

HEINONLINE

Citation: 4 Minn. J. Global Trade 271 1995



Content downloaded/printed from
HeinOnline (<http://heinonline.org>)
Wed Nov 11 14:12:17 2015

- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at <http://heinonline.org/HOL/License>
- The search text of this PDF is generated from uncorrected OCR text.
- To obtain permission to use this article beyond the scope of your HeinOnline license, please use:

[https://www.copyright.com/cc/basicSearch.do?
&operation=go&searchType=0
&lastSearch=simple&all=on&titleOrStdNo=1944-0294](https://www.copyright.com/cc/basicSearch.do?&operation=go&searchType=0&lastSearch=simple&all=on&titleOrStdNo=1944-0294)

Notes

Setting Our Sights: The United States and Canadian Investor Visa Programs

Robert C. Groven

The Immigration Act of 1990 (IM90) marked a significant shift in U.S. immigration policy.¹ Prior to IM90, humanitarian concerns largely drove U.S. immigration policy. With an eye toward benefiting the American economy, IM90 refined and re-oriented immigration admissions criteria. Where once America sought only the world's tired and huddled masses, now the United States has begun seeking the world's glittering masses—the talented, famous and rich.

This historic break signaled an intention to use immigration as a tool to generate economic advancement and help areas of the country blighted by poverty and unemployment. One program explicitly created for these purposes was the Investor Visa (IV) program.² Under this program, applicants are required to invest between \$500,000 and \$3,000,000 in the United States and to create at least ten jobs.³ Prospective immigrants who were not allowed to gain permanent residence through other means, or who did not wish to queue up in extensive waiting lists, could gain access through the IV program. This American backdoor was loosely modeled after successful programs in Canada and Australia. Unfortunately, the U.S. IV program, once touted by promoters as one of the greatest jobs program in the United States,⁴ is now scorned as a “washout.”⁵

1. THOMAS A. ALEINIKOFF & DAVID A. MARTIN, IMMIGRATION: PROCESS AND POLICY 120-22 (1991).

2. 8 U.S.C. § 1153(b)(5)(A)-(C) (1990).

3. 8 U.S.C. § 1153(b)(5)(A), (C) (1990).

4. Suneel Ratan, *For the Record*, WASH. POST, Oct. 22, 1992, at A30 (quoting immigration consultant, Paul Donnelly, describing the investor visa as “potentially the biggest job-creation program in the country, and it won't cost taxpayers a dime”).

5. Suzanne Bilello, *Visas Aren't Attracting Foreign Entrepreneurs*, NEWS-DAY, Apr. 19, 1994, at A39.

Why has the U.S. IV program floundered, while the Canadian program continues to draw large numbers of cash-laden immigrants? Congressional supporters charge that the Immigration and Naturalization Service (INS) was ineffective in implementing the program.⁶ The INS blames Congress for setting unreasonable expectations and creating too many restrictions.⁷ Many American business people and immigration lawyers who promoted the program blame the Internal Revenue Service (IRS) policy of taxing U.S. residents on their worldwide income.⁸ Others have broadened the list of mistakes to include: the economy, the timing, alternative visa programs,⁹ information disclosure rules, active management rules, anti-fraud provisions,¹⁰ and more. This litany of errors has not been subject to much careful review, however. Much of the suspicion has been cast casually upon obvious targets.

To assess these speculations, this Note compares and contrasts the U.S. IV program to the Canadian program. Part I recounts the history, purpose and structure of the American and Canadian IV programs. Part II questions the perception that the American investor program is a failure, and analyzes possible flaws that have been suggested by the popular and scholarly presses. Part III summarizes suggested reforms needed to improve the U.S. IV program.

This Note concludes that the investor visa program set its sights at crossed purposes. In essence, the program aimed in one direction, fired in another, and missed the target. Those entrepreneurs most likely to use the program cannot meet its requirements, and those passive investors able to meet the requirements have little incentive to participate. This conclu-

6. *Id.* "Congressional officials say a fundamental mistake was letting INS write the regulations for the program." *Id.* Jerry Tinker, staff director of the Senate Subcommittee on Immigration and Refugee Affairs, noted that "INS doesn't have a clue about investments or job creation." *Id.*

7. *Id.* (quoting Edward H. Skerrett, an INS official, "Congress didn't want a system that allowed passive investment because it was feared there would be criticism that they were buying their way into the United States").

8. Michael S. Arnold, *U.S. Visas for Rich Appear to be a Bust; Only 753 Millionaire Investors Have Applied in Nearly 2 Years*, WASH. POST, July 26, 1993, at A6. "[T]he coup de grace was a U.S. law that taxes residents on their worldwide earnings, not just the portion made in the United States. 'I have many clients who would love to invest in the United States if they weren't subject to taxation on their worldwide income,'" a Washington immigration lawyer said. *Id.*

9. *Id.*

10. Alex Beam, *Millionaires Only, Please*, BOSTON GLOBE, July 6, 1992, at 13.

sion suggests that the IV program can be improved either by legislative fiat or regulatory tinkering. In either case, such changes should parallel the Canadian program while preserving the more flexible elements of the U.S. program.

I. HISTORY AND STRUCTURE OF U.S. AND CANADIAN INVESTOR VISA PROGRAMS

Although both the U.S. investor visa program and the Canadian economic visa programs share many common ideas, they are substantially different in history and form. This section examines the particulars of each program, compares the performance of the two programs and explains America's need for a new immigration category specific to investors.

A. UNITED STATES INVESTOR VISA PROGRAM

Prior to passage of IM90, the United States unsuccessfully attempted to launch an effective investor program. In 1988 and 1989, Senators Edward Kennedy (D-Mass.) and Alan Simpson (R-Wym.) spearheaded two bills similar to the current IV program; both were defeated.¹¹ Although previous immigration law did contain a provision for economic visas,¹² it had little practical effect. These economic visas were only issued if surplus visas remained unclaimed in other immigrant categories.¹³ As a result of sustained demand in other visa categories, no economic visas had been issued since 1977.¹⁴

1. History

The IM90 investor visa program was controversial from the start. Congressional debate over the Kennedy-Simpson bill was rancorous and long.¹⁵ Several last minute attempts were made to defeat the IV program.¹⁶ Many contended that issuing investor visas was tantamount to selling the soul of the country for

11. S. 1611, 100th Cong., 1st Sess. (1987) (the Kennedy-Donnelly Bill); S. 358, 101st Cong., 1st Sess. (1989) (the Kennedy-Simpson Bill); Elizabeth A. Thompson, *Employment Creation Visas*, in UNDERSTANDING THE IMMIGRATION ACT OF 1990 105, 106 (Paul Wickham Schmidt ed., 1991).

12. 8 U.S.C. §§ 1153(a)(7), 1101-1524 (1988).

13. Thompson, *supra* note 11, at 105.

14. *Id.*

15. Gary Endelman & Jeffrey Hardy, *Uncle Sam Wants You: Foreign Investment and the Immigration Act of 1990*, 28 SAN DIEGO L. REV. 671, 675-76 (1991).

16. *Id.* at 675.

cash.¹⁷ In the end, however, concerns over our national soul yielded to the needs of the pocketbook. The hope that the IV program would bring thousands of wealthy, job-creating entrepreneurs to the United States ruled the day.¹⁸

Aside from concerns over morality, some critics charged that the program would be a haven for drug lords hoping to root themselves in the United States.¹⁹ Several anti-fraud provisions were added to prevent this possibility. These provisions imposed a two-year conditional residency period on recipients, and greatly increased the amount of documentation required for approval.²⁰

Some creators of the investor visa claimed it could generate 100,000 jobs and inject eight billion dollars of foreign capital into the United States every year.²¹ Despite these great expectations, the U.S. IV program got off to a slow start. Fewer than 100 applications were received within the first year and a half.²² The INS did not finalize most of the relevant regulations until late 1991.²³ In fact, the proposed regulations governing the removal of conditional residence status were not issued until January of 1994.²⁴

These new regulations again raised the hope that the IV program would attract business and create jobs. However, the INS received only 1129 applications by September 30, 1994.²⁵

17. Endelman & Hardy, *supra* note 15, at 675 (noting that “[c]riticism of the investor provision centered primarily on a perceived ‘cheapening’ of the value of American society and an assumed loss of economic sovereignty”).

18. *Id.* “Senator Edward Kennedy (D-Mass.), a co-sponsor of the investor provision in the Senate, emphasized that its main purpose was to create jobs. Indeed, Senator Paul Simon (D-Ill.), an important advocate of the provision, predicted that it would attract more than \$8 billion in foreign investment in U.S. business and create up to one hundred thousand new jobs for Americans.” *Id.*

19. *Id.* Senator Dale Bumpers (D-Ark.) “questioned the quality of immigrants our country would attract—in his opinion, mainly drug dealers.” *Id.*

20. RICHARD D. STEEL, *STEEL ON IMMIGRATION LAW*, 9-2 to 9-4 (Clark Boardman Callaghan ed., 2d ed., Release # 2, July 1994).

21. Endelman & Hardy, *supra* note 15, at 675.

22. Ronald R. Rose, *Fixing the Wheel: A Critical Analysis of the Immigrant Investor Visa*, 29 *SAN DIEGO L. REV.* 615, 615 (1992).

23. AUSTIN T. FRAGOMEN, JR. & STEVEN C. BELL, *IMMIGRATION FUNDAMENTALS* § 2.8(b) (3d ed. 1994).

24. STEEL, *supra* note 20, at 9-6 n.16.1; 59 *Fed. Reg.* 1317 et seq. (1994) (to be codified at 8 C.F.R. § 216.6) (proposed Jan. 10, 1994).

