the 912 completed foreign direct investment transactions identified by the U.S. Office of Trade and Investment Analysis. INT'L. TRADE ADMIN., U.S. DEPT. OF COMMERCE, FOREIGN DIRECT INVESTMENT IN THE UNITED STATES: 1985 TRANSACTIONS (Sept. 1986); OFFICE OF MNGT. AND BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, THE UNITED STATES BUDGET IN BRIEF: FY 1988, at 112 (1987) (Table 7: Federal Finances and the Gross National Product 1969-1990).

5. *Immigrant* visas are required by aliens who seek permanent residence in the United States. *Nonimmigrant* visas contemplate only a temporary stay. Aliens abroad apply for immigrant and nonimmigrant visas at United States consular offices. 22 C.F.R. §§ 41.110, 42.110 (1987). While the nonimmigrant visa may be valid for a certain length of time, it is the alien's permit (Form I-94 Arrival/Departure Record) which dictates when the alien must leave the United States. The permit, which the alien receives upon inspection at the border, may allow the alien to remain beyond the validity of her visa. Permits are subject to periodic renewal. Failure to depart at the expiration of the authorized stay will render the alien deportable. I.N.A. § 241(a)(9)(A), 8 U.S.C. § 1251 (1982).

6. In 1977, Congressional amendments to the I.N.A. further limited the number of visas available to each preference class per year. I.N.A. Amendments of 1976, Pub. L. No. 94-571, 90 Stat. 2703; 8 U.S.C. § 1153(a) (1982). The demand for visas in the six preference categories soon exceeded their supply. The shortage of visa numbers among the preference classes has naturally led to a more severe shortage in the nonpreference category, with little relief in sight. *See* 1 C. GORDON & H.N. ROSENFIELD, IMMIGRATION LAW AND PROCEDURE: IMMIGRATION, § 2.27h (1987).

7. *See supra* note 1.

8. In order to apply for third or sixth preference status, the potential immigrant must obtain labor certification. As provided at I.N.A. § 212(a)(14), U.S.C. § 1182(a)(14) (1982), labor certification refers to the process whereby the Secretary of Labor determines that:
(a) there are not sufficient workers who are able, willing, qualified . . . and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and
(b) the employment of such aliens will not adversely affect the wages and working conditions of the workers in the United States similarly employed.

This finding by the Secretary of Labor is then certified to the Secretary of State and the Attorney General. *Id.* Labor certification is required of B-1 and H-1 nonpreference aliens. L-1 aliens are precertified. 20 C.F.R. § 656.10. H-1 applicants [pursuant to 22 C.F.R § 41.55(1)] and investors [under 8 C.F.R. § 212.8(b)] are exempt from the requirement.

The Labor Department's Board of Alien Labor Certification Appeals (BALCA) has prevented investors from acquiring labor certifications for jobs in companies in which they are investors. *See* Matter of Keyjoy Trading Co., 87 I.N.A. 592 (BALCA 1987); Matter of Arnger Corp., 87 I.N.A. 54 n.5 (BALCA 1987). Under these circumstances, according to the Board, a good faith review of qualified United States citizens and permanent residents for the position was unlikely.

grant visas as a vehicle for entry. The nonimmigrant visa most useful to alien investors is the E-2 treaty investor visa because it permits the investor to remain in the United States indefinitely. Despite its obvious appeal, the treaty investor visa is not without shortcomings, and, in its present form, is an unsatisfactory instrument for foreign investor immigration.

The note begins by discussing the needs of the foreign investor and outlining the various nonimmigration visas available to him or her. Next the note defines treaty visas in general and then deals with the treaty investor visa in detail, critiquing its weaknesses. Lastly, the note examines proposals made by members of Congress and suggests a compromise mechanism to facilitate investor immigration.

THE ALIEN INVESTOR'S ALTERNATIVES

In response to what traditionally has been perceived as a favorable business climate in the United States, many foreign investors seek to remain in this country to establish and operate their business ventures. Until recently, a foreign investor could immigrate to this country through use of the investor visa provisions for immigrant visas.[9] Unfortunately, however, this is a nonpreference category[10] visa, and visa numbers for this category have been unavailable since 1978.[11] Therefore, foreign investors have had to look to alternative, less accomodating nonimmigration visas.

Nonimmigration Visas

Among the nonimmigration visas available for use by the alien investor are the B-1 business visitor visa, the L-1 intracompany transferee visa, the H-1 temporary worker visa, and the E treaty visa.

