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Work and borders

Message from Karl Waheed and Rayan Houdrouge, co-editors of this newsletter

Human resources are not commodities and do not cross borders as do commodities, despite the globalized economy we live in since the last two decades. Each country must balance the interest of *business* in letting foreign workers and managers bring valuable skills on the national market against the protection of the national labour market, especially in the current state of recession and high unemployment rates. Other national interests (health, security, taxes to name a few) will further complicate issues. Immigration is more than ever a political issue throughout the world and attitudes have changed dramatically as a result of the world economic recession. As barriers have gone up in many countries in the last few years, we can divide the world in three family of countries by the manner in which they are dealing with professional immigration: the New World, European Union, and the Emerging Economies.

The New World: These are countries, such as the USA, Canada, Brazil, and Australia, which have been the major destinations of much needed migrant workers since the 19th century. Based on their long experience these countries have very sophisticate immigration regulations to encourage arrival of skills which are in shortage on the national markets, with the possibilities for foreign workers to become permanent residents. Regulations in these countries have built-in mechanisms to respond to changing economic climate. Even if the current tendency is to reduce the number of incoming migrant workers, the mobility professionals will find these countries rather predictable, with respect to the immigration process, timing, and costs. You will find in this newsletter updates from Mexico by Enrique Arellano, and from Canada by Jacqueline Bart. Hugue Langlais presents an article on how Canadian citizenship acquired through misrepresentation can be lost. Mark Mancini writes on inadmissibility to the USA for crimes involving moral turpitude.

European Union: The member states of the EU have historically been rather providers of migrant workers (mostly into the New World), than receivers. During the economical boom after the 2nd world war, need for migrant workers was satisfied by intra-European movements and movements from the ex-colonies. The immigration regulations from that period are still in place in many member states. They vary from one country to another and do not take into account the political and economic reality of the European Union and our global economy. The European institutions have been working hard and efficiently over the past 2 decades to permit free movement of citizens of the European Union and have member states adopt harmonized and modern regulations to regulate the entry of third country migrant workers into their national territories and subsequent circulation of such migrants and their families in the rest of the European Union. With a few exceptions, the citizens of the European Union now enjoy full rights to move within the Union, and can be transferred within the European Union with little concern for immigration formalities.

However, we still do not have harmonized EU wide regulations when it comes to third country workers, although they are on their way, and will be here in a few years. In the mean time the mobility professionals must deal with immigration regulations at the national level with further variation at a very local level (land, department, canton, or commune). These variations often are local responses to immigration perceived as a threat to local economy. You will find in this newsletter updates from France and Switzerland by the co-editors. Laura Divine presents an article on how the immigration issue is ill framed in the UK.

Emerging Economies: These are primarily the Asian countries, with the leading roles being played by China and India. Until about some 20 years ago, these countries were providers of migrant workers and had little or no regulations to deal with in-bound migrant workers. Most of the immigration regulations in place were to secure borders and keep anyone who was not a tourist out of their countries. These countries only now have started making regulatory changes and have rules which tend to allow for professional immigration. Economies of these countries are healthy and not a reason to fear tightening of immigration. Here the difficulties come from the fact that their immigration regulations are in a state of infancy and subject to frequent changes as the governments try to manage conflicting interests, without yet having a stable horizon. Here the mobility professional must survey the regulatory changes very closely and make the corporate management sensitive to such changes. Shalini Agarwal will give us below the Indian perspective of professional immigration.

Thanks to Ellen Yost we have in this newsletter once again global trends and updates by region.

Message from the President

Dear Members of the UIA Immigration Law and Nationality Commission:

I am grateful to Karl Waheed and Rayan Houdrouge for their extensive work as Editors of the Commission's newsletter.

On January 11, 2012, we had our first Commission quarterly member conference telephone meeting. All members are encouraged to participate in the Commission's quarterly calls, which are scheduled to take place on the second Wednesday of every third month, from 10 to 11 am [E.S.T] starting in January 2012, which have been organized for the following dates:

- April 11, 2012;
- July 11, 2012; and
- October 10, 2012.

If you have not previously received an outlook calendar invitation, please contact me at bart@bartlaw.ca. Our conference calls involve the following:

- updates from each of the officers of our commission;
- two ten minute country updates by members (Nikolaos Argyriou, for Greece, and Herve Linder, for USA, on April 11, 2011);
- progress reports from members of our commission involved in organizing commission events/seminars; and
- other commission business.

Finally, the UIA 56th Congress will take place in Dresden, from October 31 to November 4, 2012. Further details of our scientific program will be provided in our next newsletter (scheduled for August 15, 2012) and during our quarterly conference calls.

Jacqueline R. Bart, President of the UIA Immigration Law and Nationality Commission

Immigration law update in Mexico

Enrique Arellano*

A new immigration law will enter into force in Mexico this year, marking an end to legislation which has occupied the field for over 40 years.

On May 24, 2011, President Felipe Calderon of Mexico signed the new Immigration Law, which abolished and superseded the General Population Law that had been in existence for 40 years. The new law makes significant changes to the current immigration regime, although these will not become evident until the implementing regulations are published, which is expected to occur in the middle of 2012. At this time, therefore, there is a new law in place, but it is without specific guidelines for its practical application.

The main objectives of the new law are (i) to protect the human rights of immigrants (making this the first such statute that governs immigration matters which is guided by a social aim); (ii) to regulate a comprehensive immigration policy that is aligned with current conditions in Mexico; (iii) to develop immigration processes focused mainly on demographic and immigration control issues; (iv) to cooperate with national security and economic development agendas; and (v) to simplify immigration processes in order to attract foreign investors.

The new law provides that immigration responsibilities are to be shared with other governments. The law is a federal public order statute applicable to the entire Mexican territory.

Along with non immigrants (FM3), nonresident immigrants (FM2), and resident immigrants, the characteristics regulated under the previous immigration status categories will change. New conditions of stay will apply to newly created immigration categories, including:

- Visitor;
- Temporary Resident;
- Temporary Resident – Student; and
- Permanent Resident.

Any immigrant, regardless of his or her immigration status, will have guaranteed access to educational and health services, may acquire fixed or variable income securities, will be able to make bank deposits, and will be able to acquire urban real estate assets, subject to the restrictions set forth in article 27 of the Mexican Federal Constitution.

Officers of the Vital Record Offices may not refuse to authorize any legal acts of a civil nature for immigrants, regardless of their immigration status. As a consequence, the requirement to obtain a legal-stay certificate in connection with marriages, divorces, and other administrative procedures will more than likely no longer be needed under the new law.

Also, all foreigners within Mexican territory must:

- Keep and protect any documents evidencing their identity and immigration status; i.e., fulfill any requirements in order to continue staying within the Mexican territory in conformity with their immigration status;

- Show their immigration documents whenever required by immigration authorities;
- Provide any data and information that the authorities may request;
- Perform any obligations established in the Federal Constitution and other applicable laws of Mexico;
- Inform the government of any change of marital status, nationality, address, or employer, within 90 days from the occurrence of such event. If they fail to do so, a fine will be imposed ranging from 20 to 100 days of the minimum daily wage;
- Prove their immigration status when carrying out any legal act before a Notary Public or Public Broker relating to real estate matters; and
- Not change their immigration status, and leave Mexican territory upon expiration of the authorized period, unless they (a) have a family relationship with a Mexican citizen, or (b) need to stay for humanitarian reasons.

Regardless of applicable timeframes, requirements, and other conditions to be established in the new regulations, the new law provides that consular officers must respond to visa applications within 10 business days.

Immigration authorities must respond within 20 business days from the date on which all the requirements established in the law, regulations, or other applicable administrative provisions are fulfilled.

If the applicant fails to fulfill any of the applicable requirements, the National Immigration Institute shall give notice and grant a 10-business-day period to remedy such failure.

The National Immigration Institute must respond to any regularization application within a 30-day period.

