

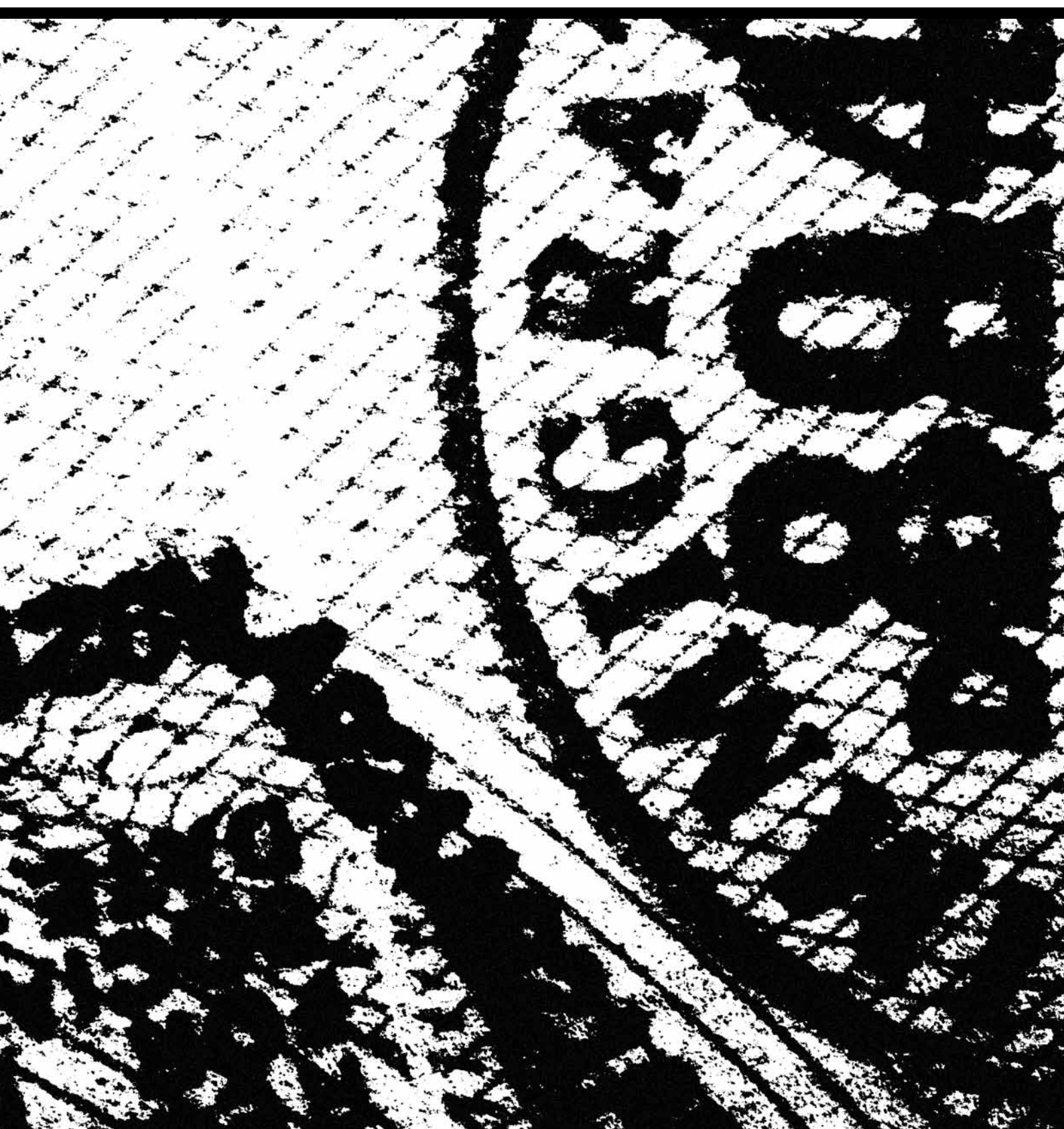


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Immigration and Nationality Law News

Newsletter of the International Bar Association Legal Practice Division

VOLUME 16 NUMBER 2 DECEMBER 2011





The Paradigm of Employment Law

29–30 March 2012

The Waldorf=Astoria, New York, USA

A conference presented by the IBA Employment and Industrial Relations Law Committee and the IBA Discrimination Law Committee and supported by the North American Regional Forum

Topics include:

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- Discrimination and Harassment: New Protections, New Rules
- New executive compensation rules
- Hiring and retaining talent
- The financial services sector under increasing global scrutiny
- The changing world of social media
- Privacy protection in an increasingly regulated world

Who should attend?

Employment lawyers, human resources professionals, lawyers working for government organisations and in-house counsel.

Headline sponsors



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Contributions to this newsletter are always welcome. If you wish to be a contributor for your country or region and can provide updates twice a year, please contact the Newsletter Editor at the address below:

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Another successful IBA Annual Conference

Enrique Arellano

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As 2011 draws to a close, I would like to reflect on the accomplishments of this year, which are a result of the hard work and enthusiasm of our Immigration and Nationality Law Committee.

In September 2011 the 5th Biennial Global Immigration Conference was held in London. I would like to personally thank the organisers and all those who participated and made this event such a success.

In October, the IBA Annual Conference, which took place in Dubai, was also very successful and was attended by many of the members of our Committee. During the conference sessions the participants shared excellent material which provided very interesting topics of conversation and food for thought.

I would like to express the gratitude on behalf of all the Officers of the Committee to the participants who attended these two conferences from around the world and for their valuable contributions during the sessions.

Next year, the IBA Annual Conference will be held from 30 September to 5 October in Dublin, Ireland, where we are planning

to work jointly with the Corporate Counsel Forum, the Employment Law Committee, and the Individual Tax and Private Client Committee in various sessions that I think will prove to be very diverse and interesting.

Day by day we have been working enthusiastically to increase the participation of more members in our Committee. As a result of these efforts I have the pleasure to announce that as of January 2012 three very distinguished attorneys will assume new positions as Committee Officers. I would like to extend my warmest welcome to Catherine Sas, Anne O'Donoghue and Corrado Scivoletto who will be occupying the positions of Website Officer, Membership Officer and Newsletter Officer respectively. In addition, the existing Committee Officers will continue to serve on the Committee as follows: Shalini Agarwal, Vice-Chair, Gunther Mävers, Vice-Chair, Jelle Kroes, Secretary and Carolina Garutti, Corporate Counsel Forum Liason Officer.

I wish you all a Happy New Year and I hope to see you next year in Dublin!

Jelle Kroes

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From the editor

The year is closing and I still have to write this introduction – yes, this newsletter is almost overdue. In my defence, let me say that new articles just kept coming in, and to accommodate our contributors we just thought we should be lenient on the deadline – to all who did make the deadline: my apologies!

The result is an abundance of articles, of which the majority are dedicated to entrepreneurs and investor immigration, as we had solicited. The choice of topic was motivated by the monetary meltdown in large parts of the world, which raises the issue whether governments will adapt their policies in an effort to attract more investment and business. We will know more about this in the course of 2012 and this newsletter will hopefully serve as a reference.

We also have a very interesting report on the Committee's panel discussions at the recently held annual conference in Dubai. And finally, we have an article on another exciting project: the Global Corporate Relocation Treaty (see page 9). The idea for such a treaty, initiated by our colleagues Tsvi Kan-Tor and Amit Acco, has been taken up by the IBA's Global Employment Institute (GEI) with a view to try and raise the interest of politicians and policy makers. If you would like to participate in this project, just contact the GEI or any of our Committee officers.

Lastly, my thanks go out to the authors and – as always – to Ed Green at the IBA, for his support and advice.

Happy holidays and a splendid 2012!



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17th Annual International Wealth Transfer Practice Conference Private Client Advisors: How many balls can you juggle?

5–6 March 2012

8 Northumberland Avenue, London, England

A conference presented by the IBA Individual Tax and Private Client Committee and supported by the IBA Family Law Committee and the IBA European Regional Forum

Join delegates and speakers from around the world to discuss the hottest issues involving international wealth transfer, private clients, estate planning and much more.

Sessions include:

- TIEAs 12 years later: are things any clearer – or at least more transparent?
- Voluntary disclosure: looking at how the evolving environment has impacted clients – are they more compliant?
- Put your trust in your trustee, but keep your powder dry: control issues and structuring for the untrusting
- We don't do it quite like that ... Islamic Estate Planning
- Cheese and Wine Vs Sand and Surf: My jurisdiction's better than yours – 4 jurisdictions compete for this year's 'Emigrant's choice' award
- Breakfast roundtable Discussions:
 - (a) Family Structures/governance issues
 - (b) Asset protection Issues

- Trusts away from home: Abort, Retry, Fail?
- That's pretty, but which way up does it go? What every advisor needs to know about their clients art?
- Messy Deaths Part II – more things Dad didn't tell you

In addition to the substantive sessions, the conference will once again feature an exclusive gala dinner and reception at 1 Whitehall Place, allowing attendees ample time to network and discuss the events of the day.

Who should attend?

Lawyers, solicitors, notaries, trust officers and other professionals involved in advising private clients, trustees, accountants and private bankers.

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IBA Annual Conference

Dubai, 30 October – 4 November 2011

Overview

Looking back to the IBA Annual Conference we have had in Dubai one can say, that we have not only seen a historic record in numbers (approximately 5,000 participants) but also a city that is so unreal that it is just fascinating to see the wonderful sights. From a business perspective, as usual, the conference has been a perfect opportunity to meet colleagues from across the world and to also see many friends again. The latter goes in particular for the other members of the Immigration and Nationality Committee. Despite of Dubai being quite far away from Europe and the US we have seen a significant number of participants in the various sessions. In order for those of you, who have had no chance to come to the conference we thought it would be a nice idea to provide an overview of the sessions by the following short report from the Session Chairs:

Monday 31 October**Immigration policies and security concerns in dangerous countries: what do expats and their employers need to know?**

Joint session with the Business Crime Committee

Session Co-Chairs

Enrique Arellano *Enrique Arellano Rincón Abogados, Mexico City, Mexico; Chair, Immigration and Nationality Law Committee and Council Member, IBA Global Employment Institute*
Shalini Agarwal *Clasis Law, New Delhi, India; Vice-Chair, Immigration and Nationality Law Committee*

The week of the IBA Annual Conference went smoothly and passed by very quickly. Now that I can appraise the conference, I am delighted to have had the opportunity to take part in so many conference sessions, work meetings, social functions and above all to have had the opportunity to spend time with friends in a marvellous setting like Dubai, that fostered a tremendous environment whereby we were able to share both our personal and professional experiences.

I was delighted as Co-Chair with the outcome of our sessions and those held jointly with other committees such as the IBA Business Crime Committee. All the sessions proved to be very fruitful with polemic panels where we addressed

several topics such as the challenges expats face in some countries, the local legislations that address these issues and liabilities for foreign nationals. My special thanks go to Shalini Agarwal, Dennis Boyle, Alan Cammidge, Sara Khoja, Tom Lightfoot, Abid Mahmood and Ariel Orrego-Villacorta whose contributions made this possible and whose support was indispensable.

I look forward to seeing you all next year for the IBA Annual Conference in Dublin.

Enrique Arellano

Wednesday 2 November**A 'flat world'? Management of employees' global geographic mobility**

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

Session Chair

Graeme Kirk *Gross & Co, Suffolk, England; Vice-Chair and Treasurer, IBA Global Employment Institute; Council Member, Public and Professional Interest Division*

The session topic arose from the recent 10/20 Survey carried out by the IBA Global Employment Institute (IBA GEI), which asked leading multinationals to name the key human resource issues which they believe will affect them over the next ten years. The topic of 'A Flat World' was considered one of the most important issues in the Survey. Salvador del Rey, the current Chair of the GEI Council, opened the session by presenting the results of the 10/20 Survey and commented on the most significant trends.

Robert Walsh from Australia, Catherine Sas from Canada, Ranjit Malhotra from India, Rebecca Ford from Dubai and Kasi Mannan from Bangladesh then all spoke about current approaches to global transfers from their country's perspective.

