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# GREEN CARDS FOR FOREIGN HOUSE BUYERS: A WAY TO HELP STABILIZE HOUSING PRICES

Gregory Scott Crespi\*

## I. INTRODUCTION

One major factor that has contributed to the current worldwide economic crisis is the precipitous drop in U.S. housing prices.<sup>1</sup> This has led to a sharp decline in the value of many mortgage-backed securities and other complex derivative financial instruments that are linked to those securities, putting many large financial institutions and other major investors in serious financial difficulties. Moreover, these housing price declines have also contributed to a large increase in the number of mortgage foreclosures, which has, in turn, exacerbated the financial problems of direct and indirect mortgage investors and contributed to the recessionary spiral of falling GDP, rising unemployment, and declining consumer and investor confidence. Some leading housing analysts expect U.S. housing prices to continue to decline by perhaps another 20% from late-2008 levels by the end of 2010,<sup>2</sup> thus further depressing the value of many mortgage loans and related derivative securities. It will probably be impossible to restore our financial system to a well-capitalized state and effectively address our challenging economic problems until housing prices stabilize.

While the continuing decline of U.S. housing prices underlies many of our current financial and economic problems, it will be difficult to arrest this decline before those prices fall to (and perhaps even overshoot for a time) levels consistent with the

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1. From its peak in the second quarter of 2006, the well-known Case-Shiller Home Price Index was down 21% through the third quarter of 2008. A. Gary Shilling, *Sell Excess House Inventories to Foreigners* 1 (Jan. 20, 2009) (Background Paper for Mar. 17, 2009 editorial in the Wall St. J.) (available at [http://www.frontlinethoughts.com/pdf/Housing\\_Whitepaper\\_1.pdf](http://www.frontlinethoughts.com/pdf/Housing_Whitepaper_1.pdf)). More recent 2009 data suggests that housing prices are now declining at a slower rate and may well stabilize by the end of 2010. The Case-Shiller Home Price Index, released August 25, 2009, shows that home prices were down only 14.9% as of June 30, 2009 as compared to one year earlier, and actually up 2.9% for the three-month period ending June 30, 2009. Les Christie, *Home Prices on the Upswing*, [http://money.cnn.com/2009/08/25/real\\_estate/June\\_CaseShiller/index.htm](http://money.cnn.com/2009/08/25/real_estate/June_CaseShiller/index.htm) (last updated Aug. 25, 2009); *but see also* Les Christie, *Homes About to Get Much Cheaper*, [http://money.cnn.com/2009/10/20/real\\_estate/home\\_price\\_forecast/index.htm](http://money.cnn.com/2009/10/20/real_estate/home_price_forecast/index.htm) (last updated Oct. 20, 2009) [hereinafter Christie, *Cheaper*] (where the Fiserv service projects median home prices to drop another 11.3% by June 30, 2010, with prices then stabilizing and rising 3.6% over the following year, and where this more pessimistic forecast is endorsed by the well known real estate economist Mark Zandi).

2. Shilling, *supra* n. 1, at 2. This projected drop of another 20% in prices from January 2009 levels would be another 14% drop as compared to the 2006 peak prices, leading to a projected overall peak-to-trough decline of 37%. *Id.*; *see also* Christie, *Cheaper*, *supra* n. 1 (offering in October of 2009 a later and comparable projection).

underlying supply and demand conditions. Most proposals for stabilizing housing prices before they fall to such low levels involve substantial commitments of government funds, either to reduce the number of mortgage foreclosures and subsequent forced sales or to provide a general economic stimulus that would indirectly boost the demand for housing. But there may also be some creative policies that could be pursued that do not require substantial government expenditures. Any inexpensive measures that hold out the promise of more quickly stabilizing housing prices, and at higher levels than would otherwise result from unimpeded market forces, should be seriously considered.

In a recent and provocative *Wall Street Journal* editorial, Richard Lefrak and Gary Shilling have set forth the broad outlines of a proposed change in federal immigration law that would allow the United States Citizenship and Immigration Services (USCIS) to award “green cards”—conditional and eventually permanent resident status that would allow those persons to live in the U.S. and seek employment here if they chose to do so—to foreigners who purchase houses in the U.S.<sup>3</sup> Such a change would not impose any additional burden on taxpayers, and Lefrak and Shilling have argued that it would result in significantly increased demand for US housing<sup>4</sup> that would help to absorb the current excess inventory of approximately 2.4 million unsold homes that is exerting further downward pressure on housing prices.<sup>5</sup> If they are at all accurate in their expectations as to the likely popularity of such a visa program, this would surely help to stabilize housing prices more quickly and at higher levels. They also argue in their editorial that there is already in place a “blueprint” for such a program in the USCIS’s current EB-5 investor visa program under which up to 10,000 visas per year can be granted to foreigners who invest sufficient funds in a U.S. business to create at least 10 new full-time jobs.<sup>6</sup>

Lefrak and Shilling’s proposal is certainly worth considering. Any measure that would bring forth additional foreign buyers to absorb some of the current excess supply of U.S. houses would certainly help stabilize housing prices, and at higher levels than they would likely otherwise descend to, and would therefore contribute to helping resolve our broader financial and economic problems. However, they are wrong in

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3. Richard S. Lefrak & A. Gary Shilling, *Immigrants Can Help Fix the Housing Bubble*, Wall St. J. A15 (Mar. 17, 2009).

4. *Id.* Lefrak and Shilling did not offer a specific estimate as to how many foreign buyers might be interested in purchasing a US house if they could thereby obtain temporary and eventually permanent resident status, but they did note that as of September 30, 2006 over 500,000 residents of the US and over 59,000 individuals living abroad were awaiting the award of employment-based visas, and that many of these persons would buy a US house if their immigration status could be settled. In addition, they noted that almost twice as many petitions for H-1B work visas are applied for each year than can be granted, and estimated that in 2007 there were 7.1 million people living outside of the US that each had at least \$1 million in financial assets, suggesting (though they did not clearly so state) that they are of the view that enough of those wealthy persons may be interested in obtaining such resident status so as to absorb the entire current excess inventory of U.S. housing. “If new immigrants bought the 2.4 million excess houses at today’s [prices] . . .” *Id.*; see also Shilling, *supra* n. 1, at 9 (“[The Lefrak & Shilling proposal] could vastly reduce . . . excess housing inventories.”).

5. Lefrak & Shilling, *supra* n. 3. Shilling estimates that there was, as of the end of 2008 in the US, an excess inventory of 2.4 million houses, contributing to likely further housing price declines. Shilling, *supra* n. 1, at 1. He also estimates that if housing prices are left to market forces to stabilize, almost 50% of homeowners who hold mortgages would then owe more than the market value of their houses, with devastating consequences for foreclosure rates and consumer confidence. *Id.* at 4.

6. Lefrak & Shilling, *supra* n. 3.

suggesting that the current EB-5 visa program should serve as a model for designing such a new initiative. That complex program has been a rather dismal failure and should not be regarded as a prototype for the design of a foreign house purchaser visa program. Rather, the EB-5 program demonstrates some pitfalls to avoid in any attempt to utilize the promise of obtaining green cards to encourage foreigners to invest in U.S. housing.

In Part II of this article, I will briefly summarize the current EB-5 visa program and its major shortcomings and will briefly note the general contours of some comparable immigrant investor programs existing in other countries. In Part III, I will first set forth the Lefrak and Shilling proposal for granting temporary and eventually permanent resident status to foreigners who purchase U.S. homes. I will then offer and discuss a proposal that is based upon their ideas, but which is more comprehensive and detailed and includes some modifications of their suggestions that I believe are called for in light of the problems plaguing the EB-5 program. I will conclude that this modified proposal would contribute at least modestly towards addressing one important component of our broader financial and economic problems, although it would raise some of the same economic and political controversies as did the enactment of the EB-5 program. Part IV will present a brief conclusion and a call for more discussion of these questions.