The National Immigration Institute may grant re-entry permits if a process is pending, as will be provided for in the regulations.

Visa applications must be filed by the foreigner, in person, with the respective Mexican Consulates abroad.

Even though the new law's regulations have not yet been issued, the law meets the need for establishing a simpler framework to regulate the processing and issuance of visas and authorizations for the different categories of immigration status in Mexico. It is also very focused on the defense of immigrants' human rights and the preservation of family unity.

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Citizenship revocation for false representations in Canada

Hugues Langlais*

During the 2006 conflict in Lebanon, many Lebanese nationals also having Canadian nationality made use of their Canadian passport and nationality to benefit from repatriation to Canada at government cost in order to escape the war zone. The Canadian government found it suspicious that so many people, many of whom it had never previously heard of, were suddenly using their Canadian nationality. After the repatriation took place, an investigation into the citizenship acquisition process by Lebanese people was conducted, which indicated that many of those who had benefited from their Canadian nationality and passport to flee the country on the boat chartered by the Canadian government could have obtained their citizenship by making false declarations in their citizenship applications concerning residency matters, with the help of unscrupulous immigration consultants.

As a consequence of its inquiries, the government of Canada announced it would strip some 1,800 Lebanese Canadians of their Canadian nationality. Shortly after, the government indicated that the process would be extended to some 6,500 other persons from over 100 countries, who had also made false representations in their citizenship and/or residency applications.[1]

These numbers are impressive at first sight, but they need to be put back in context. Each year, Canada grants citizenship privileges to more than 150,000 persons.[2] The revocation procedure has been in place since the coming into force of the Citizenship Act in 1947, but, since then, very few cases had been brought to Court (except in cases in which war criminals had hidden their pasts in immigration applications in order to enter Canada after the Second World War). Thus, very few cases have been reported in the jurisprudence compared to the announcements made in the recent months, and these numbers are only a small percentage of all applications granted over the years.

The fraudulent scheme used

When applying for residency or for citizenship, fraudsters are typically represented by immigration consultants having created and set up a fictitious real life in Canada to establish residency, leading to the satisfaction requirements for qualification for citizenship or for residency under the Immigration and Refugee Protection Act.[3]

Such consultants would give advice and assistance regarding the best possible methods of circumventing the Citizenship Act, including the provision of a permanent address in Canada, subscribing to a maximum of public utilities, opening bank accounts, obtaining credit cards, registering children with schools in Canada (with the help of school directions to have transcripts issued while children attend a school abroad), setting up a business with bogus employees, employment contracts and payroll deductions at source, or buying or renting or pretending to buy or rent a house.

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[1] Speaking notes for The Honourable Jason Kenney, P.C., M.P. Minister of Citizenship, Immigration and Multiculturalism, online: [http://www.cic.gc.ca/english/department/media/speeches/2011/2011-12-09.asp].

[2] Annual Report to Parliament on immigration 2004, p. 18, online: http://www.cic.gc.ca/english/resources/publications/immigration2004.asp.

[3] The residency requirements differ according to the privilege sought. To maintain residency rights before seeking citizenship, one must be present in Canada 2 years (730 days) out of any 5 year period. To apply for citizenship, the residency is calculated based on the last 4 years of residency before the citizenship application is made, in which it is necessary to have accumulated 3 years (1095 days) in Canada.

No exit control

Canada is not yet[4] known to have exit controls for Canadians, let alone for foreigners. Consequently, passports are not stamped when leaving Canada. As part of the fraudulent scheme, consultants would instruct outgoing Canadian nationals not to have their national passports stamped to confirm their entry into another territory, but instead only to obtain a stamp on their national customs card declarations, thereby leaving no proof in the passports of entry into another country. Thereafter, upon the return Canada, only a false declaration as to the real date of departure from Canada would be required on the entry form, placing it a several days before the return date.

By this process, there would be no evidence that the person had left Canada and was not actually living in Canada. Foreign nationals may sometimes hold many passports and in such circumstances would only use one for travel between Canada and the "real" residential country, while for other trips other passports would be used.

The revocation process

Under section 10(1) of the Canadian Citizenship Act, the Governor in Council can make an order that a person shall cease to be a Canadian citizen if he is satisfied, based on a report from the Minister of Immigration and Citizenship, that such person obtained citizenship by false representation or fraud or by knowingly concealing material circumstances to obtain the citizenship. The Minister first needs to notify the person concerned, before submitting the report to the Governor in Council. The person in question then has 30 days from the date of service to respond to the report, subsequent to which the Minister refers the case to the Federal Court of Canada for a finding by the court.[5]

Civil standard of proof

False declarations made for the purpose of cheating citizenship and immigration laws are brought before a civil court for a hearing, leading to the revocation of citizenship.[6] It is therefore a civil procedure in which a civil standard of proof is applied. Before the civil court, the burden of proof is satisfied if, on the balance of probabilities (50%+1), the person obtained citizenship by way of false representations.[7] In comparison, in criminal cases the Minister would have to prove the case beyond all reasonable doubt.

In fact, the Minister must prove that the person intentionally hid material circumstances that are otherwise considered important, with the intention of misleading the government[8] in the decision-making process. Whether or not the person knew that the misrepresented facts were or not material or important facts does not really matter. The important point is an attempt to hide the truth. The Court will also strike a balance between oversights as to statements of fact which alone cannot lead to the withdrawal of citizenship, and misrepresentations on material elements of the application.

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[4] Under the joint USA-CANADA perimeter initiative, an automatic entry-exit information-sharing system at land borders is announced to track people who are in Canada illegally or who overstay their visa. See, http://www.torontosun.com/2011/12/07/harper-obama-unveil-border-deal.
[5] Art. 18(1) Citizenship Act.
[6] Canada (Ministre de la Citoyenneté et de l'Immigration) c. Tobiass, 1997 CanLII 322 (CSC), par. 108 ; Canada (Citoyenneté et Immigration) c. Rogan, 2011 CF 1007 (CanLII) par. 25.
[7] Canada (Citoyenneté et Immigration) c. Rogan, 2011 CF 1007 (CanLII), par. 26 et suiv. ; Canada (Ministre de la Citoyenneté et de l'Immigration) c. Skomatchuk, 2006 CF 994 (CanLII), par. 21.
[8] Canada (Citoyenneté et Immigration) c. Rogan, 2011 CF 1007 (CanLII), par. 32 ; Canada (Ministre de la Citoyenneté et de l'Immigration) c. Obodzinsky, 2003 CF 1080 (CanLII), par. 159 ; Canada (Ministre de la Citoyenneté et de l'Immigration) c. Schneeberger, 2003 CF 970 (CanLII), par. 20 et suiv.

Presumption of false representation

A permanent resident admitted in Canada after making false representations and who then successfully applies for citizenship, is deemed to have made false representations to obtain citizenship.[9]

The court decision

The decision of the Federal Court is final and cannot be appealed.[10] The Governor in Council always has the final say, but the decision of the Court will form the basis of the Minister's report and from which will be taken the decision of the Governor in Council,[11] as the only authority who can decide to withdraw someone's citizenship.

When unsatisfied with the final decision of the Governor in Council, judicial review[12] of the decision may be sought. In its review of the decision, the Court shall apply the standard of reasonableness. In assessing the case to this standard, the Court shall not make findings as to fact, reweigh the factual findings of the previous decision, or substitute its decision to the Governor in Council's one. Rather, the task of the Court is to ask whether the decision of the Governor in Council "fell within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law".[13]

As an example, the Court may quash the decision if the Governor in Council made an order which exceeded his authority. Further, where the decision rendered by the Governor in Council is not in the favour of the person in question, the Court is not allowed to intervene as of right[14]. The fact that the Court could arrive at a different decision is also not enough to revoke the initial decision of the government[15], if the decision rendered is well reasoned.

