July 20, 2000

Linda MacDougall
Business Immigration Division
Selection Branch
Citizenship and Immigration Canada
300 Slater Street, 7th floor
Ottawa ON K1A 1L1

Dear Ms. MacDougall,

RE: Proposed Amendments to the Immigrant Entrepreneur and Investor Programs

The National Citizenship and Immigration Law Section of the Canadian Bar Association (the Section) is pleased to have the opportunity to comment on the discussion paper concerning proposed regulatory changes to the Immigrant Entrepreneur and Investor Programs, issued by Citizenship and Immigration Canada (CIC) in April 2000.

Immigration has been a significant factor in Canada's population growth and economic well being and can be expected to continue making a key contribution to Canada's economic and demographic growth. This is extremely important for our country, given its aging population and declining birth rate.[1]

The Minister of Citizenship and Immigration has stated an objective of increasing the number of economic immigrants to Canada. We commend this. Unfortunately, however, the number of economic immigrants – in particular the number of business immigrants – has dramatically decreased over the past several years. In 1994, over 20,000 business immigrants, including their dependants, came to Canada. In 1999, only 13,000 came. This represents a 35% decrease.

Although many of the proposed measures appear to have been designed to eliminate perceived weaknesses in the current program, we believe that the net effect will be counter-productive. In our view, the proposed regulations for the business class program will result in continued and significant

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[1] These themes are confirmed in the April 2000 Auditor General's report. See Office of the Auditor General, *2000 Report of the Auditor General*, paras. 3.15-3.16.

reductions to the number of immigrants in this category. Moreover, many of the changes are arbitrary and discriminatory and may not assist in selecting the most desirable potential business entrepreneurs.

We will address each of the issues raised in the discussion paper in turn.

I. DEFINITIONS

The Section is concerned that proposed definitions set out in the discussion paper do not reflect the reality of establishing a new business in Canada. The Canadian government should encourage entrepreneurs to succeed, rather than requiring them to satisfy conditions that are not feasible.

A. Investor

We have no comment on this proposed definition.

B. Entrepreneur

i) Business Experience

The Section agrees that previous business experience is the single best indicator of future entrepreneurial performance. However, the proposed criteria are arbitrary, discriminatory and unduly restrictive.

ii) Net Worth of $400,000

In our opinion, a minimum net worth requirement is neither necessary nor desirable. It will have a discriminatory effect on potential applicants from countries with less developed or poorer economies. It will reward applicants who have achieved their wealth through good fortune or inheritance. It is a poor measure of an applicant's prospects of success.

In any event, we believe that the proposed amount is too high. Canada has admitted many successful entrepreneurs operating small- to medium-sized businesses with a net worth of less than $400,000. Less capital is required for many types of businesses and in smaller communities. Further, the discussion paper indicates that CIC will require applicants to post a $150,000 bond. Entrepreneurs would have only $250,000 available from their original $400,000 for investment purposes.

This net worth amount is onerous and will particularly discourage young entrepreneurs who may not yet have accumulated a large net worth. For these reasons, we recommend that the net worth requirement be either eliminated of significantly reduced.

iii) Definition of Entrepreneur

The Section is concerned that the definition of entrepreneur will continue to include the requirement that the entrepreneur "intends to and has the ability to" actively manage a Canadian business. In our experience, this wording has permitted Visa Officers to request "business plans", which are then used as the basis for subjective and often poorly founded assessments that a person lacks the requisite ability or intent. This is inconsistent with the notion that previous business experience is the best indicator of future performance, as seems to be accepted elsewhere in the discussion paper. Business plans have been recognized by CIC as self-serving and often of little value. We would like to see assurance that they are not to be required and should generally receive relatively little weight.

iv) Irrevocable Agreement

The requirement that an entrepreneur enter into an agreement with a Canadian financial institution is unreasonable. A financial institution would only entertain this type of arrangement if the entrepreneur deposited the same value of money needed for the "irrevocable agreement" with that financial institution. This would reduce the entrepreneur's available capital to establish a business in Canada, and would limit their potential to obtain financing, thereby significantly undermining the program. It would be a prohibitive obstacle for entrepreneurs with limited capital. The requirement would deter many qualified business people from applying for immigration to Canada, particularly since business immigrant programs in other countries (such as Australia) are frequently much more attractive.