## II. THE EB-5 VISA PROGRAM AND ITS SHORTCOMINGS

Congress in 1990 created the EB-5 immigrant visa category to encourage foreign investors to engage in commercial enterprises in the U.S. that would create local jobs.<sup>7</sup> Under this program an investor must, in general, invest \$1 million or more in a US business, although \$500,000 is deemed to be sufficient if the investment is in a “targeted employment area,” and the investment must create at least 10 full-time jobs in the US.<sup>8</sup> The investor must also maintain a policy-making role in the enterprise.<sup>9</sup> A qualifying investor will upon application be granted conditional resident status for two years, after which time they may petition the USCIS to remove the condition and grant them permanent resident status.<sup>10</sup> The maximum number of such conditional residency visas that can be granted in any one year under the EB-5 program is 10,000, with 3,000 of these visas reserved for persons who invest in these targeted employment areas.<sup>11</sup> A separate allocation of 3,000 visas from this total of 10,000 is set aside for investors who invest through a regional center pilot program that has been in effect since 1993 and has been regularly reauthorized.<sup>12</sup> Authorized visas that are not granted in any one year then lapse and are not available to augment the 10,000 visas available for issue the next

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7. For extensive discussions of the USCIS EB-5 immigrant visa program, see generally Stephen Yale-Loehr & Carolyn S. Lee, *EB-5 Immigrant Investors*, in *Immigration and Nationality Law Handbook 2007-2008* vol. 7 480-497 (Richard J. Link et al. ed., Am. Immigration Lawyers Assn. 2007); Govt. Accountability Off., No. GAO-05-256, *Immigrant Investors: Small Number of Participants Attributed to Pending Regulations and Other Factors*, <http://www.gao.gov/new.items/d05256.pdf> (Apr. 2005).

8. Yale-Loehr & Lee, *supra* n. 7, at 480.

9. *Id.* at 481.

10. *Id.* at 489.

11. *Id.* at 480.

12. *Id.* at 480.

year.<sup>13</sup>

The EB-5 program has unfortunately not been a great success in attracting foreign entrepreneurs.<sup>14</sup> At the most only about 1,000 people have sought conditional residency under this immigration category in any given year, and usually far fewer persons than this, sometimes less than 200 persons per year,<sup>15</sup> avail themselves of this option.<sup>16</sup> As of April 2005, only a total of 6,024 conditional residency visas had been granted under the EB-5 program in all of the years since its inception in 1990, an average of less than 400 visas per year, and moreover as of June 2004, barely 10% (653) of these investors who had obtained conditional residency under the program later had the condition removed and obtained permanent resident status.<sup>17</sup>

There are a number of reasons for the limited use of this program by foreign investors and why such a small proportion of those who have initially pursued this option have later been granted permanent residency. First, and most obviously, the minimal capital investment that must be put at risk is quite substantial and effectively excludes many potential foreign investors of more modest means. In addition, the other statutory requirements for qualifying for an EB-5 visa are numerous and onerous and often unclear as to their precise meaning,<sup>18</sup> and applicants who make what they believe in good faith is an investment of the requisite size and character still face considerable uncertainty as to whether they will later be found by the USCIS to have met the requirements for permanent residency.<sup>19</sup> Finally, U.S. residence for wealthy foreign investors is made significantly less attractive by the fact that the U.S., unlike most other industrialized nations, taxes all sources of a resident's income, including foreign source income.<sup>20</sup> A wealthy foreign investor moving to the U.S. could face a large tax increase<sup>21</sup> if they have substantial foreign income and the U.S. foreign tax credit provisions and any applicable tax treaty provisions together fail to shelter that income from increased taxation.<sup>22</sup>

Navigating the complexities of the EB-5 visa program is one of the most complicated subspecialties in all of immigration law, requiring a sophisticated knowledge of corporate law, tax law, investment finance, and immigration law.<sup>23</sup> The

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13. Govt. Accountability Off., *supra* n. 7, at 5.

14. EB-5 investors have, however, invested an estimated \$1 billion in capital in a variety of business between 1992 and June 2004. *Id.* at 4. Approximately 83% of EB-5 applicants are from Asia, including Taiwan, South Korea, and China, and 41% of the investments were made in California. *Id.* at 3-4. For further discussion and criticism of the EB-5 visa program, see generally Beth MacDonald, *The Immigrant Investor Program: Proposed Solutions to Particular Problems*, 31 L. & Policy Intl. Bus. 403 (2000); Curtis M. Jolley et al., *U.S. Competitive Position and Capital Investment Flows in the Economic Citizen Market: Constraints and Opportunities of the U.S. Investor Program*, 57 Am. J. Econ. & Soc. 2 (1998); Elliot Fertik, *Reforming the Immigrant Investor Program of the Immigration Act of 1990*, 15 U. Pa. J. Intl. Bus. L. 649 (1994); Ronald R. Rose, *Fixing the Wheel: A Critical Analysis of the Immigrant Investor Visa*, 29 S.D. L. Rev. 615 (1992).

15. Govt. Accountability Off., *supra* n. 7, at 8.

16. Yale-Loehr & Lee, *supra* n. 7, at 480.

17. Govt. Accountability Off., *supra* n. 7, at 3.

18. Yale-Loehr & Lee, *supra* n. 7, at 491-493; *see also* U.S. Gov. Accountability Off., *supra* n. 7, at 8-14.

19. Govt. Accountability Off., *supra* n. 7, at 3.

20. Matthew A. Melone, *Should the United States Tax Sovereign Wealth Funds?* 26 B.U. Intl. L. J. 143, 189 (2008); MacDonald, *supra* n. 14, at 413; Fertik, *supra* n. 14, at 663; Rose, *supra* n. 14, at 617.

21. MacDonald, *supra* n. 14, at 413.

22. Melone, *supra* n. 20, at 189 n. 259.

23. Yale-Loehr & Lee, *supra* n. 7, at 494.

USCIS now has pending many investor applications filed under EB-5 for permanent resident status by persons who have earlier been granted conditional resident status, and some of these applications have been pending for as long as 10 years without a ruling being issued.<sup>24</sup> In response to requests from immigrant investors who had been hurt by several restrictive 1998 USCIS rulings denying their applications for permanent residency, Congress in 2002 passed a law which mandated that the USCIS implement clarifying regulations for the EB-5 program no later than March 2003.<sup>25</sup> However, the USCIS still has not done so as of May 2009, citing difficult and competing demands on its attention as explanations for its inaction.<sup>26</sup> This delay in issuing and implementing clarifying regulations has left hundreds of holders of EB-5 conditional visas with pending applications for permanent residency remaining in a legal limbo for as long as 10 years, understandably contributing to a widespread negative perception of the program among prospective foreign investors and their attorneys and other advisers and thus discouraging the use of that immigration provision.<sup>27</sup>

The central difficulty that has hindered the effectiveness of the EB-5 program in attracting investors is the struggle that its provisions have created between investors who seek to obtain permanent resident status but wish to avoid the requirement that they put substantial capital at business risk and the USCIS's efforts to enforce the capital investment requirement, although the disincentives created by the U.S. policy of taxing the foreign source income of its residents has also played a part in reducing its attractiveness. Congress's intent in establishing the EB-5 program was to attract wealthy entrepreneurs who would invest substantial sums in the U.S., creating new jobs, and then actively manage these investments.<sup>28</sup> Many of the persons who have sought to utilize the program, however, are instead persons of more modest means, often retirees, and an industry of consultants has evolved to help such persons attempt to qualify for EB-5 visas without placing substantial capital at risk or actively involving themselves in managing a business venture, often advising those persons to proceed in a legally dubious fashion.<sup>29</sup>

The USCIS determined in a broad investigation undertaken in 1996 and 1997 that many investors seeking permanent residency under this visa program had attempted to improperly utilize debt rather than equity to finance some or all of the requisite investment, had attempted to avoid in some other fashion being personally at risk for loss of that investment, had failed to make available the full amount of the required capital for employment creation and business operation, had used a promissory note to meet part of the capital requirement that did not have a fair market value sufficient to meet that requirement, or had utilized more than one of the above approaches in an attempt to circumvent the minimum capital requirements.<sup>30</sup> It then issued in 1998 a series of four

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24. Govt. Accountability Off., *supra* n. 7, at 2–3.

