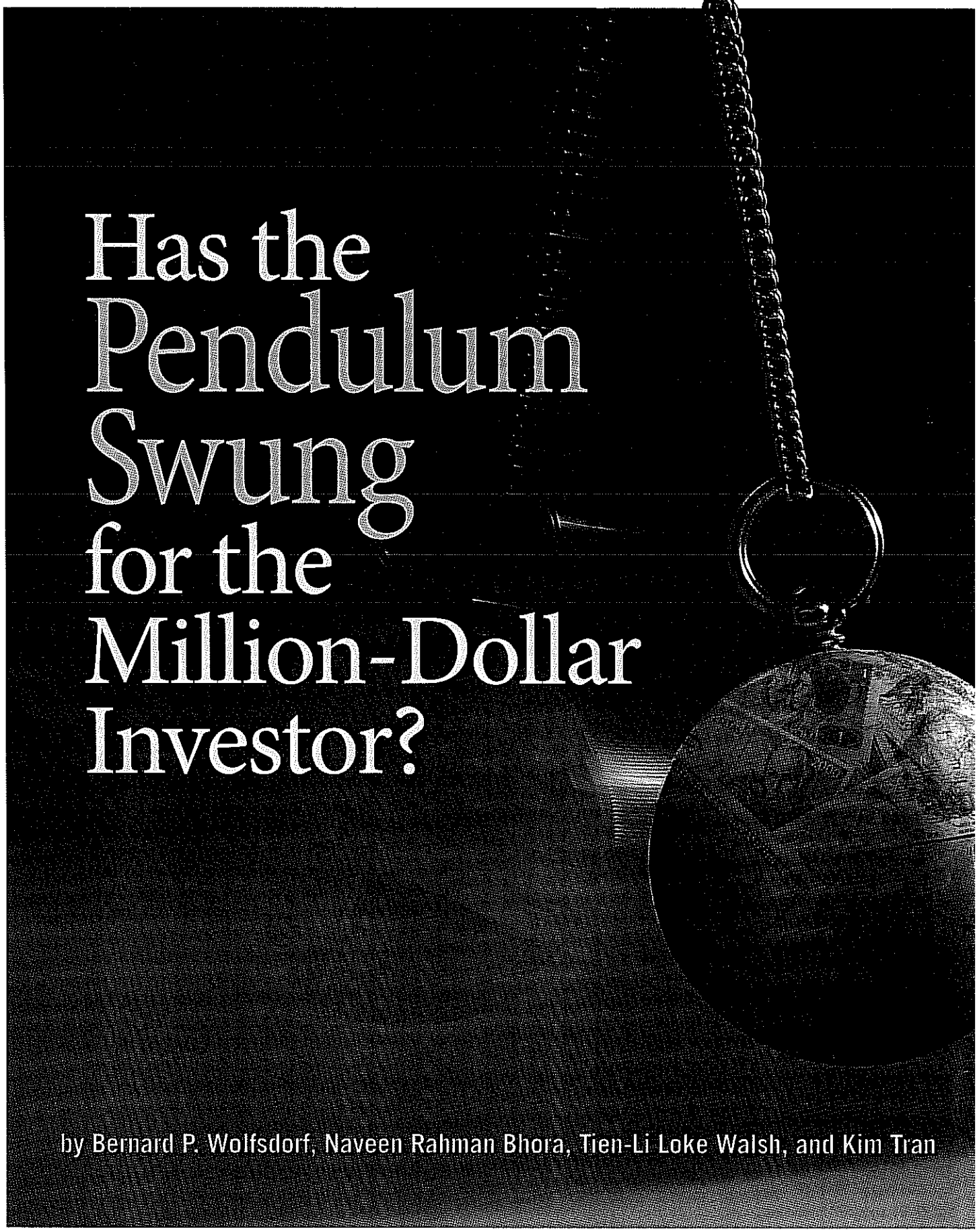

Has the Pendulum Swung for the Million-Dollar Investor?

