

U.S. Immigration Benefits for Foreign Investors

By Vance Winningham and William O'Brien

The Magna Carta that King John of England signed in 1215 at Runnymede under duress mandated that foreign merchants be allowed to travel throughout the kingdom and that they be exempt from the payment of “evil tolls.”¹ And in 1924, the U.S. Congress authorized the issuance of visas to foreign nationals who wished to come to this country to engage in trade provided that their home country had a treaty with the U.S. that allowed American citizens the same right in their nation.² Such treaties have become known as “friendship treaties.” And since that time the national legislature has seen fit to create different categories of noncitizens who are permitted to come to the U.S. for the purpose.

There are currently two classes of nonimmigrant visas that a foreign citizen who wishes to enter the U.S. to invest in businesses here can utilize. The category known as “E-1” allows admission to a foreign national who will engage in “substantial trade” between the U.S. and his or her host country.³ An “E-2” visa holder is required to develop and operate a business venture in which he or she has invested a “substantial amount of capital.”⁴ The terms “substantial trade” and “substantial amount of capital” are not defined in the relevant law. Both categories require that the visa holders be citizens of nations that have friendship treaties with the U.S.⁵ A list of those countries is in place at the U.S. State Department’s Web site. The majority of holders of those visas are citizens of European and Asian nations since nations in those two areas constitute the majority of states

that have friendship treaties with the U.S. There are several subcategories of those visas, but they all have certain requirements that include the recipient of the visa must be in an executive or supervisor role in the company that he or she is investing in, he or she must have skills that are necessary for the operation of the business in question, or the skills he or she possesses must be essential to the businesses’ successful operation. There is no test set forth for determining if an applicant’s skills qualify for that designation, and it is determined on a case-by-case basis.⁶ In addition, he or she must show an intent to depart the U.S. when his or her nonimmigrant visa expires. A holder of an E class visa can normally remain in the United States for a two-year period, and can apply for extensions of the visa provided he or she still meets the criteria for the visa.⁷

The Immigration and Nationality Act that was originally passed by the U.S. Congress in 1952 was amended in 1990 to allow foreign investors to immigrate to the U.S. and become what is known as a "lawful permanent resident" (LPR).⁸ That enactment is codified in Section 203 (b) (5) of the Immigration and Nationality Act and this category is known as "EB-5." The individual in question must be coming to this nation to develop a new commercial venture that will employ at least 10 U.S. citizens or legal permanent residents.⁹ The employees cannot be the foreign national's spouse or children.¹⁰ The measure was said to have been inspired by a series of laws passed by the Canadian parliament that had been enacted in a successful effort to entice business people in the British Crown colony of Hong Kong to emigrate to Canada before that colony became part of the People's Republic of China in 1997.

The investor must invest at least \$1 million into the venture, unless the site of the business is in a "targeted area" where the investment only has to be \$500,000.¹¹ A "targeted area" is defined in the statutes as either a rural area or an area that has an unemployment rate of at least 150 percent of the national average.¹² A rural area is described as one that is not located within a metropolitan statistical area or the outer boundary of a city or town with a population of 20,000 or more.¹³ The businesses must be in operation for at least two years and the jobs created must be in place for that time period as well.¹⁴

The regulations that were implemented in accordance with that section mandate that the business being formed does not have to be financed by a single applicant.¹⁵ Several foreign investors can jointly fund the undertaking to achieve the required investment and job creation. And to qualify for admission into the U.S. under the section each individual applicant will have to be engaged in the daily operations of the business.¹⁶

In 1992, Congress established the "Immigrant Investor Pilot Program" to encourage foreign investment in what were designated "regional centers" that are in need of economic development.¹⁷ It was somewhat different than the LPR investment visa congressional enactments. That program allows foreign investors who wish to immigrate to the U.S. to obtain lawful permanent resident status by investing capital in ventures located in those areas.¹⁸ The minimum amount of capital that has to be invested is \$500,000. The Department of Homeland Security

was tasked with the responsibility of approving the creation of regional centers. A regional center is defined as "any economic unit, public or private, engaged in the promotion of economic growth, improved regional activity, job creation and increased domestic capital investment."¹⁹ And an applicant for that designation must show that their proposed program will focus on a specific geographical region, promote economic growth, and improve regional productivity, create at least 10 new jobs, increase domestic capital investment, have a positive effect on the regional economy, and generate a demand for business services and construction jobs throughout the center's geographical area.²⁰ A combined total of 10,000 immigrants' visas have been set aside for such foreign investors on a yearly basis. But the number of annual applicants for those visas has always been below the number allotted. A study of LPR investors conducted by the Government Accounting Office found that the majority of businesses that were set up by them were hotels and motels, manufacturing, real estate and domestic sales.²¹ It was further found that 41 percent of the businesses were set up in California, followed by Maryland, Arizona, Florida and Virginia, respectively.²²

