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## Where to, Mr. Warbucks?: A Comparative Analysis of the US and UK Investor Visa Programs

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# Where to, Mr. Warbucks?: A Comparative Analysis of the US and UK Investor Visa Programs

Stephanie Torkian

## Abstract

Part I discusses the background of the US and UK investor visas by considering the intentions, legislative histories, and relevant immigration schemes of each country's program. Part II outlines and describes the requirements of each investor visa category and also touches on the alternatives offered under each program. Part III compares the US and UK investor visa programs, evaluates the issues associated with the US investor visa, and considers the benefits accompanying the UK investor visa. Eventually, this Comment concludes that the United Kingdom's simple and straightforward process is preferred to the United States' complicated and uncertain method.

**KEYWORDS:** US Investor Visa, UK Investor Visa, Tier, International law, immigration, benefits, investor immigration

COMMENT

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### *INTRODUCTION*

Imagine you are rich. You are concerned with sustaining your wealth. In order to retain your wealth you want to park your money somewhere safe. You want to be as close to absolutely positive that your money is secure. That does not limit you to basic options like the bank; since you are rich, you have money in the bank and then some. You consider investing your money in assets—ideally assets that are well protected and will appreciate.

But your worries are not limited to monetary concerns. Because you are rich, you have the luxury of considering broader interests like your quality of life and the value of your children’s education. You might consider whether you are living in a country that best suits your needs.

Consider a wealthy citizen of China who faces an analogous situation. He does not limit the outlay of his money to China and its economy; to the contrary, he often moves his money into other markets where he feels that his assets are better protected.<sup>1</sup> Recently, there has been an influx of Chinese investment in several countries including the United States and the United Kingdom.<sup>2</sup>

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1. See Dina Gusovsky, *Why Chinese Money is Flooding American Markets*, CNBC (Sept. 17, 2014), <http://www.cnbc.com/id/102001876#> (discussing why the Chinese invest in the United States instead of China, including the concern that the Chinese government could take their assets); see also Roxanna James, *Chinese Investors Seek Safe-Haven of British Infrastructure*, IPIN GLOBAL (Oct. 28, 2014), <http://www.ipinglobal.com/ipin-live/407318/chinese-investors-seek-safe-haven-of-british-infrastructure> (articulating Chinese investors’ desire to secure their money in the safety of British assets).

2. See Gusovsky, *supra* note 1 (disclosing that Chinese investment in the United States has increased from the millions in 2000 to US\$14 billion in 2013); see also Amie Tsang et al., *Britain Celebrates China Investment Flow*, FINANCIAL TIMES (Oct. 10, 2014), <http://www.ft.com/intl/cms/s/0/ab723522-44a6-11e4-ab0c-00144feabdc0.html#axzz3HHDZqbLT> (relaying that Chinese investment in the United Kingdom has doubled since 2012).

Investments from abroad in the United States and the United Kingdom are not limited to serving as a safe haven for extensive wealth.<sup>3</sup> In fact, investors and their families may qualify for investor visas in the United States and the United Kingdom.<sup>4</sup> In other words, non-citizen investors can acquire citizenship in the United States or the United Kingdom if they meet specified conditions. Consequently, non-citizen investors can safeguard their wealth and reap the benefits of citizenship such as the Western education and healthcare systems.<sup>5</sup> These visas are generally called “investor visas.”<sup>6</sup>

The investor visa system symbolizes the symbiotic nature of overseas investment. While countries like the United States and the United Kingdom benefit from increased overseas investment, wealthy citizens of countries like China and Russia get to protect their wealth and acquire the benefits associated with a visa.<sup>7</sup> Through investor visa programs, countries benefit by controlling the flow of overseas investment while investors have the choice of where to invest and can consider the investor visa guidelines and restrictions in different countries.<sup>8</sup>

This Comment considers the features of the investor immigration programs offered in the United States and the United Kingdom. It considers the purpose, elements, and quality of each program, explains their differences, and concludes with a discussion of which

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3. See *infra* note 5 and accompanying text (listing other benefits of the investor visas).

4. See 8 C.F.R. § 204.6 (2015) (laying out the qualifications for the US investor visa); see also HOME OFFICE, IMMIGRATION RULES PART 6A: THE POINTS-BASED SYSTEM, 2008, Pol’y, § 245E (U.K.) [hereinafter IMMIGRATION RULES PART 6A] (outlining the qualifications for the UK Tier 1-Investor visa).

5. See Lucy Warwick-Ching, *Moscow’s Rich Buy £1m Entry into UK*, FINANCIAL TIMES (Nov. 30, 2012), <http://www.ft.com/intl/cms/s/0/a0d6be06-3aff-11e2-b3f0-00144feabdc0.html#axzz3HXvanxir> (elaborating on London’s appeal to non-citizen investors); see also *Invest in Your Future*, US FREEDOM CAPITAL, <http://usfreedomcap.com/eb-5-visa/> (last visited May 1, 2015) (promoting the benefits of US citizenship).

6. See *supra* notes 1-5 and accompanying text (defining and discussing investor visas); *infra* note 7 and accompanying text (providing further discussion on investor visas).

7. See *Citizenship By Investment—Which Country?*, RESIDENCY INVEST (Sept. 24, 2012), <http://residencyinvest.com/citizenship-by-investment-which-country/> (recognizing the surge of countries seeking to attract wealthy investors including the US EB-5 visa and the UK Tier 1-Investor visa); Magnus Blomström, *The Economics of International Investment Incentives*, ORG. FOR ECON. CO-OPERATION & DEV., 165, 178 (2002), <http://www.oecd.org/daf/inv/investment-policy/2487874.pdf> (discussing limitations of focusing on foreign firms in order to attract foreign investment/providing a perspective on the recent increase in foreign domestic investments).

8. See generally 8 C.F.R. § 204.6, *supra* note 4; IMMIGRATION RULES PART 6A, *supra* note 4, § 245E (laying out the criteria for proper application of an investor visa).

country has a better investor visa program and why. The number and nature of the visa requirements ultimately contribute to each program's success at achieving each country's different, but related goals.

Part I discusses the background of the US and UK investor visas by considering the intentions, legislative histories, and relevant immigration schemes of each country's program. Part II outlines and describes the requirements of each investor visa category and also touches on the alternatives offered under each program. Part III compares the US and UK investor visa programs, evaluates the issues associated with the US investor visa, and considers the benefits accompanying the UK investor visa. Eventually, this Comment concludes that the United Kingdom's simple and straightforward process is preferred to the United States' complicated and uncertain method.

### I. *BACKGROUND ON THE US AND THE UK INVESTOR VISAS*

This Part provides context for the current investor immigration visa systems in the United States and the United Kingdom. Part I.A states the purpose of the United States' investor visa. It then discusses the history of the United States' investor visa and briefly explains the United States' investor immigration visa—the EB-5 visa—in its present form. Part I.B introduces the purpose of the United Kingdom's investor visa. It next discusses the legislative history of the United Kingdom's investor visa and briefly describes the United Kingdom's investor immigration visa—the Tier 1-Investor visa—in its existing framework.

#### A. *Overview of the US Investor Visa*

The goal of encouraging overseas investment in the United States is to enhance the US economy.<sup>9</sup> Overseas investment contributes to the vitality of the economy by creating new jobs,

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9. See Beth MacDonald, Note, *The Immigrant Investor Program: Proposed Solutions to Particular Problems*, 31 *LAW & POL'Y INT'L BUS.* 403, 404-05 (2000) (discussing effects of non-citizen investment and reasons to implement policies that encourage non-citizen investment); see also Emily C. Kendall, Essay, *Green Cards as the Ultimate Dividends: Why Improving the U.S. Investment Visa Program Will Encourage the Economic Recovery by Increasing Foreign Investment and Creating Jobs for Americans*, 27 *GEO. IMMIGR. L.J.* 579, 592 (2013) (stating the goal of the United States' investor immigration visa whilst criticizing and suggesting alternative schemes).

developing industries, increasing competition, and raising tax revenue.<sup>10</sup> In implementing an investor immigration visa, Congress intended not only to create jobs and boost the economy through the use of isolated investments, but also to sustain job growth and capital investment.<sup>11</sup>

The Immigration and Nationality Act of 1952 permitted non-US citizen investors to immigrate to the United States under a non-preference category until 1990.<sup>12</sup> While a number of visas are apportioned to the preference category immigrant visas, non-preference category immigrant visas are only available through the surplus of unallocated visas in the preference categories.<sup>13</sup> From 1978 until 1990 there were no leftover visas from the preference categories; thus investor visas were completely unavailable during this time.<sup>14</sup>

In 1988 and 1989, Congress mulled over bills proposing immigration reform; specifically, it debated the country's policy on overseas investors.<sup>15</sup> Advocates contended that an investor visa would result in great economic benefits, estimating that the program could attract US\$8 billion in capital investment and create 100,000 jobs each year.<sup>16</sup> Opponents of the bill questioned the morality of placing a price tag on immigration to the United States.<sup>17</sup>

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10. See Gary Endelman & Jeffrey Hardy, *Uncle Sam Wants You: Foreign Investment and The Immigration Act of 1990*, 28 SAN DIEGO L. REV. 671, 671 (1991) (arguing that non-citizen investment is not only advantageous but also essential to the US economy); MacDonald, *supra* note 9, at 404 (explaining several goals and effects of non-citizen investment).