25. Facsimile from Michael W. Straus, staff member, U.S. Immigration and Naturalization Service Adjudications Division, *Cumulative Investor Figures as of 9-30-94*, to Robert C. Groven, *Minnesota Journal of Global Trade* 2 (Nov. 15, 1994) (on file with the *Minnesota Journal of Global Trade*) [hereinafter *Cumulative Investor Figures*]. As of March 31, 1994, the U.S. Immigration

This figure is embarrassingly small when compared to the 10,000 visas per year Congress allotted to the program, or to the 9087 business visas Canada issued in 1993 alone, excluding family and dependents.²⁶ Although the IV program is inching forward,²⁷ the numbers have caused some immigration specialists to describe the program as "a resounding fiasco."²⁸

When the U.S. program began in 1990, expectations for the million-dollar visa were very high.²⁹ Some promoters declared the new program a "mini-gold mine,"³⁰ whose possibilities were nearly unlimited.³¹ This inflated vision of the program was driven, in part, by American egotism.³² Accustomed to being the premier destination of immigrants worldwide, the United States assumed that the investor visa program would be flooded with applications.³³

The crucial difference between this visa program and all others was the clientele. Investor immigrants are not the huddled masses of American immigration history. They are wealthy, sophisticated business people with many options.³⁴ As a result of the freedom created by wealth and mobility, investor immigrants are not clamoring at America's gates.³⁵ Instead, they assume the posture of cautious consumers.

and Naturalization Service had received only 983 applications for the so-called millionaire visas, and 437 were approved. Bilello, *supra* note 5, at A39.

26. Bilello, *supra* note 5, at A39.

27. Arnold, *supra* note 8, at A1; Bilello, *supra* note 5, at A39 (illustrating an approximate 100 visa increase from mid-1992 to early 1994).

28. Manfred Rosenow, *3 More Possible Ways To Get A Green Card*, MIAMI HERALD, June 29, 1992, at 16BM.

29. Paul Donnelly, *Welcoming Hong Kong Immigrants: Changes in U.S. Immigration Law Bode Well for Hong Kong Visa Recipients*, 18 CHINA BUS. REV., No. 2, at 10 (Mar./Apr. 1991). Some immigration officials predicted that 10,000 investor visas would be too few to meet the demand. *Id.*

30. Sam Fullwood III, *Would-Be Advisers Bank on Visas for Foreign Millionaires*, L.A. TIMES, May 7, 1991, at 5A (quoting Jenifer Eisen, a policy assistant with the American Immigration Lawyers Ass'n in Washington D.C.).

31. Ashley Dunn, *\$1-Million Visas Seeking to Lure the Wealthy to U.S. Immigration*, L.A. TIMES, July 21, 1991, at A1. Former commissioner of the Western Region of the U.S. Immigration and Naturalization Service, Harold Ezell, stated that "the possibilities are totally unlimited." *Id.* Mr. Ezell currently markets and sells investor visa packages to prospective immigrants. *Id.*

32. Arnold, *supra* note 8, at 1A.

33. *Id.*

34. Charlotte Parsons, *Money Talks in the Passport Chase*, S. CHINA MORNING POST, May 29, 1994, at 5.

35. *Id.* One immigration expert noted that "If you've got money you can go anywhere . . . You could buy your way into almost any country. Popular destinations like Canada represent only a small proportion of the total numbers of visas available to wealthy immigrants." *Id.*

Despite the high expectations of many, some immigration experts doubted the program would experience rapid success.³⁶ Some of these experts predicted that it would take five to ten years for the U.S. program to catch up with the Canadian program.³⁷

2. Statistical Comparison of U.S. and Canadian Program Performances

A comparison of Canadian and American IV statistics seems to bear out the prediction of a slow, but accelerating start. Over the first two years of the Canadian program the number of visas rose by an average factor of 2.7.³⁸ Over the first five years of the program the number of visas rose by an average factor of 2.4.³⁹ Table 1 shows that U.S. visas increased by a factor of 8.8 from 1992 to 1993. Even with a 1994 estimate of 783 visas, U.S. visas increased by an average factor of 5.6 over the first two years of the program.⁴⁰ This factor is well above the Canadian two year average of 2.7, and noticeably higher than its five year average of 2.4.

36. Susan Freinkel, *'Investor Visa' Program Spawns Legal Niche; Buying into America*, LEGAL TIMES, Nov. 25, 1991, at 2. Howard (Sam) Myers III, then AILA president, commented that "they never expected the program to take off right away. Given the investment required . . . it's only natural that investors—and their lawyers—are being cautious." *Id.*

37. Andrew Blake & John H. Kennedy, *Such a Deal! Instant Entry Into U.S. for \$1 Million*, CHI. TRIB., Sept. 7, 1991, at 1.

38. See EMPLOYMENT AND IMMIGRATION CANADA, IMMIGRATION STATISTICS 50 (1991) [hereinafter EMPLOYMENT AND IMMIGRATION CANADA].

39. See *id.*

40. *Cumulative Investor Figures*, *supra* note 25, at 2. The estimate of 783 visas by the end of 1994 is probably low. It is based on the 70% acceptance rate evidenced by the number of approved applications. Assuming that 70% of the 383 applications that were unprocessed through September are accepted, then 268 of these unprocessed applications are likely to be approved. That creates 783 IVs likely to be issued by year's end. Note, these figures do not account for the prospect that other applications may be filed between September and January.

Table 1. Investor Visas in Canada and the United States

Year	U.S. Visas	Change	Canadian Visas	Change
1	59 (1992)		316 (1987)	
2	524 (1993)	8.8	1028 (1988)	3.2
3	783 (1994)*	1.52	2271 (1989)	2.2
4	n/a	n/a	4208 (1990)	1.8
5	n/a	n/a	5189 (1991)	1.2
6	n/a	n/a	2295 (1992)	-2.26

* Estimated; see *infra* note 41.

Sources: EMPLOYMENT AND IMMIGRATION CANADA, IMMIGRATION STATISTICS 50 (1991); I.N.S. STATISTICS DIVISION, U.S. DEP'T OF JUSTICE, INS FACT BOOK 13 (1994); Facsimile from Michael W. Straus, staff member, U.S. Immigration and Naturalization Service Adjudications Division, *Cumulative Investor Figures as of 9-30-94*, to Robert C. Groven, *Minnesota Journal of Global Trade* 2 (Nov. 15, 1994) (on file with the *Minnesota Journal of Global Trade*).

The result of this cursory analysis is ambiguous.⁴¹ Based strictly on annual average increases, the U.S. program appears to be ahead of the Canadian program in its first few years. This at least suggests the potential for the U.S. program to catch up to the Canadian program. In absolute numbers, however, the

41. The difficulties with these statistical comparisons should be obvious given the discussion in the text accompanying notes 38-43 and 54-92. First, the numbers compare similar but not identical programs. The Canadian investor program is the passive investment arm of the business visa program. The U.S. investor visa program is an active investment program, although it has been marketed and treated much like the Canadian investor program. Unfortunately, examining the active Canadian entrepreneur program is not very useful. The program has evolved slowly over the last 20 years and no clear starting point for the present program exists. Even if such a starting point could be found, it would be too far back in time to be useful. Between 1986 and 1990, the Canadian entrepreneur program increased by only an average factor of 1.2. That number, however, probably reflects the modest increases characteristic of a mature program. Such numbers do not present a useful comparison to the fledgling American investor program.

A second problem with these statistical comparisons is the extremely small pool of data. Given that the U.S. program has only been active for three years, it is hard to know if any reliable trend can be determined.

A third and final problem with these statistical comparisons is the many cultural, economic, and political differences between the United States and Canada. Canada possesses roughly one tenth the population of the United States. The U.S. economy is substantially larger than that of its northern neighbor. One might argue that the United States ought to have a much larger investor visa program than Canada simply on the basis of scale. That argument may not be as persuasive as it first sounds. First, the numeric comparisons made earlier were all made in terms of increases, not in absolute numbers. Second, the pool of wealthy investors is by nature small and selective. Unlike most people, these investors are not tethered by financial constraints, and there is therefore no reason to believe they must be evenly distributed across national populations.

U.S. program trails well behind the Canadian program. Further, if one assumes the United States "should" receive a number of investors that is proportional to its population, it is far behind the Canadian program. Given the unique nature of these visas and these immigrants, however, it seems prudent to avoid assuming that the U.S. program "should" be categorically different from the Canadian program.⁴² Assuming that the United States and Canada are on roughly equal footing in their ability to attract these "yacht people,"⁴³ the United States seems to be off to a slow start. This slow start, however, does not yet warrant sounding a death knell for the American program. The perceived demise of the American investor visa program is probably exaggerated by cultural egotism and inflated expectations.

3. Alternative Immigration Routes

The investor visa program was structured to create new opportunities for foreign business people to gain permanent residence in the United States. Although several conventional paths for alien business people already exist, the wait under these programs is considerable.⁴⁴ If a business person wishes to immigrate to the United States, but does not want to use the conventional employment-based or family-based categories, there are two other significant options.

The "L" non-immigrant visa allows corporations to transfer executives and managers to the United States for up to seven years, and specialists for up to five years.⁴⁵ Unlike most other non-immigrant categories, the L-1 visa allows aliens to entertain the intention of abandoning their home country.⁴⁶ For this reason the L-1 can be used to move an alien from temporary to permanent residence. Investor immigrants, however, may be confronted with a hurdle to using the L-1 in this way. The INS has taken the position that self-employed aliens should not be able to use the L-1 category.⁴⁷ This restriction is aimed at

42. FREDA HAWKINS, *CRITICAL YEARS IN IMMIGRATION: CANADA AND AUSTRALIA COMPARED* 256 (1989).

43. Bilello, *supra* note 5, at A39.

44. ALEINIKOFF & MARTIN, *supra* note 1, at 227.

45. 8 U.S.C. § 1101(a)(15)(L) (1990); 8 U.S.C. § 1184(c)(2)(D) (1990); ALEINIKOFF & MARTIN, *supra* note 1, at 236-38.