In order to qualify for the B-1 visa, the business visitor[12] must maintain a residence in a foreign country[13] as proof of his intention to remain in the United States only temporarily.[14] He must have permission to enter a foreign country upon expiration of his visa[15] and demonstrate that "adequate financial arrange-

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9. The requirements for obtaining this visa appear at 8 C.F.R. 212.9(b)(4) (1988). The alien must have invested, or be actively in the process of investing, at least $40,000 in the American business he will be managing. That business must employ at least one United States citizen or legal alien, not including the investor or members of his immediate family. While most nonpreference category visas require labor certification, regulations provide that an investor is not subject to the requirement. 8 C.F.R. § 212.8(b) (1988). However, in 1988, 22 C.F.R. § 42.91 (a)(14)(ii)(d) (1987) was amended, making a minimum investment of $100,000 necessary for an immigrant investor to avoid the labor certification requirement. *See* 51 Fed. Reg. 21,157 (1986). As this preference immigrant visa has been unavailable since 1977, the impact of this amendment has yet to be tested. *See supra* note 6.
10. *See supra* note 1.
11. *See supra* note 6.
12. As defined at I.N.A. § 101(a)(15)(B), 8 U.S.C. § 1101 (a)(15)(B) (1982) a business visitor is "an alien (other than one coming for the purpose of study or of performing skilled or unskilled labor. . .) having a residence in a foreign country which he has no intention of abandoning and who is visiting the United States temporarily for business. . . ."
13. *Id.*; 9 F.A.M. § 41.25, n.2.1 (1986).
14. 22 C.F.R. § 41.25(a) (1984). All nonimmigrant visa recipients must state their intention to remain in the United States only temporarily, though the maintenance of a foreign residence is not always required.
15. *Id.*

ments have been made to enable him to carry out the purpose of his visit . . . ."[16] The temporary nature of B-1 visa status[17] makes it unsuitable for the needs of the independent foreign investor seeking to remain in the United States indefinitely.

The L-1 intra-company transferee[18] visa is available to foreign individuals who have been employed outside the United States for at least one year immediately preceding the filing of the visa application by a company doing business within the United States.[19] While the applicant need not maintain a foreign residence, he must still persuade immigration officials that his stay will be temporary.[20] The visa is granted initially for three years and then may be extended for only two years more.[21] Savvy small investors have been able to use the lack of a minimum investment requirement for the L-1 in order to enter the United States.[22] The United States Immigration and Naturalization Service (INS), however, has now cracked down on this practice.[23]

H-1 temporary worker visas are granted to aliens of distinguished merit and ability,[24] or professionals.[25] Labor certification is not required to obtain the visa.[26]

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16. *Id.* Generally, this is interpreted to mean that he may not accept employment while in this country. However, in Pereira-Diaz v. I.N.S., 551 F.2d 1149 (9th Cir. 1977), it was held that the establishment of a business is not inconsistent with visitor status. In this case, however, while the opening of a business, by itself, was not enough to render the alien deportable, the nature of the business (a building maintenance firm which probably would require his continued personal supervision) and other circumstances surrounding the opening of the business provided sufficient evidence to conclude that the alien intended more than a temporary stay and was, therefore, in violation of his visitor status. 551 F.2d 1149, 1152.
17. "A B-1 is admitted for any amount of time up to one year which is 'fair and reasonable' to achieve the purpose of the trip. As a practical matter, a grant of more than six months is rare." F.C. GORDON & G. GORDON, IMMIGRATION LAW AND PROCEDURE: PROCEDURE AND STRATEGY § 36.03(2) (1986) [hereinafter GORDON & GORDON].
18. As defined at I.N.A. § 101(a)(15)(L); 8 U.S.C. § 1101(a)(15)(L) (1982).
19. *Id.* While in the United States, the transferee must serve as a manager, executive, or have a position which requires specialized knowledge. *Id.*
20. *Id. See also supra* note 14.
21. 8 C.F.R. § 214.2(l)(15)(i) (1988). An additional extension of one year is available under "extraordinary circumstances." *Id.*
22. In its preliminary comments preceding final rule changes to the L-1 regulation, the INS stated "a self-employed person who wishes to immigrate to the U.S. but does not qualify under the [B-1, E, or H] categories Congress has set forth will frequently attempt to qualify under the L category by setting up a corporation in the United States, giving himself an executive title [e.g., 'president'] and continuing his self employment in the U.S., often with a minimal 'investment,' with no foreign operations abroad and no intent to return abroad. . . .We do not believe that Congress intended the L classification to be used in this manner, and the [amended] regulations are intended to control this abuse." 52 Fed. Reg. 5740 (1987).
23. 52 Fed. Reg. 5738 (1987). The 1987 amendments altered the definitions of manager and executive, 8 C.F.R. § 214.2(l)(1)(ii) (1988), and introduced the concept of a qualifying organization. *Id.* For a discussion of the effects of these changes, see 6 IMM. L. REP. 121 (1987).
24. I.N.A. § 101(a)(15)(H)(i), 8 U.S.C. § 1101(a)(15)(H)(i) (1982). The phrase "distinguished merit and ability implies a degree of skill and recognition substantially above that ordinarily encountered, to the extent that a person so described must be pre-eminent in his field of endeavor, and must be acknowledged as eminent by recognized critics or other experts in the particular field," 3 IMM. L. SERVICE, REPRESENTATION OF PARTICULAR CLIENTS. § 44:8 (T.J. Goger ed. 1985).
25. While the I.N.A. lists various occupations that will be considered "professions", I.N.A. § 101(a)(32), 8 U.S.C. § 1101(a)(32)(1982), there are certain characteristics which will indicate that an individual may be a professional: "(1). . .[S]uccessful completion of a specified course of education on the college or university level, culminating in the attainment of a specific type of degree or diploma, and (2) the attainment of such degree or diploma is usually the minimum

Sponsorship of the applicant by an employer is required and the H-1 alien may only remain in the United States for up to five years.[27] Additionally, a foreign residence must be maintained.[28] Therefore, an alien who lacks distinguished merit and ability, professional-level credentials, or who cannot meet the foreign residency or employment requirements, will not be able to employ this visa.