- Both Australia and Canada provide relatively efficient and smooth routes for global transfers.
- It appears that Indian legislation at this stage has not moved forward at a sufficient pace to take account of the rapidly growing Indian economy and the need for multinationals to transfer staff into the country. India has for so many years been an exporting country for personnel, rather than a receiving country and

its laws remain restrictive for the transfer of staff.

- In Dubai it is easy enough to transfer staff into Dubai for global companies, but the UAE does not allow foreign nationals to acquire permanent residence rights or indeed citizenship, no matter how much time has been spent in the UAE, and temporary residence has to be continually extended.
- In the UK, whilst intra-company transfers are relatively straight forward and quick. Since April 2010, the UK Border Agency has taken away the right for intra-company transferees to acquire permanent residence in the UK and the maximum period that an intra-company transferee may remain in the UK is five years. In these circumstances, if a multinational wishes a transferee to remain in the UK on a permanent basis, an alternate route must be found.
- In Bangladesh, there are very few, if any, multinational transfers of staff into Bangladesh. It remains a country which sends out many of its workers to third countries, often unskilled and there have been significant cases of abuse of Bangladesh workers in some countries.

Graeme Kirk then reported that the Committee, together with the GEI and the other Committees in the Human Resources Section, would be starting work on a Global Relocation Treaty in the New Year. The initial Draft of this Treaty has been prepared by Tsvi Kan Tor, an Israeli lawyer.

Thursday 3 November

The shifting global economic order and its impact on corporate immigration

Session Co-Chairs

Jelle Kroes *Kroes Advocaten Immigration Lawyers, Amsterdam, the Netherlands; Secretary, Immigration and Nationality Law Committee*

Gunther Mävers *Mütze Korsch Rechtsanwalts-gesellschaft, Cologne, Germany; Vice-Chair, Immigration and Nationality Law Committee*

The final session of this year's Annual Conference examined the changes in immigration policies against the background of the changes in the global economy during the first decade of the 21st century. Panellists commented on and were confronted with questions such as:

- Can the BRICS countries be said to be copying Western immigration policies, or are they rather developing their own systems?
- Is there a change in the composition of the nationalities of the worldwide body of highly skilled migrant workers that mirrors the change of the global economic order?
- What is the response of the West?

With panellists from Australia (Anne O'Donoghue), Brazil (Isa Soter), Canada (Kenneth Ing) France (Karl Waheed), India (Shalini Agarwal) we witnessed a most lively discussion with a great deal of comments from the floor, despite of the early morning hour and the end of week. Although the conference room was being cooled down as a freezer the question on how to react to the 'new world order' and how to attract talent turned out to be the hot topic of the day. Kenneth Ing's statistics however illustrated that recognition currents do not change their course overnight. According to Shalini Agarwal, 'this session highlighted not only the importance of corporate immigration but also how emotionally charged and personal, issues relating to immigration can actually be. What are easily perceived as issues reserved for political and legal debate, often have an impact at a very local and individual level. Many comments from delegates of host country were evidence of this and brought out clearly the need to balance a liberal immigration policy with an understanding of local custom and culture.'

See also the article 'Market movers', p.12 of the *IBA Daily News*, Monday 31 October (<http://tinyurl.com/cro9mvj>).

Jelle Kroes

Thursday 3 November

Immigration and Nationality Law Committee dinner

We have had a wonderful dinner at a golf resort (even though it was way out of the city), where we could all sit outside and enjoy the evening temperatures with food and wine clearly above the normal IBA standard we are used to. This was probably partly due to having *Immigration Solutions Australia* sponsoring the diner.

Finally, we would like to let you know that we took the opportunity of the Annual Conference to have a luncheon business meeting of the current committee officers to discuss future projects. In particular, we discussed which sessions to include in the next year's Annual Conference in Dublin, to which I cordially invite you all. We have also discussed new projects to be launched in 2012, such as the IBA Global Immigration Guide and the Global Corporate Relocation Treaty. Enrique Arellano, the current Committee Chair will update you on these issues over the next few months.

Please don't hesitate to contact any of the committee officers with any questions you may have. Input with regard to any matter you would like to discuss or have us focused on would be very much appreciated.

We very much look forward to seeing you in Dublin and hearing back from you in the meantime.

**Tsvi Kan-Tor and
Amit Acco**

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Globalisation and relocation of the skilled working force: a review of the draft proposal for a Global Corporate Relocation Treaty

As a result of globalisation, the phenomenon of the expert's relocation has increased dramatically in the last two decades and it is today estimated by industry leaders that around 1.5m experts have relocated for work. These experts facilitate the transfer of all kinds of knowledge and know-how in multinational corporations and throughout the business sector, while at the same time promoting foreign investment, encouraging GDP growth and facilitating the expansion of education.

To date, each country has its own laws and regulations over the issuance of work permits to foreign experts and managers. The proposed Global Corporate Relocation Treaty (GCRT) aims to:

- establish legal rights for any business entity to relocate experts as required;
- set legal principles and guidelines for the regulation and procedures involved in the process of experts relocation; and
- facilitate specific arrangements between any group of countries, on any issue concerning experts' relocation.

The principals set forth in the GCRT and in its proposed protocols can also be applied through the use of additional protocols to bilateral or multilateral agreements, such as Free Trade Agreements (FTA) between countries.

The current situation

In the absence of a treaty or a legal right for corporate relocation, any company that wishes to relocate experts may face difficulties. Due to a general immigration policy that tries to prevent workers immigration, some countries did not fully acknowledge the huge differences between experts and workers and the benefits experts bring to the country

and to the society. The absence of a legal right, and of coherent legislation, leads to uncertainty regarding the requirements and legal procedures that are required in order to get a work permit for a foreign expert. The GCRT will try to solve these problems.

As an example, a multinational corporation which won a contract for the construction of a power plant in a certain country needs to relocate to that country some highly qualified engineers. At present, the corporation bears the risk that the immigration authorities of the relevant country will not grant the experts work permits, which may prevent the company from fulfilling their agreement, which in turn creates a situation where the corporation may have to pay considerable compensation. The GCRT will minimise that risk, thereby encouraging companies to do business and transfer new and state of the art knowledge to countries.

The GCRT should enable the signatory countries to ensure the protection of their core legitimate interests, such as those related to security, the prevention of terrorist activity, the prevention of crime, and public health issues such as defence against contagious diseases and epidemics.

Advantages to all countries

Global corporate relocation carries a lot of advantages to all countries and players involved. It became a routine way that enabled all kinds of experts and essential professionals to be relocated from their countries of residence to another country (the 'target country') for a limited period of time, in the course of their work.

Corporate relocation enables the realisation of commercial and business opportunities



THE GCRT

that develop and exist in the target country. It is presumed that if an expert's posting in the target country is prevented, the business enterprise or the business project will suffer significant damage, or it may not happen. The result will be damage to all the relevant parties: the business entity, which seeks to send the expert; the expert; his country; and mainly the economy of the target country.

The revolution created by a combination of globalisation, technology and certain geopolitical changes that have taken place over the last two decades, have caused multinational companies around the world to divide their overall operations – development, manufacturing, marketing, etc – among different countries, in accordance with the comparative advantages of each country. These developments have created a permanent and growing need for corporate relocation of experts, in order to ensure the required movement of technology, data and know-how.

Corporate relocation brings significant gains to all the relevant parties, among which the most important are:

- the creation of many new jobs in the target country and in the country of origin;
- economic benefits arise from the transfer of knowledge to the target country;
- social benefits stemming from new education, new skills and new jobs;
- an improvement in the level of both education and wages; and
- a contribution to the technological and practical abilities of the target country.

At the same time, corporate relocation does not involve the economic and social costs which characterise the employment of unskilled or quasi-professional foreign workers. Among the reasons for this are:

- employing a foreign expert is much more costly than employing local experts, thus reducing the incentive to employ a foreign expert unless it necessary;
- foreign experts are a small group, usually no more than one per cent of the entire foreign population in a given country, and this grants the target country a disproportionate amount of benefits as compared to other groups of foreigners;
- the experts, as a group, do not tend to stay in the target country for a long period of time, and leave the target country by the end of their assignments.

According to accepted estimates of professionals involved in global corporate relocation, the relocation phenomenon in 2005 involved approximately 500,000 people

in the US alone (as opposed to approximately 750,000 in 2001), and approximately one million experts in the rest of the world, as opposed to 500,000 in 1997. Over this time, the phenomenon of expert relocation outside of the US has grown at an average annual rate of over ten per cent.

The current deficiencies in global corporate relocation

Currently, neither the companies nor the experts themselves have a sufficient level of certainty regarding their ability to relocate experts according to business needs. Several member states of the GATS (General Agreement on Trade in Services) accepted certain undertakings, of a declarative nature, regarding the entry of managers and professional experts into their territory, but this is not enough.

The absence of legal rights, transparency and the uncertainty regarding the applicable regulation and procedures for corporate relocation in the various countries has a negative impact on the commercial certainty and on the stability of the international business environment. Corporate managers have trouble knowing in advance whether they will be able to relocate the required experts to any specific target country.

Experts, investors, HR managers or other business personnel cannot know in advance what will be the criteria for assessing their work permit applications. As a result, the possibility of the agreement's realisation may be in doubt which may lead to unnecessary disputes or legal actions.

The solution proposed by this draft of the GCRT to these problems is to establish both a legal base for the right of expert relocation, as well as suggested standards and protocols for regulations and procedures through a multilateral GCRT which will be open to signature by any interested country.

The proposed draft of the GCRT also enables each country to add additional undertakings beyond the base level, created by the treaty through additional protocols that will be open for signature, either bilaterally or multilaterally.

The principles and main directives of the proposed draft GCRT

The treaty's main goals are specified at the beginning of section III. The proposed treaty relates only to the relocation of experts

among the contracting parties. The GCRT does not deal with the relocation of any other workers, refugees or any other groups of employees, such as the employees of international organisations, etc. Relocation for these groups can be arranged through additional protocols which can be added to the treaty, or included in other treaties.

Section IV of the draft GCRT defines the various groups of persons who will be considered to be experts for the purpose of the treaty.

Section V of the draft GCRT establishes the general framework of the undertakings of the contracting parties. This section provides that the posting of an expert will occur within a reasonable period of time, and that the process of issuing a work visa or a business visa will be transparent and fair while allowing the contracting parties to exercise discretion in protecting their legitimate interests.

Section VI of the draft GCRT enables the target country to ascertain that the foreign expert will indeed be arriving for the declared purpose, and that the expert is not entering for the purpose of immigration. The purpose of this section is achieved through a sponsorship of a local bona fide local legal entity that has a legitimate connection to the expert.

Section VII of the draft GCRT describes most of the details which are to be included in an application for a work visa or visitor's visa for an expert. These details include the nature of the connection between the expert and the sponsor, the facts indicating that the applicant is indeed an expert, and the special need for the foreign expert to fill the relevant position. A successful application will obligate the target country to grant the required work permit, while allowing the target country to establish additional requirements that each expert will be required to meet.

Section VIII of the draft GCRT stresses the right of the contracting parties to ensure the protection of their core legitimate interests, which are:

- security interests, such as the need to prevent the entry of a person who is suspected of a connection to a terrorist organisation or to terrorist activity;
- interests of public security, such as the need to prevent the entry of a person with a criminal background, or a person who is suspected of being a criminal; and
- interests of public health, such as the need to prevent the entry of people with contagious disease.

Section IX of the draft GCRT establishes the cases and the rationale for which a

contracting party will issue a work visa or a visitor's visa. It also provides that the visa will be issued subject to the provisions of the treaty – first and foremost of which is that the applicant meets the treaty definitions of an expert, and the existence of a legitimate relationship between the expert and the sponsor can be shown.

This section provides that the issuance of the visa is subject to conditions that may be set by each contracting party taking into consideration its legitimate interests. A work visa or visitor's visa will be issued for a limited period of time, which will be established by each contracting party taking into consideration both the business realities and the contracting party's social-economic policy, as well as its immigration policy.

