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There will be no issue next week because we will be attending the American Immigration Lawyers Association conference in New Orleans. Our next issue will be dated June 30, 2003.

IN THIS ISSUE

IMMIGRANT INVESTMENT IN LOCAL CLUSTERS PART I*

by Lincoln Stone**

This is the first part of a two-part article concerning U.S. immigration law on foreign investment, in particular, the "immigrant investor program" that was launched when Congress created an immigrant visa category for investors under the Immigration Act of 1990 (1990 Act).[1] In 1992, Congress modified the immigrant investor program by introducing a Pilot Program, representing a second major legislative effort to spur foreign investment in the U.S. economy. Acting during recessionary times of high unemployment, sponsors in Congress acclaimed these statutes as catalysts for billions of dollars in future investment capital and thousands of new jobs for the U.S. economy. The experience of the past decade with the immigrant investor program, however, has been disappointing; although interest in the program appears to remain steady, the program has been ineffective in attracting significant amounts of foreign capital for investment and job creation in the U.S.

While recognizing the enormous challenges the government faces in administering the nation's immigration laws and resources, this article focuses primarily on a few shortcomings in the administration of the immigrant investor program. Rather than attempting to wrestle with all suspected root causes for frustrated expectations, this article advances the view that the immigration bureaucracy has neglected an essential element of Congress's wishes concerning foreign investment in the U.S.—that is, the Pilot Program represents Congress's desire to test whether immigrant investor capital can be a significant source of capital for "cluster" economic development, characterized by the concentration of massive amounts of capital in close proximity for the purpose of creating an attractive economic environment for interrelated enterprises, innovation, and sustainable job creation.

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1 Pub. L. No. 101–649, § 121, 104 Stat. 4978, enacting INA § 203(b)(5).

Part I of this article focuses on the Pilot Program by presenting a sampling of the extensive economic development literature that heralds cluster economic development initiatives as dynamic engines of innovation and qualitative job growth. Part I suggests that the reorganized immigration bureaucracy within the new Department of Homeland Security (DHS)[2] revise its policy toward the Pilot Program in order to foster immigrant investment consistent with the cluster economic development model.

Part II of this article will focus on certain standards for adjudication of individual investor petitions that function as formidable deterrents to job-creating investment. Part II recommends modifying those standards in a manner that is consistent with the objective of attracting job-creating investment, without jeopardizing interests in national security and fraud prevention. The article concludes that a reformulated policy and modified adjudication standards should permit an actual test of whether the Pilot Program can facilitate the kind of interconnected businesses that are characteristic of the cluster economic development model.

BACKGROUND

By allocating unprecedented numbers of immigrant visas to investors, scientists, and other businesspersons, the 1990 Act represented Congress's determination to respond to the challenges of economic globalization with an immigration scheme that would further, for the first time, national economic policy.[3] Viewing the new immigrant investor visa category as a measure to help the U.S. compete for foreign investment and to reverse the debilitating effects of growing unemployment, Congress set aside 10,000 immigrant visas annually for foreign nationals who invest in a U.S. business and create 10 new jobs. The purpose of the immigrant investor law, in short, is to stimulate job-creating investment by holding out to investor immigrants the benefit of U.S. permanent residence.[4] Congress also intended to attract job-creating investment to areas of need by lowering the required minimum investment amount from $1 million to $500,000 for investments made in high unemployment areas and rural areas.[5] Responding to concerns about fraud, Congress provided that permanent residence would be conditional for the first two years.[6]

Through the rulemaking power and its authority over individual case adjudications, the INS (and its successor)[7] obviously has a major role in the success or failure of the immigrant investor program. The INS issued regulations implementing the immigrant investor law in 1991[8] and another set of regulations concerning removal of the conditions on resident status in 1994.[9]

Since its inception, the immigrant investor program never has functioned well. The INS provided its own list of reasons for lackluster results: investor uncertainty over removal of conditions, U.S. taxation of worldwide income, other U.S. visa alternatives, less expensive investor programs in other countries, and limited program information and outreach.[10]

2 The INS's functions were transferred on March 1, 2003, to the DHS, as mandated by the Homeland Security Act (HSA), Pub. L. No. 107–296, 116 Stat. 2135. The INS's administrative, service, and enforcement functions are now performed by various bureaus within the DHS. See 80 Interpreter Releases 305 (Mar. 3, 2003) (reporting on and reproducing final rule facilitating the transfer); 79 Interpreter Releases 1733 (Nov. 25, 2002) (section-by-section summary of the HSA).

3 S. Rep. 55, 101st Cong., 1st Sess. 2, 3 (1989); see also Endelman and Hardy, "Uncle Sam Wants You: Foreign Investment and the Immigration Act of 1990," 25 *San Diego L. Rev.* 671 (1991).

4 The 1981 Select Committee on Immigration overwhelmingly supported a new immigrant visa category for investors. Select Commission on Immigration and Refugee Policy, "U.S. Immigration Policy and the National Interest," 97th Cong., 2d Sess., Final Report (Comm. Print 1981). An investor proposal appeared in a 1982 bill, but that bill was defeated in response to the argument that a visa allocation for investors would have reduced the visa allocation for the backlogged family-based categories. That objection was overcome when the 1990 Act substantially increased visa allocations in all categories. INA § 203(b)(5) was first introduced as Senate Bill No. 258 in 1989. According to the legislative history, the goals of the law are to create jobs, see 136 Cong. Rec. S7622, 7626 (daily ed. July 11, 1989), and to attract foreign investor capital to the U.S. See S. Rep. No. 55, 101st Cong., 1st Sess. 21 (1989).

5 INA § 203(b)(5)(C).

6 INA § 216A; see S. Rep. No. 55, 101st Cong., 1st Sess. 22 (1989).

7 In accordance with recent legislation, the INS was eliminated as of March 1, 2003, and its investor visa responsibilities have been assumed by the new Bureau of Citizenship and Immigration Services (BCIS) within the new Department of Homeland Security.

8 56 Fed. Reg. 60897 (Nov. 29, 1991), codified at 8 CFR § 204.6, reported on and reproduced in 68 Interpreter Releases 1720 (Dec. 9, 1991).

9 59 Fed. Reg. 26587 (May 23, 1994), codified at 8 CFR § 216.6, reported on and reproduced in 71 Interpreter Releases 679 (May 23, 1994).

