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Immigration and Nationality Law News

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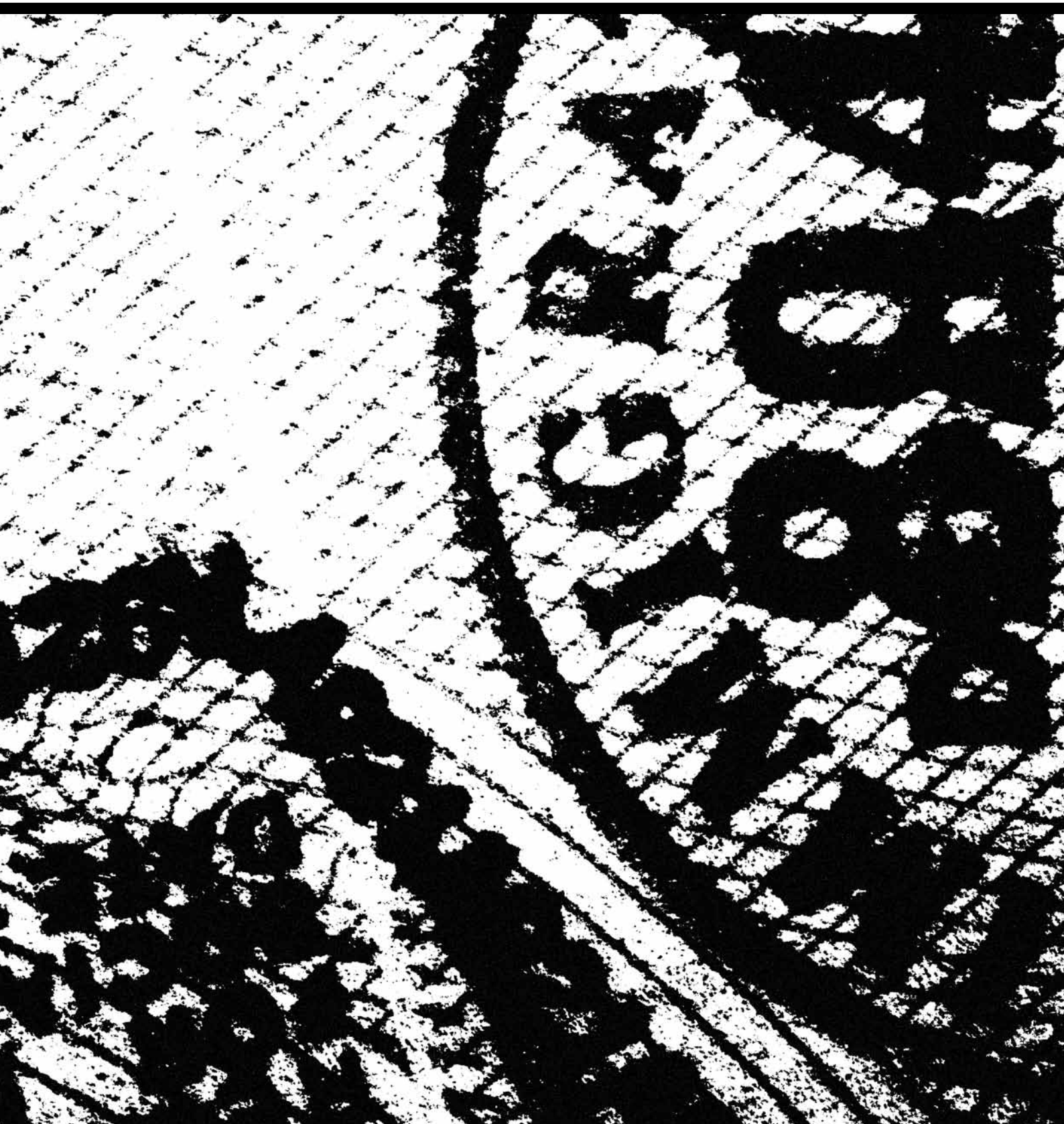

30 OCTOBER - 4 NOVEMBER 2011

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This newsletter is intended to provide general information regarding recent developments in immigration and nationality law. The views expressed are not necessarily those of the International Bar Association.

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A year of progress

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I am very pleased to convey my greetings to you and express the remarkable honour I feel about chairing this Committee on the eve of the 5th Biennial IBA Global Immigration Conference.

The main goal of the Committee this year has been to foster the inclusion of new members to diversify our horizons by involving younger lawyers in Committee activities with the purpose of preparing new generations for Committee officer positions. I especially welcome and express my interest in increasing all members' participation and to strengthen the bonds among us during my term as Chair.

The forthcoming months will be very busy for us, with two important conferences scheduled in September and October. The 5th Biennial Global Immigration Conference will be held in London on 22–23 September and the IBA Annual Conference in Dubai, which will take place from 30 October – 4 November. I hope that many of you are planning on attending as we have very interesting programmes of sessions for both conferences. I also look forward to the opportunity to greet you and discuss further any details of particular interests that you may have regarding the Committee's work.

Recent activities undertaken by the Immigration and Nationality Law Committee are the IBA Immigration Law Handbook and the planning of co-chaired sessions at the upcoming IBA Annual Conference with the Business Crime Committee, Corporate and M&A Law Committee, Employment and Industrial Relations Law Committee and the IBA Global Employment Institute. Details can be found in page 8 of this newsletter.

I would also like to express my deepest appreciation and gratitude to the other Committee members, Shalini Agarwal, Carolina Garutti, Jelle Kroes and Gunther Mävers for their hard work and enthusiasm. In addition, I would like to express a special thanks to the past Committee Chairs for their support.

I'd like to thank each of you for being part of this Committee and bringing your expertise to our gathering. You, as organisation leaders and practicing attorneys, have the vision, the knowledge, the wherewithal and the experience to help us pave our way into the future. You are truly our greatest asset today and tomorrow, and we could not accomplish what we do without your support and leadership. Throughout the conference, I ask you to stay engaged, keep us proactive and help us shape the future of our field. My personal respect and thanks go out to you all.

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From the editor

Welcome to your first Committee newsletter of the year – and the first one that was assembled by me as Newsletter Editor. I am therefore proud to present to you a genuine innovation: we have a new front cover! Although we are publishing this newsletter only in pdf and not in print, the IBA takes great care to editing and setting the layout. Our thanks go out to the IBA content team, in particular to Ed Green, for their great support.

My thanks also extend to the authors, who have really done the work, finding time in their busy schedules: all of them experts in the field of immigration. Moreover, some have agreed to my request to reduce the size of their initial contribution, in order to fit the IBA style guide. Being lawyers, we all know that to write a text is all perfectly fine, but what a pain if we are forced to limit our words. Your willingness to do so deserves respect in itself.

We have some new authors, and some veterans. This is a mix we want to maintain, not only for the newsletter but for the entire Committee. Some of the Committee officers are seasoned IBA members, others are less experienced. With two important conferences coming up (London and Dubai), we don't need much to motivate us, we will just do our utmost to bring the Committee forward. But anyone who would like to give us a hand – don't hesitate to send us an e-mail, your help is greatly appreciated.

Last but not least, let me draw your attention to the article on the IBA Global Employment Institute's recent *10/20* Survey (see page 7). The IBA GEI is an important new institution within the IBA which is strongly supported by our Committee. The Institute's 10/20 Survey is a must for any immigration lawyer and will be the subject of a joint session of the IBA GEI and the Committee at the Annual Conference in Dubai – be sure not to miss it.

