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Immigration for Investors: A Comparative Analysis of U.S., Canadian, and Australian Policies

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I. INTRODUCTION

The foreign investor[1] who wishes to immigrate to the United States to establish or procure a business faces a number of obstacles. While other major immigrant receiving nations encourage the immigration of a number of investors each year,[2] the United States has not issued an immigration visa[3] to an investor since 1978.[4] This discrepancy can be explained by looking to the policy objectives of each major immigrant receiving nation's immigration system. The U.S. system[5] controls immigration through a set of numerical limitations[6] and is oriented primarily toward the reunification of families.[7] Because of this structure, those who wish to immigrate for investment purposes have not been able to obtain visas.[8] Reform efforts in the

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1. For purposes of this Comment, the term "foreign investor" means an individual who wishes to permanently settle in another country, and seeks admission to that country solely on the basis of the business the applicant intends to establish there.

2. Australia, Canada, New Zealand, and the United States are the world's four major immigrant receiving nations. U.S. DEP'T OF JUSTICE, LABOR AND STATE, U.S. INTERAGENCY TASK FORCE ON IMMIGRATION POLICY STAFF REPORT 321 (1979) [hereinafter cited as TASK FORCE ON IMMIGRATION]. The immigration rates of Australia, Canada, and New Zealand between 1950 and 1974 were between 4.4 and 5.6 immigrants annually per thousand of population. *Id.* The rate for the United States was 1.7 per thousand per year. *Id.* Australia and Canada have recently encouraged the immigration of investors. *See infra* notes 144 and 203-204 and accompanying text.

3. A valid immigration visa is required of all immigrants seeking to enter the United States. 8 U.S.C. § 1181(a) (1976 & Supp. IV 1980). An alien seeking entry to this country without an immigration visa may be excluded, 8 U.S.C. § 1182(20) (1976), or, if the alien has entered the country without a visa, deported. 8 U.S.C. § 1251(a)(1) (1976). Immigration visas are issued through United States consular offices in foreign countries. Possession of an immigrant visa is required of immigrants entering the United States for permanent residence. 8 C.F.R. § 211.1(a) (1982).

4. U.S. SELECT COMMISSION ON IMMIGRATION AND REFUGEE POLICY, U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST 131 (1981) [hereinafter cited as U.S. IMMIGRATION POLICY]; telephone interview with B. J. Harper, Expert Advisor on Visa and Immigration Policy, Bureau of Consular Affairs, U.S. Department of State, Washington, D.C. (Oct. 25, 1982) [hereinafter cited as Harper]. For a discussion of the continuing cause of this unavailability of visas, see *infra* note 57.

5. The present immigration system was created under the Immigration and Nationality Act, Pub. L. No. 414, 66 Stat. 163 (1952) (current version at 8 U.S.C. § 1101 (1976)).

6. 8 U.S.C. §§ 1152 and 1153 (1981).

7. TASK FORCE ON IMMIGRATION, *supra* note 2, at 326. "U.S. policy is . . . heavily oriented, both in principle and operation, to the reunification of families and the admission of refugees." *Id.* Nonfamily immigration accounted for only five percent of all immigration in 1978. U.S. SELECT COMMISSION ON IMMIGRATION AND REFUGEE POLICY, U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST: STAFF REPORT 384 (1981) [hereinafter cited as U.S. IMMIGRATION POLICY: STAFF REPORT].

8. Harper, *supra* note 4.

United States seek to remedy this problem,[9] but doubts exist as to whether the proposed reforms will be effective.[10]

The immigration policies of other major immigrant receiving nations, such as Australia and Canada, present a contrast to the U.S. immigration system. The immigration policies of Australia and Canada are designed to address the economic and manpower needs of each nation.[11] Those countries not only allow investors to immigrate, but often encourage them to do so.[12]

This Comment is a comparative analysis of the immigration systems of the United States, Canada, and Australia as they relate to foreign investors. The Comment discusses and analyzes current U.S. immigration policy and recent reforms considered by Congress. The author then examines the immigration policies of Canada and Australia. The characteristics of both the Canadian and Australian systems is compared with both present and proposed U.S. policy. Finally, the author assesses the proposed reforms of the U.S. immigration system and offers a proposal for the reform of U.S. immigration policy toward investors.

II. UNITED STATES IMMIGRATION POLICY

A. *Background*

No major modifications in U.S. immigration policy have occurred since 1965.[13] In 1965, Congress amended[14] the Immigration and Nationality Act[15] to abolish the

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9. Two comprehensive immigration reform bills were introduced during the second session of the 97th Congress. Although one measure, S. 2222, was passed by the Senate, neither proposal was voted on by the House. *See infra* notes 72-95 and accompanying text.

10. Telephone interview with Jerry Tinker, Staff Member, U.S. Senate Subcommittee on Immigration and Refugee Policy (Oct. 25, 1982) [hereinafter cited as Tinker]. Mr. Tinker expressed some doubts as to whether the proposed reforms would make visas available to investors. He noted that under the proposed reforms, the immigration system would still be subject to an annual numerical limitation. The limitation, combined with a preference for skilled workers and professionals over investors, could result in the continuing unavailability of visas for investors. *Id.*

11. TASK FORCE ON IMMIGRATION, *supra* note 2, at 325-26. For a discussion of these economic and manpower considerations, see *infra* text accompanying notes 108 and 153.

12. Recent Canadian immigration reforms have been aimed at allowing more investors to immigrate to Canada. DEP'T OF EMPLOYMENT AND IMMIGRATION, PRESS RELEASE No. 83-37 (Oct. 24, 1983) (available from the Dep't of Employment and Immigration, Hull, Canada); *see also infra* notes 144-145 and accompanying text. The Australian government has also commenced a program to attract investor-immigrants to Australia. Pritchard, *Wanted in Australia: Chinese Executives to Fill a Gap*, Christian Sci. Monitor, June 28, 1982, at 8, col. 1. *See also infra* text accompanying note 203.

13. TASK FORCE ON IMMIGRATION, *supra* note 2, at 323. Three major issues in immigration policy have emerged since 1965: the regulation of Western Hemisphere immigration, illegal aliens, and refugees. Of the three, Congress had dealt only with the regulation of immigration from the Western Hemisphere by 1979. CONGRESSIONAL RESEARCH SERVICE, SENATE COMM. ON THE JUDICIARY, 96TH CONG., 1ST SESS., U.S. IMMIGRATION LAW AND POLICY: 1952-1979, at 62 (Comm. Print 1979) [hereinafter cited as U.S. IMMIGRATION: 1952-1979]. Congress addressed the refugee issue in 1980. *See infra* note 19.

14. An Act of Oct. 3, 1965, Pub. L. No. 89-236, 79 Stat. 911. Congress amended the Immigration and Nationality Act in 1965 to abolish the quota system used to admit immigrants. S. REP. No. 748, 89th Cong., 1st Sess., *reprinted in* 1965 U.S. CODE CONG. & AD. NEWS 3328, 3331-32. It had been found that

national origins quota immigration selection system.[16] In 1976, Congress replaced this quota system, which selected immigrants according to their country of origin,[17] with a system of numerical ceilings for the Eastern and Western Hemispheres.[18] By 1980, Congress had established a worldwide ceiling of 270,000 immigrants per year.[19] Under the present system, the United States selects immigrants through a set of preference classes,[20] with each foreign country[21] limited to 20,000 immigrants per year.[22]

Immigration visas[23] are issued by the Department of State through its consular offices.[24] Visas are available in order of preference class,[25] with the lower numbered classes having a priority in the issuance of visas.[26] The First, Second, Fourth, and

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the quota system had been significantly altered by special legislation. *Id.* Moreover, Congress felt the quota system lacked the flexibility required to deal with the immigration issues arising after World War II. *Id.*

15. Immigration and Nationality Act, Pub. L. No. 414, 66 Stat. 163 (1952).

16. S. REP. No. 748, 89th Cong., 1st Sess. *reprinted in* 1965 U.S. CODE CONG. & AD. NEWS 3328, 3331-32.

17. The use of a quota system began under the Quota Law of 1921, Pub. L. No. 5, 42 Stat. 5, repealed by Immigration and Nationality Act of 1952, § 403(a)(21), 66 Stat. 163, 279. The 1952 Immigration and Nationality Act established quotas based on a national origins system which applied to all countries outside the Western Hemisphere. A special racial quota was also set for Asians. *See* 1 C. GORDON & H. ROSENFIELD, IMMIGRATION LAW AND PROCEDURE 12-16 (1979).

