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## IN THIS ISSUE



# IMMIGRANT INVESTMENT IN LOCAL CLUSTERS: PART II*

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Part I of this two-part article, which was published in 80 Interpreter Releases 837 (June 16, 2003), focused on the immigrant investor Pilot Program, surveyed the literature concerning cluster economic development, and recommended that the Bureau of Citizenship and Immigration Services (BCIS) adopt a new policy that would facilitate a test of whether the Pilot Program can be effective in attracting mass investment to regional areas with the result of creating quality, sustainable jobs in the U.S. economy.

Part II of this article identifies certain standards for adjudication of individual investor petitions that loom large as deterrents to job-creating investment, and recommends that the BCIS modify these standards in a manner consistent with the objective of job creation as well as considerations of 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 be a facilitator of the kind of interconnected businesses that are characteristic of the cluster economic development model.

## MODIFYING ADJUDICATION STANDARDS FOR INDIVIDUAL INVESTOR PETITIONS

The law and procedure concerning immigration based on investment are among the more enigmatic areas of immigration law practice. Above and beyond what practitioners perceive as a hostile government attitude toward investment immigration generally, the specific legal standards that have evolved out of individual case adjudications leave many practitioners at a loss for discerning exactly what combination of facts is likely to qualify for the immigrant investor classification. Experience in actual cases and a review of hundreds of other decided cases reveal that certain adjudication standards should be modified consistent with the goals of the immigrant investor program, without jeopardizing the government's interests in national security and fraud prevention.

A core assumption of the immigrant investor Pilot Program concerns investor motivation. Immigrants will invest within the designated regional center areas if they can obtain U.S. permanent residence as one of the benefits of making the investment. Indeed, the INS observed that the Pilot Program is a consequence of Congress's intent to "increase interest" in the investor program, which it hoped to accomplish by providing to petitioners additional tools for



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proving job creation.[86] Permanent residence, therefore, is a key motivation for the kind of investor that the Pilot Program "targets."

Adjudication standards should accommodate program objectives. In crafting legal standards and processing times for review of individual investor petitions, the BCIS not only should accept as fact that the underlying motivation of the investor is to obtain permanent residence, but also should recognize that in order to "increase interest" in the investor program, there must be predictability in the adjudication process. Specifically, legal standards and processing times should reflect the essential bargain that is at the heart of the immigrant investor legislation: if the required amount of capital is invested and the immigrant petition includes evidence of forecasted job creation, the petition should be approved and the investor should obtain U.S. residence promptly. Without some degree of predictability about the outcome in adjudication of individual investor petitions, those prospective immigrants who might invest for the sake of the permanent residence benefit in fact will not invest. Whereas investors understand well the nature of "investment risk"—how quickly invested capital can vanish when put to work in a for-profit venture—presumably they will not invest if the "immigration risk" is uncertain and unmanageable. Predictability about the adjudication of individual investor petitions, therefore, is critical to conducting the test of whether the Pilot Program is effective in creating jobs in economic clusters.

Adjudications of individual investor petitions to date more than likely deter rather than encourage investment from prospective investors. Although nothing more than anecdotal evidence is available, it is likely that would-be investors who are interested in permanent residence have elected not to invest in the U.S. in view of the difficulty of obtaining approval of an investor petition.[87] Very few petitions have been approved. Adverse decisions can be attributable to misunderstandings about legal requirements on the part of investor-petitioners and/or incompetence on the part of attorneys who represent those investor-petitioners, just as well as certain case denials appear to be attributable to unrealistic, arbitrary and/or ultra vires legal standards. A review of the denied cases that have made it to the INS's Administrative Appeals Office (AAO) reveals that all of the above factors have been in play. The fact remains, though, that qualifying for permanent residence under the immigrant investor law is perceived universally as very difficult, even where the investor has invested in cash all the capital the law requires and has presented a credible business plan for creating jobs. In such hostile circumstances for adjudication of individual investor petitions, it is likely that prospective immigrant investors are electing not to invest.

In these times, all matters of immigration are viewed first through a national security lens.[88] While the immigration law already provides for the exclusion of terrorists and other national security risks,[89] the legal barriers were insufficient to shield the U.S. from terrorists masquerading as law-abiding students and visitors. Vast national resources have been committed to increasing intelligence, detection, and law enforcement, and to reshaping U.S. immigration laws and procedures. Do immigrant investors and the petitions they file present unique national security threats? Considering the question only from an immigration practice point of view, as no claim is made to national security expertise, it would appear unlikely that investors present unique threats. There is no reported case of an investor threatening national security. Investor-petitioners, to a degree unlike any other category of immigrant, are required to disclose substantial amounts of personal and financial information in the course of the petition process. It is unlikely that a terrorist or a group of conspirators would expose such information and attempt to utilize the cumbersome multi-stage immigrant investor law to gain a foothold in the U.S. It is doubtful, therefore, that the stringent standards for adjudication of individual investor petitions are necessary to maintain national security.

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86 See Interim Rule, supra note 34, Part I.

87 One of the reasons the INS cited for low participation in the program was uncertainty about removal of conditions. See INS Report to Congress, supra note 10, Part I. A significant part of that uncertainty is due to confusion about legal standards. Many practitioners conclude it is impossible to satisfy all the legal requirements spawned by the INS. As the AAO precedent decisions issued in 1998 ushered in new, stiffer adjudication standards, the case approval rates dropped sharply. See visa statistics, supra notes 10 and 18, Part I.