25. Stephen Yale-Loehr & Lindsay Schoonmaker, *EB-5 Immigrant Investor Green Cards: An Update*, 13 *Bender's Immig. G. Bull.* 1373, 1387 (2008); Govt. Accountability Off., *supra* n. 7, at 2.

26. Govt. Accountability Off., *supra* n. 7, at 2.

27. *Id.* at 4.

28. MacDonald, *supra* n. 14, at 419.

29. *Id.* at 419–421.

30. Govt. Accountability Off., *supra* n. 7, at 11–12.

restrictive rulings denying investor petitions for permanent residency,<sup>31</sup> and as noted above has subsequently failed to issue clarifying regulations regarding those capitalization questions and other issues, such as exactly how the provision's job creation requirements can be satisfied, despite Congress' 2002 statutory command that it do so, and has left many pending applications for permanent residency languishing indefinitely.

The EB-5 visa program thus has not achieved the ambitious goals sought by its sponsors.<sup>32</sup> The several major lessons to be learned from the EB-5 experience for the design of a foreign house purchaser visa program are rather obvious. First of all, the program's equity capital requirement for purchasers of houses should not be so substantial as to discourage most potential investors and motivate other investors who are still interested in the program to seek creative ways to evade that requirement. Such attempts to circumvent equity capital requirements would inevitably lead to more stringent USCIS documentation requirements and enforcement efforts to police such conduct. The result of this greater scrutiny, as shown by the experience of the EB-5 program, would likely be extended delays in processing applications for permanent residency. Controversies over what would constitute qualifying capital investments, and the consequent delays in processing applications as these issues are litigated before the USCIS or in court, would probably undermine the attractiveness of the program to foreign investors in much the same fashion as has resulted for the EB-5 program.

Second, the nature of the capital requirement and any other requirements that must be met for investors to qualify should be very clear and straightforward, particularly with regard to the amount of equity investment to be put at risk that will be required and how this investment is to be documented. This clarity would provide potential investors with greater assurance that if they comply with those requirements then their subsequent applications for permanent resident visas will be granted in a routine and expeditious fashion. Finally, consideration should be given to changing U.S. tax law with regard to the taxation of foreign source income so as to more closely conform U.S. law to the exemption provided for such income by many other industrialized countries,<sup>33</sup> at least with regard to foreign persons that we would like to encourage to apply for immigrant investor visas.<sup>34</sup>

By way of international comparison, Canada has had in place since 1986 an "Immigrant Investor Program" that is in some regards comparable to the EB-5 program.<sup>35</sup> Under the current provisions of this program, an investor with sufficient net worth and business experience<sup>36</sup> who invests \$400,000 (in Canadian dollars) with the

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31. Yale-Loehr & Lee, *supra* n. 7, at 491-492 (summarizing the import of those rulings).

32. EB-5 investors have, however, invested an estimated \$1 billion in capital in a variety of business between 1992 and June 2004. Govt. Accountability Off., *supra* n. 7, at 4. Approximately 83% of EB-5 applicants are from Asia, including Taiwan, South Korea, and China, and 41% of the investments were made in California. *Id.* at 3-4.

33. Melone, *supra* n. 20; MacDonald, *supra* n. 14, at 448-449; Rose, *supra* n. 14, at 623-624.

34. MacDonald, *supra* n. 14, 448-449; Rose, *supra* n. 14, at 623-624.

35. Shilling, *supra* n. 1, at 7.

36. *Id.* Applicants for this program must have at least two years of business experience, net worth of at least \$800,000 (in Canadian dollars), must pass medical exams and security and criminal checks, and must have a minimum point score based on business experience, age, education, English (or French) language competence, and evidence of adaptability to Canadian society.

Canadian government for use in job creation and economic development programs, to be repaid after five years without interest, will be awarded residency status.<sup>37</sup> That program was originally targeted at about 18,000 to 20,000 investors annually<sup>38</sup> and was designed primarily to attract wealthy Hong Kong investors who were concerned about the changes that would occur when Hong Kong came under Chinese rule.<sup>39</sup> It proved to be relatively successful, attracting between \$2 billion and \$4 billion per year in investments by Hong Kong persons alone in its early years<sup>40</sup> and a total of 28,935 visas were granted under this program from 1992 through 1995.<sup>41</sup> This Canadian program has continued to be substantially more popular than the EB-5 program in subsequent years, attracting 4,544 applicants in 1998 and increasing to 7,443 applicants by 2007.<sup>42</sup>

The greater success of the Canadian program relative to the EB-5 program may be at least partly due to the somewhat smaller capital investment requirement, and also because of the fact that, while the participating investors in the Canadian program cannot receive a positive return on their capital investment, they are also not exposed to any business risk with regard to the recovery of their investment as they would be under the EB-5 program. The cost to the investors of obtaining Canadian permanent residency under this program therefore is essentially only the lost interest on their \$400,000 capital investment over the five-year required period, while EB-5 investors could conceivably lose some or all of their capital investment due to failure of their business venture. The tax exemption provided by Canada for the foreign source income of its residents<sup>43</sup> also removes a disincentive that exists under the EB-5 program for some wealthy foreign investors under U.S. tax law.

As a further comparison, both New Zealand and Australia also have programs under which immigrant investors can obtain temporary and eventually permanent residency rights. The New Zealand program is highly restrictive, both in the number of visas allowed and in the large capital investment requirements imposed. Under its "Active Investor Migrant Policy" only 1000 places are made available each year.<sup>44</sup> Within that small number of places, priority is given to those investors who qualify as "Global Investors" by investing at least \$20 million (New Zealand dollars) in New Zealand, with at least \$5 million of this sum being "active investment," or to those who qualify as "Professional Investors" by investing at least \$10 million in New Zealand, with at least \$2 million of this sum being active investment.<sup>45</sup> Any remaining places are

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37. *Id.* This Canadian program does not allow the investors to reside in Quebec. Quebec has its own similar provincial program, with essentially the same capital investment and other requirements, in this case lined to Quebec investment and residence. See Henry J. Chang, *Canadian Immigration: Canadian Immigrant Investor Program (2006)*, <http://www.americanlaw.com/cdniniv.html> (last accessed Apr. 1, 2010).

38. Jolly, *supra* n. 14, at 159.

39. Fertik, *supra* n. 14, at 652.

40. *Id.*

41. Jolly, *supra* n. 14, at 163 tbl. 1.

42. Shilling, *supra* n. 1, at 7.

43. MacDonald, *supra* n. 14, at 413.

44. Immigration New Zealand, *Invest Migrant Investment Policy—Previous Policies for Investors*, <http://www.immigration.govt.nz/migrant/stream/invest/investors/> (last updated Aug. 4, 2009).

45. *Id.* An "active investment" is defined as an investment of \$100,000 or more in a new enterprise, or \$200,000 or more in a previously existing enterprise, and which results in the principal applicant receiving at least a 10% shareholding. Immigration New Zealand, *Active Investment*, <http://glossary.immigration.govt.nz/>



open to application by “General Investors” who are willing to invest at least \$2.5 million in New Zealand, and who have at least \$1 million in “settlement funds.”<sup>46</sup> There are also substantial New Zealand maintenance-of-investment and time-in-residence requirements imposed on these applicants for them to eventually obtain permanent residency,<sup>47</sup> as well as health, character, business experience, and facility with English requirements and upper age limitations.<sup>48</sup>

Australia has in place an “Investor Provisional Visa” program that is somewhat more liberal than the comparable New Zealand program. Under this program an investor with at least three years of prior business experience and who throughout at least one of the prior five years before applying for temporary residency was directly involved in managing an Australian investment of at least \$1.5 million (Australian dollars), and who has, alone or with their spouse, net assets of at least \$2.25 million, and who is under 45 years of age and has “vocational English” facility, can obtain a temporary residence visa.<sup>49</sup> After four years of maintaining that investment the investor can then apply for permanent residence.<sup>50</sup> The tax exemption provided by Australia for the foreign source income of its residents<sup>51</sup> also removes a disincentive that exists under the EB-5 program for some wealthy foreign investors under U.S. tax law.