11. See S. REP. NO. 101-55, at 22 (1989); MacDonald, *supra* note 9, at 410 (exposing Congress' thought process behind implementing the investor visa category).

12. See Leslie K. L. Thiele & Scott T. Decker, *Residence in the United States Through Investment: Reality or Chimera?*, 3 ALB. GOV'T L. REV. 103, 132 (2000) (explaining the uselessness of the investor visa's existence in a non-preference category under the Immigration and Nationality Act of 1952); MacDonald, *supra* note 9, at 406-07 (addressing the effective non-existence of investor visas under the Immigration and Nationality Act of 1952).

13. See Thiele & Decker, *supra* note 12, at 132; MacDonald, *supra* note 9, at 406-07 (discussing the attainability of citizenship through investment before the EB-5 category was implemented).

14. See Thiele & Decker, *supra* note 12, at 132 (setting up an introduction for the Immigration Act of 1990, which provides a preferential investor visa category); MacDonald, *supra* note 9, at 406-07 (presenting the legislative history for the Immigration Act of 1990). Between 1952 and 1988, the only activity was to increase the investment capital from US\$10,000 to US\$40,000. See Thiele & Decker, *supra* note 12, at 132; MacDonald, *supra* note 9, at 407 (depicting the sluggish rate of change in this visa category).

15. See Immigration Act of 1988, S. 2104, 100th Cong. § 103 (1988); MacDonald, *supra* note 9, at 407 (discussing the introduction of bills that would create an investor visa status).

16. See Elliot Fertik, Comment, *Reforming the Immigrant Investor Program of the Immigration Act of 1990*, 15 U. PA. J. INT'L BUS. L. 649, 654 (1994); MacDonald, *supra* note

The economic-centered arguments in favor of an investor visa exceeded those against it, and the bill was eventually passed.<sup>18</sup> The Immigration Act of 1990 (the “Act”) gave rise to a five-tiered employment-based immigration system that permitted non-citizen investors to obtain a visa through the fifth preference category of the employment-based system (the “EB-5”).<sup>19</sup> With the establishment of the EB-5, the US immigration system essentially went from allocating no visas to immigrant investors to setting aside a portion of visas for immigrant investors.<sup>20</sup>

The Act still governs the current US immigration system.<sup>21</sup> Specifically, the five-tiered employment-based immigration system increased the annual distribution of employment-based visas from 56,000 to 140,000.<sup>22</sup> Of these 140,000 visas, 10,000 are explicitly allotted to qualified non-US citizen investors.<sup>23</sup>

Essentially, under the EB-5 system a non-US investor qualifies for an investor visa if he or she invests the required amount of capital in a new commercial enterprise that benefits the economy and creates

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9, at 408, 411 (noting the program’s inability to attract even 10% of allocated visas continued through 2010); see Thiele & Decker, *supra* note 12, at 140; see also U.S. CITIZENSHIP & IMMIGRATION SERVS., U.S. DEP’T OF HOMELAND SEC, EMPLOYMENT CREATION IMMIGRANT VISA [EB-5] PROGRAM RECOMMENDATIONS 1 (2009), [http://www.dhs.gov/xlibrary/assets/CIS\\_Ombudsman\\_EB-5\\_Recommendation\\_3\\_18\\_09.pdf](http://www.dhs.gov/xlibrary/assets/CIS_Ombudsman_EB-5_Recommendation_3_18_09.pdf). While goals and estimations were not reached, by 2011 the program was estimated to have attracted over US\$1.5 billion in investment and created over 31,000 jobs. See Kendall, *supra* note 9, at 581; Nick Leiber, *The EB-5 Program: Create American Jobs, Get a Green Card*, BUSINESSWEEK (Aug. 4, 2011), <http://www.businessweek.com/magazine/the-eb5-program-create-american-jobs-get-a-green-card-08042011.html>.

17. See Fertik, *supra* note 16, at 654; MacDonald, *supra* note 9, at 408 (expressing fears of economically—rather than patriotically—motivated emigration).

18. See 135 CONG. REC. 14,291 (1989) (presenting arguments for and against investment visas in the United States); MacDonald, *supra* note 9, at 408 (illustrating arguments that asserted great economic benefit from non-citizen investment).

19. See Kendall, *supra* note 9, at 580; see also Thiele & Decker, *supra* note 12, at 133 (discussing the birth of the EB-5 category).

20. Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (codified as amended at various sections of 8 U.S.C.) (depicting the dramatic change in legislation for US investor immigration—from legislation to the creation of an entire immigration category).

21. See *generally id.* (governing law, subject to amendments).

22. See Chris Gafner & Stephen Yale-Loehr, *Attracting the Best and the Brightest: A Critique of the Current U.S. Immigration System*, 38 *FORDHAM URB. L.J.* 183, 193 (2010); 8 U.S.C. § 1151(d) (2006) (displaying the current level of employment-based immigration worldwide to the United States).

23. See Immigration Act of 1990 (allocating a number of visas specifically for non-citizen investors).



jobs.<sup>24</sup> Of the 10,000 immigrant investor visas, at least 3000 are reserved for qualified immigrant investors who invest a smaller qualifying amount in Targeted Employment Areas (“TEAs”).<sup>25</sup> Under the Act, TEAs are rural areas or areas experiencing high unemployment.<sup>26</sup>

In 1993, Congress passed a temporary pilot program to further encourage the use of the EB-5 visa.<sup>27</sup> The pilot program has been extended several times, and is currently set to expire on September 30, 2015.<sup>28</sup> This pilot program allots 3000 visas for investors in approved economic units known as “regional centers,” and relaxes the EB-5 requirements for investors in regional centers.<sup>29</sup>

### B. Overview of the UK Investor Visa

The objective of an investor visa in the United Kingdom is to attract high value applicants that promote economic growth by endorsing businesses in the United Kingdom.<sup>30</sup> The program seeks to derive economic benefit directly from these overseas investments.<sup>31</sup>

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24. *See id.* (laying out the qualifications for EB-5 applicants).

25. *Id.* (providing more than one route to qualify for an EB-5).

26. *Id.* (defining rural areas and areas of high unemployment as is relevant to the Act).

27. Department of Justice and Related Agencies Appropriations Act, Pub. L. No. 102-395, § 610 Stat. 5678 (1992) (laying out the details of pilot program).

28. EB-5 Regional Center Program, Pub. L. No. 112-176, § 126 Stat. 1325 (2012) (revealing that incentives are still needed for the US investor visa).

29. 22 C.F.R. § 42.32 (2012); Department of Justice and Related Agencies Appropriations Act (detailing the specifics of the pilot program). Initially, the pilot program set aside 300 visas and the number was increased to 3000. 8 U.S.C. § 1153 (2015).

30. *See* John Vine, Independent Chief Inspector of Borders and Immigration, *An Inspection of Applications to Enter and Remain in the UK Under the Tier 1 Investor and Entrepreneur Categories of the Points Based System* (2013). <http://icinspector.independent.gov.uk/wp-content/uploads/2013/09/An-Inspection-of-Tier-1-PBS-Investor-and-Entrepreneur-Applications.pdf> (reporting on the efficiency of investor applications); Migration Advisory Committee, *Tier 1 (Investor) Route: Investment thresholds and economic benefits* (2014) (discussing the investment qualifications of the Tier 1-Investor visa).

31. *See* Migration Advisory Committee, *supra* note 30 (clarifying how an investment directly contributes to economic benefit; for example a non-citizen investor has to maintain a certain investment level); National Institute for Economic and Social Research and The Migration Observatory, *The Economic and Labour Market Impacts of Tier 1 Entrepreneur and Investor Migrants* (July 2013), <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/aboutus/workingwithus/mac/economic-research.pdf> (broadly analyzing the Tier 1-Investor visa).

Indirect benefits are also anticipated through the high net worth investors' consumption of goods and services.<sup>32</sup>

From 2002 to 2008, the Highly Skilled Migrant Programme allowed non-UK investors to immigrate to the United Kingdom.<sup>33</sup> While scholars and government officials recognized the positive impact that investors and other highly skilled migrants have in the United Kingdom, they deemed this program too complicated and vague.<sup>34</sup> Thus, the United Kingdom revamped its immigration system by introducing a new points-based immigration system that is simpler and geared towards attracting more desired individuals.<sup>35</sup>

The United Kingdom's points-based employment immigration system has five tiers.<sup>36</sup> Tier 1 requires highly skilled and talented individuals to file a self-petition to work in the United Kingdom if they do not have an employment offer.<sup>37</sup> Investors can also qualify for immigration to the United Kingdom by applying through the Tier 1-Investor category.<sup>38</sup>

There are no limitations on the number of non-UK investors who could immigrate through this route.<sup>39</sup> Accordingly, a qualifying

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32. See Migration Advisory Committee, *supra* note 30, at 35; Yolande Barnes, *London's Global Appeal*, SAVILLS (June 24, 2013), [http://www.savills.co.uk/research\\_articles/141285/168753-0](http://www.savills.co.uk/research_articles/141285/168753-0) (suggesting that high net worth individuals greatly contribute to the consumption of goods and services and contribute to tax revenue).

33. See Explanatory Memorandum to the Immigration Employment Document (2005 No. 627); Dr. Lucie Cerna, *Selecting the Best and Brightest*, MIGRATION OBSERVATORY (2011) (explaining that the Highly Skilled Migrant Programme was changed several times before being replaced by the current Tier 1 system).