by Bernard P. Wolfsdorf, Naveen Rahman Bhora, Tien-Li Loke Walsh, and Kim Tran

A Review of the Immigrant Investor Program

The EB-5 Immigrant Investor Program is the most controversial and underutilized provision in the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (IMMACT90). *See* INA §203(b)(5)). Of the 130,000 visas allocated between 1992 and 2004, only 6,024 visas were issued to immigrant investors and their dependent family members. Of this group, only 643 investors were successful in removing the conditional requirement and receiving full permanent resident status.[1] As a result, numerous frustrated investors filed lawsuits against the government.[2]

Ten years after enactment, the program was still shrouded in uncertainty, and most immigration lawyers deliberately shied away from the investor option altogether.[3] According to an article written by well known immigration attorney and AILA member Stephen W. Yale-Loehr, "Qualifying a person for EB-5 status is one of the most complicated subspecialties in immigration law ... the four 1998 precedent AAO decisions have made it even harder to obtain approvals of EB-5 petitions. Investors must discard normal investment opportunities in favor of investments structured to meet the unrealistic requirements of the precedent decisions ... Hopefully, the courts or Congress will clarify this area of the law to make permanent residence through investment a realistic visa option." *See* "EB-5 Immigrant Investors," 1 *Immigration & Nationality Law Handbook* 398 (2000–01 ed.) at 412.[4]

Even U.S. Congressman Lamar Smith (R-Tex.) was quoted, saying "'for months, American jobs, created by the investor visa program, have been ensnared in bureaucratic red tape ... job opportunities have been stifled by a heavy-handed Government agency.'"[5] Meanwhile, legacy INS, responsible for adjudicating the Immigrant Investor Program, accused Congress of adopting an overly broad statute,[6] while Congress blamed INS for promulgating overly restrictive rules.

During all the fingerpointing, several hundred investors were caught in the crossfire and found themselves fighting a losing battle. While USCIS continues to deny applications at every opportunity, the federal courts are finally intervening on behalf of frustrated investors, and it appears that the tide is turning based on some significant victories, such as Chang v. U.S., 327 F.3d 911 (9th Cir. 2003).

The Statutory Framework

IMMACT90, signed by President George H. Bush, occurred during a different era—one that reflected a relatively prosperous, pro-immigrant period in U.S. immigration history. Congress recognized that "it is unlikely that enough U.S. workers will be trained quickly enough to meet legitimate employment needs, and ... immigration can and should be incorporated into an overall strategy that promotes the creation of the type of workforce needed in an increasingly global economy."[7]

IMMACT90 allocated 140,000 visas annually to employment-based immigrants, almost tripling the number allocated in prior years.[8] The fifth employment-based preference (EB-5), created for immigrant investors, is the category for the new Employment Creation Pilot Program, aimed at "creat[ing] new employment for U.S. workers and to infuse new capital into the country."[9] To achieve this, Congress allocated approximately 10,000 visas each year for immigrant investors who invest at least $1 million in a business and generate a minimum of 10 new jobs for U.S. workers. INA §203(b)(5)(A); 8 CFR §204.6.

The pilot program allows investors to meet the criteria of the 10-minimum job creation by allowing for indirect employment by individuals who invest their capital in a "designated" regional center that promotes economic growth or creates jobs. A regional center is "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 →

While a passive investment or an expansion of a business may have met the goals of employment creation and infusion of capital, it would not meet the government's restrictive interpretations and would thereby lose its eligibility under the EB-5 regulations.

domestic capital investment." 8 CFR §204.6(e).

Also, if the regional center is in a targeted employment area, the capital investment is reduced to $500,000. 8 CFR §204.6(f)(2). A targeted employment area is an area that, at the time of the investment, is a rural area or an area that has experienced unemployment of at least 150 percent of the national average. INA §203(b)(5)(B); 8 CFR §204.6(e).