18. The Immigration and Nationality Act Amendments of 1965 instituted a preference system to select immigrants from the Eastern Hemisphere, but did not apply the preference system to the Western Hemisphere. Immigration and Nationality Act Amendments of 1965, Pub. L. No. 89-236, 79 Stat. 911. The Act also limited immigration from the Eastern Hemisphere to 170,000 per year, while the limit for the Western Hemisphere was 120,000. *Id.* In 1976, Congress enacted a modified preference system for the Western Hemisphere as well as creating an annual ceiling of 20,000 immigrants from any foreign country. Act of Oct. 20, 1976, Pub. L. No. 94-571, 90 Stat. 2703. *See* U.S. IMMIGRATION: 1952-1979, *supra* note 13, at 63-64.

19. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 107. The Refugee Act created a separate immigration ceiling for refugees of 50,000 visas per year. Previously, 17,400 of the 290,000 annual visa limitation had been allocated to refugees. S. REP. No. 96-256, 96th Cong., 2d Sess. 5, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 141, 145. The limit of 17,400, however, was exceeded in most years through the authority of the Attorney General to "parole" refugees into the United States under § 212(d)(5) of the Immigration and Nationality Act. *Id.* at 146. Under this system, an average of 40,000 refugees were admitted each year. *Id.* In establishing a numerical ceiling for refugees separate from the worldwide limits, the Refugee Act reduced the worldwide numerical ceiling from 290,000 to 270,000 visas per year. *Id.*

20. *See* 8 U.S.C. § 1153(a) (1981). There are six preference classes under the U.S. immigration system. Four of the classes are designed to allow the immigration of relatives of both U.S. citizens and aliens legally admitted for permanent residence. The two other categories allow the immigration of skilled and unskilled workers. A nonpreference class exists for those immigrants who are not included in one of the six preference classes. *Id. See infra* notes 25-35 and accompanying text.

21. A foreign country is defined as: "Each independent country, self-governing dominion, mandated territory, and territory under the International trusteeship system of the United Nations, other than the United States and its outlying possessions. . . ." 8 U.S.C. § 1152(b) (1981).

22. *Id.* § 1152(a). Immigrants from colonies or areas dependent on a foreign country are limited to 600 visas per year. *Id.* § 1152(c).

23. *See id.* § 1101(16). *See also supra* note 3.

24. 8 U.S.C. §§ 1104 and 1201 (1981).

25. *Id.* § 1153(a).

26. *Id.*

Fifth preference classes include the relatives of both U.S. citizens[27] and lawful permanent residents.[28] The Third preference class includes professionals and individuals of exceptional ability in the arts or sciences.[29] The Sixth preference allows for the immigration of skilled or unskilled labor.[30] These latter two "occupational preference"[31] categories allow the entry of those trained in occupations useful to the domestic economy.[32]

The Seventh immigration category is the nonpreference class.[33] The nonpreference category contains all immigrants who do not fall into one of the six preference classes.[34] Visas are available to members of the nonpreference class only if excess visas exist after applications from members of the six preference categories have been processed.[35]

Use of the preference system evidences an emphasis in U.S. immigration policy on family reunification. Four of the six preference classes accommodate the relatives of U.S. citizens and permanent resident aliens.[36] Those wishing to immigrate based on their labor potential are included in the Third and Sixth preferences.[37] This emphasis in immigration policy has thus led to a restrictive approach toward the immigration of investors.

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27. *Id.* §§ 1153(a)(1),(2),(4), and (5); 22 C.F.R. §§ 42.30-42.31 and 42.33-42.34 (1982). The First and Second preferences apply to the unmarried sons and daughters of U.S. citizens and aliens legally admitted for permanent residence. The Fourth and Fifth preferences apply to the married sons and daughters and the brothers and sisters of U.S. citizens who are at least 21 years of age. 8 U.S.C. §§ 1153(a)(1),(2),(4), and (5) (1981); 22 C.F.R. §§ 42.30-42.31 and 42.33-42.34 (1982).

28. 8 U.S.C. § 1153(a)(1),(2),(4), and (5) (1981); 22 C.F.R. §§ 42.30-42.31 and 42.33-42.34 (1982). Legally admitted permanent residents are those immigrants legally living in the United States. The Immigration and Nationality Act defines "permanent" as "a relationship of continuing or lasting nature, as distinguished from temporary. . . ." 8 U.S.C. § 1101(a)(31) (1976). Residence is defined by the Act as the individual's "place of general abode . . . his principal, actual dwelling place in fact. . . ." *Id.* § 1101(a)(33).

29. *Id.* § 1153(a)(3) (1981). The professions which come under the Third preference include, but are not limited to, architects, engineers, lawyers, physicians, surgeons, and teachers. *Id.* § 1101(a)(32) (1976). For a discussion of the qualifications required to be considered under the Third preference, see Goldfarb, *Occupational Preferences in the U.S. Immigration Law: An Economic Analysis*, in THE GATEWAY: U.S. IMMIGRATION ISSUES AND POLICIES 412 (B. Cheswick ed. 1982) [hereinafter cited as Goldfarb].

30. 8 U.S.C. § 1153(a)(6) (1981). For a discussion of the Sixth preference, see generally Goldfarb, *supra* note 29.

31. These categories exist for those who are immigrating for employment. *See* Goldfarb, *supra* note 29, at 412.

32. 8 U.S.C. § 1182(a)(14) (1981). Immigrants in these preference categories cannot adversely affect the wages or working conditions of U.S. workers similarly employed. *Id.* The regulations promulgated by the Department of Labor pursuant to the Immigration and Nationality Act describe the general occupations for which an immigrant may be certified. Such occupations have insufficient U.S. workers who are able, willing, qualified, and available for that work. 20 C.F.R. § 656.10 (1982).

33. 8 U.S.C. § 1153(a)(7) (1981).

34. *Id.* § 1153(d). A presumption of nonpreference status exists unless the applicant can show that he or she comes under one of the preferences. *Id.*

35. The United States limits immigrants in the occupational preference categories to 20% of those receiving immigration visas each year. Family reunification immigrants may account for more than 80% of annual U.S. immigration. *Id.* § 1153(a).

36. *Id.*

37. *See supra* text accompanying notes 29-33.

B. *Treatment of Immigrant Investors*

Immigrants considered for admission under the Third, Sixth, or nonpreference[38] category must obtain a labor certification[39] from the Secretary of Labor prior to the issuance of a visa.[40] The certification process requires the potential employer of an immigrant in the Third, Sixth, or nonpreference category to file information with a local Job Service office regarding the position the immigrant will fill.[41] The purpose of the labor certification process is to reserve existing employment opportunities for Americans.[42]

Some have criticized this process as aggravating, time-consuming, and costly.[43] However, a foreign investor who wishes to immigrate to the United States, and is considered for admission under the nonpreference category,[44] is exempt from the certification process.[45] The regulations exempt investors because the money held by such immigrants makes it unlikely that they will enter the labor force to usurp an existing job opportunity.[46]

In order to qualify as an investor, an applicant must meet certain criteria. The applicant must be a principal manager[47] of an enterprise in which the applicant has invested at least $40,000.[48] Moreover, the proposed enterprise must employ

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38. 8 U.S.C. § 1153(d) (1981).

39. *Id.* § 1182(14). *See supra* note 31.

40. 8 U.S.C. § 1153(a)(7) (1981); 8 C.F.R. § 212.8(a) (1982).

41. 20 C.F.R. § 651.10 (1982). The Job Service is the "nation-wide system of public employment offices, funded through the United States Employment Service" under the Department of Labor. *Id.* § 651.2.

42. 8 U.S.C. § 1182(14) (1981). *See also* H. REP. No. 1365, 82d Cong., 2d Sess., *reprinted in* U.S. CODE CONG. & AD. NEWS 1653, 1705 (1952).

43. U.S. IMMIGRATION POLICY: STAFF REPORT, *supra* note 7, at 408. While organized labor supports the labor certification process, administrators, employers, and many labor economists criticize the certification process for two reasons. First, because it interferes with the efficiency of the marketplace in which employers locate employees likely to perform their jobs well, and second, because of the costly litigation which has often resulted from the process. *Id.* at 409-10.

44. 8 U.S.C. § 1153(d) (1981). The nonpreference category contains immigrant investors unless they can show that they come under one of the preference classes. *Id.*

45. 8 C.F.R. § 212.8(b) (1982). For a discussion of the required criteria, see *infra* text accompanying notes 47-49.

46. Matter of Heitland, 14 I. & N. Dec. 563, 566-67 (BIA 1974), *aff'd* 551 F.2d 495 (2d Cir. 1977), *cert. denied*, 434 U.S. 819 (1977).