Deportation order and time limitation

The final part of the decision to revoke someone's citizenship will constitute a removal order from Canada. This measure is a bar for life from returning to Canada, even if any contemplated return is only for vacationing or visiting family members.

False declarations are easier to make than they are to erase or correct, and the consequences and liabilities of making them do not disappear over the years; the cause of action does "not arise until the Minister had reasonably discovered that the defendant had acquired Canadian citizenship by fraud or misrepresentation or concealment"[16], which may not occur until many years after the fact.

[9] Art. 10(2) Citizenship Act.
[10] Canada (Citoyenneté et Immigration) c. Rogan, 2011 CF 1007 (CanLII), par. 14.
[11] Canada (Secrétaire d'État) c. Luitjens, [1992] A.C.F. no 319 (QL), 142 N.R. 173, par. 5.
[12] Art. 18.1(1) Loi Cour Fédérale ; Procureur général du Canada c. Inuit Tapirisat of Canada et al., 1980 CanLII 21 (CSC), p. 748.
[13] League for Human Rights of B'Nai Brith Canada v. Odynsky, 2010 FCA 307 (CanLII), par. 85.
[14] Id. par. 21.
[15] Oberlander c. Canada (Procureur général), 2003 CF 944 (CanLII), par. 20.
[16] Canada v. Obodzinsky, 2003 FC 1080 (CanLII), par. 214.

Hence, at any moment after having been granted Canadian nationality, the government may decide to withdraw that grant if it is discovered to have been obtained by false representations. It may therefore take many years between the time citizenship is awarded and the time when the government finally discovers the false representations made and takes action to withdraw it.

In conclusion, when unsure about declaring information, it is always better to do so than not to.

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Corporate immigration: On the fast track to recognition!

Shalini Agarwal*

Corporate Immigration is a practice area that is fast gaining recognition alongside the rather more traditional areas of practice that most law firms have on offer. For far too long, immigration issues have been considered to be something that HR teams are best suited to deal with; a soft issue with little urgency, that can be dealt with long after a deal has been executed. As the world faces new challenges and complexities, such as stringent border controls and stricter work permit regimes, companies have no option but to address immigration issues upfront.

Wherever companies are dealing with international operations and moving people across borders, thought must be given to appropriate corporate structures, applicable regulatory regimes, and onerous tax obligations that may arise from the movement of personnel into a foreign jurisdiction.

Immigration cannot be handled in isolation. HR professionals have to work increasingly in tandem with in-house legal counsel or to call upon external legal assistance to address issues that encompass more than just immigration rules and regulations. Apart from the obvious issues of obtaining the appropriate entry papers and complying with local registration formalities, companies across the world are realizing that the impact of moving a force across borders throws up many more serious issues.

Increasingly global conferences, such as the International Bar Association at its recent 2011 annual conference in Dubai, have sought to address issues relating to immigration policies and security concerns, problems that arise with increasing global geographic mobility of personnel, as well as the shifting economic order and its impact on corporate immigration. Tax obligations and potential liability in foreign jurisdictions are but two of many other issues that arise for consideration.

Taking India as a jurisdiction, which continues to attract foreign investment in record numbers, there are many aspects that must be considered when moving a foreign work force into the country, so as to ensure that adequate measures are put into place to minimize risk and ensure compliance with local rules and regulations.

Typically, companies are eager to complete paperwork and get all the required hands on deck to kick-start a business. Required paperwork formalities in relation to immigration are often simply seen as ‘paperwork that needs rubber stamping’ without much by way of due consideration. What many fail to realize is that many countries, including India, over the years have adapted and changed their erstwhile-relaxed approach to immigration into the country. The ‘wonder years’, when few questions were asked on the specific purpose of visit, when even fewer circulars and dictates had been issued by the Ministry of Home Affairs, when Embassies were free to use their discretion as widely as they wished to, are well and truly over.

Although India still lacks a consolidated Immigration Act per se, many rules and regulations have been prescribed over the past few years, which are now implemented in varying degrees. Many of these rules are in the form of circulars passed by the MHA or in the form of FAQs or dictates issued as Press Notes to address immediate concerns. Indian Embassies and Consulates across the world are also provided with a 'Visa Manual', which sets out the parameters of what is and what is not permitted.

Thus, those tasked with the responsibility of moving personnel across borders must be well informed of what is and what is no longer permissible in India. Many pre-arrival requirements have to be met, even before a suitable visa can be granted. Regulations exist on who can apply, where an application can be made, and how long it may take to turn it around. Variations to these rules exist based on nationality and origin, and even past backgrounds or nexus to specific jurisdictions (through birth or marriage) can change the rules that apply.

India is one of the recent BRIC countries where foreign companies are realizing the true importance of corporate immigration and the defining role it may play when doing business in the country. Whilst it is true that Indian immigration laws had not kept pace with the needs of a swiftly expanding economy, much of what has taken place in India in recent times has been the catalyst to shape the current immigration rules and regulations - illegal immigration, terrorist attacks, tax evasion; all of these had an impact on how immigration rules have developed over time.

Companies hiring foreign nationals are therefore well advised to ensure they have a corporate immigration policy in place. A well considered, adequately researched and knowledge-based corporate immigration policy can help companies prepare themselves well in advance, in order to handle the various formalities that may be required in despatching personnel to international frontiers. This can assist in cutting down the many hours that are typically lost due to a lack of clarity in applicable time frames, required documentation and processing requirements. This is where specialist corporate immigration attorneys can assist clients with more than just clerical processing of immigration applications - these specialists can help articulate a corporate immigration policy that specifically meets the needs of a particular corporation.

Equally important is the recognition by companies that corporate immigration advisors must necessarily work in partnership with a company's HR team. Many employment issues are intricately inter-twined with various employment and labour issues, including the offer documentation itself. Often, as in India, the continued employment of an employee in a foreign jurisdiction is dependent on the employee's immigration status and on the employee obtaining an extension of their work permit.

A final point in support of the need to ensure that companies recognise the importance of corporate immigration and ensure that they have an adequate corporate immigration policy in place, is to ensure that companies remain compliant, not only with the laws of their own jurisdictions, but also of international jurisdictions. In a global environment that is increasingly focusing on the necessity for compliance, companies cannot afford to fall foul of international immigration requirements.

There is no doubt that corporate immigration, both as an increasingly active practice area and as an addition of value for clients, is here to stay.

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Recent practice of the immigration authorities for non EU/EFTA work permit applications in Switzerland

Rayan Houdrouge*

Introduction

Under Swiss immigration law, the issuance of a work permit in favour of non EU/EFTA nationals is subject to the requirements of the Swiss Act on Foreigners ("SAF") which entered into effect on January 1st, 2008.

Since 2010, the Swiss/Geneva immigration authorities' practice has significantly evolved, in particular when these authorities assess work permit applications for highly skilled workers from non EU/EFTA countries. Recent practice shows that such applications are subject to significantly stricter scrutiny from the authorities.

Pursuant to past practice, a Swiss company could, as a matter of principle, obtain a work permit for a highly skilled worker who earned an average annual remuneration between CHF 100,000 and CHF 120,000 to the extent that such a company was able to demonstrate that it had not found any suitable and qualified candidate on the domestic labour market and that the new hire would also be economically interesting for the Canton.

In this context, the immigration authorities rarely required that the applying company applying disclose the details of its recruitment process. The economic interest of the Canton was proven if the said company explained in general terms the future development of its activities, demonstrated that such development would increase the attraction of the region and create new employment positions in the coming years.

General conditions for the issuance of a work authorization in Switzerland

Under the SAF, a non EU/EFTA national may be admitted to work as employees in Switzerland if (i) a unit of the quotas is available, (ii) no other suitable candidate was found on the domestic labour market, (iii) the salary and employment conditions are customary for the location, profession and sector of activity, (iv) the employee qualifies as a highly skilled worker and (v) his activities will serve the interests of the Swiss economy.