Of the 10,000 visas available annually for immigrant investors, 3,000 visas are reserved for investment in targeted employment areas. Another 3,000 are set aside for investment in regional centers. 8 CFR §204.6(j)(4)(iii). In 1997, the number of visas allocated for investment in regional centers was expanded from 300 to 3,000 per year. As of this writing, the Department of Homeland Security's U.S. Citizenship and Immigration Services (USCIS) sets aside 5,000 visas per year for investors applying through the pilot program to invest in regional centers.

President George W. Bush extended the pilot program until September 30, 2008, when he signed Senate bill 1685 into law on December 3, 2003.[10] The pilot program was initially set to expire in 2000, but the Visa Waiver Permanent Program Act of 2000, Pub. L. No. 106-396, §402(a), 114 Stat. 1637, 1647 (2000), extended the pilot program for three years until September 30, 2003. On the eve of its expiration, Senator Chuck Grassley (R-Ia.) introduced the Basic Pilot Program Extension and Expansion Act of 2003 to extend the pilot program for another five years until September 30, 2008.

The extension of the pilot program was an important sign of Congress's commitment to the Immigrant Investor Program. This positive development was designed to remove several adjudicating obstacles, indicating that there may be a silver lining behind that dark cloud of restrictive adjudication that had smothered the EB-5 Immigrant Investor Program. Although USCIS has yet to issue regulations to implement Congress's clearly expressed desire to make the program work, the tide finally may be turning.

Requirements and Restrictions

Immigrant investor eligibility requires proof that: (1) a new commercial enterprise has been established; (2) petitioner has invested or is actively in the process of investing the required amount of capital in a new commercial enterprise; (3) the investment is at risk; and (4) petitioner is or will be engaged in the management of the new commercial enterprise, either through day-to-day managerial control or policy formulation. 8 CFR §204.6. An investor qualifies by initially filing an I-526 Immigrant Petition by Alien Entrepreneur. 8 CFR §204.6(a). After the petition is approved, the investor must apply for adjustment of status in the United States or at a U.S. consulate/embassy overseas. Upon approval, the investor is granted a two-year conditional Green Card.

During the 90-day period prior to expiration of the conditional period, Form I-829 Petition by Entrepreneur to Remove Conditions must be filed. 8 CFR §§216.6, 1216.6. In this petition, the investor must demonstrate the stated investment was made or still sustained over the two-year conditional period, and the requisite jobs were created. Only upon approval of the I-829 petition is the conditional nature of the Green Card lifted and full permanent residence granted.

Restrictive Interpretation of Regulatory Goals

During the first 15 years, the restrictive interpretation of the regulations drastically limited the types of investment permitted under the program. For example, a purely passive investment of more than $1 million that created at least 10 jobs would be denied for failure to meet the managerial requirement. 8 CFR §204.6(j)(5). Likewise, if an investor sought to expand an already existing business that did not result in a substantial change, *i.e.*, an increase of at least 40 percent in either the net worth or number of employees, the petition would be denied for failure to meet the establishment requirement. 8 CFR §204.6(h)(3).

If an investor wished to risk $1 million in an existing enterprise that already has 100 employees, he or she had to create at least 40 new jobs with his or her investment, despite the statutory requirement of creating only 10 new jobs, as clearly designated by Congress. These restrictions enormously altered the statutory goals of the EB-5 program and made investment in existing businesses difficult. While a passive investment or an expansion of a business may have met the goals of employment creation and infusion of capital, it would not meet the government's restrictive interpretations and would thereby lose its eligibility under the EB-5 regulations.

Restrictive Standard of Adjudication

Not only did the regulations alter the statutory goals, but legacy INS's restrictive standards of adjudication further stifled the EB-5 program. In 1997, the Office of General Counsel issued an opinion that drastically altered the existing regulations and devastated an already faltering program.[11] The General Counsel's legal opinion prohibited certain types of business arrangements, such as: (1) the use of a down payment of cash with the remainder of the alien's contribution in the form of a promissory note; (2) a multi-year installment plan on a promissory note with a substantial "balloon" payment after the removal of the conditional status of the alien's permanent residence; (3) an option given to the alien to sell his or her investment for a fixed price that may be less than, equal to, or greater than the alien's cash contribution; (4) an option given to the enterprise or limited partnership to buy the investment at a fixed price; (5) a provision that allows or requires the commercial enterprise to place sufficient cash into a bank account →

to guarantee that funds will be available to repay the alien if the alien exercises an option to sell; (6) withholding of a portion of the alien's capital contribution for attorneys' and finders' fees and other costs; and (7) a guaranteed return on the cash portion of the alien's investment. 12 *Interpreter Releases* 332 (Mar. 9, 1998).

