

Northwestern Journal of International Law & Business

Volume 13

Issue 1 *Spring*

Spring 1992

Visas for Sale: A Comparison of the U.S. Investor Provision with the Australian Business Migration Program

Catherine R. Giella

Follow this and additional works at: <http://scholarlycommons.law.northwestern.edu/njilb>



Part of the [Immigration Law Commons](#), and the [International Trade Commons](#)

Recommended Citation

Catherine R. Giella, Visas for Sale: A Comparison of the U.S. Investor Provision with the Australian Business Migration Program, 13 Nw. J. Int'l L. & Bus. 209 (1992-1993)

This Comment is brought to you for free and open access by Northwestern University School of Law Scholarly Commons. It has been accepted for inclusion in Northwestern Journal of International Law & Business by an authorized administrator of Northwestern University School of Law Scholarly Commons.

Visas For Sale: A Comparison of the U.S. Investor Provision With the Australian Business Migration Program

Catherine R. Giella

I. INTRODUCTION

On November 29, 1990 President Bush signed the Immigration Act of 1990, approving the most overwhelming changes in U.S. immigration law in forty years. The traditional goal of family reunification remains the primary focus of U.S. immigration policy, but the number of visas granted for employment-based immigrants has been increased from 54,000 to 140,000 annually beginning October 1, 1991. This shift in focus is an attempt to meet the requirements of the U.S. labor market which needs highly skilled aliens with advanced degrees or extraordinary ability in the arts and sciences. The most controversial aspect of the new Act is the creation of a business investor category which grants 10,000 visas to immigrants who invest capital in the amount of a million dollars in this country, and thereby create jobs for at least ten full-time employees.

Although the idea of granting visas based on investment has met heavy criticism in this country, the practice has been common in many other countries, primarily in Canada, New Zealand and Australia, for a number of years. All three of these countries have been highly successful in attracting immigrants, primarily from Asia, through similar systems of granting visas based on investment. The number of investors taking advantage of these types of programs has increased significantly since the British Government announced that Hong Kong would revert to Chinese control in 1997. Many wealthy Chinese business people have taken advantage of such programs to move their wealth and their families to a

more stable environment and have benefitted the immigrating country with an influx of capital, employment and technology.

The United States decided to update its immigration policy not only to meet the demand for high-skilled employees in this country, but also to take advantage of the number of wealthy people looking to emigrate. It is noteworthy that as the United States' program was finally being put into effect, the Business Migration Program (BMP) in Australia was being canceled. This paper is an attempt to evaluate the United States' new investor program based on a comparison with Australia's failed system.

The thesis of this paper is that in order for an investor program to be successful, the program must strike a careful balance between meeting the needs of the immigrant investors and those of the welcoming country and its citizens. The analysis proceeds by briefly looking at the history of immigration in both countries and then focusing on what the interests of the investors and the country are in initiating and taking advantage of such a program. The paper evaluates the strengths and the weaknesses of Australia's BMP in an attempt to determine what led to its demise, and then applies its conclusions to the United States' new program in order to predict its success and to make recommendations for its improvement. This analysis demonstrates that the Australian system failed because it was too focused on meeting the needs of the investors, and in the process failed to uphold a positive public perception of the program. The U.S. investor program, on the other hand, will be ineffective because it fails to allow enough flexibility to meet the interests of the investor and focuses too much on the interests of the United States.

II. AUSTRALIA'S IMMIGRATION HISTORY

Australia's colonization began in 1788 with the first arrivals of English convicts and their jailers. The use of Australia as a penal colony continued for a number of years. Eventually, organized migration and settlement programs began to arrive from England, Ireland, Scotland and Wales. The 1850's gold rush attracted immigrants from all over the globe, particularly from China, which prompted a desire by the European settlers to begin controlling immigration. In fact, the desire to control immigration was one of the primary reasons why the Australian states joined together in a federation in 1901.¹ One of the first statutes to be enacted by the federation was the Immigration Restriction Act of 1901.

The Immigration Restriction Act became known as the "White

¹ Patricia Hyndman, *Australian Immigration Law and Procedures Pertaining to the Admission of Refugees*, 33 MCGILL L.J. 717, 718 (1988).

Australia Policy" because it forced immigrants to take a dictation test of not less than fifty words in any European language. Basically this test excluded any non-white immigrants.² This restrictive policy was in effect until after World War II when the government finally loosened some of the tight restrictions. The eventual outcome of allowing immigration to non-Europeans was the enactment of the Migration Act of 1958.

This Act conferred wide discretionary powers on the Minister of Immigration and Ethnic Affairs and has remained in place for the past thirty years as the main statute controlling immigration. In 1976 the Entrepreneurial Migration Category or Entrepreneur Program was first introduced as a push to attract European and U.S. business people to migrate to Australia. Under this program, a business person required only minimal evidence of a business background and \$A30,000 for transfer to Australia.³ This program remained in effect until 1981 when it was replaced with the Business Migration Program (BMP), which existed until August 1991.

III. OVERVIEW OF THE BUSINESS MIGRATION PROGRAM

The main objective of the BMP was to attract successful business people to settle permanently in Australia and contribute their expertise and capital to business ventures that were likely to achieve one or more of the following: 1) create or maintain employment, 2) introduce into Australia new or improved technology for the production of goods or services, 3) produce goods for export, or 4) produce goods or services to replace goods or services being imported.⁴ There were four requirements which an investor had to meet in order to qualify for the BMP. First, the investor had to provide evidence of having a successful business background, business skills or technical knowledge. This could be demonstrated by providing a curriculum vitae and a summary which indicated the investor's business intentions and how these intentions met the objectives of the program. Second, the investor had to indicate realistic plans to establish, or take part in a business in Australia that would meet the objectives of the program.

The third requirement was to transfer to Australia personally owned and unencumbered business capital as follows: 1) applicants aged thirty-

² *Id.*

³ Michael Bonney, *Economic Migration: What is the Likely Net Cost Benefit to Australia?*, 64 *LAW SOC'Y J.* 63, 65 (1990).

⁴ DEP'T OF IMMIGRATION, LOCAL GOVERNMENT AND ETHNIC AFFAIRS, *BUSINESS MIGRATION PROGRAM: PROCEDURES ADVICE MANUAL* § 2.1 (2d ed. Mar. 1990) [hereinafter *PROCEDURES ADVICE MANUAL*].

nine years and under, \$A350,000⁵; 2) applicants aged forty to fifty-seven years, \$A500,000⁶; and 3) applicants aged fifty-eight years and over, \$A850,000⁷. Finally, the investor had to show additional personally owned and unencumbered funds and assets to cover settlement costs. If an applicant intended on settling in Sydney or Melbourne, he or she needed a minimum of \$A150,000⁸. If he or she intended on living anywhere else in the country, the required minimum amount was \$A100,000.⁹

Prior to 1988, the application process was quite straightforward. An interested investor would make preliminary inquiries with either a lawyer, an accountant or a migration agent who would prepare an application and then submit it to the Department of Immigration, Local Government and Ethnic Affairs, (DILGEA). Based on DILGEA's assessment, the candidates would be approved based on whether they had met the objectives of the program. In November 1987, the Minister of DILGEA announced that as of January 1, 1988, a scheme would take effect to accredit agents not only to prepare applications, as previously done, but also to carry out the departmental assessment of those applications.¹⁰ This was done in order to handle more quickly the large amount of applications. It is appropriate at this time to explain the accredited agent scheme since the United States has nothing similar to this type of program.