10 INS Report to Congress on the EB–5 Investor Visa Program, under cover letter dated March 4, 1999 of Stephen R. Colgate, Assistant Attorney General, to Rep. Harold Rogers (R–Ky.), Chairman, House Appropriations Subcommittee. The report also included statistics on immigrant investor petitions for fiscal years (FYs) 1992 through 1998. The INS approved few cases, ranging from a low of 240 petitions in FY 1992 to a high of 1,110

Outside the agency, many observers anticipated from the start that there would be underwhelming results, blamed Congress for exaggerating the appeal of the law to foreign investors,[11] and criticized the INS for ignoring the legislative mandate by writing regulations that too narrowly restricted the forms of investment that would comply with the law,[12] and for resisting rather than embracing the duality of the statute, which features both an "investor" model that stresses capital investment and an "entrepreneur" model that emphasizes job creation.[13] Commentators also cited the INS's confusing memoranda and opinions concerning case adjudication that may have conflicted with its own regulations and appeared to complicate issues of compliance.[14] The incoherence more than likely stymied some job-creating investment, and also allowed conditions for incubating investment structures that probed the outer limits of INS rulings and interpretations by including contract features that tended to minimize investor risk. Ultimately, and abruptly, the INS reversed earlier instructions and opinions to conclude that these investment structures did not comply with the immigrant investor law. To effect this latter change the INS widely circulated a comprehensive legal opinion,[15] and then issued binding case adjudications that effectively implemented sweeping changes in the adjudication standards for individual investor petitions filed under the immigrant investor program.[16] Aggrieved parties, in turn, challenged these actions in court with mixed results.[17] The legal wrangling of the past five years consumed substantial INS resources, further derailing efforts directed at collaboration and improving the record of the immigrant investor program.[18]

For its part, Congress recently amended the investor statute, just a small piece of the massive 21st Century Department of Justice Appropriations Authorization Act (DOJ Act),[19] which became law on November 2, 2002. Most of the

petitions in FY 1997, and a precipitous drop to 358 petitions in FY 1998.

11 See, e.g., Rose, "Fixing the Wheel: A Critical Analysis of the Immigrant Investor Visa," 29 *San Diego L. Rev.* 615 (1992), stressing that U.S. taxation of an immigrant's worldwide income is a major deterrent to foreign investment. See also Lee, "Hot Dog Stands or High Tech? The Fate of Taiwanese Investors and the Immigration Act of 1990," 14 *U. Pa. J. Int'l Bus. L.* 63 (1993), calculating that most well-heeled Taiwanese would prefer the economic opportunities in Taiwan's dynamic high-tech sector over a fast-food franchise or other similar labor-intensive business in the U.S. that might provide a vehicle for complying with the immigrant investor statute.

12 See, e.g., Endelman and Hardy, supra note 3, at 673–74, contending that INS regulations actually inhibit rather than encourage job creation. See Rose, supra note 11, observing that INS regulations concerning investor source of funds are not only ultra vires but also discourage potential investors who are concerned about the adverse consequences of the U.S. government publicizing confidential financial information.

13 Lee, "The 'Immigrant Entrepreneur' Provision of the Immigration Act of 1990: Is a Single Entrepreneur Category Sufficient?," 12 *J. Law & Commerce* 147 (1992), observing that job creation and capital infusion may be inconsistent goals and recommending that there should be two separate investor categories (one for "investor" and one for "entrepreneur") as in the case of Canada. Nearly a decade into administering the investor program, the INS continued to struggle with the dual characteristics: "The current statutory authority is broad enough to encompass both passive investors and entrepreneurs directly involved in the operations of the business.... Passive investments have made the program more difficult for the INS to administer." See INS Report to Congress, supra note 10, at 4.

14 See, e.g., Vazquez-Azpiri, "The Role of Commercial Organizations in the EB–5 Employment Creation Process," 2 *Bender's Immigr. Bull.* 813 (Oct. 15, 1997). Some of the earlier legal opinions are reproduced in 73 Interpreter Releases 1617 (Nov. 18, 1996), and 72 Interpreter Releases 1191 (Sept. 1, 1995).

15 Memorandum of Michael D. Cronin, INS Acting Assoc. Comm'r (Mar. 11, 1998), forwarding legal memorandum to INS field offices, placing a hold on adjudication of petitions, and instructing INS service centers to certify petitions to the Administrative Appeals Office (AAO). The legal opinion is reproduced in 75 Interpreter Releases 1323 (Mar. 9, 1998).

16 See the precedent decisions in *Matter of Soffici*, 22 I&N Dec. 158, 19 Immigr. Rep. B2–25 (Int. Dec. 3359, AAO June 25, 1998); *Matter of Izumii*, 22 I&N Dec.169, 19 Immigr. Rep. B2–32 (Int. Dec. 3360, AAO June 13, 1998); *Matter of Hsiung*, 22 I&N Dec. 201, *19 Immigr. Rep.* B2–106 (Int. Dec. 3361, AAO July 31, 1998); *Matter of Ho*, 22 I&N Dec. 206, 19 Immigr. Rep. B2–99 (Int. Dec. 3362, AAO July 31, 1998). The AAO decides appealed and certified cases. "Precedent decisions" by the AAO are binding on all officers of the immigration agency. Certain "nonprecedent decisions" of the AAO, which are not binding, also are cited in this article with the names of the petitioners redacted.

17 See, e.g., *Chang v. United States*, 237 F.3d 911 (9th Cir. 2003), holding that the INS cannot apply the AAO precedent decisions to conditional resident investors who are petitioning to remove the conditions on residence. But see *Spencer Enterprises v. United States*, 229 F. Supp. 2d 1025 (E.D. Cal. 2001), finding that the AAO precedent decisions provided interpretive guidance rather than rule changes and can be applied to deny initial investor petitions.

18 Statistics reveal even lower visa usage in most recent years. Of the 40,000 visas available over a recent four-year period, only 820 were issued—252 visas in FY 1999; 231 visas in FY 2000; 189 visas in FY 2001; and just 148 visas in FY 2002. These totals include all principal investors and dependents, in both consular visa and adjustment of status cases. Barely two percent of the total visa allocation was used.

19 Pub. L. No. 107–273, 116 Stat. 1758, tit. I, subtit. B, ch. 1 § 11031 et seq. (2002). For a summary of the EB–5

investor-related amendments in the DOJ Act relate to fashioning a form of interim relief for the relatively small group of existing investors affected by the program changes implemented by the AAO precedent decisions in 1998. But perhaps more significantly, the DOJ Act also includes amendments to the investor statute and the Pilot Program that should improve the record of the immigrant investor program in the long term.

THE PILOT PROGRAM AND CLUSTER ECONOMIC DEVELOPMENT

When Congress first introduced the investor Pilot Program in 1992, it intended to catalyze immigrant investment in defined geographic areas.[20] The Pilot Program is designed to amass and pool capital for targeted investment, i.e., it contemplates "pooling investments in a region of the United States in order to develop interrelated enterprises which would increase the employment base and economic productivity of that region."[21] These "regional center" areas may be identified with city or county boundaries, a redevelopment area, an enterprise zone, or any similar geographic area with definite boundaries.

A "regional center" is designated by the immigration agency on the basis of a proposal for economic growth in the particular geographic area.[22] The applicant for regional center designation may be a private or public economic development agency, or a for-profit private entity, that advances a general plan to use immigrant investor capital to fuel economic growth within the defined geographic area.[23]

Investors in so-called "regional center" areas are not required to rely on proof of direct job creation, but instead may include in their petitions seeking permanent residence proof of indirect job creation based on "reasonable methodologies."[24] This feature of the Pilot Program is perceived as the critical motivating benefit to investors, insofar as it is a relaxation of the evidentiary standards for job creation that otherwise govern in the cases of immigrant investor petitions.[25]

Congress extended the Pilot Program twice, most recently in 2000. Congress increased the number of visas available under the Pilot Program from 300 to 3,000 visas annually, and amended the statute to clarify that investors may rely upon evidence of indirect job creation in their individual petitions regardless of whether their investment increased export sales, so long as there exists other evidence of economic growth.[26] The intent of the amendment was to correct the INS in its insistence that use of the indirect employment methodologies of the Pilot Program required evidence of increased export sales.[27]

Provision, see 79 Interpreter Releases 1573, 1574 (Oct. 21, 2002).