Section X of the draft GCRT anchors the principle according to which the work visa or the visitor's visa for the expert will allow multiple entries, that is, it will allow the expert to enter and depart the target country throughout the period of the visa's validity without any need to request a new visa upon each entry into the country. It is based on the recognition of the financial-business reality which occasionally requires the expert to travel back and forth several times during the period of the visa's validity.

Section XI of the draft GCRT stresses the need for an established timeframe for the process of issuing a visa as a necessary condition for commercial certainty. The completion of the process within a reasonable period of time is one of the conditions for achievement of stability and coherency. The issuance of a work visa within 60 days constitutes a reasonable and attainable target based on the experience of numerous countries.

Section XII of the draft GCRT allows an expert who holds a work visa, as opposed to an expert who holds only a visitor's visa, to bring his/her close family members with him/her to the target country for the period during which the visa is valid, while automatically allowing his/her spouse a work permit for the full duration of the expert's own visa.

Final remark

The preparation of the proposed GCRT was chaired and coordinated by Advocates Tsvi Kan-Tor and Amit Acco, and was presented in several international forums such as the Global Immigration Conference of the International Bar Association (IBA) and the IPBA. Comments or insights on the proposal are welcome.

What's new in Brazil

BRAZIL

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Changes in the minimum foreign investment required for obtaining a permanent visa for statutory officers/administrators and in the pension amounts for foreign retired individuals

Normative Resolution No 95/2011, dated 19 August 2011 ('RN-95'), changed the minimum amounts which foreign retired individuals and statutory officers (administrators) must observe and prove to the Brazilian immigration authorities in order to obtain permanent visas based on Normative Resolutions Nos 45/2000 and No 62/2004, respectively.

The amounts, which were previously stated in US dollars, are now stated in Brazilian reais, thereby acknowledging the strengthening of the Brazilian currency and the increasing importance of the Brazilian economy.

Statutory officers/administrators

RN-95 amended Article 3 of Normative Resolution No 62/2004, which provides the granting by the Ministry of Labour and Employment of a work permit for purposes of a permanent visa with managerial powers to foreign statutory officers (administrators), increases the value of foreign direct investment in the Brazilian company

(receptor of the funds and sponsor of the visa) from:

- US\$200,000 (work permits initially valid for a five-year term) to the equivalent of R\$600,000 (six hundred thousand reais); and
- US\$50,000 (work permits initially valid for a two-year term pursuant to the filing of a commitment to generate ten new jobs for Brazilian nationals within two years counted from the arrival of the foreigner in Brazil holding the permanent visa) to the equivalent of R\$150,000 (one hundred and fifty thousand reais).

Retirement visas

According to the new rules of RN-95, for the Ministry of Foreign Affairs to grant a permanent retirement visa, retired foreigners must demonstrate the ability to transfer to Brazil, on a monthly basis, an amount, in foreign currency, equal to or higher than the equivalent of R\$6,000. This amount entitles the retired foreigner to obtain a visa for him/her and for two legal dependents. If the retired foreigner has more than two legal dependents, then he/she will be obliged to prove the ability to transfer, in foreign currency, an amount equal to or higher than the equivalent of R\$2,000 for each additional dependent.

CANADA

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Key changes to Canada's Foreign Worker Programme

This article provides an overview of the key changes to the Temporary Foreign Worker Programme, which came into force on 1 April 2011.

The Temporary Foreign Worker Programme has been an important source of labour supply to Canadian companies to meet their human resources needs. In fact, in a typical year, Canada admits over 100,000 temporary foreign workers on work permits. Therefore, these changes will have a significant affect on the human resources planning and strategies employed in businesses.

New compliance criteria

The regulations establish stricter guidelines by which an offer of employment will be evaluated. Stemming from this, on every new application an officer will be able to evaluate whether the terms of employment offered to every foreign worker in the two years preceding an application have been met with respect to working conditions, wage and occupation. Furthermore, any changes to working conditions (such as location and hours), wage (salary increase or decrease) and occupation (promotion or lateral transfer) must be reported after the work permit is issued.

Breach of compliance: an example

The following example will illustrate the impact of the changes. If an employer brings a temporary foreign worker to Canada to work at its Toronto office, and the work permit indicates the location as Toronto, a subsequent transfer of the employee to its office in Vancouver without first obtaining a work permit amendment from Citizenship & Immigration Canada ('CIC') would breach the regulatory standard. If CIC becomes aware of this breach, then that foreign worker's application for a future work permit extension could be refused. Furthermore, that employer's application for work permits for all foreign workers could be refused for two years at all its offices across Canada.

Breach of compliance: the consequences

The most significant change to the Temporary Foreign Worker Programme to employers is the imposition of a two-year prohibition from hiring temporary foreign workers for employers who have been found to be in breach of the regulatory standard. Furthermore, these employers will be put on a public list of ineligible employers published on CIC's external website.

Impact of changes: the foreign worker

The changes to the Temporary Foreign Worker Programme also impact the foreign worker. For the first time a cumulative maximum total of four years is being imposed for the issuance of work permits. If the foreign worker does not have permanent resident status by the end of that four year period, or approval in principle/selection decision for permanent residence, then the foreign worker must leave Canada. Furthermore, that foreign worker is ineligible for a Canadian work permit for four years. The rule takes effect commencing 1 April 2011, thus the earliest date that a foreign national could reach the four-year cumulative cap is 1 April 2015. The accumulated time worked in Canada will be calculated based on the duration period of valid work permits issued to the foreign worker. If he/she has had gaps in employment during the validity period of a work permit, then he/she must provide proof (such as passport entry and exit stamps, tickets and boarding passes) for those breaks to be considered in the calculation of cumulative duration.

There are exceptions to the four-year cap on work permits. In particular, the cap does not apply to work permits issued pursuant to the following categories:

- international agreements such as the NAFTA;
- intra-company transfer;
- significant benefit to Canada;
- spousal work permits;
- Labour Market Opinion exemptions; and
- Labour Market Opinions for occupations coded as managerial (NOC O) and highly skilled (NOC A).

It is expected that the majority of foreign workers will be impacted. It therefore becomes especially important for companies to have a solid plan for transitioning foreign workers to permanent resident status if a decision has been made to employ them indefinitely.

British Columbia leads the way in addressing Canada's pending labour shortage

CANADA

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On 13 October 2011, the Government of British Columbia announced changes to the Provincial Nominee Programme ('PNP') to facilitate the ability of employers to bring workers, including lower skilled workers, to British Columbia, as well as to facilitate investment by business immigrants in small businesses throughout British Columbia. The announcement entitled *Canada Starts Here: The BC Jobs Plan* is designed to attract more entrepreneurs from abroad to British Columbia to create jobs regionally throughout the province.

In order to facilitate potential investor immigrants finding opportunities in British Columbia, the provincial government is establishing a new online investment matching service to link potential business immigrants to business opportunities in regions throughout the province. There is a particular focus on small business succession in rural areas where small business owners often face challenges in finding people to buy their companies and continue to employ people locally. This service is scheduled to start in November 2011.

Furthermore, the British Columbia PNP has been amended to provide that business immigrants who purchase or establish businesses in rural areas will meet their employment commitments by not only creating new jobs but also by maintaining existing jobs. The province intends to take aggressive marketing initiatives for the British Columbia PNP to attract prospective business immigrants, focussing on Latin America, Eastern Europe, Russia and India.

There are positive changes to British Columbia's PNP Skilled Worker Programme as well: the province has made their entry level and semi-skilled pilot category a permanent programme of the British Columbia PNP. The entry level and semi-skilled category is designed to help meet the needs of employers in key sectors such as tourism and hospitality. The entry level and semi-skilled category has a prescribed list of occupations that are eligible for nomination in the programme. Employees must already be working in British Columbia for employers for a period of nine months, prior to commencing their application and must remain employed with their nominee employer throughout the application process. The province is also modifying their eligibility criteria requirements for employers, reducing the minimum business eligibility size for outside of the Greater Regional Vancouver District from five full-time employees to three.

Lastly, the provincial government is negotiating with the federal government to increase their eligible number of annual provincial nominations. For 2011, British Columbia was allocated a maximum of 3,500 nominations by the federal government. Realising that British Columbia is facing an ongoing shortage of workers, the Ministry of Jobs, Tourism and Innovation is working with the federal government to increase British Columbia's allocation for provincial nominees to British Columbia.

In announcing these changes, the British Columbia Government referred to a recent independent study showing that

203 business nominees who immigrated to British Columbia from 2005 to mid-2010 under the PNP invested over CA\$423m into the provincial economy and created over 1,100 jobs. Furthermore, the government recognises that over the next decade that British Columbia's skills for growth strategy projects British Columbia will have 1.1m job openings due to economic growth and retirements. They estimate that new immigrants will be needed to fill an estimated third of all of these job openings and they

noted that in 2010 that one out of every six economic immigrants to British Columbia came through the British Columbia PNP.

Notwithstanding the global recession, the government of British Columbia is keenly aware of the global shortage of skilled workers as well as the need to stimulate business development and job growth within the province as a means of being well-positioned for the future. Other provinces, indeed other nations, take note!

DENMARK

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The latest developments in Denmark

Setting up as self-employed in Denmark

According to the *Doing Business 2012* report by the World Bank, it is very easy to do business in Denmark. In fact, Denmark is ranked fifth out of 183 countries. Starting a business is quite easy as well; it is much easier than in our neighbouring countries Norway, Sweden, Iceland, Finland and Germany. Thus, Danish governments have succeeded in creating a regulatory climate that promotes entrepreneurship in Denmark.

Immigration and foreign nationals' entitlement to reside and work in Denmark are regulated by the Danish Aliens Act – more specifically sections 9a and 13 in relation to self-employed persons – and subordinate legislation made under it.

Residence and/or work permit

Nationals of the Nordic countries (Finland, Iceland, Norway and Sweden) are free to stay in Denmark for an indefinite period, and such nationals will not need a work or residence permit or an EU/EEA registration certificate regardless of the length of their stay.

Other EU/EEA and Swiss nationals are free to stay in Denmark for up to three months (up to six months, if they are seeking employment). If an EU/EEA or Swiss national intends to stay longer than three months (or six months, if seeking employment), he or she

will need to apply for an EU/EEA registration certificate. No work permit is required for those nationals.

Work permits

Third country nationals will normally need a residence permit if they intend to stay in Denmark for longer than three months. Regardless of the length of their stay, they will also need to apply for a work permit if they wish to obtain employment in Denmark. Third country nationals are eligible for a residence and work permit if there are essential employment or business reasons for issuing such a permit. In deciding whether such reasons exist, a distinction is made between specialised and non-specialised work.

Non-specialised work means work which could just as well be carried out by Danish nationals or by foreign nationals already in Denmark or the EU. Thus, a work permit will be granted only if Danish or foreign manpower is unavailable in Denmark or the rest of the EU to carry out the work in question and only if the third country national has received a specific job offer and the terms and conditions of the job meet normal Danish standards.

Specialised work, on the other hand, is work which is closely associated with a particular person and can therefore only be carried



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out by that person. The sole deciding factor here is whether there are special reasons for employing that particular third country national to carry out the work. The third country national must still have a job offer in hand, and the terms and conditions of the job must still meet normal Danish standards.

Once granted, the work permit will only be valid for the job specified in the permit application, irrespective of the degree of specialisation required for the job.

Special preference categories

The conditions for obtaining a residence permit are linked to the reason for the foreign national's stay in Denmark. A number of special schemes have thus been implemented in order to provide access to Denmark for work purposes: the Positive List, the Pay Limit scheme, the Corporate scheme, the Green Card scheme and the self-employment scheme.

Requirements

Generally, self-employed persons – including foreign nationals who wish to establish and operate an independent business in Denmark – are eligible for a residence and work permit if certain conditions are met.

