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Message de Rayan Houdrouge, Président de la Commission de Droit de l'immigration et de la nationalité

Chers membres de la Commission de Droit de l'immigration et de la nationalité,

Nous sommes heureux de vous présenter dans cette édition des contributions des Etats-Unis (George Akst, Kushal Patel ainsi que Clayton Cartwright), du Canada (Jacqueline Bart et Caroline Mok), de Suisse (Rayan Houdrouge et Rebecca Beyeler), de France (Christiane Féral-Schuhl et Andreea Haulbert) et du Royaume-Uni (Laura Devine).

George Akst présente le système d'immigration des Etats-Unis et la libre circulation des personnes en abordant son histoire et son évolution ainsi que la situation actuelle.

Jacqueline Bart et Caroline Mok traitent de l'immigration économique et de l'immigration en raison de regroupement familial au Canada. Tout en reconnaissant l'influence positive de l'immigration économique sur le pays, elles critiquent le fait que celle-ci a plus d'importance que le regroupement familial.

Rebecca Beyeler et moi examinons l'accord temporaire relatif à l'accès au marché du travail qui s'appliquerait entre la Suisse et le Royaume-Uni en cas d'un "Brexit sans accord". Cet accord souligne le souhait de maintenir des liens entre la Suisse et le Royaume-Uni et d'en assurer autant que possible la continuité, malgré un "Brexit sans accord".

Andreea Haulbert examine la situation des citoyens français au Royaume-Uni et des citoyens britanniques en France après un Brexit et expose les conditions auxquelles les citoyens britanniques peuvent obtenir un permis de séjour en France.

L'article de Kushal Patel a pour sujet la "*Public Charge Rule*" qui permet au gouvernement des Etats-Unis de rejeter une demande de "*Legal Permanent Residency*" au motif qu'il est probable que l'étranger dépendra principalement du gouvernement après son admission. Il existe notamment une nouvelle règlementation qui élargit le pouvoir d'appréciation de l'autorité pour rejeter une demande.

Christiane Féral-Schuhl témoigne de la situation critique sur l'île de Lesbos qui accueille aujourd'hui 14'000 migrants et souligne l'importance de sauvegarder les valeurs européennes et humanistes.

Clayton Cartwright présente une procédure nouvellement introduite aux Etats-Unis qui permet d'obtenir un allégement fiscal pour les "*Accidental Americans*" qui renoncent à leur nationalité américaine.

Finalement, l'article de Laura Devine traite du projet du gouvernement britannique qui prévoit d'introduire un visa pour les étudiants étrangers ayant fini leurs études au Royaume-Uni et souhaitant travailler dans le pays.

Je vous rappelle que la session de notre Commission lors du Congrès du Luxembourg aura lieu le vendredi 8 novembre de 14h30 à 17h30 sur le thème suivant "Est-il nécessaire de restreindre la libre circulation ? ".

Je suis convaincu que ce Congrès sera un grand succès et je vous souhaite à tous un merveilleux séjour au Luxembourg !

Je suis également ravi d'annoncer que Hervé Linder sera le prochain président de notre Commission et prendra ses fonctions au Congrès. Je suis certain qu'il s'acquittera de ses fonctions avec beaucoup de compétence et de *leadership* et qu'il permettra à la Commission de poursuivre sa croissance.

Ce fut un honneur et un réel plaisir pour moi d'être le président de notre Commission et de poursuivre le travail de ma prédécesseur, Jacqueline Bart, dans la promotion de l'immigration au sein de l'UIA. Aujourd'hui, notre Commission est de fait une commission reconnue et l'UIA est véritablement consciente de l'importance croissante de l'immigration, domaine juridique devenu crucial dans notre société. Sur une note plus personnelle, j'ai réellement beaucoup apprécié et appris de nos discussions inspirantes et fructueuses, et ce fut sincèrement un plaisir de partager de grands moments de convivialité avec beaucoup d'entre vous.

Je me réjouis de continuer à soutenir les activités de l'UIA et en particulier de sa Commission de Droit l'immigration et de la nationalité.

Bien cordialement,

Rayan Houdrouge

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Dear Members of the UIA Immigration and Nationality Law Commission,

We are happy to present in this issue contributions from the United States (George Akst, Kushal Patel and Clayton Cartwright), Canada (Jacqueline Bart and Caroline Mok), Switzerland (Rayan Houdrouge and Rebecca Beyeler), France (Christiane Féral-Schuhl and Andreea Haulbert) and the United Kingdom (Laura Devine).

George Akst presents the US Immigration system and the Free Movement of People by discussing their history and their evolution, as well as the current situation.

Jacqueline Bart and Caroline Mok discuss economic immigration and immigration motivated by family reunification in Canada. While acknowledging the positive impact of economic immigration, they criticize the fact that the latter seems to enjoy a greater importance than family reunification.

Rebecca Beyeler and I analyze the Temporary Agreement on Admission to the Labor Market, which would be applicable between Switzerland and the United Kingdom in the case of a "no deal" Brexit. This Agreement stresses the desire to maintain links between Switzerland and the United Kingdom and to ensure their continuity as far as possible, despite a "no deal Brexit".

Andreea Haulbert presents the uncertain situation of French nationals in the UK and UK nationals in France after a Brexit and the conditions under which UK nationals can be granted residence permits in France.

Kushal Patel's article discusses the "Public Charge Rule" which allows to deny an alien of a Legal Permanent Residency status on the ground that the applicant is likely to be primarily dependent on the Government after their

admission. Namely, a final rule has recently been published which gives adjudicating officers greater discretion when determining applicants' inadmissibility.

Christiane Féral-Schuhl testifies of the critical situation on the island of Lesbos, which currently receives 14'000 migrants. She highlights the importance of safeguarding European and humanist values.

Clayton Cartwright presents the new measures of tax relief for certain Accidental Americans who relinquish U.S. citizenship.

Finally, Laura Devine's article discusses the UK Government's plans to open a new post-study work visa for international students who have finished their studies in the UK and who wish to find employment in the UK.

I wanted to remind you that the session of our Commission will take place on Friday, November 8th from 2.30 pm to 5.30 pm on the following topic “Is it necessary to restrict free movement? ”.

I am convinced that this Congress will be a great success and wish you all a wonderful time in Luxembourg!

I am also delighted to announce that Herve Linder will be the next President of our Commission and will take up his functions at the Congress. I am certain that he will carry out his duties with great skills and leadership, and will allow the Commission to further grow. I wish Herve all the very best as President of our Commission.

It has been an honour and a real pleasure for me to be the President of our Commission and to pursue the work of my predecessor, Jacqueline Bart, in advocating for immigration within the UIA. Today, our Commission is definitely an established commission, and the UIA truly realizes the increasing importance of immigration as a crucial field of law in our society. On a more personal note, I have really enjoyed and learnt from our inspiring and fruitful discussions, and I have sincerely appreciated sharing great moments of conviviality with many of you.

I very much look forward to continuing supporting the UIA's activities and in particular its Immigration and Nationality Commission.

Kind regards,

Rayan Houdrouge

The US Immigration System and the Free Movement of People

Upon the founding of the United States (US) in the 18th Century, the ability of a person to move freely into the US was an absolute right. In the early days of the US, one simply got on a boat, landed at some small port in the US, and settled down. That was the way it worked, without any restrictions, until the late 19th Century.