20 Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1993 (Appropriations Act), Pub. L. No. 102–395, § 610, 106 Stat. 1828; S. Rep. No. 102–918 (1992).

21 See U.S. Senate Report 102–331, 102d Congress 2d Sess., July 23, 1992; see also Immigrant Investor Pilot Program, Final Rule, 59 Fed. Reg. 17920–21 (Apr. 14, 1994), reported on and reproduced in 71 Interpreter Releases 531 (Apr. 18, 1994).

22 See 8 CFR § 204.6(m) for the requirements of regional center designation.

23 According to the regulations, "*[r]egional center* means any economic unit, public or private, which is involved with the promotion of economic growth, including increased export sales, improved regional productivity, job creation, and increased domestic capital investment." 8 CFR § 204.6(e).

24 See the Appropriations Act, supra note 20, § 610(c), and 8 CFR § 204.6(m)(3)(v).

25 The investor files an initial Immigrant Petition by Alien Entrepreneur (Form I–526) based on evidence of investment of capital and a plan for job creation. If the petition is approved, the investor may become a conditional permanent resident. Prior to the second anniversary of obtaining conditional permanent residence, the investor must file the Petition by Entrepreneur to Remove Conditions (Form I–829) requesting removal of the conditions on permanent residence based on evidence of the investment and the jobs created. This article assumes a basic understanding of the requirements of the immigrant investor law. For an overview, see Yale-Loehr, "EB–5 Immigrant Investors," 2 American Immigration Lawyers Association, 2002–03 *Immigration & Nationality Law Handbook* 163 (Auerbach et al. eds., 2002).

26 Visa Waiver Permanent Program Act, Pub. L. No. 106–396, § 402(a), 114 Stat. 1637, 1647 (2000), extending the Pilot Program for three years to September 30.

27 The INS maintained a narrow view of the applicability of the Pilot Program: "The pilot program includes a modified job-creation requirement that enables investors in regional centers to credit their investment with indirect job-creation through revenue generated from increased exports." INS Report to Congress, supra note 10. See, e.g., *Matter of [name redacted]*, WAC–99–055–50009 (AAO Aug. 14, 2002), a nonprecedent decision of the AAO holding that petitioner could not rely on indirect employment methodologies because a brew pub/restaurant on the island of Kauai did not involve "exports" within the meaning of restrictive INS regulations at 8 CFR § 204.6(m), dismissing a letter from the Hawaii Department of Business, Economic Development and Tourism that contended restaurants are part of the tourism trade that the island "exports." See Stone, "INS Decisions Cloud Future of Investor Pilot Program," 6 *Bender's Immigr. Bull.* 233 (Mar. 1, 2001), and discussion of emphasis on export sales.

By including immigrant investor provisions in the DOJ Act, Congress again reinforced its commitment to investment immigration and to the Pilot Program in particular. In the DOJ Act, Congress directed the immigration agency to designate regional centers based on a "general proposal" for promotion of economic growth that contains "general predictions" concerning the businesses that would receive investor capital and the jobs that would be created. Applicants for regional center designation had encountered stiff INS resistance, finding it exceedingly difficult to satisfy both the INS insistence on proof that the eventual investors in regional center areas would qualify for permanent residence, and the INS requirement of documentation concerning the identities of the specific companies and the specific jobs that would be impacted by the investment capital.[28] Congress intended to topple these barriers to regional center designation. Congress also included in the DOJ Act specific language to emphasize that the goal of the Pilot Program is to amass and pool large amounts of investment capital and to concentrate that capital in specific, limited geographic areas so as to promote economic growth and job creation in those areas.[29]

In 1992, when Congress conceived of the Pilot Program as a vehicle for attracting investment capital to specific regional areas, Congress anchored the investor Pilot Program to a theory of cluster economic development, at the time a relatively new microeconomic theory of local and state competitiveness in a global economy.[30] The linkage between the Pilot Program and the cluster economic development model is evident from the legislative statements of Congress, the circumstances surrounding enactment of the Pilot Program, and the recent statutory changes to the Pilot Program.

Congress used the language of cluster economic development theory when it initially declared its vision of the Pilot Program as the pooling of immigrant investor capital in order to develop "interrelated enterprises"[31] that would enhance the economic productivity of a region. The centerpiece of cluster economic development theory, in comparison, is the concept of clusters as "geographic concentrations of interconnected companies."[32]

The circumstances of the Pilot Program's enactment also reveal the link between the Pilot Program and the cluster economic development model. The Pilot Program statute, in fact, was based on a cluster economic development proposal that had been presented to Congress prior to enactment of the law. The proposal, by the World Trade Center of Greenville-Spartanburg (GSP), consisted of a general plan for attracting and using immigrant investor capital to help finance a broad range of development activities in collaboration with Clemson University, South Carolina's Port Authority, and other institutions and private firms located in the region.[33] The GSP proposal led not only to enactment of the Pilot Program, but also to the INS's approval of GSP as the first "regional center" under the Pilot Program.

Certain commentary in the INS's regulatory process suggests the agency understood well that it was delegated the responsibility of ascertaining whether the cluster development model could work in the immigrant investor realm.[34] Indeed, the INS correctly captured the concept of targeted regional economic development when it promulgated Pilot Program regulations that require the proposal for regional center designation to describe how the regional center will promote economic growth within a particular region.[35]

More recently, in the DOJ Act, Congress reemphasized the regional economic development objectives of the Pilot Program by amending the Pilot Program statute to clarify that the objectives of the Pilot Program are not to be equated narrowly with promotion of export sales, but instead are geared toward "concentrating pooled investment in defined economic zones."[36] The DOJ Act sent a clear message that

28 See Stone, supra note 27, for a detailed discussion of the statutory and regulatory requirements and the INS's restrictive interpretation of the requirements in the cases of five applications for regional center designation.

29 See DOJ Act, supra note 19, § 11037 ("Amendments to Pilot Immigration Program for Regional Centers to Promote Economic Growth").

30 One of the earliest articulations of the cluster theory is found in Porter, *The Competitive Advantage of Nations* (The Free Press, 1990).

31 See legislative history and INS publication of regulations, supra note 21.

32 Porter, "Location, Competition, and Economic Development: Local Clusters in a Global Economy," 14 *Economic Development Quarterly*, No. 1 (Feb. 2000), at 15.

33 The author obtained a copy of slightly redacted materials concerning the GSP proposal and other regional centers designated by the INS, all available to requesters under the Freedom of Information Act. The memorandum from Jacquelyn A. Bednarz, INS Acting Ass't. Comm'r, "Designation of Regional Centers Under the Immigrant Investor Pilot Program," HQ70//6.2.5 (July 31, 1998), lists the approved regional centers.