According to Danish administrative practice, the business to be established in Denmark must satisfy particular Danish business interests. Furthermore, the foreign national must document that sufficient funds are available to run the business. Finally, it is also a requirement that the foreign national's presence is of vital importance for establishing the business and running the day-to-day business.

It should be mentioned that foreign nationals will normally not be eligible for a residence and work permit if they intend to open a restaurant, retail shop, small trading business or the like, as such activities are not considered essential Danish business interests.

Normally, a self-employed person will be granted a residence and work permit for one year with the possibility of extension. A residence permit can only be granted – or extended – up to three months before the holder's passport expires.

Finally, it is relevant to note that if the nature or purpose of the business activities changes significantly, or if the foreign national decides to close the business and establish a new one, an application for a new residence and work permit must be submitted.

Cases

In a decision by the Danish Immigration Service, a foreign national was granted permission to run an online business, as the person in question had documented that establishing the business in Denmark would satisfy particular Danish business interests. The person had sufficient funds to run the business and his or her presence was necessary for establishing the business. The foreign national would further actively participate in the daily operations of the business. As documentation, the foreign national had provided proof of his or her co-ownership of the business, an annual report and budgets reviewed by an accountant, a transcript from the Danish Commerce and Companies Agency, a business plan and a list of business partners.

In another decision by the Danish Immigration Service, a foreign national was denied permission to run a sole trading business importing shoes, clothes, etc. The decision was based on the fact that the business would not contribute any new business activities which did not already exist in Denmark. Thus, there were no particular Danish business interests related to the business. The foreign national's application was denied even though the business had been registered with the Danish tax authorities and the person in question had relevant education as well as work experience and had procured sufficient funds for running the business.

Procedures

A foreign national who wishes to set up as self-employed in Denmark must submit his or her application for a residence and work permit to the Danish embassy or consulate in the country of residence.

In order to get the application processed by the Danish Immigration Service, the applicant must pay a fee when submitting the application. The fee for applying for a residence and work permit for a self-employed person is currently €527, whereas the fee for applying for an extension is €348.

The processing time is normally two to three months. However, in some circumstances, longer processing time must be expected, that is, if the Danish Immigration Service has not received all of the required documents or if some of the information given in the application has

not been documented sufficiently or cannot be verified. Further, processing times also depend on the general workload of the Danish Immigration Service.

The application for a residence and work permit must be submitted and granted before entering Denmark.

Documents

When applying for a residence and work permit as a self-employed person, including operating an independent business in Denmark, the application must, in addition to the completed application form, generally include:

- valid passport or other travel identification;
- two passport photos showing full face;
- documentation for CVR registration (registration in the Central Business Register in order to obtain a company identification number);
- annual report or budget (preferably reviewed by an accountant);
- documentation for the equity interest or company equity;
- business plan, which includes the type of business, innovative aspects of the organisation or prospects for growth, including the expected number of employees;
- documentation of any partnerships with, or other form of support from, Danish organisations;
- documentation of any contracts or other agreements entered into;
- documentation of relevant training or education, previous experience as a self-

employed person and/or work experience from the field in question;

- documentation of personal funds (eg, bank statements); and
- documentation of relevant authorisation (only applicable if the job or running of the business requires Danish authorisation).

In addition to the above, the applicant must include documentation that the application fee has been paid.

Accompanying family

A foreign national who has been granted a residence and work permit for self-employment is not automatically entitled to bring his or her family to Denmark. Spouses, registered/cohabiting partners and children under the age of 18 who live with the foreign national may be eligible for a residence permit, but the family members must be self-supporting and live at the same address in Denmark as the foreign national. The family members may work on a full-time basis for the duration of their permit.

Summary

The possibilities of third country nationals setting up as self-employed in Denmark will mainly depend on whether establishing the particular business in Denmark will satisfy essential Danish business interests. Thus, third country nationals wishing to set up in Denmark are advised to focus on business activities which do not already exist in Denmark.

Immigration schemes for investors and entrepreneurs in France

EU (except Romanian and Bulgarian citizens until 1 January 2014), EEA (Iceland, Norway and Liechtenstein) and Swiss citizens are not required to complete an immigration process to conduct a business in France.

Pursuant to its commitment to 'promote professional immigration', the French Government has set up several immigration processes intended to attract foreign entrepreneurs in France, such as the 'Business Activity' residence permit, the 'Skills and Talents' residence permit or the 'Exceptional Economic Contribution' residence permit (Gold card).

The immigration formalities for nationals from third countries depends on the fact that the self-employed investor wishes to permanently relocate to France or if he or she resides in a foreign country and conducts a business in France without living there.

Self-employed investors or entrepreneurs who wish to permanently relocate to France

The 'Business Activity' residence permit

Based on Article L 313-10 of the Code of the Admission and Residence of Foreigners and Asylum ('CESEDA') foreigners intending to conduct a commercial, industrial or handicraft activity on French territory can apply for a 'Business Activity' residence permit.

The 'Business Activity' residence permit, commonly known as 'carte de commerçant', is actually a residence permit authorising the performance of commercial and self-employed activities. It is issued on a one year renewable basis.

This permit has been designed for the self-employed entrepreneur who wishes to create or run a business in France; or a representative of a branch or office; or a company director of a limited liability company.

It therefore concerns entrepreneurs and investors who are:

- creating a company;
- taking over an existing business;

- implementing a subsidiary; or
 - managing a subsidiary or an existing company.
- The application of a 'Business Activity' residence permit requires that the business project is already well advanced.

The applicant should demonstrate:

- the viability of the project, by presenting documents proving the reality of the project and its economic and financial strength (capital coherent business plan with a projected multi-year commitments with reliable partners, such as banks, partners, customers, etc); and
- the ability of the entrepreneur to carry out his project, with regard to his qualifications and his professional experience.

Entrepreneurs and investors who are not residing in France should first contact the Consulate of France in their country of origin to apply for a visa 'commerçant'. The supporting documents that need to be provided will vary depending on the consulates. The visa is delivered on average three months after the filing of the case.

Foreigners already living legally in France and who need to change their status to carry out their activities should contact the prefecture of their place of residence. The investigation of the case could take several months as it is necessary to file the case four months before the expiration of a valid title.

The application includes preparing a number of technical documents and performing preliminary steps with partners in order to obtain guarantees. It is therefore strongly advised to anticipate the project.

The accompanying family will be granted a 'Visitor' residence permit. Nevertheless this 'Visitor' residence permit does not allow the spouse to perform any professional activity in France. In this case, he or she will have to get a work permit.

The 'Skills and Expertise' residence permit

Based on Article L 315-1 to L 315-9 of the CESEDA, foreigners who wish to reside in France and to create or take over an existing company,

can apply for a multi-year 'Skills and Expertise' residence permit which is valid for three years on a renewable basis.

This scheme applies to third country nationals except Algerian citizens since they are governed by the Franco-Algerian agreement dated 27 December 1968.

This scheme is very flexible and concerns foreign citizens who are working on a project contributing to the economic development of France and their home country, or their intellectual, scientific, cultural or humanitarian influence.

The holder may exercise the profession of his/her choice in the project except for regulated professions (lawyers, doctors, CPAs, ect) in accordance with the regulations. The beneficiaries should also establish their ability to achieve the project.

The applicant should present a project for starting up or taking over a company that meets one of the following criteria:

- investment of at least €300,000 (tangible and intangible assets);
- creation of at least two jobs; or
- creation of a subsidiary whose parent company has existed for at least two years.

The current application process timeframe is about four to six weeks before you will be issued with a 'Skills and Expertise' residence permit.

The memorandum of 10 February 2011 introduced a trial 'one-stop shop' in the départements of Paris, Hauts-de-Seine and Rhône and makes the French Immigration and Citizenship Office ('OFII') a single point of contact for holders of the 'Skills and Expertise' visa who are conducting business in one of these départements.

The administrative formalities are faster and there is no need to go to the prefecture. The holder of the 'Skills and Expertise' visa and their family simply appear at the OFII for the medical examination and to receive their residence permits.

Family members of a 'Skills and Expertise' residence permit holder (spouse and children under 18) are automatically granted a 'Private and Family life' residence permit which enables them to perform a professional activity in France.

The 'Exceptional Economic Contribution' residence permit

Based on Article L 314-15 of the CESEDA, as well as the Decree of 11 September 2009, a foreign national who wishes to make a

significant investment in France can apply for an 'Exceptional Economic Contribution' residence permit valid for a period of ten years (renewable).

This scheme is available to foreign nationals who, personally or through a company that they direct or of which they hold at least 30 per cent of the capital, meet one of the following two conditions:

- create or save, or agree to create or save, at least 50 jobs in France; and
- make or agree to make an investment of at least €10m in tangible or intangible assets within France.

The prefect where the investment is planned is authorised to review the application and may decide to issue this residence permit even if these numbers are not yet reached if they consider that the applicant's economic contribution is exceptional due to specific aspects or conditions in the local job market.

Applications for this status must be made in France at the prefecture of the département where the investment is to be made.

The accompanying family will be granted a 'Visitor' residence permit. Nevertheless, this 'Visitor' residence permit does not allow the spouse to carry on a professional activity in France. In this case, he or she will have to get a work permit.

Investors or entrepreneurs who reside in a foreign country and conduct a business in France without living there

Legal representatives of a company based in France and residing outside France should file a preliminary declaration with the local prefecture of their company's département. This declaration is to be made by registered letter with acknowledgement of receipt or delivered in person by the legal representative.

The supporting documents required are:

- the applicant's civil status papers (birth/marriage certificate);
- a certificate of their police record or similar from their country of origin;
- a copy of their company's articles; and
- a written statement declaring them director.

The prefect issues a certificate containing the applicant's name, business activity status and the company's business name, address and activity. This procedure is easy and fast to handle and makes it possible to issue a certificate within ten to 15 days.

INDIA

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Judicial review proceedings not maintainable against Indian employment visa refusal by Indian mission overseas

At present, India is one of the fastest growing economies in the world. The country is witnessing development at a stupendous pace. The explosive growth of multinational corporations (MNCs) who have entered the Indian market has created a wide range of employment opportunities, both for Indians and foreigners. Globalisation has brought a large number of foreign workers into India. Now, India also has a number of specific new added requirements concerning employment visas for such expatriates. Clearly, this is to protect the domestic market force at all levels. The Ministry of Home Affairs ('MHA') sets out the conditions required to be fulfilled by such foreign nationals coming to India to take up employment prior to issuing an employment visa.

Two important restrictions imposed by the MHA at present are the restriction on the minimum salary requirements of a foreign employee and the condition imposed on the employment of foreign nationals for posts where Indian citizens are available. The Bombay High Court in a recent judgment dealt with both of these issues in detail in an Indian context. Also, the larger issue is the maintainability of the judicial review proceedings against the refusal of an employment visa to a foreign national by a foreign national applying for an employment visa at an Indian mission situated overseas. This issue has been lucidly expressed in a judgment of the Bombay High Court.

In November 2010, in the case of *Stelmakh Leonid Iuliia v Respondent*,¹ the High Court of Bombay refused to entertain a writ petition under Article 226 of the Constitution of India seeking judicial review of a refusal of an employment visa application of an applicant based in Ukraine. She was promised employment

as an analyst by JP Morgan Services India Private Ltd in Mumbai. It was contended on behalf of the Union of India that as per the policy framed by the Government of India, the petitioner is not entitled to an employment visa. As per the existing policy, employment in India can be given only to those foreigners who have specialised education in a particular field and who can be appointed on a special post only in situations when Indian citizens are not available for appointment in such posts. Plus the minimum income criterion fixed by the Government of India for the grant of requirements of the employment visa to a foreign employee is US\$25,000 per year at the place where a person is employed and if the salary drawn by a person is going to be less than the prescribed amount, s/he cannot be given an employment visa. In the present case, the salary requirements of the appellant did not match the prescribed requirements by the Government of India and so the visa was rejected.