The first major immigration restriction was implemented in 1882, under a thinly veiled "Country of Origin" designation, when the US Congress enacted the notorious Chinese Exclusion Act. It was the first significant law that restricted immigration into the US, and it was clearly based on racial bias. The Chinese Exclusion Act established an absolute 10-year moratorium on Chinese labor immigration.

Since the 1850s, a large number of Chinese workers had immigrated to the U.S. They worked in the gold mines and garment factories, built most of America's railroads and did agricultural work. Although Chinese workers made up less than 0.01 percent of the American population, white workers started complaining about Chinese people taking their jobs and blamed them for their low wages.

Supporters of these Chinese immigrants. challenged the Act of 1882 in the federal courts as both discriminatory and unconstitutional. However, their efforts failed. The Act was renewed in 1892 for another ten years. In 1902 Chinese immigration was banned permanently. The Chinese population in the U.S. quickly declined.

In 1943, as Word War II raged, the US Congress begrudgingly acknowledged that the Chinese Exclusion Act was discriminatory and repealed it. The Act was replaced by the Magnuson Act, which permitted a limited number of Chinese nationals to enter the US each year. This so-called "Quota system" allowed 105 Chinese nationals to enter the US each year. The Magnuson Act remained in effect until it was absorbed and modified by the Immigration and Nationality Act of 1952, the first comprehensive US law on immigration, which abolished direct racial barriers and was subsequently updated and expanded by the Immigration and Nationality Act of 1965.

But the free movement of people into the US has also been restricted on grounds other than race. Another law that selectively restricted immigration was the Immigration Act of 1917 (also known as the Literacy Act). The Literacy Act was the first attempt at adding an element of national security to the process and, among other things, imposed literacy tests on immigrants. This act also added to the list of unwanted people, including alcoholics, anarchists, contract laborers, criminals, epileptics, illiterates, insane persons and persons afflicted with contagious diseases. Many of these restrictions are, for the most part, still in effect today.

Today, visas allowing one to come to the US to live, study or work can be divided into permanent visas (called "Green Cards") which allow one to live and work freely in the US for an unlimited amount of time, and temporary visas, which are much more restrictive in terms of duration and employment.

There are many different types of temporary visas, from those allowing one to come for a short vacation or to study, to those allowing one to work for an employer for many years or to invest in a new company. However, despite the elimination of overt racial restrictions, many of the most commonly used temporary visas for employment and business purposes still carry country of origin restrictions. In these modern-day versions, many US immigration laws are based on bilateral and multilateral treaties with certain countries that actually favor the citizens of certain countries, as they provide additional options for working and investing in the US that are not available to the rest of the world.

These country-specific temporary visas are as follows:

H-1B1 visas for citizens of Chile and Singapore. The H-1B1 visa is a visa category that is only available for nationals of Singapore and Chile. The visa for Singapore nationals is called the H-1B1-Singapore, and the visa for Chilean nationals is called, of course, the H-1B1-Chile. These visas were introduced by the Singapore-United States Free Trade Agreement and Chile-United States Free Trade Agreement in 2003. Every year, a total of 6,800 H-1B1 visas are reserved: 1,400 for Chile, and 5,400 for Singapore. Historically, these quotas have never been reached. These visas are only available for individuals in a "specialty occupation." In order to be in a "specialty occupation" one is required to have at least a bachelor's degree in a specialized field of knowledge. If education was obtained in a foreign country, an academic evaluation must be obtained to prove that an individual's education is equal to a U.S. degree. Additionally, the applicant must be coming to the US based on a job offer for a position that requires the use of this academic training.

E-3 visa for Australians. Another type of visa that is only available for nationals of a certain country is an E-3 visa. This visa is only available to citizens of Australia. The E-3 visa was established as a result of the Australia-United States Free Trade Agreement (AUSFTA). In many ways, the requirements for the E-3 are similar to the H-1B1 (job offer in a Specialty Occupation requiring the use of an advanced academic degree, etc.). There is an annual quota of 10,500, which, historically, has never been reached.

TN visa for Canadians and Mexicans. There is also a TN visa for nationals of Canada and Mexico. The United States, Canada and Mexico signed the North American Free Trade Agreement (NAFTA) in 1992. NAFTA included an Appendix 1603.D.1 that required each member state to institute laws and regulations for the free temporary movement of certain professionals among the three countries with special simplified immigration procedures.

In order to qualify for a TN visa, a person must work in a profession listed in the NAFTA treaty and have the requisite education or expertise. An initial period of stay for a Canadian entering under the TN is up to three years. The TN visa may be renewed in three year increments indefinitely. However, it is not a substitute for a green card (permanent resident visa), and therefore if somebody abuses a TN status by asking for too many renewals, authorities may refuse that person further renewals of the TN status.

There is a difference between TN status for Canadian citizens and TN status for Mexican citizens. TN status for Canadians is the simplest of all US visas to obtain because it does not involve the issuance of an actual visa. Canadian citizens are admitted into the US in TN-1 status at the border after a border officer has reviewed the request. The applicant is not required to first obtain an actual visa at a US embassy or consulate. Mexican citizens, however, must first obtain a TN-2 visa at a US embassy or consulate in Mexico and it is issued in one year increments. They may enter the US only after obtaining a TN-2 visa.

Unlike the H-1B1 or E-3 visa, the TN visa does not have an annual cap limit.

E-2 Investor Visa. Another visa available only to citizens of certain countries is an E-2 visa. The E-2 investor visa is a visa that allows its holder to enter and work in the US based on an active (not passive) investment into a US enterprise. This visa is only available to citizens of countries with which the U.S. has a treaty of commerce and navigation. Currently, there are 96 countries on the E-2 treaty list, including such diverse countries as Argentina, Australia, Austria, Canada, France, Germany, Iran, Italy, Israel, Japan, Singapore, South Korea, Spain, Turkey, Ukraine, and the United Kingdom among others.

The E-2 visa is granted from three months to five years and can be renewed indefinitely. The investment must be "substantial". It must be sufficient to run the US enterprise. There have been successful E-2 visa applications for investments of as little as $50,000. It really depends on proving that the amount of the investment is appropriate for the nature of the enterprise. For example, it would not make much sense to present an application with an investment of $50,000 for the ownership of a vineyard and winery where it may cost millions of dollars to purchase

the land and machinery for such an operation. On the other hand, if one is starting a marketing consulting firm, the enterprise may only require a small office with a desk and a computer. In that situation a much more modest investment would be considered appropriate.

Temporary Protected Status. While not technically a visa, the US has also issued Temporary Protected Status (TPS) to certain individuals from select countries fleeing civil unrest or natural disasters. Over the years, TPS has been available to such countries as El Salvador, Haiti, Nepal, and Sudan, among others. Unlike the visas mentioned above, which require authorization by the US Congress, TPS can be issued, (and revoked) by the Executive Order of the President. As such it is far more sensitive to shifting political winds and changes regularly.

In the area of Permanent Visas (Green Cards) specific country quotas still exist for citizens of China, India, Mexico and the Philippines. These country quotas have resulted in enormous backlogs for these citizens. However, as of the writing of this article, a proposed law is moving through the US Congress that would eliminate these country quotas and finally, after many years, establish a unified, world-wide quota in which applicants for Green Cards would all be in the same queue as they wait their turn for permanent residency.