Many of the initial EB-5 applications involved business plans where the creation of a limited partnership was used to pool multiple investors' money to invest in either a new or a troubled business in the United States. Unfortunately, some of these limited partnership agreements were designed to reduce the investors' risk, so that only a small amount of the investment capital actually reached the business enterprise, and much of the investment included promissory notes of collateral where it was clear the actual, designated cash amount was not at risk. *See* 8 CFR §204.6(j)(2). Furthermore, the General Counsel's legal opinion also directed legacy INS to use not only these new standards going forward, but to retroactively apply these new standards to previously approved EB-5 petitions at the I-829 stage.

In 1998, the Administrative Appeals Office (AAO) issued a series of opinions, collectively known as the "1998 precedent decisions" that not only echoed the 1997 legacy INS mandate, but that effectively signaled the end of the road for the EB-5 program:

- *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).

For example, under the initial regulation, a promissory note could be valued at face value, but under the new standard, the promissory note had to be valued at fair market value. Under the old standard, the term of the promissory note was limitless, but under the new standard, the note had to be paid after two years.

Furthermore, bank accounts could no longer be used as security. *See* S. Yale-Loehr, "EB-5 Immigrant Investors," *supra* n. 5 at 62. These decisions applied a restrictive approach and, even worse, retroactively applied the 1998 interpretations to investors who already had received I-526 approvals but were still subject to the two-year conditional residency requirement. As a result, hundreds of I-829 petitions filed by immigrant investors were denied based on the retroactive criteria. Most of the I-526 investor petitions filed after 1998 never had a chance, as investors relied on plausible interpretations of published regulations and invested in what appeared to be lawful investment plans, but ultimately became entangled in the government's restrictive interpretation of the law.

Restrictive Evidentiary Requirements

Ever wary of fraud and skeptical of previous abuses, USCIS requests extensive documentation and adheres to strict standards of adjudication. To cite a few examples, both I-526 and I-829 petitions require extensive proof that an investment has been made or is in the process of being made and must include evidence that the petitioner's personal capital was placed at risk. 8 CFR §204.6(j)(2); 8 CFR §§216.6(a)(4)(ii), 1216.6(a)(4)(ii). USCIS will not recognize investments made directly through a petitioner's incorporated or limited liability business because the corporate assets are not considered the petitioner's personal assets. *See Matter of M–*, I&N Dec. 24, 50 (BIA 1958, A.G. 1958). Furthermore, the investment arrangement cannot be structured to shift the financial risk from the investor to the commercial enterprise.

USCIS also has been particularly concerned about whether the capital used for the investment was obtained through lawful means. The regulations instruct the petitioner to document the source of funds by providing foreign business registration, five years of tax return filings (within and outside the United States), and evidence identifying any other source of capital (*e.g.*, inheritance). 8 CFR §204.6(j)(3).

In practice, the petitioner may have to trace the lawful source of funds back by several decades to the origin—which can be a daunting, if not impossible, task. Business in many countries is conducted on a trust basis—a handshake or emerging convention. This is a common problem with emerging economies that do not have the sophisticated documentary paper trails by which U.S. businesses are generally required to possess. Thus, investors from certain countries often do not have credible records of income tax documents. Moreover, even where the investment can be sourced, USCIS continues to use every technical basis to deny cases, leav-