88 Note, for example, enactment of the "Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001," Pub. L. No. 107–56, 115 Stat. 272 (2001), requiring more border personnel, enhanced technology, an entry-exit control system, and foreign student and exchange visitor tracking; the "Enhanced Border Security and Visa Entry Reform Act," Pub. L. No. 107–173, 116 Stat. 543 (2002), mandating use of tamper-resistant documents and biometrics, and visa restrictions for citizens of "terrorist states"; and legislation creating the Department of Homeland Security, which has absorbed the entire INS and many other federal agencies. Pub. L. No. 107–296, 116 Stat. 2135 (2002).

89 INA § 212(a)(3)(A)(iii).

Rather than citing national security, those in the INS and in Congress who have disfavored the immigrant investor program occasionally cited concerns about fraud and/or abuse. They advocated either repeal of the law or at least severely restricting the immigration of investors by pushing even higher the difficult standards for adjudication of individual investor petitions.[90]

A comprehensive analysis of fraud and abuse in the immigrant investor program is beyond the scope of this article, but it is worth pondering whether the petitions filed by investor immigrants pose unique risks for fraud and/or abuse. Already, the investor statute provides a conditional two-year resident status as a mechanism for deterring fraud. Are the risks for fraud in an investor petition so much greater than the risks for fraud in any other type of immigrant petition that the conditional two-year period is inadequate to deter fraud in investor cases? History suggests there are petitioners who materially misrepresent facts in all kinds of immigrant petitions; petitioners in very large numbers apparently have lied about their former military service, their work in agriculture, and their marriage bona fides. Just as an investor-petitioner could present false employment documents in alleging that certain jobs were created, so may an applicant for labor certification present fraudulent documents concerning the available job.[91] The readily available evidence suggests that the risk for fraud in an investor petition appears to be similar to, not substantially greater than, the risk for fraud in other categories of immigration petitions.[92]

As for abuse (i.e., legal conduct that produces results inconsistent with program objectives), it appears to thrive in circumstances of confused policy objectives, imprecise legal standards, aggressive petitioners and attorneys, and lax oversight. In the view of some observers, abuse exists in the H–1B, L–1, and other business-oriented visa categories.[93] With respect to immigrant investors, the two-year conditional residence period is designed to deter fraud and abuse. But experience teaches that most critical to furthering program objectives is increased engagement by the agency. Since the time of the AAO precedent decisions in 1998, the INS moved boldly to eliminate the investment schemes that the INS eventually deemed an abuse.[94] A heightened level of involvement by the BCIS in the immigrant investor program of the future, including equally bold moves by the BCIS to address the restrictive adjudication standards that are highlighted in this article, should be adequate to deter fraud and abuse in the immigrant investor program.

In sum, in crafting legal standards for individual investor petitions, the BCIS should recognize that it advances program objectives when there is predictability in the adjudication process. If the BCIS is to test whether the Pilot Program can be an effective creator of jobs in the U.S. economy, then prospective investors must perceive the prevailing legal standards as firm, fair, and feasible.

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90 Prior to enactment of the immigrant investor program, in Senate floor debate, former Sen. Dale Bumpers (D–Ark.) vehemently opposed enactment of the immigrant investor law, arguing that it was an offensive "fat-cat provision" for the wealthy to "buy their way" into the U.S. See 136 Cong. Rec. S7768–9 (daily ed. July 12, 1989). Nearly a decade later, Sen. Bumpers again took the floor in passionate opposition to the immigrant investor law, offering an amendment to repeal the law, arguing that it was unpatriotic and that it was subject to fraud and abuse. Sens. John D. Rockefeller (D–W. Va.) and Edward M. Kennedy (D–Mass.) countered that the immigration law includes many categories that favor the privileged and wealthy and that there is fraud and abuse in many federal programs, but that those facts did not warrant eliminating the particular federal programs, and that in the larger scheme of immigration, the immigrant investor program is just a modest measure devised to bring jobs to areas of need. The repeal amendment was defeated. See 144 Cong. Rec. S5026 (daily ed. May 18, 1998).

91 "Department of State Office of the Inspector General Announces Sentencing in Immigration Fraud Case" (Press Release, Mar. 7, 2003), conviction of attorney and associates in connection with labor certification fraud; *In the Matter of Tadeusz Kucharski*, U.S. Department of Labor, Board of Alien Labor Certification Appeals (Sept. 18, 2002), citing fraudulent applications for labor certification.

92 See, e.g., *Matter of [name redacted]*, EAC–98–075–51137 (AAO Mar. 19, 2003), reviewing the facts of the criminal prosecution, *United States v. O'Connor*, 158 F. Supp. 2d 697 (E.D. Va. 2001), where the court found promoters of the immigrant investor program guilty of immigration fraud on the basis of a "sham loan transaction" that involved presenting false bank documentation to the INS.

93 See, e.g., "A Visa Loophole as Big as a Mainframe: More Companies are Using L–1 Visas to Bring in Low-Wage Foreign IT Workers—and Replace Americans, *Business Week* (Mar. 10, 2003) citing abuse of the L–1 visa category; *H–1B Foreign Workers: Better Controls Needed to Help Employers and Protect Workers,* U.S. General Accounting Office (Sept. 2000), citing abuse in H–1B visa program; see also Memorandum of Thomas E. Cook, BCIS Acting Ass't Comm'r (Mar. 13, 2003), declaring certain entities ineligible for the H–1B visa program due to past willful violations or material misrepresentations.