### III. GREEN CARDS FOR FOREIGN HOUSE PURCHASERS

#### A. *The Lefrak and Shilling Proposal*

Lefrak and Shilling presented only the barest outlines of their proposed foreign house purchaser visa program in their short *Wall Street Journal* editorial. Shilling has, however, also published a somewhat more extensive and detailed Background Paper relating to that editorial<sup>52</sup> and I will draw from both the editorial and the Background Paper in outlining their proposal.

Lefrak and Shilling recommended in their editorial that foreigners who buy “houses of minimal value (not shacks)” be granted upon making that purchase “temporary resident status,” and then be awarded permanent resident status after five

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activeinvestment.htm (last accessed Apr. 19, 2010).

46. Immigration New Zealand, *supra* n. 44.

47. To obtain permanent residence, Global Investors must maintain the investment funds in New Zealand for at least four years and spend at least 73 days in New Zealand during each of the last three of those four years. *Id.* at 1-2. Professional Investors must also maintain the investment funds in New Zealand for four years and spend at least 109 days in New Zealand during each of the last three of those four years. *Id.* General Investors must also maintain the investment funds in New Zealand for four years and spend at least 146 days in New Zealand in each of the last three of those four years. *Id.*

48. Immigration New Zealand, *Invest Migrant Investment Policy—An Overview*, <http://www.immigration.govt.nz/migrant/stream/invest/migrantinvestment/> (last updated July 27, 2009). Global Investors, however, do not need to meet any English language facility requirements nor meet any upper age limitations. *Id.*

49. Acacia Immigration Australia, *Business Migration, Investor Provisional Visas*, <http://www.acacia-au.com/investor-provisional.php> (last accessed Feb. 13, 2010). If, however, the investment is sponsored by an Australian state or territorial government, then the minimum investment requirement is reduced to \$750,000, the investor minimum net worth requirement is reduced to \$1.25 million, the upper-age limitation is increased from 45 to 55 years of age, and the English language facility requirement is waived. *Id.*

50. *Id.*

51. MacDonald, *supra* n. 14, at 413.

52. Shilling, *supra* n. 1.

years if they still owned the house and “maintained clean records.”<sup>53</sup> The purchasers would not be required to live in those houses over that period, but they would be prohibited from renting the houses to others,<sup>54</sup> presumably with a temporary exemption allowed from this no-rental restriction for those persons who purchased houses that were already under lease contracts that would not by their terms terminate upon sale until those leases eventually expired. There was no discussion in the editorial of the possible impediment posed for their proposal by the U.S. tax treatment of its residents’ foreign source income.

That is as much detail regarding their proposal as was presented in the editorial. The Background Paper elaborates a bit further, but still leaves many important issues unaddressed. There Shilling states that the minimal house value requirements referred to in the editorial should be “governed by” the median prices that are prevailing in the various metropolitan areas<sup>55</sup> which, as of the third quarter of 2008, ranged from less than \$100,000 in some smaller Midwestern cities to over \$600,000 in some California metropolitan areas.<sup>56</sup> He did not, however, offer a specific percentage of local median prices that he believed should be used as the qualifying price floor, nor did he propose any minimum equity investment criteria or limitations on the number of visas that can be issued by the USCIS. He argued that purchasers who have been granted temporary resident status should be allowed to “trade” their initially-purchased houses and still eventually obtain permanent residence, but only if they trade for houses of the same or greater value.<sup>57</sup> He once again suggested that an additional requirement for obtaining permanent resident status be that the purchasers maintain “clean criminal records” throughout their conditional residency period.<sup>58</sup>

Shilling also noted that purchasers who utilize mortgage financing for part of the purchase price “could be required” to conform to Fannie Mae and Freddie Mac standards for obtaining mortgage loans, such as minimal down payment, income, asset, and/or credit score requirements,<sup>59</sup> although he did not insist on such requirements. The Background Paper reaffirms the editorial’s recommended prohibition on purchasers renting out the houses, based on the rationale that this no-rental restriction would better serve to “remove excess houses from the market.”<sup>60</sup> It does not, however, address the contours of any temporary exemption that might be provided for purchasers of houses that are under ongoing lease contracts, nor how such an exemption might be designed to prevent circumvention of a no-rental restriction through prior execution by sellers of long-term leases in connection with sales to foreign purchasers. The Background Paper also failed to address the issue of the U.S. taxation of the foreign source income of its residents.

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53. Lefrak & Shilling, *supra* n. 3, at A15.

54. *Id.*

55. Shilling, *supra* n. 1, at 4.

56. *Id.* chart 21.

57. *Id.* at 5. I assume that by the term “trade,” Shilling is referring to all situations in which a purchaser sells the initial house they have purchased and then uses the net proceeds to purchase another house, and not only those few situations that involve an actual barter-style exchange of two properties.

58. *Id.* at 4.

59. *Id.* at 5.

60. Shilling, *supra* n. 1, at 5.

Finally, their proposal does not address a number of other implementation details. For example, it does not address whether persons who are already illegally in the U.S. would be eligible to participate in the program or whether it would only be available to persons who were abroad when their conditional residency visas were filed for and granted. Nor does it address whether there would be any special consideration given to persons who seek a temporary visa so as to be able to first come to the U.S. and locate a suitable property and, perhaps, explore their job prospects as well, before they purchase the property and apply for a conditional residency visa.

### *B. My Proposal*

Let me set forth and discuss below a revised and much expanded version of the Lefrak and Shilling proposal. I have drawn upon those features of their proposal that I find to be most valuable, but I have also attempted to flesh out their proposal with regard to a number of matters that they leave unaddressed and I have made some changes that are intended to incorporate the lessons learned from the relatively unsuccessful EB-5 investor visa program.

#### 1. Eligibility of All Foreign Applicants

First of all, I would recommend that the program be available not only to foreigners currently residing abroad but also to those foreigners currently present in the U.S., whether or not those persons are legally present, so long as they meet the basic character and absence of a criminal record criteria traditionally applied to applicants for residency. My goal here is to draw upon the largest possible pool of potential foreign purchasers to try to make the program as successful as possible in stabilizing U.S. housing prices. I recognize, however, that some may feel that persons who have not respected existing immigration law are of undesirable character and should not be allowed to avail themselves of this new route to permanent residency. This is not a wholly unreasonable position to take, but I think that the normal character criteria applied to program applications will allow for sufficient screening of the population of illegal immigrants who seek to obtain residency in this fashion to address the legitimate underlying concerns raised by allowing those persons to apply. I also recognize that anti-terrorism concerns may at times call for special scrutiny of applicants from certain foreign nations, but I would hope that where necessary such scrutiny could be carried out on an individual basis, rather than by summarily excluding all applicants from a particular country from participation in the program.

#### 2. A \$40,000 Minimum Equity Investment Requirement Rather than a Larger and More Complex Capital Investment Requirement.

I would recommend that the program impose a straightforward and relatively small equity investment requirement that was linked to local median real estate prices and subject to restrictions on financing the remainder of the purchase price. I suggest for the reader's consideration a minimum equity capital investment requirement of \$40,000, not including any closing costs involved in the purchase nor any conditional residency application fees incurred, although I recognize that this particular figure is rather

arbitrary and could be set either higher or lower than this amount. I have chosen a \$40,000 figure because such an equity investment requirement would be small enough to be feasible for many potential foreign investors of relatively modest means to undertake, but still large enough to preclude the purchase of inexpensive (and perhaps even non-existent) “shacks” or decrepit mobile homes as a ploy to cheaply obtain green cards which, if allowed, would not meaningfully increase the demand for legitimate housing. This ploy to minimize the amount of investment is something that Lefrak and Shilling also sensibly seek to prevent.

I do not think that this \$40,000 capital investment requirement need be accompanied by imposition of any mortgage financing restrictions such as are suggested by Shilling. Normal bank lending guidelines now being applied in the current strict underwriting environment would presumably require these foreign investors to meet meaningful income, asset, and credit worthiness guidelines to obtain mortgage financing and to contribute additional equity beyond the mandated \$40,000 minimum investment to meet the usual 10% minimum down payment guidelines to obtain mortgage loans in excess of \$360,000 for more expensive properties. As to documentation requirements, I think that it should be sufficient for a foreign home purchaser seeking temporary resident status to submit, along with their basic visa application presenting evidence of good character and a clean criminal record, a certified copy of the deed to the property along with some verifiable documentation that they have contributed at least \$40,000 of equity capital towards that purchase. A typical applicant could presumably satisfy the equity documentation part of this requirement by submitting a copy of the mortgage documents evidencing the purchase price, the buyer’s equity contribution, and the amount of the mortgage loan. A purchaser who purchased the property outright for cash could instead submit verifiable documentation of the transaction and an appraisal as to the property’s value.