34. See House of Commons Home Affairs Committee, *Managing Migration: Points-Based System*, Thirteenth Report of Session 2008-09, Vol. II; Cerna, *supra* note 33 (illustrating the need for an updated immigration system).

35. See House of Commons Home Affairs Committee, *supra* note 34; Cerna, *supra* note 33 (suggesting that the new program is better at attracting the 'best and the brightest'); see also Migration Advisory Committee, *supra* note 30 (conceding the same point).

36. See Gafner & Yale-Loehr, *supra* note 22 (laying out the basic structure of the United Kingdom's point-based immigration system as a model for point-based immigration schemes); see also Vine, *supra* note 30 (inspecting the entire first Tier of UK immigration system).

37. See Gafner & Yale-Loehr, *supra* note 22; Migration Advisory Committee, *supra* note 30 (explaining generally the Tier 1 application process).

38. See *Tier 1 (Investor) Visa*, GOV.UK, <https://www.gov.uk/tier-1-investor>; see also Migration Advisory Committee, *supra* note 30 (describing the Tier 1-Investor application process).

39. See Gafner & Yale-Loehr, *supra* note 22 (illustrating that while the Tier-1 category was enacted with no limitations, a cap was imposed from July 19, 2010 until March 31, 2011); Work Permit, *UK Announces Permanent Skilled Immigration Cap: Tier 1 for the Select Few and an Overall Reduction in Immigration* (2010) (clarifying that the new permanent caps placed on immigration in April 2011 do not apply to investors).

investor who meets and maintains the established criteria will receive clearance to stay in the United Kingdom.<sup>40</sup> In 2011, the Government introduced accelerated settlement options for those investors who invest greater amounts of capital.<sup>41</sup>

## II. PARAMETERS OF THE US AND THE UK INVESTOR VISAS

While the US and UK investor visa programs share similar goals, each program is implemented differently. This Part will examine the requirements of the investor immigration programs in the United States and the United Kingdom. While both the EB-5 and the Tier 1-Investor categories similarly provide guidelines on the qualifying sums of money and the acceptable outlets for investment, there are different standards and requirements in each country. Additionally, the EB-5 makes several demands that the Tier 1-Investor does not, including the requirement that an applicant play an active role in his investment.

Part II.A further describes and discusses the United States' EB-5 visa guidelines. This Part also considers the application of these standards to the different types of acceptable investments. Part II.B defines and examines the procedures under the United Kingdom's Tier 1-Investor visa. In addition, it will contemplate the criteria for the various approved investments.

### A. US EB-5 Visa

The EB-5 visa provides overseas investors, who must satisfy a number of requirements, with a permanent residency visa.<sup>42</sup> An overseas investor applying for an EB-5 must invest capital in the amount of US\$1 million from a lawful source of funds in a new commercial enterprise that the investor is actively involved in, that benefits the US economy, and that creates at least ten full-time jobs

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40. IMMIGRATION RULES PART 6A, *supra* note 4, § 245E (declaring that so long as the guidelines are followed, clearance is granted).

41. See Migration Advisory Committee, *supra* note 30, at 12; see also *Investor Visas, Tier 1 (Investor)*, UK VISAS, <http://www.ukvisas.com/tier-1-investor-visa/> (reporting that investors who wish to obtain guaranteed settlement quicker than the standard route may do so by investing larger sums, as prescribed by the rules).

42. See Gordon K. Eng, *Practice Tips: Satisfying the Requirements of EB-5 Via Real Estate Investments*, 35 L.A. LAWYER 8 (2013); Kendall, *supra* note 9, at 139 (promoting the EB-5 as a visa which abandons the hard-to-satisfy hiring obligation of other employment-based visas).

within two years.<sup>43</sup> Of the 10,000 visas reserved for the EB-5, 3000 are reserved for investors investing in TEAs, and an additional 3000 are reserved for those investing through the pilot program.<sup>44</sup> The requirements for investments made in TEAs or under the pilot program are altered to further incentivize investment under these schedules.<sup>45</sup>

### 1. Investing Required Capital from a Lawful Source

To qualify for an EB-5 visa, an applicant must have invested already, or be “in the process” of investing, the required amount of capital.<sup>46</sup> Under the regular EB-5 program, the amount of capital needed to make a qualifying investment is US\$1 million.<sup>47</sup> The statute requires that the necessary amount of capital be placed “at risk” at the time of the filing of the application.<sup>48</sup> Under the rule, capital is defined as “cash, equipment, inventory and other tangible property, cash equivalents, and indebtedness secured by assets owned by the alien entrepreneur, provided that” the non-US investor is personally and primarily responsible for the invested capital and may not use the new commercial enterprise to secure indebtedness.<sup>49</sup> Under the statute, wealth obtained unlawfully is not considered capital.<sup>50</sup>

### 2. Investing in a New Commercial Enterprise

Investments must have been made after November 29, 1990, the date the Act was enacted, to meet the requirement that the commercial enterprise is “new.”<sup>51</sup> New commercial enterprises include investing

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43. See Eng, *supra* note 42; Kendall, *supra* note 9 (laying out the EB-5 basic requirements).

44. See Stephen Yale-Loehr et al., *EB-5 Immigrant Investors*, ABIL, (2009) [http://www.abil.com/articles/EB-5%20Immigrant%20Investors%20\(Yale-Loehr\).pdf](http://www.abil.com/articles/EB-5%20Immigrant%20Investors%20(Yale-Loehr).pdf); see also 8 U.S.C. § 1153 (2015) (detailing the programs within the program, EB-5).

45. See 8 U.S.C. § 1153 (2015) (foreshadowing that the EB-5 needs additional program incentives).

46. 8 C.F.R. § 204.6, *supra* note 4 (specifying petitioning idiosyncrasies for EB-5 investors). Initially an investor is granted a two-year conditional status; but even when the investor submits the application for the removal of the conditional status, the investor may still be in the process of investing the requisite capital. 8 C.F.R. §216.6 (2015).

47. *Id.* (detailing the laws of EB-5 immigration).

48. *Id.* (laying out a non-exhaustive list of five ways that a non-citizen can show that capital is “at risk,” such as evidencing monies transferred or committed to transfer to the new commercial enterprise in exchange for stock).

49. *Id.* (noting that qualifying capital does not include collateralized capital).

50. *Id.* (elaborating on forms of lawful sources of funds).

51. *Id.* (defining new as in a new commercial enterprise).

in the creation of a new business, investing in the restructuring of an existing business that effectively creates a new one, or investing in an existing business that will be materially enhanced by the overseas investment.<sup>52</sup> For the enterprise to be “commercial,” it must involve any legal, for-profit activity.<sup>53</sup> This includes sole proprietorships, limited or general partnerships, holding companies, joint ventures, corporations, business trusts, or other entities publicly or privately owned.<sup>54</sup> A new commercial enterprise does not include noncommercial activity, such as a nonprofit enterprise, or the owning and operating of a personal residence.<sup>55</sup>

### 3. Engaging in a New Commercial Enterprise

The statute further requires a non-citizen investor to “engage” in the new commercial enterprise.<sup>56</sup> This means that an investor seeking an EB-5 visa cannot play a purely passive role in the new enterprise on which the application is based.<sup>57</sup> Instead, the statute requires that an investor play an active role by either managing the day-to-day operation of the commercial enterprise or by being involved in its policy formulation.<sup>58</sup>

### 4. Benefitting the US Economy

To qualify for EB-5 status, an investment must benefit the US economy.<sup>59</sup> The statute does not clarify what type of investment satisfies this requirement.<sup>60</sup> While it can be argued that an investment

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52. *Id.* (defining a substantial change or a material enhancement as “a 40 percent increase in the net worth, or the number of employees (but not less than 20), so that the new net worth, or number of employees, amounts to at least 140 percent of the pre-expansion net worth or number of employees or both . . .”).

53. *Id.* (defining commercial as in a new commercial enterprise).

54. *Id.* (expanding on what is an acceptable new commercial enterprise in terms of the law).

55. *Id.* (relaying what a new commercial enterprise is not).

56. I.N.A. § 203(b)(5)(A), 8 U.S.C. § 1153(b)(5)(A) (2014) (delving into the breadth of the law).

57. 8 C.F.R. § 204.6 (2015) (defining what “engage” means).

58. *Id.* (expanding on ways an investor would be considered active, including a managerial role or one analogous to that of a corporate officer); MacDonald, *supra* note 9, at 410 (stating that Congress intended to circumvent the moral dilemma of investors purchasing citizenship by requiring that investors take an active role in their commercial enterprises). *See generally* Yale-Loehr et al., *supra* note 44 (elaborating on all terms of art in the law).

59. *See generally* 8 C.F.R. § 204.6, *supra* note 4 (laying out the EB-5 requirements).

