NEWSLETTER

IMMIGRATION AND NATIONALITY LAW

INTERNATIONAL BAR ASSOCIATION LEGAL PRACTICE DIVISION

the global voice of the legal profession

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IN THIS ISSUE

FROM THE CO-CHAIRS

Message from the Co-Chairs

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Co-Chairs, IBA Immigration and Nationality Law Committee

As we approach the conclusion of our tenure as Co-Chairs of the Immigration and Nationality Committee, we would like to take this opportunity to thank you for your participation in committee activities and for helping us make the last two years a success for the committee and the IBA.

With the assistance of a dedicated group of committee members and staff, several successful sessions and conferences have taken place, including sessions in Singapore, London and the upcoming conference in Buenos Aires. We would like to take this opportunity to thank all conference participants who share their knowledge with us, prepare excellent materials for the conference records, and generally give us a glimpse of immigration and nationality law in their jurisdictions. In particular, we thank those participants who travel from faraway places to conferences that are not always conveniently located for them, taking time away from their busy practices.

We encourage everyone to attend the IBA Annual Conference in Buenos Aires taking place 12–17 October 2008. The Immigration and Nationality Committee is planning four sessions at the conference. In addition to our traditional 'Global business immigration update', we will have sessions on 'Work permit and visa options in Latin America' and two very interesting joint sessions with the Human Resources Section and Family Law Committees: 'Family relationships and immigration' and 'Employment and discrimination issues in the workplace affecting foreign workers'. We are working hard to ensure that the sessions are challenging and to elevate their level of intellectual discourse while keeping them relevant and practical. Please refer to the conference brochure for the dates and

Continued overleaf

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 Editor at the address below:

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times of the sessions. If you have not already registered for the conference, please go to **www.ibanet.org/conferences/BA2008/info_5.cfm** to register and see the entire programme.

A special thanks to Julia Onslow-Cole and Graeme Kirk, our past Chairs, for the incredible success of the 'Global Business Immigration Conference' that took place in London in November 2007. The conference presented a wonderful opportunity to showcase the committee and its many talented members, as well as hearing from senior government officials from around the world.

We encourage all committee members to participate, and to submit articles for publication in our newsletter on topics of interest and current events related to the immigration practice in their jurisdictions. Very special thanks to Gunther Mävers and Jelle Kroes for generously giving their time to publish this newsletter in time for the Annual Conference.

We look forward to seeing you in Buenos Aires!

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Buenos Aires 12-17 October

International Bar Association Conference 2008

Immigration and Nationality Law

Co-Chairs

Gabrielle Buckley *Vedder Price Kaufman & Kammholz, Chicago, Illinois, USA*

Sergio R Karas *Karas & Associates, Toronto, Ontario, Canada*

Global business immigration update

This programme will cover the latest developments in immigration law around the world, with special emphasis on workforce mobility, new regulations and policies. The speakers will represent a cross-section of different jurisdictions around the world.

MONDAY 1000 – 1300

Family relationships and immigration: traditional concepts at the crossroads

Joint session with the Family Law Committee.

The programme will explore how new relationships such as common law spouses, conjugal partners and cross-border adoptions impact traditional immigration concepts and have forced nations to realign immigration policies.

TUESDAY 1000 – 1300

Work permit and visa options in Latin America

The programme will discuss the different visa and work permit options in Latin American countries, including free trade agreements such as Mercosur, and agreements with other countries such as the United States, Canada, and the European Union, with special emphasis on worker mobility and a discussion of the various national policies, future trends and other relevant topics.

WEDNESDAY 1000 – 1300

Employment and discrimination issues in the workplace affecting foreign workers

Session Co-Chairs

Dirk Jan Rutgers *Kennedy Van der Laan, Amsterdam, the Netherlands; Senior Vice-Chair and Corporate Counsel Liaison, Discrimination Law Committee*

Graeme Kirk *Gross & Co, Bury St Edmunds, England; Council Member, Professional and Public Interest Division*

Robert Mignin *Seyfarth Shaw LLP, Chicago, Illinois, USA; Chair, Employment and Industrial Relations Law Committee*

This programme will discuss what are the rights of executives, as well as employees with special or technical skills seconded or assigned to work in foreign jurisdictions? What are the obligations of employers? Is an employer obligated to respect in its workplace the culture and religion of the seconded employee? If yes, to what extent? Is the seconded employee entitled to equal pay? The session will review laws and regulations pertaining to termination or dismissals or reassignment of employees in foreign jurisdictions and review issues relating to entitlement to separation pay and other benefits provided by the laws of the foreign jurisdiction. How should employers best structure employment contracts with executives assigned and/or seconded to work in foreign jurisdictions?

Also to be addressed will be: what are the laws pertaining to work permits and visas for executives and employees with special or technical skills upon termination, reassignment and/or sale or merger of a business? What is the impact on an employee's status and ability to work in a foreign jurisdiction upon occurrence of any of the above events? What are the rules and regulations pertaining to work permits and visas?

Speakers

Bruno Blanpain *Marx Van Ranst Vermeersch & Partners, Brussels, Belgium*

Juan Bonilla *Cuatrecasas Abogados SRL, Barcelona, Spain; Assistant Newsletter Editor, Employment and Industrial Relations Law Committee*

Keith Corkan *Laytons, London, England*

Oscar de la Vega *Basham Ringe y Correa SC, Mexico City, Mexico; Secretary and Website Officer, Employment and Industrial Relations Law Committee*

Don Dowling *White & Case, New York, USA*

Neena Gupta *Kitchener, Toronto, Ontario, Canada*

Alessandro Alves Jacob *Alves Jacob, Rio de Janeiro, Brazil*

Clara Mager *Butzel Long, Detroit, Michigan, USA*

Gunther Maevers *Mütze Korsch, Cologne, Germany*

Johan Olivier *Brink Cohen Le Roux Inc, Johannesburg, South Africa*

Karl Waheed *Cabinet d'Advocats – Karl Waheed, Paris, France*

Mark Wright *Greenberg Australia Pty Ltd, Sydney, New South Wales, Australia*

THURSDAY 1000 – 1300

Work visa shortages in the United States continue

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Despite the slowdown in the US economy, the major temporary and permanent visa categories for highly-skilled workers remain seriously oversubscribed and backlogged.

The H-1B crisis

The H-1B is the major temporary visa category in the United States for professional workers. It is available to those with bachelor degrees filling positions with employers that require degrees. In 1990, Congress for the first time set a limit of 65,000 on the number of H-1B visas and within a few years it was clear that the annual quota was inadequate.

In the late 1990s, Congress temporarily raised the annual H-1B quota. Those temporary increases expired in 2003 and the annual limit returned from 190,000 to 65,000. Congress did establish several important exemption categories beginning in the late 1990s including employees of colleges and universities, certain physicians working in under-served areas and employees of non-profit research institutions.

For the last several years, Congress has provided for a bonus quota of 20,000 extra H-1Bs for graduates of US masters and higher degree programmes.

For the past two years, demand for H-1Bs has been so strong that the entire annual allotment has been drawn immediately after the numbers became available. Visas can be claimed up to 180 days before the beginning of the government fiscal year that annually starts on 1 October. That means applications must be filed on 1 April to have a reasonable chance of being selected. In 2007, US Citizenship and Immigration Services received more than twice as many applications on the first day available under the basic 65,000 cap. In 2008, a similar number of applications were received on the first day and the bonus pool of 20,000 visas for advanced degree professionals was used up within a week. In short, the H-1B process has become a lottery.

H-2B problems

A temporary visa category available for short-term and seasonal workers, the H-2B, has similar problems as the H-1B. The H-2B cap is set at 66,000 and can be used for any type of worker whether professional, skilled or unskilled. Up until 30 September 2007, returning seasonal workers were not counted against the annual 66,000 limit if they had previously been counted in the annual quota. Congress has not extended that provision which has led to the H-2B quota being used up rapidly. While demand is not quite as strong as in the H-1B category, the H-2B quota is now only available for brief periods during the fiscal year.