The last remaining option for the prospective foreign investor is to acquire an E-2 treaty investor visa, generally considered the best available alternative. However, the E-2 visa is far from a perfect solution.

THE TREATY INVESTOR VISA

Treaty Visas In General

The E-2 is called a "treaty visa" because its origins derive from what is commonly referred to as a Treaty of Friendship, Commerce, and Navigation.[29] These treaties ". . . define the treatment each country owes the nationals of the other; their rights to engage in business and other activities within the boundaries of the former; and the respect due them, their property and their enterprises."[30] Treaty visas are only available to nationals[31] of countries with whom the United States has the appropriate treaty.[32]

There are actually two treaty visas: the E-1 treaty trader visa and the E-2 treaty investor visa.[33] However, unless the alien investor principally intends to

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requirement for entry into these occupations." 3 IMM. L. SERVICE, *supra* note 24, § 44:9. Experience may sometimes be used to substitute the education requirement, but these cases are rare. *See id.* at § 44:10.

26. *See supra* note 8.
27. It is the proposed employer who files an H-1 petition on behalf of the prospective employee. *See* F.C. GORDON & G. GORDON, IMMIGRATION LAW AND PROCEDURE: PROCEDURE AND STRATEGY, § 39.01(6)(b) (1987). 8 C.F.R. § 214.2(h)(9)(ii)(1988). An additional extension of one year is available under extraordinary circumstances. *Id.*
28. I.N.A. § 101(a)(15)(H), 8 U.S.C. § 1101(a)(15)(H)(1982).
29. Relevant provisions from the Treaty of Friendship, Commerce and Navigation, February 2, 1948, U.S.-Italy, 63 Stat. 2255, T.I.A.S. No. 1965, 79 U.N.T.S. 171, are provided at appendix.
30. Walker, *Modern Treaties of Friendship, Commerce and Navigation,* 42 MINN. L. REV. 805 at 806 (1957-58). This article is highly recommended for an extensive history behind these treaties.
31. Under I.N.A. § 101(a)(21), 8 U.S.C. § 1101(a)(21)(1982), a national is one owing permanent allegiance to a country.
32. Nations with whom the United States has treaties of friendship, commerce and navigation containing treaty investor provisions are: Argentina, Austria, Belgium, China, Colombia, Costa Rica, Ethiopia, France, Germany (FRG), Honduras, Iran, Italy, Japan, Korea, Liberia, Luxembourg, Netherlands, Norway, Pakistan, Paraguay, the Philippines, Spain, Sultanate of Muscat and Oman, Switzerland, Thailand, Togo, the United Kingdom, Vietnam and Yugoslavia. 9 F.A.M. § 41.41, Exhibit I.
33. Conditions appropriate for the issuance of both treaty visas appear at I.N.A. § 101(a)(15)(e), 22 U.S.C. § 1101(a)(15)(e)(1982), which refers to "an alien entitled to enter the United States under and in pursuance of the provisions of a treaty of commerce and navigation between the United States and the foreign state of which he is a national, and the spouse and children of any such alien if accompanying or following to join him: (i) solely to carry on substantial trade, principally between the United States and the foreign state of which he is a national [treaty trader]; or (ii) solely to develop and direct the operations of an enterprise in which he has invested, or of an enterprise in which he is actively investing, a substantial amount of capital [treaty investor]."

carry on trade[34] between the United States and her country of origin,[35] the E-1 treaty trader visa will be unavailable to the alien.

The E-2 Visa

The advantages of obtaining treaty investor[36] status are many. There is neither a labor certification[37] nor a foreign residence[38] requirement. The investor's spouse and children need not be nationals of a treaty country in order to qualify for the visa.[39] Dependents of treaty investors may also accept employment in the United States without being deemed to have violated their status, though the INS normally will not grant dependents work authorization.[40] The visas are issued generally for four or five years.[41] While the investor's permit may allow only a one or two year stay,[42] it may be extended for one year intervals indefinitely, so long as the investor's activity does not change.[43] Despite these attractive features, qualifying for the treaty investor visa and maintaining that status present stumbling blocks for many who would seek to enjoy its benefits.