A GAO STUDY:
The Effectiveness of the EB-5 Program

The Basic Pilot Program Extension and Expansion Act of 2003, Pub. L. No. 108-156, §5, 117 Stat. 1944, mandated the Government Accountability Office (GAO) to study the efficacy of the EB-5 program. The GAO found that despite its turbulent history and negative perception by the government and potential investors, the program has been beneficial to the economy.[1] The 653 immigrant investors who have managed to attain permanent residency have collectively invested approximately $1 billion. This is a small estimate of the total investment in the U.S. economy because it only accounts for just over 10 percent of all EB-5 participants who have invested over a 13-year period. The GAO found that investments were made in various industries, including real estate, hotels/motels, manufacturing, import/export, agriculture, and technology, and across 17 states. However, California was the primary recipient, having drawn 41 percent of the investors.

The GAO concluded that the EB-5 program has a worthy mandate that can be beneficial to the U.S. economy and recommends that DHS issue the long-awaited regulations, thereby providing relief to the hundreds of investors whose status and cases have been in limbo for years. Furthermore, the GAO determined that the regulations will help provide guidance for adjudicators and potential investors.

ing some potential investors discouraged from pursuing the EB-5 category because of the rigorous evidentiary requirements for the initial I-526 and the subsequent I-829 petitions.

Investors who transfer exactly $500,000 or $1 million as required, but who neglect to calculate the cost of the nominal bank wire transfer fee, are routinely rejected based on such minor technical grounds. USCIS and U.S. consulates sometimes investigate the investor's foreign holdings or the commercial activities of the newly formed enterprise in the United States.

Is the Tide Turning?

Several positive developments in the last few years indicate the tide may be turning, as USCIS begins to approve EB-5 applications. Investors applying through the Employment Creation Pilot Program's regional centers appear to have met with considerably more success recently. This may be due to a perceived preference in adjudication on the part of USCIS, which seems to be approving EB-5 Pilot Program petitions at a substantially higher rate than in prior years. Unfortunately, most of the previously designated regional centers are now defunct, and investors are encouraged to undertake extensive due diligence analysis before applying for EB-5 status.

Judicial Involvement

In May 2001, the federal district court in *Chang v. United States*, No. CV-99-10518-GHK (AJWx) (C.D. Cal. May 3, 2001), chastised the government and ruled that INS could not apply the new standards of adjudication retroactively in connection with approved I-526 petitions. The court held that:

> INS could not change the rules of the game by automatically applying its new more restrictive interpretations retroactively to investors who had already received conditional green cards and who are now trying to have those conditions removed. Instead, the agency must allow some investors an opportunity to show how such a retroactive application would hurt them.

Despite this apparent victory for immigrant investors, this decision actually had the effect of curtailing the program. The court ordered that the merits of the retroactivity claim be remanded to the administrative courts for review. Unfortunately, INS refused to hear the retroactivity claims. Even though the parties argued the issue of retroactivity before the district court, the subject was left unresolved.

Two years later, on April 29, 2003, the Ninth Circuit Court of Appeals issued its review of *Chang v. United States*, 327 F.3d →

911 (9th Cir. 2003). The court held that no further exhaustion of the administrative process was necessary and that it had jurisdiction to review the claims. More significantly, the court performed the retroactivity analysis, noting that the district court's actions were irrational because it "wasted judicial resources by remanding to the INS for it to do what it firmly states it may not and will not do... The district court was itself fully capable of doing what it asked the INS to do against its will. The remand was thus an abuse of discretion." *Id.* at 925. The Ninth Circuit determined that retroactive application of the 1998 AAO precedent decisions was impermissible. It further chastised the government, stating:

> INS's approving and receiving the benefits of [immigrant] investments, only to renege on the promise of LPR status once those benefits were garnered, must seem very unfair. It is hard to imagine how the INS has a compelling statutory interest in such an outcome. Congress has not repealed the EB-5 program; it still intends for it to continue. The reputation and integrity of the EB-5 program is ill-served by the proposition that INS approval of an I-526 petition as satisfying EB-5's requirements cannot be relied upon.