46. 8 U.S.C. § 1101(a)(15)(L) (1990); ALEINIKOFF & MARTIN, *supra* note 1, at 237.

47. "The L classification was not created for self-employed persons to enter the United States to consider self-employment, unless they are otherwise qualified for L classification." 52 Fed. Reg. 5738, 5739 (Feb. 26, 1987).

preventing what the INS views as the misuse of the L category by investors and entrepreneurs.⁴⁸

The second major alternative route for an aspiring business person is the E-2 non-immigrant treaty investor provision. This provision allows an alien to petition for entrance without a sponsoring organization if he or she comes solely to develop and direct the operations of an enterprise involving a substantial investment.⁴⁹ The investment must not be in a marginal enterprise, and must therefore return significantly more income than required to support the alien and the alien's family.⁵⁰ So long as the immigrant continues the investment activities for which the E-2 visa was granted, the alien may remain in the United States indefinitely.⁵¹ This status is therefore the next best thing to true permanent residency. The E-2 visa is only available to those nations who have a treaty with the United States or who grant the U.S. reciprocal benefits.⁵²

The limitations of these two programs and the waiting lists for conventional immigration categories provided part of the motive for creating the investor visa program.⁵³ The structure of the program reflects this motivation.

4. Structure of U.S. Investor Visa Program

Section 203(5) of IM90 provides that 10,000 visas will be made available each year for "qualified immigrants seeking to enter the United States for the purpose of engaging in a new commercial enterprise."⁵⁴ A qualified immigrant must invest a sum between \$500,000 and \$3,000,000 in the commercial enterprise and create at least ten jobs.⁵⁵ The statutory language breaks into six distinct requirements: (1) "qualified," (2) "engag-

48. ALEINIKOFF & MARTIN, *supra* note 1, at 245.

49. 8 U.S.C. § 1101(a)(15)(E) (1990); ALEINIKOFF & MARTIN, *supra* note 1, at 240.

50. "An alien is classifiable as a nonimmigrant treaty investor (E-2) if . . . the alien has invested or is actively in the process of investing a substantial amount of capital in a bona fide enterprise in the United States, as distinct from a relatively small amount of capital in a marginal enterprise solely for the purpose of earning a living." 22 C.F.R. § 41.51(b)(1) (1993).

51. ALEINIKOFF & MARTIN, *supra* note 1, at 238; 8 U.S.C. § 1101(a)(15)(E) (1990).

52. ALEINIKOFF & MARTIN, *supra* note 1, at 238-39.

53. Elizabeth A. Thompson, *Investment as a Basis for Permanent Immigration Benefits*, 1994 MINNESOTA INSTITUTE FOR LEGAL EDUCATION: IMMIGRATION LAW sec. XII, at 1.

54. 8 U.S.C. § 1153(b)(5)(A) (1990).

55. *Id.*; FRAGOMEN & BELL, *supra* note 23, § 2.8(b).

ing," (3) "new commercial enterprise," (4) "capital amount," (5) "job creation," and (6) at-risk requirements implied by the "invested or actively being invested" phrase.⁵⁶

To be considered "qualified," investor immigrants must be eligible for immigration under all other INA provisions.⁵⁷ They cannot, for example, be subject to exclusion for criminal or medical reasons. In addition, they cannot attempt to gain permanent admission through any other visa program.⁵⁸

Investor immigrants must come to the United States for the purpose of "engaging" in a new commercial enterprise. This provision has been interpreted to mean that investors must remain active in the day-to-day management or policy formulation of their investment.⁵⁹ Although no specific number of days in the country is required, it is likely that a prolonged absence would terminate the IV status.⁶⁰

The "new commercial enterprise" requirement does not literally mean that a new business must be created. There are three ways prospective investors may meet this requirement. First, they may simply create an entirely new and distinct business.⁶¹ The law does not require that any particular type of business be created. Nevertheless, several types of businesses are excluded, such as nonprofit corporations, investments that only use independent contract labor, and renting one's own dwelling.⁶² Second, an existing business may be expanded by forty percent in terms of capital or jobs.⁶³ Third, a "troubled business" with ten or more jobs may be preserved. A troubled business is defined as one that has sustained a twenty percent loss over the past two fiscal years.⁶⁴

The capital requirement moves on a sliding scale and is determined by the U.S. Attorney General. An immigrant may be allowed to invest a minimum of \$500,000 if they do so in rural or

56. 8 U.S.C. § 1153(b)(5); FRAGOMEN & BELL, *supra* note 23, § 2.8(b).

57. FRAGOMEN & BELL, *supra* note 23, § 2.8(b). (requiring that "[t]he petitioner is an active, as opposed to passive, investor, and that he or she is or will be engaged through the exercise of day-to-day managerial control or through policy formulation").

58. Rose, *supra* note 22, at 627-29.

59. 8 C.F.R. § 204.6(e) (1992).

60. FRAGOMEN & BELL, *supra* note 23, § 2.8(c); Beam, *supra* note 10, at 13.

61. 8 C.F.R. § 204.6(h)(1) (1992).

62. 8 C.F.R. § 204.6(e)(3) (1992) (definitions).

63. 8 C.F.R. § 204.6(h)(3) (1992) (expansion provision); 8 C.F.R. § 204.6(e) (1992) (definitions).

64. 8 C.F.R. § 204.6(e) (1992) (troubled business definition).

high-unemployment areas.⁶⁵ An area's unemployment rate must be 150% of the national rate to qualify.⁶⁶ At the other extreme, an immigrant may be required to invest a maximum of \$3,000,000 in a high-employment area.⁶⁷ The statute establishes \$1,000,000 as the normal starting point for investments in high-employment areas. For purposes of meeting these requirements, capital is defined as "cash, equipment, inventory, other tangible property, cash equivalents, and indebtedness secured by assets owned by the alien entrepreneur, provided that the alien entrepreneur is personally and primarily liable."⁶⁸

The ten-job requirement has been called the "brass ring" of the investor visa because it is one of the few unequivocal standards used by the INS in the program.⁶⁹ The jobs must be held by American citizens or lawful aliens other than the immigrant's spouse or dependents.⁷⁰ A job has been interpreted to be a full-time job, and although work-share or work-flex agreements are permissible, aggregating part-time jobs is not allowed.⁷¹

Finally, the statute requires that the immigrant has already invested or is actively involved in investing the requisite amount of capital.⁷² This provision has become known as the "at-risk" requirement. It is not sufficient for immigrants to possess a business plan, or even to have all of their financial plans complete. They must actually be creating or running the business itself.⁷³ It is unclear whether this requirement means that second-stage investments using secured third-party loans are sufficiently at risk. If such loans guarantee a return, the capital may not be considered at risk within the meaning of the statute.⁷⁴ It is important to note that placing one's capital at risk

65. 8 C.F.R. § 204.6(f)(2) (1992).

66. 8 C.F.R. § 204.6(e) (1992) (targeted employment area definition).

67. 8 U.S.C. § 1153(b)(5)(C)(iii) (1990).

68. 8 C.F.R. § 204.6(e) (1992).

69. Rose, *supra* note 22, at 627. "One of the advantages of the immigrant investor visa is that it provides bright-line tests. Ten full-time employees is the brass ring. Such certainty is not available using the labor certification exemption green card route." *Id.*

70. 8 U.S.C. § 1153(b)(5)(A)(iii) (1990).

71. 8 C.F.R. § 204.6(e) (1992).

72. 8 U.S.C. § 1153(b)(5)(A)(ii) (1990).

73. 8 C.F.R. § 204.6(j)(5); FRAGOMEN & BELL, *supra* note 23, § 2.8(b). "The petitioner must show that he or she has already placed the required amount of capital at risk 'for the purpose of generating a return on that capital.'" *Id.*

74. Rose, *supra* note 22, at 629-34 (extensively discussing this issue and the various tests currently used by American courts in determining whether capital is at risk).

does not ensure that a visa will be issued. The immigrant may risk the money and still be denied a visa for other reasons.⁷⁵

In order for an IV application to be approved, immigrants must provide extensive documentation. They must prove that the required capital, earned through legal means, has been placed at risk.⁷⁶

If the immigrant application is approved, the applicant is granted a two-year conditional permanent residency.⁷⁷ At the end of two years, the immigrant must again petition the INS to gain permanent status. This petition process also requires extensive document production. Among other things, conditional residents must prove that their business is still viable, that their ten workers are still working, and that they have a sincere intent to continue the business.⁷⁸ If the business fails for any reason during this two year period, the alien may lose the visa and be deported.⁷⁹

B. CANADIAN BUSINESS VISAS

Canada has operated a "business visa" program since 1978. In 1986, the Canadian Ministry of Employment and Immigration revised the system and created a more flexible and inviting visa program.⁸⁰ In 1988, 4243 visas were issued under three business categories.⁸¹ Those visas brought with them hundreds of millions of dollars and created many jobs. By 1990, the program had "resulted in the direct creation and maintenance of approximately 11,000 jobs."⁸² In 1992, "nearly 7,000 investors

75. FRAGOMEN & BELL, *supra* note 23, § 2.8(b).

This provision may require an alien to put a substantial amount of his or her capital irrevocably at risk in the United States without any guarantee from the government that his or her immigrant visa petition will be approved. As current law is now written, it does not appear permissible for the alien to include an "escape clause" in the contract establishing his or her participation in the new commercial enterprise in the event the petition is not granted.