See you in London/Dubai!

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IBA GEI publishes Key Human Resources Legal Issues survey results

The International Bar Association Global Employment Institute (IBA GEI) recently published a report: *Looking to the Key Human Resources Legal Issues of the Next Decade: The 10/20 Survey*, which found the globalisation of human resources (HR) to be the number one 'stay-awake' issue among HR directors in multinational firms.

The IBA GEI asked the HR directors of 119 large multinationals with headquarters in 22 countries to rank ten HR issues in order of importance, giving ten points to the most significant. By far the highest ranking issue was new HR challenges arising from transnational company operations, such as restructuring, mergers and acquisitions, and outsourcing. This scored 71 per cent of the maximum 1,190 points.

> Salvador del Rey, IBA GEI Chair, commented: 'The extension of multinationals to new countries and sectors is making corporate operations ever more complex. Collective dismissals, reorganisations, and outsourcing, for instance, are all challenging HR issues in their own right but on an international scale they become a minefield. Most of the law relating to these areas is very local in character, so the question of 'which law to apply' is at the heart of HR directors' concerns…'

The second most important issue for the HR directors identified in the report is the 'work-life balance' of employees and its impact on recruitment and retention. To find out what issues fill positions 3 to 10, the Report can be downloaded from the IBA website.

The Report constitutes the findings from a survey conducted by the IBA GEI to assess the conventional knowledge on many HR issues in the context of new trends; increasing globalisation; the accelerating pace of IT innovation; the post financial crisis world; and the emerging economic powers bringing about a new economic order and subsequently causing a shift in the axes of the international decision makers.

The work of the Global Employment Institute may be of interest to many IBA members. To join the IBA GEI and develop its pool of expertise, please contact Sam Bayes (sam.bayes@int-bar.org) of the IBA Membership Section. For more information about the IBA GEI and to access the report visit http://tinyurl.com/ibagei on the IBA website.

Immigration & Nationality Law sessions

30 OCTOBER - 4 NOVEMBER 2011

DUBAI

INTERNATIONAL BAR ASSOCIATION ANNUAL CONFERENCE

Immigration policies and security concerns in dangerous countries: what do expats and their employers need to know?

Joint session with the Business Crime Committee.

This session will look at the various challenges and protection issues that expats and employers are facing in high risk countries due to factors such as civil wars, drug trafficking, human trafficking, kidnappings and the consequential high incidence of crime. How are countries' immigration procedures and policies changing in this scenario? What are the local protocols for foreigners? What are the security risks that assignees and their families may encounter in these countries? What do employers need to know and do to keep employees safe while continuing with their business as usual? What are the employers' liabilities? What are the issues and position for high net worth individuals when targeted by governments?

Panellists from various jurisdictions will provide their legal and practical recommendations for working, living and doing business in this ever-changing and dangerous environment.

MONDAY 1430 – 1730

A 'flat world'? Management of employees' global geographic mobility

Joint session with the IBA Global Employment Institute and the Immigration and Nationality Law Committee.

This session is intended to discuss the strategic employment and immigration issues involved in the transfer of employees worldwide by multinational corporations. How have global transfers been affected by changes in government policy due to the economic crisis? Do employers consider work/life balance for employees when considering global transfers?

WEDNESDAY 0930 – 1230

The shifting global economic order and its impact on corporate immigration

Presented by the Immigration and Nationality Law Committee.

This session will cover the changes in immigration policies against the background of the changes in the global economy that have developed during the first decade of the 21st century. The session will explore the development of corporate immigration policies both from a government and a company perspective. How do the governments, in particular in the BRIC countries, react to such a development? Do they try to attract talent, and if so do they focus on special branches or on special knowledge of the assignees in order to facilitate corporate immigration? Are the BRIC countries copying Western immigration policies, or do they rather develop their own systems? What is the response of 'the West'? What are the most crucial demands companies have in the field of corporate immigration? How do they try to attract talent if needed? Is there a change in the composition of the nationalities of the assignees that mirrors the change of the global economic order?

THURSDAY 0930 – 1230

AUSTRALIA

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Positioning Australia post the global financial crisis: An immigration update

Australia's skilled temporary and permanent programmes are a key factor behind the resilience and strength of the nation's economy which continues to outperform most other OECD countries.[1] There is no doubt that migration is integral to sustainable economic development.

This article provides a brief overview of the sponsored employee scheme facilitating temporary residence of suitably qualified foreign nationals to work in Australia for up to four years, the related monitoring framework to integrity in the programme, developments regarding information sharing among government departments, and recent government announcements in relation to the scheme designed to address the current labour shortages in Australia.

Sponsoring employees on Subclass 457 Visa

There are three steps involved in obtaining a sponsored employee 457 Visa for a foreign national needing to work in Australia: a sponsorship application; a nomination application for the position proposed to be filled by the nominee; and, a personal visa application for the employee and any accompanying family members. The current regime was subject to a major overhaul in September 2009.

If operating in Australia, the proposed sponsor, or an associated entity, applies for Standard Business Sponsorship approval to sponsor multiple foreign nationals during the three year validity period of the sponsorship. Provision also exists for sponsorship applications by businesses operating overseas but only in limited circumstances where the business intends to either establish operations in Australia or fulfil a contract with, under policy, a 'party in Australia'.

In order to be approved as a sponsor, if the business operates in Australia and depending on for how long it has been operating, the entity must demonstrate that it meets the prescribed Training Benchmark of having spent either one per cent of gross payroll on training its Australian staff or two per cent of gross payroll paid to an industry training fund. There must be no 'adverse information' about the entity, or a 'person associated', or it is reasonable for immigration authorities to disregard such adverse information.

Once approved as a sponsor, the business can then nominate the positions proposed to be filled by foreign national employees. The nominated position must be on the gazetted list of over 600 occupations for 457 visa purposes and, with limited exceptions, the nominee must be a direct employee of, and work only for, the sponsor or an associated entity of the sponsor. The terms and conditions including guaranteed annual earnings offered to the nominee must be no less favourable than those offered to Australian employees performing an equivalent role and, in any event, not less than AUD$47,480 p.a. The top five occupations the in eight months to 28 February 2011 were developer programmer, resident medical officer, management consultant, general medical practitioner and specialist manager not elsewhere classified.

The Temporary Business Entry (Long-Stay) visa subclass 457 ('457 Visa') permits a foreign national (and accompanying family members, if any) to remain in Australia from one day up to four years and to make multiple trips to and from Australia during that time. Family members are usually included in the same 457 Visa application but may also apply separately. There are a number of criteria that need to be met in order to be granted a 457 Visa including having the skills and qualifications for the position, meeting health and character requirements as well as English language requirements for certain occupations.

Sponsorship obligations, compliance and monitoring

All sponsors, by operation of law, must meet a number of legally binding obligations to the Commonwealth of Australia in relation to each foreign national and their family members (the 'Obligations') including pay travel costs to enable sponsored persons to leave at the end of their engagement in Australia, engaging sponsored employees on no less favourable terms and conditions to other Australians (that is, paying the market salary) and notify the Department of Immigration and Citizenship ('DIAC') of certain events. Failure to comply with the Obligations or failing to continue to meet sponsorship criteria, providing false or misleading information or contravening a law of the Commonwealth, State/Territory may attract serious sanctions including cancellation of sponsorship approval, being barred from nominating foreign nationals for work in Australia and/or fines.