60. *Id.* (adding to the requirement of job creation the obligation that an applicant benefit the US economy).

that creates job opportunities benefits the economy, the requirement of benefitting the economy is articulated as distinct from the investment and job creation requirements.<sup>61</sup> Thus, the requirement to benefit the US economy must be met separately by showing that the overseas investment provides some other additional benefit to the US economy.<sup>62</sup> Consequently, an enterprise that solely accommodates customers abroad and provides no additional benefit to the US economy—beyond the investment itself—and the job creation factor, might not qualify for an EB-5.<sup>63</sup> An enterprise that provides an additional benefit, like bringing goods or services to the economy, is likely to satisfy this requirement.<sup>64</sup>

### 5. Creating Jobs

To obtain EB-5 qualification, an investor must create ten full-time employment opportunities for US citizens, lawful permanent residents, or other immigrants legally authorized for employment in the United States.<sup>65</sup> A job-sharing arrangement, through which two or more employees share a full-time position, will count as one full-time position as long as the hourly requirement is met.<sup>66</sup> The creation of ten jobs does not include employment for the investor, his or her spouse, his or her children, or for unlawful immigrants and aliens.<sup>67</sup> This requirement does not have to be met at the time of the investment or at the time of the filing of the application for the EB-5 as indicated by the statute's prospective language.<sup>68</sup> The United States

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61. *Id.* (indicating that is a distinct requirement).

62. *See id.*; Yale-Loehr et al., *supra* note 44 (acknowledging that one can infer that this gap delegates to the United States Citizenship and Immigration Services adjudicators to subjectively interpret this criterion).

63. *See* Yale-Loehr et al., *supra* note 44; *see also* Thiele & Decker, *supra* note 12, at 139 (giving an example of what would not meet the distinct requirement that an EB-5 investor benefit the US economy).

64. *See* Yale-Loehr et al., *supra* note 44; *see also* Thiele & Decker, *supra* note 12, at 139 (conceding that this requirement is fairly simple to meet).

65. 8 U.S.C. § 1153 (2015) (laying out the EB-5 requirements). Note that a qualifying employee under the regulations provides services or labor for a minimum of thirty-five hours per week, and receives wages or remuneration directly from the new commercial enterprise. 8 C.F.R. § 204.6, *supra* note 4. Other immigrants legally authorized for employment in the United States include conditional residents, temporary residents, asylees, refugees, and recipients with suspension of deportation. *Id.*

66. *See* 8 C.F.R. § 204.6, *supra* note 4 (explaining technicalities of the law).

67. 8 U.S.C. § 1153 (2015) (listing those who would not qualify for the employment requirement).

68. 8 C.F.R. § 204.6 provides:

Citizenship and Immigration Services (the “USCIS”) grants an investor two years and six months to meet the employment requirement.<sup>69</sup> Nevertheless, the investor’s business plan must reasonably demonstrate the need for at least ten employees.<sup>70</sup>

#### 6. Investments Made in Targeted Employment Areas

Out of the 10,000 visas allocated to the EB-5 program, 3000 are allotted to investments made in TEAs.<sup>71</sup> A TEA is defined in the statute as a rural area or an area experiencing high unemployment.<sup>72</sup> The regulations require half of the usual investment amount be made in a TEA; thus a non-citizen seeking to satisfy the conditions of the EB-5 is required to invest only US\$500,000 when capitalizing in a TEA.<sup>73</sup>

#### 7. Investments Made Under the Pilot Program

The US Congress enacted a temporary pilot program in 1993 to encourage immigration through the EB-5 category.<sup>74</sup> The pilot program relaxes the job creation requirements for those investors who choose to invest in regional centers.<sup>75</sup> A “regional center” is an

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A petition submitted for classification as an alien entrepreneur must be accompanied by evidence that the alien has invested or is actively in the process of investing lawfully obtained capital in a new commercial enterprise in the United States which will create full-time positions for not fewer than 10 qualifying employees.

8 C.F.R. § 204.6, *supra* note 4 (emphasis added); *see* Thiele & Decker, *supra* note 12, at 140 (specifying the timing for job creation); Yale-Loehr et al., *supra* note 44.

69. *See* Yale-Loehr et al., *supra* note 44; *see also* Thiele & Decker, *supra* note 12, at 140 (delegating a soft rule for six-month and two-year conditional citizenships).

70. *See* Yale-Loehr et al., *supra* note 44; *see also* Thiele & Decker, *supra* note 12, at 140 (demonstrating a plan with reasonable demand for at least ten employees is sufficient to initially meet this requirement).

71. 8 U.S.C. § 1153 (2015) (setting aside a third of the EB-5 allotment for investments to be made in TEAs).

72. *Id.* A rural area is defined as an area that is not within a metropolitan statistical areas defined by the Office of Management and Budget, or the outer boundary of any city or town having a population of 20,000 or more. 8 C.F.R. § 204.6, *supra* note 4. An area of high unemployment is defined as an area that has experienced at least 150% of the national average rate. *Id.*

73. 8 U.S.C. § 1153 (splitting the investment of capital in half for investors who choose to invest in TEAs).

74. *See* Thiele & Decker, *supra* note 12, at 133-34; Yale-Loehr et al., *supra* note 44 (discussing the pilot program—that continues to date—and thus revealing one imperfection of the EB-5 program).

75. 8 U.S.C. § 1153 (relaxing the requirements for immigrants who choose to invest in regional centers).

economic unit involved in the promotion of economic growth.<sup>76</sup> A non-citizen investing in a regional center for purposes of obtaining an EB-5 visa does not have to show that the investment created at least ten jobs.<sup>77</sup> Instead, a non-citizen investing in a regional center should demonstrate that jobs, in general, will be created directly or indirectly as a result of such investment, in addition to showing other positive economic benefits that the investment will produce.<sup>78</sup>

This program has been extended since its inception, and is presently set to expire on September 30, 2015.<sup>79</sup> The pilot program also has a number of visas allotted to it that are separate from the 3000 EB-5 visas reserved for investments made in TEAs.<sup>80</sup> Currently, 3000 EB-5 visas are set aside for use in the pilot program.<sup>81</sup>

## 8. The Application Process

The first step in the application process for a non-citizen seeking lawful permanent residence in the United States as an immigrant investor is to file an I-526 petition.<sup>82</sup> If the I-526 petition is approved, an immigrant is granted conditional residency in the United States for two years.<sup>83</sup> Within ninety days of this two-year anniversary, an immigrant investor seeking to remove the conditional status of residency must subsequently file an I-829 petition.<sup>84</sup> If the investor

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76. *Id.* (stating that the Secretary of Homeland Security shall designate regional centers based on general proposals for economic growth such as “increased export sales, improved regional productivity, job creation, or increased domestic capital investment”).

77. *Id.* (completely replacing the requirement that an investor must create at least ten US jobs).

78. *Id.* The USCIS will not consider generating construction jobs as direct job creation; however, such jobs will be considered as indirect job creation. *See* Yale-Loehr et al., *supra* note 44; *see also* Thiele & Decker, *supra* note 12, at 140.

79. Pub. L. No. 112-176, § 126 Stat. 1325 (2012), (displaying the amendments and extensions made on the pilot program to date).

80. Pub. L. No. 102-395, § 610 Stat. 5678 (1992), (reserving a separate allotment of EB-5s for the pilot program).

81. 8 U.S.C. § 1153 (2015) (extending the pilot program and increasing the original 300 EB-5 visas set aside for the pilot program to 3000).

82. 8 C.F.R. § 204.6, *supra* note 4 (instructing that this form should be submitted with the appropriate fee).

83. *Id.* (recognizing that an immigrant investor’s dependents will also be granted conditional residency for two years).

84. 8 C.F.R. § 216.6 (2015) (requiring, through the explicit language of the statute, that an investor wishing to remove conditional status of his residency file for such removal within ninety days before the two year anniversary of conditional resident status).



maintained the requirements of the EB-5 visa during his conditional residency, under the statute the I-829 petition should be approved.<sup>85</sup>

### 9. Evidentiary Requirements

The regular EB-5 program and the pilot program have similar initial evidentiary requirements.<sup>86</sup> The main distinction is that investors under the regular program must submit all of the described evidence, while investors under the pilot program only need certification from the relevant regional center that the investor met the required criteria.<sup>87</sup> Specific guidelines are described in 8 CFR § 204.6 for acceptable manners of evidencing that the petitioner: (i) has established a new commercial enterprise; (ii) has placed the required amount of capital at risk; (iii) has obtained the pertinent capital through lawful means; (iv) has a business plan that will create at least ten jobs; and (v) is or will be engaged in the management of the new commercial enterprise.<sup>88</sup> Where a non-US investor is investing in a TEA, the petition must also be accompanied by evidence that the new commercial enterprise is principally doing business in a rural area or an area of high unemployment.<sup>89</sup>

#### B. UK Tier 1-Investor Visa

A Tier 1-Investor visa is granted to non-citizen investors who satisfy the required criteria.<sup>90</sup> On November 6, 2014, the UK government made changes to the requirements, and the new requirements only apply to investors who file an application for an investor visa after November 5, 2014.<sup>91</sup> For investors that applied

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85. *Id.* (assuming all the requirements are carried out, the process should work smoothly for a non-citizen investor).

86. 8 C.F.R. § 204.6, *supra* note 4 (laying out the requirements for both the regular EB-5 program and its pilot program).

87. *Id.* (laying out the manner in which a petitioner must individually evidence “that the alien has invested or is actively in the process of investing lawfully obtained capital in a new commercial enterprise in the United States which will create full-time positions for not fewer than ten qualifying employees”). The evidence for a non-citizen applying through the regular EB-5 should accompany the I-526 petition. *Id.*

88. *Id.* (reiterating that the requirements must be met by submitting evidence).

89. *Id.* (specifying what the petitioner needs to evidence and how).

90. *See generally infra* notes 91-138 and accompanying text (discussing the Tier 1-Investor visa and its requirements at length).