34 See 58 Fed. Reg. 44606 (Aug. 24, 1993), Interim Rule with Request for Comments ("the purpose in enacting 610(a)—to obtain empirical evidence of the effectiveness of the regional center concept in promoting economic growth...")

35 8 CFR § 204.6(m)(3).

36 See recent statutory amendments, supra note 19, § 11037.

Congress wants the immigrant investor program to feature a cluster economic development model.

Clustering is recognized widely in economic development literature and among state and local government agencies as the energizing force in modern economic development and job creation. In the words of renowned Harvard Business School Professor Michael Porter: "Clusters are a striking feature of virtually every national, regional, state, and even metropolitan economy, especially in more advanced nations."[37] Cluster-based economic development is considered a vital response to major forces that are adversely affecting large swaths of the U.S. economy, the forces of globalization, rapidly changing technology, and declining living standards.[38] In the view of state and local government agencies, cluster initiatives do not simply create or "purchase jobs" for their residents but rather impact regional economic fundamentals that are more likely to ensure that the jobs are long-lasting, quality jobs.[39] The National Governors Association advocates cluster-based economic development initiatives as essential for enabling regional areas to compete in the global economy.[40]

The common features of economic clustering include geographic proximity of interrelated businesses, concentration of capital, and involvement of local government and educational institutions. A cluster may include a broad array of linked industries and other entities important to competition. Cluster economic development theory rests on a superstructure that includes at least the following two pillars: (1) in advanced economies as in the U.S., regional clusters of private firms (rather than individual companies or single industries) are the single most significant source of quality, sustainable jobs; and (2) the public sector's role in promoting cluster economic development is to improve the circumstances that impinge on competitiveness, requiring the shaping of economic foundations (such as labor pools, knowledge, financing, physical infrastructure, and regulations) to cluster needs.[41] In other words, cluster economic development requires growing dynamic industry networks of private firms, and investment in infrastructure and other fundamental assets.[42] Real estate is one of those fundamental assets, and shaping real estate assets in suitable forms for cluster businesses can be critical to business attraction and retention.[43]

Examples of the role of universities in cluster economic development include the University of California at San Diego in the bioscience economy of northern San Diego county, the University of Texas in the high-tech economy of Austin, and the University of Akron in the polymer synthetics industry of the Akron area.[44] The Silicon Valley, California (closely linked to Stanford University), perhaps, is one of the country's best known economic clusters.[45] But not all successful economic clusters are world famous or tied to large universities; support from the state Department of Community and Economic Development kicked off Connecticut's computer software cluster,[46] and links to community colleges have been critical to cluster-based rural economies in North Carolina and Minnesota.

Economic clusters are important to enhanced economic development and job creation because they tend to enhance the microeconomic business environment, resulting in increased company productivity. In the words of Dr. Porter:

37 See Porter, supra note 32, at 15.

38 Waits, "The Added Value of the Industry Cluster Approach to Economic Analysis, Strategy Development, and Service Delivery," 14 *Economic Development Quarterly*, No. 1 (Feb. 2000), at 36.

39 Id., noting that in addition to the problem of unemployment, declining living standards result in part from poor quality, low-paying jobs.

40 National Governors Association, *A Governor's Guide to Cluster-Based Economic Development* (2002) (available at *http://www.nga.org*).

41 Waits, supra note 38, at 37.

42 Weiss, *State Policy Approaches to Promote Metropolitan Economic Strategy*, National Governors Association Center for Best Practices (Oct. 2002), at 23 (available at *http://www.nga.org/Center*). The City of San Jose, California, for example, in its decades-long drive to become capital of the Silicon Valley, invested $117 million in infrastructure improvements such as bridges, roads, street improvements, water wells, sanitary systems and storm sewers. *Introduction to Redevelopment*, California Redevelopment Association (1st ed. 1996), at 81.

43 Walcott, "Analyzing an Innovative Environment: San Diego as a Bioscience Beachhead," 16 *Economic Development Quarterly*, No. 2 (May 2002), at 99–114. Golden Rainbow Freedom Fund, an existing Pilot Program regional center in Seattle, Washington, appears to be engaged in this variety of cluster development.

44 Walcott, supra note 43, at 99; Weiss, supra note 42, at 12–14.

45 Perhaps less known is the critical role of immigrant entrepreneurship in the Silicon Valley's success. Saxenian, "Silicon Valley's New Immigrant High-Growth Entrepreneurs," 16 *Economic Development Quarterly*, No. 1 (Feb. 2002), at 20–31.

46 The "Software and Information Services Cluster" refers to the state of Connecticut's more than 1,000 software and information technology companies. See *http://www.ct.org*. See also National Governors Association Center for Best Practices, *Innovative State Policy Options to Promote Rural Economic Development* (Feb. 2003) (available at *http://www.nga.org*).

> [T]he sophistication of how companies compete in a location is strongly influenced by *the quality of the microeconomic business environment.* Some aspects of the business environment (e.g., the road system, corporate tax rates, the legal system) cut across all industries. These economy-wide (or "horizontal") aspects are important and often represent the binding constraints to competitiveness in developing economies. In more advanced economies and increasingly elsewhere, however, the more decisive aspects of the business environment for competitiveness often are cluster specific (e.g., the presence of particular types of suppliers, skills, or university departments).[47]

Vigorous local rivalry that shifts from low wages to low total cost, requiring improved efficiencies in manufacturing and service delivery, characterizes an advanced economy. Ultimately, rivalry also must evolve from cost to include differentiation. Competition must shift from imitation to innovation and from low investment to high investment not only in physical assets but also in intangibles such as employee skills and technology.[48]

Economic clusters affect competition by increasing the current productivity of constituent firms or industries and by increasing the capacity of cluster participants for innovation. The concentration of innovation, knowledge, and know-how is the greatest advantage of a cluster.[49] Firms within a cluster often are able to perceive more clearly and rapidly new buyer needs, and new technological, operating, and delivery possibilities. "The similarity of basic circumstances (e.g., labor and utility costs) combined with the presence of multiple rivals, forces firms to seek creative ways in which to distinguish themselves. Pressure to innovate is elevated."[50]

Dr. Porter observes that foreign investors may perceive the risks of investment in an established economic cluster as significantly lower:

> The presence of an established cluster not only lowers the barriers to entry to a location facing outside firms but also reduces the perceived risk (particularly if other "foreign" cluster participants already are present). There also are numerous examples of firms that have relocated entire business units to cluster locations or designated their subsidiaries located there as the regional or world headquarters for lines of business.[51]

Cluster economic development theory, in sum, is an investment and economic development model that has considerable currency among economic development experts, including the city, state, and regional planners who devise strategies for attracting investment capital and job-creating businesses. The cluster model is favored as an effective strategy for enhancing innovation and for improving the quality of jobs in the difficult competitive environment of globalization and ever-changing technology. Immigration policy and practice should recognize that cluster economic development theory is not only the underlying driving force of the Pilot Program, but is also a blueprint for impacting the regional economic fundamentals that are essential for creating quality, sustainable jobs.