Consistent with the legislative scheme and policy guidelines, DIAC has been educative in its approach to any shortcomings in compliance with the Obligations and generally has opted to issue formal Warning Notices, instead of taking more serious action that might be open to it. However, a Warning Notice constitutes 'adverse information' about the business which may be taken into account when a new sponsorship application or a new nomination is lodged. This gives the business an opportunity to demonstrate it has put in place remedial actions and make submissions that it is reasonable for DIAC to disregard the adverse information.

DIAC monitors sponsors in order to ensure compliance with the Obligations. This may take the form of a paper-based monitoring audit or a site visit. During the financial year 2009-10, DIAC monitored 2,500 sponsors, made 1,421 site visits, issued over 520 formal warnings and imposed more than 160 sanctions.

By comparison, Table 1 shows more recent figures:[2]

Table 1

Monitoring activities in 1 July 2010 – 30 April 2011

Activity	Number
Monitoring commenced	1,375
Site visits conducted	714
Warning letter issued	343
Sanction imposed (bar and/or cancellation)	120
Infringement notice issued	4

It is expected that with increased funding for the 457 Visa programme announced in the May 2011 Federal Budget there will be increased monitoring activity by DIAC.

Inter-agency information sharing

As part of the September 2009 changes to the 457 visa regime outlined above, legislative amendments to the Migration Act 1958 enabled DIAC to share information with other Commonwealth, State/Territory government agencies including the Australian Taxation Office, Fair Work Australia and Fair Work Ombudsman ('FWO'). DIAC has also entered into a number of Memoranda of Understanding with State/Territory Government occupational health and safety bodies such as WorkCover NSW.

The enhanced information sharing powers is used by DIAC to monitor a sponsor's compliance with the Obligations and disclosure of adverse information when lodging new applications, including new nomination applications or seeking a variation of the terms of its sponsorship approval. It also enables other agencies to disclose information to DIAC to determine if appropriate salary levels have been paid to overseas workers. Information in relation to recent referrals is set out in Table 2.

Table 2

Referral from DIAC to other government agencies 1 July 2010 – 30 April 2011

Agency	Number
Australian Taxation Office	20
Fair Work Ombudsman	17
Other	9

Other agencies have also been referring issues to DIAC. For example, Fair Work Australia has demonstrated its willingness to use its referral powers. In *Krishnakanth v Saai Bose Pty Ltd,* Deputy President Sams directed that the transcript of his decision in the matter of Mr Krishnakanth's application for unfair dismissal remedy be forwarded to both the FWO and DIAC. The following allegations were noted to be 'most disturbing':

- falsification of evidence in support of a skills assessment application from Trades Recognition Australia in anticipation of an application for permanent residence by overseas students;

- demands by the sponsor for large sums of money (in this case $4,000) in return for skills assessment references;
- underpayment of employees and possible breaches of Award conditions and entitlements; and
- falsifying time and wages records.[3]

Commissioner Cambridge in *Shim v JMNE Pty Ltd t/as Wooden Bowl Restaurant*[4] also directed that the transcript of his decision be forwarded to DIAC. The case resulted in compensation being awarded as a remedy following unfair dismissal in circumstances where tax had not been deducted and there was no payment of accrued annual leave entitlement. Further, the employer had requested $30,000 to nominate Mr Shim for permanent residence.

Recent Federal Government announcements

On 10 May 2011, the Australian Government announced four main immigration-related initiatives as part of the Budget for the financial year 2011–12. The changes are in response to the tightening labour market in Australia with unemployment forecast to fall to 4.75 per cent in 2011-12.

The demand-driven sponsored employee 457 Visa programme will receive additional staff and a new processing site in Brisbane at a cost of $10m. Together, these initiatives should see processing times halved to two weeks for fully documented and decision-ready applications.

In response to the need for labour in regional Australia, the Government has announced the introduction of Regional Migration Agreements (RMAs). These will bring together employers, local and State/Territory governments as well as trade unions to co-operate on addressing local labour needs. RMAs will be custom-designed, geographically based migration arrangements that set out the occupations and numbers of overseas workers needed in the area. Concessional access to semi-skilled overseas workers will be negotiated where there is a demonstrable and critical need.

Like the current arrangements for Labour Agreements, each RMA will be negotiated between the Government and representatives of the local area. Individual local employers will then be able to directly sponsor workers under the terms of the umbrella RMA. The agreements will allow employers to use overseas workers where local labour cannot be sourced. By utilising RMAs, regional employers will be able to gain streamlined access to temporary and permanent overseas workers if they can demonstrate a genuine need while at the same time ensuring training initiatives for Australians are in place.

It is expected that negotiations for individual RMAs will commence in 2012.

In addition, the Government has confirmed new Enterprise Migration Agreements (EMAs) will allow major resource projects to gain access to overseas labour for genuine skills vacancies that cannot be filled from the Australian labour market. Forecasted to streamline negotiation arrangements for access to overseas workers and deliver faster visa processing times EMAs will be custom-designed, project-wide migration arrangements uniquely suited to the resources sector, ensuring skills shortages do not create constraints on major projects and jeopardise Australian jobs. This recognises the need for labour to support the A$380bn investments in the pipeline for resources projects.

EMAs will take a project-wide approach to meeting skill needs. Rather than each sub-contractor having to negotiate their own Labour Agreement, the bulk of negotiation will occur with the project owner. This means that project owners can plan their workforce needs from the outset, and there will be a straightforward process for sub-contractors to sign up to an individual LA.

Existing migration arrangements will continue to be available to these projects as well as resource projects that do not meet these thresholds, including expedited five day processing for decision-ready 457 Visa applications. One of the advantages of an EMA is that occupations not currently eligible for sponsored employee 457 Visa (typically semi-skilled occupations) can be sponsored to a capped level, provided the project can justify a genuine need that cannot be met from the Australian labour market.

And finally, the Government has indicated its intention to implement a new Skilled Migrant Selection Model (the Model) in July 2012 based on an Expression of Interest and invitation to apply for those applicants applying under the points tested visa pathways. Key features of the Model are settled although the proposal is still in an early stage of development with further details to be released.

Conclusion

The Government's emphasis on a demand driven approach to migration is designed to ensure key skills gaps in the Australian labour market are filled where domestic workers are unable to be found. Since September 2009, there has been a focus on compliance and monitoring, consistent with the Government's initiatives in industrial law which are designed to ensure, amongst other things, that workers' rights are protected. Relevantly, holders of 457 Visas must be offered terms and conditions that are no less favourable than those of their Australian counterparts.

While we are yet to see the full impact of the immigration initiatives announced in the recent Budget, they are encouraging and will help ensure the Australian economy is robust following the global financial crisis by enabling major investment in projects for years to come.

Notes

1 K Kukoc, First Assistant Secretary, Migration and Visa Policy Division, Department of Immigration and Citizenship, Speech to the Australian Chamber of Commerce and Industry 8 February 2011
2 Courtesy of DIAC, 26 May 2011
3 *Krishnakanth v Saai Bose Pty Ltd* [20110] FWA 4578 at para 69
4 [2010] FWA 8230

Interpreting the 'three months in any six-month period' Schengen Visitors' Rule

BELGIUM

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Most business travellers or tourists to the so-called 'Schengen area' – ie, most countries of continental Europe[1] – have, at some point when preparing or during their visit, heard of the 'three months in any six months' immigration rule. According to this rule, their presence in the Schengen area may not exceed a cumulative period of three months (ie 90 days) during a six-month reference period.