As far as self-employment is concerned, slightly different requirements apply; non EU/EFTA nationals may be admitted to work on a self-employed basis if (i) a unit of the quotas is available, (ii) the necessary financial and operational requirements are fulfilled, (iii) the self-employee is a highly skilled individual and (iv) his activities will serve the interest of the Swiss economy.

We will discuss these requirements in the following Sections.

Quotas

According to the SAF, the Swiss Federal Council may limit the number of permits granted to non EU/EFTA foreigners in order to perform a gainful activity. To do so, the Swiss Federal Council determines each year a maximum number of permits that each Canton of Switzerland may award to work permit applicants.

One unit of the yearly cantonal quota must be available for each work permit to be granted. The availability of a unit is required both to work as an employee or as a self-employee (such as entrepreneurs).

For the year 2012, the number of units has not changed in comparison to 2011: the number of available short term permits amounts to 5000 (166 for Geneva) and 3500 (116 for Geneva) for long term permits. Since 2009, a reduction of the available quotas can however be noticed and may be considered as one of the reasons why the immigration authorities, in particular in Geneva, have started reviewing work permit applications for non EU/EFTA nationals with much more scrutiny.

Priority of domestic labour force

Non EU/EFTA citizens may be allowed to work in Switzerland only if no suitable domestic employees or EU/EFTA citizens can be found for the position. Such condition is only relevant for an employed activity (but not for a self-employed activity).

Domestic employees include Swiss nationals, foreigners with a permanent work and residence permit (so-called "*permis C*") and foreigners with a long term residence permit including work authorization (so-called "*permis B avec activité lucrative*"). The applying company must prove that there is no suitable candidate on the domestic labour market.

It appears that the immigration authorities have become more restrictive in their assessment of this condition. This requirement does indeed no longer seem to be satisfied if the applying company only advertised the position with the cantonal employment office (which was normally sufficient pursuant to past practice). Based on recent practice, the applying company must show own and effective researches initiated via ads in local and/or specialised newspapers, online advertisements, head hunters, networking, etc.

Salary and employment conditions

Non EU/EFTA nationals may be admitted to work in Switzerland if the salary and employment conditions are customary for the location, profession and sector of activity. This requirement only applies to employees, not to self-employees who intend to set up their business in Switzerland.

Up until 2010, a Swiss employer could generally obtain a work permit for a specialist earning an annual remuneration between CHF 100,000 and CHF 120,000. Such remuneration was deemed to be substantial enough to evidence that the applicant was an expert in his field of activities and that he would hold a high position within the company.

As from 2011, it clearly appears that the Geneva authorities have increased the salary threshold up to a range of CHF 130,000 to CHF 140,000.

Personal requirements

Work permits for non EU/EFTA citizens may only be granted to managers, specialists and other highly skilled workers and entrepreneurs.

In case of both an employed activity and an independent activity, it must be evidenced that the foreigner holds specific high level skills and knowledge to carry out the expected business and fulfil his tasks and responsibilities.

Up until 2010, the immigration authorities were generally not considering that a position was too junior if the applying company had showed the need of the new employee for its future growth. However, pursuant to recent practice, this condition is now assessed under intense scrutiny inasmuch as the authorities also examine whether the position at stake is high enough to justify the recruitment of a non EU/EFTA specialist/manager. With respect to self-employees, the authorities require that the applicant provide the very detailed information on his project which needs to be of significant size. The application must include documents that enable the authorities to

assess the potential growth opportunities of the new business. The application must notably contain a three-year business plan containing information about the prospected activities and developing business, a market analysis, the expected staff development and future recruitment process, as well as the projected investments, turnovers/revenues and profits over the three-year period.

Economic interests of the Canton

The immigration authorities proceed to an in-depth review of the economic interest of the relevant Canton for each work permit application for non EU/EFTA foreigners.

The said authorities very often require that the applying company make specific commitments notably with respect to the creation of new employment positions, the generation of revenues, the payment of taxes, etc. According to recent practice, the Swiss authorities more frequently issue conditional permits, the renewal of which are subject to the fulfilment of these commitments.

As regards new businesses, the immigration authorities mainly assess the long term economic consequences for the Swiss labour market and Swiss economy. They consider that the Swiss labour market would benefit from the establishment of a company to the extent that the new entity participates in the diversification of the regional economy in the relevant business field, creates new positions in the domestic labour force, makes substantial investments and leads to new businesses for Switzerland. Quite often, the authorizations are first delivered for a period of two years that cover the period of creation and development of the new business. The prolongation of the authorizations will depend upon achievement of the prospected commitments in the two-year time limit.

In practice, it may be very difficult for self-employees to convince the immigration authorities that their business project is interesting enough for the Canton.

Conclusion

Since the beginning of 2010, the Swiss and Geneva immigration authorities have examined with much more scrutiny work permit applications for non EU/EFTA citizens. This comment applies to both employees and self-employees.

In this context, it has now become critical for applicants to start preparing their immigration file at least a few months in advance and to adopt a fully cooperative and transparent approach, throughout the application process, towards the cantonal immigration and employment authorities. In particular, if specific questions regarding a submitted work permit application are raised by these authorities, it is crucial for applicants to be as reactive as possible and to immediately provide accurate explanations.

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Defining the issue

Laura Devine*

Albert Einstein is credited with stating that if he had one hour to save the world, he would spend fifty-five minutes defining the problem and only five minutes finding the solution.[17] Indeed, a fundamental first step to solving any problem is understanding the parameters of the issue, as without definition one cannot hope to effectively tackle the question.

Over the past year, the UK immigration system has undergone a number of dramatic reforms as a result of the Conservative-led Government's near myopic focus on the reduction of net migration. Whilst there is significant evidence to suggest that a majority, or at least a plurality, of the UK public favours a decrease in immigration numbers in some manner[18] (though it should be noted that there are demographic variations), to whom they refer when speaking about 'immigrants' and 'immigration reform' is often markedly different from those groups referred to and targeted by the Government's own reduction measures.

These disconnections in the discussion, this lack of definition, perhaps at times intentionally so on the part of the Government, coupled with some in the media's treatment of the subject, have helped to fuel the public's widespread misperceptions and discontentment with immigrants and immigration policy. Indeed, even the questions from surveys and polls on the subject may unintentionally confuse the issue. Thus, with little to no effort being put toward accurately characterising or framing the terms of debate, the solutions offered have largely been ineffective, dissatisfying and unreflective of either the issues at hand or the interest of the public.

Public perception of immigration

In an effort to explore some of these discrepancies, The Migration Observatory at the University of Oxford recently conducted a study entitled *Thinking Behind the Numbers: Understanding Public Opinion on Immigration in Britain*. The survey, which was conducted by Ipsos MORI and sampled 1,002 adults living in Britain, addressed two main issues: first, to whom do the public refer when speaking about immigrants? And second, whether the public's opinions on immigration control vary for different immigrant groups.[19] As the study reveals, there are significant differences between the public's perception of who immigrants are and the statistical data.[20]

One of the starkest examples of this contrast may be found in who the public is most likely to think of when referring to 'migrants'. According to the Migration Observatory's report, of those members of the public surveyed, 62% thought of asylum seekers when thinking about immigrants, while only 29% thought of students. Significantly, students represented the largest group of immigrant arrivals at 37% in 2009, while asylum seekers represent the smallest survey group at only 4%.[21] Along similar lines, according to a 2011 Transatlantic Trends

[17] http://www.goodreads.com/quotes/show/60780. See also http://litemind.com/problem-definition/.
[18] See Transatlantic Trends: Immigration Key - Findings 2011 at page 6. See also Thinking Behind the Numbers: Understanding Public Opinion on Immigration in Britain at page 3 and UK Public Opinion toward Migration: Determinants of Attitudes at page 2.
[19] Thinking Behind the Numbers: Understanding Public Opinion on Immigration in Britain at page 3.
[20] Thinking Behind the Numbers: Understanding Public Opinion on Immigration in Britain at pages 4, 16-17.
[21] Thinking Behind the Numbers: Understanding Public Opinion on Immigration in Britain at pages 9-10.

survey, British respondents estimated the foreign born population of the UK at an average of 31.8%, whereas the actual figure is only 11.3%.[22]

Such disparities are particularly troubling when faced with the statistic from the same Ipsos MORI study that nearly 70% of the British public support reducing immigration numbers.[23] Moreover, the areas where data suggests that the public prefers reductions the most – low-skilled labour and asylum seekers – are some of the areas where the Government has the least ability to act due to European Union and foreign policy.[24]

Government and immigration

While the Migration Observatory's report zeros in on the public's perception of who immigrants are, it is equally important to examine the Government's understanding of who counts as an immigrant for statistical purposes, and its reasoning behind the implementation of policies.