47. 8 C.F.R. § 212.8(b) (1982). The managerial duties of the investor must have a substantial influence on the direction and course of the business. A. GELLMAN, K. COHEN & J. GRASNICK, UNITED STATES IMMIGRATION FOR BUSINESSES, INVESTORS AND WORKERS 17 (1981).

48. 8 C.F.R. § 212.8(b) (1982). The investment must "be more than a mere conduit by which the alien seeks to enter the skilled or unskilled labor market." The investment must either tend to expand job opportunities or be sufficient enough to ensure that the investor will not displace any skilled or unskilled labor. *Id.; Heitland,* 14 I. & N. Dec. at 567. The investor must also show that he or she is actively in the process of investing. Matter of Khan, 16 I. & N. Dec. 138, 140-41 (BIA 1977). The courts have allowed investments made after the alien has applied for a visa to be included as part of a pattern of investment. Gill v. INS, 666 F.2d 390, 393 (9th Cir. 1982). Finally, the investment must include a legally binding commitment; for example, it should be evidenced by a contract. *Kahn*, 16 I. & N. Dec. at 141.

at least one domestic worker.[49]

Although status as an investor is desirable because the applicant need not obtain a labor certification, problems exist for investor-applicants because not enough visas are available for them to immigrate. Prior to 1976, the nonpreference category provided investors with the most significant means of immigration to the United States.[50] In 1976, Congress amended the Immigration and Nationality Act,[51] applying the preference system to all visa applicants[52] and setting a 20,000 annual limit for each nation.[53] Moreover, the amendment established a limit on the number of visas available under each of the preference classes.[54] These numerical limits have left most preference categories "oversubscribed,"[55] thereby creating a wait of up to three years for some preference classes.[56] This

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For a discussion of other cases in this area, see *Making Active and Passive Investments in the United States; Appropriate Immigrant Status*, 1 IMMIGRATION L. REP. 25, 30-31 (1981) [hereinafter cited as *Making Active and Passive Investments*].

49. The employee may not be the investor or a member of the investor's immediate family, and must be a lawful resident of the United States. 8 C.F.R. § 212.8(b) (1982).

50. *Making Active and Passive Investments*, *supra* note 48, at 30.

51. Immigration and Nationality Act Amendments of 1976, Pub. L. No. 94-571, 90 Stat. 2703.

52. The Immigration and Nationality Act Amendments of 1965, Pub. L. No. 89-236, 79 Stat. 911, instituted a preference system to select immigrants from the Eastern Hemisphere. The Western Hemisphere, however, did not come under a preference system until 1976. Immigration and Nationality Act Amendments of 1976 § 2, Pub. L. No. 94-571, 90 Stat. 2703. In 1978, Congress combined the two preference systems into a single world-wide preference system. U.S. Immigration: 1952-1979, *supra* note 13, at 62-66.

53. 8 U.S.C. § 1152(a) (1981); *see infra* note 18.

54. 8 U.S.C. § 1153(a) (1981). The First preference is limited to 20% of all immigrants. *Id.* § 1152(a)(1). The Second preference is limited to 26%, plus any unused by the First preference class. *Id.* § 1152(a)(2). The Fourth preference is limited to 10%, plus any unused visas from the First through Third preferences. *Id.* § 1152(a)(4). The Fifth preference has a maximum of 24%, plus any unused visas from the first four preferences. *Id.* § 1152(a)(5). Both the Third and Sixth preferences are each limited to 10% of all immigrants. *Id.* § 1152(a)(3) and (b).

55. Preference categories become oversubscribed when the demand for visas in those categories exceeds the statutory or regulatory limits for the class or foreign country or dependent area. U.S. DEP'T OF STATE, IMMIGRANT NUMBERS FOR SEPTEMBER OF 1982, at 1 (Aug. 1982) (available from the U.S. Department of State, Bureau of Consular Affairs, Visa Office, Washington, D.C.), [hereinafter cited as IMMIGRANT NUMBERS]. Under the current system, the State Department may issue only 270,000 visas per year, with a limit of 72,000 visas per quarter for the first three quarters of each year. 8 U.S.C. § 1151(a) (1981). Applicants are considered chronologically within the preference classes on a worldwide basis. 22 C.F.R. § 42.63(a) (1982). Thus, a high demand for a given preference class in a few countries may use nearly all of the worldwide visas available for that class. Applicants in such oversubscribed classes are placed on waiting lists until visas become available in subsequent quarters. *Id.* § 42.61 (1982). *See infra* note 56. Once a nation uses its visa limitation of 20,000 in any given year, applicants from that country must receive visas according to limits for each preference category. 8 U.S.C. § 1152(e) (1981). In these countries, immigrants in the Second preference category, for example, are limited to 26% of the country's visa allocation plus any unused visas from the First preference class. If demand is high in the Second class, applicants may have to wait for years before obtaining a visa, while Sixth preference immigrants, because of a lower demand for visas, may have no waiting period. *See* U.S. IMMIGRATION POLICY: STAFF REPORT, *supra* note 7, at 360, 379.

56. IMMIGRANT NUMBERS, *supra* note 55, at 2. The Fifth preference class has a waiting period of nearly three years. *Id.* Applicants filing for visas after November 15, 1979, could not be issued visas as of September 1, 1982. *Id.*

has resulted in the lack of availability of visas for the nonpreference category since 1978.[57]

This immigration system has received a great deal of criticism. In 1976, when visas were still available for investors, one commentator referred to the $40,000 minimum level of investment required under the regulations to qualify as an investor[58] as allowing some applicants to buy their way into the United States.[59] Later, with delays in the issuance of visas beginning to occur, it was noted that many investor-applicants were entering the United States on nonimmigrant visas, and remaining after their visas expired.[60] Commenting on the general treatment of investors under the preference system, one author writes: "[I]t seems incongruous to assign a preference to aliens who come for employment [Third and Sixth preferences] and to deny any preference to aliens whose investments contribute to the wealth and job opportunities in the United States."[61] This policy has resulted in efforts by immigration attorneys to find nonimmigration alternatives for investors who wish to live in the United States to supervise their investments.[62] The policy has also resulted in reform efforts in Congress.[63]

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57. Harper, *supra* note 4; *see also* U.S. IMMIGRATION POLICY, *supra* note 4, at 131. This situation shows no signs of changing. Visas only become available if unused by the six preference classes. The Fifth preference is allowed a maximum of 24% of a country's visa allocation plus any unused visas from the first four preferences. *See supra* note 54. Because there is a three-year wait for Fifth preference visas (*see supra* note 56), any visas unused by the first four preferences are taken by the Fifth preference class. Therefore, the Sixth preference class is the only class where visas may become available to nonpreference applicants. However, as of September 1, 1982, that class had a waiting period of nearly two years. *See* IMMIGRANT NUMBERS, *supra* note 55, at 2.

58. 8 C.F.R. § 212.8(b) (1982).

59. Note, *How to Immigrate to the United States: A Practical Guide for the Attorney*, 14 SAN DIEGO L. REV. 193, 216 n.173 (1976).

60. GELLMAN, COHEN & GRASNICK, *supra* note 7, at 17. Nonimmigrant status is generally accorded to those entering the United States temporarily for business or pleasure. 8 U.S.C. § 1101(a)(15)(B) (1976). Although several articles have been written suggesting nonimmigrant alternatives for investors, *see, e.g.*, *Making Active and Passive Investments*, *supra* note 48; and Schmitz, *Immigration Possibilities for Foreign Investors*, 25 PRAC. LAW. 73 (1979), problems can result from status as a nonimmigrant. The nonimmigrant's intention to return to his or her country may be challenged, resulting in deportation, or, for nonimmigrant investors, a substantial investment of up to $250,000 may be required for the nonimmigrant visa. *Making Passive and Active Investments*, *supra* note 48, at 27. Moreover, before a nonimmigrant may adjust his or her status to that of a permanent resident, a visa in the appropriate preference class must be available. 8 U.S.C. § 1255(a) (1976). Such an adjustment is not possible for members of the nonpreference class since no visas are presently available in that category. *See supra* note 57 and accompanying text. The government may also deny an application for an adjustment of status when evidence exists of a pre-fixed intent to remain permanently in the United States upon entering on the nonimmigrant visa. Nasan v. INS, 449 F. Supp. 244, 249 (D. Ill. 1978).

61. Gordon, *The Immigration Law of the Future*, 1 TRANSNAT'L IMMIGRATION L. REP. 4, 6 (1979).

62. *See supra* note 60.