Green card backlogs

The situation for employment-based permanent residency visas ('green cards') is no better. Waits in the popular EB-3 green card category for skilled and professional workers are now estimated at five to seven years. The wait in the EB-2 category for workers with masters degrees or higher is not backlogged for most workers. However, nationals of China and India are facing an additional wait of two to four years. Why? Because US immigration law limits admissions in the various green card categories to no more than seven per cent from any one country. Given the large populations of Indian and Chinese highly-educated professionals seeking positions in the United States, this backlog is hardly a surprise. The waiting times will likely only grow as the additional H-1B workers who benefited from larger quotas earlier in the decade seek to convert to permanent residency.

Responses

Followers of US politics know that immigration has been a very heated issue for the past few years. Attempts to pass major immigration reform legislation have failed and members of Congress have been extremely reticent to push forward any immigration legislation, whether controversial or not. Furthermore, some members of Congress who are pro-immigration have made the strategic choice to block small, pro-immigration bills – such as bills lifting H-1B and green card caps or restoring the H-2B returning worker provision – in order to force reconsideration of a massive comprehensive immigration reform package. So while there is general support in Congress for addressing the lack of non-immigrant and immigrant visas for needed workers, political considerations are getting in the way.

The odds are increasing that nothing will happen

until after the election. Democrat Barack Obama and Republican John McCain are each considered to be pro-immigration and are likely to support measures to increase visa availability. The problem will likely be in Congress where a small minority can block legislation. Democrats are generally viewed as the more pro-immigration party and there is optimism that if they increase their numbers substantially (as is widely expected) this will bode well for addressing immigration in the next session of Congress.

In the meantime, there are alternative strategies that companies and workers can consider.

First, there are other visa categories that frequently are available, some of which have no numerical limits. The L-1 visa is available for employers that first employ key workers abroad with the company for a year prior to seeking entry. The J-1 visa for trainees and interns is available for up to 18 months for junior level workers seeking to gain experience in their fields. Foreign-owned corporations with qualifying commercial treaties with the United States can sometimes bring in key employees.

Secondly, President Bush recently stepped in with a new rule that allows students in the United States in certain scientific, technology, engineering and mathematics (STEM) fields to work for up to 27 months after they complete their degrees. The previous rule limited such work to 12 months. Aside from having to work in a qualifying field, the employer must participate in the controversial new E-Verify electronic employment verification system which documents that workers are authorised to work in the United States. E-Verify is largely targeted at employers hiring illegally-present lesser skilled workers.

Finally, for advance degree workers who qualify in the EB-2 green card category and who are not from countries with limits (currently only India and China), bypassing the non-immigrant visa and going directly for the green card may be a possibility. An employer would need to be prepared to wait a number of months – likely one to two years – before the worker could enter with permanent residency.

Conclusion

Ultimately, the US Congress will need to step in if the United States is to remain an attractive location for top global talent. More visas will need to be made available both at the temporary and permanent levels. Unfortunately, the odds of this happening in 2008 are slim and it may be well into 2009 before there is any progress to report.

UNITED KINGDOM

A revolution in UK immigration law! Update on the new UK points-based system

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The British Government is making rapid progress towards full implementation of the new 5-Tier Points-Based System for UK immigration ('PBS').

Introduction

At the outset, the government's intention was to attempt to reduce more than 80 existing categories for UK immigration down to five tiers. In practice, this has not proved possible and a number of categories for UK immigration, primarily family based, remain outside the new PBS system. However, the vast majority of business and employment-based immigration applications, as well as student applications, will be made in future through the PBS system by the time PBS is fully implemented in spring 2009.

Tier 1 (general)

Tier 1 has now been fully implemented worldwide, and covers individuals wishing to come to the United Kingdom or remain there as highly skilled migrants,

entrepreneurs, investors and for postgraduate work after completing UK degree or post-graduate qualifications.

The highly-skilled section of Tier 1 is extremely similar to the old Highly Skilled Migrant Rules. However, the English language requirements have been changed so that nationals of certain countries designated as English-speaking countries do not have to prove their English language abilities. Where an English language test is still required, a wider range of options are available to applicants than in the past. For the widely-used IELTS test the requirement has increased to 6.5 General.

The Home Office has also introduced a maintenance requirement which is causing some difficulty to applicants particularly from third world countries. Applicants from outside the United Kingdom are required to show that they have held a balance in their bank accounts or accounts of at least £2,800 for the three-month period before the filing of the application, together with an additional sum of £1,600 for each dependant accompanying the applicant to the United Kingdom. This requirement is justified by the British Government on the basis that it needs to be satisfied that individuals coming to the United Kingdom under Tier 1 have sufficient funds to survive for the first few weeks in the United Kingdom, bearing in mind that no job offer is required under this tier.

The new Tier 1 entrepreneur category replaces the Business and Self-Employed Rules and a number of other categories eg, innovators and foreign lawyers. A successful applicant will need to show that a sum of £200,000 is available to them to invest in a UK business or businesses, and that their investment will lead to an additional two full-time jobs or their part-time equivalents being created in the business or businesses. Previously, under the business rules it was necessary to show that the £200,000 belonged to the individual applicant, and the funds could only be invested in one business. This is no longer the case and all the individual will need to show is that he has access to a sum of £200,000 which will be available to him for a five-year period in the United Kingdom to invest in a business or businesses. This widens considerably the opportunities for business investors to come to the United Kingdom. However, an applicant will need to pass the Tier 1 English language test, and also satisfy the maintenance requirement.

The Tier 1 investor category is identical to the existing investor route, requiring an investment of £1 million to be made by the individual applicant in the United Kingdom, either by bringing his own money to the United Kingdom and investing £750,000 in acceptable investments under the rules or alternatively, if the applicant can prove net assets of more than £2 million, by borrowing £1 million from an authorised financial institution and bringing this money into the United Kingdom to invest in the same way. This latter route has potential tax advantages in the United Kingdom which need to be set against the borrowing costs. Unlike the Tier 1 (General) and Tier 1 (Entrepreneur) route, the Tier 1 (Investor) does not need to prove English language skills, or meet the maintenance requirements.

Tier 1 permits that the above categories will be granted for an initial three-year period, and may be extended for a further two years leading to a potential right to apply for indefinite leave to remain after five years.

Finally, under Tier 1 there is a new category for post-graduate work which enables individuals who have just graduated from UK universities with degrees or post-graduate qualifications, or have graduated within the last 12 months, to remain in the United Kingdom or apply to enter for a period of two years to work without restriction. At the end of this period, there may be opportunities to switch to the Tier 1 (General) category depending on earnings in the United Kingdom during the relevant period, or possibly to the Tier 2 skilled worker category described below.

Although it is early days, it appears that Tier 1 out-of-country applications are being processed reasonably quickly, although there are currently long delays in the processing of switching applications in the United Kingdom. However, anecdotal evidence is beginning to appear of some delays, eg, applications from Australia.

Tier 2 – skilled worker category

This is in many ways the most interesting tier, as it is the tier that will replace the long-standing and generally highly successful UK Work Permit Scheme. It is anticipated that Tier 2 will come into effect in late November 2008, although this timetable is still subject to change at the date of this article. This new tier contains a number of revolutionary changes.

First, any employer who wishes to recruit a foreign worker under Tier 2 will need to have obtained an employer's licence from the British government in advance. This licence which will be valid for four years gives the employer the right, under certain conditions, to issue sponsorship certificates to foreign nationals who will then be able to take evidence of their sponsorship certificates to apply for entry clearance at the British embassy in their home country.