94 See AAO precedent decisions and background material, supra notes 16 and 17, Part I.

Otherwise, "immigration risk" will stifle investment. Accordingly, the BCIS should adopt legal standards that are sensible in the context of the Pilot Program objectives of facilitating cluster economic development and job creation, and are sensitive to the agency's other law enforcement responsibilities. The following are recommended changes in adjudication standards.

- Eliminate "Established" Requirement

To further job-creation objectives, the BCIS should promptly revise regulations to implement recent legislation that eliminated the requirement that the investor "established" the commercial enterprise.[95] This legislation was necessary to correct a set of legal standards appearing in INS case adjudications that significantly limited the utility of the investor program. Although the INS championed the "established" requirement as necessary to ensure that investors truly are "entrepreneurs" rather than passive investors, the DOJ Act clearly eliminated consideration of whether the investor established the enterprise.

Prior law required the investor to base the initial petition on investment in a new commercial enterprise "which the alien has established."[96] The INS regulations set forth three alternatives for satisfying the "established" requirement: either (1) the investor created an original business, (2) the petitioner invested in an existing business and restructured or reorganized the business such that a new commercial enterprise resulted, or (3) the petitioner invested in and expanded an existing business, causing a 40 percent increase in its net worth or employment levels.[97]

In practice, the regulation proved exceedingly difficult to satisfy because the INS seemed to add layer upon layer of requirements. With reference to the "original business" alternative, *Matter of Izumii*[98] held that an investor must "have a hand" in the formation of the enterprise and must be "present at inception" of the business in order to have established the enterprise. Since then, the INS denied cases, for example, on the grounds that the petitioner was not the person who signed and filed the business's incorporation papers with the particular state incorporation agency.[99]

According to recent interim guidance from the BCIS, because the amended statute continues to require the petitioner to invest in a "new" commercial enterprise (i.e., one that was formed after November 29, 1990),[100] the BCIS will continue to apply the "restructured," "reorganized," and "expansion" concepts in assessing whether an enterprise formed *prior to* November 29, 1990, is "new" in terms of business changes occurring since that date.[101] The utility of these concepts in promoting investment and job creation in older businesses will require further clarifications from the BCIS. *Matter of Soffici*,[102] for instance, held that purchasing the assets and business of an existing hotel does not qualify for the "restructured" or "reorganized" alternative. Thereafter, the AAO issued numerous nonprecedent cases that found insufficient restructuring and reorganizing of an existing business.[103] There is only one

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95 See DOJ Act, supra note 19, Part I, § 11036 ("Eliminating Enterprise Establishment Requirement for Alien Entrepreneurs"). For a summary of the DOJ Act, see 79 Interpreter Releases 1573 (Oct. 21, 2002).

96 INA § 203(b)(5)(i).

97 8 CFR § 204.6(h).

98 *Matter of Izumii,* supra note 16, Part I.

99 See nonprecedent cases of the AAO, such as *Matter of [name redacted]*, A77 852 732 (AAO May 30, 2001), a "founding shareholder" of a bank financed by public offering was not one of the original promoters and shareholders; *Matter of [name redacted]*, WAC–98–167–52786 (AAO Mar. 20, 2000), petitioner invested one month after formation of partnership and thus business not "original"; *Matter of [name redacted]* (AAO Dec. 15, 2000), investor in partnership did not establish the enterprise if the underlying venture investment business already existed; see also *Matter of [name redacted]* (AAO Aug. 3, 2002), concluding that a petition must prove that a business did not previously exist. *Matter of [name redacted]*, LIN–98–064–51851 (AAO Dec. 21, 2000), allegation that former business was a "defunct operation" must be supported by substantial evidence of how long meat processing plant had been idle. Cf. *Matter of [name redacted]* (AAO, April 13, 2001), approving case as an "original business" based on plan, including evidence of significant renovations already made, to operate a resort and dude ranch for dialysis patients on unoccupied property that had previously served as home to a family of cows.

100 8 CFR § 204.6(e) defines a "new" commercial enterprise as one established after November 29, 1990. To avoid confusion, it should be revised to clarify that the commercial enterprise is new if "formed" after November 29, 1990. Also, 8 CFR § 204.6(j)(1) should be amended to shift emphasis to petitioner's investment in a new commercial enterprise rather than on petitioner's establishment of an enterprise.

101 Memorandum of William R. Yates, BCIS Acting Assoc. Director for Operations (June 10, 2003), reproduced in Appendix I of this Release.

102 *Matter of Soffici,* supra note 16, Part I, observing: "A few cosmetic changes to the decor and a new marketing strategy for success do not constitute the kind of restructuring contemplated by the regulations, nor does a simple change in ownership."

103 *Matter of [name redacted]* (AAO Aug. 2, 2002); *Matter of [name redacted]*, WAC–98–194–50913 (AAO Aug. 16, 2002), faulting "mere change in ownership" of existing businesses.

known case where the AAO agreed the business was sufficiently restructured or reorganized.[104] Furthermore, with respect to the "expansion" alternative, the INS has insisted that proof of expansion of the company requires audited financial statements concerning the company's former net worth at the time of investment.[105]

Elimination of the "established" requirement should prove to be a large step toward sparking more capital investment by immigrants, particularly in existing businesses, and in turn should enhance the prospects for creating the circumstances for cluster economic development. Proven business models, and companies that have survived the infant stage of company life, in many instances are relatively safer investment targets and are better bets for creating and sustaining at least 10 more jobs in the U.S. economy. Permitting investment in existing businesses should encourage more foreign investment in the U.S. and should advance the cluster economic development and job-creation objectives of the Pilot Program.