Given the prospect of further home price declines over the next few years, an issue arises as to whether a purchaser should be required to contribute additional equity capital should the market value of the house decline sufficiently after the purchase so that the buyer’s equity position is reduced below \$40,000. I am inclined to favor reducing a foreign purchaser’s minimum equity requirement to the extent that their initial equity stake was reduced in value to below \$40,000 due to market price movements (rather than due to the purchaser obtaining additional loans also secured by the property) so as to make the program more attractive to investors by removing this margin call-type risk of having to contribute more capital due to market price declines and to avoid the need for having regular property reappraisals to police compliance with any such capital maintenance requirements.

My program is largely targeted at foreigners that are not now present in the U.S. If one wanted to also encourage participation by those numerous persons who are now illegally present in the U.S. but who have nevertheless found gainful employment here and have accumulated some savings, one would likely want to reduce the capital investment requirement below \$40,000. A minimal investment requirement of only, say, \$10,000 to \$15,000 would make it much more feasible for many of these persons to purchase a modest home, and the prospects of legalizing their resident status might well

encourage many such persons to purchase homes rather than continue to rent. On the other hand, unfortunately, such a low capital requirement might encourage many upper-middle class or wealthy foreigners to attempt to "buy residency" in the U.S. with the purchase of a decrepit and low-cost property that they would thereafter perhaps ignore altogether, rather than invest in a normal house, which would undercut the ability of the program to support the prices of legitimate housing. One could perhaps structure the program to "price discriminate" in favor of those foreign persons illegally in the U.S. and require larger minimum investments by foreign persons now residing abroad, but such a framework would create a perverse incentive for people to first illegally enter the U.S. before applying for the program. The necessity to police against such maneuvers might well be beyond the capability of the USCIS to effectively enforce, given the EB-5 program experience.

### 3. Special Availability of Temporary Visas

Some of the foreign persons who might avail themselves of this opportunity to obtain U.S. residency either are independently wealthy or are retired and therefore would not need to consider employment opportunities in the U.S. as part of their decision whether to participate. In addition, some persons might be willing to remain abroad initially and have local agents locate a suitable property for them to purchase to participate in the program. However, one would think that most potentially interested foreigners would want to first come to the U.S. to find a suitable property, and possibly to also do some preliminary research regarding their employment opportunities in the U.S. and perhaps even try to arrange for employment conditional on their obtaining conditional residency rights through the program. In particular, in some instances the availability of mortgage financing may be impacted by whether or not these foreign purchasers do already have solid employment commitments from U.S. employers, which would effectively require some of those purchasers to spend some time in the U.S. pre-home purchase and pre-residency application. The needs of such persons may often be accommodated by the existing tourist visa programs. In some instances, however, these programs may be inadequate. If so, it may be necessary to include in this program an auxiliary and streamlined process for obtaining a tourist visa upon providing evidence of the financial capability to make the \$40,000 minimum capital investment if a suitable property is found and if suitable employment arrangements are lined up.

### 4. Purchaser Rights to Subsequently Exchange Properties and a Three-Year Conditional Residency Period

I would go along with Lefrak and Shilling's suggestion that a foreign house purchaser would then be free to sell that house and buy another house without compromising their progress towards permanent residency so long as they maintained at all times the required minimum equity capitalization of \$40,000.<sup>61</sup> I agree also with their

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61. I have recommended that if the equity investment of a purchaser who initially has invested \$40,000 or more is reduced below that amount because of adverse market price movements in the value of the property, the purchaser should not be required to augment that capital investment to qualify for permanent residency. *See supra* pt. III(B)(1).

suggestion that, after the original purchase, a foreign purchaser who could document that he had invested the requisite amount for the entire required holding period and that had maintained a clean criminal record for that period could petition for the award of permanent resident status.

I disagree, however, with their proposal of a five-year required minimum ownership period before the purchase could apply for permanent residency. While that is also the minimum period required by Canada under their Immigrant Investor Program, it is substantially longer than the two-year requirement now imposed by the USCIS's EB-5 program. In order to make this new visa program attractive to foreign investors, I would recommend requiring only a three-year period of home ownership before the investor can petition for permanent residency, although I would be comfortable with any required ownership period that is between two years and five years in length. After permanent resident status was granted, the purchaser would then be free to liquidate their investment, if they choose to do so, without affecting their immigration status. Presumably many, if not most, of these persons would not only maintain their housing investment after obtaining permanent residency but would also seek to eventually obtain full U.S. citizenship.

#### 5. An 85,000 Annual Limit on the Number of Conditional Visas that Can Be Granted Under This Program

Lefrak and Shilling do not discuss the merits of having any numerical limits imposed on the number of foreigners who could take advantage of this program. Their editorial and Shilling's Background Paper each suggest that they are of the view that possibly as many as 2.4 million or more foreign investors might seek to obtain a visa through such a program<sup>62</sup> and they do not propose any limitations that would prevent that many conditional visas from being issued by the USCIS. I frankly think that they are wildly overoptimistic as to the likely attractiveness of such a program to potential foreign house purchasers if the program was to incorporate any reasonably substantial minimum capital investment requirement. I seriously doubt that, even with my relatively modest minimum equity requirement of \$40,000, there would be anywhere near such a dramatic response, particularly given the likely continuance of the U.S. policy of taxing the foreign sources of income of its residents, at least in the early years of the program when the current high rate of unemployment in the U.S. will likely deter many potential immigrants. Even were such a program to be so spectacularly popular, allowing such a massive influx of immigrants in a short period of time would obviously present some significant adjustment problems for the more heavily affected communities and would appear to be unwise. I therefore suggest initially limiting the program to a maximum of 85,000 conditional visas per year. I have tentatively chosen that particular number because it is equal to the number of H-1B visas that are now granted to foreigners each year who qualify for those visas because of their special skills and education.<sup>63</sup> This

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62. Lefrak & Shilling, *supra* n. 3, at A15 ("If new immigrants bought the 2.4 million excess houses at today's [prices] . . ."); Shilling, *supra* n. 1, at 9 ("[The Lefrak & Shilling proposal] could vastly reduce . . . excess house inventories.")

63. Shilling, *supra* n. 1, at 6.

annual limitation could be revisited and revised upwards or downwards after some experience with how popular the program proves to be and how smoothly it is operating. I would definitely not recommend including a highly restrictive limitation on the number of visas that can be granted, such as the 10,000 visas per year limit that is now imposed under the EB-5 program, since such a modest influx of foreign home purchasers would not be effective in helping to stabilize housing prices.

#### 6. No Restrictions Imposed on Foreign Purchasers Renting Out the Houses Purchased

I definitely do not favor the recommendation made by Lefrak and Shilling that, while foreign purchasers would be permitted to not reside in those houses while progressing towards permanent residency, they should be prohibited from renting the houses out to tenants. The freedom conferred on purchasers to not reside in these houses if they choose not to do so makes perfect sense if we wish to make the program as attractive as possible to potential investors. But I think that an accompanying no-rental restriction would prove difficult or even impossible for the USCIS to effectively enforce, particularly given the need for providing temporary exemptions for purchasers of houses already under ongoing lease contracts, a procedure that might easily be abused by the sellers, in concert with the foreign purchasers, entering into long-term lease contracts on the properties just before their sale. Perhaps even more importantly, this no-rental restriction is not necessary for the program to have the desired effect of increasing the demand for U.S. housing, nor would it even contribute to achieving that objective. A no-rental restriction would likely place some upward pressure upon the average level of rents, but it would not affect the program's ability to reduce the excess supply of housing units for sale and thus stabilize housing prices.