One key issue, 'net migration', is defined by the Office of National Statistics (ONS) as the inflow (immigration) minus the outflow (emigration) of those intending to change their place of residence for one year or more.[25] Although the Government has pledged to reduce net migration from the hundreds of thousands to the tens of thousands, this refers only to the reduction in areas it can control (to wit, reducing employment, education and family inflow routes of non-EU nationals and attempting to encourage outflow of the same by making settlement more difficult), a detail likely lost on the public. Thus, while on the surface the Government has appeared to adopt a powerful stance as being 'tough on immigration', its actual actions are limited and not in line with the public's understanding or desires.

In addition to glossing over key details of its policies, the Government relies at times on selective data to support its own measures. One such example may be found in the UK Border Agency's (UKBA) call for responses on proposed changes to Tier 2 in June.[26] As part of its proposal to close Tier 2 migrants' routes to settlement, the UKBA cited another Ipsos MORI poll which stated that "75% of Britons believe that immigration is currently a problem and 44% thought it was a problem because of abuse of or burdens on public services."[27] However, what the UKBA selectively left out was that these statistics represented the public's impressions at the national level. Interestingly, the same study indicated 71% of those surveyed did not view immigration as a problem in their local area, and only 36% of Britons viewed abuse of or burdens on public services as a local issue.[28]

Such a deep division between the public's perception of immigration at the local and national levels could perhaps suggest that the subject may not be nearly as contentious as some would make it out to be. Indeed, one could speculate, political rhetoric and the media may have whipped up enough fear to give the public the impression that, even though they are not personally experiencing problems at home, the issue is more dire at the national level.

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[22] Transatlantic Trends: Immigration Key - Findings 2011 at page 7.
[23] Thinking Behind the Numbers: Understanding Public Opinion on Immigration in Britain at page 3.
[24] Thinking Behind the Numbers: Understanding Public Opinion on Immigration in Britain at page 4; see also Off Target: Government Policies are not on Track to Reducing Net Migration to the Tens of Thousands by 2015 by the Migration Observatory at page 2.
[25] http://www.statistics.gov.uk/hub/population/migration/international-migration.
[26] Employment-Related Settlement, Tier 5 and Overseas Domestic Workers: A Consultation at page 19.
[27] Employment-Related Settlement, Tier 5 and Overseas Domestic Workers: A Consultation at page 11; see also Ipsos MORI Survey Does Immigration Matter? at page 5 and 10.
[28] Ipsos MORI Survey Does Immigration Matter? at page 8 and 10.

The road ahead

The failure to properly define the terms of the immigration debate has lead to misinformation, damaging stereotypes, xenophobia and poor policy. While some confusion may stem from the vague statements issued by the government in order to score political points, or even from the manner in which questions from polls and surveys on the subject are phrased, until we have properly cast light on basic terms and are able to avoid the temptation to cherry pick and slant statistical results, we cannot hope to have a rational debate or produce any sound, reasoned policy. Clearly, it is time that we halt our present course in order to spend the proverbial fifty-five minutes defining the problem. Once we have done so, discovering the solutions will follow much more easily.

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Inadmissibility for crimes involving moral turpitude and the availability of waivers for non-immigrants

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Inadmissibility

An alien seeking formal admission to the United States is an "arriving alien" and is subject to the many statutory grounds of inadmissibility. Aliens who are otherwise eligible for a visa may nonetheless be denied entry on one of these grounds. These included health-related, criminal, and national security grounds, as well as aliens who entered illegally, are likely to become a public charge, or have not completed a labor certification for an employment-based visa.

The criminal grounds of inadmissibility include offenses related to controlled substances, prostitution, human trafficking, money laundering, and crimes involving moral turpitude (CIMTs). INA §212(a)(2). The statute allows exceptions for aliens who committed one CIMT when they were under 18 years of age and more than 5 years have passed since the commission, or who committed only one CIMT for which the maximum penalty possible was one year and who were not sentenced to a term longer than 6 months. INA §212(a)(2)(A)(ii). However, any alien convicted of 2 or more offenses for which the aggregate sentences were 5 years or more is inadmissible regardless of whether the crimes involved moral turpitude.

Crimes Involving Moral Turpitude

While "moral turpitude" is a nebulous concept and there is no statutory definition for a CIMT, the term is generally defined as conduct which is inherently base, vile, or depraved, contrary to the accepted rules of morality and the duties owed between people or society in general. *Matter of Flores*, 17 I. & N. Dec. 225, 227 (BIA 1980). Moral turpitude has been defined as an act which is intrinsically wrong, and it is the morally reprehensible nature of the act, not its statutory prohibition, that renders it a CIMT. *Matter of Franklin*, 20 I&N Dec. 867, 868 (BIA 1994), *aff'd* 72 F.3d 571 (8th Cir. 1995).

Traditionally, CIMT analysis looks to whether the statute of conviction necessarily involves moral turpitude, such as when a morally turpitudinous act is an element of the crime. This is known as a strict categorical analysis. If a statute encompasses both acts that do and do not involve moral turpitude, and is divisible, then courts typically look at the record of conviction to determine whether the crime involved moral turpitude. This is known as the modified categorical approach. In 2008, the Attorney General held that in cases with divisible statutes where there is a "reasonable probability" that evidence outside the record of conviction could be used to establish moral turpitude, the Immigration Judge can consider evidence from outside the record of conviction. *Matter of Silva-Trevino*, 24 I.&N. Dec. 687 (BIA 2008). This controversial case greatly expanded the scope of the CIMT inquiry.

Non-immigrant Waiver under INA §212(d)(3)

Once a non-citizen has been convicted of or has admitted to having committed a crime of moral turpitude, they are generally inadmissible. However, applicants for non-immigrant visas can overcome that inadmissibility through an INA §212(d)(3) non-immigrant waiver. An INA §212(d)(3) waiver is broadly applicable and discretionary. The BIA established a balancing test of three factors to weigh in making INA §212(d)(3) determinations in *Matter of Hranka*, 16 I.&N. Dec. 491 (BIA 1978). The three factors weighed for a non-immigrant

inadmissibility waiver application are (1) the risk of harm to society if the applicant is admitted, (2) the seriousness of the applicant's immigration law or criminal law violations, if any, and (3)the nature of the applicant's reasons for wishing to enter the United States.

Despite the fact that the applicant had been deported for heroin and prostitution related offenses only three years prior to seeking a non-immigrant waiver of inadmissibility, evidence of her rehabilitation led the Board to conclude that she did not pose a risk of harm to American society. The evidence that the applicant presented demonstrating that she had been rehabilitated in the years following her deportation included a letter from her mother and the principal of her high school. The Board's second factor was satisfied by the fact that the applicant had no other criminal or immigration violations.