Id.

76. 8 C.F.R. § 204.6(j)(1)-(5) (1992).

77. 8 U.S.C. § 1186a(b)(1)(B)(iii)-(d)(1)(C) (1990).

78. STEEL, *supra* note 20, at 9-8.1.

79. 8 U.S.C. § 1186a(b)(1)(B)(iii) (1990); FRAGOMEN & BELL, *supra* note 23, § 2.8(c).

80. Ronald G. Atkey, *Canadian Immigration Law and Policy: A Study in Politics, Demographics and Economics*, 16 CANADA-UNITED STATES L. J. 59, 70 (1990).

81. *Id.* at 71. Of the 4243 issued, "3,081 were issued under the entrepreneur category, 840 under the self-employed category, and 322 under the investor category." *Id.*

82. *Id.*

chose . . . to go to Canada;" in 1993, the number of business visas rose to 9087.⁸³

The structure of the Canadian business visa is substantially different from that of the U.S. investor visa. The system uses three basic categories: entrepreneur, investor, and self-employed.⁸⁴ These categories separate many of the requirements that are combined in the U.S. program. Across all three categories, the entrance requirements are less burdensome, and the program provides more options for passive investment.

The entrepreneur category requires: (1) an investment that improves the Canadian economy and provides at least one job to a legal Canadian resident; (2) the entrepreneur to remain active in the day-to-day management of the business; (3) the entrepreneur to have successful past business experience; and (4) the entrepreneur to submit a business plan detailing the proposed enterprise.⁸⁵ It is important to note that in this category there is no capital requirement. The at-risk requirements are also low. The immigrant must have a plan, but no definite business proposal is required at the time of application.⁸⁶

The investor category requires: (1) a minimum capital investment between C\$150,000 and C\$500,000; (2) that the capital "contribute" to job creation for legal Canadian residents; (3) that the immigrant have successful past business experience; and (4) that the investment is locked into use for either three or five years.⁸⁷ In this category there is no concrete job requirement and no demand that the investor is active in management. This category is designed to attract passive investors who are not interested in doing hands-on work in a small business.⁸⁸ Although this category does require that the capital be locked into use for a period of years, the immigrant is allowed to in-

83. Arnold, *supra* note 8, at A1 (7000 figure); Bilello, *supra* note 5, at A39 (9087 figure).

84. Atkey, *supra* note 80, at 71; 1994 IMMIGRATION ACT OF CANADA, §§ 6.11 (investors), 8.(4) (self-employed), 23.1 (entrepreneurs) (Frank N. Marrocco & Henry M. Goslett eds., 1993) [hereinafter IMMIGRATION CANADA].

85. Asher I. Frankel, *Canadian Immigration Law: Selected Topics and Recent Changes*, in 2 IMMIGRATION & NATIONALITY LAW HANDBOOK (1991-92) 637, 645-46 (R. Patrick Murphy et al. eds., 1991); IMMIGRATION CANADA, *supra* note 84, § 23.1.

86. Frankel, *supra* note 85, at 645-46.

87. *Id.* at 647; IMMIGRATION CANADA, *supra* note 84, § 6.11.

88. Frankel, *supra* note 85, at 648. "An immigrant need not demonstrate active and on-going involvement in any business venture or activity, and can therefore pursue any activity whatsoever, including passive investment." *Id.*

clude a clause refunding the money if the government turns down the business visa application.⁸⁹

Under the investor category, the amount of capital required depends on the investor's personal net worth and where the investment will be made. If an investor's net worth is at least C\$500,000, she or he may select a C\$150,000 investment for three years in an under-invested province, or C\$250,000 for three years in a more popular province.⁹⁰ In the alternative, an investor may invest C\$250,000 in an under-invested province for five years, or C\$350,000 for five years in a more popular province.⁹¹ If the immigrant's net worth is at least C\$700,000, he or she must invest at least C\$500,000 for five years.⁹²

The self-employment category requires the immigrant: (1) to create or buy a business that will provide employment for them, and (2) to make a significant contribution to the economic, cultural, or artistic life of Canada.⁹³ It is the most open-ended of all the options. The chief concern with this category is that the business be unique or in demand, and that it add to the cultural life of the nation. Normally, artists and craftmakers with small businesses use this category.⁹⁴

Both the investor and entrepreneur categories use a two-year conditional residency period.⁹⁵ There are no similar conditions attached to the self-employment category. Once the visa is approved, the immigrant becomes a permanent resident.⁹⁶ This sense of finality is attractive to many applicants.

89. Frankel, *supra* note 85. "The only limitation on the irrevocability of the investment may be that the investment will be refunded to the investor if an immigrant visa is not issued." *Id.* This supplies the comparable "escape clause" missing from the U.S. program. See *supra* note 75 and accompanying text.

90. Frankel, *supra* note 85 at 647; IMMIGRATION CANADA, *supra* note 84, § 2.1 (definition of minimum investment).

91. Frankel, *supra* note 85, at 647-48; IMMIGRATION CANADA, *supra* note 84, § 2.1.

92. Frankel, *supra* note 85, at 648; IMMIGRATION CANADA, *supra* note 84, § 2.1.

93. Frankel, *supra* note 85, at 649; IMMIGRATION CANADA, *supra* note 84, § 2.1 (definition of self-employed person).

94. Frankel, *supra* note 85, at 649. "The applicant, by definition, need not establish a business that will provide employment opportunities but instead, some personal quality (artistic, cultural) or benefit to the Canadian economy Examples of what might be successful self-employed applicants are book-binder, hunting and fishing guide, music teacher, etc." *Id.*

95. Lawrence C. Lee, Note, *The "Immigrant Entrepreneur" Provision of the Immigration Act of 1990: Is a Single Entrepreneur Category Sufficient?*, 12 J.L. & COM. 147, 159-60 (1992); IMMIGRATION CANADA, *supra* note 84, §§ 6.11, 23.1.

96. Lee, *supra* note 95, at 159-60; IMMIGRATION CANADA, *supra* note 84, § 8.4.

Several changes to these programs have been proposed as part of a comprehensive revision of Canada's immigration policy. Under the most current proposal, a C\$100,000 minimum requirement would be placed on the entrepreneur category;⁹⁷ a uniform C\$350,000 minimum for the investor category would be set for all provinces;⁹⁸ and the self-employment category would be eliminated.⁹⁹ Although these proposals reflect Canada's growing unease with a liberal immigration policy,¹⁰⁰ they do not undermine the thrust of this Note's argument.

II. COMPARISON OF U.S. AND CANADIAN INVESTOR VISA PROGRAMS

A. SUGGESTED PROBLEM AREAS

Many theories attempt to explain the perceived failure of the U.S. investor program. Most of these theories have not been subjected to objective evaluation. The Canadian experience may help assess the relative accuracy of the various theories concerning the U.S. program.

1. U.S. Economic Recession

A number of commentators believed that weakness in the American economy was partly to blame for the lackluster response to the investor visa program.¹⁰¹ Although this argument is intuitively appealing,¹⁰² it is unlikely the recession played a significant role in the IV program's troubles. At the time the U.S. program was launched, Canada was experiencing one of its most severe recessions since World War II.¹⁰³ In fact, many economic observers noted that the U.S. and Canadian economies seemed to be moving in tandem.¹⁰⁴ Although both economies

97. Tim Harper & David Vienneau, *Clampdown on Immigration: Ottawa Wants Newcomers Kept Off Welfare*, TORONTO STAR, Oct. 29, 1994, at A1.

98. *Id.*

99. *Id.*

100. *Bonding with Immigrants*, OTTAWA CITIZEN, Nov. 2, 1994, at A10.

101. Wendy Lin, *Queens Immigration 'Millionaire Visas' are Going Begging*, NEWSDAY, July 7, 1991, at 12.

102. *Id.* One writer noted that "the rich like to get richer and the U.S. economy is in such a slump that the [investor visas] provision won't attract investors, even if the U.S. government throws in a green card—or residency documents—as incentive." *Id.*

103. *The Recession and Expected Recovery; Canada*, OECD ECON. SURVEYS—CANADA, Aug. 1991, at 11 [hereinafter OECD ECON. SURVEYS—CANADA].

104. Douglas D. Peters, *Canada: Recession and Recovery*, BUS. ECON., Apr. 1991, at 51, 55.

were moving toward recovery, Canada lingered behind the United States in almost all sectors of the economy.¹⁰⁵ From an investor's standpoint, Canada was still in the grip of an economic slump.¹⁰⁶ If such economic dragons scared off investors, one would expect Canada's investor numbers to decline precipitously. In fact, the numbers for investor and entrepreneur visas declined only slightly, from 16,471 in 1990, to 15,090 in 1991.¹⁰⁷ Although Canadian visa numbers picked up in 1992, just as the American investor program began, only 59 American investor visas were issued in that year.

The parallel performance of the American and Canadian economies provides an excellent control to test the theory that the U.S. recession can be blamed for the low number of IV's issued in 1992. Both the U.S. and Canadian economies were showing real recovery by the time the American IV program was underway in 1991-92. An examination of these trends indicates that economic performance had only a slight and short-lived effect on visa numbers.

2. Fear of Fraud

Many writers suggest that the fear of fraud played a substantial role in reducing the number of investor visa applications.¹⁰⁸ Investors were supposedly afraid of scam artists who would take the investor's money, and disappear without producing a green card. Although the fear of fraud probably played some role in investors' decisions, there is no evidence of fraud unique to the American program.