To qualify for a sponsorship certificate, an employer must carry out its own assessment of the Tier 2 points test, and satisfy the Border and Immigration Agency that, where required, a resident labour test has been carried out, and that the other requirements of the Tier 2 Points Test have been met. This new system imposes additional rights but also considerable obligations upon UK employers. It will be policed by the Border and Immigration Agency, with severe penalties and sanctions applied to errant employers, including the possible loss of the employer's licence. The loss of the licence would mean that the employer

would no longer be able to recruit or indeed retain any foreign workers brought to the United Kingdom under Tier 2.

The prospective employee will need to apply for entry clearance, following issue of the sponsorship certificate, to the nearest British embassy or consulate in their home country dealing with such cases, and the entry clearance process is likely to be a far more onerous process than that undertaken at present, with considerable scrutiny being given to the verification and review of all documentary evidence provided by the prospective employee. Entry clearance, if granted, will mean that, unlike Tier 1, the employee will have permission to take employment *only* with the UK employer who has issued the sponsorship certificate for up to three years, subject to limited rights to work elsewhere under strict conditions. Extension applications for Tier 2 permits can be made in-country leading potentially to indefinite leave to remain after five years. Tier 2 will also contain specific provisions for ministers of religion and sports people to obtain sponsorship certificates and entry clearance under this category.

As of 1 August 2008, fewer than 350 UK companies had applied for employers' licences, and fewer than 130 applications had been completed. A massive task therefore remains if Tier 2 is to be launched successfully in late November 2008, and it is hard to visualise how this will be achieved. The government has recently launched a TV advertising campaign to encourage UK employers to register for licences. Watch this space!

Tier 3 – low-skilled workers

The British government's current policy is that all low-skilled positions within the United Kingdom can be filled from within the European Economic Area (EEA). On this basis, there are no plans to implement Tier 3 at present and it is currently suspended. It will be interesting to see if this policy is maintained. There is some anecdotal evidence that some East European migrants are returning home, and there are going to be substantial demands particularly in the construction industry for the London Olympics in 2012.

Tier 4 – students

This is the category under which students will be sponsored in future to come to the United Kingdom for study. In a licensing system very similar to the employers' licensing system set out above for Tier 2, schools, colleges and universities in the United Kingdom will need to apply to the government for a sponsor's licence. Having successfully obtained a sponsor's licence, they will then be able to issue sponsorship certificates to prospective students who will then apply for entry clearance in a similar way to prospective employees under Tier 2.

Tier 4 is not likely to be introduced until March 2009, and will therefore be the last part of the PBS to be implemented. However, the registration scheme for sponsors has now opened for business, and it will be interesting to see how quickly potential sponsors apply for licences.

Tier 5 – youth mobility, temporary workers and creative workers

This is a tier which will contain a number of different categories, granting temporary residence rights only which can never lead to permanent residence rights in the United Kingdom.

Foremost among this category is the new Youth Mobility Scheme, which will replace the long-standing Commonwealth Working Holiday programme. There are a number of significant differences between the two schemes. First, the Youth Mobility Scheme will not be a Commonwealth-based scheme and no countries which currently have visa restrictions with the United Kingdom will be able to take part in the scheme. Only countries where satisfactory reciprocal arrangements allowing young UK citizens to work in third countries, and who have a satisfactory immigration record with the United Kingdom, will be entitled to take part. Although no formal announcement has been made as yet, currently it is anticipated that only Australia, Canada, Japan, New Zealand and the United States will form part of the programme when it commences in November 2008.

Individual applicants will need to be sponsored by their own governments to take part in the scheme, and will be allowed to come to the United Kingdom for a period of two years and to undertake work during this period.

In addition, there will be a new Tier 5 (Temporary Worker) category – creative and sporting – which will allow certain individuals to come to work or perform as sports people, entertainers or creative artists. These individuals will need to be sponsored by the prospective UK employer, who will need to have obtained a licence from the government to sponsor the relevant category. A resident labour test will be required in certain cases, unless there is a specific code of practice which the employer has committed to follow.

In addition, there will be separate Tier 5 categories for charity workers, religious workers, government authorised exchange, and temporary workers under international agreements such as GATS.

Business categories outside the PBS system

Currently, it appears that the long-standing sole representative category, which allows foreign companies to have no branch, subsidiary or representative in the United Kingdom to send

one individual to open a branch, subsidiary or representative office, will remain within the Immigration Rules, outside the PBS, at least for the time being. In addition, the Commonwealth Ancestral category, which allows Commonwealth citizens who have a British-born grandparent to come to the United Kingdom for work purposes, will continue, although the British government considered the possible abolition of this scheme.

However, the 'retired person of independent means' scheme which has enabled retired persons with sufficient funds and a close connection to come to the United Kingdom, will be abolished.

Conclusion

Many aspects of the new PBS system are still being developed and introduced, and it is far too early to say whether the new system will be more or less efficient than the old rules. The government's intention has been to reduce the subjective nature of decision making, and to try as far as possible to make decisions objective and document based. At the same time, virtually all legal rights of appeal against refusals of applications have been abolished other than on human rights or race relations grounds, to be replaced by an in-house system of administrative review, where an entry clearance manager not directly involved in the case will review a colleague's decision to see whether an error of fact has been made. British lawyers have lobbied unsuccessfully for the retention of appeal rights, and it will be interesting to see whether there is a substantial increase in judicial review proceedings to the High Court, which will be the only legal recourse in many cases in future.

The next 12 months will be an extremely interesting time for UK immigration lawyers.

BELGIUM

'I have my visa, why do I need to register after my entry into the country?' A few thoughts on possible confusion regarding the concepts of 'visa', 'entry' and 'authorised stay'

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In most jurisdictions, many immigration practitioners will agree that there is a great deal of confusion amongst their clients (as well as amongst other parties with whom they interact) regarding the concepts of 'visa', 'entry' and 'authorised stay' in the country to which they seek to travel.

Such confusion can adversely affect the current and future immigration status of their clients. In that regard, having and conveying a clear view of these concepts can help to prevent compliance issues.

Defining the concept of a visa and its legal implications is far more complex than may appear at first glance. This complexity is mainly due to the absence of any generally accepted legal definition of a 'visa', since visas are issued by countries on the basis of their own immigration policies (even when common technical rules are agreed between certain countries).

That being said, visas issued across the world tend to demonstrate common features, such as (i) an application process during which supporting information and documents are submitted to and reviewed by the consular authorities of the issuing country, (ii) different categories of visas depending on the purpose of the envisaged entry, (iii) a well-defined period of validity, and (iv) a reference to the number of entries envisaged during this period.

Once a visa has been obtained, the successful applicant may be under the impression that he or

she may enter and stay in the issuing country for the reasons explained and reviewed during the application process. Such an impression is often reinforced by the official notes printed on the visa which pertain to the reasons for entry, the number of entries and the duration of the period of validity.

In that regard, another lesser-known but nonetheless essential feature of a visa must be borne in mind: for most issuing countries, a visa does not allow entry or residence per se. A visa merely allows its holder to travel to the port of entry of the country in question and request entry. This arguably-defining feature is notably illustrated by information found on official websites, such as **www.unitedstatesvisas.gov** managed by the US Department of State:

> '…A visa doesn't permit entry to the United States, however. A visa simply indicates that your application has been reviewed by a US consular officer at an American embassy or consulate, and that the officer has determined you're eligible to enter the country for a specific purpose. Consular affairs are the responsibility of the US Department of State.
>
> A visa allows you to travel to the United States as far as the port of entry (airport or land border crossing) and ask the immigration officer to allow you to enter the country. Only the immigration officer has the authority to permit you to enter the United States. He or she decides how long you can stay for any particular visit. Immigration matters are the responsibility of the US Department of Homeland Security…'

or in the Convention of 19 June 1990 implementing the Schengen Agreement of 14 June 1985:

> '…Article 5
>
> 1. For stays not exceeding three months, aliens fulfilling the following conditions may be granted entry into the territories of the Contracting Parties:
>
> …(b) that the aliens are in possession of a valid visa if required;
>
> … Article 22
>
> 1. Aliens who have legally entered the territory of one of the Contracting Parties shall be obliged to report, in accordance with the conditions laid down by each Contracting Party, to the competent authorities of the Contracting Party whose territory they enter. Such aliens may report either on entry or within three working days of entry, at the discretion of the Contracting Party whose territory they enter…'

In other words, from a legal and practical perspective a visa, when required, is generally a necessary, but not a sufficient, requirement for its holder's entry and residence in the country of issuance. This also confirms that, in the absence of a visa requirement eg, in the framework of a visa waiver programme, the beneficiary of the waiver is not automatically entitled to enter and stay in the country at hand. Hence, this lesser-known common feature emphasises the importance of any immigration steps to be complied with upon or shortly after entry in order to safeguard the visa holder's immigration status when entering and staying in another country.