The Board in *Hranka* does not require that the applicant's reasons for wishing to enter the United States be compelling. Rather, *Hranka* requires only that the applicant have a "substantial" reason for desiring a waiver, a standard which the applicant met by having close relatives in Detroit and the awkwardness of living on a border town and not being able to go on dates across the border. Because the Board set such a low standard for a "substantial reason," it is likely that many tourists, students, investors, and even H-1B non-immigrant workers would qualify for this discretionary waiver.

There are two procedures for seeking a §212(d)(3) non-immigrant waiver. A non-citizen who already has a valid entry document such as a visa, but needs a waiver to enter, may apply before CBP at the border through Form I-192. INA §212(d)(3)(A)(ii). Someone who is seeking a non-immigrant waiver with the approval of a non-immigrant visa first applies at a consular office and requires a concurrence from the Department of Homeland Security. INA §212(d)(3)(A)(i). The standards for a consular officer's recommendation of a non-immigrant waiver are set forth in 8 C.F.R. §212.4(a).

The non-immigrant visa waiver available under INA §212(d)(3) can be extremely important to clients who were convicted of a CIMT or are otherwise inadmissible but who have a substantial reason for wanting to visit the United States.

Sources:

- INA §§212(a)(2), 212(d)(3)
- *Matter of Flores*, 17 I. & N. Dec. 225, 227 (BIA 1980)
- *Matter of Franklin*, 20 I&N Dec. 867 (BIA 1994), *aff'd* 72 F.3d 571 (8th Cir. 1995)
- *Matter of Silva-Trevino*, 24 I.&N. Dec. 687 (BIA 2008)
- *Matter of Hranka*, 16 I.&N. Dec. 491 (BIA 1978)
- Ira J. Kurzban, *Kurzban's Immigration Law Sourcebook* (12th Ed. 2010)
- Norton Tooby & Joseph Justin Rollin, *Tooby's Checklists on Criminal Immigration Law* (2010)

- Norton Tooby, *Tooby's Categorical Analysis Tool Kit* (2nd Ed. 2009)

- Christina B. LaBrie, *The INA 212(d)(3) Nonimmigrant Waiver – Available to All?*, http://www.ilw.com/articles/2003,0930-labrie.shtm (2003)

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Significant changes to temporary foreign worker regulations in Canada

Jacqueline R. Bart*

Effective April 1, 2011, the Canadian government introduced into law a number of important legislative amendments on employer immigration compliance concerning foreign worker work permits and Labour Market Opinions from Service Canada. Specifically, the Canadian government has introduced a new test to evaluate the genuineness of an offer of employment to a foreign worker, based on the following:

- Whether the offer is made by an employer that is actively engaged in the business in respect to which the offer is made;
- Whether the offer is consistent with the reasonable employment needs of the employer;
- Whether the terms of the offer are terms that the employer is reasonably able to fulfill; and
- The past compliance of the employer, or any person who recruited the foreign national for the employer, with the federal or provincial laws that regulate employment, or the recruiting of employees, in the province in which it is intended that the foreign national work.

The regulations limit the number of years which certain foreign workers can remain in Canada on work permit status to four years. Once they have completed the four-year work permit period, they are not authorized to work in Canada for another four years.

Fortunately for employers, some foreign workers are exempt from this four-year work permit limitation. Exemptions to the four-year limitation include foreign workers who have been on the following types of work permits or are in the circumstances listed below:

- Temporary foreign workers in managerial (NOC 0) or professional occupations (NOC A).
- Temporary foreign workers who have applied for permanent residence and received:
    - A Certificat de sélection du Québec (CSQ) if applying as a Quebec Skilled Worker;
    - A Provincial Nominee Program (PNP) certificate if applying as a provincial nominee;
    - An approval in principle letter if applying under the Live-in Caregiver Class;
    - A positive selection decision if applying under the Federal Skilled Worker Class; or
    - A positive selection decision if applying under the Canadian Experience Class.
- Temporary foreign workers who are employed in Canada under an international agreement, such as NAFTA, the Seasonal Agricultural Worker Program, or another agreement.
- Temporary foreign workers who are exempt from the Labour Market Opinion (“LMO”) process, including:

- Spouses and common-law partners of international graduates participating in the Post-Graduation Work Permit Program and highly-skilled temporary foreign workers;
- Charitable or religious workers;
- Entrepreneurs, intra company transferees, researchers and academics; and
- Others for purposes of self-support (refugee claimants) or humanitarian reasons (destitute students, holders of temporary resident permits valid for at least six months).

The government has imposed sanctions on employers who do not comply with the new regulations by providing non-genuine job offers or who have provided non-genuine job offers in the previous two-year period. The regulations require Citizenship and Immigration Canada to post the name of the non-compliant employer on the Citizenship and Immigration website.

As of January 2012, the government is aggressively auditing employers to ensure that they are in compliance with the wages, working conditions, position and duties of the occupation. Compliance audits can be minor (ie. verification of employment details for one foreign worker) or major (verification of compliance for all the employer's foreign workers, which can become a massive undertaking).

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Professional immigration in France: Outlook and update

Karl Waheed*

OUTLOOK

France has one of the highest birth rates in Europe. So it is doing fine in replenishing its population. But France still needs immigrants more than ever, to satisfy its need for qualified workers, and to be a prominent actor in a global economy. The current government was understanding this well, when it created regulations adapted to global employment needs of multi-national groups and allowed graduating foreign students to seek employment in France, and thus keep the talent here.

So what happened? The electoral campaign started in 2011 and immigration is a hot issue here, as it is in most other European countries. With its new anti business immigration stance the current government is trying to re-capture the voters it may have antagonized by its pro-business conduct in preceding years.

Business should be back to normal by the middle of this year, after the presidential and parliamentary elections.

UPDATE

The government circular of 31 May 2011 has instructed the labour authorities to apply greater scrutiny in adjudicating work permits, and interpret the regulations restrictively, with the aim of reducing the number of foreign nationals being admitted to France for professional purposes. We will provide you below details of the restrictive measures (**I**). On a more positive note, France has created a new immigration category by implementing the European Blue Card directive, in order to attract skilled workers from third countries and facilitate the mobility and permanent residence of such workers within the European Union (**II**).

1. Restrictive measures: Greater scrutiny of employer

The labour authorities are to deepen the scrutiny to verify the existence of the employer and its past and present compliance with the labour, social security, and immigration regulations. Any violations may be sufficient grounds to deny a work permit application.

Greater scrutiny of the employment offered

Labour market tests are to be applied strictly and application is to be denied if market analysis reveals insufficiently high tension for the position sought to be filled or the possibility of filling the position by a training program in the short future. Any advertisement seeking candidates for a position must be carried out for a reasonable period of time. The administration is being asked to consider “two two three months” as being reasonable, whereas in the past the administration considered two to three weeks as reasonable.

The labour authorities are to evaluate if the foreign worker is not under or over qualified for the employment offered. If he/she is under qualified, the application must be denied. If he/she is overqualified, the advertisement must be modified and published again.

Such authorities must also verify that:

- the compensation meets the appropriate thresholds, as determined by the collective bargaining agreements, market, and the minimum salary laws;
- the candidate has adequate knowledge of French language;
- the candidate is provided adequate housing.

Greater scrutiny of change of status applications

The labour authorities are urged to examine any request for change of status application very carefully, especially when such applications are made by foreign students. The circular states that foreign students are to return to their home countries after the end of the schooling.

Such instructions resulted in a massive protest from the universities, students and even criticism within the government. The government issued a new circular on 13 January 2012, which provides a guideline to the adjudicating officers, in order to avoid tarnishing the attractiveness of French schools to foreign students and undermining French business in need of young foreign talent.

These restrictive measures are not applicable to work permit categories which receive preferential processing, such as intra-company transfers, secondments, and seasonal workers.

The restrictive measures have increased the processing time of all work permit categories.