If the fear of being cheated out of their investments kept investors away,¹⁰⁹ such fear should have favored the American program, not hindered it. Confidence in the American program was seen as "a critical factor in the long-term success of the im-

105. Andrew Gurney & Ray Barrell, *The World Economy*, NAT'L INST. ECON. REV. (UK) No. 137, Aug. 1991, at 24.

106. See OECD ECON. SURVEYS - CANADA, *supra* note 102, at 11 (commenting that the recession in Canada hurt all aspects of the economy, but "has been felt particularly strongly in Central Canada [and] has affected interest-sensitive components of domestic demand especially strongly").

107. EMPLOYMENT AND IMMIGRATION CANADA, *supra* note 38, at 50.

108. Dunn, *supra* note 31, at A1.

109. Ken Maver, *Foreign Affairs: Whether It Is Opening New Canadian Businesses, Buying Existing Ones Or Wooing Canadian Investors to Do the Same, Foreign Capital Is Fueling Business Activity*, LONDON BUS. MONTHLY MAG., Feb. 1992, at 6. One consultant noted that "Chinese immigrants are leery of the immigrant investor program because many have been burned buying bad investment packages put together by less than scrupulous brokers." *Id.*

migrant investor program."¹¹⁰ Nevertheless, Canada's program experienced a rash of frauds that "tainted" their program.¹¹¹ Australia's program became so enmeshed in fraud, both against investors and by investors, that it had to be shut down for a period of time, and yet achieved successful levels of visa applications.¹¹² Given this backdrop, it is difficult to believe that fear of fraud in the virgin U.S. program would cause thousands of frightened immigrants to invest in Canada and Australia instead.

The resilience of fraud-tainted programs may be explained by the business sophistication of the investors. As one expert on Hong Kong investors noted, "You're not going to see much abuse in the million-dollar category . . . these people aren't stupid."¹¹³ These immigrants are experienced and careful investors. Even if investors are unable to detect fraud, they will hire someone who can.¹¹⁴ Although some scams undoubtedly succeed in deceiving experienced investors and their lawyers, the experiences of Canada and Australia demonstrate that fraud does not pose a threat unique to the American investor program.

3. Timing of the U.S. Investor Program

The argument that the American IV program came too late in the game is popular with many pundits.¹¹⁵ It is true that the timing of the American program was unfortunate. Many nations had long established their presence in the market by the time the United States inaugurated its IV program,¹¹⁶ making the United States a "latecomer to the investor visa game."¹¹⁷ Some writers assert that this delay was a conclusive mistake, permanently¹¹⁸ depriving the United States of its share of the market.¹¹⁹

110. Rose, *supra* note 22, at 619.

111. *Id.*

112. *Id.* at 616 n.3.

113. Dunn, *supra* note 31, at A1.

114. See Arnold, *supra* note 8, at A1 (An INS spokesperson commenting that "[a]nyone who has a million [dollars] and wants to immigrate can probably get himself a good immigration lawyer").

115. Tom Schmitz, *Greenbacks for Green Cards: U.S. Has Begun Offering Visas to Investors*, PHILA. INQUIRER, Oct. 5, 1991, at C13.

116. Parsons, *supra* note 34, at 5.

117. Schmitz, *supra* note 115, at C13.

118. *Id.*

119. Parsons, *supra* note 34, at 5. The delay, it is argued, caused a shift in attitude so that "[b]y the time the Government began handing out slices of the American pie, Hong Kong's investors had developed an appetite for Canadian passports." *Id.*

Despite these dreary conclusions, other evidence indicates interest in U.S. visas among potential investor immigrants.¹²⁰ The flow of investors to Canada does not necessarily mean that interest in the United States is waning. One analyst noted that "many [of his investors] have gone to Canada, but the country of choice is the United States."¹²¹ Continuing interest by the foreign elite in the United States, and the ongoing success of the Canadian program undermine the notion that timing was a fatal error for the U.S. IV program.¹²²

4. Slow INS Regulatory Action

No one seems to doubt that the INS was slow to formulate the regulations for the investor visa program.¹²³ Perhaps as a result of the INS's lack of business expertise, the basic regulations were not finished until November of 1991,¹²⁴ while the final regulations were only completed in January 1994.¹²⁵ The effect of the INS delay was reported to be considerable.¹²⁶ Many investors waited for the final regulations before acting.¹²⁷

Even after the INS issued most of the regulations, confusion among potential investors further delayed applications.¹²⁸ When the regulations appeared, people were confused by the

120. Jon Basel, *A Capital Idea; Attracting Foreign Investors in the U.S.*, SMALL BUS. REP., Mar. 1992, at 65; see also Lizette Alvarez, *Million-Dollar Visas; U.S. Offering Green Cards For Greenbacks to Stimulate Economy*, GAZETTE (MONTREAL), Sept. 26, 1991, at A13 (noting that investment promoters anticipated increased interest by their clients).

121. Al Kamen, *An Investment in American Citizenship Immigration Program Invites Millionaires to Buy Their Way In*, WASH. POST, Sept. 29, 1991, at A21.

122. Basel, *supra* note 120, at 65.

123. George White, *State Hopes to Attract Foreign Entrepreneurs*, L.A. TIMES, Dec. 20, 1990, at 2D (noting that the INS did not begin issuing visas until October 1, 1991).

124. 26TH ANNUAL IMMIGRATION AND NATURALIZATION INSTITUTE 461 (PLI Litig. & Admin. Practice Course Handbook Series No. H-486, 1993) [hereinafter 26TH IMMIGRATION INSTITUTE].

125. STEEL, *supra* note 20, at 9-6 n.16.1.

126. See Freinkel, *supra* note 36, at 2 (Howard S. (Sam) Myers III, President of the AILA, stating that potential immigrants "aren't willing to make that kind of investment without knowing what the ground rules are").

127. See Dunn, *supra* note 31, at A1 (noting that "most investors [were] holding back until the release of final regulations, detailing the types of acceptable investments").

128. See Schmitz, *supra* note 115, at C13 (indicating that because the program was so new, people "did not know what to expect").

complexity of the program.¹²⁹ Once the rules were understood, some experts felt that U.S. investor visas were “both a complicated and risky way of achieving a status which might more effectively be achieved by other more traditional immigration strategies.”¹³⁰

Although this initial period was difficult and confusing for investors and immigration experts, the program is now almost entirely in place.¹³¹ Whatever problems the sluggish INS response may have created, the investor program is now beyond them.

B. PERSISTENT PROBLEM AREAS

1. U.S. Worldwide Taxation

The U.S. policy of worldwide income taxation is the most prominent reason given for the failure of the American investor visa program.¹³² Worldwide taxation has been dubbed the “coup de grace” responsible for bringing down the program.¹³³ A close analysis of the issues, however, indicates that worldwide taxation should be only a marginal deterrent to potential investors. The perception of a great difference between U.S. and Canadian tax burdens is more threatening than the reality, for most immigrants.

The United States uses a citizenship and residence-based tax system. As a result, “a non-resident alien (NRA) individual is taxed only on U.S. source income All other individuals, including resident aliens, citizens, and U.S. nationals, are taxed by the United States on worldwide income.”¹³⁴ Unless some exception applies, even if a U.S. citizen is living in Togo, and earn-

129. See FRAGOMEN & BELL, *supra* note 23, § 2.8(a) (noting that “because of the complexity of the INS rules with regard to immigrant investors,” few people were likely to apply early in the program).

130. Howard S. (Sam) Myers III, *U.S. Immigration Reform—A “Weather Prediction,”* in FEDERAL IMMIGRATION LAWS AND REGULATIONS at v, x (1993 ed.).

131. Rose, *supra* note 22, at 619.

132. Manfred Rosenow, *Luring Millionaires to U.S. Proves Hard*, MIAMI HERALD, Dec. 30, 1991, at 12BM (suggesting that the tax problem is the “chief” reason for IV failure). Of the more than 105 relevant articles surveyed, 57 mentioned U.S. taxes as a large problem to the success of the IV program, 48 criticized the capital amount, 37 noted the restrictiveness of the investment options, and 24 blamed the INS. See *id.* Many other causes also appeared, but these are the most frequently mentioned, and the most heavily blamed. See *id.*

133. Arnold, *supra* note 8, at A1.

134. Roger H. Epstein, *Tax Implications for the Foreign Investor*, in NEW WAVES FOR FOREIGN INVESTORS IN THE 1990s 53 (Theresa Fisher & Alan W.C. Ma eds., 1990); I.R.C. §§ 7701(b)(1)(A)(i), 7701(b)(3) (1988).

ing all income in Guinea Bissau, he or she must pay taxes to the United States on all income.¹³⁵

It is this worldwide citizenship tax that has earned the United States an aggressive reputation.¹³⁶ The perception that U.S. taxes are more burdensome than Canadian taxes, whether true or not, deters some investors from immigrating to America.¹³⁷ Some critics, most of whom are working to save their clients tax money,¹³⁸ argue that "the high cost of taxes is simply not outweighed by the benefits of living in the United States."¹³⁹

Some authors making this argument fail to make the crucial distinction between taxes paid by citizens and taxes paid by residents.¹⁴⁰ Authors who do not make this distinction incorrectly imply that other nations, including Canada, do not tax their residents on all worldwide sources of income. In fact, "a Canadian resident will be taxed on his income from all sources, both within and outside Canada."¹⁴¹ A citizen who is a resident in Canada must pay worldwide income taxes, while a citizen who is resident abroad pays much less income tax to Canada.¹⁴²

So where is the real difference between U.S. and Canadian taxes? Some have suggested that Canada makes it easier to avoid "double taxation" (being taxed in two countries on the same income).¹⁴³ In fact, Canada and the United States have very similar systems for avoiding double taxation. Canada al-

135. Rose, *supra* note 22, at 617.

136. See Donald K. Miller, *Tax Considerations for U.S. Citizens Moving to Canada*, in TAX PLANNING FOR CANADA-U.S. AND INTERNATIONAL TRANSACTIONS 16:1 (Canadian Tax Foundation ed., 1994) (noting that "[t]he United States is one of only a handful of countries that taxes its citizens wherever they are resident").