In light of the above Belgium, like most other member countries of the European Economic Area (i) may deny entry to visa holders or beneficiaries of a visa waiver travelling to its borders, and (ii) requires formal registration with the local municipal authorities shortly after entry (ie, within three or eight days, depending on whether the stay will exceed three months). In that regard, whenever a foreign visitor does not stay in a hotel, registration requires a visit to or notification of the municipal authorities of the place of residence in Belgium. Failure to register can give rise to compliance issues, which could lead to penalties, deportation and a negative immigration record with the authorities, possibly impacting future entries.

Such a local registration requirement, the mandatory nature or consequences of which are not always known or understood, is therefore a crucial immigration step, since neither the visa and/nor the entry is sufficient to safeguard immigration status in the country.

In this context, the chances are that, in a fair number of jurisdictions, the answer to the question 'I have a visa, why do I need to register after entry?' will also clarify that registration is an important step in the immigration process.

Recent evolution of investments in Brazil

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Brazil is one of the emerging countries which have most attracted foreign investments in recent years. The economical stabilisation reached after the implementation of the Plano Real and the structural reforms implemented in the economy in the past few years have enabled the participation of foreign capital in sections that until then were state monopoly. Therefore, sections like telecommunications and energy were opened to investment by foreign companies. Measures like this, that indicate an aperture and modernisation of the Brazilian economy, contributed to reinforce Brazil as one of the countries historically more attractive to foreign investments.

The connection of the country's economy with international capital flows is a tendency of globalisation that will persist for a long time. This entrance of foreign capital in Brazil may occur, among other ways, by Foreign Direct Investment (IED, in Portuguese) or individual investment, which will be the subject of this article.

The foreign investment flow is increasing every year. Many times in this decade, Brazilian economic attractions were obfuscated by other emerging market giants, China, India and Russia. However, Brazil received twice as much IED as India in 2007, and this investment growth is happening at a faster rate than in China or Russia. The total flow was more than double the amount attracted by Brazil in 2006 and, at least in nominal terms, more than at the beginning of the decade when the privatisation campaign was in full swing.

The increasing flow is the consequence of a series of factors, among which is growing demand for natural resources and investment in the manufacturing industry. The mining and the ethanol section attracted billions, but the flow increase is also a consequence of the improvement of macroeconomic perspective in Brazil. Even with the backdrop of instability of the world economy and the slowdown of the US economy, investors are still confident that great internal demand and the rate of increase of capital formation will allow Brazil to survive comparatively safely.

To allow foreign capital into the country to stimulate economic growth brought about the adoption of an auspicious immigration policy. The Normative Resolution (RN) # 60, of 6 October 2004, is about the granting of permanent visas for individual investors. In 2004, Brazilian immigration law was modified and the minimum amount required for investors was reduced from US$200,000 to US$50,000. This modification was a remarkable easing for foreign investors, as with a smaller amount required the range of possible investors increased greatly. The number of visas went from 197 in 2004, to 1,336 in 2007. Last year, the total amount invested by individual investors was US$109,499,867.01. The main countries of origin of the investors are the European Community, as in the schedule below:

Country of origin	Importance
Italy	US$22,055,931.19
Spain	US$16,827,763.82
Portugal	US$11,520,626.31
Norway	US$7,984,947.50
United States	US$7,496,785.37

If this tendency continues, the numbers of conceded visas in 2008 will grow and the investments will be even greater.

Notes

* A 20-year-old company, specialising in rendering services in the immigration market, transferring employees to and from Brazil to other countries.

Indian business and employment visas

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Growing interest in doing business in India has seen a rise in the number of foreigners travelling to India. Indian law does not place restrictions on the number of foreign nationals that can work or do business in India, but regulates their entry, stay and movement. It is important to understand that the structure of the entity that wishes to employ a foreign national is important when applying for business or employment visas. This article describes a few methods by which a foreign national can commence business or work in India along with an overview of appropriate visas.

The Foreign Exchange Management Act (FEMA) and relevant government regulations control Foreign Direct Investments (FDI) subject to a few restrictions. FDI up to 100 per cent is freely allowed in almost all sectors in India except where the existing and notified sectoral policy prohibits FDI or does not permit it beyond a ceiling.

The most common methods used by foreign nationals to set up a business in India include establishing a representative office, project office, branch office, incorporation of a wholly-owned subsidiary or company or establishing joint ventures.

A liaison office is generally used to explore and understand the business environment and opportunities in India for a foreign parent entity. It cannot undertake any commercial activities. Foreign companies planning to execute specific projects in India can set up temporary project or site offices in India. Foreign entities engaged in manufacturing and trading activities abroad are allowed to set up branch offices for most purposes, including export and import of goods, rendering consulting services, conducting research among many others.

A wholly-owned subsidiary or a joint venture can be incorporated as a company under the Companies Act 1956. A company can be private or public. A private company can commence business the moment it is registered with the Registrar of Companies (ROC). However, a public company requires a certificate of commencement of business from the ROC. A qualifying foreign national may be employed by any of these entities.

Overview of Indian business and employment visas

The Foreigners Act 1946, The Registration of Foreigners Act 1939 and The Citizenship Act 1955 with allied rules and periodic amendments regulate the foreigner's entry, movement and stay in India. Most foreign nationals entering India require a valid passport along with an appropriate visa.

Business visa

An individual seeking to travel to India on business should obtain a business visa. The validity of a business visa can range from six months to ten years. Individuals who seek to establish a business in India may be eligible for a business visa, which is usually issued with a longer validity period (a long-term visa). A business visa application should include supporting documents from the sponsoring organisation(s).

Employment visa

Generally, foreign nationals with high levels of professional skills and qualifications are granted visas to take up employment in India. The duration of the employment visa would depend on the period of the employment contract and the validity of the applicant's passport.

General information

There is no prior petition or labour application. There is no restriction on the duration an individual can stay in India on a business or employment visa as long as the stay is in keeping with the visa that was issued initially. The visa needs to be extended from time to time.

Foreign nationals of certain countries may be subject to additional checks or restrictions pertaining to a visit or stay in India. The spouse and children of a foreign national applying for an employment visa or a long-term business visa are usually issued entry visas co-terminous with the principal applicant's visa. It should be noted that most foreign nationals are required to register with the Foreigners Regional Registration Office (FRRO) within a stipulated

period after arrival in India or if they intend to reside in India for more than 180 days. Visas, once granted, cannot generally be changed.

As the number of foreign investments in India increase, the demand for Indian visas is on the rise. In the future it might be necessary to impose some restrictions on the number of foreign nationals working in India to ensure that the local work force is not disadvantaged. However, it is unlikely that a developing country like India, dependent on FDI for its growth and requiring skills that are not available in India to sustain that growth will impose numeric restrictions on visas in the near future.

Notes

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Disclaimer

The information is not a comprehensive consideration of the subjects discussed and is intended to provide general information. This does not create a client/attorney relationship. Readers should not conclusively rely on the information as legal advice and should seek independent counsel before any action is taken with respect to these or other specific issues.