The main question in the dispute was whether at the time when the petitioner applied for visa on 3 June 2010 the criterion of income of US\$25,000 per annum was applicable or not. The issue was that it was changed before this date and subsequently it was decided to remove the income criterion altogether. At the time when the application of the petitioner was rejected, the income criterion was not in force although it was reintroduced on 7 August 2010, and so it was contended that since the income criterion was not in existence at the time the visa was rejected, the rejection of the visa was against the law.

The question regarding the validity of the rejection of a visa by the immigration authorities was answered by the Honourable High Court in paragraph 10 of the judgment in the following terms:

'10. So far as the argument of the learned counsel for the petitioner that at the relevant time when the application was rejected the income criterion was given a go-by is concerned, it is not in dispute that at the time when the petitioner applied for Visa, the said income criterion was applicable. It is also not in dispute that the petitioner has not fulfilled minimum income criterion prescribed for getting the employment Visa. Even assuming that for the time being, the said policy was given a go-by, it is not in dispute that at the time when the petitioner applied for employment Visa, the said income criterion was in existence. There is nothing on record to show that when the application was rejected income criterion was totally taken away. But even otherwise the application is rejected on the ground that as per the policy framed by the government, the employment Visa cannot be granted for the jobs for which qualified Indians are available. In the instant case, it is pointed out that for the post in question, so many Indians are available. It is also pointed out that employment Visa cannot be granted for routine, ordinary or secretarial/clerical jobs.'

Clearly, according to the Honourable High Court, the rejection of the employment visa both on the ground of non fulfillment of the income criterion and on the policy of the government regarding the restriction on giving employment to foreign employees where qualified Indians are available was correct in the present case.

Further, in relation to the maintainability of the writ petition, the Court held that the real question requiring consideration is whether such petitions are maintainable in the instance of a foreign national and whether the issue in question can be said to be justifiable.

The upshot of this significant ruling is carved out in paragraphs 7, 9 and 11 of the said judgment, which read as follows:

'7. It is pertinent to note that so far as foreign nationals are concerned, all the fundamental rights enshrined in the Constitution of India are not available to them except Articles 21 and 14 of the Constitution of India. In our view, it is not a fundamental right of a foreign national to get employment to get employment visa in India. If the visa is rejected on the basis of a policy framed by the Government of India, this Court cannot sit in appeal over

such decision in order to find out as to whether visa application should have been granted or not. In our view, asking for visa by a foreign national cannot be said to be a justiciable issue and this Court cannot issue any writ under Article 226 of the Constitution of India in connection with the availability of fundamental rights where a foreign citizen is concerned. [...]

9. So far as right to get visa is concerned, in our view, it is not a fundamental right of a foreign national and, therefore, the petition under Article 226 of the Constitution of India, violating such right is not maintainable. So far as Article 14 and 16 are concerned, Article 16 relates to equality in the matter of public employment and non-citizen cannot invoke Article 16 in any manner as the said Article is only applicable to the citizens of the country. It cannot be said that there is violation of Article 21 of the Constitution in present case, nor any such argument is canvassed before this Court. Considering the said aspect, in our view, this petition cannot be entertained which challenges the decision of Indian Embassy rejecting employment visa to the petitioner. It is not for this Court to find out whether such restriction in the matter of granting visa to a foreigner is proper or not.

11. [...] In our view what should be the guidelines for giving visa is a matter which is solely in the discretion of the Government of India in its department of External Affairs. This Court cannot decide the issue as to what policy should be framed for granting employment visa or other visa. This Court cannot lay down any criterion in this behalf in any manner. Similarly this Court is not expected to decide as to whether the visa application should be allowed or not. Rejection of visa by the Consulate is not an issue which is justiciable one. If the Government of India in its wisdom has taken a decision by prescribing certain criterion this Court cannot take a judicial review in such a matter. It is always open to the State to restrict the entries of foreign nationals by imposing restrictions by framing certain policy and the said policy decision should not be interfered. As pointed out earlier only few fundamental rights like Article 21 of the Constitution of India are available to the foreign nationals and Article 16 cannot be said to be applicable to the foreign nationals for getting public employment in this country. In our view, in the instant case, no relief



can be granted to the petitioner in view of what is stated hereinabove. It cannot be said that there is a violation of Article 21 in the present case. The petitioner has no right to approach this Court and it cannot be said that income criterion prescribed by the Government of India is arbitrary in any manner, which issue cannot be decided at the instance of the Petitioner, who is not an Indian citizen. We accordingly do not find any substance in the petition [...].'

The ruling categorically held that the guidelines for issuing a visa to a foreign national is the discretion of the Government of India and the courts have no right to interfere with such decisions. And, since the

right to get a visa to work in India is not a fundamental right of a foreigner under the Indian Constitution, filing a writ petition under Article 226 of the Constitution of India is not an appropriate remedy. Hence, as per the judgment of the Honourable Bombay High Court, the issues and problems regarding visas is at the sole discretion of the Indian Government.

Note

- 1 *Stelmakh Leonid Iuliia v Respondent*, Secretary to the Ministry of External Affairs, Government of India and Union of India, in writ petition number 1648 of 2010 and Chamber Summons number 334 of 2010, decided on 25 November 2010.

Visas for investors

ITALY

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Italy does not have a specific visa for investors in the country although they can obtain an entry visa under two different categories, depending upon on the type of activities they will be carrying out. An individual who is planning on working or establishing a company can apply for an autonomous work visa, while someone who is interested in only living in the country without working can apply for an elective residence visa.

Autonomous Work Visa – Article 26 Decree 286/98 and Article 39 Law 394/99

Italian immigration law provides the possibility for foreign nationals to enter Italy and carry out active investing activities through a self-employment procedure ('Autonomous Work'). With the term 'Autonomous Work', we usually refer to industrial, professional, commercial or hand-crafted activities, and the person will normally be appointed as a director or an officer of an Italian company.

Autonomous Work permits can be issued for:

- Activities which are subject to a licence – The procedure for those who intend to carry out an activity subject to a licence (such as doctors, lawyers, architects, etc) is the most lengthy one, as the foreign worker needs to register first with the relevant professional body. The procedure to obtain such clearance varies depending on the type of activity the foreigner wishes to perform in Italy.
- Consultancy activities – Freelancers need to have in place a contract with an Italian company and an annual compensation of not less than €8,500 gross per year. The contract must be submitted to the Labour Office for clearance.
- Officers of Italian companies – The issuance of authorisations for those appointed as an officer of an Italian company is the fastest one and there are less requirements. The foreign national will have to provide evidence of the appointment. Even though this procedure can be followed for newly established companies, it is becoming increasingly difficult to obtain these kinds of permits unless a company has been established for a few years or can provide sufficient financial guarantees (such as

registered capital well above the minimum set forth by the law).

Procedure

The application must be filed by the individual in person or by a delegate appointed with a legalised proxy. The application is submitted first with the Labour Office or to the Chamber of Commerce (depending upon the kind of activity) and then with the police for security clearance. The individual will then need to apply for the working visa at the Italian consulate of the country where he/she resides. After the entry into the country, the worker will need to register with the police and obtain residence with the local town hall.

Limitations

The issuance of Autonomous Work Permits pursuant to Article 26 of the Decree 286/98 is subject to the availability of the quotas, as provided by Article 3 of said Decree.

A limited number of quotas is issued periodically (usually once a year) by the Italian Government, and divided for each Italian province; if obtained, the quota allows the foreigner to obtain work authorisation and the relevant entry visa. The issuance and number of quotas is, however, unpredictable and therefore obtaining these kinds of permits is generally not easy. As to company officers, many companies follow the route of the intra-company assignment because these kinds of permits are not subject to the quota system.

Entrance for elective residence – Article 11 Law 394/99

The elective residence visa is limited to individuals who have a large amount of money and savings in their country of origin and sometimes proof of possession of property in Italy is also requested. Individuals will need to show assets from a portfolio

(the consulate may request original financial statements from banks, investments/brokerage firms, social security, all indicating current balances). Also, note that balances cannot be derived from current employment or any other work activities. The deciding factor is being able to show wealth. There is no strict line, and each application is decided on a case-by-case basis. Some consulates want to see at least US\$1m in accounts, and some want to see a steady flow of monthly income, not derived from work, of between a minimum of US\$35,000 to US\$150,000 annually. The first thing that needs to be done is to prepare a written portfolio of assets in order to assess whether the Italian consulate would entertain your visa request.

The holder of an elective residence visa is not allowed to work in Italy which is why the consulate wants to make sure that they have balances that provide revenues so that the applicant can finance him/herself in Italy. In fact, this type of visa allows entry into Italy for an open-term long visit to aliens who intend to take up residence in Italy and who are able to do so, and to support themselves autonomously without having to rely on any employment in Italy, whether as a dependent employee or as a self-employed worker.

Procedure

Applications for elective residence visas are applied for at the Italian consulate of the place where the applicant is resident. In addition to documents showing their financial status, the applicant will also need to provide proof of housing availability in Italy: rental agreements, proof of ownership (title deed) and international medical insurance valid in Italy. In some cases, the consulate can also require a certificate of good conduct (police record) issued by the local police authority.

After entry into the country, the worker will need to register with the police and obtain residence with the local town hall.

Would Japan help entrepreneurs?

This article is meant for international readers who are interested in living in Japan as an investor/entrepreneur. In the second part of the article, I will focus on the particular visa category designed for investors and entrepreneurs; I will describe its characteristics and requirements, and then discuss the advantages and disadvantages of this visa.

Japan and its immigration policies and statistics for foreign investors

The Japanese Immigration Law does not have a concept of ‘immigrants’, mainly because it is not a young country that was recently built by immigrants, unlike the United States or Australia. Those who come to Japan merely intending to work for a short period of time and those who intend to work and stay in Japan for the rest of their lives are treated in the same manner. A permanent residency status is only granted upon the fact that the particular foreign national has actually led a decent life in Japan for a substantial amount of time, which is generally ten years. There is no specific investment-type permanent residency status. Renewal of an already obtained working visa status is possible an unlimited amount of times.

Because of the long-time economic slump, discussion of how to increase foreign direct investments and an influx of talented people has been taking place in Japan. After the Great East Japan Earthquake and the following disaster in March 2011, not only the Ministry of Justice but also other ministries covering economic activities, industries, tourism, finance, or labour are seemingly accelerating their discussions in order to accept more non-Japanese citizens including entrepreneurs. A drastic change in Japan’s immigration policies may be introduced in a few years time.

According to the *2010 Immigration Control*, which was released by Japan’s Ministry of Justice in 2009, about 850 foreign nationals newly obtained an investor/business manager status. The figure differs from year to year,

though it has been between 600 and 900 over the past few years. The total number of foreign nationals currently staying in Japan on the investor/business manager status as of 2010 is about 10,908. This total number has been steadily increasing over recent years, which indicates that foreign nationals who come to Japan on the Investor/Business visa tend to stay in Japan on the same residency status for at least a few years. The number of holders of the Investor status is comprised of not only entrepreneurs but also business managers and directors of large established companies. The share of entrepreneurs is supposed to be no more than 20 per cent.

Requirements for the ‘Investor/Business Manager’ visa and other working statuses for entrepreneurs

Investor/Business Manager status

MAJOR CHARACTERISTICS – ‘REAL’ BUSINESS REQUIRED

One of the Japanese entrepreneur-based statuses of residence is called ‘Investor/Business Manager’. However, there is a large difference in its concept when compared to its counterparts in some other countries. In short, Japan does not have a programme that allows you to ‘buy’ a residency status: it would rather have a real business up and running in Japan than just an investment.

Compared to the legislations in other countries, ¥ 5m is the amount required for an initial investment which should be much more affordable compared to other countries. This gives opportunities to foreign entrepreneurs with relatively small sizes of capital. Meanwhile, from time to time, it can be difficult to maintain the visa status by doing ‘real’ business and running the business soundly.

REQUIREMENTS

The Ministerial Ordinance (Ordinance of the Ministry of Justice No 16 of 24 May 1990) provides specific criteria for the Investor/Business Manager status. To briefly sum up;

- The foreign national must establish an entity by investment and commence its operation.
- The office/facilities of the business must be located in Japan.
- The business must have the capacity to employ at least two full-time employees.