137. See Rose, *supra* note 22, at 621-22 (noting that, in fact, many "[p]rofessionals involved with this program agree that the biggest problem with the immigrant investor visa is the worldwide taxation [provision]").

138. Arnold, *supra* note 8, at A1.

139. Rosenow, *supra* note 132, at 12BM.

140. *Id.* For example, one author stated that "[t]he U.S. tax system contrasts with that of many European countries as well as Canada and Australia, which give the foreign investor much more lenient treatment. In the end, the cost of living permanently, and being taxed correspondingly, in the United States may simply be prohibitive for the average investor." *Id.*

141. Bryan R. Emes, *Planning for Immigration to Canada from Countries Other Than the United States*, in TAX PLANNING FOR CANADA-U.S. AND INTERNATIONAL TRANSACTIONS 13:5 (Canadian Tax Foundation ed., 1994).

142. *Id.* at 13:2.

143. Richard Tremblay, *Foreign Tax Credit Planning*, in TAX PLANNING FOR CANADA-U.S. AND INTERNATIONAL TRANSACTIONS 3:1 (Canadian Tax Foundation ed., 1994).

lows a series of limited tax credits and deductions to defray double taxes.¹⁴⁴ The United States does the same.¹⁴⁵ Canada has a broad network of tax treaties that can eliminate the problem of double taxation altogether.¹⁴⁶ The United States has a similar network of treaties.¹⁴⁷

The difference between the two nations might be explained if Canada simply had lower tax rates and "softer" enforcement policies. Canada actually has rather high tax rates, and rather rigid enforcement, however.¹⁴⁸

The critical distinction between the two nations rests in the way the two nations define residence.¹⁴⁹ Before examining this distinction, an example may help illustrate the importance of residence. A Hong Kong resident wishes to secure a new home for her family. This investor has many sources of income around the world, but none in the United States or Canada. She would like to get an investor visa from the United States, live in Hong Kong and pay no U.S. taxes on business outside of America. Unfortunately, she discovers that once she has a green card she is automatically considered a U.S. tax resident and subject to worldwide taxation. As a result, this prospective investor looks to Canada. She has been told that only Canadian residents are taxed worldwide, and that immigration status is irrelevant to being dubbed a tax resident by Revenue Canada. The potential investor believes she can have immigration residence in Canada but not be a tax resident. In fact, it will be difficult and unlikely that the investor can make this work.

The United States uses two tests to determine tax residency. Meeting either standard is conclusive. It is possible for an alien to be a tax resident in the United States without intending to reside permanently in America.¹⁵⁰ The first tax resi-

144. *Id.*

145. 26TH IMMIGRATION INSTITUTE, *supra* note 124, at 134-35.

146. Tremblay, *supra* note 143, at 3:1.

147. See 26TH IMMIGRATION INSTITUTE, *supra* note 124, at 145 (listing the relevant treaties).

148. Emes, *supra* note 141, at 13:1. One Canadian tax expert noted that because "Canada imposes relatively high tax rates, defines income broadly, taxes income on a worldwide basis, and enforces its tax laws strictly, the new resident usually will face a greater potential tax burden in Canada than he did in his former jurisdiction." *Id.*

149. For the remainder of this Note, the words "resident" or "permanent resident" will refer to residency for immigration purposes such as determining citizenship or deportation. "Tax resident" will, of course, refer to residency for tax purposes, such as whether a person will be taxed on their worldwide income or only their domestic income.

150. Epstein, *supra* note 134, at 53.

dency test is referred to as the "green card test" and is met if an alien is lawfully admitted for permanent residence under U.S. immigration laws.¹⁵¹ The second test is the "substantial presence test." It uses a mathematical formula to measure how many days an individual has been in the United States over the last three years.¹⁵²

The Canadian tax system also defines residence in two ways. The first standard is objective and states that "an individual who 'sojourns' in Canada for periods of 183 days or more in a calendar year is deemed to be [a tax] resident for the entire year."¹⁵³ The second standard is called the "concrete and substantial connection" approach, and examines many social and business contacts to determine whether an individual is a tax resident.¹⁵⁴ Meeting either the subjective or objective test subjects the individual to Canadian worldwide income taxation. Canada has no green card test, and "[g]enerally citizenship and immigration status are irrelevant with respect to determining [tax] residency."¹⁵⁵

At first blush, these rules appear to make it easy for a new immigrant investor to avoid Canadian worldwide taxes. Unfortunately for the investor, Canadian immigration law makes it much harder for a new immigrant to avoid worldwide taxes than for a citizen. Investors who enter Canada under the investor visa program are eligible for citizenship after three years.¹⁵⁶ In the interim, immigrants must meet certain criteria or lose their status as a permanent resident.

A person may lose permanent resident status under Canadian law if they leave Canada with the intention of abandoning Canada, or if they remain outside of Canada for more than 183 days.¹⁵⁷ Now our fictional Hong Kong investor is in a bind. If

151. *Id.*; I.R.C. § 7701(b)(1)(A)(i) (1988).

152. Epstein, *supra* note 134, at 53; I.R.C. § 7701(b)(3) (1988).

153. Michael Cadesky, *ADVANCED IMMIGRATION LAW: TAX CONSIDERATIONS FOR THE IMMIGRANT 5* (Can. Bar Assoc. Ontario, CLE, June 18, 1990).

154. Emes, *supra* note 141, at 13:5. Some of the factors examined under the concrete and substantial connection test "include such factors as the presence of dependents remaining in Canada, ownership of Canadian property, housing available on notice, Canadian bank accounts, professional or social memberships, a Canadian driver's license, the reasons for absence from Canada, and the obtaining of a returning resident permit." *Id.*

155. Cadesky, *supra* note 153, at 3.

156. Emes, *supra* note 141, at 13:4-13:5.

157. *Id.* at 13:3. A permanent resident may lose their immigration status in the following manner:

Section 24(1) of the Immigration Act provides that a person ceases to be a permanent resident *for immigration purposes* when he leaves or

she stays in Canada for 183 days, she can keep her permanent resident status, but must pay worldwide taxes. If she stays out of Canada for 183 days, she will not have to pay worldwide taxes, but may lose her permanent residence status.

The last phrase of section 24(2) of the Canadian Immigration Act provides investors with a way out.¹⁵⁸ That phrase allows an immigrant to be out of Canada for more than 183 days if the investor can convince immigration officials to issue a permit stating that the immigrant did not intend to abandon residence in Canada.¹⁵⁹ To obtain a permit, however, an immigrant must satisfy the same type of criteria used in Canada's subjective tax residency analysis.¹⁶⁰ As a result, convincing the immigration officials that the investor did not abandon Canadian immigration residency will generally convince revenue officials that the investor should be considered a tax resident.¹⁶¹

To become a citizen, the immigrant must "demonstrate ties that . . . will lead to the conclusion that he was also resident in Canada for that period for tax purposes."¹⁶² Thus, if our Hong Kong investor wants to become a Canadian citizen, as most permanent residents do, she will have to subject herself to worldwide taxation for at least three years. The threat of losing permanent residence, and the hope of becoming a citizen, combine to force the immigrant to walk a very fine line if they wish to avoid worldwide taxation.¹⁶³ For these reasons, the func-

remains outside Canada with the intention of abandoning Canada as his place of permanent residence. In addition, section 24(2) of that statute provides that permanent residents who have been outside Canada for more than 183 days during any 12 month period are deemed to have abandoned their permanent resident status, unless they have satisfied the appropriate immigration authorities or adjudicator that they did not intend to abandon Canada as a place of residence.

Id.

158. IMMIGRATION CANADA, *supra* note 84, § 24.(2), at 107.

159. *Id.*

160. Emes, *supra* note 141, at 13:3. In fact, "Revenue Canada takes the view that 'where an individual enters Canada otherwise than as a sojourner [as an immigrant], and establishes resident ties within Canada . . . he will generally be considered to have become a resident of Canada for tax purposes.'" *Id.*

161. *Id.*

162. *Id.* at 13:5.

163. See Cadesky, *supra* note 153, at 4 (commenting that with a talented immigration lawyer at the immigrant's side it might be done. Normally, however, "an individual who intends to become a permanent resident of Canada for immigration purposes will . . . become a resident for income tax purposes 'on arrival.'").

tional difference between the tax status of an immigrant to the United States and an immigrant to Canada is very slight.¹⁶⁴

Although Canadian law currently allows immigrants to keep their permanent residence status if they do not intend to abandon Canada, a new amendment (§ 25.1) may eliminate that option.¹⁶⁵ That section changes the conditions under which immigrants lose their permanent residence.¹⁶⁶ If § 25.1 does become effective, it is likely to eliminate the intent standard that allows immigrants to retain their immigration status while being absent for more than 183 days.¹⁶⁷ It appears Canada may be sealing up the crack that has allowed immigrants to keep permanent residence and avoid worldwide taxation.¹⁶⁸

If most investors desire to reside in their new land, unlike our Hong Kong example, much of this analysis is irrelevant. For many Asian investors, the decision to invest and to make a home go hand-in-hand,¹⁶⁹ and that motive means investors are likely to want to stay in Canada regardless of tax and immigration laws.¹⁷⁰ In fact, the vast majority of Hong Kong investor immigrants stay in Canada even after they gain citizenship.¹⁷¹ If Hong Kong investors are a representative example, most investors willingly remain Canadian residents and incur Canada's worldwide tax burden even after they could leave. The fact that

164. Emes, *supra* note 141, at 13:3. Even when the steps taken upon arrival do not create this conclusion, the "steps taken to preserve [permanent residence] will typically lead to living patterns that imply residence for tax purposes." *Id.*

165. IMMIGRATION CANADA, *supra* note 84, § 25.1, at 112.

166. *Id.* This section eliminates the original intent language and substitutes: "§ 25.1. A person ceases to be a permanent resident when (a) subject to the regulations, the person ceases to ordinarily reside in Canada." *Id.* This amendment was enacted in 1992 but was not scheduled to go into effect until 1994. *Id.* Nevertheless, the amendment only becomes effective at the discretion of the Immigration Minister. *Id.* As of this writing the Minister had not acted.

