In re Walsh and Pollard: Designing a Way around U.S. Immigration Policy

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In re Walsh and Pollard: Designing a Way Around U.S. Immigration Policy

I. Introduction

The United States provides a favorable visa status\(^1\) to particular foreign investors who wish to enter the U.S. labor force and maintain their nonimmigrant status.\(^2\) The E-2 visa allows a foreign investor or its employee to work in the United States without fear of quota restrictions\(^3\) or the obligation to pay U.S. taxes on worldwide income.\(^4\) The United States benefits from job opportunities expanded through this foreign investment.\(^5\)

Although the E classification smacks of an open-door policy, it is

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1 The favorable option referred to is the E-2 visa, also known as the treaty investor visa. A "treaty investor" is defined as:
[A]n alien entitled to enter the United States under and in pursuance of the provisions of a treaty of commerce and navigation between the United States and the foreign state of which he is a national . . . (ii) solely to develop and direct the operations of an enterprise in which he has invested, or of an enterprise in which he is actively in the process of investing, a substantial amount of capital. 8 U.S.C. § 1101(a)(15)(E)(ii) (1988).

2 There are actually two treaty visas. The E-1 treaty trader visa is provided to aliens who wish to engage in substantial trade that is principally between the United States and the treaty country. Id. § 1101(a)(15)(E)(i). See infra notes 36-37 and accompanying text. Aliens seeking treaty trader or treaty investor status must be nationals of one of the following nations having treaties of friendship, commerce, and navigation with the United States:

1. E1 and E2 Eligibility:
   - Argentina, Austria, Belgium, Canada, China (Taiwan), Colombia, Costa Rica, Ethiopia, France, Germany (FRG), Honduras, Iran, Italy, Japan, Korea, Liberia, Luxembourg, the Netherlands, Norway, Oman, Pakistan, Paraguay, Philippines, Spain, Suriname, Switzerland, Thailand, Togo, United Kingdom, Yugoslavia.

2. E-1 Eligibility Only:
   - Bolivia, Brunei, Denmark, Estonia, Finland, Greece, Ireland, Israel, Latvia, Turkey.

Dept. of State, 9 Foreign Affairs Manual § 41.51, Exhibit I (1988) [hereinafter cited as F.A.M.]. The nationality of a firm is determined by the nationality of those owning at least 50% of the stock of the corporation regardless of the place of incorporation. The nationality of small business companies is determined by the nationality of those owning the principal amount of the business. Id. § 41.51 N5.1. For a comparison of the E-1 and E-2 visas, see Fragomen & Robosson, The Foreign Investor: Current Approaches Toward United States Immigration Law, 18 Vand. J. Transnat'l L. 335, 347-50 (1985).


4 Fragomen & Robosson, supra note 2, at 341.

5 Id. at 345. The State Department indicates that one way an applicant may establish eligibility for treaty investor status is by showing "that the investment will expand job
subject to limitations. Before entering the United States under this classification, an investor must first establish that his domestic investment is substantial, not marginal, and that any employees brought over to establish the new enterprise must possess supervisory skills or "special qualifications" essential to the enterprise and which cannot be obtained from the U.S. labor force. These limitations echo the congressional concern that the U.S. labor force be free from any threat of foreign competition.

Prior to 1988, the "special qualifications" requirement for E-2 classification did not exist. The advent of this new category in the recodified regulations added a new consideration to the analysis of whether an investment was substantial enough for treaty investor status. In re Walsh and Pollard was the first case dealing with this new immigration issue. This Note examines whether the holding in that case was true to the goals of immigration policy.

II. Background of In re Walsh and Pollard

Applicants Walsh and Pollard were British automotive designers employed by the British automotive design firm IAD Modern Design, Ltd. (IAD, Ltd.). The designers came to the United States pursuant to a contract between IAD, Ltd. and General Motors Corporation (GM) for the purpose of redesigning GM's line of cars in a "smaller, more European fashion." GM required the services of foreign specialists because of a nationwide shortage of qualified domestic automotive designers. The designers were assigned to work on GM projects at Hydra-matic, a GM subsidiary in Michigan. IAD, Ltd. paid the designers at an hourly rate with a daily living allowance plus bonuses, which GM reimbursed to IAD, Ltd. by purchase order at a higher hourly rate. To facilitate and expand contract relations be-
tween the British firm and U.S. automobile manufacturers, IAD, Ltd. formed a Michigan corporation, IAD Modern Design, Inc. (IAD, Corp.), a wholly owned subsidiary of IAD, Ltd.17 IAD, Corp. subsequently rented office space, purchased office furniture, hired two U.S. citizens to assist the British designers in their relocation and established a corporate bank account of $15,000.18

Walsh and Pollard sought admission to the United States as employees of a nonimmigrant treaty investor under the Immigration and Nationality Act of 1952.19 The U.S. Immigration and Naturalization Service (INS) sought exclusion of these aliens, contending that the British employer had not made a substantial investment in the United States as required by the Act.20 INS contended that a minimum dollar amount was required to meet the substantiality test.21 INS further contended that the employees of the treaty investor were not coming to the United States to "develop and direct" the investment as required by the Act.22 The Chief Immigration Judge rejected INS' contentions and terminated the exclusion proceedings.23 The Board of Immigration Appeals (BIA) affirmed the Chief Judge's decision and dismissed the appeal.24