Although the completely free movement of people into the US has not been possible since the late 19th Century, and the current rhetoric coming out of Washington DC would appear to indicate that the current administration would close the nation's borders if it could, it is clear that, for many people, the permission to enter the US to work and live is still a very real possibility.

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Is it Necessary to Restrict Free Movement: A Balancing Act between Economic and Family-Class Immigration

Introduction

Building a strong, prosperous economy, facilitating family reunification, and fulfilling Canada's international legal obligations with respect to refugees and those in need of resettlement are explicit objectives of Canada's *Immigration and Refugee Protection Act*. To fulfil these objectives, the Government of Canada attempts to balance immigration levels between three 'pillars' or categories of immigration, namely the economic, family and humanitarian classes. Whether the right balance is being struck is an important question that needs to be considered as Canada aims to increase its permanent resident admissions to 350,000 by 2021.

"*The best and the brightest from around the world*"

Economic immigrants are selected to immigrate to Canada for their high-level skills or experiences, their potential to establish or run businesses and to make substantial investments, or for their capacity to address the specific labour needs of Canadian provinces and territories. In contrast, family class immigrants are selected to fulfill the goal of family reunification based on familial ties to Canadian citizens or permanent residents, and other foreign nationals, such as refugees, are accepted on the basis of Canada's humanitarian and international obligations.

In 2018, the Canadian government reported one of its largest influxes of immigration since the early 1900s with over 320,000 new immigrants to Canada becoming permanent residents.[1] Of the total number of new immigrants to Canada, over 186,000 were landed as members of the economic class. Around 85,000 were admitted as members of the family class while the rest were accepted under the refugee class or other humanitarian classes.

On its face, these figures suggest that the balance between the categories of immigration in Canada has tipped heavily in favour of economic-class immigrants, in contrast with countries like the United States where immigration policy is primarily motivated by family reunification.[2] Since a points-based system was first introduced in 1967 as the primary method for selecting immigrants under the economic class, the Canadian government has generally tended to pursue immigration reforms that "focus Canada's immigration system on fuelling economic prosperity" and that place a premium on those immigrants who possess the human capital and skilled experience to meet Canada's economic needs.[3]

Some examples of recent initiatives and reforms undertaken by the Canadian government, that have aimed to attract the "best and the brightest from around the world"[4] include the following:

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[1] Government of Canada, *150 years of immigration in Canada*, released June 29, 2016 < https://www150.statcan.gc.ca/n1/pub/11-630-x/11-630-x2016006-eng.htm>; Statistics Canada, Government of Canada, "Canada - Admissions of permanent resident by province/territory of intended destination and immigration category" (modified on June 12, 2019).

[2] "What Can the U.S. Learn from Canada's Immigration Policy?." *Knowledge@Wharton.* The Wharton School, University of Pennsylvania, 16 September, 2016. Web. https://knowledge.wharton.upenn.edu/article/what-the-u-s-can-learn-from-canadas-immigration-policy/; Quoctrung Bui and Caitlin Dickerson "What Can the U.S. Learn From How Other Countries Handle Immigration?" *The New York Times,* 16 February 2019. Web. https://www.nytimes.com/interactive/2018/02/16/upshot/comparing-immigration-policies-across-countries.html; Stacy Torres and Xuemei Cao, "The Immigrant Grandparents America Needs,", *The New York Times,* 20 August 2018. Web. https://www.nytimes.com/2018/08/20/opinion/family-immigration-grandparents.html?login=email&auth=login-email

[3] Immigration, Refugees and Citizenship Canada (IRCC), *2018 Annual Report to Parliament on Immigration* (2018), available at: https://www.canada.ca/content/dam/ircc/migration/ircc/english/pdf/pub/annual-report-2018.pdf; IRCC, Notice – Transforming the Immigration System (May 25, 2012), http://www.cic.gc.ca/english/department/ media/notices/notice-transform.asp.

[4] IRCC, "Attracting skilled talent to drive prosperity for all Canadians," 24 June 2019, available at: https://www.canada.ca/en/immigration-refugees-citizenship/news/2019/06/immigration-key-to-unlocking-canadas-future-economic-success.html

- In January 2015, IRCC launched the Express Entry system, a dynamic two-step online application management system designed to improve flexibility in selection and application management, respond to federal and regional market needs, and speed up application processing.[5] In general, eligible applicants must first submit an Expression of Interest (EoI) and enter into the Express Entry pool. The system then ranks applications based on human capital and other factors, such as language proficiency, age and education, through the Comprehensive Ranking System (CRS). Every two weeks, IRCC issues invitations to the top candidates in the pool to apply for permanent residence. Since the implementation of the Express Entry system, there has been a significant improvement in the efficiency, effectiveness and flexibility in the selection of economic immigrants.

- In June 2017, the federal Express Entry system was amended to provide extra points under the CRS for candidates who have strong French language proficiency. Additional points were also allocated to former international students with Canadian educational credentials or to applicants with a sibling in Canada. The weighting of points was also readjusted to allocate more points for human capital, skills and experience factors.

- In March 2018, the Start-up Visa Program became a permanent feature of Canada's economic-immigration program. The Start-up Visa Program functions as a pathway to permanent residence for innovative and inventive foreign entrepreneurs seeking to launch Start-up programs in Canada, with the committed support of designated organizations, such as venture capital funds, angel investor groups or business incubators.

- Most recently, in July 2019, the Canadian government announced a new Agri-Food Immigration Pilot that aims to address labour shortages in the agri-food sectors and stimulate industry growth. The Agri-Food Immigration Pilot promises to offer new pathways to permanent residence for certain agri-food temporary workers, particularly those working in meat processing and mushroom production. While further details about the application process are due to be announced in early 2020, this pilot is a welcome development from both an economic and human rights perspective, as it promises to address issues with worker exploitation and to provide employers and foreign workers with more stability and security.

This prioritization of economic-class immigration is often justified by the government as being a solution to demographic and labour shortage concerns, and as a way of developing Canada's economy by stimulating manpower, purchasing power, and innovation.[6]

Faults with Family-Class Immigration

While Canada has been globally recognized for its efforts and progress in attracting high-skilled, talented migrants,[7] these success stories have not eclipsed some common concerns regarding Canada's approach to facilitating family reunification under the family-class

The most topical concern with Canada's family-class program relates to the administration of the Parent and Grandparent (PGP) sponsorship program. In January 2019, the government began accepting sponsorship applications online on a first-in basis; however, the 'first-in' system was met with criticism as the program was closed within a matter of minutes of launching, due to the high demand amongst potential sponsors. The first-in approach was implemented to replace the previous lottery system, which was also criticized for being unfair and for improperly hinging family reunification on the 'luck of the draw'.

[5] IRCC, *Express Entry Year-End Report 2015,* available at: https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/express-entry-year-end-report-2015.html
[6] IRCC, *2018 Annual Report to Parliament on Immigration* (2018), available at: https://www.canada.ca/content/dam/ircc/migration/ircc/english/pdf/pub/annual-report-2018.pdf;
[7] Canada was ranked by the OECD as one of the most attractive OECD countries for highly qualified worked and entrepreneurs. See OECD, "How do OECD countries compare in their attractiveness for talented migrants?" Migration Policy Debates, OECD/Bertelsmann Stiftung, N°19 May 2019.