The list of jobs for which workers are in shortage reduced by half

A decree of 11 August 2011 has reduced to half the list of jobs in certain fields where employers encounter difficulties in recruiting workers. The list contains from now on only 14 job categories, as opposed to 30 previously. Foreign workers can fill these jobs without being submitted to a labour market test in the framework of their work permit application. The reduced list is unique and applies throughout the French territory unlike the previous regional lists which allowed local market situations to be taken into account. This list will be revised at the latest on 1st August 2013.

It should be noted that bilateral agreements regarding the control of migration flows have been signed by France and other countries (Brazil, Burkina Faso, Cameroun, Cape Verde, Gabon, Mauritius, Benin, Congo, Senegal and Tunisia). These agreements allow nationals to obtain work permits under conditions negotiated country by country, and may contain more generous lists of jobs.

2. Good news: The French Blue Card permit

The law n° 2011-672 of 16 June 2011 and the decree n°2011-1049 of 6 September 2011 provide the legal framework for the transposition of the EU “Blue Card” directive into French law.

The qualifying criteria are in accordance with the criteria stated in the EU directive:

(1) Employment contract with a duration of one year or more.

(2) The minimum annual salary threshold of 1.5 times the average salary of reference, which is determined by the Minister of Interior on an annual basis. According to the current reference salary (€ 34,296), this annual salary threshold is € 51,444.

(3) A 3 year higher education diploma or equivalent knowledge through 5 years of experience.

The qualifying third country national will be issued a joint residency and work permit for the length of employment, with maximum validity of 3 years. This permit is renewable. Accompanying spouse will be issued a Private and Family Life category work permit which authorizes work. This latter work permit will be renewed annually for as long as the main applicant has a valid Blue Card permit.

The Blue Card may also be issued to a third country national who already holds a Blue Card issued by another member state, and wants to accept employment in France after 18 months of residence under the initial Blue Card. The application is made within one month of arrival in France. The applicant need not present a long-stay French visa.

The Blue Card permit is issued without labour market testing. Its beneficiary and his/her spouse would qualify for the EU long term resident permit after 5 years of residence under the Blue Card in the EU of which only the last 2 years must be in France.

The French authorities have up to 90 days to adjudicate the Blue Card application and up to 6 months to adjudicate the accompanying spouse residency permit.

The advantages of the Blue Card over the pre-existing categories are:

- It does not require an intra-company prior employment.
- Mobility within EU is facilitated.
- Acquisition of long term resident status is facilitated.
- The qualifying criteria are very precise (leaving less room for discretion of the labour authorities).

We expect the Blue Card to be very good news for skilled third country nationals who are unable to qualify under the pre-existing categories.

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Immigration policy news from around the world: Trends and updates as we enter 2012

Ellen G. Yost*

It is difficult to predict what kind of year 2012 will be for immigration policies around the world. If we continue to see unfavorable economic news additional efforts by countries to limit immigration growth, particularly for foreign workers, are likely this year. However if economic forecasts remain constant or improve, 2012 could resemble 2011, which was typified by gradual, incremental changes. In contrast, 2010 saw wide-ranging, large-scale policy changes in a number of countries. Likely developments for 2012 include increases to minimum salary requirements, decreases in the number of occupations considered "in-demand" and thus more appropriate for foreign workers, heightened scrutiny of labor market tests where they are required, and similar policy shifts. In brighter news, probable change for 2012 also include more countries introducing investor or entrepreneur visa programs aimed at increasing foreign investment and domestic innovation.

Europe

A number of key European Union measures took effect in 2011. In April, any remaining work restrictions for nationals of the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, the Slovak Republic and Slovenia expired, meaning citizens of these countries may now freely move and work throughout the EU without requiring work or residence permits. December saw a related deadline for EU countries to reconsider whether to retain work restrictions for Bulgarians and Romanians. Some of Europe's larger economies, such as Germany, France and the UK elected to retain work permit requirements for at least some Bulgarians and Romanians, while other EU members decided to eliminate any remaining restrictions for these nationals, such as in Italy.

Three important EU-wide rules also took effect in 2011, though not all member countries have fully implemented their provisions. First, member countries must implement a new uniform biometric residence permit containing a variety of security and biometric features, such as the holder's fingerprints and a digital photograph. The new residence cards seek to prevent unauthorized migration and facilitate police work. The uniform permits were also intended to help employers comply with another key piece of EU legislation that took effect in July 2011, requiring EU member countries to implement rules prohibiting the employment of third-country nationals without proper work authorization and to provide sanction regimes for noncompliance. Under this directive, employers must check the work authorization of new hires to ensure they have the proper documentation to work.

Lastly, the EU Blue Card program was launched in 2011. The program was announced in 2009 and is designed to attract highly skilled third-country nationals to the region by offering expansive employment and residence rights. All EU member states – except Denmark, Ireland and the United Kingdom, which opted out of the program – were required to adopt Blue Card provisions into their domestic legislation by June 19, though some countries have yet to do so. In general, the Blue Card allows qualifying third-country nationals to reside and work in an EU member state and ultimately attain long-term residence rights. After residing for 18 months in the EU country that initially granted the Blue Card, the cardholder will be permitted to take up highly skilled employment and move freely throughout participating EU countries. After five years of legal and continuous residency within the EU as a Blue Card holder, a qualifying foreign national may apply for permanent residency in the EU country where he or she lives. However, the EU Blue Card directive gives member states considerable latitude to determine how the

program will be incorporated into their domestic immigration systems, and as a result, each country has its own unique Blue Card program.

Individual countries in Europe continue to tighten their immigration systems. In the United Kingdom, the Conservative-led coalition government is still studying options for reducing the number of immigrants entering the country each year. Federal authorities in France called for a tightening of work permit rules and heightened scrutiny of work permit applications in late 2011, though recently Federal authorities backed off slightly from stringent requirements for foreign students seeking to work in the country after graduation. While in Spain and Ukraine, what seemed like minor procedural changes (corporate registration requirements in Ukraine and more restricted access to a fast-track processing program in Spain) created significant processing difficulties for employers seeking to send skilled workers to the two countries.

However, some countries in Europe have again begun to look at immigration as a way to increase access to skilled, in-demand workers and to promote investment and entrepreneurship. In 2012, Germany will make it easier for foreign professionals to work within their field by simplifying and standardizing the process to have their foreign-issued professional qualifications recognized. Under the new law, individuals will be able to have their foreign qualifications recognized regardless of their citizenship or the country of origin of the qualification. There will be new standardized assessment procedures for all of Germany's non-regulated professions, based generally on the substance and quality of each specific qualification. In addition, applications will be reviewed within three months of submission. The change is expected to address a recognized shortage of professionals in Germany. Currently, many individuals holding foreign professional qualifications or degrees cannot put them to use because the current recognition procedures are onerous and lack objective standards of review.

In Ireland, 2012 should bring the introduction of a new immigration program for investors and entrepreneurs seeking to launch start-up companies in the country. The program is intended to spur investment and job creation. Ireland is also expected to provide greater clarity on family reunification policy concerning family reunification and permanent residence, focusing on non-European Economic Area (EEA) family members of Irish citizens, as well as non-EEA family members of non-EEA nationals already living in Ireland.

Asia and the Pacific Rim

In general, countries in Asia and the Pacific Rim also continue to tighten immigration requirements, though there have not been any of the bigger policy shifts like those seen in the UK or France over the past few years nor are any expected in 2012.

In Australia, the big news for employers in 2011 was the launch of a new accredited sponsor status program offering priority processing for subclass 457 nominations and visa applications (the country's primary temporary work visa category). Employers apply to the DIAC for accreditation, either as an amendment to an existing sponsorship agreement or as part of a new sponsorship application. If approved, the accreditation will remain valid for the duration of the sponsorship agreement, typically six years. However, proposed tax changes for 2012 have raised fears that they could deter foreign workers from moving to Australia when compared to other countries that have more beneficial tax regimes in place. If implemented, the government's tax proposals would make foreign workers' housing and food benefits subject to either Australia's income tax or fringe benefits tax, similar to the rules on taxable housing and food benefits that apply to Australian workers. Currently, housing and food benefits are exempt from both income and fringe benefit taxes. This concession delivers significant tax savings to foreign workers and their employers and has played an integral role in many Australian employers' recruitment and retention strategies.