The BIA rejected INS' argument that the British firm had not invested the minimum dollar amount necessary to meet the substantiality test, noting that no minimum dollar investment requirement was "published or reflected in any written material."25 To establish the substantiality of the British firm's investment, the BIA applied the proportionality26 and marginality27 tests proposed by the Department of State. Under the two-pronged proportionality test, the amount invested is weighed against 1) the total value of the enterprise, or 2) the amount normally considered necessary to establish a viable enterprise of the nature contemplated.28 Under the marginal enterprise test, the amount invested must reap more than a mere

17 Id.
18 Id. at 4.
21 Id. at 11.
22 Id. at 4.
23 Id.
24 Id. at 14.
25 Id. at 11. Although there is no express or explicit statutory language requiring a minimum dollar amount, the State Department has established the arbitrary criterion that an investor must invest at least one-half of the business' value. See State Department Cable (Mar. 13, 1982), noted in Fragomen, supra note 1, at 345 n.41; see, e.g., A. FRAGOMEN, A. DEL RAY & S. BELL, 1989 IMMIGRATION PROCEDURES HANDBOOK 183 (1989) (recommending $100,000 as an absolute minimum for investment).
26 9 F.A.M. § 41.51 N5.3.
27 Id. N5.4.
28 Id. N5.3-1.
livelihood for the investor. Finding IAD, Ltd.'s investment sufficient to establish a profitable and viable business in the United States, the BIA held that the British firm had met the requirements of a treaty investor under the second prong of the proportionality test. The BIA further held that because the firm expected substantial revenues from its investment it was not engaged "in a marginal enterprise solely for the purpose of earning a living." The BIA flatly rejected INS' contention that Walsh and Pollard should be excluded on the ground that they were not coming to "develop and direct" the investment of the treaty investor, citing the new regulation which allows classification of an employee as E-2 if "the employee has special qualifications that make the services to be rendered essential to the efficient operation of the enterprise." Noting that the older of the two designers had over thirty years of design experience and that the younger one possessed "unique" computer expertise, the BIA had no difficulty establishing the aliens' special qualifications. Basing its decision upon these considerations the BIA allowed Walsh and Pollard admission to the United States.

III. Applicable Immigration Laws

The treaty investor and treaty trader visas derive their name from the treaties of friendship, commerce, and navigation entered into by the United States and certain foreign nations. Pursuant to the purposes of these treaties nationals of these countries are eligible for favorable E-visa status. The E-2 visa differs from the E-1 visa in that the former is granted to aliens entering the United States to invest a substantial amount of capital, while the latter is granted to those aliens entering to engage in substantial trade between the United States and their home country. The E-2 visa is also the only nonimmigrant category based solely upon investment. The great advantage of the E-2 visa is that it "affords the investor the opportunity to enter the United States, manage his investment, compensate

29 Id. N5.4.
31 Id. at 12-13.
32 22 C.F.R. § 41.51(c) (1989).
34 Id. at 14.
35 See supra note 1.
36 See supra note 18.
37 A "treaty trader" is defined as: [A]n alien entitled to enter the United States under and in pursuance of the provisions of a treaty of commerce and navigation between the United States and the foreign state of which he is a national . . . (i) solely to carry on substantial trade, principally between the United States and the foreign state of which he is a national.
38 Fragomen & Robosson, supra note 2, at 340.
himself with any salary he deems appropriate, and avoid United States taxation on worldwide income by remaining outside the United States for enough days not to qualify as a resident for tax purposes. Another advantage is the absence of any requirement to file a petition with the INS prior to receiving E status. Instead, the alien submits documentation directly to the consular office. E-2 classification may then be renewed yearly subject to review by the consular office. The treaty investor’s spouse and minor children are allowed to enter the United States under the same classification regardless of their nationality. As an additional incentive to foreign investors, E-2 status does not require that the alien maintain a residence abroad. All that is required is a present expression of an intent to return home when the visa expires.

Before receiving E-2 status an alien must submit substantial supporting documentation to satisfy the consular officer that he qualifies under the Act. This documentation must clearly establish the following: (1) the enterprise or firm has the nationality of the treaty country; (2) the applicant intends to depart when E status terminates; (3) the investment involved is substantial; (4) the applicant has invested or is actively in the process of investing; (5) the enterprise is a real and operating commercial enterprise; (6) the investment is more than a marginal one solely for earning a living; (7) the applicant is in a position to “develop and direct” the enterprise; and (8) if the applicant is an employee of a treaty investor, the applicant is qualified as a manager or a highly trained and specially qualified employee. If the evidence fails to establish any one of these elements, then the applicant is denied E-2 status.

It is critical that the alien establish that he has invested or is actively in the process of investing a substantial amount of capital in a bona fide enterprise in the United States. Capital involved in the investment process must be placed at commercial risk in hopes of generating a return. Mere possession of uncommitted funds in a bank account does not qualify, although a reasonable amount of cash held in a bank account to be used for routine business purposes

39 Id. at 341.
40 22 C.F.R. § 41.51(b) (1989).
41 1 C. GORDON & G. GORDON, IMMIGRATION LAW AND PROCEDURE: PRACTICE AND STRATEGY § 37.05 (1989); 22 C.F.R. § 41.51(b) (1988).
43 22. C.F.R. § 41.51(d).
44 9 F.A.M. § 41.51 N3.2.
45 Id.
46 For an inventory of required and suggested documentation, see C. GORDON & G. GORDON, supra note 41, § 37.05.
47 9 F.A.M. § 41.51 N2.
48 Id. N5.1-1.
49 Id. N5.1-2.
might be counted as investment funds. Payments for leases and purchases of property or equipment may be used in calculating the investment.