Let me explain my reasoning here in some detail. The effects of an influx of foreign purchasers on U.S. housing purchase and rental markets are each likely to be rather complex and somewhat uncertain, they would be made even more complicated if a no-rental restriction is imposed upon those purchasers. Assume initially, for the sake of argument, that a foreign home purchaser visa program is adopted using my \$40,000 minimum equity contribution criterion and that in each year my entire recommended initial quota of 85,000 temporary visas is issued to foreign home purchasers. This would result in an aggregate equity contribution of at least \$3.4 billion per year,<sup>64</sup> and possibly significantly more than this amount to the extent that foreign purchasers choose to make larger equity investments than the minimum that is required or choose to buy more expensive homes that would require them to make larger than \$40,000 down payments to obtain mortgage financing. This influx of 85,000 new house buyers per year would reduce the current excess supply of 2.4 million homes noted by Shilling<sup>65</sup> by approximately 3.5% per year.<sup>66</sup> These new home purchases would therefore make a

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64.  $85,000 \times \$40,000 = \$3.4$  billion.

65. Shilling, *supra* n. 1, at 1.

66. The 85,000 homes purchased would constitute approximately 3.5% of the posited excess supply of 2,400,000 homes. *Id.*

modest but helpful contribution to the effort to halt the decline in U.S. housing prices<sup>67</sup> as well as making a modest contribution to reducing the large U.S. balance-of-payments deficit. There would also likely be some additional demand for housing generated as an indirect effect of these initial purchases, which I will discuss more fully below.

What would be the significance of imposing a no-rental restriction on these foreign purchasers? Would such a restriction further enhance the program's ability to reduce the excess supply of housing? This is a difficult question, and to answer it one needs to consider the actions of not only those new foreign purchasers, but also the actions of the sellers of the properties and of any tenants that have been renting the properties from those sellers.

Some of those sellers will not be residing in those houses at the time of sale and may or may not choose to invest their sale proceeds in buying another house. I will henceforth refer to these sellers as "non-resident sellers." Those sellers who did reside in these houses as of the time of their sale (resident sellers) and any persons that were living in any of these houses as tenants of non-resident sellers at the time of their sale (tenants) will have no choice but to make new housing arrangements, either purchasing or renting new housing or possibly renting the same homes back from the foreign purchasers.

Assume for a moment that this program incorporates a no-rental restriction for those foreign purchasers. The initial effect of these purchases would reduce the excess supply of housing offered for sale by 85,000 units per year. Now some of these 85,000 houses will be vacant when purchased, but some will be occupied by resident sellers and some will be occupied by the tenants of non-resident sellers. Those resident sellers and tenants will now have to move out after the properties are sold,<sup>68</sup> either purchasing or renting new housing, and some of the non-resident sellers may choose to reinvest their sale proceeds into buying new houses. To the extent that these sellers and tenants choose to purchase new homes, this will further reduce the excess supply of housing offered for sale, an additional indirect benefit of the program. However, if some of these displaced resident sellers choose to become renters, at least temporarily,<sup>69</sup> and if the displaced tenants almost all choose to remain renters, which appears likely, this will increase somewhat the demand for rental units. In addition, to the extent that some of the 85,000 homes purchased by foreign buyers were previously rented out by non-resident sellers and now cannot be leased, this will now decrease the supply of rental units. These supply-reducing and demand-increasing changes in the rental market will together place upward pressure on rental prices. An increase in average rents will not affect the total wealth of landlords and tenants taken together, but will lead in the short-term to some redistribution of wealth from tenants as a class to landlords, and will provide some

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67. Moreover, if the demographic profile of these foreign home buyers is at all similar to the predominantly Asian population that has availed itself of the EB-5 program, one would expect a disproportionate proportion of those purchases to be in the West Coast and Sunbelt communities most favored by Asian immigrants and that have in many instances suffered more severe housing price declines than the national average. *See* Govt. Accountability Off., *supra* n. 7, at 2. Thus the additional demand for housing would have the most impact in areas where the price declines have had the greatest consequences.

68. I ignore, for the purposes of this explanatory hypothetical, the fact that some of the sellers' tenants will have leases whose terms will bind the new owners for a period of time.

69. This appears quite likely given recently declining rates of home ownership. Shilling, *supra* n. 1, at 12 chart 5.



additional longer-term incentive to landlords to expand the stock of rental housing.

Assume now that this program is fully subscribed but does *not* incorporate a no-rental restriction. Once again, to the extent that the sellers and former tenants then choose to purchase new houses, there will be further reduction in the excess supply of houses for sale, just as there will be if the purchasers are subject to a no-rental restriction. The presence or absence of a no-rental restriction on foreign purchasers is irrelevant to the decisions of sellers or tenants whether to buy new houses.

The impacts of these house purchases by foreigners upon rental prices, however, is now made much more difficult to predict if a no-rental restriction is not imposed. Perhaps some significant proportion of these foreign purchasers will now likely choose to rent out their properties, thus increasing the overall supply of rental units above what it would have been had they been placed under a no-rental restriction. However, how this will play out in terms of impacting rental prices depends on how the 85,000 house sellers and their tenants behave.

Let me explore this scenario a little further. First, assume for the sake of argument that the proportion of foreign purchasers who choose to rent out their houses coincidentally turn out to be exactly the same as the proportion of those houses that were previously rented out by non-resident sellers. In that case, the supply of rental units will remain unchanged after the 85,000 house purchases. Unless the demand for rentals is increased by a significant number of displaced resident sellers now choosing to rent rather than to purchase another house (along with all of the displaced tenants seeking new rental abodes), average rents are likely to remain unchanged. If, however, the proportion of foreign purchasers who choose to rent out their houses exceeds the proportion of those houses that were formerly rented, the supply of rental units will be increased after the purchases and the likely effect will then be downward pressure on rental prices. Similarly, if the proportion of foreign purchasers who choose to rent out their houses is smaller than the proportion of those houses that were formerly rented, there will be a reduced supply of rental units available, leading to upward pressure on rental prices.

The key result of this rather complicated analysis to keep in mind is that the amount of indirect additional demand for purchasing housing that will result from the initial 85,000 house purchases by foreigners depends *not* on how many of these houses are then rented out, if any, but on what the sellers of those houses then choose to do with their sale proceeds and on whether and to what extent former tenants of those properties then choose to purchase homes rather than remaining as renters. To the extent that these sellers and former tenants decide to buy new houses, this will further increase the demand for purchasing housing. To the extent that these sellers and former tenants choose to become (or remain) renters, this will not increase the demand for purchasing housing. The post-purchase behavior of the foreign home purchasers that might be affected by a no-rental restriction is irrelevant to these buy-or-rent choices made by displaced sellers and former tenants and to the reinvestment choices of non-resident sellers, and thus will not affect the resulting amount of additional indirect demand for purchasing houses that results.

A no-rental restriction imposed on the original foreign purchasers, however, will

pretty much guarantee that there will be upward pressure on rental prices since, as discussed above, the demand for rentals will likely be expanded at least slightly as some displaced sellers now elect to rent along with virtually all former tenants while the supply of rental units will definitely be reduced as some former rental homes are now taken out of that usage, at least once existing leases expire. If there is no restriction imposed upon the foreign purchasers renting out the houses, however, then whether rental prices are pushed up or down or will remain unchanged, as discussed above, cannot be determined until we see how both the foreign purchasers and the sellers and their former tenants behave after the transactions take place.

Since the major goal of this proposed foreign home purchase visa program is to reduce the excess supply of U.S. housing offered for sale and not to place upward pressure on rents, there is no need to impose a difficult to enforce and burdensome no-rental restriction on those foreign purchasers since, as I have shown, such a restriction will not impact at all the number of additional indirect home purchases that will result from the program. Finally, a no-rental restriction would also create a painfully obvious economic inefficiency as those houses that are purchased by foreigners who choose not to reside in them will now have to be left entirely vacant rather than rented out. Any new visa program should be designed to avoid creating such an obviously wasteful side effect of completely unutilized housing, if at all possible.