The last requirement of creating two full-time positions in Japan is currently not examined by the immigration authorities when ¥ 5m or more is invested since the law requires only 'the capacity' to employ two staff members, and it does not always require actual employment at the time of the initial application to the immigration office.

The Regional Immigration Bureau requires the submission of the following:

- a resume of the applicant, business plan, certificate of company registration and investment;
- a report to commence salary payments to a tax office; and
- a copy of an office lease contract.

Usually only a one year duration of investor status will be granted to small businesses on the initial application. Therefore before its expiry date the following year, the status has to be renewed by lodging an application for the extension of period of stay to the Immigration Bureau. In this next application, the annual report of the company and a certificate of personal tax payment of the applicant should be attached. If the performance of the company in its financial report is found not to be sound, the extension may be denied and the entrepreneur will need to leave Japan unless he or she injects an additional investment or changes their visa status to another type.

Since the 'Investor/Business Manager' visa is activity-based, your activities have certain restrictions such as you cannot engage in other money earning activities enumerated in a different residency status category. This is quite different from the status based residency status, such as 'Spouse of Japanese National', with which you can engage in any kind of activities. If you stay in Japan with the 'Investor/Business Manager' visa and would like to engage in activities other than running

your own business, such as working for another company as an employee, you would have to either obtain special permission to engage in those other activities on a part-time basis or change your visa.

Self employment status

There is no residency status called 'self employment' nor is there a 'self-sponsored' type of visa specified in the immigration code, although it is often referred to by foreign residents in Japan.

Two popular working statuses are 'Specialist in Humanities/International Services' and 'Engineer'; neither actually require employment. Supposing a person provides IT consultancy to multiple clients, they may be able to obtain the 'Engineer' status by those contracts as an independent consultant. If someone teaches English at two or three language schools, they may obtain the 'Specialist' visa. An entrepreneur could also apply for an 'Engineer' or 'Specialist' status by providing their services to clients while they may not have invested in nor registered an entity. However, it would not be easy to obtain because of the irregular application to the immigration officials. If the applicant has ¥ 5m to invest, the investor visa status mentioned earlier must be the first option to recommend in general.

Conclusion

If you are interested in living in Japan as an investor/business manager, you will have to actually run a business that 'has the capacity' to employ two full-time workers, while the amount of initial investment to obtain an investor/business visa can be comparatively small in comparison to other advanced countries' criteria for investor visas. The downside of the Japanese investor visa is that activities other than the operating of a business are restricted, yet a new policy to ease the running of business for foreign entrepreneurs in Japan could be introduced in a few years time.

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Immigration law update Switzerland 2011

This immigration law update from Switzerland will focus on the three main topics:

- immigration rules for EU/EFTA nationals;
- governmental statistics on foreign nationals living in Switzerland; and
- special conditions for investors and entrepreneurs.

Business immigration in Switzerland is always dynamic. New administrative practices, court decisions and political changes may result in reforms of Switzerland's immigration law. This is where updates such as this can play their part.

Immigration rules for EU/EFTA nationals

More than ten years ago, Switzerland entered into bilateral agreements with the European Union. The Free Movements of Persons Agreement was signed in 1999. It came into force on 1 June 2002. Following the eastern expansion of the EU on 1 May 2004, the agreement was supplemented by an additional protocol containing provisions for the gradual introduction of the free movement of persons in the ten new member states of the EU (EU-8 plus EU-2). This protocol came into force on 1 April 2006. The Swiss population agreed to the continuation of the Free Movement of Persons Agreement after 2009 and the second protocol on extending the agreement to Romania and Bulgaria, the newest two EU Member States. The second protocol came into force on 1 June 2009.

The Free Movements of Persons Agreement and the protocols lift restrictions on EU nationals wishing to live and/or work in Switzerland. In addition to the right of free movement, the agreement grants a mutual recognition of professional qualifications, the right to buy property and the coordination of social security systems. EU/EFTA-nationals are granted access to the Swiss labour market regardless of their qualifications.

All these rules also apply to the nationals of the European Free Trade Association (EFTA). As the regulations contained in the Free

Movement of Persons Agreement come into force gradually, transitional measures and special regulations still apply to nationals of some states.

Nationals of the EU-17 and the EFTA states have full rights to freedom of movement since 1 June 2007. There are no longer any transitional measures for these nationals. However, until 31 May 2014, Switzerland has reserved the right to reintroduce quotas (the so-called specific safeguard clause), should labour immigration from EU countries become excessive (exceeding the average of the previous three years by ten per cent).

As described above, the Free Movements of Persons Agreement was supplemented by the first protocol in order to extend the regulation to the ten new EU Member States which joined the EU in 2004. However, as far as employment in Switzerland is concerned, Switzerland was allowed to impose restrictions on citizens from EU-8 countries until 30 April 2011. Nationals of these countries were still facing restricted access to the Swiss labour market and were subject to special quotas. Since 1 May 2011, citizens from EU-8 countries can also benefit from the full rights of the freedom of movement regulation.

According to the second protocol to the Free Movements of Persons Agreement, the bilateral agreement was extended to Romania and Bulgaria. Employees and service providers from these two EU-2 countries will initially be subject to interim provisions. Switzerland may apply restrictions on employment matters to citizens of Bulgaria and Romania until 2016. EU-2 nationals therefore still have restricted access to the Swiss labour market and are subject to special quotas. The domestic workforce can be given priority over the Romanian and Bulgarian workforce. Moreover, salaries and working conditions may be controlled by the authorities. With regard to family reunions and stays without gainful employment, Romanian and Bulgarian nationals enjoy the same rights as all the other EU nationals.

Governmental statistics on foreign nationals living in Switzerland

According to governmental statistics on foreign nationals living in Switzerland, in 2010 the number of foreign nationals living in Switzerland stood at 1.75m. This is equivalent to 22.3 per cent of the whole Swiss population. In densely populated economically strong cantons (such as for example Zurich), the percentage is even higher. In comparison, in Germany only nine per cent of the population does not hold a German passport.

The percentage of foreign nationals living in Switzerland increased by three per cent in 2010. Between 2005 and 2009, more than 150,000 new foreigners took up residence in Switzerland.

Even though immigration decreased during the economic crisis to some extent, Switzerland still records the highest immigration rates of all OECD countries compared to the resident population.

More than 60 per cent of all the foreign nationals living in Switzerland come from an EU/EFTA country, while the rest are from so called 'third countries'.

Among all foreign nationals living in Switzerland, people from Italy represent the biggest group (16.3 per cent) followed by immigrants from Germany. Whereas Italians mainly entered Switzerland as guest workers in the middle of the last century, the number of Germans taking up residence is still increasing due to the higher salaries paid in Switzerland in, for example, the service and health sectors.

The percentage of foreign nationals varies greatly depending on the region. In the economic centres of the country such as Zurich, Basel and Geneva, more than 30 per cent of all inhabitants do not possess Swiss nationality. However, in some rural regions of the Bernese Oberland or in central Switzerland, the number of foreign nationals amounts to less than ten per cent.

Special conditions for investors and entrepreneurs

EU/EFTA nationals are allowed to invest in Switzerland without restrictions. They also have a legal claim to set up their own business as entrepreneurs in the canton and the branch of their choice. Governmental permit obligations (such as, for example, for licensed businesses and branches with patent obligations) still apply.

The following groups of persons from a third country (not an EU/EFTA Member State) also have a legal claim to get a permit for self-employment:

- foreigners holding a C permit;
- foreign spouses of foreigners holding a C permit; and
- foreign spouses of Swiss nationals.

All other foreigners seeking to be self-employed need a valid work and residence permit before starting a business. In addition to fulfilling all the other requirements for the issuing of the permits, permits for self-employment will only be granted if the applicant demonstrates that the self-employment is going to have a lasting positive impact on the Swiss labour market. Such a lasting positive impact is assumed if the new business contributes to a wider diversification of the local economy, several new jobs are created or at least maintained, if significant investments are made or significant new orders are generated for the Swiss economy. As permits for self-employed third country nationals are rarely issued, it is easier in most cases to establish a company first in order to work as an employee. Foreigners wishing to proceed this way should bear in mind that at least one person who is authorised to sign for the company has to reside in Switzerland. Otherwise an established firm will not be incorporated in the commercial register.

Some cantons may even require a commercial register entry as an attachment to the application for a permit as a self-employed person. Consequently, the foreigner wishing to immigrate to Switzerland needs a business partner who is authorised to sign for the company and already resides in the country.

The conditions for obtaining a permit as an investor in Switzerland are quite similar to the ones applicable to self-employed people. The investment in a company located in the canton of residence has to be considerable and should contribute to the local labour market. Buying shares in a market-listed firm does not serve this purpose. For the same reason, a permit cannot be obtained simply by putting assets in a Swiss bank account. Additionally, investors should be wealthy and financially independent (ie, able to live off their assets).

Furthermore investors applying for a residence permit have to spend the majority of the year here and should give proof of close personal connections to Switzerland.

Foreigners who are admitted as self-employed entrepreneurs or investors will receive a B permit (residence permit). Generally, B permits have a validity of one year and are prolonged upon request if the conditions are still met.

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

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Introduction

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

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

As per past practice, a Swiss employer could, as a matter of principle, obtain a work permit for a highly skilled worker that earns an average remuneration of between CHF 100,000 and CHF 120,000 to the extent that such employer was able to demonstrate that they could not find any suitable and qualified candidate in the domestic labour market and that the new hire would be economically viable for the canton.

The authorities rarely required the employers to disclose the details of their recruitment process. The economic interest of the canton was proved if the company explained in general terms the future development of its activities, demonstrated that such development would increase the attraction of the region and create new employment positions in the following years.

General conditions for the issuance of a work authorisation in Switzerland

As per the general principle of the SAF, non EU/EFTA nationals may be admitted to work as an employee in Switzerland if:

- a unit of the quotas is available;
- no other suitable candidate was found in the domestic labour market;
- the salary and employment conditions are customary for the location, profession and sector of activity;

- the employee is a highly skilled worker; and
- the employee's activities will serve the interests of the Swiss economy.

As far as self-employees such as investors and entrepreneurs are concerned, they must meet slightly different requirements. Foreign nationals may be admitted to work on a self-employed basis if:

- their activity serves the interests of the Swiss economy;
- the necessary financial and operational requirements are fulfilled;
- a unit of the quotas is available; and
- the applicant is a highly skilled individual.

Quotas

One unit of the yearly cantonal quota, which is issued by the Swiss Federal Council for each Swiss canton, is available. The availability of a unit is required both to work as a self-employee or as an employee.

For the year 2011, the number of units was decreased: the number of available short term permits amounted to 5,000 (166 for Geneva) and 3,500 (116 for Geneva) for long term permits. Since 2010, the reduction of the available quotas may be considered as one of the reasons why the immigration authorities, in particular in Geneva, have started reviewing work permit applications for non EU/EFTA nationals with much more scrutiny.

Priority of domestic labour force

Foreign nationals may be allowed to work in Switzerland only if no suitable domestic employees or EU/EFTA citizens could be found for the position. Such condition is only relevant for an employed activity.

Domestic employees include Swiss nationals, persons with a permanent work and residence permit (so-called 'permis C') and persons with a long term residence permit including work authorisation (so-called 'permis B avec activité

lucrative'). The applying company must prove that there was no suitable candidate in the domestic labour market.

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

Salary and employment conditions

Foreign nationals may only be admitted to work in Switzerland if the salary and employment conditions are customary for the location, profession and sector of activity. This requirement only applies for employees, not for investors and entrepreneurs that intend to set up their business in Switzerland.

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

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

Personal requirements

Short stay and residence permits for work purposes may only be granted to managers, specialists and other highly skilled workers and entrepreneurs.

Both in an employed or independent activity, the applicant must evidence that he/she holds specific high level skills and knowledge to carry out the expected business and fulfil his/her tasks and responsibilities.