Further, the enterprise must be "real and commercially active, producing some service or commodity." It cannot be a "paper organization or an idle speculative investment held for potential appreciation in value . . . ." When a new enterprise is the object of the investment the investor faces a greater burden of establishing the investment's validity; mere intent to invest will not establish treaty investor status. It has been argued that "[t]he safest course of action for the alien investor is to form a corporation or other legal entity, rent premises, employ, contingently employ or show plans to employ persons from the domestic labor force, and place the capital in an account under the name of the corporation."

To test the substantiality of the investment, the Department of State has propounded a "proportionality test," in which the consular officer weighs the amount invested against either: 1) the total value of the enterprise in question, or 2) the amount normally considered necessary to establish a viable enterprise of the nature contemplated. Only one of these criteria need be satisfied in order to establish a "substantial investment." The first criterion involves weighing evidence of the actual value of an established business. Establishing the proportion of the investment to the total value of the enterprise is an important step in determining whether the applicant has a controlling interest in the enterprise. "An interest of 50 percent or less usually will mean that the applicant does not have the requisite control, particularly in small enterprises." Purchase price or tax valuation are recommended evidence of investment value. The second criterion is more difficult to assess. In this case the consular officer is directed to draw upon her personal knowledge of the

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50 Id. See In re Kung, 17 I & N Dec. 260 (Comm. 1980) (where evidence showed applicant had available an additional $46,000 in reserve funds, it could not be said that he had invested in a marginal business solely for the purpose of earning a living); In re Lee, 15 I & N Dec. 187 (BIA 1975) (applicant denied admission where there was no evidence that applicant had the financial ability to make an additional $35,000 investment in the enterprise).

51 9 F.A.M. § 41.51 N5.1-3.
52 Id. N5.2.
53 Id.
54 Id. N5.1-1.
55 Fragomen & Robosson, supra note 2, at 344.
56 9 F.A.M. § 41.51 N5.3-1.
57 Id.
58 Id. N5.3-2.
59 Id. N5.3. See Choi v. INS, 798 F.2d 1189 (8th Cir. 1986) (case remanded for consideration of whether applicant owned over 60% of the enterprise); In re Lee, 15 I & N Dec. 187 (Reg. Comm. 1975) (applicant failed to show an ability to invest additional capital in order to bring his investment to 51% of the enterprise).
60 9 F.A.M. § 41.51 N5.3-2.
U.S. business scene in order to evaluate whether the proposed investment is reasonable by U.S. standards.\footnote{The notes to the Foreign Affairs Manual indicate that this test is subjective: [E]valuating the investment in relation to the amount normally considered necessary to establish a viable enterprise is less susceptible to precise calculation. Here the consular officer must draw on personal knowledge of the U.S. business scene to judge whether the amount the alien proposes to invest is reasonable for that type of business. If in doubt, the consular officers may seek additional evidence to help establish what would be a reasonable amount. Such evidence may include letters from chambers of commerce or statistics from trade associations.} This is most often the case where a new business enterprise is being formed.\footnote{The Code of Federal Regulations offers no additional guidance to the consular officer: (b) Treaty investor. An alien is classifiable as a nonimmigrant treaty investor (E-2) if the consular officer is satisfied that the alien qualifies under the provisions of INA 101(a)(15)(E)(ii) and that the alien: (1) Has invested or is actively in the process of investing a substantial amount of capital in a bona fide enterprise in the United States, as distinct from a relatively small amount of capital in a marginal enterprise solely for the purpose of earning a living; and (2) Intends to depart from the United States upon the termination of E-2 status. 22 C.F.R. § 41.51 (1989). For further discussion of the highly subjective nature of this test, see infra notes 136-39 and accompanying text.}

An applicant for treaty investor status must also prove that he is not investing in a marginal enterprise solely for the purpose of earning a living.\footnote{See In re Walsh and Pollard, I & N Interim Dec. No. 3111 at 12; 9 F.A.M. § 41.51 N5.3-1.} The applicant may establish this requirement with a showing that the investment will expand job opportunities in the local area or by showing that the investment was sufficient to ensure that the applicant's primary function will not be that of a skilled or unskilled laborer.\footnote{9 F.A.M. § 41.51 N5.4.} This is best established when the applicant has substantial income from other sources and does not depend upon the investment enterprise for a livelihood.\footnote{Id.} Better stated, this proposition means that "the return on the investment, rather than the amount invested, and the likelihood that the investment will tend to expand job opportunities in the domestic labor market are indicia of the substantiality of the investment."\footnote{Id. See In re Kung, 17 I & N Dec. 260 (Comm. 1980) (evidence showed applicant had an additional $46,000 in reserve funds on which to draw).} The treaty investor is not the only alien eligible for E-2 classification. E-2 status may be granted to an employee of a treaty investor provided that the applicant qualifies as a manager or a highly trained and specially qualified employee.\footnote{9 F.A.M. § 41.51 N5.4-2 to N5.4-3.} Before approving an applicant's employee on the executive or supervisory ground the consular officer should consider the following factors: the applicant's position and duties, the degree of control and responsibility the applicant will...
exercise, the number and skill levels of the applicant's subordinates, the level of pay, and the applicant's supervisory experience. Further, the consular officer must ensure that the position is a "principal and primary function" and not an "incidental or collateral function." Positions requiring key supervisory responsibility for a large section of firm operations with only minimal routine staff work generally qualify for E-2 status. Positions requiring primarily routine work with incidental supervision of low-level employees would not qualify.