#### 7. No Proposed Change in Tax Law

The current U.S. policy of taxing the foreign source income of its residents discourages those potential foreign house buyers who have significant amounts of foreign source income that would now be subject to additional taxes should they obtain U.S. residency by pursuing this new visa program to the extent that they would be unable to fully shelter that foreign income from increased taxation under applicable tax treaties or the U.S. foreign tax credit provisions.<sup>70</sup> A change in U.S. tax law that would broadly exempt the foreign source income of all of its residents from U.S. taxation would remove this disincentive. However, such a change could easily create additional opportunities for tax evasion by persons with the ability to shift the recognition of income across national borders and would also have major adverse implications for U.S. federal tax revenues during a period of great concern over rising government deficits. Such a sweeping tax reform proposal would therefore likely be a non-starter politically in the current environment. A much more limited exemption from taxation on foreign source income that is allowed only for immigrant investors who choose to pursue this proposed foreign home purchaser visa program would not have such broad implications. However, there may well be substantial political resistance to giving foreign immigrant investors tax breaks that are not accorded to U.S. citizens or non-citizen residents who hold other

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70. In order to more precisely determine just how significant a disincentive to participating in such a program would be created by US tax policy in this area, it would be necessary to conduct an extensive, country-specific analysis that took into account differences in marginal tax rates and the applicable tax treaties and US foreign tax credit provisions relating to each country of origin, then apply this information to empirical data regarding the amounts and composition (e.g. active or passive income) of the non-US income of potential foreign home purchasers currently residing in each of these countries of origin. Such a detailed empirical analysis of potential tax consequences is beyond the scope of this short article.

forms of visas,<sup>71</sup> even if it is clear that such a tax preference is the necessary “price” for having many of those foreign investors participate in this new visa program. I have therefore not included in my proposal any recommendation for a change in U.S. tax law to exempt the foreign source income of some or all residents from taxation, even though I believe that such a change might significantly increase investor interest in the program, because I do not believe that such a change is politically feasible at this time.

#### 8. Brief Summary of My Proposal

Let me here briefly summarize the main features of my proposal. The USCIS would initially be authorized to issue up to 85,000 conditional residency visas a year to foreign purchasers of U.S. houses who can meet the character and clean criminal record qualifications and who initially invest at least \$40,000 of equity capital in the purchase of a U.S. house. Those foreign purchasers would be free to live in those houses or not as they choose, and also free to rent them out if they choose to do so. If they continuously maintain their equity position<sup>72</sup> in that house or in another US house for a three-year period, they would then be eligible to apply to have the condition removed and permanent residency status granted. After that grant of permanent residency they would have no further equity ownership obligations. The proposal does not include any recommended changes in the current regime of U.S. taxation of the foreign source income of its residents, subject to applicable tax treaties and foreign tax credit provisions.

#### C. Discussion of the Proposal

My proposed foreign house purchaser visa program, if adopted, is likely to prove popular with many foreigners of moderate means who often expect to have quite limited foreign source income once they immigrate to the U.S. (and thus are not significantly deterred by the U.S. tax laws with regard to the foreign source income of its residents) and who often want to obtain U.S. resident status but are unable to qualify under the current stringent immigration restrictions. If the program did prove attractive enough to such potential foreign investors to result in somewhere in the neighborhood of 85,000 home purchases per year and, as discussed above, also indirectly led to some additional house purchases by sellers or former tenants, this would make a modest but significant contribution to the goal of stabilizing housing prices as well as help ameliorate our chronic balance-of-payments deficit. Since the proposal does not include a difficult to enforce and unnecessary no-rental restriction, and since the other application and documentation requirements are quite straightforward and easily verifiable by USCIS, the program would provide these economic benefits to the U.S. economy at relatively little enforcement cost to taxpayers.

I recognize that my proposal for granting residency visas to foreign home

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71. See Fertik, *supra* n. 14, at 672, 673 n. 132; MacDonald, *supra* n. 14, at 448–449.

72. I have recommended that, if the equity investment of a purchaser who initially has invested \$40,000 or more is reduced below that amount because of adverse market price movements in the value of the property, the purchaser should not be required to augment that capital investment to qualify for permanent residency. See *supra* pt. III(B)(1).

purchasers would no doubt encounter substantial opposition. I can foresee that this proposal might reasonably be criticized for several reasons. First of all, some critics may believe that such a visa program is, for one reason or another, likely to prove to be relatively unpopular with potential foreign investors and thus will not lead to significantly increased demand for U.S. housing. Second, some opponents may concede that the program would probably be popular with foreign investors, and thus might serve to help stabilize U.S. housing prices, but will nevertheless criticize the proposal on the basis of other adverse economic consequences that they fear it might engender. Finally, some persons may criticize the proposal on broader, non-economic grounds that tie into overarching and highly controversial principles of immigration policy. Let me address in turn each of these potential objections.

It is certainly possible that such a visa program might prove to be relatively unpopular with those foreign investors who envision also finding employment in the U.S. once they purchase a home and obtain residency rights, at least in the near term when U.S. unemployment rates are likely to persist in the discouraging 10% range.<sup>73</sup> If the program was poorly subscribed by those foreigners of working age who did not have independent means of support because of the current unfavorable U.S. employment situation, then it probably would not result in significant support for U.S. housing prices. The U.S. policy of taxing the foreign source income of its residents is another obvious deterrent to the participation of those potential foreign investors that do have substantial non-U.S. income that would not be sheltered from increased taxation by applicable tax treaties or foreign tax credit provisions. In addition, it may be that even the relatively modest \$40,000 equity capital requirement that I have suggested might be large enough to discourage many potentially interested foreign investors, particularly in the current economic climate in which the employment opportunities available to U.S. residents are much less attractive than they were in the recent past. It is conceivable that investor interest in the program might be as tepid as it has been for the EB-5 program.

I do not believe, however, that this argument regarding the potential ineffectiveness of this program either should or would ultimately prove to be effective in persuading legislators and others to oppose such a proposal. First of all, the claim that the program is likely to be unpopular is not very plausible. In my opinion such a program would likely prove to be far more popular than the very restrictive EB-5 program, perhaps by even a couple of orders of magnitude, given the much smaller and more straightforward capital investment requirement. This smaller investment requirement would make the program a viable option for many foreign persons of relatively modest means who will not have sufficient foreign source income after they move to the U.S. for our current tax policy to be a significant deterrent. In addition, if foreign investor interest did prove to be relatively limited, and the program was therefore undersubscribed and ineffective in supporting house prices, it would then also impose few if any burdens on anyone. In other words, little would be lost if the program was implemented and then failed to achieve its objective, so why not give it a try? The fixed costs of setting up

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73. Although, given the worldwide nature of the current recession, it is not clear that the employment prospects in the US have declined relative to those prospects in the countries which potential foreign home purchasers now reside.

USCIS procedures and personnel for processing anticipated visa applications under this program would be relatively minor, and the marginal costs of processing those applications would also be relatively minor if there turned out to be only a small number of applications filed. There would also be few if any burdens imposed by purchasers on the communities in which the home purchases took place if there were only a few such purchases.

A second group of criticisms that would likely be offered against my proposal would be made by those opponents who would concede its likely popularity and effectiveness in helping to stabilize U.S. housing prices, but who would also point out some adverse economic consequences of the program that would arguably outweigh these benefits. One such argument is that if one takes an international rather than a national perspective, the proposal has somewhat of a zero-sum character. That is, the benefits for the US housing market of an influx of foreign capital might be largely or even wholly offset in global welfare terms by the roughly equivalent withdrawal of capital from, and consequent downward pressure on, asset prices in various foreign capital markets. In addition, the benefits to the U.S. economy of the skills brought by many of these foreign purchasers and their dependents to the U.S. labor force might be largely offset by the comparable losses to the labor forces of various foreign economies. To the extent that global rather than national interests are given primacy, these arguments emphasizing the proposal's potentially adverse foreign consequences do have some merit and undercut the proposal.