63. S. 2222 and H.R. 6514, 97th Cong., 2d Sess. (1981). For a discussion of the reform efforts, see *infra* § II.C.

C. *Proposed Reform*

Congress created the Select Commission on Immigration and Refugee Policy in 1978[64] to produce "an objective and thorough study of current immigration law. . . ."[65] The Commission issued its final report in March, 1981.[66] It contained a series of recommended changes in U.S. immigration policy, including a recommendation for the creation of an Independent Immigration category for those immigrants not coming to the United States for family reunification.[67] This Independent Immigration category would contain a limited number of visas for investors.[68] To qualify for these visas, the report recommended that applicants would be required to invest substantially more than the $40,000 currently required.[69] Moreover, the investor would need to be a principal manager of the enterprise,[70] and the business would need to employ more domestic workers than is required under existing law.[71]

The Commission's report was followed by legislation introduced in both the House and Senate.[72] Senate Bill 2222[73] was passed by that chamber on August 17, 1982.[74] The bill contained reforms of the immigration system and measures designed to deal with the problem of illegal immigration.[75] Under S. 2222, the Independent Immigration category would have an allocation of 75,000 visas per year.[76] The category would apply to three groups of applicants: (1) exceptionally qualified individuals;[77] (2) skilled workers;[78] and (3) investors.[79] Visas not issued

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64. An Act of Oct. 20, 1976, Pub. L. No. 95-412, 90 Stat. 2703. The Commission consisted of sixteen members from the House, Senate, the Carter Administration's Cabinet, and four public members appointed by President Carter. *Id.*

65. U.S. IMMIGRATION: 1952-1979, *supra* note 13, at 67-68, *quoting* CONG. REC. s15599-15600 (daily ed. Sept. 20, 1978).

66. U.S. IMMIGRATION POLICY, *supra* note 4.

67. *Id.* at 127-28. The report cited two reasons for the creation of the Independent Immigration category. First, it would increase the fairness of the immigration system by providing a means by which those without any close family ties in the United States could immigrate. *Id.* at 111. Second, the category would remedy the "widespread inequities and confusion" which exist concerning the present system's dual goals of family reunification and supplying immigrants with needed skill to the U.S. work force. *Id.*

68. *Id.* at 132.

69. The Commission noted that $250,000 could serve as a minimum required investment. *Id.*

70. *Id.*

71. *Id.*

72. H.R. REP. No. 980, 97th Cong., 2d Sess. 29 (1982). The Reagan Administration had its proposals introduced as H.R. 4832 and S. 1765, 97th Cong., 1st Sess. (1981). After hearings before the House Judiciary Immigration Subcommittee on various aspects of immigration, identical companion immigration reform bills were introduced in the House and Senate. *Id.* at 29-30.

73. S. 2222, 97th Cong., 2d Sess. (1982).

74. 128 CONG. REC. s10618-19 (daily ed. Aug. 17, 1982).

75. *Senate Passes Legislation to Curb Illegal Immigration*, 40 CONG. Q. 2053, 2055 (1982).

76. S. 2222 § 201(a)(2). The 75,000 allocation applies after visas for special immigrants, as defined in § 101(a)(27)(A), have been issued. *Id.*

77. *Id.* § 203(b)(1). The bill defines an individual of exceptional ability as one who either holds a doctoral degree or who, because of exceptional ability in the sciences, arts, or business, will substantially benefit the United States. *Id.*

to applicants from the first two groups would be available to qualified investors, with a ceiling of 7,500 visas per year.[80]

Under this arrangement, the Independent Immigrant category would consist primarily of the present Third, Sixth, and nonpreference classes.[81] The State Department anticipates that under this category, visas will become available to investors after the current backlog[82] of visa applications for Third and Sixth preference immigrants is cleared.[83] However, one commentator questions whether any visas will be available for investors after skilled workers and professionals, who are preferred under the Independent Immigrant category,[84] have been granted visas.[85]

If visas do become available for investors, applicants wishing to qualify for investor status, under the proposed Senate bill, would be required to meet several criteria.[86] First, an applicant would have to make a substantial investment of at least $250,000.[87] Second, the investor would have to be a principal manager of the proposed enterprise.[88] Finally, the business would have to employ at least four U.S. citizens.[89] These requirements address one of the criticisms of present policy. The substantial increase in the required investment, from $40,000 to $250,000, will reduce the number of immigrants who seek to buy their way into the United States.[90]

Legislation introduced in the House was identical to that introduced in the Senate.[91] However, following consideration of the legislation, the House Com-

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78. *Id.* § 203(b)(2). The skilled workers must perform labor for which qualified workers are not available in the United States. *Id.*

79. *Id.* § 203(b)(3).

80. *Id.*

81. Harper, *supra* note 4.

82. *Id.* The backlog of qualified Third preference category applicants, as of September, 1982, had created a waiting period of nine months to obtain a visa in that category. Likewise, in the Sixth preference category, a waiting period of nearly two years existed. IMMIGRANT NUMBERS, *supra* note 55, at 2.

83. Harper, *supra* note 4.

84. *See supra* text accompanying note 80.

85. Tinker, *supra* note 10.

86. S. 2222 § 203(b)(3).

87. *Id.* The U.S. Attorney General is to set the amount required, which cannot be less than $250,000. *Id.*

88. *Id.*

89. *Id.*

90. Tinker, *supra* note 10. Mr. Tinker noted that one of the motivating factors behind the proposed reforms was the desire to avoid the ability of some immigrants to buy their way into America. The current level of investment required of investors, $40,000, raises questions of whether those immigrants entering as investors are actually investors. Some immigrants may have used investor status as the easiest means of immigration available to them, with no intent of becoming businessmen in the United States. *Id. See also supra* text accompanying notes 58-59.

91. H.R. REP. No. 980, 97th Cong., 2d Sess. 30 (1982). The legislation in the House was introduced as H.R. 5872. After a mark-up of the bill in the House Judiciary Subcommittee on Immigration, the legislation was reintroduced as H.R. 6514. *Id.* at 29. As passed by the Subcommittee on Immigration,

mittee on the Judiciary amended the bill.[92] Supporters of the amendment were dissatisfied with the bill's proposed limitations on legal immigration.[93] Thus, the amendment removed the proposed reforms of the current preference system, leaving only those measures designed to "close the back door on illegal immigration."[94]

At the close of the 97th Congress, neither bill had been acted upon by the House.[95] Immigration reform legislation, however, has been introduced in the 1983 session of Congress. The Senate passed S. 529[96] on May 18, 1983.[97] That bill contains many of the provisions previously passed by the Senate.[98] Senate Bill 529, however, was amended to eliminate the visas provided for investors under the Independent Immigrant category.[99] Legislation in the House[100] also lacks any provisions for investors.[101] Although efforts to reform the legal immigration system in the United States remain unsuccessful, several other major immigrant receiving nations have enacted effective immigration reforms during the past ten years.

III. CANADIAN IMMIGRATION POLICY

A. *Background*

Reform of the Canadian immigration system took place under the Immigration Act of 1976.[102] Prior to this reform, the Canadian government had con-

H.R. 6514 was similar to S. 2222 when passed by the Senate. However, two substantial differences existed in § 202(b)(3) of the House bill. First, the House bill required that the immigrant's investment must be in an area of high unemployment. Second, it required that the enterprise employ at least ten U.S. citizens or lawful permanent residents. H.R. 6514, 97th Cong., 2d Sess. (1982).

92. H.R. REP. No. 980, 97th Cong., 2d Sess. 29 (1982).

93. Cohodas, *House Panel Votes Changes in Immigration Reform Bill*, 40 CONG. Q. 2300 (1982). Supporters of the amendment were concerned with two issues. First, the bill proposed setting an overall immigration limit of 450,000. Included in that limit would be the spouses and minor children of U.S. citizens, who are currently admitted independently of the numerical ceilings. Second, the legislation eliminated the Fifth preference category for the brothers and sisters of U.S. citizens. Rep. Rodino, Chairman of the House Committee on the Judiciary, felt these reforms would adversely affect immigration for family reunification. *Id.*

94. *Id.* The bill was passed by the House Committee on the Judiciary on September 22, 1982. 128 CONG. REC. D236 (daily ed. Sept. 22, 1982).

95. Cohodas, *Immigration Reform Measure Dies in the House*, 40 CONG. Q. 3097 (1982). The reasons cited for inaction on the bill included opposition from several groups, such as organized labor, Hispanics, business and civil rights organizations, a lack of support from the House leadership, and the lack of time. *Id.*

96. S. 529, 98th CONG., 1st Sess., 129 CONG. REC. S6970 (daily ed. May 18, 1983).

97. 129 CONG. REC. S6970 (daily ed. May 18, 1983).