C. Business Experience

We object to the requirement in the first "avenue" that the applicant have had control of a business through majority ownership of shares. This would preclude applicants who had a controlling interest in a widely held company, were equal joint venture partners or who participated in a family-owned business where the ownership may have rested in the titular head of the family. In our experience, persons from all of these backgrounds have excellent potential in this category.

We recommend that the proposed requirement that the entrepreneur have managed and supervised "at least 100 full time jobs" be eliminated. It is arbitrary and unnecessary and will reduce significantly the number of qualified applicants. Many successful entrepreneurs and managers direct far fewer employees. Their businesses may be less labour-intensive, yet more complex and more profitable. Yet, there is no real difference in the skills required to manage 20 people or 100. In our view, the definition should not specify a minimum number of jobs.

We also anticipate difficulty interpreting whether management and supervision includes functional management. A functional manager may manage key aspects of a large organization without directing

the day-to-day operations of a large number of workers.

D. Full-Time Job Equivalent

Defining "full-time job equivalent" as 2000 hours of employment translates to an individual working 40 hours a week, 50 weeks a year with only two weeks' holiday. The definition should be more flexible, as many full-time workers work 36-hour weeks and are entitled to more than two weeks' vacation in a year.

E. Qualifying Business

The numerical targets set for the definition of "qualifying business" are arbitrary and unrealistically high. This definition will disqualify many deserving entrepreneurs who would contribute to Canada and the Canadian economy, yet could not demonstrate two of the four requirements. The emphasis on numerical criteria which are substantial by Canadian standards will have a discriminatory effect on younger applicants and applicants from less developed or poorer countries.

A number of aspects of the definition are confusing. For example:

- Is the requirement to show $100,000 profit per year measured in pre-tax or after-tax dollars? The accounting practice of preparing financial statements to reflect a minimum amount of profit could punish an entrepreneur for being financially prudent.

- Does the requirement to maintain $250,000 in net assets at the end of the year include depreciation of assets or capital cost allowances? Depreciation is a well-established accounting practice which, in most cases, reduces the paper value of assets or income. This, in turn, reduces either the business profits or the net value of its assets. Again, this would punish entrepreneurs for preparing prudent financial statements.

It is expensive for businesses to obtain assessments of their financial performance. A business performance assessment prepared by one of the large accounting firms costs approximately $40,000. It is unreasonable to expect a potential business immigrant to incur this expense as part of the application process. Unfortunately, the result under the current system is a reduced number of business immigrants. We predict that this will continue under the proposed regulations.

In our view, the requirement to demonstrate $1 million in sales per year is too high, and would discriminate against persons from countries with less developed or successful economies. We also question the rationale for choosing five full-time employees as the threshold.

Instead of applying arbitrary numerical targets, we believe that applicants should be assessed on a case-by-case basis. Many business applicants whose businesses may not meet the requisite levels of sales, profits, net assets or employees could nonetheless make valuable contributions to the Canadian economy and society.

F. Qualifying Canadian Business

Again, we believe that these provisions are unrealistic. By requiring a new business to meet two of the criteria, the Government may place an unfair burden on the entrepreneur in its initial years of operation.

For example, most new businesses could not initially generate $500,000 in sales. A business needs time to grow. In today's world, it is a remarkable achievement for a business to survive the first few years of operation. The high threshold is inconsistent with business realities.

The dollar amount of sales will naturally differ depending on the nature of the business. A car dealership may meet the $500,000 minimum sales requirement, while a bookstore may have difficulty reaching this plateau. This may not reflect the success of each business but may simply be a result of the type of product sold.