Accredited agents were persons or companies that entered into a contract with the DILGEA for the purpose of attracting and counselling prospective applicants under the BMP. The Accredited Agent Scheme (AAS) was introduced as a self-financing means of providing counselling services and assessing applications for business migrants.¹¹ The system was self-financing because the agents would enter a twelve month renewable contract with the government under which the agent was required to (1) pay \$A4000 to the government in consideration of the use of the BMP logo, and (2) an additional \$A500 for each application submitted on behalf of a client.¹²

In order to be eligible for agent accreditation the person or company

⁵ Approximately \$259,000.00 in U.S. dollars using the exchange rate as of January 13, 1992.

⁶ Approximately \$370,000 in U.S. dollars as of January 13, 1992.

⁷ Approximately \$629,000 in U.S. dollars as of January 13, 1992.

⁸ Approximately \$110,000 in U.S. dollars as of January 13, 1992.

⁹ The amount in U.S. dollars would be approximately \$74,000 as of January 13, 1992.

¹⁰ Paul Baker, *Business Migration*, LAW INST. J. at 833, 833 (Sept. 1988).

¹¹ PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA, JOINT COMMITTEE OF PUBLIC ACCOUNTS, REP. NO. 310, § 6.5 (June 1991) [hereinafter REP. NO. 310].

¹² *Id.* at § 6.10.

had to be registered in Australia, have effective control of the agency, be an Australian citizen, be professionally qualified and be able to assess the business background and viability of the applicant, be of good character and be registered to act as a migration agent under the terms of Division VI of the Migration Act 1958.¹³ Prior to 1988, the agents were strictly involved in counseling the applicants and preparing the applications to be submitted to the DILGEA. The rationale behind allowing accredited agents to perform the actual assessment of the applicants was that this system would be quicker and that the accredited agents were more likely to predict the success of the investor's business because the agent had a business background.¹⁴ Technically, the DILGEA was supposed to make the final decision on each applicant, but many critics of the accredited agent system have suggested that DILGEA acted merely as a rubber stamp. As explained in greater detail below, the Accredited Agent Program was one of the reasons that the BMP failed. In its attempt to make the process as easy and quick as possible for the investor, the Australian government failed to take precautions that would protect the interests of the country.

IV. THE DEMISE OF THE BMP

On July 25, 1991, the Minister for Immigration, Local Government and Ethnic Affairs announced that as of August 2, 1991 the Business Migration Program would be discontinued. The question to be answered is why, if the program was so successful in attracting foreign capital into the country, was it considered a failure? The answer is that although the program met the needs of the immigrant investors (discussed in Part A, below), it did not meet the needs and best interests of the Australian people (discussed in Part B, below).

A. The BMP Met the Needs of the Immigrant Investors

In explaining why the BMP did meet the needs of the immigrant investor, the first step is to look at what the typical immigrant investor is looking for when he or she decides to emigrate. These needs and interests may be arranged into four main categories: 1) a stable economic and political structure, 2) a sustainable market for their product or business, 3) a comfortable social environment, and 4) a low risk/reward analysis.

The first category is quite obvious. Most investors who are interested in emigrating do so because they fear the instability of their native

¹³ Baker, *supra* note 10, at 833.

¹⁴ *Id.*

country's political or economic situation. The perfect examples of this are the Hong Kong citizens who are emigrating en masse based on their apprehensions regarding the political and economic climate after the transfer of Hong Kong to Chinese control.

The second category is also a fairly obvious interest of an investor. A successful business person will look for a country in which he or she will either have a market for his or her product or service, and where he or she will have the natural resources available to produce the product. Some factors to be considered in determining whether or not a country meets this requirement is whether there is a growing population, whether the country has an abundance of natural resources, whether there are skilled laborers available to work in the investor's particular industry or business, and whether there is an abundant supply of this type of industry or business in the country already.

Third, an investor will look at the social environment of the country to which he or she is considering immigrating. Will the investor feel comfortable with the culture? Will the people of the country welcome the immigrant investor or will they resent the investor's presence? These questions are crucial when considering whether an investor will want to relocate his or her children and spouse to the new country.

Finally, an immigrant will consider whether the possible rewards involved in investing in a foreign country outweigh the possible risks imposed by the immigration requirements. If the rewards are high and the risks low, an investor will quickly look to emigrate to this country. If the rewards are high and the risks are also high, the investor will probably refrain from emigrating to this country; as will the investor if the rewards are low, regardless of whether the risks are high or low. This benefit/risk analysis varies greatly from country to country depending on the requirements of the program. The investor will look at a number of factors: the restrictiveness of the investment requirements, whether the conferred residency status is conditional or permanent, the autonomy of the investor's business, and the consequences if the investor cannot meet the specified requirements of the program. These factors are all crucial factors which the investor must weigh before deciding where to emigrate.

Based on these categories, there is sufficient evidence to suggest that the Business Migration Program met the needs of the immigrant investors. This paper focuses primarily on an analysis regarding the last category because Australia and the United States have a fairly similar work force, political structure, economy and society. Australia is a country with a fairly stable economy and political structure. It is also a country with an abundance of natural resources, particularly mineral and ore de-

posits. In addition, Australia is a growing country with an educated work force. The interesting comparison here is the risk/reward analysis because this category is the one in which Australia and the United States greatly differ.

The rewards under the BMP were great in comparison to the amount of risk involved, and thus the program was successful in meeting the needs and interests of immigrant investors. The program's greatest strength was its flexibility regarding the minimum investment requirement and other goals of the program. The Australian program recognized that younger entrepreneurs normally do not have the amount of available capital that older investors do, yet the program appreciated the fact that these younger, energetic business people were the type of individuals that the country was seeking. Therefore, the program included a graduated minimum investment requirement based on age.¹⁵

There was also no requirement regarding the creation of employment even though the creation or retention of jobs was one of the objectives of the program. This was because an investor had the option of meeting one *or* more of the four objectives of the program. If the business venture would not create or retain employment, the visa would still be granted if the venture would introduce new or improved technology, stimulate exports, or replace imports.¹⁶ This gave the program a large amount of flexibility. For example, if the immigrant wanted to invest in a company that was already established in Australia and the investor had new and improved technology that would help to reduce imports in that industry, the venture would be allowed even though no new jobs would be created. In the long term, the goals of providing new technology and reducing imports should be as valuable to an economy as creating new employment. Thus, this type of venture was not prohibited simply because it failed to meet one of the objectives of the program.

The program also contained little risk to the investor because the investor was given permanent residency status as soon as the funds were transferred to the country. There was no conditional period where the investor had to prove that the venture would be successful before the government granted permanent residency. The investor was not at risk that he or she would invest the minimum amount (\$A350,000, \$A500,000 or \$A850,000) and then fail to be given permanent residential status because he or she had failed to meet another requirement of the program.¹⁷ There were also no civil or criminal penalties brought against

¹⁵ PROCEDURES ADVICE MANUAL, *supra* note 4, at § 3.1.

¹⁶ *Id.* at § 2.1.

¹⁷ *Id.* at § 5.2.15.

the investor if the funds were not invested as indicated in the proposal, or if it was proven that the funds had come from an illegitimate source. If fraud was detected, the immigrant was simply deported.

Once the venture had been approved and the visa granted, the investor was given autonomy regarding how the venture should be implemented, subject of course to Australian rules and regulations. This gave the investor the freedom to establish the company as he or she wished without government intervention or surveillance. (As will be mentioned later, this was also one of the main problems with the program.)