- Modify the Adjudication Standard for Investment of Capital

The BCIS also should modify its standards for determining that a petitioner actually has "invested" or is "in the process of investing" the required capital. According to the INS regulation, the petitioner has not "invested" capital unless the capital is placed at risk of loss. It may not be enough, in other words, for the investor to file the I–526 petition on the basis of depositing the required amount of capital into a business and then commencing business activities. In recent case decisions the INS has appeared to set the bar higher than is reasonable, stating that the full amount of the required capital must be expended by the enterprise directly toward job creation; otherwise that capital is not at risk of loss.[106] This is a restrictive and onerous standard that clouds the planning for compliance with the law and consequently may have a chilling effect on job-creating investment. The BCIS should modify its standard for assessing whether an investor's capital is at risk, consistent with the Pilot Program objective of amassing investment capital for job creation in regional areas.

A search of the potential sources of law for the requirement that capital must be fully deployed toward job-creating activities reveals, notably, that the investor statute merely requires proof that the petitioner "has invested," or is "in the process of investing," the required capital.[107] The investor statute, clearly, does not require that the petitioner invested all the required capital before filing the I–526 petition. Nor does the investor statute require that the invested capital be expended toward only "job-creating" uses. Significantly, too, the statute for removal of conditions on permanent residence—which contemplates that the investor still may be "in the process of investing" at the end of the two-year conditional period—does not require that all capital be invested prior to removal of the conditions on permanent residence.[108] In fact it is the INS regulation, not the statute, that is the source of the rule that invested capital is counted toward the minimum capital requirement of the law only if at the time of filing the I–526 petition, the "petitioner has placed the required amount of capital at risk for the purpose of generating a return on the capital placed at risk."[109] The current confusion in the immigrant investor program concerning what exactly will qualify as "at risk" capital stems from the recent decisions issued by the INS in restrictively interpreting its regulation.

As a starting point for analysis, the INS regulation is based on the standards used in adjudication of applications for the E–2 treaty investor visa, as the INS noted in its comments to the final regulation.[110] As with the immigrant investor status, the E–2 treaty investor visa may be granted on either of two bases: (a) the investor already invested the required capital, or (b) the investor is in the process of investing the required capital. With respect to the former alternative (i.e., the investor already "invested" the required capital) the source of law for E–2 visas, the *Foreign Affairs Manual*, emphasizes that whether the investor already made a complying "investment" depends on risk of loss: "If the funds are not subject to partial or total loss if business fortunes reverse, then it is not an "investment" in the sense intended by INA § 101(a)(15)(E)(ii)."[111] Conversely,

104 *Matter of [name redacted]*, (AAO July 11, 2001), approved case involved the "restructuring" of a horse breeding business into a new business for horse breeding and training.

105 *Matter of [name redacted]*, WAC–99–010–50117 (AAO Dec. 15, 2000).

106 *See, e.g., Matter of [name redacted]*, WAC–98–194–50913 (AAO Aug. 16, 2002).

107 INA § 203(b)(5)(A)(ii).

108 INA § 216A(d)(1)(B).

109 8 CFR § 204.6(j)(2).

110 Final Rule, supra note 8, Part I, at 60904: "The evidentiary showing necessary to establish that the petitioner either has invested or is in the process of investing the required amount of capital is modeled after requirements used by the Department of State for nonimmigrant 'treaty investors.' As with that program, the concept of investment here connotes the placing of funds or other capital assets at risk for purpose of generating a return on the funds placed at risk."

111 9 FAM 41.51 n.7.1–2 (note entitled "Investment Connotes Risk").

therefore, if the invested capital is subject to risk of loss, then the investor has made a qualifying investment.

With respect to the latter alternative (i.e., the investor is "in the process of investing" the required capital), the *Foreign Affairs Manual* emphasizes that the funds must be irrevocably committed to the business: "To be 'in the process of investing' for E–2 visa purposes, the funds or assets to be invested must be committed to the investment, and the commitment must be real and irrevocable."[112] In this latter case, the investor has not yet deposited the capital in the enterprise but is in the process of doing so, and typically the issue arises because the investor maintains control over the funds either in a sole proprietor or close corporation form of business. The *Foreign Affairs Manual* elaborates: "Moreover, for the alien to be 'in the process of investing,' the alien must be close to the start of actual business operations, not simply in the stage of signing contracts (which may be broken) or scouting for suitable locations and property. Mere intent to invest, or possession of uncommitted funds in a bank account, or even prospective investment arrangements entailing no present commitment, will not suffice."[113] Thus, to be "in the process of investing" means that the investor has irrevocably committed the funds to the business, such as in the case of an escrow that releases funds to the business without further action by the investor upon approval of the I–526 petition.