RUSSIA

Introduction to the Russian immigration system

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Summary

The Russian Federation immigration system comprises several categories of temporary entry. The most commonly applicable bases for temporary stay in the territory of the Russian Federation are the 'ordinary' visas, including:

- Tourist and private visit visas, for foreign nationals intending to come to Russia for tourism or family visits.
- Student visas, for foreign nationals entering to engage in a course of study at a Russian educational institution.
- Business visas, for foreign nationals entering Russia to conduct business activities.
- Work visas, for foreign nationals entering Russia to be directly employed by a Russian company or to work for the representative/branch office in Russia of a foreign legal entity.

General principles of employment in Russia

1. In order to work legally in Russia a foreign national is obliged to have a work permit and a work visa. Prior to employment the employer has to receive an employment permit. Working with a work permit and a business visa is a breach of Russian immigration legislation.
2. Employment and work permits are issued for a period of one year and are renewed each year.
3. A work visa is issued for the same period as a work permit.
4. The main criteria for the need to obtain a work permit is the essence of the activity conducted in Russia and not the length of stay. If the activity is work, the work permit has to be obtained from day one. Example: strictly speaking, any foreign band or singer coming to Russia with a one-day concert has to obtain a work permit.
5. A work visa should be obtained in the Russian consulate abroad. The consulate, subject to production of an original work invitation, issues a single-entry three-month work visa, which upon arrival is converted to a multiple work visa. A multiple work visa allows a foreign national to stay in Russia continuously for the whole period of its validity and is renewed annually in Russia without the need to exit and apply to the Russian consulate again.
6. In order to obtain a work permit a foreign national has to provide a medical certificate which confirms absence of certain diseases, such as HIV, tuberculosis and some others.

7. Once the work permit is obtained the employer has to notify several Russian authorities about the employment of the foreign national.
8. A work permit is region specific. A work permit for Moscow does not allow work outside Moscow. A work permit for each specific region has to be obtained.
9. As of 17 February 2007 the Russian government has shortened the business trip length for expatriates travelling to Russian regions. Instead of up to 40 continuous days, now the business trip cannot be more than ten days within a year.
10. There is a test.

Temporary entry

Summary

In order to enter Russia, the majority of foreign nationals would require a visa. The exemption here covers only citizens of certain Commonwealth of Independent States (CIS) countries, other than Georgia and Turkmenistan.

In order to process the visa, a foreign national should have an invitation letter issued on behalf of the sponsoring company. The sponsoring company can be either a Russian legal entity or a representative/branch office of a foreign company acting through its accredited authority. In the case of a Russian company, it should be registered with the Department of the Federal Migration Service (DFMS) for further processing of invitation letters. This registration is valid for up to one year and should be renewed every year accordingly.

Types of stay

We will consider only two types of stay: business trips and employment.

Business trips

The business visa is applicable to foreign nationals entering Russia for business or commercial activities for which they will not receive compensation from a Russian source. The possible activities are as follows: (1) attending meetings, conferences, trade fairs, auctions or seminars; (2) negotiating or signing agreements or contracts; (3) attending meetings at the invitation of a government body; (4) entering as a representative of a foreign company to install, dismantle, service or repair the company's products; (5) examining goods to be purchased, or purchasing or delivering goods pursuant to a sales contract; (6) attending personal professional development and retraining programmes; (7) giving lectures at institutions of higher academic or professional education; (8) entering as a foreign media correspondent to report on a specific event or to serve as a technical assistant to a foreign media correspondent; and (9) entering as a crew member or transportation service driver.

Usually an inviting/sponsoring company submits the documents to the DFMS for the invitation letter processing. Upon its issue, the sponsoring company sends either a scanned or hard copy of the invitation letter to the business traveller who applies to the Russian consulate for a visa.

However, it should be stated here that since the Agreement between the European Community and the Russian Federation on the facilitation of the issue of visas to the citizens of the European Union and Russia entered into force on 1 June 2007, visa procedures have undergone changes.

The purpose of the Agreement is to facilitate the issue of visas for certain categories of citizens of the European Union and Russia (members of official delegations; businessmen; journalists; pupils, students, post-graduate students and accompanying teachers travelling to study; close relatives – spouses, children, parents, grandparents and grandchildren – visiting citizens of the European Union legally residing in Russia and *vice versa*, etc) who intend to stay no more than 90 days within a period of 180 days. For these categories there is no need any more to have the official invitation letter issued by the state authority of the Russian Federation since only written requests from a host person or host company are required to justify the purpose of the trip. It should be stated here that currently the state authority responsible for the issue of invitation letters in Moscow (DFMS of Russia for Moscow) continues to issue invitation letters without any changes in the procedures for all foreign nationals intending to come to Russia including the above-mentioned categories. Thus we assume that at the moment there are two possible ways to receive the Russian invitation letter.

The types of business visa are single (for one or three months), double (for one or three months) or multiple entry (for six or 12 months). We would like to draw your attention to the fact that on the basis of a multiple visa a foreign national is entitled to stay 90 days within every 180 days.

In the Agreement between the European Union and Russia there is a separate article dedicated to the issue of multiple visas as the requirements now have changed and in order to receive a one-year multiple visa a foreign national intending to come to Russia (or a Russian citizen going to the European Union) within the previous year should have had at least one used visa to Russia/the European Union. It means that if a person has never been to Russia or the European Union he or she will have first to receive a single/double visa and only then apply for a multiple one. But the Agreement allows the possibility of getting the multiple visa for a longer period (from two to five

years) for those citizens who within the previous two years have used a one-year multiple visa and still have reasons for requesting a long-term multiple visa. In Russia currently only the Chamber of Commerce and Industry supports this procedure and issues invitation letters on its behalf for two–five years. This rule applies to all foreign nationals as the DFMS of Russia for Moscow requests copies of previous Russian visas in order to process a multiple one and, if not provided, nobody (even citizens of Great Britain, Ireland, Iceland and Denmark who are exempted from the Agreement as well as citizens of all other countries that do not belong to the European Union) can be issued with a multiple invitation letter/visa.

The Agreement also defines the visa handling fee and the terms of visa processing. It is not possible any more to process the same-day visa and the minimum period requested for the visa issue is three working days provided you pay the consulate fee of €70 and there is the proof of urgency. Though the standard time is ten days (for a €35 fee) which in exceptional cases can be extended up to 30 days. We would like to draw your attention to the fact that the time of processing the application for a multiple visa is strictly 10 days and it cannot be reduced.

Extension of the business visa is not permitted, however in exceptional cases the foreign national may apply for a ten-day extension provided s/he has evidence of urgent need to stay longer.

- Accompanying family members**:** a business traveller may be accompanied by a spouse and unmarried children under the age of 18. Each family member who possesses his or her own passport must obtain a separate invitation letter and visa accordingly. Children who do not have their own passports should be included in a parent's visa application (either the principal business traveller or a spouse, depending on whose passport the child is included).
- Changes of status: business visa holders are not permitted to change their status while in Russia. Though the foreign national may be present in Russia on the basis of the business visa while his/her work permit application is in process, s/he will have to leave Russia upon its issue, apply for a work visa to a Russian consulate and come back on the basis of the work visa.
- Notification requirements: all foreign nationals must notify the DFMS of the place of their stay within three working days upon arrival in Russia. If the foreign national is staying in a hotel, the hotel is responsible for completing the notification requirements. Upon his/her departure, the sponsoring company should notify the immigration authority on departure of a foreign national by sending the detachable part of the initial notification form back to the DFMS.

Employment

We can distinguish two processes with respect to employment of foreign nationals: (1) through a Russian legal entity, and (2) through a representative/branch office of a foreign legal entity. The main difference is in the sequence of actions to be taken to secure the work visa. In the case of a Russian legal entity, the procedure is straightforward: employment permit – work permit – work invitation letter – three-month work visa – 12-month work visa; with a representative/branch office the procedure looks a bit different: accreditation card – work invitation letter – three-month work visa – 12-month work visa through the accredited authority while at the same time the company has the right to process the employment permit – work permit.