91. *See Tier 1 (Investor) Visa: Extend Your Visa*, GOV.UK, <https://www.gov.uk/tier-1-investor/extend-your-visa> (introducing the new requirements for investors that apply on or after November 6, 2014, which increase the minimum investment from GB£1 million to GB£2

before that date, the criteria include: (i) realizing seventy-five points for attributes to enter the category; (ii) investing at least 75% of the total qualifying funds into share or loan capital in UK trading companies or in government bonds; and (iii) keeping the balance of funds at a maximum of 25% in cash or assets.<sup>92</sup> For investors that applied on or after November 6, 2014, the criteria include: (i) realizing seventy-five points for attributes to enter the category; then (ii) investing the full amount of the qualifying funds.<sup>93</sup> Under the regular Tier 1-Investor option, non-citizen investors can attain permanent resident status in the United Kingdom in five years.<sup>94</sup> Accelerated options for permanent residence exist and correspond with larger investment amounts.<sup>95</sup> There are no existing limitations on the distribution of such investor visas.<sup>96</sup> While there are fewer requirements in comparison to the US EB-5 program, strict evidentiary standards are in place for applicants of the Tier 1-Investor visa.<sup>97</sup>

### 1. Seventy-Five Points for Attributes

Ordinarily, the Tier 1 category requires—for non-investors—seventy-five points for attributes, ten points for maintenance, and ten

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million, require the full amount of qualifying funds to be invested rather than just 75%, removes the topping up requirement, and removes the option of sourcing the required investment sum as a loan when the investor holds double the amount of the loan in assets).

92. See Nick Rollason, *Corporate Immigration in the United Kingdom*, in 1 CORPORATE IMMIGRATION LAW § 14.02 (Mathew Bender ed., 2013); see also IMMIGRATION RULES PART 6A, *supra* note 4, § 245E (revealing that the law limits the types of investments made, for example those made in companies principally involved in property investment, property development, and property management).

93. See *Extend Your Visa*, *supra* note 91; see also Tier 1 (Investor) of the Points Based System - Policy Guidance, November 2014, (U.K.) [hereinafter Tier 1 (Investor) of the Points Based System] (clarifying the pre—and post—November 6, 2014 requirements).

94. See Laura Devine et al., *GBR United Kingdom*, in 1 GLOBAL BUSINESS IMMIGRATION PRACTICE GUIDE, GBR § 1.02 (2015); Rollason, *supra* note 92 (relaying that the regular route is the lengthiest choice to permanent immigration).

95. See Rollason, *supra* note 92; see also UK VISAS, *supra* note 41 (laying out the qualifying accelerated amounts as GB£5 million, and GB£10 million to correspond with the possible periods to obtain accelerated indefinite leave to remain in three years or two years, respectively).

96. See Devine et al., *supra* note 94; see also Rollason, *supra* note 92 (inferring that hypothetically, all Tier 1-Investor applications could be granted).

97. See Tier 1 (Investor) of the Points Based System, *supra* note 93, at 9-10; see also Rollason, *supra* note 92 (specifying the evidentiary requirements at length for Tier 1-Investor applicants).

points for the English language.<sup>98</sup> However, the Tier 1-Investor category drops the maintenance and language requirements.<sup>99</sup> The purpose of these requirements for the ordinary Tier 1 category is to ensure that applicants can work and support themselves in the United Kingdom.<sup>100</sup> The rationale behind excusing these requirements for the Tier 1-Investor visa is that applicants under this category generally consist of high net worth individuals who will not need to work.<sup>101</sup>

For investors that successfully applied for Tier 1-Investor status before November 6, 2014, there are two routes to achieving the required seventy-five points.<sup>102</sup> The first way is for applicants to have at least GB£1 million of their own money, which is disposable in the United Kingdom, held in a regulated financial institution.<sup>103</sup> The second way is to own GB£2 million of assets beyond liabilities, and to borrow at least GB£1 million of funds disposable in the United Kingdom from a regulated financial institution.<sup>104</sup> For investors that apply for Tier 1-Investor status on or after November 6, 2014, to achieve seventy-five points, the applicant must have at least GB£2 million under their control held in a regulated financial institution and

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98. See Devine et al., *supra* note 94 (discussing and defining relevant terms such as maintenance, which is the requirement to show a specific amount of savings over a period of time to show the ability to monetarily support oneself); see also *UK Tier 1 Investor Visa*, INVEST UK, <http://www.investuk.com/tier-1-visas/tier-1-investors.html> (last updated Jan. 2013) (breaking down the seventy-five points for required attributes into three separate twenty-five point monetary requirements for the different Tier 1 categories).

99. See Devine et al., *supra* note 94; see also INVEST UK, *supra* note 98 (indicating that less points are required for Investors in the Tier 1 category).

100. See Tier 1 (Investor) of the Points Based System, *supra* note 93, at 1; see also Application for an Initial Grant of Leave (Switching) or an Extension of Leave and Biometric Residence Permit Under Tier 1 (Entrepreneur) Main Applicant 2014, (Apr. 2015) (U.K.), available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/423054/t1\\_ge\\_form\\_04\\_15.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/423054/t1_ge_form_04_15.pdf) (revealing the reason for those requirements in other Tier 1 categories).

101. See Tier 1 (Investor) of the Points Based System, *supra* note 93, at 46; see also Initial Grant of Leave (Switching), *supra* note 100 (disclosing the logic behind the allocation of points under the UK's point based system of immigration).

102. See Vine, *supra* note 30, at 49 (laying out the two possible ways to achieve the seventy-five point attribute requirement for the investor visa); see also Tier 1 (Investor) of the Points Based System, *supra* note 93 (discussing the two ways Tier 1 investors proceed if they applied before November 6, 2014).

103. See Devine et al., *supra* note 94 at (b)(ii); Rollason, *supra* note 92, at (1)(c) (explaining that under then-existing exchange rates, converting GB£1 million into US dollars results in approximately US\$1,538,000; also that GB£750,000 is approximately the equivalent of US\$1,154,000).

104. See Devine et al., *supra* note 94, at (b)(ii); see also Rollason, *supra* note 92, at (1)(c); See UK VISAS, *supra* note 41 (noting that both of these methods to obtaining seventy-five points vary for an investor seeking the accelerated options).

the currency must be in a form that is disposable in the United Kingdom.<sup>105</sup>

## 2. Extension Applications

Investors that successfully applied for the Tier 1-Investor category before November 6, 2014 must invest at least GB£750,000 of their GB£1 million capital within three months of attaining their clearance in this category in order to extend their leave to remain in the country.<sup>106</sup> Investors that successfully apply on or after November 6, 2014 must invest all GB£2 million of their capital within three months of attaining clearance in this category in order to extend their leave to remain.<sup>107</sup> This money must be invested in UK government bonds, or as share capital or loan capital in active and registered UK trading companies.<sup>108</sup> The regulations explicitly reject investments made in companies that are not registered in the United Kingdom, investments in dormant and non-trading companies, and other investments that would not benefit the UK economy.<sup>109</sup>

For example, companies principally engaged in property investment, property management, or property development are excluded as qualifying investments made in UK companies.<sup>110</sup> However, this does not exclude construction companies.<sup>111</sup> The purpose of this requirement is to prevent investors from merely

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105. See Immigration Rules Appendix A, *Attributes For Tier 1 (Investor) Migrants*, (November 2014); see also *Extend Your Visa*, *supra* note 91 (revealing the informed and increased minimum investment amount).

106. See Tier 1 (Investor) of the Points Based System, *supra* note 93, at 4; see also *Extend Your Visa*, *supra* note 91 (discussing that pre-November 6, 2014 investors must invest only three-fourths of the total required capital).

107. See Tier 1 (Investor) of the Points Based System, *supra* note 93, at 14; see also *Extend Your Visa*, *supra* note 91 (elucidating that post-November 6, 2014 investors not only have a one hundred percent increase in capital requirement, but also have to invest that total amount).

108. See Tier 1 (Investor) of the Points Based System, *supra* note 93, at 4; see also *Extend Your Visa*, *supra* note 91 (discussing a Tier 1 investor's choices for passive investment).

109. See Tier 1 (Investor) of the Points Based System, *supra* note 93, at 40; see also IMMIGRATION RULES PART 6A, *supra* note 4, § 245E (listing the types of investments that would not qualify under the Tier 1-Investor category).

110. See Tier 1 (Investor) of the Points Based System, *supra* note 93, at 22; see also IMMIGRATION RULES PART 6A, *supra* note 4, § 245E, at 11 (U.K.) (excluding property investments as acceptable Tier 1 investments).