In addition to the great amount of flexibility which decreased the amount of risk involved for the investor, the large number of individuals who took advantage of the program suggests the program's success in meeting the needs of the immigrant investors. Up to and including fiscal year 1988-89, a total of 6,637 principal applicants from over sixty countries entered Australia under the Business Migration Program, bringing with them 19,920 dependents.¹⁸ These investors transferred over \$3.3 billion since the beginning of the program.¹⁹ From July 1989 through May 1990, 3,138 applications were lodged and 2,272 visas were issued to investors.²⁰ These investors brought with them 9,456 dependents,²¹ and were expected to transfer almost \$2 billion into Australia.²² The majority of the visas went to individuals from Hong Kong, Malaysia and Indonesia.²³ The fact that so many people took advantage of the program suggests that it met the needs of those individuals seeking to emigrate.

B. The BMP Did Not Meet the Needs of the Australian Public

If the program was so successful in meeting the investors' needs, why was it canceled? This question relates to the second part of the thesis that a program is only successful if in addition to meeting the needs of the investors, it also meets the needs of the country and its people. The Australian Business Migration Program failed to meet the needs of the Australian people and thus was canceled. Presently, the Australian legislature is attempting to put together a new program that will meet both of these crucial requirements.

¹⁸ Gregory M. Clement, Note, *The New Job-Creating Investor Visa Category: Legitimate Spur to Investment or a Sell-Off of U.S. Citizenship to the Highest Bidder?*, 24 GEO. WASH. J. INT'L L. & ECON. 195, 224 n.186 (1990).

¹⁹ *Id.* at 224.

²⁰ *Austrade-IBA Profile Australian Industry for the Potential Business Migrant*, BUSINESS MIGRANT (Official Journal of the Australian Migration Consultants Ass'n), at 8, 8 (Aug. 1990) [hereinafter BUSINESS MIGRANT].

²¹ *Id.*

²² Bonney, *supra* note 3, at 66.

²³ BUSINESS MIGRANT, *supra* note 20.

The first question is, what are the needs of the Australian people? There are two main goals which the people of any country consider when regulating immigration policies: the enhancement of economic conditions and improvement of social conditions. Immigration improves or benefits a society by reuniting families, providing diversity of cultures, and providing a sense of goodwill among citizens by allowing refugees from impoverished or totalitarian nations into their country. Immigration improves economic conditions by recruiting highly skilled individuals. These skilled employees increase efficiency and technology in the affected industries, thereby increasing the profits earned in these industries and generating new capital. In addition, immigration creates an influx of capital into the country because the immigrants often bring with them large amounts of money and other assets. This influx of capital often creates jobs and reduces imports.

While it is obvious that the BMP provided an injection of capital into the Australian economy, the program lacked the legitimacy of the Australian people. Constant allegations of widespread fraud and connections with organized crime created a general dislike of and apprehension towards the program.²⁴

There were three main problems with the BMP which created this general apprehension: the inherent conflict in the Accredited Agent Scheme, the lack of adequate follow-up and monitoring of the program, and the constant state of flux regarding the regulations which controlled the program.

1. The Accredited Agent Scheme

As the BMP became more popular, the system of accreditation was introduced as a way of fast tracking applications so that an investor could get through the immigration process more quickly and efficiently. As mentioned previously, an accredited Business Migration agent was a person or company authorized by the Australian Government to act on the investor's behalf to advise and counsel the investor on how he or she could make a successful application under the program. In order to qualify as an accredited agent, the individual or company had to meet certain requirements and attend a two day, government sponsored course intended to familiarize prospective agents with DILGEA requirements.²⁵ The initial hope was that the agents would assist the investor and his or her family in settling in Australia and establishing his or her business.

Under the accepted procedure, the accredited agent submitted the

²⁴ REP. NO. 310, *supra* note 11, at § 7.2.

²⁵ Baker, *supra* note 10, at 834.

application for the investor and certified to the embassy or consulate that the application met the requirements of the program. Applications handled by agents were normally processed more quickly and did not require any direct contact between the investor and the Australian Government office.²⁶ The applicants preferred accredited agents over governmental officials because they provided a whole range of services, including guidance on where and how to set up a business, how to transfer funds to Australia, tax advice and advice on how to establish a home.²⁷

In return for these services the applicant paid the agent a fee in addition to the application fee paid to the government. The agent's fee was discretionary, based on the type of services the agent provided to the investor.²⁸

When the press began to question the effectiveness of the Migration Program and the Accredited Agent Scheme in particular, the Government authorized an inquiry under the auspices of the Australian Joint Committee of Public Accounts. Their report concluded that there were three main problems with the Accredited Agent Scheme: 1) the agents were delegated authority by the Commonwealth to assess migration applications, yet the agents were responsible to their clients and not to the Commonwealth; 2) the scheme was introduced too quickly and was not well thought-out; and 3) competition developed among agents for clients due to the overwhelming number of agents.²⁹

a. An Inherent Conflict of Interest

The most apparent problem with the scheme was that it created an inherent conflict of interest. The agent was paid by the investor for counseling on how to complete a successful application,³⁰ yet the accredited agents were making determinations about the applicants they counseled. The government conceded that this was a "basic conceptual flaw in the AAS."³¹ The government had delegated its authority in granting visas to the private sector, yet the private sector agents owed their allegiance to their clients and not to the Australian Government.

In addition, although it was not intended that decision making on

²⁶ AUSTRALIAN DEP'T OF IMMIGR., LOC. GOV'T & ETHNIC AFF., USING AN ACCREDITED BUSINESS MIGRATION AGENT (Sept. 1989).

²⁷ *Id.*

²⁸ *Id.*

²⁹ REP. NO. 310, *supra* note 11, at 48.

³⁰ Hon. Gerry Hand, Minister for Immigration, Local Government and Ethnic Affairs, *New Category for Business Migrants*, Media Release July 25, 1991 [hereinafter *New Category*].

³¹ REP. NO. 310, *supra* note 11, at § 1.18.

cases certified by accredited agents be one of rubber stamping³², the system was susceptible to exactly that type of abuse. After the agent had gone through the process of checking on the applicant's business experience and assessing whether the client had met the objectives of the program, it was highly unlikely that the Government would go through the whole process again. Thus, the agent wielded a great deal of discretion to determine 1) whether the applicant had a successful business background, and 2) whether the applicant's intended venture would meet the requirements of the program. The fact that the agent had such absolute discretion, combined with the fact that he or she was paid by the investor, contributed to the perception that the agents were allowing unqualified investors into the country. The agents were profiting from each investor who was granted a visa and the government had no procedure for reviewing decisions.

b. The AAS Was Introduced Too Quickly

The second major problem identified by the Committee was that the program was implemented too quickly and was not well thought-out. Parliament approved the AAS in August 1987 and implemented the program on January 1, 1988.³³ The Committee noted that the "brief lead time prevented the development of a clear concept of exactly how the AAS was to work."³⁴ This lack of preparation meant that DILGEA was forced into the uncomfortable position of developing administrative controls over the AAS while concurrently dealing with the administrative problems which arose when the scheme was implemented.³⁵

One example demonstrating the lack of foresight regarding the AAS is that there were no provisions regarding the sanction or punishment for an agent who acted improperly. The only punishment provided was that the agent's contract would not be renewed at the end of the twelve month period.³⁶ This hardly seems an adequate disincentive to prevent agents from taking advantage of the BMP for their own personal gain.

c. Competition Developed Among the Agents

Lastly, DILGEA was ill-prepared for the large number of individuals and institutions interested in the agent scheme. The Government expected only fifty or sixty applications for accreditation, but received

³² PROCEDURES ADVICE MANUAL, *supra* note 4, at § 4.2.4.

³³ REP. NO. 310, *supra* note 11, at § 6.17.

³⁴ *Id.*

³⁵ *Id.* at § 6.18.