From a narrower U.S. national perspective, one could also make the related distributional argument against this proposal that the annual influx of a possibly fairly large group of relatively affluent (and thus likely relatively well-educated, on average) foreign persons into U.S. employment markets, persons who have not been screened by restrictive H1-B visa criteria so as to avoid direct competition with available U.S. workers for attractive positions, would lead both to displacement of some U.S. workers by foreign workers and perhaps also to some downward pressure on wages in those sectors. There is some force to this argument, although it is vulnerable to the standard free market-oriented rejoinders that greater international freedom of choice and movement, in this context as well as others, will likely enhance overall economic efficiency even though some persons may be injured. The benefits to employers of having access to a larger pool of potential employees will, due to market forces, to a large extent be passed along to their customers as lower prices for goods and services, and it is widely recognized that the most efficient way to address such distributional concerns is through adjustment assistance of one form or another to those injured by the adjustments rather than through imposing barriers to trade or movement of persons. There are, of course, likely to be at least minor distributional implications for the residents of a community in which this program is effective in supporting housing prices, since those higher prices will affect the relative wealth of buyers and sellers of houses as well as have some impact upon local property tax revenues and the local services thereby provided, but such distributional impacts are likely to be minor in size and not of sufficient concern to undercut merits of the program.

The more troubling criticisms of such a program, however, are in my opinion not

these various economic arguments that can be made against its adoption, but a third group of non-economic and (at least facially) more principled arguments. For example, there are some commentators who argue that the current rate of immigration into the U.S. is already too high and that any programs that would further increase such immigration should be opposed. Obviously some of this blanket opposition to increasing immigration would be based on unseemly xenophobic and nativist or even racist grounds, particularly given that the experience under the EB-5 investor visa program suggests that participation in this new program would be disproportionately Asian.<sup>74</sup> However, reasonable and non-racist arguments can also be made that the high current rates of immigration, when one considers illegal as well as legal immigration, exceed our nation's ability to effectively assimilate immigrants into our economy and society and that, at least at this time, further expansion of immigration would be unwise. These critics do have a point that should be addressed in any debates over the adoption of a program along the lines that I have proposed, although in response to such criticisms one could certainly argue that those foreign persons who are in a financial position to meet the minimal capital requirements of my proposal are on average likely to more easily assimilate into our economy and society than are typical illegal immigrants who often have very limited educations and financial resources.

Another potential group of critics of my proposal are the minority of persons who favor the U.S. making a radical policy shift to more of an "open borders" immigration regime which would allow all interested persons who met basic character and clean criminal record criteria to establish U.S. residency.<sup>75</sup> Some of these open borders advocates might criticize my proposal, even though it would allow significant additional immigration that is now prohibited to take place, because the proposal admittedly does not directly confront and thereby arguably implicitly accepts as a foundational premise the legitimacy of the current stringent immigration criteria. It thus could be argued that my proposal would serve to indirectly support and further legitimize an overly restrictive and fundamentally ill-advised immigration system. My response to those persons is that movement to an open borders regime does not appear to be at all politically feasible at this time, given public concerns about competition for jobs, illegal immigration, and terrorism (whether or not those concerns are well-founded), and for open border advocates to oppose a proposal that would allow a significant number of foreigners who are now precluded from immigrating to do so is to allow the perfect to be the enemy of the good, so to speak.

Finally, some persons would likely oppose my proposal on the basis that it would essentially allow wealthy foreigners to "buy their way in" to the U.S. when they do not merit such status on the basis of traditional immigration criteria.<sup>76</sup> Those persons would

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74. Govt. Accountability Off., *supra* n. 7, at 3–4.

75. For an extensive defense of this "open borders" position on immigration policy, see Kevin R. Johnson, *Opening the Floodgates: Why America Needs to Rethink Its Borders and Immigration Laws* (N.Y.U. Press 2007).

76. This position was articulated at some length by Senator Dale Bumpers of Arkansas in the 1989 Senate floor debates regarding the adoption of the EB-5 provision. See 135 Cong. Rec. 14286–14293 (July 12, 1989).

What this bill says is they do not even have to love the flag [to be allowed to reside in the U.S.]. All they have to do is have \$1 million. . . . The road to the United States today, if this bill becomes law,

likely even more strongly oppose the proposal if it allowed current illegal immigrants to participate. The claim would be that the privilege of residency should not be conferred solely to encourage an influx of foreign capital to meet temporary national economic difficulties, but should be granted only to those persons who merit admission on traditionally favored family reunification or essential-skills grounds and who fit within current national origin quotas, and not sold much like a commodity to persons of means without regard to their nation of origin and who otherwise have no particular justifications for receiving that residency privilege, particularly if they have already violated existing immigration law.

This is another fair criticism that merits full discussion before any such proposal should be adopted. Any steps that may be taken towards changing immigration criteria to reflect more of a cash nexus present legitimate questions that need to be addressed.<sup>77</sup> My proposal concededly raises many of the same concerns along these lines that were expressed in the debates preceding the 1990 adoption of the EB-5 investor visa program.<sup>78</sup> Moreover, this proposal, in one sense, raises the stakes significantly beyond those of that prior debate because the lower capital requirement I have here recommended, compared to the far more stringent EB-5 requirements, will likely lead to much greater participation in this program if it is enacted than in the very small EB-5 program unless the U.S. policy of taxing the foreign source income of its residents proves to be a major impediment. I personally feel that the potential economic benefits for the U.S. in these difficult economic times from the possibly substantial foreign capital contributions to the U.S. housing market that such a program would facilitate are sufficient to justify taking this step towards treating U.S. residency more as a marketable commodity than it has previously been understood to be. Sometimes, unfortunately, you do have to sell some of the family silver, so to speak, to get through hard times, and I think that now is perhaps one of those hard times with regard to our national economy. But I understand that reasonable persons can differ about this.

In summary, my proposed foreign house purchaser visa program is, in my opinion, a promising approach for helping to address the continuing decline in U.S. housing prices that is a primary source of our serious financial and economic problems. I readily concede, however, that the proposal raises a number of issues, both economic issues and broader non-economic questions that touch on basic and controversial first principles of immigration law, and may require both an improved US employment picture and some change in the U.S. tax treatment of foreign source income in order to be as effective as possible. I welcome a comprehensive and inclusive discussion of the merits of this proposal or of similar proposals made along these same lines.

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will be a toll road. . . . “[T]he rich ought not to be able to buy their way into this country.” . . .  
Father Hesburgh [in this prior quote] expresses my thoughts perfectly.

*Id.* at 14286–14287 (Senator Bumpers’ Senate floor statement, quoting with approval Father Theodore Hesburgh, president of Notre Dame University).

77. See Jolly et al., *supra* n. 14, at 163–165 (discussion of the various issues raised by this criticism).

78. See 135 Cong. Rec. 10, at 14287.

#### IV. CONCLUSION

Richard Lefrak and Gary Shilling have offered a provocative and interesting suggestion regarding how the continuing decline in U.S. housing prices might be ameliorated through the enactment of a new immigration program under which foreign purchasers of U.S. housing would be granted conditional residency and eventually permanent resident visas. Their broad proposal, however, has some significant weaknesses and omissions and, in my opinion, substantially overstates the benefits that its adoption would likely provide. I have here presented and discussed a modified and more detailed version of their proposal that I believe could make a modest, though significant, contribution to supporting U.S. housing price levels.

My proposal calls for a relatively small minimum equity capital requirement of \$40,000, imposes no restrictions on the ability of foreign purchasers to subsequently rent out those properties, requires a three-year ownership period to qualify for permanent residency, suggests that the program be initially limited to a maximum of 85,000 conditional visas per year, and in the interest of political feasibility does not recommend any changes in U.S. tax law with regard to the taxation of foreign source income of U.S. residents.

There are some economic arguments that can be made against the enactment of such a proposal even if one concedes that the program will be successful in achieving its core objective of helping to stabilize housing prices. Perhaps more importantly, my proposal does raise basic questions concerning the desirability of increased immigration and the proper overall normative framework for guiding immigration policy. It also raises legitimate concerns that it would constitute a move towards the relatively indiscriminate selling of U.S. residency to those foreign persons who have the requisite means. However, I believe that a suitably designed foreign home purchaser visa program would be justified, despite all of these legitimate concerns, because of the significant contribution that a substantial influx of foreign capital into the U.S. housing market could make towards helping us resolve our current financial and economic difficulties. I hope that this article will contribute to a comprehensive and inclusive discussion of these questions.