A good understanding of this rule is particularly important to tourists and business travellers who benefit from (and rely on) a visa-waiver programme between the Schengen countries and their country of origin, since such visitors generally do not contact a consulate prior to arriving in the Schengen area.

Although the first part of the rule – ie, a maximum total stay of 90 days – is well understood by both visitors and immigration officers, some confusion appears to surround the second part of the rule, namely how to calculate the six-month period. In particular, determining the starting point appears to pose most legal and practical difficulties.

The rules applicable to such visitors are notably laid out in the Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders (CISA), signed on 19 June 1990 at Schengen (Luxembourg).

Article 20 of the CISA provides that 'aliens not subject to a visa requirement may move freely within the territories of the Contracting Parties for a maximum period of three months during the six months following the date of first entry, provided that they fulfil the entry conditions referred to in Article 5(1) (a), (c), (d) and (e).' Furthermore, Article 23 of CISA specifies that 'aliens who do not fulfil or who no longer fulfil the short-stay conditions applicable within the territory of a Contracting Party shall normally be required to leave the territories of the Contracting Parties immediately.'

Recent legislation – ie, Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders ('Schengen Borders Code') and Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009

establishing a Community Code on Visas ('Visa Code') – have substantially amended and complemented CISA. However, Articles 20 and 23 of CISA have been left untouched at this stage. Moreover, the Visa Code contains explicit references to notions set forth in CISA (see notably Article 2(2)(a) that refers to an 'intended stay in the territory of the Member States of a duration of no more than three months in any six-month period from the date of first entry in the territory of the Member State' and Article 32(1)(a)(iv) referring to the notion of a three-month stay 'during the current six-month period' on the Schengen territory).

The above rules have been tested by the European Court of Justice (ECJ). The ECJ's *Bot* ruling of 3 October 2006 is worth mentioning.[2] Although this judgment was handed down prior to the 2006 and 2009 overhauls of the Schengen rules, it allows for a better understanding of the concepts and mechanism currently in force, such as the notion of 'three months in any six-month period from the date of first entry'.

The facts of the *Bot* case are outlined below.

Mr Bot, a Romanian national benefiting from the visa waiver referred to in Article 20 of CISA (Romania had not yet accessed the EU at that time), entered and stayed in the Schengen area several times over a period of more than six months. More specifically, Mr Bot stayed in France from 15 August to 2 November 2002 and then again from 30 November 2002 until 31 January 2003. His total stays during the six-month period from the date of his first entry – that is, between 15 August 2002 and 15 February 2003 – thus exceeded three months.

After returning to France via Hungary on 23 February 2003 and then through Austria and Germany, he was stopped by the French police on 25 March 2003. By a decree of 26 March 2003, the French police ordered that Mr Bot be escorted to the border pursuant to Article 22(2)(b) of Regulation (EC) No 45 2658.

The police were of the opinion that, although Mr Bot re-entered the area after the expiry of an initial six-month period since his first entry, he could not rely on the fact that his arrest was carried out less than three months after the start of a new six-month period. The authorities argued that owing to his overstay during the initial six-month period (from 15 August 2002 until 15 February 2003), Mr Bot could not be regarded as having proved that he had re-entered France lawfully for the purposes of the regulation. This argument, which is notably based on the alleged 'rolling' nature of the notion of first entry, is raised on a regular basis in such cases.

Mr Bot disagreed with this position and challenged the authorities before the French courts. Mr Bot lost before the administrative court in Melun and appealed to the Council of State (France's supreme administrative court). As the court had doubts about the interpretation of Article 20(1) of CISA, it submitted a request for a preliminary ruling to the European Court of Justice, asking whether the term 'first entry' refers to any new entry into the Schengen area or only, in addition to the very first entry into that territory, to the next entry made after expiry of a six-month period from the first entry.

In answer to this question, the ECJ ruled that the reference to 'first entry' in Article 20(1) of CISA should be interpreted to mean, in addition to the very first entry into the territories of the Schengen states, the first entry into those territories taking place after the expiry of a six-month period from the very first entry *and* to any other first entry taking place after the expiry of any new six-month period following an earlier date of first entry.

The ECJ thus confirmed that Article 20(1) of CISA turns on the notion of 'first entry'. The Court emphasised that other interpretations have no basis in the wording of the provision and therefore cannot be accepted since this could affect the uniform application of Article 20(1) of CISA and undermine legal certainty for individuals.

The ECJ nevertheless also confirmed that the term 'first entry' in Article 20(1) of CISA does not in any way deprive the competent national authorities of the power to penalise, in compliance with community law, a visitor whose stay in the Schengen area has exceeded the maximum period of three months during an earlier six-month period, even if, on the date of the check, the individual's stay in that area, like that of Mr Bot, has not exceeded three months since the most recent date of entry.

In light of the above, the wording 'first entry' in Article 20 (1) of CISA should arguably be interpreted as referring, in addition to the very first entry into the territory of a contracting state to the Schengen Agreement, to the first entry into such a territory after expiry of a six-month period from the initial entry. For example, if an initial first entry takes place on 21 August 2010,

the six-month reference period starts to run on that date and expires on 21 February 2011. During that period, the visitor is entitled to stay for a total of three months (ie 90 days) in the Schengen area. A new six-month reference period starts to run on 22 February 2011 and will expire on 22 August 2011. During that new reference period, the visitor is again entitled to a stay up to 90 days in the Schengen area.

That being said, in addition to this – now clearer – condition with respect to the 'first entry', it is important to keep in mind that, pursuant to the applicable Schengen rules, beneficiaries of the visa waiver programme remain subject to the following admission conditions (notably assessed at the port of entry, based on the totality of the circumstances, on a case-by-case basis):

- possession of a valid passport;
- justification of the purpose and conditions of the intended stay as well as proof of sufficient financial means to return to the country of origin and medical insurance for the duration of the intended stay;
- no alert(s) in the Schengen Information System for the purpose of refusing entry (such an alert implies a serious offence or threat, which arguably goes beyond a mere overstay); and
- no threat to public policy, internal security, public health or the international relations of the Schengen states, in particular no alert has been issued in national databases for the purpose of refusing entry on the same grounds.

Notes

1 Austria, Belgium, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Norway, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden and Switzerland (see **http://diplomatie.belgium.be/en/services/travel_to_belgium/visa_for_belgium/faq/schengen_countries/index.jsp**).

2 ECJ, 3 October 2006, C-241/05 (Bot), **http://curia.europa.eu**.

What's new in Brazil

BRAZIL

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Training visas

In the past year the main changes which occurred with respect to immigration norms in Brazil are related to the so-called 'training visas'.

Normative Resolutions (NR) Nos 26, 37, 41 and 42 were revoked and different types of training are now regulated as follows:

NR-86, dated 12 May 2010, regulates training to be carried out at sports associations or organisations which offer regular and specialised sports training activities, of non-professional foreign athletes, older than 14 and younger than 21, who are enrolled in training in similar entities in other countries. In addition to the sports activities, the athlete must be enrolled at a regular educational, and all costs must be borne by a foreign source. It must be noted, however, that the athlete is allowed to receive an education scholarship in Brazil. This is an Article 13, Item I visa, for a one-year period, applied for directly at the Brazilian Consulate. Upon proof that the athlete is regularly enrolled at a Brazilian educational institution and that he/she has satisfactory school results, the visa can be renewed for successive one-year periods.

