



ONTARIO
BAR ASSOCIATION
A Branch of the
Canadian Bar Association

CITIZENSHIP AND
IMMIGRATION

Citizenship & Immigration • Volume 12, No. 2 • August 2009 34

USA: Immigrant Investors (EB-5)

Eileen Martin and Elizabeth Buscaglia*



UNDER SECTION 203(B)(5) of the *Immigration and Nationality Act (INA)*, 8 U.S.C. §1153(b)(5), 10,000 immigrant visas per year are available to qualified individuals and their family members seeking permanent resident status in the United States on the basis of their engagement in a new commercial enterprise. This immigrant category was established to entice investment of Hong Kong dollars prior to the United Kingdom's transfer of sovereignty of Hong Kong to China in 1997. It was unsuccessful largely due to the lower investment levels of countries like Canada.

In order to qualify for the Canadian Investment Program, alien investors must have business experience, a legally obtained net worth of \$800,000, and make an investment of \$400,000 through CIC in Ottawa. They are subject to a points system based on age, education, language proficiency, adaptability and quantified business experience. They can redeem their investment funds, five years and two to three months, after investing.

Generally, in order to qualify for an Immigrant Investor Visa in the United States, an applicant must fulfill the following criteria:

1. Invest or be actively in the process of investing \$1 million (\$3 million in a High Employment Area, or \$500,000 in a Targeted Employment Area);
2. Place the required capital at risk (it cannot just sit in a company bank account);
3. Establish that the capital invested was obtained through lawful means;
4. Demonstrate that the enterprise benefits the U.S. economy and creates full-time employment for not fewer than 10 Americans;
5. Show that the investment is in a "new commercial enterprise" (one created after November 29, 1990 or, if the business existed prior to that date, show that the investment increased the net worth of the company or the number of employees by 40% or more), or a "troubled business" (one that has been in existence for at least two years, has incurred a net loss for accounting purposes during the 12- to 24-month period before the petition was filed, and that the loss for such period was at least equal to 20 percent of the business's net worth before the loss); and
6. Engage in the management of the enterprise, either through day-to-day management control or policy formation.

These criteria have been employed since the inception of the category in 1991 under the *Immigration Act of 1990*.

As a result of a disappointing response to the immigrant investor program created in 1991, Congress enacted an immigrant investor pilot program on October 1, 1993. Of the 10,000 investor visas available annually, 3,000

are set aside for those who apply under a pilot program involving USCIS-designated "Regional Centers." Regional Centers are entities, organizations or agencies that have been approved by the USCIS, which focus on a specific geographic area within the United States. They seek to promote economic growth through increased export sales, improved regional productivity, creation of new jobs and increased domestic capital investment.

Currently, there are 45 Regional Centers across the U.S. which focus on the agriculture, hospitality/tourism, commercial development/re-development, technology, manufacturing and health services industries, among others. In order to qualify, an investor must show that ten or more jobs are actually created either directly or indirectly, using economically or statistically valid forecasting devices, by the new commercial enterprise. The required investment amount is \$1 million, or \$500,000 if located in a rural or targeted employment area.

The Pilot Program was extended by President Obama on March 11, 2009 for an additional six months. A further five-year extension of this program will be debated by Congress over the coming months.

When a U.S. immigrant investor petition is approved, permanent residency status is conditional for the first two years, after which the investor must file another petition to prove his or her eligibility to remove the conditions. The following criteria must be proved by an investor in order to remove the conditions placed on permanent residence:

1. The commercial enterprise was established by the alien;
2. He or she invested or was actively in the process of investing the required capital;
3. He or she sustained the enterprise and the investment in it throughout the period of conditional permanent residence;
4. He or she created, or can be expected to create within a reasonable time, 10 full-time jobs for U.S. workers; and
5. The commercial enterprise maintained the number of existing employees at no less than the pre-investment level in the case of an alien who invested in a troubled business.

Both the U.S. and Canadian programs have struggled with investment vehicles used by immigrants. Either the investment program scammed the investors out of their money, or the investors scammed the government by never really placing "investment" funds at risk. Both countries have overhauled their programs, subjecting them to heightened scrutiny to protect investors and the integrity of the process.

The U.S. and Canadian programs were initially set up for investors who would manage their investments. While Canada changed gears to a program of managed investment, the U.S. maintains two sets of criteria, one for immigrant-managed vehicles, and one for investments managed by approved Regional Centers.

Moreover, while there are several drawbacks to the U.S. investor program, namely the conditional status on the initial permanent residence approval and the investment risk, there are also benefits to the program. These benefits include: the ability of the investor and his or her family members to live and work anywhere in the United States; the ability to self-petition (no need for a company or relative to sponsor the alien); and the ability to apply for U.S. citizenship after five years. The U.S. program also avoids eligibility requirements based on age, English proficiency, employment experience and education; and there is no need to show investor management of the investment on a day-to-day basis nor to obtain labor certification by the U.S. Department of Labor. Further, there is no retrogression of visa numbers in this category.

* Eileen Martin and Elizabeth Buscaglia are counsel at Hodgson Russ in Buffalo, New York, and may be reached at emartin@hodgsonruss.com and ebuscaglia@hodgsonruss.com respectively.