Prior to the recodification of the regulations, treaty investors did not have the "special qualifications" option. The former regulation only allowed an employee employed in a "responsible capacity" to be classified E-2. Now the consular officer must consider "the degree of proven expertise of the alien in the area of specialization, the uniqueness of the specific skills, the length of experience and training with the firm, the period of training needed to perform the contemplated duties, and the salary the special expertise can command." The standards for supervisory personnel and specially qualified personnel are the same except for personnel needed for the "start-up" of an enterprise. These start-up employees "derive their essentiality from their familiarity with the overseas operation rather than the nature of their skills." This is usually the case where an established foreign firm attempts to enlist foreign specialists to establish its U.S. operation, usually for a period of up to a year.

Highly trained and specially qualified personnel may be classified as E-2 as long as they are employed by the treaty investor to train or supervise personnel employed in manufacturing, maintenance, and repair functions, and the treaty investor establishes that it cannot obtain the services of qualified U.S. technicians. There is, however, a presumption that the treaty investor will train U.S. workers within a reasonable time to replace the alien technicians. It is the duty of the consular officer to remind the treaty investor of this obligation when it becomes apparent that the treaty investor is repeatedly requesting E classification for alien specialists.

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68 Id. N3.4-2(a).
69 Id. N3.4-2(b).
70 Id.
71 Id.
73 Id.
74 9 F.A.M. § 41.51 N3.4-3(a).
75 Id. N3.4-3(b).
76 Id.
77 Id.
78 Id. N3.4-3(c).
79 Id. N3.4-3(d).
80 Id.
IV. Treaty Investor Cases

One obvious concern throughout the regulations is to prevent the circumvention of the "congressional policy of protecting American labor from undesirable job competition." That concern is echoed in cases examining the admission of treaty investors into the United States prior to the decision in *Walsh*. Whenever the judicial body felt that the U.S. labor force was threatened, the applicant was denied admission.

Recently, the Eighth Circuit Court of Appeals in *Choi v. INS*, examined a proposed partnership agreement between Lee, a native of Korea and nationalized citizen of the United States, and Choi, a citizen of Korea. The agreement called for Choi to invest $40,000 to open and manage an oriental gift shop in Springfield, Missouri. When Choi's initial treaty investor status expired at the end of a year, he applied to extend his temporary stay. The District Director of the INS denied the application on the ground that Choi did not solely develop and direct the operation of the enterprise. The Eighth Circuit remanded the matter to the INS for failure to consider other evidence of Choi's income when analyzing Choi's controlling interest in the enterprise. The Eighth Circuit stated that "in light of the complexity involved in analyzing the 'develop and direct issue' . . . [i]t is clear that the alien's actual control over the business affairs of that enterprise is a key element."

Degree of control was also an issue in *In re Kung*. The applicant, a Chinese national, purchased a franchise restaurant in California for $53,000. Previously classified as a nonimmigrant student under F-1 status, the applicant now sought a change to treaty investor status. The District Director denied this change on grounds that Kung failed to show his investment represented more than a small amount of capital in a marginal enterprise and that Kung failed to demonstrate an ability to control the enterprise.

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83 798 F.2d 1189 (8th Cir. 1986).
84 Id. at 1190.
85 Id.
86 Id.
87 Id. at 1191.
88 Id. at 1193.
89 Id.
91 Id. at 261.
92 Id.
93 Id.
Kung had produced evidence that he had an additional $46,000 in reserve funds, the Commissioner rejected the Director's first assertion by stating "[i]t can hardly be said that such a person has invested in a marginal business solely to earn a living." Addressing the question of control, the Commissioner held that although there were certain limiting factors imposed by the franchise agreement, they were overshadowed by nonlimiting factors allowing the applicant control of his enterprise.

In Kung, the District Director's conclusion that the applicant had not demonstrated an ability to control his investment was based in part on "the fact that the enterprise was a franchised restaurant . . . and that the franchiser . . . imposed strict conditions on the franchisee . . . that effectively reduced the degree of control over the operation of the restaurant to the point where the applicant could not develop and direct the enterprise." The Commissioner rejected these allegations, finding that any "limiting factors imposed [on] the franchisee to develop, direct, and protect his investment are overshadowed by the nonlimiting factors."

The limiting factors considered by the Commissioners were:
1. 3.5 percent of the gross sales must be expanded in advertising.
2. The franchisee must use only the batter mix provided by franchiser.
3. The franchisee may sell only those products approved by the franchiser.
4. The franchiser may terminate for default of the agreement and thereafter has the option of purchasing the business.

In considering the nonlimiting factors, the Commissioner noted that the franchisee received the full benefit from the local advertising mandated by the first condition. Despite the second requirement that the batter mix must be provided by the franchisee, the Commissioner found that all other services, supplies, products, fixtures, or any other goods could be purchased on the open market. The Commissioner also found that the third condition did not restrict the franchisee's retail pricing of these products, nor did it preclude the franchisee's submission of new or different products for approval to the franchiser. Finally, the Commissioner found that the franchisee could prevent default by correcting any infringement during a

94 Id. at 262.
95 Id. at 263-64. The Regional Commissioner in Kung found "no fault with the precept set forth in In re Lee . . . that an investor must show that he has the ability to control the investment, thereby fulfilling that part of the definition of a treaty investor contained in section 101(a)(15)(E)(ii) of the Act." Id. at 262.
96 Id.
97 Id. at 263-64.
98 Id. at 263.
99 Id.
100 Id.
101 Id.
fifteen-day grace period. Further, since the franchise appeared freely transferable to a third party as evidenced by the applicants instant purchase, it appeared that the franchisee had the right of first refusal only. The Commissioner cited additional favorable factors that were instrumental in his decision. These factors included the franchisee’s powers to hire and fire employees, set wage scales, and set business hours.