The brief overview of the standards applicable to E–2 visas is critical not only because the INS acknowledged from the outset of the immigrant investor program that the intent of the immigrant investor law is to incorporate legal standards that echo the E–2 visa standards. The overview also illustrates just how far the INS has drifted from the moorings of the E–2 visa standards. For one, the INS has collapsed the two alternatives (the "invested" alternative and the "in the process of investing" alternative) into just one very restrictive standard. In recent nonprecedent cases the INS formulated the very restrictive standard by juggling components of the two alternatives such that it eliminated any concept of being "in the process of investing" and then determined that a petitioner has not "invested" the required capital unless the deposited capital has been irrevocably committed by the business to certain expenditures. In rearranging these standards, the INS also eliminated the consideration of whether the capital is at risk, which up to that point had been the sole factor for determining whether the investor had invested the required capital. The INS, in effect, transformed the "at risk" issue into a consideration of how the business would expend its capital, and specifically, whether the capital would be expended toward job-creating activities. Whereas, arguably, the AAO may have reached the correct result on the "invested" capital issue in the *Ho* and *Izumii* precedent cases, the recent nonprecedent decisions that purport to follow *Ho* and *Izumii* in fact articulate standards for "invested" capital that look nothing like the standards applicable in E–2 visa cases.[114]

In the *Ho* case,[115] the AAO held that where the petitioner controls the business and its accounts, the mere deposit of the required amount of capital in a bank account and the signing of a lease agreement do not place that capital at risk. Rather, according to the AAO, the regulation requires the petitioner to present evidence of "meaningful concrete action" and the "actual undertaking of business activity" in order to provide sufficient assurance to the INS that the deposited capital would be used during the two-year conditional period to carry out the business objectives of the enterprise. This decision appears not only reasonable but also warranted by the E–2 visa standard that requires an adjudication to discern whether the capital is at risk of loss.

The other relevant AAO precedent decision, the *Izumii* case,[116] involved a limited partnership that used capital from its limited partner investors to fund a subsidiary credit company that extended loans to exporter businesses. The limited partner entered into an investment agreement that included a promissory note with a payment schedule that exceeded the two-year conditional period; a provision for the limited partnership to pay guaranteed returns to the investor; a sell option that the investor could exercise to redeem the limited partner ownership interest; and a provision for reserve funds that could be used by the partnership to fund the redemption to the investor. The AAO held that this combination of investment features all but eliminated the risk of loss and therefore the capital had not been invested. Also, the AAO held that the portion of capital used to pay the partnership's administrative expenses prior to the partnership's transfer of invested capital to the credit company was not at risk. The AAO stated: "The full amount of money must be made available to the business(es) most closely responsible for creating the employment upon which the

112 9 FAM 41.51 n. 7.1–3 (note entitled "Funds Must be Irrevocably Committed").

113 Id.

114 Of course, the E–2 visa is distinct from the immigrant investor category in many respects. The immigrant investor statute, for starters, requires a minimum amount of capital ($500,000 or $1 million), whereas the E–2 visa requires only a "substantial" investment. Also, the E–2 visa typically can be issued within just a few days of making application, and is not subject to the exceedingly lengthy processing times that exist for adjudication of I–526 petitions.

115 *Matter of Ho,* supra note 16, Part I.

116 *Matter of Izumii,* supra note 16, Part I.

petition is based."[117] Similarly, with respect to the partnership's maintaining reserve funds that might be used to fund a redemption, the AAO declared that "these reserve funds are, by agreement, not available for purposes of job creation and therefore cannot be considered capital placed at risk for the purpose of generating a return on the capital being placed at risk."[118]

Read in a reasonable light, the latter references to the *Izumii* decision, which refer to a requirement that capital must be made available for job creation, should be interpreted narrowly given the unusual facts of that case. In *Izumii* the capital set aside as reserves and the funds used to pay administrative expenses did not constitute an investment under the law because, according to the AAO, *the capital was never invested into the actual business*. In ascertaining which level of the investment structure (limited partnership, subsidiary credit company, or borrower company) would be the analytical focus appropriate in the determination of whether the petitioner actually has invested in the entity, the AAO observed that the "job-creating" entity must receive the investor's capital. Insofar as the fund for reserves and the administrative expenses were established at the level of the limited partnership, before the remaining capital was transferred to the level of the credit company that was in the business of extending loans, it was enough in the *Izumii* case for the AAO to decide that the limited partnership was not the job creator.[119] Thus, the investor could not have "invested" the capital set aside to fund reserves and to pay administrative expenses because that capital would never be at risk of loss in the underlying credit company business.

Unfortunately, later cases have interpreted incorrectly the catchy dicta of the *Izumii* decision as "precedent" for defining capital "at risk" as capital that is used in employment-creating activities prior to the time the I–526 petition is filed. In recent nonprecedent cases, for instance, the AAO declared that INS regulations require that "at the time of filing, the petitioner must already have placed the full requisite amount of capital at risk in profit-generating, employment-creating activities."[120] The AAO has remarked: "Simply making money available to a business is not the same as placing that money at risk in employment-creating activities."[121] With a different spin, the AAO also has attacked what it perceives as idle capital by rejecting petitions that are based on "overcapitalizing" a business: "Money deposited with a grossly overcapitalized business cannot be said to be at risk."[122] Whether a business is overcapitalized, in the view of the AAO, depends on an assessment of what capital is used toward job creation.[123] In other words, according to these decisions, invested capital is not to be credited as capital at risk unless the full required amount (at a minimum $500,000), is irrevocably committed to job-creating uses.