³⁶ *Id.* at § 6.43.

approximately 350 applications at the introduction of the program.³⁷ In June of 1990 there were in excess of 240 accredited business migration agents. Because of the large number of agents involved, it was difficult for the government to keep an effective watch over them.

The large number of agents also created problems because they were competing for clients and actively recruiting investors to take advantage of the BMP. There were three types of accredited agents: 1) those that used accreditation as a means to obtain other forms of business from the investor, such as firms of lawyers and accountants who hoped to continue to work for the investor after they settled in Australia; 2) those that were experimenting in the migration market to see if potential business existed; and 3) those that made their living off the BMP as special migration consultants.³⁸ The agents that fell into the third category comprised between 10% and 20% of the total number of agents, yet they processed the majority of the BMP applications.³⁹

Although the majority of agents were committed to setting and maintaining high standards, there were frequent attacks and criticism by the general public for alleged unethical practices by unscrupulous agents.⁴⁰ The Joint Committee reported that the AAS created a situation in which migrants were favored rather than the national interest.⁴¹ The perception among the general public was that in order to make a profit, these agents were forced to recruit and approve investors who were not appropriate candidates under the program. This in turn created a resentment towards the business investors because many Australians felt that they had entered the country illegally and were receiving the benefits of living in Australia without contributing anything back to the country.

2. *The Lack of Adequate Monitoring Devices*

The second problem with the BMP was the lack of adequate monitoring and follow-up procedures. The individuals who applied and were successful in obtaining a visa were given permanent residency status as soon as the funds were transferred into the country. The system created a lack of incentive for people to actually invest the money to meet the goals of the program. As soon as the money came into the country and the visa was granted, there were allegations of the investors "recycling" their money back out of the country for investment in other countries.⁴²

³⁷ *Id.* at § 6.21.

³⁸ *Id.* at § 6.13.

³⁹ *Id.* at § 6.14.

⁴⁰ Bonney, *supra* note 3, at 66.

⁴¹ REP. NO. 310, *supra* note 11, at § 6.23.

⁴² *Id.* at § 7.24.

The Joint Committee Report concluded that "due to the lack of a system for monitoring the transfer of funds by business migrants before November 1989, the extent of the practice of recycling funds by BMP migrants could not be determined," but that the Committee was "of the opinion that recycling of funds out of Australia ha[d] occurred."⁴³

There were also allegations of investors laundering illegal money into the country through this program, and accusations that emigres were involved in the mafia and other organized crime syndicates. In response to this attack, the Joint Committee stated that there were only a "limited number of instances of penetration of the BMP by identified criminal figures."⁴⁴ But even if only a small number of criminals had entered the country under the BMP, this was enough to create resentment on the part of the Australian people regarding the entire program.

These problems occurred because the only organized ongoing evaluation of the program until 1989 was a voluntary survey questionnaire which the investor was asked to complete and forward to the BMP Section, Central Office.⁴⁵ The purpose of the questionnaire was to evaluate 1) program outcomes against objectives, 2) performance of accredited agents, and 3) effectiveness of BMP promotion.⁴⁶ This voluntary questionnaire was obviously not effective in monitoring how the investor's money was being used. In fact, only 50% of the survey forms were ever filled out and returned.⁴⁷ It was also not effective in catching fraud which may have been perpetrated by the agents. Even though the agents had to be recredited every year, it was highly unlikely that an investor who bribed an agent to certify his application or was involved in some other type of fraud would voluntarily share this information with the government when filling out this questionnaire.

Beginning in November 1989, DILGEA tried to take a more active role in monitoring the BMP by requiring investors who were granted a visa to sign a document, entitled the BMP Declaration. This document authorized DILGEA to obtain information relating to the investor's bank account in Australia for a period of three years from the date the immigrant took up residence in Australia.⁴⁸ However, this monitoring device was inadequate to ensure the integrity of the program. If an investor was questioned about transfers of money out of his or her account, the investor could simply explain that the money had been invested into

⁴³ *Id.* at § 7.28.

⁴⁴ *Id.* at § 7.10.

⁴⁵ PROCEDURES ADVICE MANUAL, *supra* note 4, at § 7.2.1.

⁴⁶ *Id.* at § 7.1.1.

⁴⁷ REP. NO. 310, *supra* note 11, at § 3.27.

⁴⁸ PROCEDURES ADVICE MANUAL, *supra* note 4, at 26.

the business or equipment for the business, etc. It would then be fairly easy to forge receipts and bills for business expenditures. In addition, it does not appear that the Australian government consistently used this device to check up on the program. Only about five percent of all Business Migrants' accounts were regularly monitored.⁴⁹ If random checks had been done more frequently, this could have led to the correction of any problems earlier on in the life of the program. This lack of monitoring created the perception that there were no controls over the activities of the business migrants and further devalued the BMP in the eyes of the Australian public.⁵⁰

The criteria used to assess whether a candidate would be granted a visa were also ineffective in determining whether the objectives of the program would be met. These criteria were highly discretionary and esoteric. For example, how does one determine if the applicant had a "successful business background"? Should the emphasis be placed strictly on how profitable the venture was? Or on how many years of experience the applicant had? If this is the case, how many years experience is adequate? These types of criteria were conducive to fraud because it would be easy for the investor to falsify his or her work experience, or for the agent to certify the applicant based on what he or she "felt" was a successful business background if the applicant was willing to pay enough. These issues illustrate the problems inherent in a program which lacked organized requirements and consistent follow-up and monitoring.

3. *The Regulations Were In A Constant State of Flux*

The final problem with the BMP, leading to the general distrust by the Australian people, was that the program regulations were constantly changing, making it hard for anyone to know the requirements and guidelines. Again, this created the perception that unqualified individuals were being assisted by the program. An example of the constantly changing regulations is evident from the mess which surrounded the Migration Amendment Act of December 19, 1989. The changes the Act created and the renumbering of the Migration Act of 1958 necessitated a third reprint of the Act which did not come out until mid-February 1990. The final format of the regulations was unknown until early January 1990.⁵¹ During the interim period, interested parties were forced to make sense of the old Act with the aid of the Amendment Act.⁵² When

⁴⁹ REP. NO. 310, *supra* note 11, at § 1.35.

⁵⁰ *Id.* at § 4.41.

⁵¹ Elizabeth Lee, *The Dramatic Amendments to Australian Immigration Law*, 64 LAW INST. J. 499, 499 (1990).

⁵² *Id.*

the new regulations were finally available, they sold out quicker than they could be amended. From December 19, 1989 to March 23, 1990, there were seven amendments.⁵³ In addition, the Procedure Advice Manuals, which were intended to facilitate a practical understanding of the new legislation, were also subject to the amendments. This required a group of departmental officers to issue further amendments and attempt to redraft a large proportion of the pamphlets.⁵⁴ When changes are occurring this frequently and the government is unable to publish the new regulations quickly, it is extremely difficult to keep apprised of current requirements.

These problems caused by attempting to update the program to meet the needs of the large number of applicants demonstrate that the BMP was *too* successful in meeting the needs of the immigrant investors. The system became overwhelmed by the number of applicants and was unable to effectively follow-up on the investors and the accredited agents. In addition, the regulations, which were constantly changing in order to try and manage the program, ended up adding to the problem. In the end, the Australian people felt cheated by the entire program because they felt that "undesirable" investors were illegally entering their country. This caused annoyance because the business investors were supposed to have been the cream of the immigrant crop. It also led to prejudice against anyone in the program including those immigrants who had made significant contributions to the country and had met the objectives of the program. As the Minister for Immigration, Local Government and Ethnic Affairs stated: "[p]ersistent, often ill-informed criticism has done considerable damage to public perceptions and confidence in business migration and has placed an unfair stigma on business migrants already in Australia".⁵⁵

V. PROPOSED SOLUTIONS

Because of these persistent problems with the BMP, the Australian Joint Committee of Public Accounts was assigned the task of evaluating the program and making recommendations for its improvement. Based on its suggestions, a new "Independent/Business Skills" program is intended to go into effect in early 1992.⁵⁶ Business migrants under this program will probably be subject to a points test which will include

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *New Category*, *supra* note 30, at 1.