167. Emes, *supra* note 141, at 13:4.

168. *Id.*

169. Sandra Durrans, *Love That Asian Money*, B.C. BUS., July 1990, at 60. Durrans emphasized that "the decision to come to [British Columbia] and locate a business here is tied to the desire to live here. It is not an investment decision alone." *Id.*

170. *Id.* Many Asian business people want to "invest where they live." *Id.*

171. See Moira Farrow, *Hong Kong Exodus; Canadian Good Life Not Good Enough For Many Wealthy Immigrants*, OTTAWA CITIZEN, Jan. 7, 1995, at B8 (noting that local officials in Hong Kong estimate that, "[t]he return rate from Canada usually after the immigrant has obtained Canadian citizenship is estimated at about 15 per cent").

investors maintain residence in Canada indicates they are willing to endure worldwide taxation.

Despite this hopeful conclusion, the evidence indicates that U.S. tax rules create a perceptual drag on the investor program. It may be that investors make up their minds before examining the tax laws of these two nations carefully. In any case, the United States should either carve out a limited exemption for investor immigrants,¹⁷² or more effectively inform potential investors of the tax similarities between the United States and Canada.

2. U.S. Capital Requirements

The American program requires substantially more initial investment than the Canadian program. The celebrated million dollar price tag has discouraged many investors.¹⁷³ In addition to the sheer amount of capital necessary, the at-risk requirements cause many investors to seek safer investments in the international visa market.¹⁷⁴

Many investors thought that the U.S. program was simply overpriced.¹⁷⁵ Some immigration attorneys argued that the price tag was "the major fault" when "other countries are making sweeter offers."¹⁷⁶ After enactment, even the half-million dollar exception was decried as too high an investment hurdle.¹⁷⁷

Some scholars note that requiring a large capital outlay makes the program more likely to attract aloof millionaires than hands-on entrepreneurs.¹⁷⁸ Ironically, the million dollar mark may attract "foreigners who are able to meet the monetary threshold but lack the entrepreneurial skills to run an American commercial enterprise . . . [while] experienced entrepreneurs

172. Rose, *supra* note 22, at 615.

173. Arnold, *supra* note 8, at A1. "Congress and the INS apparently overestimated the value of U.S. citizenship to wealthy foreigners, many of whom can already invest here under certain conditions, without resident status." Bilello, *supra* note 5, at A39.

174. Rose, *supra* note 22, at 629-34.

175. Beam, *supra* note 10, at 13. One commentator noted that "[i]n the bidding for transnational moneybags, we set the ante too high. Australia and Canada, which have the most successful investor visa programs, ask that rich people pony up as little as \$250,000 . . ." *Id.*

176. Ashley Dunn, *Lure of Visas Fails to Attract Rich Investors*, L.A. TIMES, Dec. 24, 1991, at A3.

177. Arnold, *supra* note 8, at A1.

178. Lee, *supra* note 95, at 149.

may be deterred"¹⁷⁹ Aside from attracting the wrong crowd, or no crowd at all, the high price is unnecessary. Nothing in the legislative history of the program indicates why the million and half million dollar figures were chosen. The Canadian program has succeeded in creating jobs and investment with a much lower threshold.¹⁸⁰ Moreover, "[a]s one former franchise developer observed, a franchise employing ten full-time employees can be started for well under \$1 million."¹⁸¹

Even if investors could afford to put up the money, they might be leery of committing the money with no guarantee that they will receive a visa. As noted above, the U.S. program requires the investor to demonstrate that the funds for the investment actually have been committed *before* filing his or her petition.¹⁸² This means that the investor must either already be operating the business or close to actually starting operations.¹⁸³ Evidence of intent to invest or plans to invest without "present commitment" is not enough.¹⁸⁴

Beyond the present commitment requirement, the investor must place the capital "irrevocably" at risk.¹⁸⁵ Once the contracts are signed, the investor cannot pull out of the investment.¹⁸⁶ If the application for an investor visa is denied, the investor is saddled with the investment deal. In contrast, in the Canadian program the "only limitation on the irrevocability of the investment may be that the investment will be refunded to the investor if an immigrant visa is not issued."¹⁸⁷ It is easy to understand the attraction of an escape clause to a jittery investor who wants to live near her or his investment.

3. Few Investment Options

When Congress created the investor program it worried that passive investments would be viewed unfavorably by the public.¹⁸⁸ Fear over the appearance of "catering to the rich" caused Congress to emphasize the job-creation aspects of the

179. *Id.*

180. Beam, *supra* note 10, at 13.

181. Lee, *supra* note 95, at 162.

182. *Id.* at 156.

183. *Id.*

184. Rose, *supra* note 22, at 629-30.

185. FRAGOMEN & BELL, *supra* note 23, § 2.8(b).

186. *Id.*

187. Frankel, *supra* note 85, at 648.

188. Bilello, *supra* note 5, at A39.

program.¹⁸⁹ The INS may have read this mandate into the law too strongly. In fact, IM90 “requires only that the immigrant investors engage in a new commercial enterprise; it does not require that they engage in either direct management or policy-making activities”¹⁹⁰ The INS requires that the investor remain active in the “day-to-day” affairs of the business or in policy formulation.¹⁹¹ Such management requirements may be the only way to determine if the investor was responsible for creating ten jobs.

The INS left open the type of businesses that investors could create.¹⁹² INS believed that Congress did not intend to needlessly regulate the type of business used for investment.¹⁹³ Even for-profit holding companies are specifically included within the ambit of the investor program.¹⁹⁴ Despite this apparent openness, the management requirements circumscribe the types of investments actually available.¹⁹⁵ For example, “those most likely to emigrate from Taiwan or Hong Kong made their fortunes in real estate or import-export businesses” which are not available in the U.S. program.¹⁹⁶ The result is a program at odds with its most promising customers.

The large capital requirement tends to attract people more accustomed to passive investment. People who “lack[] the business acumen to successfully guide the enterprise in the long run” are required to take charge.¹⁹⁷ To compensate, many of these displaced investors gravitate toward service sector businesses that only provide minimum wage jobs.¹⁹⁸ Since they lack the skill or desire to run the business for the long term, many will probably sustain the business just long enough to receive permanent residency.¹⁹⁹ For these reasons, the capital, man-

189. *Id.* An INS official commented that “Congress didn’t want a system that allowed passive investment because it was feared there would be criticism that they were buying their way into the United States.” *Id.*

190. Endelman & Hardy, *supra* note 15, at 674.

191. FRAGOMEN & BELL, *supra* note 23, § 2.8(b).

192. Lee, *supra* note 95, at 155.

193. *Id.*

194. FRAGOMEN & BELL, *supra* note 23, § 2.8(a). Nevertheless, “not-for-profit corporations, charitable institutions” and utilities have been specifically excluded from investment. Endelman & Hardy, *supra* note 15, at 674.

195. Lee, *supra* note 95, at 155-56.

196. John Tsui, *The Money Immigrants*, LODGING HOSPITALITY, Oct. 1991, at 26. Investment pools, commercial stock investment, real estate development, and real estate speculation do not qualify as acceptable investments. *Id.*

197. Lee, *supra* note 95, at 161.

198. *Id.* at 163.

199. *Id.* at 161-62.

agement, and at-risk requirements thwart the program's goals of job creation and long-term economic growth.

In contrast, Canada offers many options for investors. Its basic categories provide for both passive investors and active entrepreneurs.²⁰⁰ Within the passive investment category, a Canadian investor may choose from a menu of options which is more diverse and more flexible than its American counterpart.²⁰¹ Investors gravitate toward provinces with the most flexible investment options.²⁰² Those provinces that provide a real return on the investment seem to fare best.²⁰³ To that end, Quebec has used federal immigration laws to set up a province-certified investment pool.²⁰⁴ The local economy benefits from this arrangement because the government makes the capital pool available to small businesses at below market interest rates.²⁰⁵

A visa is only part of an investor immigrant's ultimate goal. For the business elite many nations offer both freedom and opportunity.²⁰⁶ These foreign investors insist on being treated better than they would be treated at a bank.²⁰⁷ Their chief concern is producing a solid and safe return on their investment.²⁰⁸ An immigration attorney noted that "realistically, any investment from the Pacific Rim will be driven by the return on the financial opportunity, not by the green card."²⁰⁹

This return-driven interest should cause U.S. immigration officials to focus their efforts on creating a competitive prod-

200. *Id.* at 158-60.

201. Atkey, *supra* note 80, at 70-71.

202. Lee, *supra* note 95, at 159-60.

203. EMPLOYMENT AND IMMIGRATION CANADA, *supra* note 38, at 8. Quebec is the most popular destination for immigrant investors, and has one of the most advanced investment arrangements. Joel Millman, *Visas for Sale*, FORBES, Apr. 29, 1991, at 107.