For CIS citizens (with the exception of Georgia and Turkmenistan) employment procedure requirements have been changed. Thus, in order to hire such a foreign citizen, the employer has no obligation to process employment for him, and a foreign citizen himself/herself has the right to apply for the work permit on their own behalf. This work permit will contain information on the validity period (valid for up to one year), but the region does not contain information on the employer, so that these individuals can work for any employer in the region where the work permit has been granted.

In addition, the following categories are exempt from the employment permit and work permit requirements: (1) Russian permanent residents; (2) employees of diplomatic missions and international organisations and their domestic employees; (3) journalists accredited in Russia; (4) student visa holders; (5) employees of overseas entities entering Russia to perform warranty or post-warranty maintenance or installation services in connection with equipment imported into Russia; and (6) foreign nationals entering Russia as instructors, teachers and lecturers, pursuant to an invitation from a Russian academic institution (with the exception of religious institutions).

Employment of foreign nationals is governed by the quota system. Every company intending to hire foreign nationals must submit the application to the authorised state authority on necessity for foreign labour prior to 1 May of the year preceding the year when the foreign national will actually be hired. At the end of the year the Russian government establishes the quota for processing of work permits and work invitation letters for foreign nationals. In Russia there are precedents when this quota has been met and the whole process ceases until the reserve quota is established. However, it should be stated here that there is a list of professions (occupations, positions) of foreign nationals – qualified specialists, who are to be hired without quota: it covers managing personnel

and highly-specialised positions, where work requires special professional education, knowledge and great experience.

The employment permit process

The whole procedure is as follows:

1. The employer has to submit to the local labour department information about vacancies available.
2. After 30 days the employer can apply to FMS with an application and other documents for obtaining employment and work permits for foreign nationals.
3. The FMS official should on the next day (provided the paperwork is in order) send a request to the Labour Department to issue consent for a particular employer to employ foreign nationals.
4. The Labour Department should reply within ten working days either with a consent or motivated refusal.
5. Once the consent is received by FMS they should issue the employment and work permit. The FMS should issue the employment and work permit within 28 days from the day of accepting the request from the employer.

This procedure has focused on the practical application of the 'one window' system in the work of FMS in Russia for processing employment and work permits at the same time, as well as on the creation of an effective method stipulated by the legislation to secure the preferential right of Russian nationals to employment in Russia. The 30-day term is provided to the employment centres to find a suitable Russian national who will be able to replace a foreign national, and in the case of a successful search, these candidates will be offered to employers.

Reasons for refusal in issue of the employment permit

The Decree dated 11 January 2008 'On approval of administrative regulation of public service procedure for issue of Resolution for employment of foreign nationals, issue of the Employment permit as well for issue of work permits for foreign nationals and stateless persons' stipulated and extended the reasons for refusal of employment of foreign nationals in Russia.

I The Resolution of employment of foreign nationals containing the Decision on inexpedience of employment of foreign nationals for correspondent professions, positions is issued by the State Employment services of the Russian Federation regions with consideration for the method of efficiency assessment of foreign nationals employment in the following cases:

1. Lack of the information on the employer's necessity in employees for substitution of vacant positions in the register of public service recipients in the area of population employment.
2. If the term of submission of the information on the employer's necessity in employees for substitution of vacant positions has been submitted to the State Employment service less than one calendar month as on the date of FMS or its territorial division request to receive the Resolution on employment of foreign nationals.
3. Availability of Russian nationals possessing the required professional qualification and registered in the State Employment centres for the purpose of search for a suitable job (unemployed citizens).
4. The employer's refusal to hire Russian nationals possessing the required professional qualification, including Russian nationals residing in another region.
5. The employer's refusal to hire Russian nationals possessing the required professional qualification and residing in regions (municipal districts, towns) where the amount of unemployed citizens is much higher than the vacant positions.
6. Lack of the information on job positions for which the employer has submitted the Request on necessity in the labour force to substitute vacant positions by foreign nationals for the current year in the register of public service recipients in the area of population employment.

II The reasons for refusal in issue of the employment permit by FMS or its territorial divisions are:

1. The Resolution on employment of foreign nationals issued by the State Employment service of the region of the Russian Federation containing the Decision on inexpedience of employment of foreign nationals for correspondent professions, positions.
2. The information on results of the investigations carried out by Government executive bodies authorised to execute supervision and control functions on the employer that have revealed the facts of violation of the guarantees of material, medical and housing support of foreign nationals.
3. Possibilities to satisfy labour requirements by means of regional labour force including job training and retraining of unemployed citizens, employment of Russian nationals from other regions of the Russian Federation.
4. In case if the employer intending to hire foreign nationals has the unresolved violation of the order of employment of foreign nationals occurred with quota processing within the past or current year.
5. In case if the employer intending to hire foreign nationals has the outstanding debt in salary payment for the period exceeding three months, as well as any unresolved violation of Labour legislation detected by the State Labour Inspection within the past or current year. Lack of possibility to secure the housing for foreign nationals in the regions where the employment of foreign nationals is intended.

FMS can suspend the employment permit in case of

violation of Russian immigration legislation by the employer till elimination of these violations within the established term.

FMS can suspend the employment permit in case if the Employer:

1. Has failed to receive the work permit for a foreign national.
2. Has failed to notify the territorial authority of FMS on the place of foreign national's stay within three working days.
3. Has failed to notify the tax authority on the place of stay or work, or on the receipt of the work permit, or on signing of a new labour/civil law contract or cancellation of the work permit within ten working days.
4. Has failed to send the information to the territorial authority of FMS on the violation of a foreign employee of the terms and conditions of the labour or civil law contract as well as on the early termination of the contract within three working days.
5. Has failed to notify the territorial authority of FMS and territorial authority of the federal executive body authorised for security issues on unauthorised leaving of a foreign national from the place of work or place of stay within three working days.
6. Has failed to secure the guarantees of material, medical and housing support of a foreign national.

The employer is not permitted to transfer its employment permit to any other employer within the same region.

The work permit process

Once the employment permit is issued, the employer may apply for an individual work permit for the foreign national. The work permit application is submitted to the DFMS.

If the application is approved, a work permit will be issued. The validity of the work permit will be equal to the employment permit validity but not for more than one year. The permit is valid only for employment with the particular employer and only within the particular region.

The work permit issued for CIS citizens will contain information on the validity period (valid for up to one year), but the region does not contain information on the employer which means that these people can work for any employer in the region where the work permit has been granted.

Reasons for refusal to issue a work permit for foreign nationals by FMS or its territorial divisions are:

1. A foreign national arriving in Russia, including foreign nationals arriving without visas, who:

- publicly advocates the violent overthrow of the government or constitution of the Russian Federation or threatens the security of the Russian Federation or its citizens;
- finances, plans, supports or assists in the commission of terrorist acts;
- has been the subject of an administrative action that led to his or her departure or deportation from the Russian Federation within the previous five years;
- has presented false documentation or false or misleading information;
- has been convicted of a serious or violent crime or for the repetition of crime that is considered serious;
- has an unexpunged conviction for a serious or violent crime in the Russian Federation or abroad;
- has committed two or more violations of Russian immigration legislation;
- has left the Russian Federation to establish a permanent residence in a foreign state;
- has been outside the Russian Federation for more than six months;
- is drug-addicted or has failed to provided the HIV certificate or has any of the infectious diseases that pose a hazard to others. The list of such diseases and the approved method to determine of its presence or absence is stipulated by the Government of the Russian Federation.

2. If a foreign national is younger than 18 years old.
3. Employment of a greater number of foreigners than stipulated in the employment permit.