⁵⁶ Australian Consulate General, Hong Kong, *Business Migration to Australia*, Media Release, Aug. 6, 1991 [hereinafter Hong Kong Consulate].

credit for their business skills as well as their age and English language skills, and place less emphasis on the transfer of money and capital.⁵⁷ In announcing the wind-up of the BMP, the Government stressed that it was firmly committed to the concept of "providing a way for business people to settle in Australia as part of the migration program."⁵⁸ At the same time, the Government announced the termination of the Accredited Business Migration Agent Scheme, as strongly recommended by the Parliamentary Committee.⁵⁹

It is interesting to note that this Committee also recommended that conditional visas not be given to migrants entering under the new business skills category of immigration. The committee felt that because "no other category of migration carries with it a conditional status, the imposition of a conditional visa on one particular class of visa would act as a disincentive. . . and would defeat the purpose of this category of entry".⁶⁰ This is a completely different approach from the U.S. Government which is a strong proponent of conditional visas.

VI. SUMMARY OF THE BMP

On the whole, Australia was very successful in attracting foreign capital into the country under the BMP. Yet the program failed because the appropriate balance was not struck between accommodating the needs of the investors and the needs of the country and its citizens. The program was heavily weighted in favor of the investors while ignoring some of the basic concerns of the Australian people. The investors who took advantage of the program were given flexible capital amounts and business goals in order to qualify under the program. In addition, their risk was very small because as soon as they transferred the requisite amount, they were given a permanent visa. The Australian people, on the other hand, felt cheated by the program because of a common belief that the investors defrauded the system to gain entry into Australia and then failed to meet any of the requirements of the program which would benefit the country.

Even though the program failed, the United States can learn a great deal about improving its new investor visa category based on a comparison with the Australian system. In this way, the United States can avoid the pitfalls of the BMP, yet take advantage of the success in luring investors to transfer their capital into the country.

⁵⁷ *Id.*

⁵⁸ *New Category*, *supra* note 30, at 1.

⁵⁹ *Id.* at 2.

⁶⁰ REP. NO. 310, *supra* note 11, at § 8.57.

VII. U.S. IMMIGRATION HISTORY

Until the late 19th century, when prostitutes, convicts and Chinese immigrants were banned, the United States had a very open immigration policy.⁶¹ In 1924 a national quota system was instituted which favored immigrants from western and northern Europe.⁶² This quota system continued with the passing of the McCarran-Walter Act in 1952, which maintained the National Origin Quota System over President Truman's veto.⁶³ In addition to maintaining certain quotas, the Act listed a number of ideological reasons for excluding aliens based on their beliefs, politics and sexuality. The last major immigration reform prior to the 1990 Act was the Immigration Reform and Control Act of 1986. The 1986 Act was enacted for the purpose of controlling illegal immigration by requiring employers to verify within seventy-two hours of employment that all new employees were authorized to work in the United States.

VIII. THE IMMIGRATION ACT OF 1990

Unlike the 1986 Act, the purpose of the 1990 Act was to reform legal immigration.⁶⁴ With respect to permanent immigration, the 1990 Act retained family reunification as a major goal, but attempted to achieve a better balance between family reunification and employment-based immigration.⁶⁵ The Act provided a three-tiered immigration system: family-sponsored, diversity-based and employment-related. Prior to this Act, an investor was unable to immigrate to the United States in order to establish or purchase an existing business. Investors were only granted visas if there were remaining issuable visas that had not been granted to preference applicants such as applicants with family relationships.⁶⁶ If visas were available, the investor was required to transfer \$40,000 or more into a U.S. business that would employ them as principal manager and that would hire at least one U.S. worker.⁶⁷ In reality,

⁶¹ Pamela Cowan & Steve Miller, *The Immigration Act of 1990 - A World of Possibilities*, WASH. ST. B. NEWS, 19 (Mar. 1991).

⁶² THOMAS ALEINIKOFF & DAVID MARTIN, *IMMIGRATION: PROCESS AND POLICY* 52 (2d ed. 1991).

⁶³ Cowan & Miller, *supra* note 61.

⁶⁴ Charles C. Foster, *The New Immigration Act of 1990: Major Reform of Legal Immigration*, 28 HOUS. LAW. 26, 26 (1991).

⁶⁵ 56 Fed. Reg. 11,705 (1991) (to be codified at 20 C.F.R. 655) (proposed Mar. 20, 1991).

⁶⁶ Gregory M. Clement, Note, *The New Job-Creating Investor Visa Category: Legitimate Spur to Investment or a Sell-Off of U.S. Citizenship to the Highest Bidder?*, 24 GEO. WASH. J. INT'L L. & ECON. 195, 196 (1990).

⁶⁷ *Id.* at 201.

there was always a shortage of visas.⁶⁸

Before this Act, the United States did not actively encourage foreign investors to emigrate to this country. There are a variety of reasons why the United States changed its policy. The United States realized that there is a tremendous amount of wealth in the world that people are willing to invest. The best example of this situation is the enormous number of Hong Kong citizens looking to emigrate before control of the colony switches from Britain to China in 1997. The United States realized it was missing out on the economic benefits as countries such as Australia, Canada and New Zealand began to actively recruit these people.

The U.S. government also realized the potential employment creation which could be realized through this type of program. As immigrants invested in the country, jobs would be created benefitting U.S. citizens. In addition, these investors would bring with them advanced technology and skills which are essential to the United States if it is to remain competitive in this ever-increasing technological age.

The 1990 Act increased employment-related immigration from 54,000 slots to 140,000. Five categories were combined under the Employment-Based Immigrants heading: 1) priority workers (40,000 slots); 2) aliens who are members of the professions holding advanced degrees or aliens of exceptional ability (40,000 slots); 3) skilled workers, professionals and other workers (40,000 slots); 4) certain special immigrants (10,000 slots); and 5) employment-creation immigrants (10,000 slots).⁶⁹ The main objectives of the employment-creation category were to create new employment and to encourage the transfer of new capital into the country.⁷⁰

A. Requirements To Obtain an Investor Visa

In order to obtain an investor visa the immigrant must invest at least \$1 million in capital towards: 1) a new commercial enterprise which the alien has established, 2) the purchase of an existing business and the reorganization or restructure of that existing business into a new commercial enterprise, or 3) an existing business such that the investment of the required amount of capital results in an increase of 40% in either that company's net worth or number of employees so that the new net worth or number of employees amounts to at least 140% of the business's pre-

⁶⁸ *Id.*

⁶⁹ Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978, § 121 (1990).