98. *See* Cohodas, *Senate Passes Immigration Reform Bill*, 41 CONG. Q. 1006 (1983).

99. 129 CONG. REC. S6811 (daily ed. May 17, 1983). Senator Bumpers, the sponsor of the amendment, stated that it would be wrong to grant a preference to "fat cat[s]" simply because they express a wish to invest $250,000 in the United States. *Id.*

100. H.R. 1510, 98th Cong., 1st Sess., H. REP. No. 115, 98th Cong., 1st Sess. (1983).

101. *Id.*

102. Immigration Act of 1976, ch. 52, 1976-1977 Can. Stat. 1193. For a detailed discussion of the

ducted a comprehensive review of both its immediate and long-term immigration needs.[103] The review began with proposals initiated by the government, which were followed by nationwide hearings conducted by a Special Joint Committee of Parliament and consideration by the Standing Parliamentary Committee on Labour, Manpower, and Immigration.[104] The result was legislation which reflects Canada's assessment of its future population, manpower, and economic needs.[105] The Act provides that the number of immigrants to be admitted each year is to be set annually by the Minister of Immigration.[106] The objectives of the new immigration policy are set forth in Section (3) of the Act.[107] One of those objectives is fostering the "development of a strong and viable economy."[108]

While no preference system exists for the selection of immigrants to Canada, the immigration regulations have established a priority list for the consideration of applicants.[109] The priority list requires that applicants immigrating to Canada for family reunification are to be processed before other applicants.[110] Following the processing of family reunification applicants and refugees, immigration officers process the applications of investors.[111] Applicants who will be engaged in designated occupations[112] and applicants with arranged employment in

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Act, see LAW UNION OF ONTARIO, THE IMMIGRANT'S HANDBOOK (1981) [hereinafter cited as THE IMMIGRANT'S HANDBOOK]; Berger, *Canada — Immigration — 1978*, 1 TRANSNAT'L IMMIGRATION L. REP. 15 (1979); and Black, *Novel Features of the Immigration Act, 1976*, 56 CAN. B. REV. 561 (1978).

103. TASK FORCE ON IMMIGRATION, *supra* note 2, at 326-27. The review included the solicitation of views, later collected in the government's Green Paper, regarding immigration policy problems. The Green Paper was followed by a report issued to Parliament by the Special Joint Committee of the Senate and House of Commons on immigration policy. The report resulted in the drafting of the 1976 Immigration Act. *Id.* The Act was the first comprehensive legislative reform of immigration law in Canada since 1952. It represented a much more detailed approach than under previous legislation. The government drafted the Act with the hope of resolving problems which had arisen under past immigration policy. Black, *supra* note 102, at 561.

104. Black, *supra* note 102, at 561.

105. TASK FORCE ON IMMIGRATION, *supra* note 2, at 327.

106. Immigration Act of 1976, ch. 52, § 7, 1976-1977 Can. Stat. 1193.

107. *Id.* § 3.

108. *Id.* § 3(h).

109. Immigration Regulations § 3, 112 Can. Gaz., Part II, No. 5, at 5 (1978).

110. *Id.*

111. *Id.*; DEP'T OF EMPLOYMENT AND IMMIGRATION, ATTACHMENT TO PRESS RELEASE No. 83-37 (Oct. 24, 1983), at 2 [hereinafter cited as IMMIGRATION PRESS RELEASE] (available from the Department of Employment and Immigration, Hull, Canada). This press release announced changes in Canadian immigration policy effective January 1, 1984. The new policies were the result of discussions begun in November, 1982. *Id.* The discussions were aimed at allowing the greatest number of bona fide investors to immigrate, while preventing abuse of the system. The government hopes to discourage those individuals attempting to immigrate as investors who rely on funds of questionable origin for their proposed business. Such applicants may have no intention of running a business in Canada. Instead, upon entry to Canada, they enter the work force, using borrowed funds only to gain entry as an investor. Telephone interview with Warren Lloyd, Immigration Officer, Canadian Consulate, Boston, Mass. (Oct. 21, 1982) [hereinafter cited as Lloyd].

112. Immigration Regulations § 3, 112 Can. Gaz., Part II, No. 5, at 5 (1978). A designated occupation is an occupation in a locality or area where workers in that occupation are in short supply, as determined by the Minister of Immigration. *Id.* § 2(1).

Canada are processed last.[113]

B. *Treatment of Immigrant Investors*

Canadian immigration policy places a priority on immigration for family reunification.[114] However, the economic emphasis of the Canadian system is clear.[115] This emphasis is reflected in the treatment of investors. The Canadian government considers investor-applicants as either entrepreneurs[116] or self-employed[117] immigrants. The entrepreneur is an applicant who intends, and has the ability, to establish a business or purchase a substantial interest in the ownership of a business in Canada.[118] The proposed entrepreneurial business must employ at least one Canadian[119] other than the entrepreneur and make a significant contribution to the Canadian economy.[120] Moreover, the entrepreneur must be active in the management of the business.[121] Self-employed applicants[122] must intend, and have the ability, to establish a business[123] in Canada that will employ only the applicant.[124] The business must contribute to the economy or the cultural or artistic life in Canada.[125]

Both categories of investor-applicants are assessed under the Independent Immigrant category.[126] Canadian immigration officers evaluate Independent applicants on a scale of 100 points, with a score of fifty points required for entry.[127] The factors used to assess candidates are:

Factor	*Maximum Available Points*
Education	12
Specific Vocational Preparation	15
Personal Suitability	10

113. *See id.* § 3(c).

114. Immigration Act of 1976, ch. 52, § 3(c), 1976-1977 Can. Stat. 1193.

115. The Act states its objectives in § 3, including the "development of a strong and viable economy. . . ." Immigration Regulations § 3(h).

116. Immigration Regulations § 2(1).

117. *Id.*

118. *Id.* No definition is provided by the regulations for what constitutes a "substantial" interest, or what an immigrant must show to prove the ability to establish a business or purchase a substantial ownership in a business.

119. *Id.*; IMMIGRATION PRESS RELEASE, *supra* note 111, at 2.

120. Immigration Regulations § 2(1); IMMIGRATION PRESS RELEASE, *supra* note 111, at 2.

121. Immigration Regulations § 2(1); IMMIGRATION PRESS RELEASE, *supra* note 111, at 2.

122. Immigration Regulations § 2(1); IMMIGRATION PRESS RELEASE, *supra* note 111, at 2.

123. Immigration Regulations § 2(1); what constitutes a "business" is not defined by the regulations. *See id.*

124. IMMIGRATION PRESS RELEASE, *supra* note 111, at 2.

125. *Id.*

126. THE IMMIGRANT'S HANDBOOK, *supra* note 102, at 130.

127. Immigration Regulations § 9(b)(i).

Occupational Demand	15
Experience	8
Age	10
Arranged Employment or Designated Occupation	10
Knowledge of English and/or French Languages	10
Relative in Canada Willing to Assist	5
Intended Destination in Canada	5
Total	100[128]

Entrepreneurs must score only twenty-five points to be granted a visa for entry to Canada.[129] They are not assessed with respect to the occupational demand[130] or pre-arranged employment factors.[131] Self-employed applicants[132] are not assessed under the pre-arranged employment factor.[133] However, if the immigration officer considers the self-employed applicant capable of becoming successfully established in the proposed business,[134] an additional ten points may be

128. *Id.* at Schedule I. The general characteristics sought in immigrants are set forth in § 115(l)(a) of the Immigration Act of 1976. Each of the factors of assessment used by immigration officers is described below: (a) Education: One unit is awarded for each successfully completed year of formal education, with a maximum of twelve units; (b) Specific Vocational Preparation: A maximum of fifteen units may be awarded for time spent preparing for a specific vocation. The maximum number of units is awarded for ten years or more of vocational preparation; (c) Personal Suitability: A maximum of ten units may be awarded, which are assessed during an interview with an immigration officer. Qualities upon which the applicant is judged are adaptability, motivation, initiative, and resourcefulness; (d) Occupational Demand: Units are awarded according to the demand in Canada, as determined by the government, for workers in the applicant's occupation. A maximum of fifteen units is awarded where demand for an occupation is strong; (e) Experience: Up to eight units may be assessed for experience in the applicant's occupation; (g) Arranged Employment or Designated Occupation: Ten units may be awarded if the applicant has arranged employment in Canada or will be employed in a designated occupation as defined in § 2(l); (h) Knowledge of English or French: Fluency in both languages results in an award of ten units, with fewer units awarded for varying levels of fluency in either language; (i) Relatives in Canada: Five units are awarded if the applicant will be living in the municipality where a relative who is willing to assist him in becoming established resides. Three units are awarded if the applicant will live elsewhere; (j) Intended Destination: The maximum of five units is awarded if the applicant intends to go to an area where there is a very strong general demand for labor. Immigration Regulations, Schedule I.