Consequently, for those investors caught in the midst of the rule changes, this landmark decision provided the first indication that the 10-year pattern of negative, restrictive adjudication might be drawing to a close based on the appellate court's conclusion that retroactive application of the 1998 precedent decisions was impermissible.

Congressional Involvement

While the federal courts breathed new life into an otherwise moribund program, Congress also tried to revive the program with the 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, 116 Stat. 1758 (2002) (DOJ amendments), signed into law on November 2, 2002. This law was specifically designed to reform the program and provide some regulatory guidance. The immigrant investor provisions are in §§11031–37. The DOJ amendments considerably eased the regulations by providing relief to investors left in limbo by the restrictive 1998 precedent decisions, outlining special procedures for investors with I-526 petition approvals between January 1, 1995 and August 31, 1998, and who had filed an adjustment of status application or had applied for an immigrant visa overseas. §§11031–32.

Some investor applicants with denied I-829 petitions were given an opportunity to file a motion to reopen (§11031(b)(2)), and others with approved I-526 petitions awaiting removal of conditional resident status in the United States were given a second chance at compliance. §11031(b). Even investor applicants outside of the United States with approved I-526 petitions were given an opportunity to return to the United States, if necessary, to obtain adjustment. §11032(c)(2)(B).

The DOJ amendments eliminated the "establishment" requirement—that EB-5 investors have "established" a commercial enterprise. See S. Yale-Loehr, "EB-5 Immigrant Investors," *supra* n. 5 at 53. Instead, investors only needed to show they have "invested" in a commercial enterprise. Immigrant investors who invest in an existing enterprise no longer had to prove they expanded the net worth or the number of employees by 40 percent. 8 CFR §204.6(h)(3).This significantly altered the original regulations and eliminated one of the biggest obstacles created by the 1998 precedent decisions. For instance, in *Matter of Izumii*, the AAO determined that the limited partners who had joined the general partnership over varying periods had used these "pooling agreements" to circumvent the establishment of a new business enterprise requirement. Because the DOJ amendments eliminated the "establishment" requirement, the finding stated in *Matter of Izumii* is no longer applicable.

For advocates of the investor visa program, Congress's decision to eliminate the establishment requirement was seen as a significant positive development. However, soon after those judicial and statutory victories were celebrated, USCIS once again dealt the program another setback. On June 10, 2003, USCIS issued an interim guidance memo confirming that although an "alien entrepreneur is no longer required to establish a commercial enterprise,"12 the new law does not remove the requirement that the enterprise be "new," as defined in 8 CFR §204.6(e). From this restrictive interpretation, it appeared that the "establishment of a new commercial enterprise" requirement still pertained to those enterprises established prior to November 29, 1990.

Most disturbing, however, is that USCIS has yet to issue conforming regulations to implement the DOJ amendments, leaving investors stuck in the quagmire from the prior confusion and guessing as to how they can extract themselves from the regulatory and adjudicatory mess.

☞ **PRACTICE POINTER: Investors should therefore exercise caution in applying for immigrant investor visas and avoid any issue or area that the government has indicated disfavor. For this reason, some investors have chosen to participate only in recently approved pilot program designated regional centers, as they allow for creation of indirect employment, and the alien investor is not required to engage in the day-to-day management of the new commercial enterprise. More importantly, USCIS appears to be approving pilot program cases for designated regional centers. However, the investor is cautioned that the strict reading of the source of the funds continues to be rigorously enforced.**

On the Bright Side

As mentioned above, participation in the EB-5 program through the pilot program appears to be the best option for prospective investors. By investing in commercial enterprises located within a designated regional center, the investment amount is reduced to $500,000, and the petitioner does not have to directly prove job creation. USCIS appears to show preference for these types of cases, and there have been several reports confirming the higher rate of approval for investments made under the pilot program. This positive development provides greater certainty that both the

I-526 and I-829 petitions will be approved, and the investor will eventually succeed in obtaining permanent residence status.