The analytical framework employed by consular personnel when faced with an application for an E-2 visa is clearly laid out in the Foreign Affairs Manual (F.A.M.) of the State Department.[44]

> In adjudicating E-2 applications, consular posts should analyze whether:
> (a) The enterprise has the nationality of a treaty country;
> (b) The applicant has invested or is actively in the process of investing;
> (c) The enterprise is a real, operating commercial enterprise;
> (d) The investment is substantial;
> (e) The investment is more than a marginal one solely for earning a living;
> (f) The investor is in a position to "develop and direct" the enterprise;

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34. For purposes of establishing treaty trader status, "trade" means ". . .trade of a substantial nature which is international in scope, earned on by the alien in his own behalf or as an agent of a foreign person or organization engaged in trade, and is principally between the United States and the foreign state of which such alien is a national. . . ." 22 C.F.R. § 41.40(b) (1987).
35. *Id.* At a minimum, 51% of the trade conducted by the treaty trader must be between the United States and the alien's treaty country. *See* 9 F.A.M. § 41.40 n.6
36. 22 C.F.R. § 41.41(a)(1987) defines a nonimmigrant treaty investor as "an alien . . . [who] establishes to the satisfaction of [a] consular officer that he qualifies under the provisions of section 101(a)(15)(E)(ii) of the [I.N.A.] and that: (1) He intends to depart from the U.S. upon the termination of his status; and (2) he is an alien who has invested or is investing capital in a bona fide enterprise and is not seeking to proceed to the U.S. in connection with the investment of a small amount of capital in a marginal enterprise solely for the purpose of earning a living; or that (3) he is employed by a treaty investor in a responsible capacity and the employer is a foreign person having the nationality of the treaty country who is maintaining the status of a non-immigrant treaty investor, or an organization which is at least fifty percent owned by a person having the nationality of the treaty country and, if not residing abroad, maintaining non-immigrant investor status."
37. *See supra* note 8.
38. *See supra* note 14.
39. *See supra* note 33; 22 C.F.R. § 41.41(b) (1987).
40. 9 F.A.M. § 41.41, n.14. However, the working dependent may be denied a later adjustment of status to permanent resident. *Id.*
41. *See* GORDON & GORDON, *supra* note 27 § 37.09(2).
42. *Id.* at § 37.10; 8 C.F.R. § 214.2(e) (1988).
43. 8 C.F.R. § 214.2(e) (1988).
44. The Foreign Affairs Manual is a collection of policy instructions by the State Department interpreting various immigration regulations.

(g) If the applicant is an employee of a treaty investor, the applicant individually qualifies as a manager or a highly trained and specially qualified employee; and

(h) The applicant intends to depart when the investment ends or the applicant's status otherwise terminates.

Unless each question can be answered in the affirmative, the applicant is not entitled to E-2 status.[45]

If the investor is from a treaty country, the nationality of the company he wishes to maintain is still a primary concern.[46] The corporation[47] sought to be established must have more than fifty percent of its stock owned by nationals of a treaty country.[48] If this ownership situation changes at anytime while the business is in operation, the foreign investor will risk losing his treaty status.[49]

The alien must show immigration officials he "has invested or is actively in the process of investing"[50] before he may obtain the E-2 visa. In essence, the alien puts himself at risk before he has any assurance that he will be permitted to remain in the United States and manage his investment.[51] If the alien applies for the E-2 visa at an American consulate abroad and is denied, he has no right to either administrative or judicial review of the decision.[52]

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45. *See* 9 F.A.M. § 41.41, n.1(a). Nationality of a company is ascertained by the nationality of ownership of 50% of the company's stock. 9 F.A.M. § 41.41 n.3.
46. 9 F.A.M. § 41.41 n.1.
47. Concerning the question of incorporation:
> In applying for treaty status, it is preferable for the alien to form a corporation, even if he or she will be the sole owner of the stock, rather than operate the business as a sole proprietor. The existence of a corporation adds to the credibility of the treaty application. In reviewing formal documents as part of the treaty application, such as stock certificates, articles of incorporation, and minutes meetings of the board of directors, the adjudicating officer is frequently impressed by the official nature of the documents.