ADMINISTERING THE PILOT PROGRAM TO TEST THE CLUSTER MODEL

The Bureau of Citizenship and Immigration Services (BCIS) should adopt new policy and adjudication standards recognizing that the cluster economic development model is the centerpiece of the Pilot Program and that the BCIS is its steward. Congress intended the INS to administer the Pilot Program to encourage mass investment by foreign investors desiring U.S. permanent residence, so that the INS could test the feasibility of immigrant capital as a stimulus to cluster economic development. While the INS initially may have recognized that it was tasked with testing the effectiveness of the model,[52] in practice the INS role in the Pilot Program has appeared to be one of a reluctant overseer that holds the view that the Pilot Program is little more than a liberalized path to permanent residence, for which a petitioner must pay the "cost" of presenting evidence of jobs created through increased export sales. That reluctance (along with the severe disruption in the program since 1998 when the INS issued new precedent decisions and faced off against investors and their sponsors in the courts), has muddled the administration of the Pilot Program such that the only reasonable conclusion to be reached is that there has not been a sufficient test of the Pilot Program model thus. Consequently, to assess whether immigrant investor capital in fact can stimulate cluster economic development, changes in policy and adjudication standards are needed.

47 Porter, supra note 32, at 19.

48 Id. at 20.

49 *A Governor's Guide to Cluster-Based Economic Development*, supra note 40, at 9.

50 Porter, supra note 32, at 24.

51 Porter, supra note 32, at 25.

52 Interim Rule with Request for Comments, supra note 34. See also INS Report to Congress, supra note 10, at 7: "The Immigrant Investor Pilot Program is intended to assess whether immigrant investor capital can stimulate job-creation, economic growth, export trade, and domestic capital investment in approved regional centers."

Specifically, once the BCIS adopts policy changes that reflect a strong commitment to the Pilot Program's success, the agency should modify standards so that regional center designation can be expedited; it should seek out and welcome the participation of local and state economic development agencies that are likely to be interested in the benefits of the Pilot Program; and it should reexamine legal standards applicable to review of individual investor petitions in order to ensure prompt approval of meritorious petitions filed by individual investors.

There ought to be a genuine test of the cluster economic development model. There is no guarantee, however, that adoption of the changes recommended herein would translate into mass investment and job creation. Substantial doubt, in fact, lingers in the mind of this author: It is possible that investors never bring their investment capital to regional center areas in significant mass on the terms that a rational immigrant investor program requires. Demonstrable results, if any, are not likely to appear for several years after the program changes are implemented, investments are made, businesses mature, and new jobs appear in the regional economy. Absent program changes of the kind recommended herein, however, it is unlikely the cluster economic development model for immigrant investors ever could be genuinely tested.

- Facilitate Regional Center Designation

The first task for the BCIS is to facilitate regional center designation among entities that have current plans to use the Pilot Program. Although the INS designated approximately 20 regional centers in the early 1990s, due to a variety of reasons the vast majority of the entities are not active as regional centers and are not likely to be active as regional centers in the future. Unless a sufficient number of viable regional centers is designated, there cannot be an adequate test of whether the Pilot Program can attract immigrant capital to the economic clusters that breed interconnected businesses, innovation, and quality jobs.

Regional center designation is just a preliminary, small step in the Pilot Program experiment. The Pilot Program requires that a sponsor of economic development in a particular geographic region file an application for "regional center" designation.[53] The regional center designation may be awarded to any entity "public or private, which is involved with the promotion of economic growth."[54] Thus, approved regional centers include public entities such as the Economic Development Department of Pueblo, Colorado, and the State of Vermont Agency of Commerce and Community Development, as well as private entities such as CMB Export LLC, which had focused on military base redevelopment in the state of California. The regional center designation does not confer any particular monetary or other benefits on the regional center entity per se. Rather, the benefit of the designation is reserved for the immigrant investors who invest capital within the boundaries and scope of the regional center, as they can use multiplier tables and other employment methodologies and forecasts to measure the job creation that is an essential element of their individual petitions for immigration status.

Consistent with its mission as steward of the Pilot Program, the BCIS should adopt flexible criteria for regional center designation based on general proposals for investment of capital, economic development, and job creation. Inflexible criteria, in the past, have hindered the designation of regional centers. For at least a four-year period ranging from 1998 to 2002, the INS erected exceedingly high hurdles for obtaining regional center designation. The INS required an applicant for regional center designation to present exacting details concerning the specific companies that would be created as a result of investment within the proposed regional center, the specific jobs that would result, evidence of the application of multiplier tables to the specific businesses and investments, and unusually detailed information concerning the export sales that would result from investment in the proposed regional center area.[55] The INS required exacting details, although the proposal for regional center designation by nature involves considerable estimation and forecasting of events that involve hundreds of uncontrollable variables that occur two, three, and four years into the future. By insisting on exacting details and by focusing exclusively on export sales, the INS denied several applications for regional center designation,[56] and more than likely deterred many other applicants from pursuing the applications they had filed.

Congress enacted legislation to curb the INS's insistence on exacting details. In the DOJ Act, Congress further clarified that the Pilot Program law does not require an emphasis on export sales in an application for regional center

[53] 8 CFR § 204.6(m)(4).

[54] 8 CFR § 204.6(e), defining "regional center."

[55] See, e.g., *Matter of Envirotek International, Incorporated* (Ass't Comm'r Adj., May 3, 2000); *Matter of Redevelopment Agency of the City of Vernon* (Ass't Comm'r Adj., July 14, 2000).

[56] See cases reviewed in Stone, supra note 27.

designation,[57] and directed the INS to designate regional centers based on a "general proposal" for promotion of economic growth that contains "general predictions" concerning the businesses that would receive investor capital and the jobs that would be created.[58] The DOJ Act also emphasized that the goal of the Pilot Program is to amass and pool large amounts of investment capital and to concentrate that capital in specific, limited geographic areas so as to promote economic growth in those areas. The BCIS should faithfully interpret this legislation by welcoming applications for regional center designation and revising its regulations as needed.[59]

The BCIS also should act promptly to review and decide on applications for regional center designation. The experience to date is that an application may languish without decision by the INS for years. The typical profile of a regional center sponsor is a local government agency or a group of local business people who anticipate that a regional center designation may be attractive to foreign investors who would consider investment in a particular area. These agencies and local business people invest substantial resources toward planning a regional center, preparing an application for regional center designation, and promoting the regional center as an investment opportunity. This considerable investment in time, effort, goodwill, and money typically is made well in advance of locating actual immigrant prospects who may want to invest capital in the particular area. Not only do the applicants deserve a prompt adjudication, but also, the economic factors are not stagnant. Investment opportunities may be short-lived. Any application for regional center designation is in jeopardy of becoming moot if it is not attended to promptly. For the Pilot Program to function properly, the review process should be compacted. A thorough review of an application should be conducted within 90 days.