204. Millman, *supra* note 203, at 107. "Why do investors like Quebec? Because the provincial government fully recognizes that while immigrants hope to become Canadian citizens, investors also want to recoup their capital, with interest if possible." *Id.*

205. *Id.* This capital pool "is managed by a government-approved securities brokerage firm," and investors must meet eligibility standards before being allowed to invest. *Id.*

206. See Parsons, *supra* note 34, at 5 (commenting upon the many options available to wealthy investors).

207. Jane Applegate, *Slow INS Response Thwarts Foreign Investment Program*, WASH. POST, Aug. 3, 1992, at F9.

208. Lin, *supra* note 101, at 12.

209. Schmitz, *supra* note 115, at C13.

uct.²¹⁰ Unfortunately, given the restrictive U.S. system, some investors have already turned elsewhere.²¹¹

The U.S. investor program is not structured to meet its customers' needs. This conclusion is supported by the Canadian experience. The passive investor program in Canada draws much larger amounts of capital than the active entrepreneur program.²¹² The entrepreneurs, on the other hand, create the lion's share of direct employment.²¹³ These facts indicate that the group of investors most interested in active day-to-day management of a business are not the ones able to invest millions in cash. Likewise, those who are willing to invest millions do not choose to actively manage their investments.

Unlike the immigrants of legend, who yearn to be free, investor immigrants yearn to be richer. Because the American program offers only restrictive investment options, both the type of investors and the type of returns are rather limited.

III. PROPOSED REFORMS FOR THE UNITED STATES INVESTOR VISA PROGRAM

The United States must decide what it wants in order to realign the IV program's sights and take true aim at the target of job creation and economic advancement. If the United States wants to attract wealthy investors and large sums of capital, it needs to change the perception of the U.S. tax code, restrict alternative immigration routes, and expand the use of indirect job creation. If the United States wants to attract entrepreneurs who will build smaller businesses with their own hands, then it should lower the capital amount, streamline the application process, and loosen the at-risk requirements. If the United States wants to attract both groups, it should consider bifurcating the

210. Jennifer Lin, *Fare Trade: U.S. is Offering Green Cards to Lure \$1 Million Investments*, PHILA. INQUIRER, Oct. 23, 1991, at A1. The prospect of a green card may be a powerful lure to foreign investors, but "[t]he first thing they [will want] to know . . . after they get their green card in two years, [is] how could they get their money back." *Id.*

211. Kamen, *supra* note 121, at A1.

212. EMPLOYMENT AND IMMIGRATION CANADA, ANNUAL REPORT 38-39 (1990-91). In 1990 Canada admitted 3024 entrepreneurs each of whom averaged a C\$143,000 business investment. In that same year, Canada admitted only 992 investors but each investor averaged "slightly more than C\$2 million." *Id.*

213. *Id.* at 39. As of March 31, 1991, over 7683 jobs had been created by the entrepreneur program, while the investor program created only about 2317 jobs directly. *Id.*; EMPLOYMENT AND IMMIGRATION CANADA, ANNUAL REPORT 19 (1991-92).

program in order to create two types of investor visas with distinct requirements.

A. EXPAND INVESTMENT OPTIONS AND REDUCE AT-RISK REQUIREMENTS

Investment flexibility is probably the area most in need of reform. The combination of excessive capital requirements, stringent at-risk standards, the bar against escape clauses, and a rigid job requirement all conspire to make the U.S. IV program an unattractive product. An examination of the Canadian program suggests that allowing both passive and active investment options should attract more immigrants.²¹⁴ By attracting slightly poorer entrepreneurs the United States may create more and better jobs.²¹⁵

To attract both types of investors, the United States could create two categories of investment options.²¹⁶ The passive investment option could be modeled after the Canadian immigrant investor program, and could include large investment pools.²¹⁷ The second option would model the current U.S. active entrepreneur approach but lower or eliminate the minimum capital requirement.

To facilitate the entrepreneur program, the definition of "actively in the process" of investing should be loosened, and the program should provide investors with the option of inserting an escape clause, in case the visa application is denied.²¹⁸ Allowing investments which are near completion may make investors more willing to file for an investor visa.²¹⁹ This could be done by altering the evidence requirements to include proof of transactions still in progress.²²⁰

Loosening the at-risk rules so they comport more closely with commercial business definitions of risk may encourage more investment pools, and ease investors' fears of loss.²²¹ In particular, capital investments which are exchanged for debt instruments such as bonds or notes should be allowed to bring the program into line with current business practice.²²²

214. Lee, *supra* note 95, at 159-60.

215. *Id.* at 162-63.

216. *Id.* at 163.

217. See *supra* text accompanying notes 197-213.

218. FRAGOMEN & BELL, *supra* note 23, § 2.8(b).

219. Thompson, *supra* note 53, at 7-8.

220. *Id.*

221. Rose, *supra* note 22, at 630-32.

222. Thompson, *supra* note 53, at 8-9.

Loosening the criteria for assessing job creation could encourage investment, and raise the quality of the jobs created.²²³ By simply relaxing the criteria, the INS could improve the problem without changing the statutory ten-job requirement. A pilot program currently running under the auspices of the INS demonstrates how this might be accomplished.²²⁴ The pilot sets aside 300 visas each year for investors who demonstrate that they have indirectly created ten jobs through improved productivity, economic growth, expanded export sales, and other criteria.²²⁵ The petitioner bears the burden of producing a reasonable methodology for the INS to use in evaluating the job creation claim.²²⁶ Refining and expanding the pilot program's approach could breathe new life into the investor visa program.²²⁷

B. REDUCE CAPITAL REQUIREMENT

The Canadian experience suggests that hands-on entrepreneurs are not likely to possess enough cash to meet the U.S. capital requirements.²²⁸ If the United States wishes to attract smaller operations under the direct day-to-day control of the immigrant it should lower the capital requirement accordingly. This could be done by simply decreasing the amount to \$100,000, in the entrepreneur category, and \$250,000, in the investment category, the levels required under the proposed revision of Canada's immigration policy.²²⁹ Such action by Congress seems unlikely, however, given the present anti-immigration political climate.²³⁰

An alternate method for lowering the capital requirement is available through the regulatory power of the INS. If the INS changed the at-risk and investment standards to lower the debt-to-equity ratio, entrepreneurs could meet the current \$500,000 minimum more easily.²³¹ Although such leveraging represents some risk of instability, such practices are common in business,

223. See Lee, *supra* note 95, at 162-65 (suggesting that the present structure creates low wage, low skill jobs).

224. 59 Fed. Reg. 17,920-21 (1994) (codified at 8 C.F.R. §§ 204.6(e) (definition of employee), 204.6(j)(4)(iii), 204.6(m)).

225. Thompson, *supra* note 53, at 23-24.

226. *Id.*

227. See *id.* at 24-25 (describing the flexibility of the pilot program).

228. See *supra* text accompanying notes 192-210.

229. See *supra* text accompanying notes 97-99.

230. Bilello, *supra* note 5, at A39.

231. See Thompson, *supra* note 53, at 9-10 (explaining the AILA proposal for loosening the debt requirements).

and would fit the expectations of bankers and investors alike.²³² The INS could also clarify its position on how capital reserves are to be counted in the minimum requirement.²³³ If the INS were to inform investors about the ability to shield some of their investment from risk by keeping it in reserve, the \$500,000 minimum might appear more attractive.²³⁴

C. INFORM INVESTORS OF TAX POLICIES

The perceived burden of U.S. worldwide taxation certainly is a deterrent to investors.²³⁵ It is a deterrent despite the fact that the actual distinction between the U.S. and Canadian tax systems is surprisingly small.²³⁶ It seems unlikely that investors are making decisions based on these relatively minor distinctions. It is more likely that foreign investors are making their decisions based upon a complex set of motivations, where tax is only one consideration. To solve this problem, the United States needs to better inform investors about these tax issues. Although a limited tax exemption for immigrant investors would be an excellent enticement, it may be both politically impossible and unnecessary.²³⁷

IV. CONCLUSION

The American investor visa program presents a puzzle that becomes more complex as it unfolds. The Canadian story has many lessons for the United States, but some of those lessons are ambiguous. The popular press has declared the American investor program a failure. The scope of that failure, however, is difficult to determine. The most likely answer lies somewhere in the middle and leads to the conclusion that the American program is merely a slow starter. Even an optimistic assessment, however, suggests that many aspects of the American program should be changed to improve the program's lackluster reception.

Several potential problem areas fade when examined closely. Suggested areas such as the U.S. recession, fear of fraud, and bad timing, are red herrings with little to distinguish

232. *Id.*

233. Lee, *supra* note 95, at 163.

234. *Id.*

235. See *supra* note 132 and text accompanying notes 132-35.

236. See *supra* part II.B.1.

237. See Rose, *supra* note 22, at 622 (commenting upon the political impracticality of carving out an immigrant investor tax exemption).

them from problems that exist in the successful Canadian program. Although slow INS promulgation of regulations may have once played a part, this delay no longer threatens the investor program's success.

Although the perceived burden of U.S. worldwide taxation does deter investors, that perception is greater than the reality. Under current laws, most immigrant investors will be forced to pay worldwide taxes whether they live in the United States or Canada. Even if investors were not compelled to remain residents and pay worldwide taxes, it appears that most immigrants would accept that burden voluntarily.

Because foreign investors are neither huddled masses nor yearning to be free they must be lured to the United States with more than the promise of a green card. Allowing both passive and active investment options should attract more immigrants.

A careful comparison of the U.S. and Canadian investor visa programs reveals much about the American struggle to accept a new immigration policy. America must learn how to entice the world's wealthy while still embracing the world's poor. Likewise, America must learn how to use its immigration policy as a tool to solve domestic economic problems without simply selling visas to anyone who would buy. Such refined targeting requires setting one's sights carefully. Unless the United States adapts to this challenge, the nation of immigrants may fall behind in the international race for opportunity.

