



CAPITOL BEAT

by Paul Herzog

Recent Developments Could Spur Economic Growth, Job Creation

The dismal state of the economy has prodded Congress and President Barack Obama's administration to re-examine the potential for immigrants to spur economic growth and job creation. This is good news for immigrant entrepreneurs and the economy. According to an October 2, 2011, article by C.S. Tager in *Crain's New York Business*, "Immigrants Drive Small Business in NYC," in cities such as New York, foreigners account for nearly half of all small business owners. This, followed by a *Washington Post* article on October 6, by V. Wadhwa, "We Need to Stop America's Brain Drain," stating that foreign-born individuals established more than half the companies in Silicon Valley.

More Opportunities to Start a Business

In March 2011, Senators John Kerry (D-MA) and Richard Lugar (R-IN) introduced the Start-Up Visa Act. This legislation would expand eligibility for the EB-5 investor green card by decreasing the minimum investment to \$100,000. This allows foreign graduate students and professionals holding advanced degrees in the sciences to qualify for the green card and encourages entrepreneurs to relocate their businesses to the United States. It also says that noncitizen entrepreneurs who have secured venture capital funding from U.S. sources can qualify. This legislation is important because it benefits those who actually want to start a business in the United States. In addition, by providing benefits to those with advanced degrees in the sciences, mathematics, and engineering, it particularly encourages investment in those high-value industries that have



Sen. Kerry



Sen. Lugar

the greatest promise of generating high-wage jobs.

Until recently, this legislation had been languishing amid the partisan rancor in Washington and because the Obama administration preferred to support a comprehensive immigration reform bill. But during a September 14, 2011, hearing on "the Investor Visa Program: Key to Creating American Jobs," House Republican Lamar Smith (R-TX) commented favorably about the role of the investor visa program in creating jobs. As discussed below, the Obama administration is striving to make the existing immigration machinery more job-friendly. This indicates that bipartisan support for the bill may be emerging.

Positive Changes Involving H-1B, NIW, and EB-5 Categories

On August 2, 2011, U.S. Citizenship and Immigration Services (USCIS) announced new guidelines allowing noncitizen entrepreneurs to sponsor themselves using the H-1B category. U.S. companies mainly use H-1B visas to employ foreign workers in professional specialty occupations, such as engineering and the sciences. This updated guidance allows noncitizens who establish their own companies to be sponsored by those companies for the H-1B visa. This is a limited expansion of the options for immigrant entrepreneurs—they must still abide by the many requirements of the H-1B program, such as paying a salary that meets prevailing wage requirements for the profession, and performing job duties that are related to their degree. This policy carved out an exception from earlier guidance, which had restricted the use of the H-1B visa. It remains to be seen how this policy will be implemented by frontline bureaucrats, who tend to be skeptical of applications filed by small firms.

USCIS also has issued guidance stating that entrepreneurs could apply for lawful permanent residence

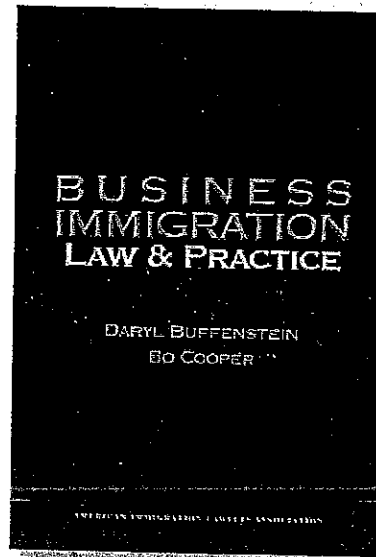
through the National Interest Waiver category. This category normally is used by individuals with an advanced degree. It allows them to self-sponsor and avoid the labor market tests of other green card categories, if they can demonstrate that their work is in the national interest. Typical cases usually involve scientists performing work beneficial to U.S. research priorities in the sciences, such as health care, nanotechnology, materials science, or energy. The latest USCIS guidance now suggests that entrepreneurs who can demonstrate that they have created jobs might be considered to be "in the national interest." As with the H-1B, the guidance on the National Interest category is quite vague.

Finally, USCIS has acted to make the process for investor green-card applicants more user-friendly. The EB-5 program grants residency status to those who invest \$1 million (or \$500,000 in rural or high unemployment areas) and can show that the investment has created 10 full-time jobs for U.S. workers. The program historically has been under-used, in part because of lengthy delays in adjudication and an exceedingly opaque decision-making process on the part of USCIS. The proposed changes include making fast-track processing available for applicants who seek expedited adjudication of their petitions, implementing direct communication between immigration officers and applicants, and providing applicants with the opportunity for an interview before a USCIS panel of experts to resolve outstanding issues in an application. By making the investor green-card program more practicable, the administration indicates that foreign investors are welcome in the United States.

The proposals are encouraging. The test will be in the follow-through. **W**

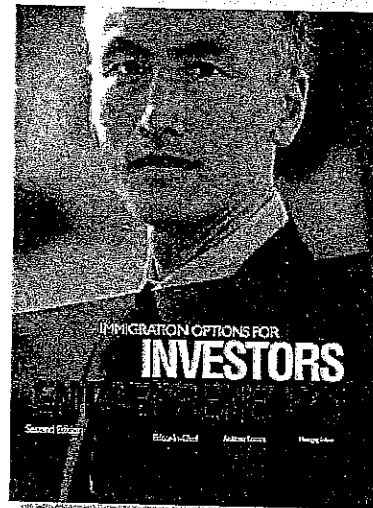
Paul Herzog practices employment- and family-based immigration law in Los Angeles. He received his J.D. from Tulane Law School. The author's views do not necessarily represent the views of AILA nor do they constitute legal advice or representation.

Comments? use your **VOICE**



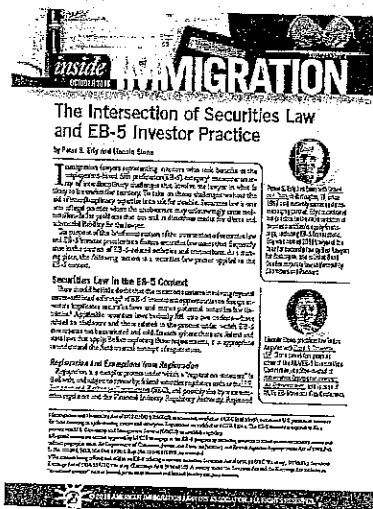
Business Immigration: Law & Practice

BUY!



Immigration Options for Investors & Entrepreneurs

BUY!



Inside Immigration Series on EB-5 Issues

BUY!