NR-87, dated 15 September 2010, regulates professional training. This visa is granted in two different situations:

- the so-called 'intercompany professional training', which is applied to individuals who are employed by a foreign entity, and who will undertake professional training either at a Brazilian branch or subsidiary of the foreign entity, or at the Brazilian parent company of the foreign entity, always provided that the foreign employer and the Brazilian sponsoring company belong to the same economic group; and
- to foreigners who need to receive professional training in the operation and maintenance of machines and tools produced in Brazil ('Article 4 of RN-87').

The intercompany professional training is an Article 13, Item V visa, for a one-year period, and is non-renewable, with no employment relationship in Brazil, and the foreigner's remuneration must be paid by a

foreign source, there being no employment relationship in Brazil. Before the visa can be applied for at the Brazilian Consulate, the candidate must apply for a work authorisation at the National Coordination of Immigration in Brazil. The visa of Article 4 of RN-87 is an Article 13, Item I visa, for a maximum period of 60 days, which can be extended once for an equal period of time, and is applied for directly at the Brazilian Consulate.

NR-88, dated 15 September 2010, regulates the granting of visas to trainees. For purposes of this norm, training is considered to be the supervised academic education in a working environment aimed at preparing a student who is attending classes at a Brazilian graduate institution. This is an Article 13, Item IV visa, which can be granted for a maximum period of one year, renewable once for a similar period of time, and it is applied for directly at the Brazilian Consulate. For purposes of this visa, a letter-agreement between the student, the Brazilian educational institution and the Brazilian training entity is required. Under this type of visa, the student can receive a scholarship from the Brazilian training entity for his/her upkeep, as well as any other benefits included in the respective Brazilian legislation.

NR-94, dated 16 March 2011, regulates the granting of professional exchange visas to individuals who are attending a graduate or post-graduate course, or who have concluded one of such courses within the previous twelve months. This is an Article 13, item V visa, for a one-year period, non-renewable, and the foreigner will need to be registered as an employee of the Brazilian sponsoring company. As one of the requirements for his visa, the country where the student is coming from must grant the same type of visa to Brazilians, and there must be a letter-agreement between the candidate, the Brazilian sponsoring entity and the Brazilian intervening exchange agency. Before the visa can be applied for at the Brazilian Consulate, the candidate must apply for a work authorisation at the National Coordination of Immigration in Brazil.

2009 amnesty for foreigners – change of temporary residence into permanent to be applied for in 2011

On 2 July 2009, the Brazilian Congress enacted Law No 11.961, granting amnesty to all foreigners who entered Brazil prior to 1 February 2009, and who were living illegally in the country under an 'irregular migration situation'.

The amnesty initially regulated the migration situation through the granting of a two-year temporary (residence) visa, at the end of which, if certain legal requirements are met (among which, proof: of work or of funds for maintenance of the foreigner and of his/her family; that the foreigner did not spend more than 90 consecutive days outside of Brazil during the two-year period; and of police and social security and tax debts clearance), it is possible to apply for a permanent residency visa.

The application must be filed during the 90 days prior to the date of expiry of the temporary residence which appears in the foreigner's RNE (Registro Nacional de Estrangeiros – the Brazilian identification card for foreigners) under penalty of losing the visa. The appointment at the Federal Police must be made online.[1]

Migranteweb System

The Migranteweb System, which first became available on 25 August 2010, has now become mandatory as of 1 February 2011. This means that for work authorisations to be submitted to the General Coordination of Immigration, all applications must be pre-registered at the Migranteweb System of the Ministry of Labor.[2]

Simplification of Procedures – RN-74

Some of the undertakings and statements which had to be made by the Brazilian sponsoring company to be submitted with all work authorisation applications, namely the undertakings to bear all medical and hospital costs related to the foreigners and their legal dependents; and repatriate the foreigners and their legal dependents at the end of their stay in Brazil, and the statement concerning the place where the foreigner will work can now be presented in one document.

Notes

1 **www.dpf.gov.br**.

2 **http://migranteweb.mte.gov.br/migranteweb**.

Employer compliance measures come to Canada

CANADA

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Canada has joined the ranks of countries such as the UK, the US and Australia in imposing compliance measures on employers who bring foreign workers to Canada. Effective from 1 April 2011, employers must demonstrate compliance with new regulations for Canada's temporary foreign worker programme. These changes have been brought in to ensure the fair treatment of temporary foreign workers. These new measures provide that employers must demonstrate that:

- a job offer is genuine;
- the wages, working conditions and job description are substantially the same as the terms and conditions of the job offer; and
- for many workers, there is now a maximum cumulative period of four years that a worker can be in Canada.

As a result of these new regulatory provisions, workers in the foreign worker programme will be assessed by all parties in the foreign worker programme, including Human Resources and Services Development Canada – Service Canada (HRSDC-SC), Citizenship and Immigration Canada (CIC) and Canada Border Services Agency (CBSA). HRSDC-SC assess an employer's application for a Labour Market Opinion (LMO) to determine whether there are persons within the Canadian labour market available to fill this position. An LMO will only be issued in those circumstances where the employer can demonstrate a shortage of suitably-qualified Canadians. CIC assesses applications where HRSDC-SC has issued a positive LMO, or in those instances where an applicant is exempt from the need for an LMO. When applicants arrive to enter Canada, they are once again assessed by CBSA agents, who will apply the same criteria. Accordingly, employers and foreign workers will have their work arrangements assessed at least on two occasions, by CIC or CBSA, and in many cases, by all three parties.

At any point, a determination can be made with respect to the genuineness of the job offer, and whether the duties, wages and working conditions of employment in an occupation are substantially the same as those items set out in the employer's offer of employment to this particular foreign national, or any foreign national within a two-year period. Lastly, they will assess whether or not a specific worker has surpassed the four-year cumulative duration for working in Canada.

Genuineness

In assessing LMO requests to HRSDC-SC, or for all LMO-exempt work permit applications processed by CIC, a determination will be made as to whether or not an offer of employment is genuine. There are four factors upon which genuineness is assessed, that:

- the job offer is made by an employer who is 'actively engaged' in the business;
- the job offer is consistent with the reasonable employment needs of the employer;
- the employer is reasonably able to fulfil the terms and conditions of the job offer; and
- the employer or the authorised recruiter has demonstrated past compliance with all federal, provincial or territorial laws concerning employment or recruitment in the province or territory that the individual will be working in.

Substantially the same

In assessing an LMO or work permit application for a particular applicant, all three government departments are able to look back retroactively for a two-year period to all work permits that have been issued to that particular employer to determine whether, in all cases, the wages, working conditions and employment in a particular occupation were substantially the same as those set out in the offer of employment for those foreign workers. It is not merely the individual application that is being considered at the time, but all applications within a two-year period of a particular employer that may be assessed. In those circumstances where employers are not able to demonstrate that wages, working conditions and occupations are not substantially the same, they must

demonstrate that there has been a reasonable justification for the failure to be compliant. Reasonable justification includes:

- a change in federal/provincial law or change to a collective agreement;
- changes an employer had to make in response to a dramatic economic change that was not disproportionately directed to foreign workers;
- a good-faith employer error in interpreting obligations for wages, working conditions or occupation, and demonstration that the employer has made sufficient efforts to rectify any such error;
- an administrative accounting error by the employer, and the demonstration that the employer has made sufficient efforts to rectify any such error; or
- circumstances similar to any of those set out above.