111. See Tier 1 (Investor) of the Points Based System, *supra* note 93, at 40; see also IMMIGRATION RULES PART 6A, *supra* note 4, § 245E (distinguishing construction companies from the other taboo property investments).

owning and managing buildings, because this would not contribute to the promotion of business competition in the United Kingdom.<sup>112</sup>

Applicants must also maintain the minimum level of investment throughout the period of their leave.<sup>113</sup> For pre-November 6, 2014 applicants, this also means topping-up their investments such that if the investment fluctuates to effectively reduce the value of such an investment below GB£750,000, or below 75% of the total for larger investment amounts, the investment must be replenished to meet the requisite minimum.<sup>114</sup> While post-November 6, 2014 applicants must maintain their investment level, they are not required to top-up their investments.<sup>115</sup> Investors must further provide quarterly portfolio valuations to certify that this requirement is met.<sup>116</sup>

### 3. Balance of Funds for Pre-November 6, 2014 Applicants

A candidate in the Tier 1-Investor category who applied before November 6, 2014 must maintain the balance of their investment so as to not exceed 25% of the total amount, in the United Kingdom.<sup>117</sup> These remaining funds can be retained in cash or invested in UK property or assets.<sup>118</sup> For example, the balance of funds can be invested in an un-mortgaged home or in an open-ended investment

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112. See Tier 1 (Investor) of the Points Based System, *supra* note 93 (effectively compelling non-citizen investments to promote business beneficial to the United Kingdom economy, rather than improving the value of assets); see also IMMIGRATION RULES PART 6A, *supra* note 4, § 245E, at 22 (U.K.) (banning investments in mere property).

113. See Tier 1 (Investor) of the Points Based System, *supra* note 93, at 14 (explaining that if an investor sells part or the entire portfolio such that the price paid for the retained portfolio is below GB£2 million, the shortfall must be corrected by purchasing further qualifying investments by the next reporting period); see also *id.* at 46 (laying out the periods of leave, first entry clearance of three years and four months and next leave to remain, which is about two years if the previous grant of leave was as a Tier 1-Investor and is three years if the previous grant of leave was not as a Tier 1-Investor).

114. See Tier 1 (Investor) of the Points Based System, *supra* note 93, at 13-14; see also Rollason, *supra* note 92, at (1)(c) (explaining that the investor has to replenish an inadequate investment by the next quarterly reporting period).

115. See Tier 1 (Investor) of the Points Based System, *supra* note 93 (reiterating that if the investment fluctuates to effectively reduce the value of an investment below 75% of the investment, the investment need not be replenished to meet the minimum).

116. See Tier 1 (Investor) of the Points Based System, *supra* note 93; see also Rollason, *supra* note 92 (discussing yet another of the Tier 1-Investor visa's evidentiary requirements).

117. See Rollason, *supra* note 92; see also Tier 1 (Investor) of the Points Based System, *supra* note 93 (illustrating that for an investment amount of GB£1 million, the balance of funds should not exceed GB£250,000).

118. See Tier 1 (Investor) of the Points Based System, *supra* note 93; see also Rollason, *supra* note 92 (specifying ways to maintain such funds).

company.<sup>119</sup> If the investment totals meet the qualifying amount, then sustaining a balance of funds is not necessary.<sup>120</sup>

#### 4. Accelerated Options

In April 2011, accelerated settlement options were introduced under this route for investors who elect to invest greater amounts.<sup>121</sup> Instead of investing the minimum requisite amount and settling in the United Kingdom after five years, non-citizens can settle in three years or two years by investing GB£5 million or GB£10 million, respectively.<sup>122</sup> For pre-November 6, 2014 applicants, the two possible ways to attain seventy-five points to gain entry clearance are by either holding the qualifying amount in the United Kingdom or sourcing the desired investment level through a loan, so long as the applicant holds personal assets of twice the value of such investment, beyond liabilities.<sup>123</sup> On the other hand, the only way for post-November 6, 2014 applicants to obtain seventy-five points under the regular or the accelerated options would be to have the qualifying amount at hand in the United Kingdom.<sup>124</sup>

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119. See Tier 1 (Investor) of the Points Based System, *supra* note 93; see also Rollason, *supra* note 92 (clarifying that the balance of funds will be taken into account only for the unmortgaged portion of a home).

120. See Tier 1 (Investor) of the Points Based System, *supra* note 93; see also Rollason, *supra* note 92 (following that a non-citizen who has invested their total qualifying amount of either GB£1 million, GB£5 million, or GB£10 million, will not be required to maintain a balance of funds). Note this is also relevant to the amendments made for post-November 6, 2014 investors.

121. See Devine et al., *supra* note 94; see also Migration Advisory Committee, *supra* note 30, at 12 (consequentially, faster settlement periods available for greater sums of investment).

122. See Rollason, *supra* note 92; see also Migration Advisory Committee, *supra* note 30, at 12-13 (laying out the price tag on available settlement options).

123. See UK VISAS, *supra* note 41; see also Migration Advisory Committee, *supra* note 30, (following that to borrow GB£5 million an applicant must demonstrate personal assets of GB£10 million and that to borrow GB£10 million an applicant must demonstrate personal assets of GB£20 million).

124. See Immigration Rules Appendix A, *Attributes For Tier 1 (Investor) Migrants*, (November 2014); see also *Extend Your Visa*, *supra* note 91 (addressing discrepancies in the updated requirements).

### 5. The Application Process

Applicants that have the requisite funds can apply for clearance to enter the United Kingdom.<sup>125</sup> Tier 1-Investors must apply for an extension of leave within three months of their specified date, which for an applicant granted entry clearance as a Tier 1-Investor, is either their date of entry to the United Kingdom, or if there is no evidence to establish the date of entry, the date of such investor's entry clearance.<sup>126</sup> Approval of this application will grant an investor permission to stay in the United Kingdom for three years and four months.<sup>127</sup> If an investor properly demonstrates compliance during their initial leave, they can then apply for a two-year extension.<sup>128</sup> To qualify for settlement in the United Kingdom, applicants under the Tier 1-Investor route must maintain consecutive residency in the United Kingdom for five, three, or two years, depending on their level of investment.<sup>129</sup>

### 6. Evidentiary Requirements

While the UK investor visa does not have an extensive list of requirements, there are stringent evidentiary standards that demand copious, and often lengthy, financial documents.<sup>130</sup> A non-citizen seeking to qualify for entry to the United Kingdom under the Tier 1-Investor category must demonstrate that he or she has the required

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125. See Tier 1 (Investor) of the Points Based System, *supra* note 93; see also Migration Advisory Committee, *supra* note 30 (stating the pre-application credentials).

126. See Tier 1 (Investor) of the Points Based System, *supra* note 93; see also UK VISAS, *supra* note 41 (providing definitions of "specified date" as used in the law).

127. See Tier 1 (Investor) of the Points Based System, *supra* note 93; see also Migration Advisory Committee, *supra* note 30 (providing the length of initial grant to stay).

128. See Tier 1 (Investor) of the Points Based System, *supra* note 93; see also Migration Advisory Committee, *supra* note 30 (providing that if the criteria to extend are met, one will be granted for two years).

129. See Migration Advisory Committee, *supra* note 30 (outlining the required continuous residence periods for the regular investment level, GB£5 million, and GB£10 million as five years, three years, and two years, respectively); see also UK VISAS, *supra* note 41. Note that to satisfy continuous residence, one must not be absent from the United Kingdom for more than 180 days in any twelve-month period. See Migration Advisory Committee, *supra* note 30; IMMIGRATION RULES PART 6A, *supra* note 4, § 245E.

130. See Tier 1 (Investor) of the Points Based System, *supra* note 93; see also Vine, *supra* note 30 (implying that the United Kingdom compensates for a small number of requirements by way of its high evidentiary standards).

seventy-five points.<sup>131</sup> The initial application for an investor exploiting personal funds requires proof of investment funds for a ninety-day period.<sup>132</sup> If the full amount is not evidenced for ninety days, an applicant must also demonstrate the source of the money.<sup>133</sup> If the funds are not already being held in the United Kingdom, an applicant must also prove that the money can be transferred to the United Kingdom.<sup>134</sup> The initial application for a pre-November 6, 2014 investor borrowing the funds involves confirming that the non-citizen is able to borrow a qualifying sum, and that the investor has personal assets valued at a minimum of double the amount of the borrowed funds.<sup>135</sup>

After being granted entry clearance, a Tier 1-Investor that applies for an extension of his leave for three years and four months must provide evidence that his funds have been invested in the specified ways.<sup>136</sup> Pre-November 6, 2014 applicants must also evidence a balance of funds adding up to the total qualifying amount, but not more than 25% of such qualifying amount, if the total qualifying amount was not utilized in the investment.<sup>137</sup> Lastly,

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131. See IMMIGRATION RULES PART 6A, *supra* note 4, § 245E; Tier 1 (Investor) of the Points Based System, *supra* note 93 (indicating that seventy-five points is met through displaying the proper investment funds).

132. See Tier 1 (Investor) of the Points Based System, *supra* note 93; Rollason, *supra* note 92 (depicting the acceptable forms for evidencing the investment funds).

133. See Tier 1 (Investor) of the Points Based System, *supra* note 93 (discussing the various options for demonstrating proof, each description being very specific); Vine, *supra* note 30 (providing the alternative options for evidencing funds).

134. See Tier 1 (Investor) of the Points Based System, *supra* note 93; Vine, *supra* note 30 (providing that if investment funds are not in the United Kingdom at the time of application, a Tier 1-Investor applicant must provide evidence that such funds are available for transfer to the United Kingdom).

135. See Tier 1 (Investor) of the Points Based System, *supra* note 93; see also Migration Advisory Committee, *supra* note 30 (discussing that if an investor chooses to borrow GB£1 million for Tier 1-Investment, such investor must also show evidence of personal assets summing up to at least GB£2 million).

136. See Tier 1 (Investor) of the Points Based System, *supra* note 93 (providing details on the extension applications); see also Migration Advisory Committee, *supra* note 30, (analyzing prior extension applications).