Other limitations of the PGP sponsorship program include long processing times (currently, processing times are approximately 20 to 24 months), minimum income requirements, and prolonged sponsorship undertaking periods.

To meet the minimum necessary income (MNI) requirement, sponsors must demonstrate that, for the three consecutive taxation years preceding the date of their application, their income is equal to or greater than the annual MNI which is based on low income cut-off levels determined by Canada's national statistics agency. In 2014, the Canadian government amended the *Immigration and Refugee Protection Regulations* such that sponsors now have to demonstrate that their income is equal to or greater than the annual MNI *plus an additional 30%* for each of the three years.[8] While a sponsor may combine their income with a spouse or common-law partners to try and meet the MNI, this increased financial threshold makes it difficult for many Canadian citizens and permanent residents from being able to sponsor their parents.

Another requirement of the family sponsorship program more generally is the sponsorship undertaking agreement that all sponsors must sign and submit as part of their applications. The sponsorship undertaking commits all sponsors to providing for the basic needs of their sponsored family members for a period of time after their family member becomes a permanent resident. Should a sponsored family member receive social assistance during the undertaking period, the sponsor will be found to be in default and will be ineligible from sponsoring any other member of the family class. Under the 2014 regulatory amendments, the duration of this sponsorship undertaking for parents and grandparents was extended from ten years to twenty years.

Achieving Economic Goals through Family Class Immigration

These barriers to family reunification that characterize the PGP program are reflective of the government's broader policy concern with limiting the number of immigrants who may "burden" Canada's economy, healthcare and welfare systems. However, while recognizing that these policies are motivated by fiscal concerns, it would be an error to discount the numerous tangible and intangible benefits that family-class immigrants can provide to the Canadian economy and society at large.

For instance, various stakeholders[9] have recognized that a sponsored relative in Canada can help a Canadian sponsor by assisting with child care, and by enabling the sponsor to work more hours or attend further education programs. Sponsored relatives, whether a spouse, parent or grand-parent, may also assist by supplementing household income, which in turn increases the purchasing power of immigrant families and their ability to participate in the Canadian economy. Reuniting families in Canada will also allow Canadians to keep their savings in the country instead of sending remittances back to family members abroad.

Other less tangible but equally important benefits of facilitating family reunification include the increased emotional and mental support that having parents and grandparents in Canada can provide, to help Canadians and their children succeed in the long run.

Removing barriers to family reunification can also have a direct impact on the economic-classes by attracting and retaining high-skilled foreign workers in Canada as such immigrants may be more inclined to move to Canada, and be better equipped to integrate and settle permanently, if they have their family by their side.

Conclusion

In August 2019, Canada was recognized as having the "most comprehensive and elaborate skilled labour migration system" amongst OECD countries. While recognizing that economic-class immigrants form a direct and essential

[8] IRCC, Operational Bulleting 561 – December 31, 2013, available at: https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/bulletins-2013/561-december-31-2013-modified.html#appa

[9] IRCC, *Evaluation of the Family Reunification Program,* February 2014, available at: https://www.canada.ca/en/immigration-refugees-citizenship/corporate/reports-statistics/evaluations/family-reunification-program.html; Canadian Bar Association (CBA), "Family Reunification – We're For It", 8 November 2016, available at: https://www.cba.org/Our-Work/cbainfluence/Submissions/2016/November/Family-reunification; El-Assal, Kareem and Daniel Fields. Canada 2040: No Immigration Versus More Immigration. Ottawa: The Conference Board of Canada, 2018.

part of Canada's successful immigration policy, policy makers should not discount the role that family-class immigrants have to play in Canada's long-term economic and social development. To ensure that Canada continues to fulfill its economic, social and humanitarian goals, policy makers should address the barriers to family reunification that currently exist and re-evaluate the balance between economic and family class immigration in Canada.

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Accès post-Brexit au marché du travail suisse dans le cas d'un 'Brexit sans accord'

Introduction

A l'heure actuelle, le délai pour un "Brexit ordonné", scénario dans lequel l'Union européenne (l'"UE") et le Royaume-Uni se mettraient d'accord sur une phase transitoire jusqu'au 31 décembre 2020, se termine le 31 octobre 2019 et a été prolongé au 31 janvier 2020. Pendant cette phase transitoire le Royaume Uni continuerait de participer au marché intérieur européen ainsi que de respecter le droit de l'UE, pourtant sans pouvoir de codécision dans le processus de décision de l'UE.

Après le 31 octobre 2019, un "Brexit sans accord", scénario dans lequel l'Union européenne et le Royaume-Uni n'auraient pas ratifié d'accord de retrait, s'imposerait. Dans ce cas, les accords bilatéraux entre l'Union européenne et la Suisse, y compris *l'Accord sur la libre circulation des personnes* (l'"ALCP"), cesseraient de s'appliquer entre la Suisse et le Royaume-Uni.

Le Conseil fédéral suisse a développé une stratégie connue sous le nom de "*Mind the Gap*", qui vise à maintenir autant que possible les droits et obligations acquis sous le régime de l'ALCP.

Dans cette perspective, l'objet du présent article est d'exposer la situation pour les citoyens britanniques qui aimerait accéder au marché du travail suisse après un "Brexit sans accord".

L'accord temporaire relatif à l'accès au marché du travail

Le Royaume-Uni est un partenaire considérable de la Suisse d'un point de vue économique et politique. Afin d'assurer la continuité de ces liens importants malgré un "Brexit sans accord", le Royaume-Uni et la Suisse ont signé plusieurs accords, dont *l'Accord relatif à l'accès au marché du travail pour une période transitoire à la suite du retrait du Royaume-Uni de l'Union européenne et de la fin de l'applicabilité de l'accord sur la libre circulation des personnes* (l'"Accord").

L'Accord vise à atténuer l'impact d'un changement soudain de la libre circulation des personnes à un "statut de pays tiers" et à assurer la sécurité juridique et la stabilité pour l'économie suisse. Il servira ainsi de régime de transition dans le cas d'un "Brexit sans accord" et sera en vigueur pendant une période limitée jusqu'au 31 décembre 2020. Durant cette période, il remplacera les dispositions plus restrictives de la *Loi fédérale sur les étrangers et l'intégration* (la "LEI"), qui s'appliquent actuellement aux ressortissants non-UE et qui s'appliqueraient également aux citoyens britanniques à défaut de l'Accord dans le cas d'un "Brexit sans accord".

Après le 31 décembre 2020 toutefois, la LEI s'appliquera, sauf si les parties conviennent de la prolongation de l'Accord ou de la conclusion d'un nouvel accord.

Il convient de noter que l'Accord n'a pas encore été ratifié par le Parlement suisse. Toutefois, si le Royaume-Uni se retire de l'Union européenne avant la ratification officielle de l'Accord, ce qui est probable dans le cas d'un Brexit le 31 octobre 2019, l'Accord entrerait néanmoins immédiatement en vigueur, mais provisoirement jusqu'à sa ratification.

Les principes de l'Accord

L'Accord prévoit un accès facilité au marché du travail pour les citoyens britanniques en Suisse et les citoyens suisses au Royaume-Uni.

L'Accord précise notamment que le Conseil fédéral suisse fixera un contingent distinct d'autorisations de travail pour les citoyens britanniques (un contingent de 3'500 autorisations a été établi en anticipation en février 2019 pour l'année 2019).