But this latter string of case decisions—based on the dicta in *Izumii* indicating "[t]he full amount of money must be made available to the business(es) most closely responsible for creating the employment"—lack any sound basis in the law. The decisions are not based on a determination of whether the capital is at risk of loss, which is the applicable standard set forth in the regulation. It is impossible, moreover, to square the requirement that prior to filing the I–526 petition the investor place the "full requisite amount of capital at risk in profit-generating, employment-creating activities," with the subject investor statute that permits an

117 Id. at 12.

118 Id. at 24. In its report to Congress, the INS summarized these holdings: "Only capital placed at risk for purposes of job creation within the 2-year period will be counted as part of the investment funds; accordingly, fees and expenses paid to attorneys and funds in reserve funds or corporate accounts will not be counted as investment capital." INS Report to Congress, supra note 10, Part I.

119 The AAO also decided that where capital is placed in reserves to fund a redemption, it is clear the investor has loaned money to the enterprise in violation of the requirement to invest equity capital.

120 See, e.g., *Matter of [name redacted]* (AAO Feb. 4, 2000), and *Matter of [name redacted]*, WAC–99–244–51464 (AAO Nov. 25, 2002), denying similar petitions where $2.65 million of the total capital was already expended, and the remaining $1.85 million of the capital for nine investors held in reserve for future investment.

121 *Matter of [name redacted]*, LIN–98–198–52940 (AAO Feb. 12, 2001); see also *Matter of [name redacted]*, WAC–98–194–50913 (AAO Aug. 16, 2002), funds in account of enterprise must be used "for the purpose of employment creation."

122 *Matter of [name redacted]*, WAC–00–049–50402 (AAO Oct. 12, 2002). See also *Matter of [name redacted]*, WAC–00–105–50880 (AAO May 20, 2002): "While business reserve accounts are reasonable in some cases, where well over half of the 'investment' is not used for start-up costs or other capital expenses to which the petitioner was committed at the time of filing, those funds cannot be considered at risk." *Matter of [name redacted]* (AAO Jan. 15, 2003): "Funds 'invested' into an overcapitalized business are not sufficiently at risk."

123 *Matter of [name redacted]*, A79 512 017 (AAO Mar. 13, 2003), reciting that "[a] petition cannot meet the investment and employment requirements separately." *Matter of [name redacted]* (AAO Aug. 16, 2002), denying a petition based on use of some capital for purchase of real estate, and only some of the capital for "employment." *Matter of [name redacted]* (AAO Mar. 12, 2001), denying petition based on plan to open five ice cream stores; construction commenced on the first location, but funds set aside for remaining locations not yet determined are not at risk.

investor to be "in the process of investing."[124] Furthermore, such a requirement is inconsistent with the legal authority for filing the I–829 petition to remove the conditions on residence after two years of conditional resident status at which time (and not before that time) the petitioner is required to prove that he has "in good faith, substantially met" the capital investment requirement, i.e., that he had "invested or was actively in the process of investing the requisite capital."[125] This onerous pre-filing requirement also is patently inconsistent with the well-accepted legal authority for depositing as much as 100 percent of the capital in an escrow pending immigrant visa approval,[126] in which case a petitioner could not possibly have engaged yet in any employment-creating activities. Finally, the requirement also is not easily reconciled with the regulatory authority for submitting a comprehensive business plan whereby a petitioner has up to two years to create the required employment.[127]

Apart from recognizing that there is no legal foundation for the adjudication standard that would require deploying all capital toward job-creating uses prior to filing the I–526 petition, there also are no persuasive reasons for imposing such an adjudication standard. Put succinctly, the standard is entirely unreasonable in the context of the immigration motivations of the investors and the objectives of the immigrant investor program. This standard requires the petitioner's business to expend the full amount of the required capital toward job creation, or at least enter into binding commitments to do so, prior to filing a I–526 petition.[128] While it may be reasonable to require an investor's business to expend some capital before obtaining conditional residence (as suggested by the *Ho* case), it is clearly unreasonable to require an investor's business to expend, or enter into binding commitments to expend, the full amount of the required capital prior to obtaining conditional residence. What policy is advanced by requiring such extensive activities? Why is the two-year conditional period and review mechanism not sufficient for advancing the interests in facilitating investment that will create jobs? For the BCIS to require the investor to meet the higher standard—to cause the investor's business to enter into binding commitments, prior to filing the I–526 petition, to expend the full amount of the required capital on job-creating activities—is to impose an extremely heavy burden on petitioners for immigrant visa classification. The consequence is that many would-be investors would balk at such a requirement, and instead would forego investment in the U.S. For one, the extremely lengthy processing times for adjudication of I–526 petitions (beyond 12 months) render this approach infeasible. Assuming, again, that the immigrant investor program attracts investors who are motivated by the U.S. immigration benefit, few investors would cause their businesses to expend the full amount of the required capital prior to filing the I–526 petition in the hope that more than one year later the BCIS would approve the I–526 petition. If the investor's funds are to be in escrow until the I–526 petition is approved, recall that it is the desire to minimize "immigration risk" that makes the escrow approach so appealing. But if the BCIS also requires all funds in escrow to be irrevocably committed for certain identified business expenditures immediately upon approval of the I–526 petition, then the extended processing times for adjudication of I–526 petitions also renders unappealing the escrow alternative. Certain business expenditures that appear feasible prior to filing the I–526 petition are not necessarily going to be sound business decisions more than one year later. Business environments change, sometimes very rapidly. Business people, investors, understand that reality. The consequence, again, is that few investors would enter into such binding commitments, meaning many potential investors instead

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124 The INS, in fact, recommended that Congress repeal the statutory language that permits an investor to be "in the process of investing." INS Report to Congress, supra note 10, Part I.