Ehenpreis, *Treaty Status: Immigration Law's Overlooked Benefit,* 3 L.A. LAW.. 34, 38 (DEC. 1980).
48. 22 C.F.R. § 41.41(a)(3) (1987). In major corporations, ownership of less than fifty percent of the stock by a treaty alien may be sufficient. *See* 1 GORDON & ROSENFIELD, *supra* note 6, § 2.11a(4)(c) (1987); 9 F.A.M. § 41.41 n.9.3.
49. 8 C.F.R. § 214.2(e) (1988). For purposes of that section, the change in business ownership is treated like an unauthorized change of employer; the alien will be deemed to have violated her nonimmigrant status and will be deportable under I.N.A. § 241(a)(9), 8 U.S.C. § 1251(a)(9) (1982). Alien investors must be mindful of the business ownership requirement when considering primary stock offerings or when taking on a new partner. Theoretically, the ownership requirement could hinder the investor's ability to raise additional capital. Also, a problem arises if the ultimate owner of shares is a public company whose stock is widely dispersed. *See* Mailman, *Treaty Traders and Investors*, 44 N.Y.L.J., Sept. 6, 1978, at p. 1, col. 1.
50. 9 F.A.M. § 41.41 n.1(b).
51. ". . . [T]he concept of investment connotes the placing of funds or other capital assets 'at risk' in the commercial sense, in the hope of generating a return on the funds thus risked. If the funds have not been risked, that is, committed to the investment enterprise, and subject to potential or total loss if investment fortunes reversed, then the alien has not yet 'invested' in the sense intended in [I.N.A.] § 101(a)(15)(E)(ii); nor in situations where the alien is 'in the process' will wholly prospective investment arrangements entailing no present commitment of funds suffice. Mere intent to invest does not meet the requirements of the I.N.A." 2 IMM. L. REP. 161, 164 (March, 1983) (quoting a March 13, 1982 cable from the State Department to its consular offices). For a practical discussion of ways in which the alien may avoid loss of the investment, *see* GORDON & GORDON, *supra* note 27, § 37.05(3)(b).
52. 8 U.S.C. § 1104(a). *See also* Licea-Gomez v. Pilliod, 193 F.Supp. 577 (N.D. Ill. 1960), in which a consul's decision to withhold a visa on the grounds of the alien's ineligibility for

Another hurdle the investor faces is establishing whether his investment in "a real, operating commercial enterprise"[53] is "substantial." The State Department and the INS have both declined to specify an amount which will constitute a substantial investment for E-2 purposes.[54] Some guidance is contained in 22 C.F.R. § 41.41 (a)(2) (1987) which states that no visa should issue if the investor seeks to enter the United States ". . . in connection with the investment of a small amount of capital *in a* marginal enterprise . . ." (emphasis added).[55]

The State Department contends that the use of the word "substantial" was not meant to exclude small business investors.[56] Nonetheless, this has largely been the effect.[57] Despite attempts by the Department to propose tests to be used to identify a substantial investment,[58] the tests employed do not lend themselves to

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citizenship was not reviewable and was not a denial of due process. Both administrative and judicial review are available in cases where the application has been filed and denied within the United States, though the scope of judicial review is extremely narrow. *See* Patel v. Minnix, 663 F.2d 1042 (11th Cir. 1981); 8 C.F.R. § 103.5 (1988).

53. The State Department defines a "real, operating commercial enterprise" as "a business venture productive of some service or commodity. It cannot be a ficticious paper organization, or an idle speculative investment held for potential appreciation in value (*e.g.*, underdeveloped land, stocks held with no intent to direct the enterprise, etc.)." 9 F.A.M. § 41.41 n.8.

54. This is somewhat surprising since the I.N.S. had previously set the $40,000 investment minimum in connection with immigrant investor visas. *See supra* note 9.

55. Leonard F. Walentynowicz, speaking as Administrator of the Bureau of Security and Consular Affairs of the Dept. of State, made this comment concerning the regulation: "While . . . no dollar value is set, the thrust of the regulation is to direct the consular officer's attention to the particular investment concerned, and such circumstances must satisfy the consular officer that the investment is of an amount as to establish that the enterprise is commercially viable." *Nonimmigrant Visas: Requirements and Procedures: Hearings Before the Subcomm. on Immigration, Citizenship, and Int'l Law of the House Comm. on the Judiciary,* 94th Cong., 2d Sess. 54 (1976).

56. *See* 9 F.A.M. § 41.41 n.9.3.

57. In Matter of Heitland, 14 I.N. 563 (B.I.A. 1974), an often cited case in this area, the respondent alien ran a delivery business whose main asset was a truck worth $3,400. The Board of Immigration Appeals found this business to be marginal and the investment inadequate within the meaning of 8 C.F.R. § 212(8)(b)(4) [immigrant investor provision]. In so ruling, the court stated, "The investment must be more than a mere conduit by which the alien seeks to enter the skilled or unskilled labor market. Consequently, the investment either must tend to expand job opportunities . . . or must be of an amount adequate to insure, with sufficient certainty, that the alien's primary function with respect to the investment, and with respect to the economy, will not be as a skilled or unskilled laborer." *Id.* at 567. The test articulated by the Heitland court would be difficult to pass by the typical small investor.

Treaty investor status was denied to an alien businessman in Kun Young Kim v. District Director, 586 F.2d 713 (9th Cir. 1978) when the court ruled that the I.N.S. District Director had not abused his discretion in finding the alien's drive-in restaurant business which was producing $1000 per month in profits, was not a substantial investment. The alien's initial investment in the restaurant, in which he employed several people, was $11,500. The restaurant had been in business for only one year.

58. These tests include:

(1) The relation of the investment to the total value of the business. This is said to be most relevant when acquiring an interest in an already established business.

(2) The amount normally deemed to establish a viable business of the type proposed.

(3) In the case of small businesses, a substantial investment is said to entail an amount normally considered necessary to the enterprise.