En outre, l'Accord dispose que certaines des exigences découlant de la LEI pour embaucher des citoyens non-UE ne s'appliqueront pas aux citoyens britanniques. Cela est par exemple le cas pour :

(i) l'exigence de priorité de la main d'œuvre provenant du marché local (en principe, les citoyens non-UE peuvent obtenir une autorisation de travail que s'il est démontré qu'aucun citoyen suisse ni aucun ressortissant de l'UE ne correspond au profil recherché) ;
(ii) l'exigence de la qualification professionnelle (en principe, seul les citoyens non-UE hautement qualifiés peuvent obtenir une autorisation de travail) ; et
(iii) l'exigence de l'intérêt économique (en principe, les citoyens non-UE sont autorisés à travailler en Suisse que s'ils servent l'intérêt économique de la Suisse).

En outre, les citoyens frontaliers britanniques ne seront pas soumis aux exigences de la LEI s'appliquant aux citoyens frontaliers non-UE. Ils ne devront notamment pas prouver qu'ils sont au bénéfice d'un droit de séjour permanent dans un Etat voisin, ni qu'ils se sont établis depuis au moins six mois dans la zone frontalière suisse.

En revanche, les autres exigences de la LEI s'appliqueront tout de même aux citoyens britanniques (e.g. les règles d'intégration, notamment les exigences en matière de connaissances linguistiques et le respect des conditions locales de travail et de salaire).

L'Accord ne concerne toutefois pas les citoyens britanniques sans activité lucrative, les personnes admises pour le regroupement familial, les prestataires de service transfrontaliers ainsi que les étudiants. A la suite d'un "Brexit sans accord", ceux-ci seront en effet soumis aux règles plus restrictives de la LEI.

Le contingent distinct d'autorisations de travail, ainsi que la non-application des exigences susmentionnées pour les citoyens britanniques souhaitant recevoir une autorisation de travail après un "Brexit sans accord" faciliteront de manière significative l'admission de citoyens britanniques au marché du travail suisse.

L'Accord est donc une reconnaissance de l'importance des liens entre la Suisse et le Royaume-Uni et souligne une fois de plus le souhait de les maintenir et d'en assurer autant que possible la continuité, malgré un éventuel ‘Brexit sans accord’.

Rayan Houdrouge / Rebecca Beyeler
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Brexit: to be agreed, or not to be agreed? That's the question!

Great Britain's entry into the European Union on January 1st, 1973 marked the beginning of forty years of turbulent history. Not being a founding member of the EU, the UK has often seemed hesitant about its investment in the EU process, as illustrated by its refusal to adopt the euro in 1999.

On 23 June 2016, some 17.4 million of British nationals (51.9% of the vote) voted in favor of leaving the European Union. The following day, Conservative Prime Minister David Cameron, at the initiative of the referendum but supporter of the EU, resigned.

This is the beginning of three years of uncertainties for French nationals living in UK and for British nationals living in France. From the British side, EU nationals have until December 31, 2020 to file their case in case of hard Brexit, or until June 30, 2021 if a divorce agreement is reached with Brussels, according to the UK government website. Prime Minister Boris Johnson repeats that his country will leave the European Union on October 31, agreed or not, and is ready for a "no deal", despite the economic and social consequences feared.

In total, more than 1.5 million applications have, according to official statistics, resulted in 61% receiving the status of "settled status", granted to persons who have had a continuous period of at least five years, which will allow them to continue working and benefit from social benefits after Brexit. Nearly two million citizens of Europeans have asked to stay in the UK after Brexit, including half a million only in September near the expected date of exit, state statistics released by the government on October 9th, 2019.

From the French side, in 2012, 400,000 British citizens were settled in France. Since 2016, some of them have tried to obtain the French naturalization and got it with a lot of work "integration" and practice of French and its history. Indeed, from the client's side, they are telling that they are motivated by an "emergency feeling" after Brexit. This emergency is reflected by the number of the British nationals who request the French nationality: 320 British nationals get the French citizenship in 2015, they are 439 in 2016 and 1 518 in 2017.

More than 200 measures of all types (information, material or human needs, legal measures, etc.) were identified in the summer of 2018 and are now implemented at the operational or legislative level. It is in this context that the Parliament authorized the Government to legislate by order on limited fields, priority, to temporarily ensure certain elements of continuity, deemed strictly necessary to individuals and companies. These measures may be withdrawn or modified in the absence of reciprocal decisions of the United Kingdom.

The French authorities recall that the ratification of the agreement remains uncertain and call on citizens and businesses to anticipate the various possible scenarios. As regards the public authorities, the Prime Minister decided on January 17th, 2019 of the implementation of the preparation plan that he had asked the ministers from April 2018 in view of a possible absence of agreement.

The French government published an order which determines the right of UK nationals continuing to stay in France after the Brexit date of 29 March 2019, in the most probable event of no exit agreement being reached between the UK and the EU. Such UK nationals will be allowed three to twelve months to acquire permanent residency if they have been in France for 5 years or more on 30 March 2019, or acquire the appropriate permit to stay, if they have been in France on such day for less than 5 years.

The Ordonnance n° 2019-76 of 6 February 2019 was published in the Journal Officiel on 7 February. Also, the Decree n° 2019-264 of 2 April 2019 was published in the Journal Officiel on 3 April 2019.

The following are the principle conditions of issuance of the residence permits to British nationals and their family members.

A transition period of 12 months
UK nationals and family members continuing their stay and professional activities beyond the Brexit date may do so for a maximum period of 12 months after the Brexit date. During this transition period they do not need to be in possession of a residence permit.

Residence permit application to be requested within 6 months following the Brexit
The UK nationals who wish to remain in France beyond this transition period will have 6 months after the Brexit date to apply for one of the appropriate residence permits.

Tax amount
The amount of the tax due for the issuance of a residence permit is reduced to 100 euros for British nationals and their family members instead of 269 euros applicable to third country nationals.

Presence of less than 5 years
UK nationals having resided for less than 5 years as of the Brexit date will have to apply for the various permits to stay, according to their status (student, employee, temporary worker, posted worker, independent professional, unemployment beneficiary, family member, long-term visitor etc.). Such permits, when allowing work, will not be conditioned to labour market tests (Article 2).

Presence of 5 years or more
UK nationals having resided for 5 years or more in France as of the Brexit date, will be entitled to the Residency Card, with 10 year validity (Article 3).

UK national practicing law in France
UK nationals who exercise the profession of lawyer ("avocat") in France, based on their EU rights, may continue to do for a period of 12 months from the Brexit date. Such lawyers may benefit from the disposition of the Article 89 of the law of 31 December 1971 (Article 13).

Article 89 of the law of 31 December 1971 facilitates the registration of foreign lawyers with a French bar association after showing that they "effectively and regularly practiced French law on [French] national territory for a period of at least 3 years". Such activity needs to be demonstrated to the French bar association with which the foreign lawyer wishes to register. If over the three year period, the practice of French law was for a lesser period, the bar association will have the discretion to determine if the foreign lawyer has the capability of practicing French law.

Subsidiaries of law firms formed under UK law, and registered with a French bar association, on the Brexit date, may continue to pursue their activity in France beyond such date, even if no lawyer registered under a UK qualification is still practicing within such structure. No new structure under UK law may be created in France after the Brexit date (Article 16).