129. *Id.* § 9(b)(ii). Visa officers may issue a visa to an applicant who has not acquired the number of points necessary for entry. Such a determination is to be made when a visa officer feels that the points awarded do not accurately reflect the applicant's chances for becoming successfully established in Canada. *Id.* § 11(3).

130. *Id.* § 8(l)(c).

131. *Id.*

132. *Id.* § 2(1).

133. *Id.* § 8(l)(b).

134. The officer examining the applicant looks for a successful business history in the applicant's home country as a measure of anticipated success in Canada. The focus of the officer's inquiry is on the individual and the proposed business. Lloyd, *supra* note 111.

awarded.[135] But, unlike entrepreneurs, self-employed applicants must score fifty points of assessment to qualify for an immigration visa.[136]

The major factors in the consideration of entrepreneurs for immigration include their business experience, financial resources, and intent to create jobs in Canada.[137] Immigration officers also consider the entrepreneur's business proposal[138] to determine the kind of admission granted to the applicant.[139] In certain cases, the government will grant an applicant admission provisionally,[140] lasting up to two years.[141] During the provisional admission, the applicant must create job opportunities in Canada.[142]

Both entrepreneurs and self-employed applicants may be denied an immigration visa even though they may have scored the requisite number of points of assessment, with ultimate discretion resting with the immigration officer to admit those applicants thought to be able to successfully establish themselves and become adjusted to the Canadian way of life.[143] To aid in the assessment of entrepreneurs, many Canadian immigration posts have entrepreneurial immigration officers.[144] All immigration posts seek to encourage the immigration of investors by providing "express personalized service" to entrepreneurial applicants.[145]

The Canadian immigration system allows for flexibility in immigration policy. Immigration levels are set annually.[146] Moreover, although immigrants are assessed on a point basis,[147] the emphasis in the assessment of investors is on their potential to benefit Canada economically.[148] The Canadian government encourages entrepreneurs to immigrate by providing them with priority processing[149] and personalized attention.[150]

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135. Immigration Regulations § 8(4).

136. *Id.* § 9(b)(i). As with entrepreneurs, *see supra* note 126, visa officers may issue a visa to an applicant who has not acquired the number of points necessary for entry. Such a determination is to be made when a visa officer feels that the points awarded do not accurately reflect the applicant's chances for becoming successfully established in Canada. Immigration Regulations § 11(3).

137. IMMIGRATION PRESS RELEASE, *supra* note 111.

138. Telephone interview with Ingrid Wilson, Program Development, Immigration, Department of Employment and Immigration, Hull, Canada (Jan. 16, 1984) [hereinafter cited as Wilson].

139. *See* IMMIGRATION PRESS RELEASE, *supra* note 111, at 3.

140. *Id.* Provisional admission applies when an applicant has an acceptable business proposal but has not taken any concrete steps to realize the plans, when an applicant has a successful business history but no firm idea as to the kind of business to create in Canada, or when the applicant is one with which a province wishes to negotiate the establishment of a business. *Id.*

141. *Id.* The maximum period during which an applicant can enter Canada and make a concrete commitment to a business is two years. *Id.*

142. *Id.*

143. Immigration Regulations § 11(3)(a).

144. IMMIGRATION PRESS RELEASE, *supra* note 111.

145. *Id.*

146. Immigration Act of 1976, ch. 52, § 7, 1976-1977 Can. Stat. 1193.

147. *See supra* notes 126-236 and accompanying text.

148. *See supra* text accompanying notes 119-120.

149. *See supra* note 111 and accompanying text.

150. *See supra* notes 144-145 and accompanying text.

IV. AUSTRALIAN IMMIGRATION POLICY

A. *Background*

Australia's immigration policy is based upon the Migration Act of 1958.[151] The Act does not set a specific immigration policy; instead, it serves as the framework for the establishment of immigration policy under the Federal Administration.[152] The dominant factors in past immigration policy have been economic growth,[153] national security,[154] and the maintenance of a racially homogeneous society.[155] Recent reform efforts, however, have led to the abandonment of the "White Australia" policy.[156] Current immigration policy began in 1976 with the most comprehensive review of immigration in Australia's history.[157]

The immigration policy adopted in 1978[158] by the Fraser Administration resulted in an immigration system consisting of four categories of immigrants: (1) family reunification; (2) general eligibility;[159] (3) refugees; and (4) special eligibility.[160] The last category included investors.[161] This policy also established a numerical multifactor assessment system (NUMAS)[162] to assess applicants on a point scale.[163] Factors considered included family ties with Australia,[164] occupational demand,[165] literacy in the applicant's native tongue,[166] knowledge of English,[167] and prospects for successful settlement.[168] The system allowed for

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151. Migration Act of 1958, 7 AUSTL. ACTS P. 771.

152. *Id.*

153. Glick, *Australia's New Immigration Laws*, 29 INT'L & COMP. L. Q. 773, 773 (1980).

154. *Id.*

155. *Id.* This policy is referred to as the "White Australia" policy, so called because the policy sought to prevent non-Europeans from immigrating to Australia. *Id.*

156. TASK FORCE ON IMMIGRATION, *supra* note 2, at 324; *see also* Glick, *supra* note 153.

157. *New Immigration Policies Look to the Future*, 49 AUSTL. FOREIGN AFF. REC. 376, 376 (1978) [hereinafter cited as NEW IMMIGRATION POLICIES]. The review began with the publication of a Green Paper on Immigration Policies and Australia's Population by the Australian Population and Immigration Council in 1976. *Id.* Consideration of the Paper was tabled by the Australian government in 1977. *Id.* This action was followed by "extensive consultations" between the Federal Government and State governments, employers, unions, and migrants in Australia. *Id.* In June, 1978, the Minister for Immigration and Ethnic Affairs announced new immigration policy initiatives before Parliament resulting from the discussions of the previous two years. *Id.* at 376-77.

158. *Id.*

159. *Id.* at 379. The general eligibility category contained those immigrating for employment and without family ties in Australia. *Id.*

160. *Id.* The special eligibility category included investors, retirees, and citizens of other Commonwealth nations. *Id.*

161. *Id.* at 380.

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

overseas immigration officers to exercise discretion in the selection of immigrants.[169] Moreover, immigration levels were to be set on a triennial basis, instead of annually, as was done in the past.[170] These reforms in Australian immigration policy changed the structure of the Australian immigration system. The system considered immigrants in separate categories,[171] and NUMAS assessed applicants who were not immigrating for family reunification.[172]

However, the use of NUMAS to assess applicants was criticized on several grounds. One commentator criticized NUMAS because it did not apply to the family reunion category, thereby allowing unskilled labor to enter the country through family ties.[173] Other criticisms were raised by domestic immigrant communities who criticized NUMAS as discriminatory against applicants from non-English speaking countries.[174]

In 1980, a new head of the Department of Immigration and Ethnic Affairs was selected,[175] and modifications of the immigration system occurred soon thereafter.[176] The Department abandoned the NUMAS system in April, 1982, and implemented a new immigration policy.[177]

B. *The Treatment of Immigrant Investors*

The new Australian immigration policy assesses applicants without a point system.[178] The policy considers investors proposing a substantial enterprise[179]

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169. Glick, *supra* note 153, at 774. The author notes that "much of the work and probably all of the discretion is exercised in the overseas Australian immigration offices when application is made by the prospective immigrant for a visa." *Id.* The immigration officer's discretion is exercised according to government directives and bureaucratic practice. *Id.* The discretion of immigration officers is exercised according to the government regulations published in DEP'T OF IMMIGRATION AND ETHNIC AFFAIRS, Canberra, Australia, MIGRANT ENTRY HANDBOOK (1982) [hereinafter cited as MIGRANT ENTRY HANDBOOK]. (available at the Australian Consulate General, New York, N.Y.).

170. *New Immigration Policies*, *supra* note 157, at 381. The triennial program sets an average yearly gain over the three-year period. *Id.*

171. *Id.* at 379.

172. *Id.* at 380.