Both Choi and Kung cite In re Lee for the proposition that “[i]n order for an investor to develop and direct the operations of an enterprise, it must be shown that he has a controlling interest; otherwise, other individuals who do have the controlling interest are in a position to dictate how the enterprise is to be developed and directed.” In Lee, the evidence indicated that the applicant had invested only $10,000 in a restaurant valued at $64,000. The applicant asserted that at some unspecified time in the future he would increase his investment to $35,000 and, as a result, he would have a controlling interest in the enterprise. Noting that there was a lack of evidence supporting the applicant’s financial ability to make the additional investment, the Regional Commissioner found Lee’s contention that he would have a controlling interest in the enterprise “too speculative,” and denied Lee admission.

Other cases involving E-2 classification have dealt with the admissibility of employees of the treaty investor who are employed in a “responsible capacity.” These cases have dealt exclusively with the admission of Oriental restaurant personnel. In In re Nago, the BIA granted admission to a highly trained chef brought to the United States to enable other employees to become proficient in “Nabemono” cooking because he was employed in a responsible capacity. In In re Tamura, the Regional Commissioner granted

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102 Id.
103 Id.
104 Id. at 264.
108 Id. at 189.
109 Id. at 190.
110 Id.
111 Id.
114 Id. at 448. The BIA considered the following facts in their determination of whether the applicant was to serve in a responsible capacity:

The applicant will cook in the “Nabemono” style and train other employees of the restaurant in this form of cooking. It appears that “Nabemono” chefs are scarce in the United States and that the applicant’s employer has been
admission to a Japanese chef on the same grounds.\textsuperscript{116} Two additional cases, however, arrived at different conclusions in circumstances similar to \textit{Nago} and \textit{Tamura}.\textsuperscript{117}

The Deputy Associate Commissioner in \textit{In re Kobayashi and Doi}\textsuperscript{118} denied E status to two restaurant employees.\textsuperscript{119} Applicant Kobayashi was to train and supervise entertainers in Japanese art, culture, and tradition.\textsuperscript{120} Doi was to instruct the wait staff in the art of preparing and serving Japanese foods.\textsuperscript{121} Despite the applicants' expertise the Deputy Commissioner denied admission based upon the determination that the record was devoid of any evidence tending to show that the applicants had even "slight experience in the managerial or executive field."\textsuperscript{122}

The applicant in \textit{In re Udagawa}\textsuperscript{123} was a chef specializing in the preparation of Japanese tempura meals.\textsuperscript{124} Recognizing that the denial of Udagawa's application was in conflict with the \textit{Tamura} holding,\textsuperscript{125} the BIA was nonetheless convinced "that Congress did not intend that skilled alien laborers or aliens occupying minor managerial posts should be eligible for treaty investor status."\textsuperscript{126} The BIA

\begin{itemize}
\item searching for such a chef for several years. The applicant's employer testified that the applicant is a graduate of a leading Japanese cooking school and experienced in the art of "Nabemono" cooking. The applicant's employer also testified that the applicant will teach other employees to carry on the "Nabemono" style of cooking; that the "Nabemono" process can be learned in one year, and that the applicant intends to return to Japan after one year.
\end{itemize}

\textit{Id.} at 447.


\textsuperscript{116} The Regional Commissioner based his determination on the following:

The applicant herein is engaged as chief cook by Japanese nationals who have invested substantial sums of money in establishing a restaurant known for its excellent Japanese cuisine. He was brought to the United States by his employers because of his skill in the preparation of Japanese dishes. He is not only charged with the responsibility of supervising several subordinate cooks in preparing fried food specialties but also performs the duties of the main kitchen chef in the latter's absence.

\textit{Id.} at 718.


\textsuperscript{119} \textit{Id.} at 427.

\textsuperscript{120} \textit{Id.} at 426.

\textsuperscript{121} \textit{Id.}

\textsuperscript{122} \textit{Id.}

\textsuperscript{123} 14 I & N Dec. 578 (BIA 1974).

\textsuperscript{124} The BIA noted the applicant's relevant qualifications:

The applicant appears to have had at least one full year of schooling and two years' practical experience as a cook. During the last six months of his work experience in Japan he had specialized as a tempura chef and had supervised the activities of several other cooks. The applicant had been expected to remain in the United States for as long as two years, during which time he was to supervise and train American workers as tempura cooks and was to assist in the preparation of meals at the restaurant.

\textit{Id.} at 578-79.

\textsuperscript{125} \textit{Id.} at 582.

\textsuperscript{126} \textit{Id.} at 581.
further held that “[s]killed alien employees should be required to enter in a non-immigrant status that will afford some measure of protection to American labor.”

Udagawa echoes the regulatory presumption that a treaty investor will train U.S. workers within a reasonable time to replace the alien technicians. The BIA expressed concern over admitting an applicant to a status which might result in a limitless visit to the United States. If the applicant was to be admitted, the BIA held that “it must be via a category which would not utterly circumvent the congressional policy of protecting American labor from undesirable job competition.”

