U.S. IMMIGRATION LAW — SWEEPING CHANGES BENEFIT AUSTRALIANS

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At the 1990 AMPLA Annual Conference, one of the authors briefly addressed U.S. immigration and visa matters in the relevant portion of his written presentation on 'Australian Investment in United States Resource Projects and Companies'.[1] Due to recent changes in U.S. immigration law,[2] the author thought that an update might be helpful. Most of the recent changes in U.S. immigration law will benefit Australian citizens and corporations investing or operating in the United States, but a few of them are setbacks. The greatest benefit is the availability of treaty trader and treaty investor visas to Australians starting 1 October 1991.

TREATY TRADER AND TREATY INVESTOR VISAS

The treaty trader and treaty investor visas will allow Australians to enter the U.S. to carry on 'substantial trade' between the U.S. and Australia (E-1 visas), or to develop and direct a 'substantial investment' in the U.S. (E-2 visas). The U.S. enterprise must be at least 50% owned by Australian citizens, and the visa applicant must be an owner of the enterprise, an executive or manager, or an employee whose specialized skills or detailed knowledge of the business are truly essential to the U.S. enterprise.

To qualify for a treaty trader (E-1) visa, the applicant or employer must be engaged in substantial trade which is principally (51% or more) between the U.S. and Australia. Trade can be in goods or in services such as banking, insurance, transportation, communications, data processing, advertising, accounting, design, engineering, management consulting, tourism and technology transfer.

To qualify for a treaty investor (E-2) visa, the applicant or employer must make, or be actively in the process of making, a substantial investment in the United States. The investment must involve an active commercial enterprise, not a passive investment directed by others or held solely for future use or sale. There is no minimum dollar amount of investment required, but the investment must be substantial in relation to the nature of the business. In a small or medium-sized enterprise, the investment must generally be at least half of the value of the enterprise, or at least half of the amount normally necessary to establish a viable enterprise of that nature. In a large enterprise, a proportionally smaller investment may be sufficient. In all cases, loans secured by the assets or shares of the enterprise are not counted as investment capital, even if the investor is fully liable for repayment of the loan.

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1 See [1990] *AMPLA Yearbook* 38.

2 Immigration Act of 1990, Pub. L. 101-649, 104 Stat. 4978 (1990).

Applications for E visas are made directly at U.S. consular posts, without the need for a prior petition to the U.S. Immigration and Naturalization Service. E visas are normally valid for five years and can be renewed indefinitely, so long as the qualifying activity continues.

OTHER CHANGES

Other notable changes in U.S. immigration law include:

— New criteria for H-1 visas may exclude business people who lack university degrees but they may now qualify based on 'prominence' in business.
— H-1 visas will require the employer to attest that it will pay locally prevailing wages and offer prevailing working conditions to the H-1 visa holder and all similarly employed U.S. workers. Penalties for violations include fines and back pay remedies.
— H-1 visa holders may now stay in the U.S. for up to six years.
— L-1 visas will be available to managers who manage functions rather than people, and the definition of 'specialized knowledge' for L-1 visa purposes has been expanded.
— The L-1 visa requirement of one year of qualifying experience outside the U.S. immediately preceding application for such visa has been changed to one year at any time within the preceding three years.
— Managers and executives holding L-1 visas may stay in the U.S. for up to seven years. Other L-1 visa holders are limited to five years.
— The number of immigrant visas ('green cards') available each year to business people nearly triples under the new law and the system for allocating those visas favors executives, managers and highly skilled workers.
— The new law grants 10,000 immigrant visas per year to investors who create at least 10 U.S. jobs. The minimum investment is US$1,000,000 in most cases, but it can be reduced to as little as US$500,000 in rural or high unemployment areas, or increased to as much as US$3,000,000 in low unemployment areas.

All of these changes take effect on 1 October 1991.