Where it is determined that an employer has not honoured their commitment to workers that are substantially the same as their contractual obligations, and the employer is further unable to demonstrate that such failure is justified, in accordance with the regulations, the particular application will be denied and an employer will be found to be ineligible to make further applications for foreign workers for a period of two years. Furthermore, ineligible employers are then identified on the CIC Temporary Foreign Worker employer eligibility website.[1]

Four-year cumulative duration

The regulations further provide for a four-year cumulative limit on the time a foreign worker can spend working in Canada. There are numerous exemptions to this four-year limitation, most notably for:

- highly-skilled occupations in a management position (NOC level O) or a professional (NOC level A);
- temporary foreign workers who have already applied for permanent residence and for whom a positive selection determination has been made with respect to their application;
- temporary foreign workers who obtained their work permits pursuant to international agreements such as NAFTA, the Seasonal Agricultural Worker Program, or another agreement;
- temporary foreign workers who are LMO exempt, including spouses and common-law partners of foreign students, post-graduate workers or highly skilled foreign workers;
- charitable or religious workers;
- entrepreneurs, intra-company transferees, researchers or academics; and
- others, such as refugee claimants, destitute students, or holders of temporary resident permits valid for more than six months.

Skilled workers who are not exempt and who have met the four-year cumulative limit are ineligible to reapply until they have been outside of Canada for a further 48 months. The responsibility of demonstrating that the employee has not yet met the four-year limit on actual time spent working in Canada (regardless of the length of the validity of the work permits) falls upon the employee. Employers will want to encourage employees to keep vigilant records of their travel, boarding passes, and exits and entries in order to clearly demonstrate their actual time spent working in Canada.

Conclusion

Given the serious ramifications to an employer of a potential two-year bar from employing foreign workers and the potential publication of being blacklisted, employers will want to ensure that they are compliant with these new regulations. It is recommended that employers set up internal audit procedures with their human resources department to ensure consistency with their foreign workers and with the terms of employment that have been offered to foreign workers. The onus of demonstrating compliance, where requested, falls upon the employer.

Notes

1 **www.cic.gc.ca/english/work/list.asp**.

Professional immigration in France: update and outlook

FRANCE

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The 12 months preceding 1 May 2011 have been relatively calm, compared to previous years when the regulations specifically conceived for professional immigration were being put to the test, principally to facilitate assignments for intra-company transfers or for provision of services. The main events this year have been: a new court decision confirming one of the specificities in French labour law, the prohibition of using a foreign secondment assignee to fill a position which is permanent in nature; and the issuance of a circular which brings more clarity to the intra-company transfer regulations. Lastly, I will provide a brief outlook for the year to come.

New court decision confirms that foreign employees cannot be seconded to fill permanent positions

A decision of the Administrative Court of Appeal of Paris confirms that a foreign employee cannot be seconded to a position in France, when such position is permanent in nature.

The facts in this case[1] are quite simple and frequently encountered by mobility managers of multinational corporations. Turkish Airlines had transferred one of its Turkish employees to be the accountant of their operations based in France, under a secondment ('*détachement*') work permit. As such, the Turkish employee remained under a Turkish employment contract, on the Turkish payroll and Turkish social security scheme. The secondment work permit had been renewed annually over three consecutive years, before a new renewal application was denied by the labour authorities of Paris.

The denial of the work permit was cancelled in the first instance by the Administrative Court and then confirmed by the Administrative Court of Appeal. The latter court reasoned that the position of accountant in France was a permanent position, by its very nature. It could therefore not be filled by a Turkish employee on a secondment assignment, regardless of the facts that the position required knowledge of the Turkish language and Turkish accounting principles. A secondment, as defined by the labour code (Article L 1261-3), must be temporary in nature. Consequently, Turkish Airlines should have applied for a permanent work permit under a French employment contract giving rise to French social security charges.

The secondment in this case occurred before the intra-company transfer ('*salarié en mission*') category was created by the government in 2006. The intra-company transfer work permit, under the present regulations, is intended for a temporary assignment, as was the secondment work permit obtained by Turkish Airlines. In our opinion, this decision may also be extended to conclude that the new intra-company transfer work permit would not have allowed Turkish Airlines to temporarily transfer its Turkish employee to be the accountant of their French operations.

New measures for employees on intra-company assignment and their family

A circular of 12 November 2010 from the Ministry of Immigration details the procedures applicable to employees and their family on intra-company assignment, and it notably includes the creation of a specific procedure for assignments under three months.

The inter-company transfer facilitates mobility of foreign employees sent on secondment assignments or hired in France by a company from the same group as their home employer. This status is attributed to employees who have more than a three month tenure in the group and come to France for an initial period of three months to three years, and whose compensation is equal to or greater to one-and-a-half times the French minimum wage ('SMIC').

The circular provides for the following changes:

Short-term assignments: creation of a specific procedure

Reserved in the past to assignments exceeding three months in length, the intra-company transfer status now benefits from a specific procedure for shorter assignments.

In an effort to simplify procedures, work permit requests of under three months which otherwise answer to the 'intra-company transfer' criteria, will lead to the issuance of 12-month work authorisations. Visas with multiple entries will also be delivered to nationalities submitted to this obligation. This authorisation and the visa will allow their beneficiary to undertake assignments of up to three months per semester, during a year, instead of having to request an authorisation for each short-term assignment.

Intra-company transfer residence permits are not to be segmented

When a work permit authorisation under intra-company transfer status has been granted for a period of over three months, the residence permit delivered must be valid for three years. Contrary to practices observed up until now, the *préfectures* will not be allowed to limit the validity of residence permits when the assignments are planned for a duration that is less than three years.

New procedures for application processing

- A guichet unique (single teller): As a result of the objectives and performances contract signed between the Ministry of Immigration and the OFII in July 2009, a new procedure has been implemented so as to simplify the intra-company transfer application process. From 1 December 2010 until 30 June 2011, the districts of Paris, Hauts de Seine and Rhône will put in place a new process named *guichet unique* for intra-company transfer procedures. Work authorisation requests will have to be sent directly to the OFII, which will liaise with the Labour Authorities and Consulates.
- Accompanying Family: Starting on 1 December 2011, files for families accompanying employees on assignment will have to be filed jointly with the work authorisation requests, as is currently the case for standard procedures. This ends the simplified procedure currently in force, as the authorities concluded it did not meet the desired objectives. Also, it will be once again possible for intra-company transferees and their spouse to undergo a OFII-mandated physical exam and retrieve their residence permits concomitantly.

The right to work for the spouse of an intra-company transferee

The circular restates the fact that spouses of intra-company transferee for six months or more are to be given residence permits entitled *vie privée et familiale* (private and family life), which allow them to hold a professional occupation while in France. When the assignment of the intra-company transfer is less than six months, the spouse is given a *visiteur* (visitor) status, which does not permit her or him to work.

A reminder: no second-rank secondments

Intra-company transfer seconded to a French company belonging to the same corporate group as the home employer cannot in turn be seconded by the host company to another firm. This so-called 'second-rank' secondment or 'secondment in series' is not authorised in France.

Renewal of the intra-company transfer residence permit

The circular confirms that the residence permit is, in principle, renewable, so long as evidence is provided to show that the initial conditions that led to the delivery of the initial residence permit are still met (mainly with respect to conditions of employment and compensation). That being said, the text also states that the status of intra-company transfer on secondment is not indefinitely sustainable. Finally, one is reminded that intra-company transfers are not eligible for the delivery of ten-year residence cards even after having spent five years in France, as their presence is temporary in nature.