An issued work permit is to be cancelled by FMS or its territorial authority if a foreign national:

1. Publicly advocates the violent overthrow of the government or constitution of the Russian Federation or threatens security of the Russian Federation or its citizens.
2. Finances, plans, supports or assists in the commission of terrorist acts.
3. Has been the subject of an administrative action that led to his or her departure or deportation from the Russian Federation within the previous five years.
4. Has presented false documentation or false or misleading information.
5. Has been convicted of a serious or violent crime or for the repetition of crime that is considered serious.
6. Has unexpunged conviction for a serious or violent crime in the Russian Federation or abroad.
7. Has committed two or more violations of Russian immigration legislation.
8. Has left the Russian Federation to establish a permanent residence in a foreign state.
9. Has been outside the Russian Federation for more than six months.
10. Is drug-addicted or has failed to provide the HIV certificate or has any of the infectious diseases that pose a hazard to others. The list of such diseases and the approved method to determine its presence or absence is stipulated by the Government of the Russian Federation.

The invitation process

Upon issue of the work permit (with a Russian legal entity) or upon issue of the accreditation card (in case of a representative/branch office of a foreign legal entity), the employer should apply to the DFMS for invitations for a foreign employee and his/her accompanying family members. The initial invitation letter will be issued for three months. Upon its issue, the original should be delivered to a foreign employee who will thereafter apply to the Russian consulate for a visa.

The work visa application process

Upon receipt of the invitation letter, a foreign national may apply for a work visa at the Russian consulate. As the result, a foreign national will receive a three-month single work visa. Once the foreign national enters Russia, the employer should apply to the DFMS for conversion of a single work visa into a multiple one valid for the same period as the work permit, limited up to one year. The work visa can be extended every year on the territory of the Russian Federation, provided the work permit is renewed in the due time and manner.

Accompanying family members

A foreign employee may be accompanied by a spouse and unmarried children under the age of 18. Each family member who possesses his or her own passport must obtain a separate invitation letter and visa accordingly. Children who do not have their own passports should be included in a parent's visa application (either the foreign employee or a spouse, depending on whose passport the child is included).

Accompanying family members are not allowed to work unless a separate work permit is processed.

Notification requirements

All foreign nationals must notify the DFMS of the place of their stay within three working days upon arrival in Russia. If the foreign national is staying in a hotel, the hotel is responsible for completing the notification requirements. Upon his/her departure, the sponsoring company should notify the immigration authority on departure of a foreign national by way of sending the detachable part of the initial notification form back to the DFMS.

In addition, the employer must notify the appropriate tax inspectorate within ten days of the foreign national's arrival. The Territorial Employment Centre and DFMS should be notified within ten working days upon engagement by the client of a foreign national arriving in Russia by a method not requiring a visa; while the Territorial Employment Centre and State Labour Inspection should be notified within 30 days upon engagement by the client of a foreign national requesting a visa.

Changes or termination of employment

A foreign national is allowed to work only for the employer sponsoring his/her work permit, and in the region noted there. In order to begin the new engagement, a new employment and work permit should be processed by a new employer company. However, if the legal status of both employers (current and prospective) are the same (ie, if both are Russian legal entities or both are offices of foreign legal entities) the visa can be transferred from one employer to the other, provided that a new work permit is processed in the due time and manner.

Nationals of the CIS may work for any employer, though they are restricted with respect to the region.

In all cases, if the employer or foreign national terminates the employment, the employer is responsible for transportation costs and administrative expenses in connection with the foreign national's departure, as well as for notification to correspondent state authorities on the employment termination.

Restrictions on travel

The Russian government has placed restrictions on a foreign national's ability to travel to certain closed administrative territories. A foreign national who is required to go to such a closed territory for any purpose must obtain special permission to do so. The municipality will request the approval of the Federal Security Service and the Ministry of Defence in order to grant entry and exit permission to the foreign national.

Current developments in Dutch immigration

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Holland is buzzing with action. Each and every government department involved in immigration is recalibrating its legislation. The Ministry of Justice is organising expert meetings on the blueprint for a new immigration policy (the eight-tier system, anticipated for 2011), involving policy officers as well as practitioners in the debate. The immigration service is involved in the Amsterdam Expatcenter pilot, a high-profile joint venture with the city of Amsterdam, and is also setting up a combined front office with the Central Labour office in The Hague. Even the Ministry of Employment is making an effort, organising brainstorming sessions in order to modernise the Employment of Foreigners Act.

If all of this is not purely cosmetic, it would seem that we are actually moving forward to meet the Lisbon 2010 standards. One thing is clear: all of these efforts are aimed at more lenient admission criteria and more welcoming procedures. It seems that all of a sudden everything is possible. For example, the Expatcenter allows immigrants to apply for a residence permit from within their country of origin. This is one of immigration's sacred cows under attack, and certainly not the only one.

This article is set out as follows. First, some recent history. Then, the Amsterdam Expatcenter process is explained. Next the main business immigration schemes are briefly described, highlighting new developments such as the new points-based system for entrepreneurs.

The recent past

In 2005, the former Immigration Minister Mrs Rita Verdonk gave the restrictive policies for foreign workers a 180 degrees turn. She introduced the Knowledge Migrant Regulation (KMR scheme) which must have shocked the Immigration Service (*Immigratiedienst,* IND). The first uncompromising liberal immigration scheme was a fact.

In the meantime, the IND has adapted pretty well to the new approach. The KMR desk of the IND has dutifully supported the Ministry of Justice in fine-tuning the KMR scheme. For example, family members of Knowledge migrants who travel separately from their sponsor now also enjoy a two-week decision term, and graduates from Dutch universities have a full search year instead of three months, and a salary threshold of only €25,000.

In the slipstream of the KMR scheme, several work permit schemes were enhanced and a points-based system for entrepreneurs introduced in 2008. With adequate admission criteria now in place, the focus is shifting towards more practical issues, such as fast-track application procedures and one-stop shop immigration desks.

Expatcenter Amsterdam

The Expatcenter Amsterdam, a joint effort of the cities of Amsterdam and Amstelveen, together with the IND, opened its doors in June 2008. The Expatcenter, located at the World Trade Center, conveniently close to Schiphol airport, is a one-stop shop for expats travelling to the Amsterdam area.

The process allows expats to collect their residence permit and be registered in the municipal records during one visit, whereas several visits are normally required. They receive their tax number within a few days, by post, instead of collecting it in person at the tax office. Practical things are also facilitated such as opening a bank account and exchanging a foreign driver's licence.

The residence permit application can be submitted by the employer while the employee is still in his or her country of origin. They can have their appointment at the Expatcenter within four weeks from the date of application, or two weeks if they are exempt from entry clearance. They fly in shortly before the appointment, collect the permit and start working immediately afterwards.

In a first phase, ten companies were asked to participate in a pilot project. As from 16 September 2008, all companies in the area are in principle allowed to take part, provided they are registered with the IND as Knowledge migrants employers (see below).

The system still has some teething problems, but the IND and the city of Amsterdam are keeping in close contact with the participating companies and their immigration advisers, and are making a huge effort to enhance and perfect the system.

The Expatcenter is the first in a series of one-stop shops and fast-track procedures in various regions of the country, in particular Eindhoven and Rotterdam.

The Central Labour office is also working with the IND on a joint front office in The Hague for companies which do not have a KMR registration or prefer to use regular work permit schemes (see below).

The intensity of these joint operations is something new, and might well mark a dramatic change in the Dutch climate for business immigration.

A bird's eye view of new and existing immigration law

This paragraph covers three subjects:
- The KMR scheme
- Work permits
- Entrepreneurs/investors.

It should be kept in mind that citizens of the European Union, of the EEA (Norway, Iceland and Liechtenstein) and Switzerland are entitled to work in all EU countries without work authorisation (except Bulgarians and Romanians, who do not have access to the Dutch labour market yet).