V. Analysis

Preventing the circumvention of congressional policy is the prevailing concern in the cases prior to Walsh. These cases, however, had only the “responsible capacity” criterion by which to gauge the admissibility of an alien employee. With the advent of the recodified regulations in 1988, a new category of “specially qualified” alien could be granted E-2 status. Further, prior cases generally involved small investment enterprises. These cases did not have to broach the issue of whether a large multinational design firm’s plan to import specialized labor into the United States to fulfill contract obligations with large U.S. automotive manufacturers constituted a substantial investment. Because Walsh is a case of first impression on these issues, its impact on congressional and immigration policy bears further examination.

Of the two issues discussed in Walsh, the issue of “substantial investment” is the most critical. Failure to establish this requirement would preclude any discussion of employees with “special qualifications” because IAD, Ltd. would not qualify as a treaty investor. Because the enterprise involved in this case was newly formed, the BIA made its determination based upon an application of the second prong of the proportionality test, weighing the amount of the investment against the amount normally considered necessary to establish a viable enterprise of this nature. With little explanation, the BIA stated that a large investment was not needed to establish a viable

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127 Id.
128 9 F.A.M. § 41.51 N3.4-3(d).
129 The BIA was concerned that the yearly renewal provision found in 8 C.F.R. § 214.2(e) could “be designed to allow a treaty investor an indefinite stay.” 14 I & N Dec. at 581 n.3.
130 Id. at 582.
131 22 C.F.R. § 41.51(c) (1989).
132 See supra note 82. With the exception of Choi, which involved a gift shop, all of these cases concerned individually owned restaurants.
133 I & N Interim Dec. 3111 at 12.
business of this kind.\textsuperscript{134} The BIA held that evidence showing that the enterprise had incorporated in Michigan, rented offices and purchased office furniture, hired U.S. citizens as employees, established a corporate bank account, and did business for the parent company was sufficient indication that the investment accomplished its purpose.\textsuperscript{135}

Admittedly, "evaluating the investment in relation to the amount normally considered necessary to establish a viable enterprise is less susceptible to precise calculation."\textsuperscript{136} The Visa Office grants a great deal of discretion to the Consular Officer's "common sense" and personal knowledge of the U.S. business scene in the determination of whether an enterprise is viable or not.\textsuperscript{137} Unfortunately, this is an entirely subjective decisionmaking process. The process provides no objective standards for the BIA to review an appeal, nor does it provide any clear guidelines for the INS to apply when reviewing applications.

The only check on this broad grant of discretion is the Consular Officer's duty to ensure that "applicants are not, in truth, seeking to circumvent the numerical limitations on immigrants."\textsuperscript{138} Nowhere in its laconic discussion of the viability prong of the proportionality test does the BIA apply this check to \textit{Walsh}. Had the BIA done so, it would have arrived at the conclusion that a plan to import hundreds of foreign designers circumvented the numerical limitations on immigrants. To establish the viability prong of the proportionality test, the BIA should have required IAD, Ltd. to show that it not only had invested enough money to start up the enterprise, but also had committed funds sufficient to provide for the training of U.S. personnel to eventually replace the foreign designers.\textsuperscript{139}

The BIA also should have reached a different conclusion when it applied the "marginal enterprise" test.\textsuperscript{140} Applying a very narrow interpretation of the test to the facts of the case, the Board concentrated on the language excluding aliens who receive only enough return on their investment to earn a living.\textsuperscript{141} Noting from past experience in supplying designers for automobile firms, IAD, Ltd. expected substantial revenues far above a living wage, and noting that the chief economist in the Michigan Department of Commerce

\textsuperscript{134} \textit{Id.}
\textsuperscript{135} \textit{Id.; see supra} note 55 and accompanying text.
\textsuperscript{136} 9 F.A.M. § 41.51 N5.3-2; \textit{see supra} note 61.
\textsuperscript{137} 9 F.A.M. § 41.51 N5.3-2.
\textsuperscript{138} \textit{Choi} v. \textit{INS}, 798 F.2d 1189, 1193 (8th Cir. 1986) (quoting \textit{U.S. DEPT. OF STATE}, 5 \textit{VISA OFFICE BULLETIN} No. 20, \textit{TREATY INVESTOR GUIDELINES}, n.25, \textit{reprinted} in 59 \textit{INT. REL.} 264 (1982)); \textit{see In re} Udagawa, 14 I & N Dec. 578, 582 (1974); \textit{see also supra} notes 123-130 and accompanying text.
\textsuperscript{139} \textit{See infra} notes 164-66 and accompanying text.
\textsuperscript{140} 9 F.A.M. § 41.51 N5.4.
expected the investment to expand job opportunities, the BIA held that IAD, Corp. was not a marginal enterprise.\textsuperscript{142} The Board unfortunately emphasized the wrong standard in this case, however. The key concern is not whether a return exceeds an \textit{individual} applicant's living wage, but whether the return on the \textit{corporate} investment is marginal. When the drafters of the regulations emphasized "living wage,"\textsuperscript{143} they apparently did so in response to the large number of cases treating the exclusion of individual treaty investors.\textsuperscript{144}

If the BIA had applied a corporate standard of marginality to the facts of this case, IAD, Ltd. would arguably have failed to establish its status as a treaty investor. Purchase orders that reimburse the hourly compensation of an employee's services at a higher rate\textsuperscript{145} ought not constitute a "substantial" investment return within the purview of the regulations. The corporate return in this case is merely a skim off the top of the employee's hourly compensation, and the only way it can reach a substantial level is through the increased importation of foreign personnel. Further, testimony by an economist that the investment would expand job opportunities\textsuperscript{146} loses probative value when it is apparent that the openings would be filled by support personnel for the 300 specialists IAD, Ltd. plans to import over the next few years.\textsuperscript{147} There is nothing wrong with hiring these support personnel, but it would be more consistent with U.S. policy if they were hired to support U.S. designers trained for positions currently held by foreign personnel. Otherwise, the expanded job opportunities for nonskilled personnel hardly compensate for the several hundred skilled positions denied to U.S. citizens.