- Engage Local and State Economic Development Agencies

To test the effectiveness of immigrant capital as a contributor to the success of cluster economic development, the BCIS should encourage the participation of local and state economic development agencies. Although a few such agencies have been involved in the Pilot Program of the past, the BCIS should involve even more of these agencies in the Pilot Program of the future. Specifically, the BCIS should conduct a publicity campaign directed at local and state agencies to encourage their various enterprise zone, empowerment zone, redevelopment agency, rural development and other economic development entities—both public and private—to examine the immigrant investor Pilot Program as a possible source of capital for creating jobs and economic benefits within their jurisdictions. The BCIS's campaign message would include information on immigrant capital as a potential source of capital for businesses and new jobs, and information on how agencies can serve as a regional center sponsor entity, or as a coordinator and supporter of regional center activities sponsored by private entities. The INS has previously cited the absence of any significant outreach efforts as one of several likely causes of the investor program's failure to date.[60]

By taking aggressive steps to involve local and state agencies more fully in the Pilot Program, the BCIS would be increasing the likelihood that immigrant capital will have a

[57] Congress made a technical amendment, changing "and" to "or" in subparagraph 610(c) when it extended the Pilot Program in the year 2000, see Appropriations Act, supra note 20, and then in the DOJ Act, Congress closed the loop by making the same technical amendment to subparagraph 610(a) as it concerns applications for regional center designation.

[58] See DOJ Act, supra note 19, § 11037 ("Amendments to Pilot Immigration Program for Regional Centers to Promote Economic Growth"). The Pilot Program statute, section 610(a), now reads:

> SEC. 610. PILOT IMMIGRATION PROGRAM.—(a) Of the visas otherwise available under section 203(b)(5) of the Immigration and Nationality Act (8 U.S.C. 1153(b)(5)), the Secretary of State, together with the Attorney General, shall set aside visas for a pilot program to implement the provisions of such section. Such pilot program shall involve a regional center in the United States, *designated by the Attorney General on the basis of a general proposal,* for the promotion of economic growth, including increased export sales, improved regional productivity, job creation, *or* increased domestic capital investment. *A regional center shall have jurisdiction over a limited geographic area, which shall be described in the proposal and consistent with the purpose of concentrating pooled investment in defined economic zones. The establishment of a regional center may be based on general predictions, contained in the proposal, concerning the kinds of commercial enterprises that will receive capital from aliens, the jobs that will be created directly or indirectly as result of such capital investments, and the other positive economic effects such capital will have.* [New language in italics.]

[59] Perhaps signaling the start of a welcome trend, the INS recently approved two applications for regional center designation filed by private entities, the first focused on investment in agricultural areas of Central California (see California Consortium for Agricultural Export, *http://www.ccax.com*), and the second focused on investment in the City of Philadelphia (see Philadelphia Industrial Development Corporation, *http://www.pidc-pa.org*).

[60] See INS Report to Congress, supra note 10, at 4.

role in cluster economic development and the attendant innovation, company formation and job creation. Local and state economic development agencies, both public and private, have public benefit goals—e.g., to create jobs, eliminate blight, increase the tax base, and target economic development in a particular area either because of poverty and need or because of an area's relative economic advantages—that coincide neatly with Pilot Program goals, or at least complement those goals. Hundreds of local and state agencies across the country already are in operation, with financial, infrastructure, and professional resources dedicated to economic development and job creation, all of which can be leveraged by those agencies to promote the Pilot Program with little added cost.

The local and state government role as a facilitator of economic development is well understood and documented in the literature concerning the cluster economic development model:

> By grouping together firms, suppliers, related industries, service providers and institutions, government initiatives and investments address problems common to many firms and industries without threatening competition. A government role in cluster upgrading, then, will encourage the building of public or quasi-public goods that significantly affect many linked businesses. Government investments focused on improving the business environment in clusters, other things being equal, might well earn a higher return than those aimed at individual firms or industries or at the broad economy.[61]

The local development entities likely to be interested in, and likely to be effective in directing, the capital that flows from the Pilot Program are local city government agencies that preside over redevelopment districts[62] and enterprise zones,[63] as well as private nonprofit entities that focus on local development activities. The city of Los Angeles, for example, has five state-designated enterprise zones (Central City, Mid-Alameda Corridor, Eastside, Harbor Area, and Northeast San Fernando Valley) covering the most impoverished areas of the city. The successful private nonprofit entities include Joint Venture: Silicon Valley Network[64] and the San Diego Regional Economic Development Corporation,[65] among many other organizations with proven track records of helping to direct capital in the public interest.

At the state government level, the state of California Technology, Trade and Commerce Agency, for example, awards designations for Local Agency Military Base Recovery Area (LAMBRA) to alleviate the hardships resulting from closure of 29 military installations and from 187,000 displaced workers throughout the state.[66] The LAMBRA designation functions like an enterprise zone designed to attract capital investment and businesses to the sites of the closed or downsized military bases. Other state agencies promoting business development include Hawaii's Department of Business, Economic Development & Tourism.[67]

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61 Porter, supra note 32, at 27. The appropriate role of a particular local development agency at any point in time is likely to vary, depending on such factors as cluster maturity and sources of competitive advantage. Roles include organizing relevant government departments around clusters; focusing efforts to attract foreign investment around clusters; focusing export promotion around clusters; eliminating barriers to local competition; sponsoring streamlined, pro-innovation regulatory standards affecting the cluster; creating specialized education and training programs; establishing local university research efforts in cluster-related technologies; enhancing specialized transportation, communications, and other infrastructure; mounting cluster-specific efforts to attract suppliers and service providers from other locations; and establishing cluster-oriented free trade zones, industrial zones, or supplier parks. See also Walcott, supra note 43, emphasizing role of advocacy and political groups in San Diego's cluster success; Weiss, supra note 42, at 16, observing that it is "absolutely essential" that state and local development agencies be involved in metropolitan economic strategy.

62 A local government body in most states can pass an ordinance establishing a redevelopment area based on a redevelopment plan for the improvement of infrastructure within city limits. The plan focuses on revitalizing blighted properties. The state permits the local government to pursue redevelopment activities financed at least in part with the increased tax receipts that come from enhanced property assessments in the redevelopment area. See *Introduction to Redevelopment*, California Redevelopment Association (1st ed. 1996).

63 Enterprise zone programs typically target economically distressed areas by offering tax incentives to attract businesses that provide employment. Tax benefits include loss carry-forwards, state tax credits for employees hired, sales tax credits, accelerated depreciation, and incentives for lenders that loan money to businesses located in the enterprise zone.

64 See *http://www.jointventure.org*.

65 See *http://www.sandiegobusiness.org*.

66 See *http://www.commerce.ca.gov*. One of the existing regional centers under the Pilot Program, CMB Export LLC, was designed to attract investment to closed military base areas.