Outlook

Besson Draft Law

As this article goes to press, the Senate is getting ready to vote on the controversial immigration reform law (referred to as the Besson Draft Law) which has already been adopted by the French Parliament. This draft law transposes into French law the three recent European Directives:

- Directive 2008/115/CE on standard procedures for returning illegal third-country nationals;
- Directive 2009/50/CE regarding the conditions of entry and stay of highly qualified third-country nationals, also referred to as the European Blue Card Directive; and
- Directive 2009/52/CE setting the standards for minimal sanctions against employers of third-country nationals staying illegally in the European Union.

This law illustrates the current government's policy of favouring professional immigration, while adapting a hardening stance on illegal immigration. This policy is not expected to change despite the fact that Mr Besson is no longer the Minister of Immigration and his ministry has been absorbed by the Ministry of Interior. The current Minister of Interior, Mr Guéant, advocates restricting access to the French labour market by third-country nationals. It is nevertheless unlikely that Mr Guéant would tamper with regulations put in place by the current government, which have eased and quickened the immigration process for intra-company transfers.

Europeanisation of French immigration laws or the gallicisation of European immigration laws

In the *Impact Study of the Besson Draft Law*, the government states its ambitions as follows:

> 'The laws of the European Union determine more and more today the laws applicable to foreigners, as in other areas of laws. This is the consequence of the new direction being taken since the Schengen Agreements, the Dublin Convention, and the Treaty of Amsterdam: the immigration problems are being apprehended today as European priorities, and no longer as just a national matter. The French government, a long-time proponent of the European policy in this area, wishes to be one of its driving forces, after its reinforcement by the Lisbon Treaty.'

Practically speaking, the Commission's proposal on the future EU Directive on intra-company transfers is largely inspired by the French legislation. When the proposal becomes a directive, little, if any, changes will need to be made to transpose it into French national law.

This being said, the Commission is not giving this directive its priority, and a year from now it may still remain a proposal.

Note

1 CAA Paris, 18 October 2010, *Min du travail v Société Turkish Airlines.*

Recent wide-ranging changes to the United Kingdom's immigration system: No 'red carpet' for some

UK

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On 6 April 2011, the UK Coalition Government brought into force wide-ranging changes to the country's immigration system as part of its pledge to 'reduce net immigration from the hundreds of thousands to tens of thousands'.

Broadly, the reforms seek to reduce significantly the number of lower earning and lower skilled nationals of countries outside the European Economic Area (EEA) and Switzerland (Migrants) that are eligible under the UK's points-based visa system; while at the same time it aims to attract those who are able to make a significant financial investment and/or create new jobs in the UK.

As the UK's immigration minister recently put it, 'the UK remains open for business and we want those who have the most to offer to come and settle here.' The UK Border Agency (UKBA) website proclaims that, 'Government

"rolls out the red carpet" for entrepreneurs and investors'.

No 'red carpet'

Skilled workers

The Tier 2 (General) visa category is designed for Migrants who have a 'skilled' job offer to fill a gap in the UK workforce that cannot be filled by a resident worker.

On 6 April 2011, the first annual cap on the number of Certificates of Sponsorship came into force. Without such a certificate, issued under the Tier 2 (General) visa category, an applicant cannot apply for a Tier 2 visa. These certificates are allocated in 12 monthly tranches through the year (4,200 for April and 1,500 for the next 11 months). The cap has been set at 20,700 for the first year.

To be able to apply for one of these visas, Tier 2 Migrants first have to be sponsored by an employer that holds a licence, from the UKBA, to act as a Tier 2 sponsor.

Being a licensed sponsor is an arguably onerous role which entails regulatory duties relating to sponsored Migrants and liability to civil and, in some cases, criminal penalties if these duties are not met.

Employers who wish to hire skilled workers from outside the EEA or Switzerland will now have no choice but to become licensed sponsors if they wish to hire skilled Migrants under Tier 2.

For many larger organisations (with large HR Departments) that wish to sponsor numerous Migrants, being a sponsor may be a burden that they are prepared to accept. However, smaller employers, and particularly those who only wish to employ one Migrant to fill a specific or specialist role, will have to consider whether the benefits of becoming a sponsor outweigh the costs of sponsorship status.

What awaits those lucky enough to meet all of the criteria is a form of lottery system in which applicants are ranked against each other by use of a points system designed to favour jobs on the shortage occupation list, scientific researchers and those with a higher salary. This leaves both eligible applicants and their employers facing a final stage of uncertainty before a Tier 2 (General) visa can be issued.

The skilled worker category has also been made more strict in other ways, for instance:

- This category is now reserved for graduate level occupations only. Some 71 occupations have now been removed from the previous list of 192 'approved occupations', as they were deemed to be below graduate level.
- The minimum English language competency level has been raised.
- Employers are no longer given 'pre-allocated' Certificates of Sponsorship for the year based largely on anticipated need. Instead they have to apply for certificates on a case by case basis for specific roles.

It will, however, come as a relief for some high earning Migrants and their prospective employers that the cap does not apply to Tier 2 (General) Migrants who are paid £150,000 or more per annum.

Intra-company transfers

The Intra-Company Transfer (ICT) visa category is designed for employees of multinational companies who are being transferred by their overseas employer to a UK branch of the organisation on a short or longer term basis.

Many multinational employers in the UK feared that the ICT visa category would also be made subject to a cap, but the Government decided against this option. The ICT category has nonetheless been restricted in a number of ways, for instance:

- As with Tier 2 (General), this category is now reserved for graduate level occupations only.
- Only applicants paid £40,000 per annum or more will be able to stay in the UK for more than a year; those who qualify and earn between £24,000 and £39,999 per annum can now only stay in the UK for up to 12 months.

'Red carpet treatment'

Investors

The Investor visa category is designed for Migrants who want to make a substantial financial investment in the UK, and without having to take the more proactive steps involved with an 'Entrepreneur' visa. There is no 'cap' on visa numbers under this category.

As of 6 April 2011, an applicant for a Tier 1 (Investor) visa has to show that they are able to make an investment of not less than £1 million in the UK. The money must, for instance, be controlled by the applicant, be disposable in the UK and be held in a regulated financial institution. Alternatively, the applicant can show that, taking into account any liabilities, they have assets worth

more than £2m and have on loan from a UK regulated financial institution no less than £1m which is under the applicant's control and disposable in the UK. Applicants are required to provide documentary evidence that they have the funds available to invest in the UK and, in some circumstances, the source of the funds.

Examples of ways in which the Investor visa category has been made more attractive include:

- Accelerated settlement ie, indefinite leave to remain. With an investment of no less than £10m or £5m, and if certain other criteria are met, Migrants can apply for settlement after two or three years respectively instead of having to wait five years to apply for settlement.
- Allowable absences from the UK have been increased from 90 to 180 days a year.
- Applicants no longer need to meet a minimum English language competency standard.

Entrepreneurs

The Entrepreneur visa category is designed for Migrants who wish to establish, join or take over one or more businesses in the UK. There is also no 'cap' on visa numbers under this category.

To apply for a Tier 1 (Entrepreneur) visa, an applicant or joint applicants have to be able to demonstrate, for instance, that they have access to the required funds and that the funds are held in a regulated financial institution and disposable in the UK. In addition, the applicant or joint applicants must be able to show that they meet the UKBA's English language competency and financial maintenance requirements.