Another factor the BIA failed to consider was the risk involved with the investment. "If the applicant has substantial income from other sources and does not rely on the investment enterprise to provide a living, \textit{the investment may be one of risk and not one of providing a mere livelihood}."\textsuperscript{148} The Department of State expounds on this assertion: "The concept of investment connotes the placing of funds or other capital assets at risk in the commercial sense in the hope of generating a return of the funds risked."\textsuperscript{149} Funds that are not subject to partial or total loss are not investments in the sense intended by the Act.\textsuperscript{150}

\textsuperscript{142} \textit{Id.}
\textsuperscript{143} 9 F.A.M. § 41.51 N5.4.
\textsuperscript{144} See \textit{supra} note 82.
\textsuperscript{145} The BIA did not discuss the difference between the billed hourly rate and the purchase rate.
\textsuperscript{146} 1 & N Interim Dec. No. 3111 at 13.
\textsuperscript{147} See \textit{id.} at 3. IAD, Corp. expressed no future intention of hiring or training any U.S. designers for use in the enterprise.
\textsuperscript{148} 9 F.A.M. § 41.51 N5.4 (emphasis added).
\textsuperscript{149} \textit{Id.} § 41.51 N5.1-1.
\textsuperscript{150} \textit{Id.}
lic changed overnight and GM decided to end its contract with IAD, Ltd., the British firm would only suffer a nominal loss on its investment. They would conceivably lay off or bring back the designers, terminate their lease, sell the furniture, close out the corporate bank accounts, and dissolve the Michigan corporation. Ironically, the apparent investment made by this corporation is less than some investments made by individual applicants to whom E classification has been denied, and it was proportionately much less of a risk. The thrust of this regulatory scheme is that an investor must feel the smart of a loss on an investment, otherwise the investment should be classified as marginal—not substantial.

The BIA also failed to consider whether IAD, Ltd. would “develop and direct” the enterprise. While the Board was correct when it held that the “develop and direct” requirement did not apply to IAD’s employees, it erred by not applying the requirement to the treaty investor. The emphasis of the “develop and direct” requirement is not strictly on who has the majority ownership, but on who has “operational control.” There is no doubt that IAD, Ltd. has majority ownership—IAD, Corp. is its wholly owned subsidiary. The question is whether their majority interest grants them operational control of foreign investment.

In light of the Kung holding, operational control of a design firm like IAD, Corp. would seem to imply that control over design projects and design personnel is necessary to fulfill the “develop and direct” requirement. IAD, Corp. apparently exercises very little control over its design personnel. The designers are assigned to a GM subsidiary to work on GM projects, most likely, according to GM production schedules. This indicates some degree of creative control by GM, but exactly how much control is imposed by the conditions of the agreement between GM and IAD, Corp. was not discussed by the BIA. The BIA also ignored GM’s leverage in negotiating the hourly wages of the designers. The BIA should have considered these potentially limiting factors in their determination that IAD, Ltd. exercised operational control over its investment.

Although the BIA was correct in its decision that employees of the treaty investor need not fill a supervisory position in order to receive E status, it nonetheless failed to consider adequately the rela-

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151 See Choi v. INS, 798 F.2d 1189 (8th Cir. 1986) ($40,000 needed to open and manage a gift shop); In re Kung, 17 I & N Dec. 260 (Comm. 1980) (applicant invested $53,000 as sole owner of a franchised restaurant).
152 See 9 F.A.M. § 41.51 N5.5 (requires that the treaty investor be in a position to develop and direct the investment).
153 Id.
155 See supra notes 108-111 and accompanying text.
156 See supra notes 90-104 and accompanying text.
tionship between the investment and the treaty investor’s “specially qualified” employees. Specially qualified employees do not gain access to the United States merely to set the stage for a future invasion of foreign specialists. “[T]he presumption is that the firm will train U.S. workers in a reasonable period of time to replace the foreign technicians.” When it becomes apparent that the firm is requesting additional visas for foreign specialists, the consular officer is to remind the firm of its obligation to train U.S. citizens for this work. This presumption was contradicted by the Visa Office in its replies to interrogatories from the petitioners in *Walsh*. Because the Visa Office’s interpretations of the regulations were accorded “great deference” in the BIA’s analysis of the case they require close scrutiny.

The Visa Office stated that it did not consider the number of applicants to be significant because “all visa applicants would have to satisfy the requirement of being either an executive/manager or being an essential employee to the efficient operation of the enterprise.” The Visa Office defended its reasoning by stating “[t]he proper and normal operation of those tests would control the number of persons contemplated by the treaty provisions.” Notwithstanding the normal and proper operation of those tests, no evidence of an intent to control this number of persons is found in *Walsh*. The BIA indicated that as IAD, Corp. contract commitments expanded, so would the number of foreign designers coming to the United States.