⁷⁰ S. REP. NO. 55, 101st Cong., 1st Sess. 13 at 21 (1989).

expansion net worth or number of employees.⁷¹

Three thousand of the 10,000 visas in this category are set aside for qualified immigrants who establish a new commercial enterprise in a "targeted employment area". A "targeted employment area" is defined as a rural area or an area which has experienced unemployment of at least 150% of the national average.⁷² A "rural" area is defined as any area not within either a metropolitan statistical area or the outer boundary of any city or town having a population of 20,000 or more.⁷³ If the investment is made in a targeted area, the Attorney General has the power to specify an amount less than, but not less than half of, the required amount. Conversely, if an investment is made in an area that is not a targeted employment area or is an area with an unemployment rate significantly below the national average unemployment rate, the Attorney General may specify an amount of capital that is greater but not greater than three times the \$1 million mark. It is important to note that under the final regulations, the Attorney General authorized the required amount of capital necessary to invest in a targeted employment area at \$500,000.⁷⁴

In order to qualify for the visa, the investor's venture must also benefit the U.S. economy through the creation of at least ten full-time jobs for U.S. citizens, aliens lawfully admitted for permanent residence, or other immigrants lawfully authorized to be employed in the United States, other than the immigrant and the immigrant's spouse or children.⁷⁵

The Act also creates special provisions for residents of Hong Kong who are employees of certain U.S. or U.S. related businesses. Beginning in 1991, 12,000 additional immigrant visas per year will be available for Hong Kong Officers who have worked for a U.S. business or affiliate who meet certain requirements and who have received an offer to work for the company in the United States.⁷⁶ The Act allows immigrant visas issued to certain residents of Hong Kong after November 29, 1991 to remain in effect until January 1, 2002.⁷⁷ This was done in part to prevent a mass exodus from China until the investors can see how the new government will manage the colony. This provision has been called an insurance policy for the Hong Kong citizens because it provides a quick exit if Hong

⁷¹ 56 Fed. Reg. 60,897, 60,911 (1991) (to be codified at 8 C.F.R. § 204.6).

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ Immigration Act of 1990 § 121 (5)(A)(3).

⁷⁶ *Id.* at §§ 103, 124, 152, 154.

⁷⁷ *Id.*

Kong's future under Chinese control becomes uncomfortable for capitalists.⁷⁸

B. Application Procedures

The regulations concerning employment-creating immigrants were finalized as of November 29, 1991. Under these regulations, application procedures for obtaining an employment-creating visa are quite straightforward. The investor must file a petition with the Immigration and Naturalization Service Center (INS Center) having jurisdiction over the area in which the new commercial enterprise is or will principally do business. A petition under this classification may only be filed by an alien on his or her own behalf.⁷⁹ The petition must include a fee payable to the INS. In addition, the petition must include initial evidence to demonstrate that the petitioner fits the alien entrepreneur classification. This initial evidence can be divided into six categories: 1) evidence of establishment, 2) evidence of the amount invested or to be invested, 3) evidence of capital obtained through lawful means, 4) evidence of employment creation, 5) evidence of the degree of management authority exercised by the investor, and 6) evidence addressing whether the enterprise will be in a targeted or non-targeted area.⁸⁰

The first category of evidence includes either articles of incorporation, a partnership or joint venture agreement, a certificate of merger or consolidation, a business trust agreement, or other similar organizational documents for the new commercial enterprise.⁸¹ Other documentation which suffices include a certificate showing authority to do business in a state or municipality. If the business entity does not require any such certificate, or if the State or municipality does not issue such a certificate, the investor may submit a statement explaining this fact.⁸² Lastly, the investor may submit evidence that as of November 29, 1990, the required amount of capital has been transferred and the investment has resulted in a substantial increase in either net worth or the number of employees or both. This latter evidence may be in the form of payroll records, stock purchase agreements or other evidence showing the conveyance of the funds from the alien entrepreneur to the business.⁸³

Under category two, to demonstrate that the petitioner invested or

⁷⁸ Arsenio Oloroso Jr., *New Ticket for Green Card is Money*, CRAIN'S CHICAGO BUSINESS, Sept. 30 - Oct. 6, 1991, at 1.

⁷⁹ 56 Fed. Reg. 60,897, *supra* note 71, at 60,910.

⁸⁰ *Id.* at 60,911.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

is actively in the process of investing the required capital, the petition must be accompanied by at least one of five acceptable documents. The five documents that meet this requirement are: 1) bank statements showing the amount of money deposited in the U.S. business account for the enterprise, 2) invoices or receipts showing assets which have been purchased for use in the enterprise, 3) U.S. Customs Service commercial entry documents containing descriptions and fair market valuations of property transferred from abroad for use in the U.S. enterprise or other similar documents, 4) evidence of monies transferred to the new enterprise in exchange for shares of stock, and 5) evidence of any loan or promissory note, or other evidence of borrowing which is secured by assets of the investor, other than those of the new commercial enterprise, and for which the investor is personally liable.⁸⁴ The key element under this category is that the investor "has placed the required amount of capital at risk for the purpose of generating a return on the capital placed at risk."⁸⁵ The investor must show actual commitment of the necessary amount of capital.

The third category was added to the final regulations to ensure that the capital invested came from legal means. It is possible that this provision was added to the regulations as a precautionary measure against the money laundering that occurred in Australia through the BMP. This objective can be evidenced through: 1) foreign business registration records; 2) corporate, partnership and personal tax returns or any other tax returns filed within five years with any taxing entity in or outside the United States by or on behalf of the investor; 3) evidence proving any other sources of capital; or 4) certified copies of any judgments of all pending governmental civil or criminal actions involving monetary judgments against the investor from any court in or outside the United States within the past fifteen years.⁸⁶

Under category four, in order to show that the new commercial enterprise will create at least ten full-time positions, defined as a minimum of thirty-five hours a week in the regulations,⁸⁷ the petition must be accompanied by either photocopies of Forms I-9 for ten qualifying employees (if the employees have already been hired), or a copy of a business plan showing that due to the anticipated size and nature of the enterprise at least ten employees will be needed, and the approximate dates (within the next two years) when the employees will be hired.⁸⁸ If the capital has

⁸⁴ *Id.* at 60,912.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* at 60,910.

⁸⁸ *Id.* at 60,912.

been invested in a troubled business, the petition must be accompanied by evidence that the number of existing employees is being maintained at no less than the pre-investment level for a period of at least two years. A troubled business is defined as a business that has been in existence for at least two years and has incurred a net loss for accounting purposes, equal to at least twenty percent of the troubled business's net worth prior to such loss.⁸⁹

To meet the fifth category the petition must include evidence demonstrating that the investor will be actively engaged in the management of the new commercial enterprise either through day-to-day managerial control or through policy formulation. This can be shown by a statement of the title that the entrepreneur will have in the new enterprise and a complete description of the position's duties, evidence that the investor is a corporate officer or holds a seat on the board of directors, or if the enterprise is a partnership, evidence that the investor is engaged in direct management or policy-making activities.⁹⁰

Finally, if the entrepreneur is planning to establish his or her new enterprise in a rural targeted employment area, the petition must also include evidence that the new commercial enterprise is primarily doing business within a civil jurisdiction not located within any metropolitan statistical area or within any city or town having a population of 20,000 or more.⁹¹ If the entrepreneur is investing in a high unemployment area, the petition must include evidence that the metropolitan area in which the new enterprise is primarily doing business has experienced an average unemployment rate of 150% the national average, or a letter from an authorized body of the government of the state in which the new enterprise is located which demonstrates that the political or geographical subdivision of the city in which the enterprise is doing business has been designated a high unemployment area.⁹² The evidence required under this category is crucial for those investors who want to invest in a targeted area in order to take advantage of the smaller \$500,000 investment requirement.

The final decision regarding whether the visa will be granted rests with the Immigration and Naturalization Service; the INS notifies the investors accordingly.

⁸⁹ *Id.* at 60,911.

⁹⁰ *Id.* at 60,912.