Reciprocity required

The Order states that the preferential treatment provided for UK national can be suspended by a State Council decree, after three months of the Brexit date, if the French government observes that the UK government has not taken equivalent dispositions [towards French nationals] (Article 19).

On October 10th, 2019, the French authorities opened an online service which is meant for British citizens as well as their family members (spouse, children and parents of British nationality or third-country nationals residing on the French territory before the United Kingdom's withdrawal date from the European Union, in case of a no-deal Brexit.

Having a residence permit will be mandatory as of October 31, 2020 for all people over the age of 18. Until October 31, 2020, the British's citizen's rights in terms of residency, employment as well as all of their social rights will continue. British citizen living in France will have a six-month period as of the United Kingdom's withdrawal date (i.e. until 04/30/2020) in order to request a residence permit.

The residence permits obtained before the United Kingdom's withdrawal date from the EU will remain valid for one year. They will need to be exchanged during this period, including permanent residence permits.

For all the situations, the British citizens will need to provide a proof establishing the date they moved to France. Two situations are possible :

- If they have or had a French residence permit: they will need to provide only this document; or
- If they never had a French residence permit, a proof of the move in France can be: rental contract, certificate of ownership drawn up by a notary, home insurance contract, home insurance attestation or work contract.

After filling out the administrative information and downloading the documents, a confirmation of the request will be sent by email to the applicants with a number confirming the registration.

Once the file has been processed, an email will be sent to the applicants in order to make an appointment at the prefecture to finalize the request (fingerprinting, photo, and proof of fee payment).The residence permit will be sent to the home address of the applicants.

From the client's side, they are telling us that they are motivated by an 'emergency feeling' after Brexit. This emergency is reflected by the number of the British nationals who request the French nationality: 320 British nationals get the French citizenship in 2015, they are 439 in 2016 and 1,518 in 2017.

At this stage, the issue is still uncertain. As a conclusion, the United Kingdom remains in the European Union. A little more. Brussels has decided to respond favorably, Monday, October 28, the request for postponement of the date of Brexit formulated reluctantly by the British Prime Minister Boris Johnson ten days ago. In other words, the Brexit will not take place on Thursday, October 31, as planned. This is the third postponement since 29 March and the initial end date of the UK lease in the EU.

The decision, taken unanimously by the 27 other Member States, sets a new deadline of 31 January, with the possibility for the United Kingdom to leave before, as soon as a withdrawal agreement is adopted in Westminster.

Wait and see!

Andreea Haulbert
Karl Waheed Avocats
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Moria, île de Lesbos, 2019

Moria, un camp de réfugiés sur l'île grecque de Lesbos.

A 15 km des côtes turques.

Une terre de l'Union Européenne.

Une île où notre droit commun européen s'applique.

Moria, 14 000 personnes livrées à elles-mêmes dans un camp prévu pour 3000.

65% de femmes et d'enfants.

1000 « mineurs isolés ».

Ils attendent toutes et tous d'hypothétiques entretiens qui marqueront le début de leur procédure d'asile.

Des entretiens qu'ils attendront pendant des semaines, des mois. Certains venaient de recevoir une convocation pour… 2021.

14 000 personnes nourries aléatoirement par l'armée. Avec des files d'attentes en moyenne de 3 à 4 heures chaque jour.

14 000 personnes. 12 policiers, trois médecins.

Quelques volontaires débordés.

Et les avocats bénévoles du programme ELIL (European Lawyers In Lesbos) qui tentent, dans ce chaos, de réinsérer le droit.

Le droit… qui a disparu.

Le droit qui a abandonné ces femmes, hommes et enfants.

Dans une section du camp, une centaine de mineurs isolés. Ils ont entre 8 et 17 ans. Ils ont été rassemblés dans cette section « B ». On nous dit que cette section n'est pas surveillée la nuit, faute de budget pour ouvrir un poste de garde.

Agressions, violences, viols, parfois même suicides… La nuit, les enfants ont peur. Ils ne dorment pas la nuit pour rester en alerte. Ils dorment le jour.

Où sont les droits de l'homme lorsqu'on ne traite plus nos semblables comme des êtres humains?

A Moria nous avons constaté la faillite de l'Europe.

La faillite de notre système juridique.

L'abandon par les autres Etats membres de l'Etat grec, débordé face à une situation hors de contrôle.

Oui, à Moria - comme ailleurs - les droits de l'homme sont devenus subsidiaires.

En Grèce comme ailleurs, des ministres nous expliquent que leur priorité est la sécurité de leurs concitoyens.

Quand j'entends le slogan de certains de nos hommes politiques européens : "la sécurité est la première des libertés", je pense à ces enfants de Moria.

Sacrifiés sur l'autel de peurs irrationnelles.

Privés de leurs droits fondamentaux.

Qui ont quitté l'enfer et qui arrivent dans le néant.

Il faut aller à Moria, ou à Samos, ou à Lampedusa ou tout près d'ici, porte de la Chapelle avant de débattre des questions migratoires.

Le Président de la République française va lancer un grand débat sur l'immigration ; je propose qu'il ait lieu aussi à Moria.

Pour que nous osions regarder au-delà de nos quartiers, de nos peurs et de nos égoïsmes.

Il en va de l'avenir du droit, de l'Europe et de ce qui caractérise notre civilisation.

J'ai promis aux fonctionnaires débordés du camp de Moria, aux bénévoles des ONG, aux regards tristes de ces enfants de vous parler d'eux.

Je sais que nous avons tous en commun l'exigence de tenir nos promesses.
Le Conseil national des barreaux continuera de soutenir financièrement le projet ELIL. A cet égard, j'appelle solennellement toutes les instances représentatives de la profession à soutenir le projet ELIL ou toute autre initiative d'assistance aux migrants dans la mer Egée.

Le Conseil national des barreaux va par ailleurs solliciter les pouvoirs publics français et européens pour œuvrer à une solution politique pour les réfugiés partout en Europe.

Parallèlement, j'appelle les avocats bénévoles à continuer leurs actions et invite vivement les jeunes avocats et élèves-avocats à s'investir dans des projets pro bono d'assistance aux exilés.

Le Conseil national des barreaux soutiendra également, par le biais de tierces interventions, des stratégies contentieuses visant à faire respecter les droits fondamentaux des demandeurs d'asile et notamment, le droit au respect de la dignité humaine et le droit à un procès équitable, le droit à la sûreté et au respect de la vie privée et familiale.

President Christiane Féral-Schuhl
Présidente du Conseil National des Barreaux
FERAL SHUHL / SAINTE MARIE
http://www.feral-avocats.com/fr/

Tax Relief Granted to Accidental Americans Who Relinquish U.S. Citizenship

The United States is unique in that it taxes citizens, as well as residents, on their worldwide income. There is the occasion when an individual (known colloquially as an "Accidental American") is born inside the United States to non-U.S. parents, or is born outside the United States to USC parents, and is unaware of their status as a USC, and hence, their U.S. tax obligations, for years. On September 6, 2019, the Internal Revenue Service (IRS) announced procedures to provide a measure of tax relief for certain Accidental Americans (known herein as the "Relief Procedures").[10]

Any Accidental American whose past U.S. tax compliance failures were due to non-willful conduct is eligible to claim tax relief under the Relief Procedures, provided that all of the following six criteria are satisfied:

1. The Accidental American must have relinquished U.S. citizenship after March 18, 2010.[11]

2. The Accidental American has no filing history as a U.S. tax resident.[12]

3. The Accidental American does not satisfy the tax liability test under the U.S. exit tax regime.[13]

4. The Accidental American does not satisfy the net worth test under the U.S. exit tax regime.[14]

5. The Accidental American has an aggregate total tax liability of $25,000 or less for (a) the five tax years preceding their expatriation date (*i.e.*, the effective date of loss of U.S. citizenship) and (b) the year including their expatriation date.