The Visa Office asserted that there was no “absolute requirement” to train domestic labor in the skills of an essential employee. The Visa Office qualified this by stating “[t]here is an implicit requirement to train only if the skills are of a nature conducive to transfer to the local labor market,” and that “[s]ome skills are not readily transferred, and therefore, remain essential to the efficient operation of the business for an indefinite period of time.” Using this rationale, the Visa Office could have arrived at a different result and found error in the issuance of the E-2 visas. If the skills described in *Walsh* can be acquired by hundreds of foreign designers, then they can be readily acquired by domestic engineers.

158 9 F.A.M. § 41.51 N9.4-3(d).
159 Id.
162 C. Gordon & G. Gordon, supra note 41, App. 37C at 15.
163 Id.
164 “IAD, Ltd. expects in the future to bring as many as 300 designers and other related workers to the United States to meet the demands of United States automotive manufacturers.” In re Walsh and Pollard, I & N Interim Dec. No. 3111 at 3.
165 C. Gordon & G. Gordon, supra note 41, App. 37C at 15.
166 Id.
167 The Sixth Circuit in a case factually kindred to *Walsh* noted: “The reputed 'qualifi-
Under the foregoing analysis, IAD, Ltd. begins to look more like a foreign employment agency than a treaty investor. This was precisely INS’ contention in *Walsh*. Under remarkably similar facts, the Sixth Circuit in *Sussex Engineering Ltd. v. Montgomery*, labeled such firms as IAD, Ltd. “specialized temporary service agencies.” *Sussex Engineering* was a British “professional design and engineering firm specializing in providing design and engineering personnel under contract to various automotive manufacturers,” one of which was GM. Sussex Engineering petitioned the INS office in Detroit for H-2 classifications for three alien automotive design engineers who were to work temporarily designing car body interiors at a GM Tech Center in Michigan. Conceding that there was a dearth of qualified U.S. automotive designers, the Sussex court nonetheless upheld the district director’s denial of the petitions on the grounds that the need for the alien design engineers was ongoing rather than temporary.

The H classification discussed in *Sussex* differs essentially from the E classification in its temporal nature. While an alien classified as H-2 may only enter the United States to perform temporary services or labor, the E-2 treaty investor may conceivably remain in the United States for a limitless amount of time. Despite this difference, the ongoing need for foreign designers was a concern in both *Sussex* and *Walsh*. In *Sussex*, the ongoing need for foreign labor ran contrary to the plain language of the Act. In *Walsh*, the plan to import hundreds of foreign engineers over time ran contrary to the

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169 825 F.2d 1084 (6th Cir. 1987).
170 General Motors had been using British design engineers, employed by specialized temporary service agencies and entering the country on H-2 visas to work pursuant to one-year contracts, since at least 1978. *Id.* at 1086.
171 *Id.*
172 *Id.*
173 *Id.*
174 *Id.*
175 An H-2 alien is defined as “an alien having a residence in a foreign country which he has no intention of abandoning . . . who is coming temporarily to the United States . . . to perform other temporary service or labor if unemployed persons capable of performing such service or labor cannot be found in this country . . . .” 8 U.S.C. § 1101(a)(15)(H)(ii)(b) (1988).
176 See [* supra* note 129 and accompanying text; 22 C.F.R. § 214.2(e).*
177 825 F.2d at 1089.
immigration policy requiring that this need be satisfied by training U.S. personnel. As long as GM and other U.S. automotive manufacturers can import foreign engineers by the hundreds, there is little incentive to establish training programs for domestic engineers in order to alleviate the shortage.

VI. Conclusion

Before granting E-2 status to IAD, Corp., the BIA should have reminded the firm of its obligation to train U.S. residents. As evidence that the firm would fulfill its obligation, the BIA could have required the firm to implement a plan to train domestic engineers and then invest substantial capital into the program. Under such a program, the firm could continue to import foreign designers until enough domestic designers were trained to meet the requirements of the firm’s contracts with U.S. automotive manufacturers. This would be the most certain indication that the firm was not merely a temporary employment agency, but a substantial treaty investor.

Although the BIA’s decision in Walsh has opened a new door for foreign investments in the United States, it has also opened a door through which foreign employment agencies masquerading as treaty investors can flood specialized foreign labor into the U.S. labor force while reaping the benefits of their nonimmigrant investor status. Walsh confounds the proposition that “skilled employees should be required to enter in a nonimmigrant status which affords some measure of protection to American labor.”

Firms that have been denied H status now have a way to skirt the holding in Sussex merely by incorporating in the United States. The potential for abuse is great. Absent a revision to the regulations which specifically addresses this new issue in the law, the problem can only be remedied by judicial consideration that is mindful of legislative purpose on a case-by-case basis. Until then, U.S. labor remains susceptible to the designs of clever foreign draftsmen.

Phillip Kevin Woods

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178 The Foreign Affairs Manual states that:
[T]he presumption is that the firm will train U.S. workers in a reasonable period of time to replace the foreign technicians. If it is apparent that the employing firm is repeatedly requesting visas for foreign technicians, the consular officer should remind the firm that it has an obligation to train U.S. residents for this work and that the absence of effective training programs will be a negative factor in examining future visa applications for such foreign technicians.

9 F.A.M. § 41.51 N3:4-3(d).


180 Kun Young Kim v. District Director, 586 F.2d 713, 717 (9th Cir. 1978).