137. See Tier 1 (Investor) of the Points Based System, *supra* note 93; Rollason, *supra* note 92 (clarifying that while pre-November 6, 2014 Tier 1-Investors were only required to invest at least 75% of their qualifying funds, they still had to demonstrate availability of the remaining portion of minimum required funds).



quarterly financial reports must be provided to verify that the investment level is being maintained at the appropriate sum.<sup>138</sup>

The EB-5 and the Tier-1 Investor visa programs both require applicants to provide a qualifying sum of money with guidelines for satisfactory investment. However, the standards and requirements of each program significantly vary. These differences attribute to the levels of success demonstrated by each program.

### III. A BETTER INVESTOR VISA

This Part analyzes the differences between the US and the UK investor visas. It then examines issues associated with the EB-5 visa and several benefits associated with the Tier 1-Investor visa. Part III.A highlights the important differences between the US and the UK investor visa programs. Part III.B considers how some requirements of the EB-5 visa contribute to its overall weakness. Lastly, Part III.C explains how aspects of the Tier 1-Investor visa underscore its general success in comparison to the US EB-5 visa. Recognizing the shortfalls of the US program as compared to the successes of the UK program leads to the conclusion that a simple and objective immigrant investor program is preferable to a complex and demanding one.

#### A. Differences Between the US and the UK Investor Immigration Programs

The most significant difference between the US and the UK investor immigration programs is their goals.<sup>139</sup> While both programs seek to promote economic welfare, the intent behind the investor visa program in the United States is broader than its counterpart in the United Kingdom.<sup>140</sup> The US Congress wanted overseas investments to benefit the economy in several specific ways, such as in the areas of job development and industry growth.<sup>141</sup> On the other hand, the UK

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138. See Tier 1 (Investor) of the Points Based System, *supra* note 93; Rollason, *supra* note 92 (establishing the minimum appropriate investment level for an applicant who entered with funds of GB£1 million as GB£750,000).

139. See *infra* notes 140-42 and accompanying text (discussing the goals of the US and UK investor visas).

140. See MacDonald, *supra* note 9, at 404 (listing the extensive aims of the US investor visa; see also Vine, *supra* note 30 (stating the clear purpose of the UK investor visa)).

141. See MacDonald, *supra* note 9, at 404; see also S. REP. NO. 101-55, at 22 (1989) (naming and discussing the purpose of the US investor visa).

government inferred that high net worth individuals would inherently contribute to the economy in various ways beyond their mere economic investments.<sup>142</sup>

It follows that the EB-5 visa makes many more explicit demands than the Tier 1-Investor visa.<sup>143</sup> While the Tier 1-Investor visa requires investment in government bonds or in share or loan capital in existing UK companies, the EB-5 program does not permit passive investment.<sup>144</sup> Instead, the EB-5 requires a qualifying investor to engage in a new commercial enterprise, thus posing two requirements that the Tier 1-Investor visa does not require: creation of a new commercial enterprise and active participation in that enterprise.<sup>145</sup>

In fact, all of the requirements associated with the Tier 1-Investor visa are geared towards meeting the statutorily required amount of capital.<sup>146</sup> Whether compelling an investor to exceed a threshold sum to obtain seventy-five points, or obliging investors to invest and maintain a certain investment level, the Tier 1-Investor requirements only dictate how much money is required and where that money should go.<sup>147</sup> In contrast, the demands made of an EB-5 investor go above and beyond guidelines about capital requirements.<sup>148</sup>

In addition to the aforementioned demands for EB-5 investors to create a new commercial enterprise and to exhibit active involvement in that enterprise, EB-5 investors must also comply with the job creation requirement under the statute.<sup>149</sup> Further, the United States

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142. See Migration Advisory Committee, *supra* note 30 (discussing the possibilities for benefit from non-citizen investors); Vine, *supra* note 30 (asserting the purpose of the investor visa).

143. See Eng, *supra* note 42 (providing the ins and outs of EB-5 legalese); Kendall, *supra* note 9 (criticizing the complexity of the EB-5).

144. See IMMIGRATION RULES PART 6A, *supra* note 4, § 245E; see also 8 C.F.R. § 204.6, *supra* note 4; Rollason, *supra* note 92; MacDonald, *supra* note 9, at 410 (illuminating one of the large discrepancies between the US and UK investor visa programs).

145. 8 C.F.R. § 204.6, *supra* note 4 (providing the EB-5 requirements).

146. See IMMIGRATION RULES PART 6A, *supra* note 4, § 245E; Rollason, *supra* note 92 (laying out the Tier 1-Investor requirements).

147. See IMMIGRATION RULES PART 6A, *supra* note 4, § 245E; see also, Rollason, *supra* note 92. While this statement lists examples from the pre-November 6, 2014 requirements, the amendments made on that date have merely monetary effects; the changes include raising the minimum level of capital, requiring that the full sum be invested (not just 75%), removing the ability to bring in money as a loan and no longer requiring the topping up of investments. See *Tier 1 (Investor) Changes*, QUILTER CHEVIOT (Nov. 16, 2014), <http://www.quiltercheviot.com/latest-news/tier-1-investor-changes/>.

148. 8 C.F.R. §§ 204.6, 216.6 (2015) (laying out the EB-5 requirements).

149. *Id.* (articulating that EB-5 investors have to fulfill a job creation requirement).

also requires an EB-5 investor to certify that the money invested comes from a lawful source.<sup>150</sup> The United Kingdom does not necessarily require evidence of the source of the invested funds unless an investor fails to demonstrate that they possess the required funds ninety days before his application is made.<sup>151</sup>

Another notable disparity between the US and UK investor visas manifests itself in the program alternatives.<sup>152</sup> The United Kingdom offers incentives to non-citizen investors who choose to invest higher sums, while the United States provides a discount for non-citizen investors who comply with an additional set of requirements.<sup>153</sup> This, again, is a manifestation of the disparity between each program's goals. Consistent with the Tier 1-Investor visa goal of attracting high net worth individuals that will help bring economic prosperity to UK businesses and its overall economy, the Tier 1-Investor's accelerated options essentially raise the investment ante in exchange for a quicker permanent settlement process.<sup>154</sup> On the other hand, the EB-5 investor visa goal in promoting economic welfare through job creation and industry enhancement is achieved via lowering the requirements in areas that are in need of more economic growth, such as TEAs and specific regions.<sup>155</sup>

### B. Problems Associated with the US Investor Visa

There are several problems associated with the US investor visa.<sup>156</sup> The EB-5 is extremely complex and highly demanding of

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150. *Id.* (requiring that an EB-5 investor disclose his source of funds).

151. *See* Tier 1 (Investor) of the Points Based System, *supra* note 93; Rollason, *supra* note 92 (elucidating that while a Tier 1-investor will not necessarily have to show his source of funds, there are circumstances in which he might be required to do so). This raises the question of morality associated with a Tier 1-Investor visa, because at its core it offers a visa in exchange for an amount of money, regardless of how such money was obtained.

152. *See infra* notes 153-55 and accompanying text (considering the program alternatives for the EB-5 and the Tier-1 Investor visa).

153. *See* Migration Advisory Committee, *supra* note 30, at 12 (providing the various options for investment under the Tier 1-Investor route); *see also* 8 U.S.C. § 1153 (2015) (discussing alternatives to the regular EB-5 program); Devine et al., *supra* note 94.

154. *See* Migration Advisory Committee, *supra* note 30, Rollason, *supra* note 92 (posing the alternative 'exchanges' as GB£5 million for permanent settlement in three years and GB£10 million for permanent settlements in two years, instead of the standard investment in exchange for permanent settlement in five years).

155. *See* 8 U.S.C. § 1153 (2015) (framing the alternative EB-5 requirements); MacDonald, *supra* note 9, at 404-13 (discussing the logic of lowering investment amounts for certain investors).

156. *See infra* notes 157-66 and accompanying text (considering shortfalls of the EB-5).

overseas investors.<sup>157</sup> While the US Congress presented each condition with modest intentions, there are simply too many requirements.<sup>158</sup>

Despite having met these relentless expectations, an EB-5 applicant is left unsure of his status in the United States beyond the initial receipt of the two-year conditional residency.<sup>159</sup> For this conditional status to be lifted, an EB-5 investor must demonstrate, through acceptable evidence, that the large investment has created the requisite numbers of jobs.<sup>160</sup> Even if an investor is confident in the new commercial enterprise's need for at least ten employees, the economy is forever volatile and prospects are merely prospects.<sup>161</sup> This uncertainty may deter adept investors from applying for the EB-5.<sup>162</sup>

Therefore, it is of no consolation to an EB-5 investor that he or she must have already invested the requisite funds, or be in the process of investing the requisite funds, at the time he or she submits the initial application.<sup>163</sup> Moreover, even though a non-citizen will not qualify as a lawful permanent resident during the conditional residency period, he or she will be considered a resident for tax purposes.<sup>164</sup> Thus, an EB-5 conditional status resident will be subject to the US tax scheme on his entire worldwide income.<sup>165</sup> Under this

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157. See Eng, *supra* note 42; Kendall, *supra* note 9; David North, *The Immigrant Investor (EB-5) Visa: A Program that Is, and Deserves to Be, Failing*, CTR. FOR IMMIGRATION STUD. (January 2012), available at <http://www.cis.org/sites/cis.org/files/articles/2012/investor-visa-program-is-failing.pdf> (criticizing various aspects of the EB-5 program).