⁹¹ *Id.*

⁹² *Id.*

IX. PREDICTIONS ON THE SUCCESS OF THE ALIEN ENTREPRENEUR CATEGORY .

The Alien Entrepreneur Category will be unsuccessful because it does not meet the two-pronged test which bases success on whether the program 1) meets the needs of the immigrant investor *and* 2) meets the needs of the American people. Unlike the BMP in Australia, the new U.S. program meets the needs of the U.S. people in the sense that fraud should be eliminated through the use of strict requirements and follow-up procedure. Thus, it is unlikely that the U.S. citizens will feel the apprehension and distrust of the program which was felt in Australia due to the perception of widespread abuse of the BMP. In addition, if investors take advantage of the program, the U.S. will benefit through the influx of capital and the creation of jobs. The question is whether or not investors will take advantage of the program.

Again, this question may be answered by looking at the needs or interests of the immigrant investor broken down into four categories: 1) a stable economic and political structure, 2) a sustainable market for their product or business, 3) a comfortable social environment, and 4) a low risk/reward ratio. Most people would agree that the United States meets the requirements of the first three categories. Consequently, this analysis focuses on the fourth category, the risk/reward ratio, which discourages immigrant investors from emigrating to this country under this program.

A. Risks to Potential Investors

In analyzing their risk/reward ratio before deciding whether to emigrate to the United States, a majority of investors may feel that the risk is too high in comparison with the possible rewards. There are four major disincentives to the investor that is considering taking advantage of the new U.S. program: 1) the required investment amount is very high, 2) the requirements to meet the objectives of the program are narrow, 3) the required creation of ten jobs is restrictive and expensive, and finally, 4) the monitoring devices are very strict.

First, there is currently an investment requirement in place of at least \$1 million. The Attorney General has decreased the amount to \$500,000 in areas with extreme unemployment or rural areas, but this scenario includes further problems for the investor which are beyond the scope of this paper. On the whole, the requirement that an investor must transfer \$1 million dollars fails to take into account the huge number of entrepreneurs who are talented, motivated, and hard-working, but who are younger and have not been able to accumulate \$1 million dollars which can easily be transferred. Those individuals who can afford to

transfer the minimum amount may simply feel that it is safer to go to a country such as Australia or Canada where the requirements are lower, for the simple reason that if given the option it is better to invest less than more, especially if the enterprise is risky.

Second, the program may also be considered too risky because the requirement of investing \$1 million dollars in capital fails to take into account that there are many more ways to meet the objectives of the program, e.g. to create employment and to create an influx of capital into the American economy. The regulations define capital 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 the indebtedness."⁹³ Some items that were not included in the definition of capital were copyrights, trademarks and patents. Because the regulations specifically list *tangible* items under the definition of capital, one can assume that intangible items such as intellectual property are not included. This is unfortunate because it would seem that an investor who can only invest \$500,000 but has valuable patents in, for example, computer software, should qualify under the investor provision because this type of individual could greatly enhance the U.S. economy. Due to the million dollar requirement, investors with valuable intangible assets but little cash will not come to this country; rather, they will take their knowledge and experience elsewhere where they will create jobs and increase technology.

Third, investors may also see the requirement that their commercial enterprise create ten full-time jobs as overly restrictive. For example, if an investor wants to create a small manufacturing firm which would only employ seven people, he or she will look elsewhere. This seems contradictory to the goal of the program which is to create new jobs. One would think that it is better to create seven jobs than no jobs, but this is exactly what will happen if investors are not sure whether their enterprise will sustain ten full-time employees. The other goal of the program is to create an influx of capital into the country, yet this too may be discouraged based on the ten person requirement. There may be many cases of investors who want to put their money into existing U.S. companies because they have new and improved technology which would greatly increase the competitiveness of the company, yet would not require new employees. The entrepreneur cannot do this if the technology

⁹³ *Id.* at 60,910.

and investment will not create ten new jobs. This is a clear case of the U.S. economy losing out due to overly restrictive requirements.

Finally, the established monitoring devices to control the program are very strict and thus very risky for the potential investor. The harshest requirement and one that will be a significant deterrent for investors considering emigration to the United States is the conditional residency requirement. After an alien entrepreneur is approved for a visa, he or she is given "permanent" residence on a two year conditional basis. During a ninety day period immediately preceding the expiration of the two year period, the alien is required to file a petition with the Attorney General confirming that the Act's requirements have been met and requesting the removal of the conditional nature of the residence status.⁹⁴ At the same time, the investor must schedule a personal interview with an officer or employee of the INS to explain how he or she has fulfilled the program objectives.⁹⁵ Failure to comply with the objectives and requirements of the category will result in deportation of the investor and the investor's family. This conditional status is the strongest monitoring device of the investor category. However, with the \$1 million requirement, potential investors may be reluctant to gamble their money on a conditional visa.

In addition, if the Attorney General finds at any time before or after the investor requests the removal of the temporary status that the establishment of the commercial enterprise was done to evade the immigration laws of the United States or if the enterprise was never established or the required capital was never invested, the permanent resident status of the alien and his family will be terminated. Furthermore, fraud could be punished through imprisonment of up to five years, fines in accordance with Title 18, United States Code, or both.⁹⁶

It is not yet clear what will happen to the investor's capital if at the end of the conditional period he or she is to be deported. Will the investor be allowed to sell the commercial enterprise and take the money when leaving the country? What if the investor makes a good faith effort to meet the objectives of the program yet the enterprise fails? Will this person be forced to leave the country with no money to establish a new start elsewhere? These questions have been considered and even though the final regulations do not address these issues, there appears to be a consensus that the INS will have some flexibility in allowing extra time for the investor to turn the company around or allowing the investor to

⁹⁴ Immigration Act of 1990 § 216A.

⁹⁵ *Id.*

⁹⁶ Immigration Act of 1990 § 275.

stay if a good faith effort can be shown.⁹⁷ This conditional status will ultimately have the effect of discouraging many investors from coming to this country because the venture will be considered too risky.

B. Criticisms of the Program

There seem to be two major criticisms against the Alien Entrepreneur Program in the United States. The strongest criticism was articulated by Congressman John Bryant (D-TX) who stated that the provision was simply "selling American citizenship to the highest bidder."⁹⁸ This view was also stated by Congressman Barney Frank (D-MA) during a keynote address:

I am especially unhappy, I must tell you, with the notion that in this vast world of ours, one of the things we in the United States should do, is to let some people buy their way in ahead of others. I particularly dislike the notion of an economic buy-in to immigration. I'm willing to accept investment from people who will invest because they think it makes sense for them to invest here. But allowing people to buy their way into American citizenship doesn't strike me as very attractive morally.⁹⁹

Another complaint, based along the same lines, is that the provision is a repudiation of the U.S. values of opportunity based on merit and effort.¹⁰⁰ The theory is that the United States was founded by people who came here with nothing in order to start a new life, and thus it goes against our basic philosophy to give preference to certain people because they are able to invest \$1 million dollars. Part of the problem stems from the fact that, at the same time the country is granting 10,000 visas to wealthy investors, the Act lowers the number of low-skilled immigrants who can enter the country legally.¹⁰¹ This change will have an immediate impact upon the number of poor Central American immigrants who flock to the U.S. border each year. These people tend to have a long wait for legal status in this country and this reduction in the number of low-skilled immigrant visas will make their wait even longer, perhaps up to six years.¹⁰² Lawyers who deal with Central American immigrants fear that their clients may grow discouraged and abandon their quest for U.S. citizenship or attempt to enter the country illegally.¹⁰³

⁹⁷ Leo M. Garonski, *Immigration Act of 1990 Encourages Entrepreneurs to Create Jobs in U.S.*, IMMIGR. J., 24 at 26 (Apr.-June 1991).

⁹⁸ USA TODAY, Oct. 29, 1990, at 11a, col. 1.