(4) In order to overcome a possible assumption that the business is marginal and established for the sole purpose of providing him a living as a laborer, the investor in a small enterprise can show that the business will tend to expand job opportunities or that he has substantial income from other sources (largely a restatement of the Heitland test). 1 GORDON & ROSENFIELD, *supra* note 6, § 2.11(a)(4)(c) (1986).

uniform application. The final decision is still discretionary with consular officials. It appears that $100,000 is the minimum investment amount that will insure the granting of the E-2 visa.[59]

The enterprise which an investor alien undertakes in this country must continue to operate[60] and she must continue to direct and develop the enterprise[61] in order for treaty status to be maintained. Consequently, the investor who has plans to eventually retire and remain in this country will find herself in violation of her treaty investor status and eligible for deportation upon retirement.[62]

A desire to retire in the United States also demonstrates that the treaty investor does not have the requisite intent to depart.[63] While the burden is on the foreigner to show his intent to depart, a statement to that effect usually suffices.[64]

PROPOSALS

While attempts to aid the immigration of alien investors have been met with a certain mistrust,[65] some proposals have demonstrated thoughtful consideration of the investor's dilemma.

In 1981, the Select Commission on Immigration and Refugee Policy suggested the creation of a separate independent immigrants category.[66] Implementation of

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59. *See* GORDON & GORDON, *supra* note 27, § 37.05 [4][c] (1987).
60. *See supra* note 53.
61. 9 F.A.M. § 41.41 n.11.
62. 8 C.F.R. § 214.2(e) (1988).
63. *See supra* note 14. The wisdom of requiring a showing of an intent to remain in the United States only temporarily has been questioned:

> For instance, take the case of an applicant applying for an E visa who, say, is an executive of a major corporation. When asked how long he intends to remain in the United States, if his answer is, "I intend to remain in the United States forever," the visa would be denied because he doesn't have the requisite nonimmigration intent. If, on the other hand, he were to reply that he intends to remain in the United States until he retires 20 years hence, and at that point he is going to depart from the United States, then that would be perfectly acceptable; and the E visa would issue.
>
> I strongly suggest that the nonimmigrant intent issue is a major preoccupation of consular officers and the Immigration Service. It is set forth in the statute. I really think, however, it is totally unnecessary.

Consular Operations: Oversight Hearing Before the Subcomm. on Imm., Refugees, and Int'l Law of the House Comm. of the Judiciary, 99th Cong., 1st Sess. 74 (1986) (statement of Fragomen).

64. A recurring issue in E-2 cases is the difficult one of whether the applicant has "an intent to depart." Given the possibility of a lengthy stay to direct his enterprise it is assumed that an applicant will often terminate temporarily those ties to his home which are usually looked to for his intent, *e.g.*, sell his home, take his family with him, close out bank accounts, etc. This E-2 status does not require that an alien provide concrete proof that he has an actual residence or other ties to which he will return. Rather, it is normally deemed sufficient that he express an unequivocal "intent" to return when his E-2 status ends. Therefore, unless a consular officer can identify specific or objective indicia that an alien's intent is to the contrary, that is, to remain in the United States, his statement of intent to return should in most instances be considered to satisfy the regulatory criteria of 22 C.F.R. § 41.41(a)(1)."
Issues in Qualifying for E-2 Treaty Investor Status, 2 IMM. L. REP. 161, 163 (March 1983) (quoting a March 13, 1982 cable from the State Department to all consuls).
65. *See supra* note 2.
66. "The Select Commission recommends creating a small, numerically limited subcategory to provide for immigration of certain immigrant investors. The criteria for the entry of investors should be a substantial amount of investment or capacity for investment in dollar terms substantially greater than the present $40,000 requirement set by regulation [8 C.F.R. § 212.9(b)(4)]." STAFF OF U.S. SELECT COMM. ON IMM. AND REFUGEE POLICY, REPORT ON U.S. IMM. POLICY AND THE NATIONAL INTEREST 131 (1981).

the proposal would have involved the establishment of a floating annual limit for independent investor aliens.[67] The limit would rise or fall according to the country's economic needs.[68]

The ill-fated Immigration Reform and Control Act of 1982[69] partially incorporated the suggestions of the Select Commission by including a provision placing investors in a preference classification for independent immigrants.[70] The plan was criticized not only for pandering to a special interest group, but for requiring *too much* in the way of concessions from alien investors.[71]

A new interest in the barriers to immigration by foreign investors has resurfaced among both lawyers and lawmakers. The American Bar Association's House of Delegates and the American Immigration Lawyers Association (AILA) have recently passed resolutions designed to facilitate immigration to the United States by foreign investors.[72] In Congress, a bill entitled the Immigration Act of 1988, S. 2104,[73] proposes to set aside 5,000 immigrant visa numbers, or four

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67. *Id.* at 384. *See also* Weaver, *Immigration for Investors: A Comparative Analysis of U.S., Canadian and Australian Policies*, 7 B. C. INT'L. COMP. L. J. 113, 120 (1984).