Examples of ways in which the Entrepreneur visa category has been made more attractive include the following:

- It is now possible for two entrepreneurs to apply together (without a requirement for increased levels of funding) provided that they can show that they have equal access to the funds.
- Accelerated settlement. An entrepreneur can apply for settlement after three years if they have created ten full time jobs for resident workers for at least 12 months or the company of which the entrepreneur is a director has generated a total turnover of £5 million over the three-year period for start-up companies, or an additional turnover of at least £5m compared with the previous three-year period for existing businesses.
- The normal £200,000 funding threshold has been reduced to £50,000 if an applicant or joint applicants have access to £50,000 of qualifying funding, for instance funding from a registered and regulated venture capital firm or from a UK Government Department.
- There is a new six month entrepreneur visit visa which will allow prospective entrepreneurs to visit the UK to secure backing for their business from relevant potential investors, for instance from a registered and regulated venture capital firm or from a UK Government Department.
- Allowable absences from the UK for entrepreneurs have also been increased from 90 to 180 days a year.

Exceptional talent

And finally, the Government has stated that it wishes to 'ensure that Britain remains open to the brightest and the best' and has therefore introduced a new 'Exceptional talent' visa category for scientists, academics and artists who are internationally recognised as being outstanding in their field or are likely to achieve such recognition. This category has not been opened yet, but the Government has stated that when it is open, it will be subject to a cap of 1,000 for the period up until 5 April 2012.

Conclusion

There can be very little doubt that the UK is now an even more accessible destination for the world's financial and business elite. However, many skilled and even highly skilled Migrants will lose out as the reforms bite and as many UK employers, particularly smaller employers, begin to place a greater emphasis on hiring resident workers.

USA

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An update on US immigration law and policy

Reforming the US immigration system continues to make headlines even though there does not seem to be very much optimism about legislation being implemented in the near future. There is general agreement that the system is broken. An estimated 12 million immigrants are living in the US illegally. Those who have applied to immigrate through various legal channels face backlogs of many years. Temporary work visa numbers for highly skilled workers continue to run out in the middle of the government fiscal year, even when unemployment rates remain high.

US immigration law has generally changed only incrementally since a major reform law was passed in 1986. The 1986 law, the Immigration Reform and Control Act ('IRCA') legalised most of the three million people living illegally in the US at that time and also created the employer enforcement system which is in place today. Employers are required to check the identity and authorisation to work for all their employees in the US. This is done by having employees complete a form called an I-9 and by examining documents that the law mandates employees present. The law also included substantial penalties for employers who knowingly hire unauthorised workers. The IRCA specifically bars states from imposing their own penalties on employers except in the area of licensing. The 1986 bill was originally supposed to have a guest worker programme that would deal with inevitable future flows of workers to the US, but business and labour could not agree on a plan and Congress decided simply to deal with the question later, something that never happened.

As many predicted, growth in the US economy in the years that followed IRCA's implementation caused a greater demand for foreign workers, but the lack of a guest worker programme and inadequate immigration enforcement led to millions of new workers entering the country illegally. Many workers obtained false documents including millions who work on the basis of social security numbers that are invalid or belong to other people. Some industries are largely dominated by unauthorised workers. For example, the US Department of Labor estimates that 53 per cent of the country's 2.5 million farm workers are illegally in the US.[1]

In 2004, President Bush proposed a comprehensive reform plan that many expected would have substantial support from members of both political parties. The plan had three major components:

- dramatically increase US immigration enforcement efforts;
- put those in the US illegally on a path that would eventually lead to US citizenship; and
- reform the legal immigration system to, among other things, make it easier for employers to hire needed foreign workers and also to increase family immigration quotas to reduce backlogs.

Despite numerous public opinion polls showing substantial support for the plan, several well-organised pressure groups lobbied heavily against the proposal. Protests included inundating members of Congress with so many phone calls and faxes that the Capitol switchboard was forced to shut down. Republicans seemed to react to the pressure more than Democrats and most members of President Bush's party ended up opposing the bill when it was brought up for a vote in 2006 and 2007. The bill narrowly failed on each occasion.

There were several reasons opponents offered to explain why they voted 'no' even if they believed that the system is broken. Some in the President's party argued that they were not against legalising workers per se, but that they first wanted the President to demonstrate that the US had control over its borders before supporting such a plan. Others said that any legalisation programme amounted to an amnesty and such illegal behaviour should not be rewarded. A few Democrats opposed the measure because the guest worker programme was not deemed adequate to address the demands of organised labour.

In August 2007, shortly after the second failed effort to pass a reform bill, President Bush's Homeland Security Secretary Michael Chertoff and Commerce Secretary Carlos Gutierrez

held a joint press conference to announce that in the wake of Congress's failure to pass immigration reform, it would focus mainly on immigration enforcement. Over the last four years, both Presidents Bush and Obama have devoted substantial resources to immigration enforcement and the change has been dramatic.

The number of deportations has increased by 70 per cent, to nearly 400,000 over the past three years. Since President Obama took office, employers have been fined more than $50,000,000 under IRCA and more than 3,200 companies have had their I-9s audited. Substantial portions of a fence along the US-Mexican border have been completed. The number of illegal entries to the US has declined by half. And an estimated one million unauthorised immigrants have left the country.

Despite the changes, the prospects for legislation to deal with the millions of unauthorised immigrants seem to be worse than ever. Even one of the most sympathetic parts of the comprehensive immigration reform bill, a measure called the DREAM Act that would legalise people who came to the US as children and who have done well in school or served in the military, failed to pass when it was brought before Congress last year. Comprehensive reform has virtually no Republicans supporting it and Democrats lacked the votes to pass it on their own.

So it has caught many by surprise that President Obama has recently given considerable attention to immigration reform. The President did campaign in 2008 on the promise to push through immigration reform in his first year in office. Indeed, his support for immigration reform is credited with him earning substantially more support from Latinos than Democrats have in the past and that support likely helped him win several states.

But the President has largely been on the sidelines in the immigration debate since taking office and has relied on Congress to take the lead. The failure to deliver on the promise of reform in his first year in office has not gone unnoticed. President Obama's support among Latinos has declined by a quarter since the 2008 election and since the number of Latinos in the US has now passed 50,000,000 (they now are the nation's largest minority group), the impact on the loss of those voters could be enormous.

Perhaps due to a fear of losing Latino support in the President's re-election effort in 2012, President Obama has decided to pursue immigration reform in a much more public way. On 10 May 2011, just a few days after he announced the capture of Osama Bin Laden, President Obama delivered a major address on immigration reform.[2] The President largely echoed the same them of pushing for comprehensive reform, although he left open the possibility of pursuing more modest measures if that is all that is possible.

Obama is also resisting pressure from pro-immigration groups to use his executive authority to address many of the problems. For example, some are calling on the President to enact a moratorium on the deportation of individuals who would eventually qualify for the DREAM Act if enacted. Last year, a memo was prepared for the White House by USCIS outlining options for unilateral action by the White House. The memo created controversy when it was linked to the right wing press. The White House has disavowed the document and has stated on a number of occasions that it lacks the authority to do anything on its own and that only Congress can act. He mentioned that again in his speech this month even after 22 members of Congress sent him a letter stating that he has the authority and needs to act.

Immigration policy analysts are divided over what direction the White House is planning to take. At this point, they are engaged in a public relations blitz and have organized dosens of 'roundtable' meetings to discuss immigration policy in communities across the country. Beyond that, it is unclear whether the President will engage in any serious negotiations with members of Congress to move immigration legislation forward.

Notes

1 **www.nytimes.com/2007/09/04/world/americas/04iht-export.4.7380436.html**

2 **http://youtu.be/-kLHA9m8bOQ**