⁹⁹ Barney Frank, Keynote Address, 4 GEO. IMMIGR. L.J. 169, 171 (1990).

¹⁰⁰ Cowan & Miller, *supra* note 61, at 21.

¹⁰¹ Clara Tuma & Tom Watson, *Money for Visas? Immigration Act Boon to Firms with Elite Clients*, 13 LEGAL TIMES 6, 7 (1990).

¹⁰² *Id.*

¹⁰³ *Id.*

C. Strengths of the Program

Although the criticisms voiced in opposition to the program are compelling, there are two sides to the controversy. The Alien Entrepreneur category finally allows wealthy investors, who have been discriminated against for a number of years in favor of low-skilled immigrants with family relationships in this country, a chance for a permanent visa. Since 1978 it has been impossible for an investor to qualify for a permanent visa because these visas were always taken up by immigrants in the preference categories.¹⁰⁴ Equitably, it would seem that no group of people in any economic class should have such a monopoly on immigration that another group of people can be effectively eliminated from the immigrant pool.

It should also be stressed that it is quite possible for immigration to serve economic as well as humanitarian interests in the United States.¹⁰⁵ Many people in the United States erroneously believe that immigration is an all or nothing situation. It is important that immigration serve both the needs of the immigrants *and* the needs of the citizens already in that country. Economic viability, which the investor provision can improve, should be a main concern in formulating immigration policy given that economic stability is one of the reasons that immigrants try to enter the country.

Another positive aspect of the Alien Entrepreneur visa is that if investors take advantage of it, it will be an effective way to create jobs for U.S. workers. This is especially important in the current recession. These investors will have a stake in guaranteeing that their commercial enterprise will create employment. Under the established regulations, they will be deported if they fail to meet this requirement. The fact is that these investors will have to be motivated, disciplined and work very hard in order to be successful in the U.S. market.

X. SUMMARY OF THE INVESTOR PROVISION

This new addition to U.S. immigration law will not be effective because, similar to the BMP in Australia, it does not achieve a balance between the interests of the immigrant investors and the American people. The legislature, perhaps in trying to avoid some of the pitfalls that other countries had with their investor programs, made the requirements far too restrictive and inflexible. Thus, the program is protected against fraud and dishonesty, but it is unlikely that many investors will take ad-

¹⁰⁴ Clement, *supra* note 18, at 195.

¹⁰⁵ Cowan & Miller, *supra* note 61 at 19.

vantage of it anyway. The risks involved to the investor are too great for the *possibility* of a permanent visa and possible penalties if the commercial enterprise is not successful. This is unfortunate because if the program would bring in foreign investors, the U.S. would benefit greatly through the creation of employment, new technology and new ideas. The main goal seems to be striking a balance between upholding sufficiently strict requirements and follow-up procedures so that U.S. citizens will support the program, and loosening the requirements enough so that entrepreneurs will be able and willing to take the risk to come to the United States.

XI. SUGGESTED IMPROVEMENTS BASED ON A COMPARISON WITH THE BMP

If the United States is serious about attracting foreign investors, it can learn many lessons from the failed Business Migration Program in Australia. The United States must act quickly since other countries, primarily Canada, New Zealand and Australia, have a huge head start. From the success that Australia and other countries have had in attracting foreign capital, it is obvious that there are many investors willing to emigrate to countries where the political and economic conditions are stable. Unfortunately, based on the experiences in Australia, it is equally obvious that there are individuals who will try to use an investor visa program as a means of entering a country illegally. The goal is to attract foreign investors who are sincere in their desire to create a commercial enterprise that will increase employment and benefit the United States' economy and to deter those who would simply use the program fraudulently to obtain a permanent visa.

The first improvement which must be made in the U.S. program is a decrease in the investment requirement. Australia's system of varied investment requirements based on age is a better system. The Australian program increases the capital in the economy while allowing entry for young, aggressive entrepreneurs who do not possess \$1 million dollars yet have the ability to help develop business skills and technology throughout the next generation. It seems hypocritical that current regulations allow and encourage the granting of visas based on investment, but those same regulations are so restrictive that they make the cost of obtaining a visa prohibitive for most people. The fact that only seventy-two people as of September 7, 1991 have applied for an investor visa implies that many investors find the requirements too restrictive,¹⁰⁶ espe-

¹⁰⁶ Andrew Blake & John Kennedy, *Such a Deal! Instant Entry into U.S. for \$1 Million*, Chi. Trib., Sept. 7, 1991, § 1, at 1.

cially since these same investors can go to other countries where the investment requirement is much lower and the living conditions are quite similar.

The fact that the Attorney General has decreased the required investment amount in targeted employment areas to \$500,000 does not go far enough to attract investors to come to the United States. It seems unlikely that an investor would want to undergo this higher risk by coming to the United States and investing in an area that has an unemployment rate that is 150% higher than the national average or in an area that is not within the boundary of a town having more than 20,000 people. This provision does little to attract the young entrepreneurs who have the potential to contribute to this country.

Another improvement would be to alter the minimum number of people who must be employed full-time. This could be done in a variety of ways. First, the government could allow variations based on the type of commercial enterprise the investor is going to establish. For example, if an investor wishes to establish a manufacturing company, then the minimum number of jobs could remain at ten because manufacturing tends to be labor intensive. On the other hand, if the investor wishes to set up a consulting firm, or a small store, then the minimum amount of employees could be set at five. This suggestion is based on the assumption that the primary goal of the provision is to create employment for U.S. citizens.

Second, the requisite number of employees could be set at a lower number initially while the commercial enterprise is being established; after the two year period expires, the number could increase to ten. This would lessen the financial pressures on the investor during the first two years. The current regulations require either copies of I-9 Forms, if employees have already been hired, or a business plan showing that ten employees will eventually be hired *within* the two year conditional period. It would take financial pressure off the investor if he or she were given a two year grace period in which there was no minimum employee requirement. Two years should be an adequate amount of time for the investor to get the enterprise up and running at its capacity. After this period, the ten employee requirement could go into effect.

Assuming the first two improvements are made, the United States should maintain the conditional status of the visa and the tight follow-up procedures. Regular and organized follow-up is the most effective way to eliminate sham enterprises, but flexibility should be allowed in those cases when an honest investor has made a good faith effort to create a successful enterprise but has nonetheless failed. For these type of situa-

tions it is essential that there are clear definitions of what constitutes a good faith effort. There should also be specific guidelines defining what penalties will be brought for failure to comply with the objectives of the program.

On the whole, the U.S. investor provision is much more effective in meeting the needs of the U.S. people than the BMP was in meeting the needs of the Australian people. The tighter control and follow-up will ensure that fraud will be kept at a minimum. In addition, the opportunity for bribery to occur when assessing the applications is far less likely under the U.S. system because it has no program like the accredited agent program that existed in Australia. All petitions in the United States must go through the INS, and although there is always a chance that someone along the way could be dishonest, the system is not conducive to bribery like the Accredited Agent Program. Under the U.S. system, there are no inherent conflicts of interest between the decision-maker and the investor.

XII. CONCLUSION

If the U.S. Government is serious about attracting foreign capital to the United States in order to create employment opportunities, the investor provision must be amended to decrease the investment requirement of \$1 million. In addition, the employment creation requirement of ten people must, at least initially during the two year period when the commercial enterprise is being established, be decreased.

An effective and successful U.S. investor provision would combine the flexible and realistic Australian admittance requirements, but keep the strict follow-up and monitoring requirements in place. This combination would encourage investor emigres to invest in this country, yet ensure that the program is not abused. In this way the program would meet the needs of the investors as well as the needs of the U.S. people. Under these circumstances, everyone benefits and the program will be successful.