Up until 2010, the authorities did not generally consider a position was too junior to the extent that the applying company had to show the necessity of the new employee for its future growth. However, as per recent practice, this condition is now assessed under intense scrutiny inasmuch as the authorities also examine whether the position at stake is high enough to justify the recruitment of a non EU/EFTA specialist/manager. With

respect to investors and entrepreneurs, the authorities require the applicant to provide the details of his/her project. The application must include documents that enable the authorities to assess the potential growth opportunities of the new business. The application must notably contain a three-year business plan comprising of information about the prospected activities and developing business, a market analysis, the expected staff development and future recruitment process, as well as the projected investments, turnovers/revenues and profits over a three-year period.

Economic interests of the canton

The immigration authorities proceed to an in-depth review of the economic interest of the relevant canton for each and every application.

In this context, the immigration authorities very often require from a company applying for a new non EU/EFTA hire that the company takes specific commitments notably with respect to the creation of new employment positions, the generation of revenues, the payment of taxes, etc. According to recent practice, the Swiss authorities more frequently issue conditional permits, the renewal of which are subject to the fulfilment of these commitments.

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

Conclusion

It results from the recent practice of the Swiss and Geneva immigration authorities that work permit applications in favour of non EU/EFTA citizens have been examined with much more scrutiny since the beginning of 2011.

Such a conclusion applies both for employees and entrepreneurs, although substantial new investments for already successful businesses are likely to receive a positive outcome.

It also appears that the collaboration of the Swiss authorities and in particular of the

competent Cantonal Economic Development Office can help in obtaining the requested work authorisation as they can assist companies and entrepreneurs in the development of their business plan and in the creation of relationships within the Swiss economy.

Immigration issues for foreign investors in Turkey

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Developed countries have long seen the advantage of special immigration provisions to attract individual foreign investors.

Even rapidly developing countries keen on attracting foreign investment are working on implementing special immigration incentive programmes. However, Turkey is not yet one of those countries, regardless of the incredible growth in foreign investment over the course of the last decade.

Special work permit application procedures for corporate investors

Turkey certainly has special legal provisions, even in the context of immigration, for work permit issuance for companies that engage in very high level foreign direct investment. These provisions are pursuant to the Direct Foreign Investments Law No 4875. Under such law, a business entity established in Turkey that evidences one of the below criteria is eligible for special beneficial treatment in work permit adjudication for their 'key personnel'. The criteria include:

- the last annual turnover amounts to at least TL 67.02m, under the condition that the total capital share of the foreign shareholders amounts to at least TL 894.068m;
- the company's last annual operation amounts to at least US\$1m, where the total capital share of the foreign shareholders amounts to at least TL 894.068m;
- at least 250 personnel (as registered with the Social Security Institute) are

employed by the company or branch within the last year, where the total capital share of the foreign shareholders amounts to at least TL 894.068m;

- the company will make an investment, where the minimum fixed investment amount foreseen shall be at least TL 22.4m; or
- the principal/parent company has direct foreign investment in at least one more country apart from the country where its head offices are situated.

If the employer establishes to the satisfaction of the Work Permit Directorate that one of the above criteria exists, the work permit application for key personnel must be adjudicated expeditiously within 15 days (as opposed to 30 days). Key personnel are defined in the law as:

- an associate chairman or member of the board of directors;
- a general manager, deputy general manager, a company manager, company associate manager or similar position (ie, one who manages the entire or part of the company, supervises the work of the company's auditors, administrative or technical personnel, and is responsible for hiring and firing personnel);
- or an employee who possesses essential knowledge regarding the company's services, technology, methods or research.

It can be seen that this immigration scheme does not envision attracting individual foreign investors but is focused on benefiting large scale investment by foreign corporations.

Immigration procedure for individual foreign investors

If an individual investor wishes to establish him/herself and family in Turkey, they have few options that give them any special treatment. If the investor simply wishes to make passive investments and live in Turkey, without the benefit of work authorisation, this is possible if they are of a certain nationality (to be described in more detail below). If the investor wishes to directly manage an active commercial concern, and therefore requires work authorisation, the only option is to establish a business entity that then utilises the traditional work permit scheme by sponsoring the investor.

Residence permits for passive investors

If a foreigner has what is termed 'Group A'¹ nationality in Turkey, he/she may apply for a residence permit based on passive funds in Turkey (called a 'funds based residence permit') or through ownership of residential real estate in Turkey. Note that a residence permit for either of these categories does not confer employment authorisation. The residence permit for the investor and his/her dependents (spouse and minor children) could then be renewed on an annual basis.

This type of residence permit would be filed at the local foreigners' police station. The documents required vary somewhat on the location, but for the Istanbul region would be filed with the following documents: passport, ID photos, prepared local application form, and a current bank statement in the applicant's name from a Turkish bank account evidencing US\$300 per month or US\$3,600 per year, or a current foreign exchange receipt in the applicant's name evidencing conversion of at least US\$300 per month or US\$3,600 per year into Turkish Lira or the Deed of Trust to residential property in the investor's name. The mentioned documents and/or amounts may vary depending on the police station.

Work permits for investors

If an investor intends to actively manage his/her investment in Turkey, one of the

few immigration options for the foreign investor is to establish a local business entity which then sponsors him/her for a work permit. The foreigner would enter Turkey on a business visitor status, and then if necessary and able, convert to a 'funds based' residence permit in order to make the necessary arrangements to establish the entity in Turkey. Certainly, the most difficult aspect of this is not engaging in 'productive work' but in initiating the establishment of the entity. Once the entity is duly established, it may then sponsor the investor for a work permit.

Generally a work permit can only be filed by a Turkish employer that can show a five-to-one ratio of Turkish to foreign employees as evidenced on social security records. This is clearly difficult for a newly established entity. Therefore, the work permit regulations recognise a short term exemption to the five-to-one ratio in the scenario of a new entity. A work permit may be approved for a founding foreign investor of a newly established legal entity if that investor owns at least 20 per cent (but amounting to not less than TL 40,000) worth of shares of the entity. Therefore the company would be exempt from the five-to-one ratio temporarily for a work permit for a founding shareholder, as long as within six months the five employee criteria can be met.

Certainly the risk of this immigration scenario is that it can take months to formulate the appropriate business and establish a legal entity. Engaging in such activities while in a visitor status or on a funds based residence permit can be quite limiting.

Turkey's immigration laws have made many significant changes in 2010–2011. The authors hope that the Labour and Social Security Ministry may consider further amendments to the work permit regulations that would confer special categories available to individual investors in the future.

Note

- 1 Nationals of Australia, Belgium, Canada, Czech Republic, Cyprus, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Iceland, Italy, Japan, Latvia, Lithuania, Luxembourg, Malta, Mexico, Netherlands, New Zealand, Norway, Austria, Poland, Portugal, Republic Of Korea, Slovenia, Slovakia, Spain, Sweden, Switzerland, United States of America, and the United Kingdom.

Rolling out the red carpet for investors and entrepreneurs in the UK

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In a bid to boost overseas inward investment, the UK Government has rolled out the red carpet to foreign entrepreneurs and investors. This resulted in the overhaul of two visa categories, Tier 1 (Investor) and Tier 1 (Entrepreneur) of the Points Based System ('PBS') on 6 April 2011. Both categories now provide for an accelerated path to permanent residence in the UK with less restriction on the time which needs to be spent in the UK to qualify.

Tier 1 (Investor)

Under this category, high net worth individuals can come to the UK to live and work, provided that they have at least £1m at their disposal and these funds are available for investment in the UK. The funds must be held in regulated financial institutions and can be:

- either the investor's own funds, which have been held in a bank account for three months, or funds which were more recently acquired, for example through a gift, inheritance, divorce or proceeds from a business; or
- funds loaned by a UK regulated bank where the bank certifies that the investor has additional net assets of at least £2m. Investors who meet the above investment criteria can apply for visas for themselves and their family, including spouses, partners and children under 18.

Investors must invest at least 75 per cent of the funds in one of the following: UK Government bonds, share capital or loan capital in active and trading UK registered companies. The remaining 25 per cent of the funds can be maintained in cash deposits in UK banks or represented in the unmortgaged value of property in the investor's own home or other assets kept in the UK. The investment must be made within three months from the date of entry to the UK. Throughout the period of investment, the overall funds must remain at a minimum level

of £1m. Therefore, the investor must ensure that, should the investment dip in value at any time, it must be topped up to remain at £1m.

Extension of leave

Initial permission under the Tier 1 (Investor) route will be granted for a period of three years. Throughout this time on a quarterly basis, the applicant must retain evidence that the investment has been maintained and, if the UK Border Agency (the relevant UK Government department) is satisfied, they should grant a further two years' stay in the UK. At the end of five years, the investor and dependant family may apply for permanent residence (also known as settlement or indefinite leave).

Permanent residence for investors

Under the new rules, new investors and those already in the UK in this category will be fast tracked to settlement in the following circumstances:

- those investing at least £10m will be able to apply for settlement after two years;
- those investing £5m will be able to apply for settlement after three years; and
- those investing £1m will continue to be able to apply for settlement after five years.

Where investors used loaned funds, they must further demonstrate that they still have net assets of at least twice the loan amounts to qualify. The new rules apply retrospectively and will mean that investors admitted to the UK under the old rules but who have held these higher amounts in qualifying investments can apply for settlement now or can increase their invested funds to accelerate their route to settlement.

In addition to the above fast track requirements, investors and any family members over 18 must also pass the 'Life in the UK' test and ensure that they do not have any unspent criminal convictions. In recognition of potential

investors need to travel frequently, the UK Border Agency announced an increase in permitted absences from the UK up to 180 days in any 12 calendar months without jeopardising their application for settlement.

Tier 1 (Entrepreneur)

Under the Tier 1 Entrepreneur route, non European nationals can come to the UK to establish a business or acquire an existing business.

They need to demonstrate that they have at least £200,000 of their own money available to make a fresh investment in a UK business. They may include funds made available by one or more other people (known as third party contributor/s; for example, family members as well as other investors). In these circumstances they must also provide a declaration from every contributor that the funds are available to the applicant, which includes confirmation from a legal representative that the declaration document is valid.

Alternatively, from 6 April 2011, applicants can now also qualify if they have access to an amount no less than £50,000 obtained from one or more registered venture capital firms regulated by the Financial Services Authority; UK entrepreneurial seed funding competition which has been endorsed by the UK Trade & Investment Department; or other UK Government departments, made available for the specific purpose of growing a UK business.

A special 'Prospective Entrepreneur' visitor category has been introduced to cater for entrepreneurs who need to come to the UK to continue discussions with any of the abovementioned entities, to secure funding. Once funding has been secured, they can submit a Tier 1 Entrepreneur 'leave to remain' application from within the UK.

These investment funds can now be shared by a team of no more than two entrepreneurs. In other words, it will be possible for two individuals to come to the UK as Tier 1 Entrepreneurs using the same funds.

This application is subject to an English language and maintenance requirement, which does not apply to the Tier 1 Investor category.

They must demonstrate, if applying from outside the UK, that they have at least £2,800 (or equivalent in foreign currency) of personal savings for themselves and (where applicable) £1,600 for each dependant accompanying them and that they have held these amounts for a

minimum period of 90 days immediately preceding, and dated no more than one month prior to the date they submit the application. The balance cannot fall below the required minimum at any time during the three month period. For applicants applying from within the UK, the same principle will apply, however they will only need to show personal savings of at least £800 for themselves and £533 per dependant, for a consecutive 90 day period.

Extension of leave

At extension stage, the Tier 1 Entrepreneur must show that the full amount of £200,000 or £50,000 has already been invested in the business.