125 8 CFR § 216.6(a)(4).

126 See, e.g., Memorandum of Robert L. Bach, INS Exec. Assoc. Comm'r (Aug. 28, 1998), confirming acceptance of use of escrow in I–526 petition context; see also 9 FAM 41.51 n.7.1–3, approving use of escrow in E–2 visa context. But the peril for petitioners using an escrow is evident in recent cases such as *Matter of [name redacted]*, WAC–98–201–52237 (AAO May 22, 2002), where the AAO decided that the capital in escrow was not at risk because, although immediately on I–526 petition approval some of the capital would be used to purchase real estate and the remaining capital would be set aside in a construction account, a significant portion of capital would not be spent on construction activities until some indefinite time in the future. Petitioners are not likely to gain much comfort either from another nonprecedent case that resulted in a dismissal of the investor's appeal. Responding to the appellant's argument concerning acceptance of escrows, the AAO stated without commitment: "As long as the enterprise's business activity meets the requirements in *Matter of Ho*, an irrevocable escrow agreement *might* demonstrate that the petitioner is actively in the process of investing the funds in that account depending on the facts of the case." *Matter of [name redacted]* (AAO Aug. 16, 2002) (italics added).

127 8 CFR § 204.6(j)(4)(i)(B); and see 8 CFR § 216.6(a)(4), allowing a petitioner to prove *after* two years of conditional residence that he "can be expected to create within a reasonable time ten full-time jobs for qualifying employees."

128 See legislative history for a strong statement by one of the investor law's sponsors, Sen. Paul Simon (D–Ill.), favoring an INS adjudication that would not involve the INS in second-guessing businesses on how capital will be expended or held in reserves. 136 Cong. Rec. S17, 106–112 (Oct. 26, 1990).

forego investment in the U.S. Besides, if the very purpose of the two-year conditional status is to enable the immigrant to oversee and manage the investment, and given the requirement that at the end of the two-year conditional period the investor must file the I–829 petition and document how capital was expended, it appears exceedingly unreasonable to require the investor's business to have expended the full amount of the required capital prior to filing the I–526 petition.

A related, but different, rationale supports rejection of the disputed adjudication standard: The "employment-creating activities" standard is hopelessly ambiguous. Presumably, it would include expenditures for payroll. But would it include payments for rent, utilities, fire insurance, equipment leasing, promotion, travel, and professional fees? As there is no guide to knowing what activities are included, the adjudication standard is likely to produce arbitrary and capricious results in adjudication of I–526 petitions. Uncertainties in adjudication standards more than likely have a chilling effect on job-creating investment.

The recent decisions that object to "overcapitalizing" businesses also tend to deter job-creating investment. If, for instance, in the best judgment of the BCIS the investor could have created at least 10 jobs in the business with an investment of $295,000, why should an investor who invests $500,000 in such a business be disqualified from the benefit of the immigrant investor program just because in the BCIS's judgment some $205,000 of the investment will not be spent directly on job creation? Judged by the appropriate "risk of loss" standard that should apply in the case of all I–526 petitions, if the full $500,000 is deposited in an entity that commences business activities by leasing premises, entering contracts, employing and training staff, investing in equipment and purchasing inventory, then that full $500,000 continues to be at risk of loss regardless of whether the business has expended the entire amount. The entire $500,000 could be lost if the company is a losing business. The "at risk" standard therefore is satisfied. If, on the other hand, for some reason the "undeployed" portion of the capital is not at risk of loss (either because in fact it was never transferred into the business, or because it was transferred into the business but then in fact it was transferred out), then it is not at risk of loss because that portion of the capital actually has not been invested in the business. In short, the "at risk" analysis does not require linking each dollar of the invested capital to specific instances of the business spending money on job creation.[129]

Due to the heightened level of activity that the disputed adjudication standard would require of the investor prior to filing the I–526 petition, the possibility that the disputed adjudication standard is deterring prospective investors, the fact that actual business activity will be reviewed at the end of the two-year conditional period, and the ambiguity of the disputed adjudication standard, the BCIS should abandon any efforts at the I–526 petition stage to assess whether an investor has "overcapitalized" the business or has irrevocably committed all the required capital to employment-creating activities. The BCIS should recognize that it is unreasonable at the I–526 petition stage to require the investor to pinpoint each use of every single dollar that will be invested and to link the use of all invested capital directly to the creation of jobs. Such a requirement is clearly an obstacle to creating jobs because it is an unreasonable standard that actually discourages future job-creating investment.

A reconsideration of the adjudication standard for investment of capital may lead to formulating a feasible standard that has the following component parts. First, the BCIS should require the investor to deposit all required capital in the enterprise (or deposit that capital in an irrevocable escrow) prior to filing the I–526 petition.[130] If some of the required capital is in the form of a promissory note, then the promissory note must meet current adjudication standards.[131] Next, the BCIS should require the investor's business to engage in some concrete initial business activity as indicated in the *Ho* case. If the capital is in escrow, however, at least some but not all of the capital must be committed to specific business uses immediately upon approval of the I–526 petition. Finally, the BCIS should require the investor to submit a comprehensive business plan that, in addition to including the factors described in the *Ho* case, also would describe planned business activities that compel a conclusion that the required amount of capital is at risk of loss.[132]

By clarifying in its adjudication standards that the BCIS requires the I–526 petition to include evidence of concrete

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129 Of course, there must be some identifiable, general nexus between the petitioner's investment and job creation. But the investor should not be required to go to extraordinary lengths to prove a proximate cause between every dollar of invested capital and job creation.