173. Gittens, *Immigration, The Rising Star, Has Us Bedazzled*, Sydney Morning Herald, Nov. 5, 1981, at 2, col. 1. Mr. Gittens noted that the vast majority of immigrants entered under the family reunion category, where applicants were not assessed according to NUMAS. Therefore, the protection to domestic labor provided by NUMAS was minimal. *Id.*

174. *See* Malloy, *Immigration Policy Switch Likely*, Sydney Morning Herald, Nov. 25, 1980, at 2, col. 1.

175. *Id.* Mr. John Menadue began a major "shake-up" of the Department after he was appointed its permanent head in 1980. *Id.*

176. *Id.*

177. THE MIGRANT ENTRY HANDBOOK, *supra* note 169, contains the new guidelines used by immigration officers to assess applicants for immigration to Australia.

178. Interview with Stephen H. Roberts, Vice Counsul for Visas and Immigration, Australian Consulate-General, New York, N.Y. (Nov. 11, 1982) [hereinafter cited as Roberts]. Section 10 of the Migrant Entry Handbook provides the guidelines for assessing investor-applicants previously assessed under NUMAS. *See* note 169, *supra*.

179. MIGRANT ENTRY HANDBOOK, *supra* note 169, § 10.4.1. No definition of "substantial enterprise" is provided. However, one commentator notes that applicants are usually required to have an investment of at least $300,000. Snow, *Govt Check on Business Migrants*, AUSTL. FIN. REV., Dec. 22, 1981.

separately from self-employed investors.[180] Both categories of applicants must submit a business proposal before they are considered for immigration.[181]

Applicants who propose to establish a substantial enterprise are assessed by immigration officers according to the following criteria: (1) the proposed industry's potential benefit to Australia;[182] (2) the applicant's relevant experience or expertise;[183] (3) the applicant's intention to take an active part in the proposed enterprise;[184] and (4) whether adequate capital for the enterprise is available to the applicant without borrowing, legally transferable, and to be left in Australia.[185] Furthermore, the applicant must personally present a detailed business proposal.[186] The government examines the business proposal according to these criteria: (1) benefit to Australia;[187] (2) whether the applicant proposes to establish a business, or buy an existing one;[188] (3) the proposal must be for an investment and not for property development;[189] (4) the proposed business may compete with existing industry, but may not make the Australian industry unprofitable;[190] and (5) the applicant should have visited Australia and have personally researched and demonstrated the viability of the business proposal.[191]

Immigration officers assess self-employed applicants according to similar standards.[192] The self-employed class accommodates individuals with personal skills and proven ability[193] who are capable of making a significant contribution[194] in their area of expertise.[195] Areas of business for these applicants include management consulting, public relations, marketing, advertising, and tourism.[196]

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180. MIGRANT ENTRY HANDBOOK, *supra* note 169, § 10.4.1.

181. *Id.* § 10.4.2.

182. *Id.* § 10.4.4.

183. *Id.*

184. *Id.* The investor must be more than a shareholder or silent partner. *Id.*

185. *Id.*

186. *Id.* § 10.4.5.

187. *Id.* § 10.4.13. Preferred activities are those "that will introduce new technology, improve existing industry, create jobs or develop export markets." *Id.*

188. *Id.* Proposals to buy an existing business are carefully examined and are acceptable if the applicant will bring a particular skill to the business. If the applicant's only contribution is capital, the proposal is not acceptable. *Id.*

189. *Id.* Proposals to build or purchase groups of dwelling units, or to "live off the rentals" are not acceptable. Purchases of rural property are acceptable if the applicant is already a "primary producer." *Id.*

190. *Id.*

191. *Id.* The regulations also contain a conditional immigrant category which allows for a temporary visa for those applicants with a proper business proposal, but whose real intentions are doubted by the immigration officer. After twelve months in Australia, the government considers the applicant for permanent residence. *Id.* § 10.4.14.

192. *Id.* § 10.4.29. This category does not apply to those professions or trades in which an occupational demand may be determined, such as doctors, tradesmen, or consulting engineers. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.* Not included are those fields in which there are numerous self-employed individuals or

In assessing applicants from both categories, immigration officers must first consider the applicant's business proposal.[197] If the proposal is rejected, the immigration officer cannot continue processing the application for immigration.[198] Approval or rejection of a business proposal generally rests within the discretion of the immigration officer.[199]

The Australian government has recently referred[200] to its policy toward investors as the Business Migration Scheme.[201] The government designed the program to attract investors who will establish or expand industries which are not thriving in Australia.[202] In June, 1982, an advertising program was begun to attract business immigrants from Southeast Asia.[203] The government expects to expand the program, on a limited basis, to Europe, North America, and South America.[204]

In March, 1983, a new Prime Minister of Australia was elected.[205] Although some changes in Australian immigration policies are anticipated,[206] the new Prime Minister has not altered the Business Migration Scheme.[207] The only significant change to date established a minimum investment of $250,000 for an immigrant to qualify as an investor.[208]

Australian immigration policy is, by its structure, flexible.[209] While the Migra-

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which are prone to business failures, such as: food, clothing, footware, glassware, hardware, gift outlets, news agencies, service stations, pharmacies, and franchise operations. *Id.*

197. *Id.* § 10.4.2.

198. *Id.* §§ 10.4.2 and 10.4.13.

199. *Id.* §§ 10.4.7, 10.4.9, and 10.4.15. Consideration of an entrepreneur's proposal requires both the views of a domestic Australian processing officer and an immigration officer. *Id.* §§ 10.4.7 and 10.4.9. Immigration officials are cautious of entrepreneurs who wish to maintain a high level of business activity in their former countries. They prefer to see a commitment to Australia, as evidenced by the portion of the entrepreneur's assets and time invested in Australia. Stirling, *Wooing Foreign Businessmen*, AUSTL. BUS., Feb. 18, 1982, at 72. The business proposal of a self-employed applicant may be rejected by an immigration officer whenever the officer has "sufficiently strong" doubts about the proposal. MIGRANT ENTRY HANDBOOK, *supra* note 169, § 10.4.15. When doubts exist as to an applicant's intentions, a conditional visa may be issued. *See supra* note 191.

200. DEP'T OF IMMIGRATION AND ETHNIC AFFAIRS, BUSINESS MIGRATION TO AUSTRALIA (1981) (pamphlet available from the Australian Consulate-General, New York, N.Y.).

201. Stirling, *supra* note 199, at 71.

202. *Id.*

203. Pritchard, *supra* note 12.

204. *Id.* Although the government denies that the program is designed to lure millionaires from Hong Kong and other Asian cities who may be worried about future political changes there, a government spokesman has said "if we get some nervous Chinese millionaires who meet our requirements, that's fine." *Id.* While the policy is designed to recruit investors, the government is wary of immigrant-investors who wish to maintain a high level of business activity in their former country. Stirling, *supra* note 199, at 72. Because of the recent implementation of the policy, no figures are available on its effect on immigration. Roberts, *supra* note 178.

205. Boston Globe, March 6, 1983, at 16, col. 4.

206. Telephone interview with Stephen H. Roberts, Vice Consul for Visas and Immigration, Australian Consulate-General, New York, N.Y. (Sept. 23, 1983).

207. *Id.*

208. *Id.*

209. Glick, *supra* note 153, at 773. Australian immigration policy prior to 1979 had been even more

tion Act of 1958[210] establishes a framework for immigration,[211] actual policies are implemented by the Federal Administration.[212] The current Australian immigration policy exhibits this flexibility. The latest policy reflects a movement toward greater discretion for immigration officers, as evidenced by the abandonment of NUMAS,[213] and a concerted effort to attract foreign investors.[214]

V. COMPARATIVE ANALYSIS OF THE IMMIGRATION POLICIES OF AUSTRALIA, CANADA, AND THE UNITED STATES

A. *Immigration Reform*

Most major immigrant receiving nations[215] have initiated immigration reforms during the past decade.[216] The effect of these reforms on investors who wish to immigrate varies. Canada has recognized the economic goals of its immigration policy[217] and encourages investors to immigrate.[218] Australia has undertaken a program to recruit investors for immigration to that country.[219] Both countries have immigration levels that may be adjusted according to the needs of each nation.[220] Whereas Canada sets immigration levels annually,[221] Australia sets immigration levels on a triennial basis.[222] Canada and Australia have also separated the consideration of investors from family reunification immigrants.[223] Canadian immigration policy, enacted in 1976,[224] assesses investors according to a point system.[225] The Canadian government also assesses enterpreneurs in terms of their past business experience[226] and their potential to benefit Canada

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flexible than under present law. The Migration Amendment Act of 1979, however, provided a more extensive statutory basis for immigration policy. *Id.* at 774-76.