158. See MacDonald, *supra* note 9, at 410 (specifying that Congress required an active role from investors to thwart the moral quagmire of selling citizenship); see also 135 CONG. REC. 14,291 (1989) (illuminating the US Congress's thought process behind implementing the EB-5).

159. See Thiele & Decker, *supra* note 12; see also North, *supra* note 157 (elucidating that the EB-5 does not guarantee citizenship for [just] cash).

160. See Thiele & Decker, *supra* note 12; see also Yale-Loehr et al., *supra* note 44 (discussing how a non-citizen investor would remove his conditional status after two years in the United States).

161. See generally *supra* notes 159-60 and accompanying text (considering the lack of assurance for an EB-5 candidate).

162. See generally *supra* notes 159-60 and accompanying text (implying that the insecurity of the EB-5 system deters candidates from applying).

163. 8 C.F.R. § 204.6, *supra* note 4 (laying out that in order to even apply for the EB-5, an investor must already have the money and be ready to use it).

164. See Thiele & Decker, *supra* note 12; see also Eng, *supra* note 42 (emphasizing that conditional residents under the EB-5 will not be granted the benefits of guaranteed citizenship, yet they will be required to fulfill tax obligations as though they were US citizens).

165. See Thiele & Decker, *supra* note 12; see also Eng, *supra* note 42 (recounting that US citizens are taxed on their worldwide income).

process, the stakes for an EB-5 applicant are even higher than they originally seem.

Despite all of these stringent parameters, an EB-5 applicant's status will be automatically terminated for failure to file the I-829 petition.<sup>166</sup> Notwithstanding an investor's compliance and satisfactorily meeting all of the crucial criteria during the two-year conditional residency, a candidate who fails to file the I-829 form will be subject to removal proceedings.<sup>167</sup> Thus, the United States secures the benefits of an investor's irrevocably committed funds and guarantees nothing for the overseas investor in return.<sup>168</sup> In sum, an EB-5 applicant is afforded no guarantees, as even a guaranteed return on an applicant's investment disqualifies them from the EB-5 category.<sup>169</sup>

### C. *Benefits Accompanying the UK Investor Visa*

While the Tier 1-Investor visa is not the perfect investor immigration system, this simple model encompasses many positive features. As a whole, the United Kingdom's points-based immigration system creates a methodical and more objective procedure for governing immigration.<sup>170</sup> By awarding points to immigrants for various criteria, the United Kingdom's point-based system places values on certain unwavering, ascertainable qualities.<sup>171</sup> Thus, qualified immigrants will have the merits that the United Kingdom seeks to help enhance its nation.<sup>172</sup>

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166. See Kendall, *supra* note 9; see also Thiele & Decker, *supra* note 12.

167. See Kendall, *supra* note 9; see also Thiele & Decker, *supra* note 12 (emphasizing that compliance with every single idiosyncrasy of the EB-5 is necessary in order for an applicant to be eligible for citizenship).

168. See Kendall, *supra* note 9; see also Thiele & Decker, *supra* note 12 (clarifying that behind the fog of the EB-5 process, there is a government taking money in exchange for nothing certain).

169. See Thiele & Decker, *supra* note 12; see also Eng, *supra* note 42 (reiterating that the "at risk" requirement prohibits guarantees on investments).

170. See Gafner & Yale-Loehr, *supra* note 22; McKenzie Harker, Comment, *Immigration Reform: The Applicability of a Point Based Immigration System in the United States*, 21 WILLAMETTE J. INT'L L. & DISPUTE RES. 56 (2013) (discussing the benefits of a points-based immigration system).

171. See Gafner & Yale-Loehr, *supra* note 22; Harker, *supra* note 170 (explaining that each tier has differing requirements and that points are awarded based on fulfillment of such requirements).

172. See Gafner & Yale-Loehr, *supra* note 22; see also Harker, *supra* note 170 (reporting common qualities of all the immigration categories in the points-based system, such as the language requirement, age, and previous experience).

Compared to the EB-5 visa, the Tier 1-Investor visa poses a small number of requirements.<sup>173</sup> To achieve Tier 1-Investor status, an investor initially has to meet only two requirements: attaining seventy-five points and then investing those funds in the stipulated manner.<sup>174</sup> Not only are these few requirements straightforward, but they are also complemented by simple upkeep requirements.<sup>175</sup> To put it lucidly, a non-citizen who demonstrates that he possesses the qualifying funds and who invests those funds can almost guarantee his ability to maintain the proper level of invested funds for the requisite period of time.

A program based on established criteria, like the Tier 1-system, is more promising than one based on meeting uncertain expectations. While the stakes remain high for investors under the Tier 1-Investor category, the route to citizenship is unequivocally clear compared to the uncertain nature of the EB-5. While a wealthy non-citizen cannot predict the market's accommodation for creating jobs, a wealthy non-citizen can easily plan to maintain a certain investment level.

Beyond being able to comfortably meet the qualifications under the Tier 1-Investor visa, a candidate in this category is not required to do much in order to maintain their status. The mere nature of investments permitted under the Tier 1-Investor category requires very little from its candidates.<sup>176</sup> While the EB-5 demands time and money from a non-citizen investor, the Tier 1-Investor only burdens an investor's pocket, not his watch.<sup>177</sup>

Further, an investor seeking citizenship under the Tier 1-Investor system does not have to create a commercial enterprise, or even engage in one, and instead can choose to invest in UK government

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173. See IMMIGRATION RULES PART 6A, *supra* note 4, § 245E (outlining the Tier 1-Investor requirements). *Contra Eng*, *supra* note 42 (discussing the EB-5 requirements, which are numerous compared to the Tier 1-Investor requirements).

174. See Tier 1 (Investor) of the Points Based System, *supra* note 93; see also IMMIGRATION RULES PART 6A, *supra* note 4, § 245E (providing the initial steps for Tier 1-Investor visa application); Rollason, *supra* note 92.

175. See Tier 1 (Investor) of the Points Based System, *supra* note 93; see also Immigration Rules Appendix A, *supra* note 105 (presenting the requirements for the Tier 1-investment route).

176. See Tier 1 (Investor) of the Points Based System, *supra* note 93; see also IMMIGRATION RULES PART 6A, *supra* note 4, § 245E (indicating what is required of a non-citizen investor applying for the Tier 1-Investor visa).

177. See 8 U.S.C. § 1153(b)(5)(A) (requiring an investor under the EB-5 to engage in their new commercial enterprise). *But see* Tier 1 (Investor) of the Points Based System, *supra* note 93; IMMIGRATION RULES PART 6A, *supra* note 4, § 245E (requiring little of Tier 1-Investors beyond investing capital into the UK).

bonds or in share capital or loan capital of active and trading registered UK companies.<sup>178</sup> In fact, requirements for the Tier 1-Investor visa are completely different from the EB-5 requirement that an investor create a new commercial enterprise and actively engage in that enterprise, and, unlike the EB-5, the Tier 1-Investor visa does not require that the investment provide some additional benefit to the economy beyond creating jobs.<sup>179</sup> Since investments under the Tier 1-Investor route are directed towards established UK companies, the investment will inherently benefit the UK economy.<sup>180</sup>

Though investment under the Tier 1-Investor route is simpler than that through the EB-5 category, the Tier 1-Investor route also places limitations that the EB-5 does not. For example, investments in companies primarily engaged in property investment, development, or management are excluded as qualifying investments under the Tier 1-category.<sup>181</sup> Since the intention of the Tier 1-Investor visa is to promote business beneficial to the UK economy, increasing the value of immoveable property does not count.<sup>182</sup>

### CONCLUSION

A simple and objective investor-immigration scheme is more preferable to investors than a complex and overly demanding program. Further, a program that focuses on achieving a narrow set of goals has a better chance for success than a program that seeks to

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178. See Tier 1 (Investor) of the Points Based System, *supra* note 93; see also IMMIGRATION RULES PART 6A, *supra* note 4, § 245E (discussing the Tier 1-Investor requirements).

179. Recall that the EB-5 explicitly requires an applicant to invest in a new commercial enterprise that benefits the economy in a manner separate from and additional to the requirement of job creation. 8 C.F.R. § 204.6 (2015). Thus a company that solely serves clientele abroad, with no further benefits to the United States economy may not qualify under the EB-5 while a company that provides goods or services to the United States may qualify under the EB-5. See Yale-Loehr et al., *supra* note 44; see also Thiele & Decker, *supra* note 12, at 139.

180. Note, the regulations also explicitly reject investments made in companies that are not registered in the United Kingdom, in dormant and non-trading companies, and other investments that would not benefit the United Kingdom economy. See Tier 1 (Investor) of the Points Based System, *supra* note 93; see also IMMIGRATION RULES PART 6A, *supra* note 4, § 245E.

181. See Tier 1 (Investor) of the Points Based System, *supra* note 93; see also IMMIGRATION RULES PART 6A, *supra* note 4, § 245E (noting that certain types of investments are not acceptable as Tier 1-investments).

182. See Vine, *supra* note 30; see also INVEST UK, *supra* note 98 (disclosing the reasoning for not considering property investments as acceptable Tier 1-investments).

achieve a number of individual goals. The UK Tier 1-Investor category is uncomplicated and clear compared to the US EB-5 visa, which is labyrinthine and unpredictable. The United States can improve its program based on the UK model by more narrowly focusing on its goals, basing its program on objective criteria, and creating a process that is deliberate.