67 See *http://www.dbedt.hawaii.gov*. The agency is designated as a regional center under the Pilot Program.

Entities likely to be interested in the benefits of investor capital that could flow from the Pilot Program include county governments or county-wide nonprofit entities that direct rural empowerment zones, enterprise communities, and renewal communities.[68] In order to administer its empowerment zone program, for instance, Riverside County, California, arranged a partnership between a nonprofit corporation (The Desert Alliance for Community Empowerment) and the Riverside County Economic Development Agency.[69]

The specific agendas of these agencies vary, of course, but most espouse the promotion of economic development activities that at least complement the activities that are characteristic of the cluster economic development model. The U.S. Department of Housing and Urban Development's description of its "Community Renewal Initiative" illustrates the point. It describes the Initiative as the melding of four key principles: strategic vision for change; community-based partnerships; economic opportunity; and sustainable community development:

> Economic opportunity includes creating jobs within the designated RC/EZ/EC communities and linking residents to jobs throughout the region; providing entrepreneurs with technical assistance; providing greater access to capital and credit for businesses so they can expand and create job opportunities for residents; and providing residents with access to job training and job placement services, including those associated with Welfare-to-Work and school-to-work initiatives....The first priority in revitalizing distressed communities is to create economic opportunities—jobs for residents. The creation of jobs, both within the community and throughout the region, provides the foundation on which residents can become economically self-sufficient.[70]

Rural areas also could benefit tremendously from an effective investor Pilot Program. Economic development experts contend that cluster-based strategies must be pursued to overcome the many economic challenges faced by rural communities.[71] Following a cluster development model, some 150 hosiery manufacturers in rural North Carolina formed a Hosiery Technology Center to collaborate in research, worker training, prototype creation, and website development. And in Minnesota "rural knowledge clusters" have sprouted in rural locations, with specialties in wireless technology, automation technologies, and recreational equipment such as snowmobiles.[72] The development office of the Wichita County Enterprise Community (of Kansas) is an example of the kind of rural-based entity that could view the Pilot Program as a critical source of capital for its economic and community development projects. According to its website,[73] the office strives to channel grant funds to infrastructure needs (such as water, sewer, roads, and airports), housing for low-income residents and first-time home buyers, health care needs (including recruitment of physicians and other medical personnel), education initiatives (vocational training, adult education, and an entrepreneurship incubator), and environmental concerns (including a county recycling center). The area has suffered from severe depopulation as a consequence of the restructuring of the local farm economy, in turn resulting in a drastically lower tax base, fewer businesses that provide jobs, and a strain on social services. With respect to economic development, the Wichita County strategic plan proposed to channel funds for business training for new and existing businesses; a revolving loan fund to assist new and expanding businesses; an Agricultural Technology Center to facilitate processing of agricultural products; an industrial park; and a local investment corporation to invest in new business developments. Federal grant funds, of course, amount to only the start-up money. Wichita County actively pursues additional outside funding sources.

The BCIS should find ready, willing, and able allies among local and state government agencies and their collaborating private nonprofit agencies that focus on economic development. These agencies may apply for a regional center designation directly, or instead may advise a private entity seeking regional center designation and then consult that private entity throughout the course of its

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68 Empowerment zones, enterprise communities, and renewal communities are designated under federal grant and tax incentive programs designed to aid both urban and rural areas such as Shannon County, South Dakota, which demonstrated high rates of poverty, and the areas of Lake Aggasiz, North Dakota, and Wichita County, Kansas, which demonstrated unusually high population "emigration." The designations entitle the regions to federal grant funds, administered by the U.S. Department of Agriculture and the U.S. Department of Housing and Urban Development. See "EZ/EC" website, *http://www.ezec.gov*.

69 See *http://www.dcez.org*.

70 See *http://www.hud.gov* ("Community Renewal Initiative").

71 See, e.g., Rosenfeld, Federal Reserve Bank of Kansas City, *Networks and Clusters: The Yin and Yang of Rural Development* (May 2001); National Governors Association Center for Best Practices, *Innovative State Policy Options to Promote Rural Economic Development* (Feb. 2003) (available at *http://www.nga.org*).

72 Munnich, Jr. et al., *Rural Knowledge Clusters: The Challenge of Rural Economic Prosperity*, U.S. Economic Development Administration (Aug. 2002).

73 See *http://www.wichitacounty.org*.

involvement in the Pilot Program. The agency's assistance may include sourcing the best available businesses as investment targets, performing due diligence, serving as a reference for local businesses, providing business plan advice, consulting on business growth and additional financial resources, and qualifying the investments and petitioners for immigration benefits in terms of providing unemployment statistics and job creation forecasts and results.

These local and state agencies, furthermore, typically are democratic and transparent. The agencies usually conduct business in meetings open to the public, where all financial information concerning business and activities must be disclosed and significant projects and initiatives must be submitted to a public vote. The added transparency that comes with more involvement by local and state agencies in the Pilot Program aids the BCIS in law enforcement responsibilities and in assessing the job-creation potential of investment plans. An incidental but not insignificant benefit is that increased participation by such agencies also may enhance the appeal of immigrant investment in the view of prospective investors.

This article in no way argues that government must participate in private sector job creation. Rather, on balance, the more coordinated participation in the Pilot Program by local and state economic development agencies, public and private, the better.[74]

- Embrace the Underlying Economic Model for Job Creation

The BCIS's legal standards relative to measuring job creation in the cases of individual investor petitions should embrace the underlying Pilot Program model for job creation. The model attempts to recognize the broadest possible range of economic impacts.

In the standard investor case, a petition that is not based on the Pilot Program, the petitioner may claim credit for workers the business hires as "employees"—those who provide services for the commercial enterprise and who are compensated directly by the commercial enterprise.[75] Conversely, job creation in the case of a petition that is based on the Pilot Program may consist of workers who are not employees of the commercial enterprise in which the petitioner has invested. Thus, at least in terms of the immigrant investor program, there is a simplified distinction between "direct" and "indirect" employment, the latter category reserved for Pilot Program cases. This distinction varies somewhat from an economist's use of the terms, "direct" impacts, "indirect" impacts, and "induced" impacts. Investment in an auto manufacturer, for example, may cause increased employment in the auto manufacturer ("direct"), in the company that supplies the rubber tires ("indirect"), and in the economy generally when the increased earnings are spent again in the economy ("induced"). The induced employment impacts are calculated according to multiplier tables and other statistical methodologies. The Pilot Program model for job creation recognizes all three forms of employment creation.

Pilot Program regulations provide that the reasonable methodologies for measuring indirect job creation "may include multiplier tables, feasibility studies, analyses of foreign and domestic markets for the goods or services to be exported, and other economically or statistically valid forecasting devices."[76] Forecasting methodologies, such as "RIMS II," are widely used in the public and private sectors as a systematic analysis of the economic impacts of state and local programs on affected regions.[77] The Department of Defense uses RIMS II to estimate the regional impacts of military base closings. State departments of transportation use RIMS II to estimate regional impacts of airport construction and expansion. In the private sector, analysts, consultants, and economic development practitioners use RIMS II to estimate the regional impacts of a variety of projects, such as the development of theme parks and shopping malls. RIMS II, of course, is just one among many types of economic analysis that can be used in support of an immigrant investor petition. A survey-based input-output model, such as the one in use in the state of Washington, may be even more reliable than RIMS II as a forecasting tool.[78] Many forecasting tools

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[74] Cf. for views against government involvement in economic development, see Murray, "Cluster-Based Development Strategies: Lessons From the Plastics Industry in North Central Massachusetts," 13 *Economic Development Quarterly*, No. 3 (Aug. 1999), at 266–280, finding little or no government role in the 200 year history of the plastics industry. See also Bates, "Government as Venture Capital Catalyst: Pitfalls and Promising Approaches," 16 *Economic Development Quarterly*, No. 1 (Feb. 2002), at 49–59, for a discussion of the Small Business Administration's (mis)handling of the SBIC program.