In 2005, the Department of Homeland Security created the Investor and Regional Center Unit to oversee the operation of regional centers and to consider applications for new ones. The Investor and Regional Center Unit has evolved into the Foreign Trader, Investor, and Regional Center Program (FTIRCP).²³ As of this date, several counties in western Oklahoma are included in a regional center. The FTIRCP and its bureaucratic predecessor have approved more than 30 applications for regional centers throughout the nation, and of those currently in operation, most are located in Pennsylvania and Vermont, Louisiana and Texas, South Dakota, Iowa, Wisconsin, California and Hawaii.²⁴

The business ventures that have been launched under the auspices of the program include several that could be replicated in Oklahoma. They include an assisted living center for the elderly in the state of Washington, a venture designed to finance the renovation of moribund business areas in Philadelphia, a variety of cattle operations and a meat packing plant in South Dakota, and an ethanol fuel producing plant in Kansas.²⁵ And both public and private entities are involved in many of these undertakings. After Hurricane Katrina, the FTIRCP amended the regional center designation to include all of the parish of

Orleans, La., and authorized the regional center there to engage in a broad array of needed infrastructure development activities, and approved the City of New Orleans' plan to enter into a memorandum of understanding with a private entity to oversee the regional center activities.²⁶ The FTIRCP also required that that regional center retain the services of another private entity that would monitor the center's activities to ensure that they were in compliance with the program's regulations.²⁷

The FTIRCP has denied several applications for regional center designations in recent years on the grounds that the applications did not contain sufficient documentation.²⁸ And in several other instances applicants were advised by that entity that they needed to submit additional documentation in support of their respective applications to demonstrate that the necessary number of jobs would be created.²⁹

As noted above, the U.S. program is said to have been inspired by the laws that were enacted by the Canadian parliament. But the program adopted in Canada has lesser standards for such immigrants. To qualify under that program, an immigrant investor has to have a net worth of at least \$800,000 Canadian dollars and make an investment in that nation of \$400,000 Canadian dollars.³⁰ Our northern neighbor also offers what is known as an "entrepreneurial visa" for foreign nationals who have a net worth of at least \$300,000 Canadian dollars, and will invest and operate a new business that will create at least one full-time position that will be filled by a non-family member.³¹ According to figures contained in a report to the U.S. Congress by the Congressional Research Office, the Canadian investor visa program attracted a total of \$6.6 billion Canadian investment in that nation for the period from 1986 through 2004.³² In contrast, the American investor visa program generated an investment of \$1 billion in businesses for the period from 1992 through 2004.

The U.S. Congress may wish to lower the amount of investment needed to qualify as an immigrant investor as a way to foster economic growth.

1. MAGNA CARTA, paragraph 41.
 2. 43 Stat, 153.
 3. 8 USCA Section 101 (a) (15)(e).
 4. *Id.*

5. C. Haddal, Foreign Investors Visas, 1.29.07, Congressional Research Service, page 14.
 6. 8 C.F.R. Section 206.6
 7. *Id.*
 8. 8 USCA Section 203 (b) (5)
 9. 8 C.F.R. Section 204 6 (j)
 10. 8 USCA Section 203
 11. *Id.*
 12. *Id.*
 13. 8 C.F.R. Section 6 (j)
 14. *Id.*
 15. 8 C.F.R. Section 206.6
 16. *Id.*
 17. Section 610 Public Law 102-395 (Oct. 6, 1992)
 18. *Id.*
 19. 8 C.F. R. Section 204.6 (m)
 20. 8 C.F.R. Section 204.6
 21. US Government Accountability Office, Immigrant Investors, April 2005 p. 8.
 22. *Id.* at 10.
 23. L. Stone, New Life for the Immigrant Investor Program, draft received by Vance Winningham by the author on 5.30.07
 24. *Id.*
 25. *Id.*
 26. *Id.*
 27. *Id.*
 28. *Id.*
 29. *Id.*
 30. US Government Accountability Office, Immigrant Investors, April 2005, p. 18.
 31. *Id.*
 32. *Id.*
 33. *Id.*

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