In India, foreign nationals may soon see or begin to see a lessening of some of the inconveniences related to in-country registration and extension processes. Various local governmental departments with immigration responsibilities have begun to introduce a new online registration application procedure that eventually is expected to simplify the process, though in the short-term may cause delays. These procedures are already implemented in Mumbai and are being piloted in Bangalore and Chennai. Eventually, Indian authorities plan to network the country's overseas missions and in-country immigration offices for greater efficiency and control. Authorities in India also clarified recently that foreign nationals working in India with an employment visa may change employers without having to leave the country and reenter with a new visa, as long as the new employer is within the same corporate family. To qualify for visa portability, the foreign national must be moving between a holding company and one of its subsidiaries or between two subsidiaries of the same registered holding company.

In Singapore, foreign nationals applying for new employment passes in the Q1 and P2 categories have begun to face tougher eligibility requirements as of January 1, 2012, when Singapore's Ministry of Manpower (MOM) raised the minimum salary for each category and introduced a heightened education requirement for the Q1 pass in an effort to maintain the country's current level of foreign workers in the face of increased demand. The P and Q employment pass categories are available to foreign nationals who will enter Singapore to work as managers, professionals, administrators, or specialists provided that they meet minimum salary requirements, and possess professional credentials and post-secondary educational qualifications adequate for their position or relevant work experience.

Similarly in Thailand, business visitors now face stricter application procedures for Urgent Work Permits, the authorization required to conduct most short-term business activities in the country. Business visitors who do not comply with the new rules could have their permits delayed or denied. Applicants must file for the permit in person or through a representative and must provide an invitation letter from a Thai sponsor. Faxed applications are no longer accepted. Same-day service should continue to be available under the new rules. Unlike most countries, Thailand requires visitors to get a work permit for nearly all business activities. Business visitors entering for 15 days or less usually seek an Urgent Work Permit after arrival.

In an interesting development, Vietnam introduced immigration reforms in August that appeared to greatly simplify formalities for foreign nationals seeking to work in Vietnam as chief representatives or heads of project offices, by exempting them from obtaining a work permit. However, several months later, the Ministry of Labor clarified that only foreign nationals heading representative offices of non-governmental organizations are exempt from the work permit requirement. Foreign nationals who entered the country with a work permit in the interim had to obtain them or leave the country. Despite the clarification, the earlier reforms have also left many unanswered questions about new employer reporting requirements that are expected to be settled in early 2012.

Africa and the Middle East

A number of governments in Sub-Saharan Africa have been making policy changes to open up their countries' immigration systems to promote investment and trade. Mozambique announced a new short-term permit that will allow foreign nationals to work for companies in the petroleum and mining industries for up to 180 days within a calendar year. Angola negotiated a bilateral agreement with Portugal, and is negotiating one with Norway, to simplify visa processes for their respective nationals. Each country will introduce two new visas. A multiple-entry short-term visa will allow business stays of up to 90 days per entry within a six-month period. A multiple-entry long-term work visa will allow stays of up to 12 months per entry. The new visas will also benefit from expedited processing.

Lastly, Rwanda enacted a new law that overhauls the country's entire immigration system to attract foreign investment and skilled workers in an effort to enhance Rwanda's status as a progressive and growing African market. The law creates new visa categories to facilitate business travel and eases the work and residence permit procedures for foreign employees. New entry visa classifications are intended to better accommodate business travelers and allow for increased entry visa validity periods and multiple entries. The new law will also harmonize the country's immigration system with East Africa Community protocols on free movement, allowing nationals of the Community to visit Rwanda for up to six months without a visa.

In contrast, according to media reports, Saudi Arabia is implementing a new nationalization program, the *Nitagat* system, designed to reduce the ratio of foreign workers in the country from the current 31 percent to 20 percent by 2014. The *Nitagat* system classifies businesses with 10 or more employees into one of four groups based on the percentage of their workforce that are Saudi nationals. The larger the business, the more Saudi nationals it must employ to qualify for the broadest sponsorship privileges. Businesses in the lower groups may only be able to sponsor foreign workers in limited circumstances, if at all.

In the United Arab Emirates, the biggest news continues to be the implementation of a new national ID card. All UAE residents, including foreign and Emirati nationals, must obtain the new Emirates identity card by the prescribed government deadline for a resident's immigration status and place of residence. Individual Emirates have been integrating the ID card application process with existing registration procedures, which is expected to be the norm nation-wide. In an unrelated development, foreign nationals who have received a work permit ban from the UAE's Ministry of Labor are now unable to obtain employment visas for work within the UAE's free trade zones for the duration of the ban, typically six months. Previously, these work permit bans only prevented foreign nationals from working for a sponsoring employer operating outside of the free trade zones. The change in policy has meant that foreign nationals seeking to change from an employer operating outside of a free trade zone to a new employer that operates inside a free trade zone are now subject to Ministry of Labor imposed work permit restrictions.

The Americas

2011 was a relatively quiet year in the Americas in terms of immigration news. The United States has remained in a political stalemate concerning immigration policy at the federal level for several years, and with 2012 being a presidential election year, this will likely continue. However, individual U.S. states continue to pass their own immigration enforcement bills with increasing speed. In a federal lawsuit challenging an Arizona law, the U.S. Supreme Court is expected to clarify the Constitutional boundaries for state-level immigration laws this year. Depending on how the Court rules, 2012 could see an explosion of additional state-level immigration laws or a return to previous times when only federal immigration laws mattered.

Canada intends to increase the number of foreign nationals granted permanent residence under its Federal Skilled Worker Program and admit as many as 57,000 permanent residents under the program this year, an increase of approximately 10,000 over 2011. The Federal Skilled Workers Program is one of the principal avenues of employment-based permanent residence in Canada. In late 2011, Canada also began offering qualified foreign PhD students and recent graduates the ability to apply for permanent residence under the Federal Skilled Worker Program if they have completed at least two years of study toward a PhD and remain in good academic standing at a provincially recognized school in Canada, or have graduated from a Canadian PhD program within the twelve months before applying. Up to 1,000 qualifying students and graduates will be admitted in 2012 under the new initiative. Canada also began allowing intra company transferees who travel internationally while working in Canada to extend their work permits by the number of days they are abroad. The policy means that frequent travelers will no longer be deprived of their full period of physical stay and employers will have more flexibility to move staff in and out of Canada.

In Brazil, employers' and foreign nationals' concerns surrounding in-country registration requirements will likely continue. Foreign nationals staying in Brazil for more than 90 days must register with the police within 30 days of entry and obtain an RNE. The RNE is not required to begin work with the sponsoring employer. However, a foreign national must have an RNE in order to be added to the employer's local payroll, open a bank account, obtain a driver's license and complete other post-entry formalities. The registration process used to be a relatively quick formality, but procedural changes and a lengthy strike in 2010 have caused the process to take several months in some cities, particularly in São Paulo. However, in recent months authorities have made efforts to reduce problems caused by these delays, such as allowing foreign nationals to travel abroad while their registration is pending or opening additional registration locations.

In 2011, Mexico published a comprehensive reform law that makes significant changes to the country's immigration system, and its implementation will likely continue into 2012. Most notably, the new law decriminalizes unauthorized immigration into Mexico and creates new short-term work permit exemptions. Among the provisions whose implementation remains unclear, foreign nationals could be permitted to perform activities in Mexico for up to 180 days without prior employment authorization, even if paid from a local source. In addition, the new law could create a new one-year, multiple-entry visa for cross-border workers. Holders of this new visa will be able to work in designated Mexican states and receive a salary from a local source in Mexico.

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