[75] 8 CFR § 204.6(e).

[76] 8 CFR § 204.6(m)(7)(ii).

[77] The INS has recognized that the Regional Input-Output Modeling System (RIMS II) of the U.S. Department of Commerce, Bureau of Economic Analysis, is a credible methodology. *Matter of [name redacted]* (AAO Dec. 15, 2000). See *http://www.bea.doc.gov/bea/regional/rims. Regional Multipliers: A User Handbook for the Regional Input-Output Modeling System (RIMS II)*, U.S. Department of Commerce, Bureau of Economic Analysis, (3d ed. Mar. 1997).

[78] Sommers et al., *Revitalizing the Timber Dependent Regions of Washington*, Northwest Policy Center for the Washington Department of Trade and Economic

are based on an accounting framework called an input-output table that is industry-specific, indicating the distribution of the inputs purchased and the outputs sold. Use of the input-output table requires providing detailed geographic and industrial information on the initial changes in output, earnings, or employment that are associated with the project under study. The multipliers then can be used to estimate the total impact of the project on regional output, earnings, or employment. These forecasting tools are widely accepted as a systematic analysis of economic impacts, which attempt to account for the interindustry relationships within regions that largely determine how regional economies are likely to respond to project and program changes.

The BCIS should accept that petitions based on the Pilot Program may be based on business plans and methodologies that forecast job creation throughout what could be a very broad geographic area,[79] and that a job forecast may not precisely identify the jobs that will be created, when they will be created, and in which companies the jobs will be created.[80] One of the consequences of accepting methodologies for forecasting jobs is that the business plans submitted in support of investor petitions may include forecasting that lacks specificity. These plans and projections should be welcomed so long as they are based on "reasonable methodologies" for identifying the number of jobs that will be created as a result of the investment.[81]

Multiplier tables, feasibility studies, and other statistically based methodologies are not guarantees of what jobs may be created in the future. Nor are these methodologies necessarily accurate concerning their estimations of the jobs already created. The evaluation of economic development outcomes remains very much an inexact science.[82] Nonetheless, the statutory intent is for the BCIS to defer to the economics professionals on the question of job creation, just as the public and private sectors do in other economic development endeavors. Beyond confirming that a recognized methodology is employed in support of claims of induced employment impacts, the BCIS should not substitute its own judgment concerning job creation for that of a credible professional who has rendered a forecast of job creation.

The policy rationale supporting a BCIS practice that defers to sometimes-unspecified employment forecasts is that the Pilot Program has at least the potential to substantially benefit the U.S. By providing an investment-for-jobs model that relieves the immigrant investor from having to open a business that directly employs 10 workers, and instead allowing the investor to pool capital along with the capital of other investors for concentrated investment in a particular area, the Pilot Program adopts a central tenet of the cluster economic development model. The Pilot Program endorses amassing capital for substantial, concentrated investment that breeds innovation, advances in technology, and the higher-skilled jobs that are sustainable in our sophisticated international economy. If the INS indeed disfavored investor petitions based on regional center designation under the Pilot Program, it is not exactly clear why.[83] In its policy-making

Development (Feb. 1991); Beyers and Nelson, *The Economic Impact of Technology-Based Industries in Washington State*, Report for the Technology Alliance, University of Washington (Aug. 1998).

79 Although *Matter of Izumii, supra,* note 16, declared that the job-creating activity of the enterprise must occur within the geographic boundary of the regional center, the petitioner nonetheless should be able to claim credit for the induced employment impacts that are reasonably forecasted to occur both within and beyond the geographic boundary of the regional center.

80 Thus, for example, a petition based on the Pilot Program might not meet the requirement that a business plan include a hiring timetable. See *Matter of Ho,* supra note 16.

81 Appropriations Act, supra note 19, § 610(c). The provision for "reasonable methodologies" should not preclude an investor in the Pilot Program from presenting a business plan that forecasts job creation in the petitioner's company ("direct" employment) and in the companies that do business directly with petitioner's company ("indirect" employment), without the aid of an economist's multiplier analysis, because such a forecast does not require multiplier tables.

82 Some analysts believe that much more complex analytical tools and methodologies are required to measure accurately the benefits from economic development efforts. Tao and Feiock, "Distributing Benefits to Need: Evaluating the Distributive Consequences of Urban Economic Development," 13 *Economic Development Quarterly*, No. 1 (Feb. 1999), at 55–65. For discussion of the difficulty in measuring results, see Wallace, "A Case Study of the Enterprise Zone Program: 'EZ' Avenue to Minority Economic Development?," 13 *Economic Development Quarterly*, No. 3 (Aug. 1999), at 259–65; Boarnet, "Enterprise Zones and Job Creation: Linking Evaluation and Practice," 15 *Economic Development Quarterly*, No. 3 (Aug. 2001), at 242–54.

83 Of the 148 immigrant investor visas issued in FY 2002, only *one* of the visas is reported as a Pilot Program visa. The INS attributed extraordinary delay in Pilot Program processing to indecision on how to count jobs created indirectly, citing "significant administrative challenges," and recommended to Congress a "full evaluation" of the Pilot Program. See INS Report to Congress, supra note 10; see also Minutes of INS Policy Council Meetings, March 17, 1999, and April 14, 1999. Closer scrutiny reveals nothing particularly problematic with the Pilot Program per se, however. Instead, the oversight challenges the INS encountered in the immigrant investor program generally during the 1990s influenced the INS's views about the Pilot Program. The INS issued four precedent decisions in 1998, supra note 16, describing recurring problems in the immigrant investor program, including investment of debt

concerning the Pilot Program, the BCIS should consider the program's potential for creating higher-quality jobs. Using a cluster economic development model, for example, the state of Arizona shaped a workforce development plan designed to move workers from construction, retail, and tourism sectors to higher-skilled, higher-wage occupations in certain industry clusters such as optics, software, and environmental technology.[84] It is widely believed that effective economic clusters nationwide cultivate a higher-skilled, specialized workforce due to the higher propensity for vocational education and customized training in businesses located in clusters.[85]

In sum, in fashioning standards for job creation, the BCIS should heed the statutory provision for reasonable methodologies to identify job creation in the Pilot Program. In so doing, the BCIS would be appropriately featuring the underlying cluster economic development model that could be an engine for substantial growth in quality, sustainable jobs. ■

rather than equity, investment features that too aggressively minimized investor risk, insufficient business plans, and the lawful source of investor capital. A review of AAO decisions reveals that similar investment plans of insufficient risk existed in investor petitions of all kinds, some of the Pilot Program variety and some not. Now that the INS has acted to eliminate investment plans that involve insufficient risk, the conditions appear ripe for the BCIS to test whether the Pilot Program can be an effective vehicle for cluster economic development.

84 Waits, supra note 38, at 48.

85 National Governors Association, *A Governor's Guide to Cluster-Based Economic Development,* supra note 40, at 30; *see also*, National Governor's Association, *A Governor's Guide to Creating a 21st-Century Workforce*, available at *http://www.nga.gov*, asserting that the competitive advantage enjoyed worldwide by U.S. firms depends on continuing investment in workforce.