210. Migration Act of 1958, 7 AUSTL. ACTS P. 771.

211. Glick, *supra* note 153, at 773.

212. *Id.*

213. Roberts, *supra* note 178.

214. Pritchard, *supra* note 12.

215. Australia, Canada, New Zealand, and the United States are considered the world's four leading immigrant-receiving nations. *See supra* note 2.

216. TASK FORCE ON IMMIGRATION, *supra* note 2, at 322.

217. Immigration Act of 1976, ch. 52, § 3(h), 1976-1977 Can. Stat. 1193.

218. *See supra* notes 144-145 and accompanying text.

219. Pritchard, *supra* note 12.

220. *See supra* text accompanying notes 106, 145, and 209-214. This flexibility results in a broad variation in the number of immigrants admitted to Australia and Canada from year to year. *See* TASK FORCE ON IMMIGRATION, *supra* note 2, at 339-41. In comparison, levels of immigration to the United States are relatively stable. *Id.* One Canadian official noted that when a country is suffering an economic downturn, the number of investors allowed to immigrate is likely to increase. Lloyd, *supra* note 111. The economic needs of a country often play a significant role in the treatment of investor-immigrants. *Id.*

221. *See supra* note 106.

222. *See supra* note 170.

223. *See supra* text accompanying notes 109-123 and notes 171-172.

224. Immigration Act of 1976, ch. 52, 1976-1977 Can. Stat. 1193.

225. *See supra* text accompanying notes 124-132.

226. *See supra* text accompanying note 137.

economically.[227] Moreover, the immigration applications of entrepreneurs are given priority processing,[228] and the government accords entrepreneurs personalized attention when immigrating.[229] Recent Australian reforms[230] have led the Australian government to actively recruit investors for immigration.[231] The abandonment of NUMAS[232] reflects a trend toward greater flexibility.[233] The government primarily assesses investors on their business proposals.[234] Moreover, the government's recent efforts to attract investors exhibit Australia's willingness to allow investors to immigrate.[235]

The reforms in U.S. immigration policy over the past twenty years have focused on establishing a uniform immigration system.[236] The United States abandoned the national origins quota system in 1965 in favor of a system of numerical limitations.[237] Visas are issued according to preference categories,[238] which reflect this country's traditional emphasis on family reunification.[239] The combination of preference classes with numerical limitations has resulted in the unavailability of visas for investors.[240]

Recent efforts to reform the U.S. immigration system would create an Independent Immigrant category.[241] This category would result in a system similar to that employed by Canada and Australia in that applicants seeking to immigrate for economic reasons[242] would be separated from those immigrating for family reunification. However, the Canadian and Australian systems are oriented more toward their countries' economic needs.[243] Flexible immigration levels allow both governments to meet these needs.[244] The economic approach of the Canadian and Australian systems is also evidenced by their emphasis on an investor's business proposal and ability to benefit the host country economically.[245]

The economic approach of the Canadian and Australian policies, combined

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227. *See supra* text accompanying notes 119-120.
228. *See supra* text accompanying notes 110-113.
229. *See supra* text accompanying note 145.
230. *See supra* text accompanying notes 158-204.
231. The government calls this policy the Business Migration Scheme. *See supra* note 201.
232. *See supra* text accompanying note 177.
233. *See supra* text accompanying notes 178-199.
234. *See supra* text accompanying notes 181-192.
235. *See supra* text accompanying notes 201-204.
236. *See supra* notes 13-18 and accompanying text. During this period, Congress placed the immigration system under a set of worldwide numerical limitations and a unified preference system that applies to all immigrants.
237. *See supra* note 14.
238. 8 U.S.C. § 1153(a) (1981). *See supra* text accompanying notes 20-22.
239. *See supra* notes 7 and 35.
240. *See supra* note 57 and text accompanying notes 54-57.
241. *See supra* text accompanying notes 67-71.
242. *See supra* notes 29-32.
243. *See supra* text accompanying notes 108 and 153.
244. *See supra* note 220.
245. *See supra* text accompanying notes 119-120 and notes 181-192.

with the flexibility of their systems, allows both countries to issue visas to investors.[246] Proposed U.S. reforms may not have this result. While the proposed reforms would create an Independent Immigrant category,[247] the levels of immigration will continue to be set by statute.[248] This rigidity in immigration levels, together with the preference for skilled workers and professionals,[249] may result in a continuing unavailability of visas for investors.[250] Moreover, the proposed reforms were not enacted by the 97th Congress,[251] and the House omitted the revision of the preference system that would have created an Independent Immigration class.[252] In 1983, both houses of Congress eliminated the proposed reforms benefitting investors.[253] Because of this action, it remains doubtful whether any reforms regarding immigration by investors will be enacted by Congress.

B. *A Proposal for Immigration Reform*

With reform efforts continuing in Congress in 1983,[254] the author suggests a modification of the previous reform proposals. The creation of an Independent Immigration category is a positive step as it will separate the consideration of family reunification immigrants from those immigrating for economic reasons.[255] However, numerical limitations on the Independent Immigration category still may not allow investors to immigrate.[256] Under the Independent category originally proposed in Congress, the immigration of investors would be determined by the uncontrolled demand for visas by professionals and skilled workers, who would receive a preference for visas.[257]

One method to avoid this result would be to create a flexible annual immigration ceiling for Independent immigrants.[258] Such a flexible ceiling would elimi-

246. As noted earlier, Australia is recruiting investors. *See supra* text accompanying notes 200-204. In 1982, Canada admitted 436 entrepreneurs and 1,604 self-employed immigrants. Wilson, *supra* note 138. An estimated $718 million was invested by these immigrants, creating a minimum of 4,220 jobs for Canadian citizens. *Id.*

247. *See supra* text accompanying notes 67-71.

248. The statutory limit for Independent Immigrants will be 75,000. *See supra* text accompanying note 76.

249. *See supra* text accompanying note 80.

250. *See supra* note 10.

251. *See supra* note 95 and accompanying text.

252. *See supra* note 94 and accompanying text.

253. *See supra* notes 96-101 and accompanying text.

254. *See* S. 529, 129 CONG. REC. S1308 (daily ed. Feb. 17, 1983).

255. U.S. IMMIGRATION POLICY: STAFF REPORT, *supra* note 7, at 426.

256. Tinker, *supra* note 10.

257. *See supra* text accompanying notes 76-80. Under the proposed Independent Immigrant category, investors receive visas only after visas have been issued to professionals and skilled workers. *Id.*

258. Such an approach was suggested by the staff of the U.S. Select Commission on Immigration and Refugee Policy. U.S. IMMIGRATION POLICY: STAFF REPORT, *supra* note 7, at 365-68. The staff recommended the creation of an Immigration Advisory Council to oversee the setting of immigration ceilings, which could be raised or lowered to meet the country's need for immigrants. The staff noted that such a

nate the problems created by a rigid numerical limitation on Independent immigrants, and allow for a reasoned choice to be made regarding the immigration of all Independent immigrants. By adjusting the number of Independent immigrants allowed to immigrate each year, the economic needs of the United States could be more accurately met. Thus, when increased investment would aid the U.S. economy, the ceiling for Independent immigrants could be raised, allowing a number of investors to immigrate. The enactment of such a modification, however, remains doubtful because of recent Congressional action suspending further consideration of immigration reform legislation in the House.[259] With Congressional action on all immigration reform legislation uncertain, it is unlikely that the United States will enact measures to provide visas to investors.

VI. CONCLUSION

American, Canadian, and Australian immigration policies present contrasting approaches toward foreign investors. The economic and demographic needs which serve as the basis for the Canadian and Australian systems are evident in their treatment of investors. Their systems encourage such individuals to immigrate, and are responsive through annual limitations and administrative policies. The treatment of foreign investors under both present and proposed U.S. immigration systems reflects this country's orientation toward family reunification. However, the preference system and the numerical ceilings which govern immigration to the United States have produced a rigid immigration system. This rigidity, under both present and proposed U.S. policy, results in the unavailability of immigration visas for investors. The United States should adopt a modified version of the flexible Canadian and Australian systems. By using flexible immigration ceilings for Independent immigrants, the U.S. immigration system could adjust to the country's economic immigration needs on an annual basis. Such flexibility would allow for the immigration of foreign investors when there exists a need for investor-immigrants.

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system would allow changes in priorities to "be intentional and for specific purposes rather than left to the chance patterns of demand of applicants for immigrant visas." *Id.* at 367.

259. Cohodas, *O'Neill Pulls Immigration Reform Measure*, 41 CONG. Q. 2088 (1983).