6. The Accidental American submits all required tax returns for (a) the five tax years preceding their expatriation date and (b) the year including their expatriation date.[15]

The nature of the tax relief granted to an Accidental American under the Relief Procedures includes:

a. No payment is required under a submission under the Relief Procedures,[16] which effectively grants forgiveness of U.S. tax liability up to US$25,000.

b. There is no requirement that the Accidental American have a social security number or individual taxpayer identification number for a submission under the Relief Procedures,[17] eliminating a major administrative burden of U.S. tax compliance.

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[10] "*Relief Procedures for Certain Former Citizens," Internal Revenue Service (IRS) News Release IR-2019-151 (Sept. 6, 2019), located at www.irs.gov/newsroom/irs-announces-new-procedures-to-enable-certain-expatriated-individuals-a-way-to-come-into-compliance-with-their-us-tax-and-filing-obligations (retrieved Oct. 25, 2019) (hereinafter known as "Relief Procedures").*

[11] *Relief Procedures at FAQ 2*.

[12] *Id*.

[13] Id. The U.S. exit tax regime imposes an income tax on certain former U.S. citizens on a deemed sale of their worldwide property, which generally is treated as being sold for its fair market value on the day before the expatriation date (i.e., the effective date of loss of U.S. citizenship). *See generally Internal Revenue Code (IRC) §§877 and 877A.* The tax liability test examines the former citizen's average annual U.S. income tax liability for the period of five tax years ending before their expatriation date, to determine whether it is greater than an amount adjusted for inflation annually (US$168,000 for 2019). *IRC §877A(g)(1)(A) (incorporating IRC §877(a)(2)(A)); IRC §877(a)(2) (flush text); Internal Revenue Service Revenue Procedure 2018-57, §3.37, 2018-49 I.R.B. 835 (Dec. 3, 2018)*.

[14] *Relief Procedures at FAQ 2*. In order to satisfy the net worth test, a former U.S. citizen must have a net worth of at least US$2,000,000 on their expatriation date. *IRC §877A(g)(1)(A) (incorporating IRC §877(a)(2)(B))*.

[15] *Relief Procedures at FAQ 2*.

[16] *Id. at FAQ 12 and FAQ 13*.

[17] *See id. at FAQ 16*.

c. The Accidental American will receive a notification from the IRS that their submission under the Relief Procedures was received and is complete,[18] providing some assurance of closure of the U.S. income tax compliance issues.

Conclusion

The Relief Procedures are a significant measure of tax relief granted to an Accidental American who already has lost U.S. citizenship. However, an Accidental American who is eligible to claim relief under the Procedures but who has not relinquished U.S. citizenship may be caught between Scylla and Charybdis. To claim relief under the Procedures, U.S. citizenship must be relinquished. To keep U.S. citizenship means that other means must be employed for the Accidental American to come into U.S. tax compliance, at potentially a significantly higher cost in terms of U.S. tax liability and in terms of transactional costs from tax advisers.

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[18] *Relief Procedures at FAQ 19*.

The Public Charge Rule: Sealing America's Golden Door?

First introduced as an undefined concept in the Immigration Act of 1882, "public charge" serves as the ground for inadmissibility to the U.S., or a reason for denying an alien of a Legal Permanent Residency (LPR) status. Since then, the Immigration and Nationality Act of 1952 (INA) and guiding principles outlined by the Department of State (DOS) set guidance on determining inadmissibility "if the applicant is likely, at any time after admission, to become primarily dependent on the U.S. Government."[19] While inadmissibility on public grounds has been a part of the U.S. immigration system for decades, recent attempts to change the federal laws and adjudication standards have the potential to significantly limit the number of immigrants obtaining LPR status in the U.S.

Recent Background

On August 14, 2019, the U.S. Department of Homeland Security (DHS) published a final rule,[20] which set to amend regulations to the public charge ground of inadmissibility. This final rule was scheduled to go into effect on October 15, 2019, the new rule sought to change how the Department of Homeland Security (DHS) makes public charge determinations for applications for admission and adjustment of status purposes, as well as set public benefit conditions for extensions of stay or changes of status for non-immigrants residing in the U.S. On October 11, 2019 the DOS published an interim final rule that amends 22 CFR 40.41, Ineligibility Based on Public Charge Grounds, including definitions of public charge, public benefit, alien's household and receipt of public benefit.

On October 11, 2019, the U.S. District Court of the Southern District of New York, enjoined and restrained the DHS and United States Citizenship and Immigration Service (USCIS) from "enforcing, applying or treating as effective" the DHS Public Charge Final Rule. The court went further and enjoined the government from, "implementing, considering in connection with any application, or requiring the use of any new or updated forms whose submission would be required under the rule…" Though the court order does not mention the DOS or their interim final rule, on October 24, 2019, the DOS posted an alert on their website stating that "Although the effective date of the interim final rule is October 15, 2019, the Department will not implement the rule until the use of a new form for information collection is approved by the Office of Management and Budget." The notice goes on to explain that visa applicants will not have any additional steps and should attend their visa interviews as scheduled.

Definition of Public Charge: Then and Now

In determining inadmissibility based on public charge, officers reviewing adjustment of status and immigrant visa applications relied on definitions set-forth by "Field Guidance on Deportability and Inadmissibility on Public Charge Grounds," 64 FR 28689 (May 26, 1999)[21] which proposed that ''public charge'' means an alien who has become, or who is *likely to become*, ''primarily dependent on the government for subsistence, as demonstrated by either (i) the receipt of public cash assistance for income maintenance or (ii) institutionalization for long-term care at government expense.'' In determining inadmissibility on public charge grounds, adjudication officers considered factors such as age, health, family status, assets, resources, financial status, education and skills.[22] A significant factor in coming to this determination has been the Form I-864, Affidavit of Support Under Section 213A of the INA, which acts as a contract between the applicant's financial sponsor and the U.S. Government. The financial sponsor takes on financial responsibility for the applicant and provides detailed information to show that they have sufficient

[19] https://www.federalregister.gov/documents/2006/06/21/06-5522/affidavits-of-support-on-behalf-of-immigrants
[20] https://www.federalregister.gov/documents/2019/10/11/2019-22399/visas-ineligibility-based-on-public-charge-grounds
[21] https://www.govinfo.gov/content/pkg/FR-1999-05-26/pdf/99-13202.pdf
[22] Section 212(a)(4)(B) of the Immigration and Nationality Act (INA)

income to provide for their household and the applicant at 125% or above the Federal Poverty Guidelines[23], thus preventing future dependency on government benefits.

The final rule published on August 14, 2019 redefines what makes an individual dependent on government benefits or likely to be primarily dependent on the government in the future for the purpose of determining inadmissibility on public grounds under section 212(a)(4) of the INA. The new rule limits the discretionary decision-making ability of the adjudicating officer and replaces it with a narrowed approach and detailed guidance on interpreting the factors to be considered, including categorizing the public benefits and the length of time they are received for determining inadmissibility. Another significant change is to expand the application of the new public charge rule to include applicants currently in the U.S. holding a nonimmigrant status and seeking to extend or change their status in the U.S. Previously, only individuals who sought to become permanent residents had to show financial independency.