They will also need to show that they have either registered as self employed with HM Revenue & Customs, registered a new company in which they will be a director, or registered as a director of an existing company within a six month period of a specified date. For those who were granted entry clearance as a Tier 1 Entrepreneur, the specified date is calculated from the date of first entry to the UK. Where there is no evidence of this, then the specified date will be calculated from the date of the grant of the entry clearance; or the date of the grant of leave to remain. The Tier 1 Entrepreneur will also need to show that they have established a new business, or taken over an existing business and created the equivalent of at least two new full time jobs for persons settled in the UK. Tier 1 Entrepreneurs will also need to meet a maintenance criterion, as outlined above.

Permanent residence

Tier 1 Entrepreneurs may now be eligible to apply for permanent residence after three years stay in the UK provided they can show their business has created at least ten new jobs, or they have generated an income from the business of at least £5m. Otherwise Tier 1 Entrepreneurs will need to wait five years before applying for permanent residence. Like the Tier 1 Investor category, they too along with any dependants over the age of 18 will be required to pass the 'Life in UK' test and be free from unspent convictions. Like the Tier 1 Investor category, absences from the UK of up to 180 days in any 12 calendar months is now permitted without jeopardising their application for settlement.



British citizenship for those with leave under the Tier 1 Entrepreneur and Investor categories

After having held permanent residence for one year, the settled person may apply for British Citizenship. The core requirements are that the applicant must not have been absent from the UK more than 450 days in the last five years and 90 days in the last year prior to submission of their application and again must not have any unspent convictions.

By introducing an accelerated route to settlement, the UK Government hope to attract foreign investment to the UK. However, unless the current British nationality requirements are amended in line with these new provisions, the earliest they could naturalise as British citizens is five years, subject to meeting the abovementioned criteria before applying for a British passport.

Visa options for foreign entrepreneurs in the US – while keeping an eye on the potential traps and pitfalls

UNITED STATES

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On paper, there are many attractive options for foreign entrepreneurs to live and work in the US temporarily without investing large sums of money. This article takes the reader through these options, but will also make one aware about the many traps that may befall him or her on the way to achieving fame and fortune in the land of opportunity. This may sound a bit clichéd as the US economy remains sluggish and the unemployment rate hovers over nine per cent, along with the fact that immigration bureaucrats have been tending to restrictively apply the rules. Yet the Administration, at the highest levels, has welcomed entrepreneurs and investors. On 2 August 2011, the Department of Homeland Security ('DHS') Secretary Napolitano and United States Citizenship and Immigration Services ('USCIS') Director Mayorkas made dramatic announcements advising that foreign entrepreneurs could take advantage of the existing non-immigrant and immigrant visa system to gain status and permanent residency. According to the press release from the Department of Homeland Security dated 2 August 2011,² these administrative tweaks within the existing legal framework would 'fuel

the nation's economy and stimulate investment by attracting foreign entrepreneurial talent of exceptional ability'. Many were left wondering whether this was simply hot air or whether it represented an attitudinal shift to encourage a surge of entrepreneurs into the US.

H-1B Visa

The DHS announcement acknowledged that the H-1B visa, which is the workhorse non-immigrant work visa, could be used by entrepreneurs who formed their own entities and were even the owners of these entities. The H-1B visa requires the employer to demonstrate that the position normally requires a bachelor's degree in a specialised field, regardless of the size of the company or the investment. Prior decisions have recognised the existence of the separate corporate entity as being able to petition for the beneficiary, even though it may be solely owned by him or her. However, in recent times, this concept got somewhat muddled by the insistence that the sponsoring entity also control the H-1B worker's employment,³ and such a sponsorship could not be possible when the H-1B worker owned the

sponsoring entity. In the H-1B Question and Answers accompanying the 2 August 2011 announcement,⁴ the USCIS appears to still hold the line about the need to demonstrate an employer-employee relationship, but has conceded that this can nevertheless be demonstrated even when the owner of the company is being sponsored on an H-1B visa. This may be established by creating a separate board of directors, which has the ability to hire, fire, pay, supervise and otherwise control. There is nothing preventing such a board constituting foreign nationals or family members of the beneficiary.

Yet, despite this announcement, USCIS officers in the field still appear to display an anti-small business attitude. Take the example of Amit Aharoni, an Israeli citizen who graduated with an MBA from Stanford University. He founded a hot startup, www.cruisewise.com, and received over US\$1.65m in venture capital funding. The H-1B visa that was filed on his behalf by the company got denied and he was forced to leave the US and run his company from Canada. It was only after ABC news reported the story that the USCIS changed its mind and reversed the denial.⁵ Since the H-1B visa requires a bachelor's degree in a specialised field, be aware that when one is managing a small company as its CEO, the USCIS may absurdly view the position based on old administrative decisions as too generalised and not requiring a specialised bachelor's degree.⁶ While Mr Aharoni was fortunate that the USCIS relented because the media shone a bright light on his case, one wonders how many similar deserving cases that have not received media attention have been denied, resulting in the loss of so many jobs here. The H-1B visa is also subject to a 65,000 annual cap, which gets exhausted well within the fiscal year.

L-1A Visa

If the entrepreneur has been running a company in his or her home country as a manager or executive, the L-1A visa also readily lends itself to a foreign national who wishes to open a branch, subsidiary or affiliate in the US, but it is important that the beneficiary must still be able to establish that he or she will work in an executive, managerial or specialised knowledge capacity. The source of the salary can come from the foreign entity.⁷ A sole proprietorship can also qualify as a qualifying entity for L purposes.⁸ If the beneficiary is a major stockholder or owner, then 'the

petition must be accompanied by evidence that the beneficiary's services are to be used for a temporary period and evidence that the beneficiary will be transferred to an assignment abroad upon the completion of the temporary services in the United States'.⁹ The purpose of this regulation is to ensure that the beneficiary will maintain the qualifying foreign entity, which is a pre-requisite for the L visa. The entity in the US must generally be the subsidiary, parent or affiliate of the foreign entity.

Yet in recent years, the USCIS has come down on L-1A petitions by small businesses with a heavy hand. Denial decisions often argue, albeit erroneously, that the manager in a small business would also be involved in day-to-day operations, which are considered disqualifying activities. Despite the salutary amendment to the L-1A definition by the Immigration Act of 1990 to also include one who manages an essential function, INA section 101(a)(44)(A)(2),¹⁰ as opposed to people, the USCIS appears to have read this provision out of the INA by insisting that such a manager still cannot perform the duties of the function. There have also been credible reports that the US consulates in India have been denying L visa applications in what is thought to be an unofficial trade war against India,¹¹ although these also include employees of established global companies who are applying for L-1B specialised knowledge visas.

E-1 and E-2 visas

The E-1 and E-2 visa categories lend themselves readily to foreign entrepreneurs, but they are only limited to nationals of countries that have treaties with the US.¹² This category thus disqualifies entrepreneurs from the dynamic BRIC countries – Brazil, Russia, India and China. For the E-1 visa, the applicant must show substantial trade principally between the US and the foreign state. For the E-2 visa, the applicant must demonstrate that he or she has made a substantial investment in a US enterprise. While there is no bright line amount as to what constitutes a substantial investment, it must be weighed against the total cost of purchasing the enterprise and whether the investment will lead to the successful operation of the enterprise. However, based upon the proportionality test in the Foreign Affairs Manual ('FAM'), the lower the cost of the enterprise, the investor under the E-2 will be expected to make a higher proportion of investment.¹³ Note that the E-2 visa will be denied if the enterprise

is marginal – if it does not have the present or future capacity to generate more than a minimal living for the investor and family.

Conclusion: the importance of foreign entrepreneurs

These three options, if applied consistent with the true intent under their respective statutory provisions, provide wonderful opportunities for foreign entrepreneurs, including students graduating out of a US university, to implement their business ideas in the US. Unfortunately, in recent times, immigration adjudicators have become the self-appointed guardians of US economic well being by assuming that the entry of foreign nationals in the US would eliminate US jobs. In fact, it is quite the opposite as such individuals through their innovations will generate more jobs for Americans. New York City Mayor Bloomberg has categorically called the failure to bring in foreign entrepreneurs and skilled workers as being akin to committing ‘national suicide’.¹⁴ There also exists the Employment-based Fifth Preference (EB-5) pursuant to INA section 203(b)(5) resulting in permanent residency, which is specifically designed for investors, but this involves an investment of US\$1m (or US\$500,000 in targeted areas with high unemployment or that are rural) and the creation of ten jobs. Investments in designated regional growth centres allow the showing of the indirect creation of ten jobs and also allow passive investment. The H-1B, L and E categories can offer speed and flexibility to a foreign entrepreneur who may not be able to afford a US\$1m or US\$500,000 investment, and the need to immediately create ten jobs. Also, the EB-5 option is fraught with risks if the investor cannot show his or her own source of funds and if the ten jobs are not created directly or indirectly at the end of the two year conditional residency period. Another important bill, the Startup Visa Act of 2011 sponsored by Senators John Kerry (D-MA) and Richard Lugar (R-Ind),¹⁵ remains stuck in Congress as a result of partisan stalemate. This bill would allow the investor to demonstrate that he or she has obtained funding or created jobs to a lesser degree than the EB-5. While we wait for the Startup Visa, an enlightened interpretation of the already existing H-1B, L and E visa categories for entrepreneurs will surely benefit the US at this point in time and be consistent with the Administration’s 2 August 2011 announcement.

Notes

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- 1 This press release, *Secretary Napolitano Announces Initiatives to Promote Startup Enterprises and Spur Job Creation*, is available at: www.dhs.gov/ynews/releases/20110802-napolitano-startup-job-creation-initiatives.shtm.
 - 2 See Memo, Donald Neufeld, Associate Director, Service Center Operations, USCIS, *Determining Employer-Employee Relationship for Adjudication of H-1B Petitions, Including Third Part Placements*, HQ 70/6.2.8, AD 10-24 (8 January 2010), available at: www.uscis.gov/USCIS/Laws/Memoranda/2010/H1B%20Employer-Employee%20Memo010810.pdf.
 - 3 See *Questions & Answers: USCIS Issues Guidance Memorandum on Establishing the ‘Employer–Employee Relationship’ in H-1B Petitions*, published on 13 January 2010, revised on 2 August 2011, available at: www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=3d015869c9326210VgnVCM10000082ca60aRCRD&vgnnextchannel=6abef6d26d17df110VgnVCM1000004718190aRCRD.
 - 4 See *Immigrant Entrepreneur Gets Visa After ‘World News’ Story*, ABC World News, 2 November 2011, available at: http://abcnews.go.com/WN/Economy/immigrant-entrepreneur-visa-world-news-story/story?id=14867513#.TrH2UrlMR_M.twitter.
 - 5 See *Matter of Caron International Inc*, 19 I&N December 791 (Comm 1988).
 - 6 See *Matter of Pozzoli*, 14 I&N December 569 (RC 1974).
 - 7 See *Johnson-Laid v INS*, 537 F.Supp 52 (D Or 1981).
 - 8 See 8 CFR §214.2(1)(3)(vii).
 - 9 Under 101(a)(44)(A)(2) the term ‘managerial capacity’ includes one who ‘supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization (emphasis added) or a department or subdivision of the organization.’
 - 10 See NFAP Policy Brief, *L-1 Visa Approvals Decline Significantly At US Posts In India In 2011*, National Foundation For American Policy, available at: www.nfap.com/pdf/L1_Visa_Approvals_In_India_Decline_in_2011_NFAP_Policy_Brief_Nov2011.pdf.
 - 11 A list of the countries that have a treaty with the US can be found at: http://travel.state.gov/visa/fees/fees_3726.html.
 - 12 See 9 FAM 41.51 N.10.
 - 13 See *Bloomberg: US Immigration Policy Is ‘National Suicide,’ Politico*, 15 June 2011, available at: www.politico.com/news/stories/0611/57013.html. For a study of the benefits that entrepreneurs bring to the US, see *The ‘New American’ Fortune 500: The Partnership For A New American Economy*, June 2011, available at: www.renewoureconomy.org/sites/all/themes/pnae/img/new-american-fortune-500-june-2011.pdf.
 - 14 More information about this worthy legislative proposal can be found at: www.startupvisa.com.