68. STAFF OF THE U.S. SELECT COMM. ON IMM. AND REFUGEE POLICY, *supra* note 66, at 384.

69. H.R. 5872 and S. 2222, 97th Cong., 2d Sess. (1982).

70. (3) Investors —

> Qualified investors who have invested, or established to the Attorney General their intention to invest, substantial capital (in an amount not less than $250,000, set by the Attorney General) in an enterprise in the United States of which the alien will be the principal manager and which will benefit the United States economy and create full-time employment in a high unemployment area (as defined by the Attorney General, after consultation with the Secretary of Labor and as determined at the time of the application for the visa) for not fewer than ten eligible individuals . . . other than spouse and children of such immigrant, shall be allocated any visa not required for the classes specified in paragraphs (1) and (2), but in a number not to exceed 10 per centum of such numerical limitation.

H.R. 5872, *Joint Hearings on H.R. 5872 and S. 2222 before the Subcomm. on Imm., Refugees, and Int'l Law of the House Comm. on the Judiciary and the Subcomm. on Imm. and Refugee Policy of the Senate Comm. on the Judiciary*, 97th Cong., 2d Sess. 46 (1982).

71.

> While we believe that the provision in the independent preference system for investors of substantial sums of capital is a welcome change, we think that the specifics of this proposal will not achieve the desired result. The combination of requirements—an investment of at least $250,000, a location in a high unemployment area, and the employment of at least ten qualifying employees—will only serve to discourage investments that would truly benefit the United States economy. While we do not question the dollar amount established for the investment, we think it is unrealistic to expect that a business enterprise requiring ten employees can be established for anything close to that figure. The ten-employee requirement in effect mandates that the minimum investment range into the millions of dollars . . . . We also believe that the requirement that the investment must take place in a high unemployment area is too restrictive and would hamper rather than aid efforts to use foreign investments as a means to encourage employment.

Id. at 487.

72. The A.B.A. resolution announced that the Association "favors Federal legislation that would reestablish a legal basis upon which foreign nationals who have invested or are in the process of investing a substantial amount, may legally enter and immigrate to the United States in order to manage and direct their investment as lawful permanent residents and that would also create a new nonimmigrant visa classification for principal investors and their key employees." The resolution, adopted August 12 by voice vote, was co-sponsored by AILA. See 64 INT. REL., 967, (1987).

73. S. 2104, 100th Cong. 2d Sess., 134 CONG. REC. § 2215 (daily ed. March 15, 1988). The bill

percent of the proposed worldwide quota if 590,000 visa numbers, for investors.[74] Co-sponsored by Sen. Edward M. Kennedy (D-Mass.) and Sen. Alan K. Simpson (R-Wyo.), the bill requires the alien entrepreneur to invest at least $1 million[75] in a new enterprise and employ a minimum of ten United States citizens or permanent residents[76].

While S. 2104 has easily passed in the Senate,[77] the bill's future is still uncertain.[78] Naturally, the establishment of an independent immigration preference category, thereby removing immigration visas for investors from the oversubscribed nonpreference class, would be an ideal solution. However, should this provision in S. 2104 fail to survive scrutiny in the House, a less drastic proposal may be in order: a restructuring of the treaty investor visa, giving independent investors an easily exercisable immigration option after operating a business in the United States as a treaty investor for a number of years. The requirement that the investor show an intent to remain only temporarily would be eliminated.[79] A minimum start up investment expenditure of $500,000 would be set out by regulation. Upon approval of her application, the investor immigrant would receive conditional permanent residence. During the period of conditional residency, the investor would be required to manage and direct her enterprise and maintain other investment criteria to be set out by regulation. Given the built-in ability to immigrate contained in the restructured treaty investor visa, a requirement that a specified minimum number of American citizens be employed (five, for example), as well as a high unemployment location requirement, seem perfectly justifiable.

A further improvement would be to open up the eligibility for treaty visas not only to countries with whom the United States shares a Treaty of Friendship,

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represents a compromise of previous proposals by Senator Edward M. Kennedy (D-Mass.) and Senator Alan K. Simpson (R-Wyo.). For discussions concerning these prior proposals, see 64 INT. REL. 940 (1987), 64 INT. REL. 1286 (1987), 64 INT. REL. 1394 (1987).

74. "(4) Employment Creation. - Visas shall be made available next, in a number not to exceed 4 percent of such worldwide level or 5,000, whichever is greater, to any qualified immigrant who is seeking to enter the United States for the purpose of engaging in a new commercial enterprise which the alien has established and in which such alien has invested, or is actively in the process of investing, capital, in an amount not less than $1,000,000, and which will benefit the United States economy and create full time employment for not fewer than 10 United States citizens or aliens lawfully admitted for permanent residence (other than the spouse, sons, or daughters of such immigrant) . . . ." S. 2104, 100th Cong., 2d Sess. 134 CONG. REC. S. 2218 (daily ed. March 15, 1988).

75. The dollar amount had been $2 million in the bill's original form, but was cut in half by the Senate Judiciary Committee.