The new rule will assess application based on the following criteria:

- *Likelihood of future reliance on government benefits*. The new rule elaborates on statutory requirements outlined by the INA, such as alien's age; health; family status; assets, resources, financial status; and education and skills.
- *Past receipt of public benefits*. The final rule redefines the definition of public charge as an alien who "received, or has been certified or approved, to receive one or more public benefits," for more than 12 months in aggregate within any 36-month period. Receipt of two benefits in one month counts as two months' worth of benefits. The rule also expands the list of public benefits that immigration officers may consider when deciding whether someone is likely to become a public charge.
- *Introduction of "heavily weighted negative factors" and "heavily weighted positive factors."* The rule provides a list of negative and positive factors that immigration officers will weigh in the decision of whether an alien is inadmissible as likely at any time to become a public charge. Most notably, the new rule establishes financial requirements on the applicant seeking to adjust, change, or extend status, not just the sponsor. Under the rule, a heavily weighted positive factor will be if an applicant can demonstrate an annual income of at least 250% of the Federal Poverty Guidelines.

While the new rule does not clarify the relative weight a decision maker should attribute to a heavily weighted factor or how to decide when an applicant has both heavily weighted positive factors and heavily weighted negative factors. The ruling changes the interpretation and implementation of standards when determining applicants' inadmissibility. Instead of assessing whether a visa applicant or adjustment of status applicant is "likely at any time to become a public charge," the analysis of evidence shifts to assessing whether the applicant is "more likely than not" to become a public charge.

Impacts

Should the government be allowed to implement the proposed rule as it is currently written, adjudicating officers will have greater discretion to deny change and/or extension of status applications and adjustment of status applications under the new "more likely than not" standard of review. Additionally, while certain vulnerable populations will continue to be excluded from the public charge assessment rules, the new standards have the potential to discriminate against applicants of certain demographic or socioeconomic groups. According to the Migration Policy Institute (MPI), the rule could significantly decrease the number of low-skilled workers, women, children, and older adults who are granted lawful permanent residency status.[24] Based on 2012-2016 data from the U.S. Census Bureau's American Community Survey (ACS), MPI's analysis suggests that "only 39% of LPRs admitted in FY 2017—about 370,000 immigrants—would have met the heavily weighted positive factor of having an income of at least 250 percent of the poverty level." The U.S. government has robustly enforced its public

[23] https://familiesusa.org/resources/federal-poverty-guidelines/
[24] https://www.migrationpolicy.org/research/impact-dhs-public-charge-rule-immigration

charge rules and the path to obtaining permanent residency in the U.S. is already a challenging and lengthy process, the proposed rules are set to raise the bar even higher.

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A Return to the Post Study Work Regime

In September, the UK Government announced plans to open a new post-study work visa for international students. Under the proposed new route, qualified migrants will have the flexibility to work or seek employment in any field, and at any skill level, for up to two years following successful completion of their degree.[25]

Tier 1 (Post-Study Work)

The UK closed the popular Tier 1 (Post-Study Work) visa over seven years ago. Under that route, nationals from outside the European Economic Area (EEA) and Switzerland (collectively 'the EU') who earned bachelor's degrees or higher from listed UK institutions could apply within 12 months of graduation for permission to independently work or seek employment for up to two years.[26]

This afforded non-EU graduate migrants and employers alike significant flexibility, as both were freed from the administrative, legal, and financial burdens associated with sponsored employment immigration categories. Unfortunately, as public concerns about immigration increased around 2010, so too did Government efforts to reduce net migration. This resulted in, amongst other measures, the closure a number of useful routes including the Tier 1 (Post-study Work) visa in 2012.[27]

Since that closure, Tier 4 (Student) migrants undertaking studies lasting 12 months or more are only granted leave in line with the length of their course plus four months,[28] leaving little time to find sponsored work after graduating.

New post-work study route

While the Government has not yet released a complete framework for how the new post-study work route will operate, the September announcement did outline some tentative details:

- the route will be available to migrants with valid UK immigration permission as students who have recently completed an undergraduate degree or higher at an approved UK Higher Education Provider;
- individuals will have the ability to work, or look for work, for up to two years following graduation;
- individuals will be able to work at any skill level;
- individuals will be able to seek employment in any field; and
- there will be no sponsorship requirements.[29]

Assuming the new route is introduced alongside the Government's proposed Australian style points-based immigration system, set to take force in January 2021, it would almost certainly apply to nationals from both inside and outside the EU at the outset.

Considerations

For migrants considering a future course of study in the UK, news of the new post-study work route was a welcome step in a positive direction. Unfortunately, it has also left some current foreign students wishing that they had held off on their studies,[30] as it appears it will only benefit those graduating from 2021 onwards. In fact, over 21,000

[25] GOV.UK "UK announces 2-year post-study work visa for international students." (12 Sept. 2019).
[26] Tier 1 (Post-Study Work) Policy Guidance (version 07/13) at 8, 12-13-, paras. 46, 51-52.
[27] See generally Statement of Changes in Immigration Rules (15 March 2012) HC 1888; see also Explanatory Memorandum to the Statement of Changes in Immigration Rules Presented to Parliament on 15 March 2012 (HC 1888) at 4, para. 7.6.
[28] Tier 4 Policy Guidance (version 08/2019) at 71-72, para. 287.
[29] GOV.UK "UK announces 2-year post-study work visa for international students." (12 Sept. 2019).
[30] Young-Powell, Abby. "'I wish I'd delayed coming to the UK': overseas students call for further visa extensions." *The Guardian* (23 Sept. 2019).

individuals have already signed an online petition to allow all current international students to take advantage of the new route.[31]

For businesses, the significantly reduced costs and logistics associated with hiring foreign national graduates will be a boon. Under current rules, employers must first apply for a Tier 2 sponsor licence and then individually sponsor each non-EU national they wish to hire. Additionally, fees such as the Immigration Skills Charge and the Immigration Health Surcharge can add thousands of pounds to each application, while mandatory skills levels and minimum salary thresholds make it harder for some recent graduates to qualify at all. That said, there is a legitimate concern that some employers may delay implementing a more aggressive foreign graduate hiring strategy, or even put off hiring graduates entirely, until the new route is in effect.[32]

Lastly, for institutions of higher education, a post-study work category will aid in the recruitment of future students, as the prospect of being able to work in the UK for up to two years without sponsorship, salary level, or skills level requirements will certainly be viewed as an advantage over other programmes.

Looking ahead

Given the ongoing uncertainty regarding the UK's departure from the European Union it is naturally challenging to forecast what will happen in the coming weeks and months in the UK with regard to immigration. Add to this the reasonably high probability that a general election could be called before January 2021 when the Government's proposed new Australian style points-based system is set to come into force, and the entire new immigration system, (including the post-study work route) could conceivably be abandoned for a different set of policies favoured by a new Government.

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[31] https://www.change.org/p/uk-government-post-study-work-visa-for-international-students-currently-in-uk

[32] Young-Powell, Abby. "'I wish I'd delayed coming to the UK': overseas students call for further visa extensions." *The Guardian* (23 Sept. 2019).