Another positive development occurred in January 2005, when USCIS established the Investor and Regional Center Unit (IRCU) to provide oversight for policy and regulatory development, field design, case auditing, and training on regional center adjudication. See S. Yale-Loehr, "EB-5 Investors," *supra* n. 5 at 65. USCIS believes that this will encourage foreign investment and job creation without damaging the integrity of the EB-5 program.[13]

Be Encouraged but Proceed with Caution

Following a decade of turbulence, there have been positive developments for investors who are able to demonstrate the lawful source of funds used for investment in designated regional centers under the pilot program. Moreover, Congress has historically expressed support for the EB-5 program. Whenever legacy INS interpreted the regulations restrictively, Congress took action and passed new laws, attempting to soften the blow on immigrant investors. Congress's latest decision to extend the pilot program reiterates the government's commitment to the EB-5 program. Regrettably, USCIS continues to delay the issuance of final enabling regulations that may help those lost in the labyrinth of restrictive adjudication, leaving previous investors without clear directions as to how to emerge from the quagmire.

Hopefully, USCIS will recognize the clear congressional intent and draft regulations that nurture, rather than inhibit, a program that has the potential to strengthen the American workforce and economy at a time when both capital investment and jobs seem to be going abroad at record levels. It appears the tide has turned for certain investors, specifically those investing in the pilot program in designated regional centers. For now, investors choosing not to take part in the pilot program and plan to file the $1 million and direct their own investments need to exercise extreme caution. Do not take any action contrary to the government's expressed or implied dislikes, since the EB-5 program historically has shown that investors should not challenge the government or attempt to be too creative.

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Notes

[1] *See* "Immigrant Investors: Small Number of Participants Attributed to Pending Regulations and Other Factors," GAO-05-256 (Apr. 2005), *published on* AILA InfoNet at Doc. No. 05040475 (*posted* Apr. 4, 2005) (GAO Report).

[2] "Federal Court Rules in Favor of Immigrant Investors," U.S. Newswire (May 9, 2001).

[3] J. Werner, "Immigration Limbo: INS $1 Million Visa Program has Some Foreign Entrepreneurs Fearing Deportation While Trying to Build Their Businesses in the United States," *Broward Daily Business Review* (Oct. 27, 2000).

[4] To view the mot recent version of this article, see S. W. Yale-Loehr, "EB-5 Immigrant Investors: An Overview," *Immigration Options for Investors* 51(AILA 2006).

[5] B. MacDonald, "The Immigrant Investor Program: Proposed Solutions to Particular Problems," 31 *Law & Pol'y Int'l Bus.* 403, 431 (2000).

[6] "Investors Follow INS Rules and Now Fear Deportation," *The Baltimore Sun* (Feb. 20, 2000).

[7] H.R. Rep. No. 723, 101st Cong., 2d Sess., pt. 1, at 41 (1990).

[8] L. C. Lee, "The 'Immigrant Entrepreneur' Provision of the Immigration Act of 1990: Is a Single Entrepreneur Category Sufficient?" 12 *J.L. & Com.* 147, 149 (1992).

[9] *See* S. Rep. No. 55 (1989).

[10] Pub. L. No. 102-395, §610, 106 Stat. 1828, and the Basic Pilot Program Extension and Expansion Act of 2003, Pub. L. No. 108-156, §4(b), 117 Stat. 1944. See GAO Report, *supra* n. 1.

[11] D. Hirson and C. I. Mayou, "The Sinking of the Titanic, or the Rising of the Phoenix? An Update on Immigrant Investor Visas," 98-09 *Immigration Briefings* (Sept. 1998).

[12] USCIS Memorandum, William R. Yates, "Amendments Affecting Adjudication of Petitions for Alien Entrepreneur" (June 10, 2003), 8 *Bender's Immigr. Bull.* 1306 (Aug. 1, 2003), *published on* AILA InfoNet at Doc. No. 03061744 (*posted* June 17, 2003).

[13] USCIS Memorandum, William R. Yates, "Establishment of an Investor and Regional Center Unit" (Jan. 19, 2005), *published on* AILA InfoNet at Doc. No. 05012663 (*posted* Jan. 26, 2005).