76. *See supra* note 73. Senator Bumpers once again opposed the provisions of S. 2104 designed to accomodate foreign investors. "The issue I want to make is that why on earth would we allow somebody to come into this country because he can produce $2 million [now $1 million] while over 60,000 deserving brothers and sisters are on a waiting list, and cannot get in?" 134 CONG. REC. S. 2126 (daily ed. March 14, 1988). Senator Simpson defended the provision, "If you want to talk about the little guy, talk about the little guy who is going to get knocked out of the bushes because his investor cannot come in and so, if you throw [this provision] out, you have denied 10 U.S. citizens or people with permanent resident alien status or people with work [authorization] in the United States . . . new jobs." 134 Cong. Rec. S. 2127 (daily ed. March 14, 1988).

77. The bill was passed by a vote of 88-4. See 134 CONG. REC. S. 2215 (daily ed. March 15, 1988).

78. *See* 65 INT. REL. 265 (1988).

79. *See supra* notes 14 and 62.

Commerce, and Navigation, but also to nationals of countries with whom there is a bilateral investment treaty.[80] While not a formal Treaty of Friendship, Commerce and Navigation, the Free Trade Agreement between Canada and the United States expressly authorizes the issuance of E treaty visas to Canadians who otherwise meet the visas' requirements.[81]

CONCLUSION

There is much to be gained from increased foreign direct investment in the United States. But without an adequate immigration process by which investor aliens may enter this country and develop their investments, much of this potential gain will remain elusive. Because of the extensive backup in demand for all nonpreference category immigration visas, the chances that the immigrant investor visa will be issued again look bleak. The treaty investor visa has helped to ease some foreign capital into this country's economy, yet its limitations prevent the full exploitation of this rich financial source. Congress must act to tap this resource. Establishment of an independent immigrant category which would include investors, or a restructuring of the treaty investor visa, would go a long way towards this end.

*Victoria Young**

80. The Reagan Administration has actively pursued a policy of increasing foreign direct investment in the United States through these bilateral investment treaties, which are generally entered into with third world countries. For a further discussion of these treaties see Salacuse, *Towards a New Treaty Framework For Direct Foreign Investment*, 50 J. AIR L. 969 (1984-85).

81. F.T.A. Annex 1502.1 (United States of America B) (Dec. 9, 1987).

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APPENDIX
TREATY OF FRIENDSHIP, COMMERCE AND NAVIGATION

ARTICLE I

1. The nationals of either High Contracting Party shall be permitted to enter the territories of the other High Contracting Party, and shall be permitted freely to reside and travel therein.

2. The nationals of either High Contracting Party shall, within the territories of the other High Contracting Party, be permitted, without interference, to exercise, in conformity with the applicable laws and regulations, the following rights and privileges upon terms no less favorable than those now or hereafter accorded to nationals of such other High Contracting Party:

(a) to engage in commercial, manufacturing, processing, financial, scientific, educational, religious, philanthropic and professional activities except the practice of law;

(b) to acquire, own, erect or lease, and occupy appropriate buildings, and to lease appropriate lands, for residential, commercial, manufacturing, processing, financial, professional, scientific, educational, religious, philanthropic and mortuary purposes;

(c) to employ agents and employees of their choice regardless of nationality; and

(d) to do anything incidental to or necessary for the enjoyment of any of the foregoing rights and privileges.

3. Moreover, the nationals of either High Contracting Party shall not in any case, with respect to the matters referred to in paragraphs 1 and 2 of this Article, receive treatment less favorable than the treatment which is or may hereafter be accorded to the nationals of any third country.

4. The provisions of paragraph 1 of this Article shall not be construed to preclude the exercise by either High Contracting Party of reasonable surveillance over the movement and sojourn of aliens within its territories or the enforcement of measures for the exclusion or expulsion of aliens for reasons of public order, morals, health or safety. . . .

ARTICLE X

Commercial travelers representing nationals, corporations or associations of either High Contracting Party engaged in business within the territories thereof, shall, upon their entry into and sojourn within the territories of the other High Contracting Party and on departure therefrom, be accorded treatment no less favorable than the treatment now or hereafter accorded to commercial travelers of any third country in respect of customs and other rights and privileges and, subject to the exceptions in paragraph 3 of Article IX, in respect of all taxes and charges applicable to them or to their samples. . . .

ARTICLE XXIV

7. The provisions of this Treaty shall not be construed to affect existing laws and regulations of either High Contracting Party in relation to immigration

or the right of either High Contracting Party to adopt and enforce laws and regulations relating to immigration; provided, however, that nothing in this paragraph shall prevent the nationals of either High Contracting Party from entering, traveling and residing in the territories of the other High Contracting Party in order to carry on trade between the two High Contracting Parties or to engage in any commercial activity related thereto or connected therewith, upon terms as favorable as are or may hereafter be accorded to the nationals of any third country entering, traveling and residing in such territories in order to carry on trade between such other High Contracting Party and such third country or to engage in commercial activity related to or connected with such trade.