Very few new enterprises can produce $50,000 in profits. As discussed above, financially prudent accounting practice frequently tries to minimize profit margins on financial statements. New businesses often operate in the red for the first few years while they establish themselves. Asking them to produce a clear profit in the first two or three years of operation is unrealistic and could promote poor business decision making.

G. Control

The proposals are unduly restrictive in requiring the applicant to own greater than 50 per cent of the shares of a corporation, or greater than 50 per cent of the interest in income or loss of a partnership business.

While the definition may be appropriate for the purposes of the *Income Tax Act* (as indicated by the discussion paper, it is not sufficiently flexible as a criterion for admitting business immigrants into Canada. Control of a business cannot simply be measured by ownership of a majority interest. For instance, a person may own a plurality of the shares in a corporation, without reaching the 50% plateau. Business people may structure their affairs for valid tax or estate planning reasons such that family members or others have paper ownership of a majority of the interest. In these cases, *de facto* control of the business may reside with applicants even though they are not the majority owners on paper. The definition should take into account *de facto* control.

We also note that a person owning 51% of a small company could qualify, whereas a person owning less than 51% of a very large firm would not. This simply does not make sense.

The proposal would eliminate joint ventures and situations where two or more applicants combine their resources to create a larger business. In a joint venture each partner has sufficient control through veto power.

II. COMPLIANCE STRATEGIES

A. The Transfer Option

This option would allow an entrepreneur to make an investment in the Investor Program after landing, in lieu of meeting the active business term and condition. We support this proposal.

B. Terms and Conditions

We do not believe that terms and conditions are necessary. Once CIC officials have selected a business immigrant, assessing future entrepreneurial performance based on previous business experience, that should be the end of the matter. As with skilled worker applicants, CIC uses its best efforts to select successful individuals it thinks will be successful in Canada. If skilled worker applicants do not work in their intended occupations, there are no immigration consequences. No conditions are attached to skilled worker visas. Similarly, no conditions should be attached to entrepreneur visas.

The proposals are shortsighted and unjust in removing the right to a review at the Immigration Appeal Division (IADon humanitarian and compassionate grounds. An IAD review allows for leniency in circumstances where there are compassionate considerations. For example:

- the principal applicant may die and leave a spouse and children who have assets and who have settled in Canada;
- a principal applicant may satisfy the business terms only after the three-year limit, yet may develop a successful and viable business in Canada;
- an entrepreneur may fail to meet the strict terms and conditions through circumstances beyond their control and despite sincere efforts and sound management..

C. Temporary Entry Model

In our view, this proposal will discourage business immigrants from coming to Canada. Entrepreneurs will only want to commit their funds and time to an enterprise in Canada if they are given permanent residence status. Business immigrants have enough worries about establishing a new business in a

different country with an uncertain business climate. They will not want to deal with uncertainty about their immigration status.

That said, we could contemplate temporary entry in limited circumstances where CIC determines that an entrepreneur clearly does not meet the regulatory criteria. In such cases, Immigration Officers should be able to allow entrepreneurs temporary entry to prove that they can establish a business in Canada. Having said this, we would prefer the norm to be a grant of permanent residence. Temporary entry should be an exceptional circumstance.

The discussion paper compares the proposed temporary model to the Live-in Caregiver Program. This is an apples-and-oranges comparison, as the two programs serve separate objectives and have separate criteria. Heavy burdens are placed on the entrepreneur applicant that the live-in caregiver applicant does not have to meet. In addition, entrepreneurs usually liquidate their business and assets to immigrate to Canada. This is generally not the case for caregivers.

III. CONCLUSION

We trust our comments will be useful in the continuing evaluation of these proposed regulations. We have serious concerns that the proposals would contribute to a continuing decline in business immigration, which is important for the economic well-being of our country. We hope to continue the dialogue with CIC officials in reviewing future proposals to improve the business immigration program.

Yours very truly,

Elizabeth Chow Bryson
Chair
National Citizenship and Immigration Law Section