[14] GAO Report, *supra* n. 1.

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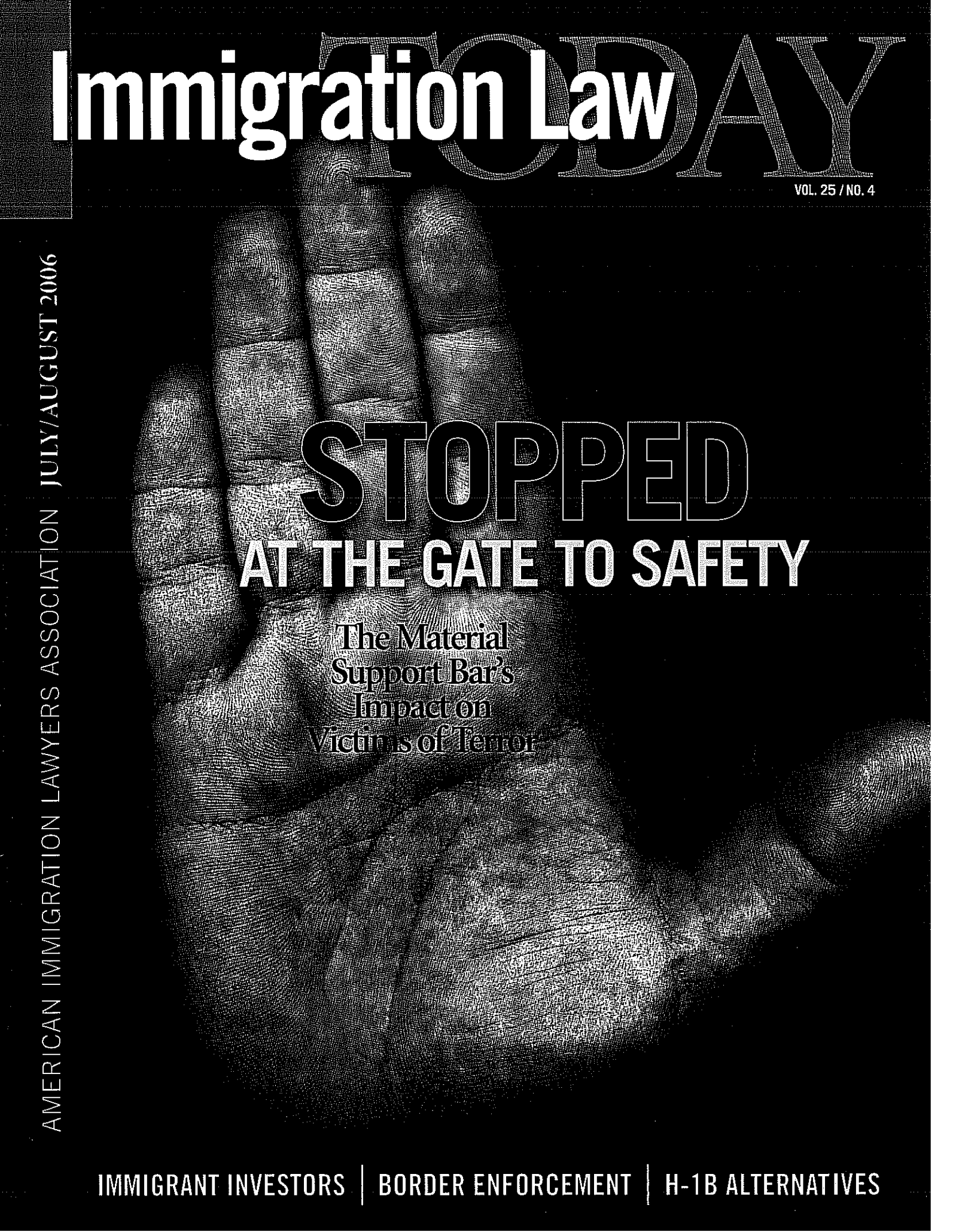

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