130 Cases based on a deposit of some of the required capital and an unenforceable commitment to deposit the remaining balance at some time in the future still would not comply with the legal standard for being "in the process of investing" the required amount of capital because such cases are based on "mere intent to invest" the undeposited portion of capital. See, e.g., *Matter of [name redacted]* (AAO Jan. 15, 2003)

131 *Matter of Hsiung*, supra note 16, Part I, sets forth the current standards for a promissory note.

132 *Matter of Ho*, supra note 16, Part I, sets forth the requirements of a comprehensive business plan.

business activity and a credible business plan—as a matter of assurance that the enterprise will be progressing on its plan to create jobs—the BCIS sufficiently balances the interests in amassing capital for job creation and confirming that the investor has invested capital that will be used for job creation during the two-year conditional period.

- Adopt a Feasible Adjudication Standard for Source of Capital

To amass capital for job creation, the BCIS also should adopt a feasible standard for determining the source of the petitioner's invested capital. The INS regulations introduced the concept that capital should not include assets acquired by unlawful means, and the requirement that the petitioner prove the invested capital originated from a lawful source. The underlying rationale of the regulations is that the immigrant investor program should not be a conduit for laundering the proceeds of drug trafficking. The objective is unassailable, and therefore criticisms of the regulations and prevailing practices in this article are made with the utmost respect for the challenges faced by law enforcement. In brief, the regulations and the adjudication standards the INS has applied recently in specific cases are not tailored to concerns the agency may have about drug traffickers, and more than likely, deter investment in the U.S. without significantly furthering any other policy objectives. The BCIS should adopt a legal standard that advances the goals of the Pilot Program to amass large amounts of capital for job creation without forsaking the needs of national security and law enforcement.

As an initial observation, the immigrant investor statute does not require the investor to prove that the invested capital originated from a lawful source. In legislative deliberations concerning the immigrant investor law, members of Congress did remark that the investor category should not be a conduit for criminal organizations to launder the proceeds of their drug trafficking and visa processing should be terminated if such criminal activity "becomes known" to an examiner.[133] But in specifying the requirements for qualifying as an immigrant investor, Congress required proof of investment of "capital" and did not designate proof of lawful source of capital as a requirement of the petitioner's case in chief.[134] And this choice of language is not surprising, because the model for the immigrant investor statute, the E–2 treaty investor visa, also does not require an applicant to submit proof of lawful source of capital.[135]

In its regulations, the INS stipulated that "[a]ssets acquired, directly or indirectly, by unlawful means (such as criminal activities) shall not be considered capital for the purposes of section 203(b)(5) of the Act."[136] To the extent "unlawful means" is interpreted consistently with Congress's concern about laundering the proceeds of drug trafficking, the regulatory definition of capital is legal and unobjectionable. Nonprecedent decisions of the AAO, however, interpret "unlawful means" very expansively to include any form of unlawful activity and thus the regulation is subject to legal challenge.

Furthermore, the regulations impose on an investor the affirmative obligation to present evidence in the petitioner's case in chief to prove that it is an investment of "capital obtained through lawful means."[137] Insofar as Congress contemplated only that visa processing would be terminated if it "becomes known" the money invested was obtained through illegal means such as drug trafficking, and Congress elected not to require such evidence as part of a petitioner's case in chief, the regulation appears to contravene legislative intent and could be voided if directly challenged in court.[138]

The same regulation also provides certain categories of proof that an investor may rely upon for purposes of proving lawful source of capital; most notably, the regulation provides

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133 "Finally, the committee intends that processing of an individual not continue under this section if it becomes known to the Government that the money invested was obtained by the alien through other than legal means (such as money received through the sale of illegal drugs)." S. Rep. 55, 101st Cong. 1st Sess. 21 (1989).

134 Basic principles of statutory interpretation require the agency to give effect to the intent of Congress and not impose additional requirements not found in the statute. See, e.g., *Coronado-Durazo v. INS*, 123 F.3d 1322 (9th Cir. 1997); *Almero v. INS*, 18 F.3d 757, 760 (9th Cir. 1994).

135 See, e.g., INA § 101(a)(15)(E)(ii), and 9 FAM 41.51 n.7.1; see also Item 13 to Optional Form 156E, Justification Attachment to Bureau of Consular Affairs, Visa Office, OMB Control Number 14050101 (Aug. 8, 1997), clarifying that the intent of the item on the visa application form is to confirm only that capital is investor's personal risk capital.

136 8 CFR § 204.6(e).

137 8 CFR § 204.6(j)(3). The regulation is procedurally defective insofar as it was not preceded by notice and comment as required by the Administrative Procedure Act. 5 USC § 551–4. Rules made without compliance with the APA notice requirement have no force or effect. 5 USC § 706(2)(D).

138 5 USC § 706(C)(2); *Ali v. Smith*, 39 F. Supp. 2d 1254 (W.D. Wash. 1999); *Tenacre Foundation v. INS*, 829 F. Supp. 289 (D.D.C. 1995). Reading the statutory scheme as a whole, including the legislative history and regulations, the better view is that Congress intended to impose the initial burden of presenting a questionable issue concerning lawful source of funds *on the agency*.