The Knowledge Migrant Regulation (KMR scheme)

The KMR scheme is fast and easy. It involves a salary threshold only, no skills or education test, and the processing time is two weeks. Applications are only available online, and only to IND-listed employers. For the current list of employers see: **www.ind.nl/nl/inbedrijf/wonenenwerken/kennismigranten/organisaties_in_procedure.asp**

The current salary thresholds are €47,565 gross salary per annum for those aged 30 or over; €34,881 for those under the age of 30; €25,000 for graduates from Dutch universities and polytechnics, who also have a search period of 12 months to find a job with a KMR employer. For researchers at designated universities and research institutes the salaries prescribed in the functions grid of the institute serve as a threshold.

Work permit schemes

The general work permit scheme, which prescribes a labour market test, is virtually unfit for business immigration. Instead, employers should aim at using a preferential work permit scheme (if not the KMR scheme), typically involving a waiver of the labour market test. Companies also intensively make use of exemptions to the work permit requirement as such eg, for business meetings and short-term software implementation.

Intra-company transfer scheme (ICT)

The ICT scheme is still the most frequently used scheme for temporary assignments of up to three years. It is open to foreign-based companies with an annual sales turnover of at least €50 million. There are four types of transferees: managerial staff, specialist staff, trainees, and employees transferred in connection with the transfer of specific know-how and techniques.

	Salary	**Position**	**Education**	**Maximum duration**
Managerial	€47,565	'Polytechnic level'	No formal requirements	3 years (extendable)
Specialist	€47,565	'Polytechnic level'	No formal requirements	3 years (extendable)
Trainee	Market level	In trainee programme	Polytechnic degree	Less than 3 years
Technical	Minimum wage	Transfer of know-how/ techniques	Polytechnic degree	Less than 1 year

International companies with less than €50 million sales per annum, who want to open up a Dutch branch or expand their existing Dutch business operations, are allowed to transfer key personnel to supervise the operation. No specific requirements apply, only a business plan and solid financial justification.

Interns

Two types of interns are eligible for a work permit: interns (*stagiaires*) who are still in university or at a polytechnic, and trainees (*praktikanten*) who are already working in their country of origin but need further training on the job in the Netherlands.

Academics

Academics are exempt from the labour market test as well, including PhD students and junior researchers. For fellowship lecturers a work permit of one year can be obtained. In all cases the minimum wage is the threshold. For spouses who want to work, employers can obtain a work permit without a labour market test. For project researchers who remain on the payroll of the sending university or polytechnic, a permit for two years can be obtained.

Work permit waivers (assignments shorter than 90 days)

The most important category is the one for incidental labour activities, more specifically its two subcategories: software implementation and business meetings.

Work permit waiver for 'incidental activities'	
Software implementation Note: This exemption is generally indicated as 'software implementation', but is in fact much broader than that.	Assembling and repairing tools, machines or equipment, supplied by [his] employer established outside the Netherlands, or implementing and adapting software supplied by [his] employer established outside the Netherlands or instructing in the use thereof.
Business meetings	Business negotiations and the conclusion of contracts with companies and institutions on behalf of a constituent established outside the Netherlands.

Work permit waivers (assignments over 90 days)

A few examples: foreign news agency correspondents, NATO civilian staff and EU researchers. Then there are the working holiday programmes with Canada, Australia and New Zealand. WHP applicants should be under 31 and can remain one full year during which they have full access to the Dutch labour market.

Independent entrepreneurs/investors

The points-based system was introduced on 3 January 2008. Points can be earned for personal experience, business plan and added value for the Netherlands. Per category 100 points can be earned, whereas the required minimum per category is 30 points.

	Category	Maximum points	For example:	points
Experience (30 points required)	Education	40	Masters degree	30
	As entrepreneur	35	company owner	30
	As employee	10	senior > 5 years	9
	In the Netherlands	15	Dutch client	5
Business plan (30 points required)	Commercial prospects	50	market analysis	15
	Organisation	10	Supporting the product	10
	Financial justification	40	Capital > €10,000	15
			Sales > €125,000	10
Added value (30 points required)	Innovativity	40	Patents	20
	Job creation	30	3-6 with wage > €45,000	20
	Investments	30	assets > €100,000	20
			assest > €1,000,000	30

Entrepreneurs are considered independent if they own more than 20 per cent of the company. The age threshold is 60 years.

Artists, sports people

Independent artists, musicians and dancers should obtain a substantial assignment from a Dutch cultural institution as evidence that the Dutch cultural interest is served by their activities. Sports people eg, athletes, have to perform at the level of at least the Dutch top-8 in their sport or discipline.

United States, Japan

Nationals of the United States and Japan do not have to prove that they serve the Dutch interest, pursuant to bilateral treaties. The Treaty of Friendship and Trade between the United States and the Netherlands allows US entrepreneurs to obtain a residence permit, provided an element of trade between the two countries is involved in their business and capital is invested of a mere €4,500. Comparable criteria apply to Japanese entrepreneurs, based on the 1913 bilateral Trade and Seafaring Treaty. This agreement used to be ignored by the IND but was put on the map again in case law by Everaert Advocaten. It is yet to be implemented in policy rules.

The European immigration law perspective – update from Europe

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Having started with six Member States only back in the 1950s, since 1 January 2007 the European Union has no less than 25 Member States (and some more are knocking on the door). However, when it comes to laws and regulations there is still a difference between areas of law where the European Union is competent to set legislation and areas of law where the Member States are solely competent. Moreover, there are some (sort of 'grey') areas where it cannot be said any more whether its source is European or national. This is due to the fact that only the EU treaties and EU regulations apply with immediate effect in the Member States whereas EU directives have to be transferred to national law in order to implement a certain framework set by the EU directives. This is also reflected when it comes to the existing immigration laws and regulations, some of them being EU law, some of them still following national rules only. This article summarises some of the EU immigration law principles and sets the scene for (corporate) immigration to Europe. However, the author being German, it is mostly based on German law, though only when it comes to national laws and regulations.

Entry and residence

The question of entry and residence is mostly a matter of or is mostly influenced by EU law. With regard to entry and residence a distinction must be made between nationals of the European Union, of the European Economic Area (EEA), of all other privileged countries and of so-called third countries.

EU nationals

As far as entry and residence are concerned there are no limitations. According to Article 18 EC Treaty any EU national is entitled to enter any Member State and to stay there at will. In particular they do not require visas. EU nationals ie, the nationals of presently 25 Member States (Belgium, Denmark, Germany, Finland, France, Greece, Great Britain, Ireland, Italy, Luxemburg, the Netherlands, Austria, Portugal, Sweden and Spain plus the following accession states: Estonia, Latvia, Lithuania, Malta, Poland, Slovenia, Czech Republic, Slovakia, Hungary and Republic of Cyprus) as well as the members of their family therefore only have to keep their passports or any accepted alternative documents with them and to produce such document on request to the responsible public officials. Moreover, any EU citizen will be entitled to get a so-called certificate of residency right which would be given to him officially by the responsible foreigner's office. Further, he/she will have to keep his/her passport with him whilst crossing the border and to show it to public officials if he/she is asked to do so. See Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States ('Freedom of Movement Directive') for further details.

Having said that these rights were laid down in the directive, its content had to be transferred to national law. In Germany, for example, this has been done as follows. Since 1 January 2005 the EU nationals of the Member States specified above only have to fulfil the obligation to register with the responsible resident's registry office ('Meldebehörde') within the registration periods that are stipulated in the applicable statute of the respective German Federal State (approximately seven to 14 days after taking residency). The resident's registry office will submit any information and supporting documents to the responsible resident's registry office. The latter may also request that the preconditions for the right to free movement of workers are proven as probable within an appropriate period of time. The information required to establish the probability can be submitted to the responsible registry office when registration is made and shall be presented there, if required, by showing the original document and a certified translation.

EEA/Swiss nationals

On a par with EU nationals are the nationals of the states of the EEA (Iceland, Liechtenstein, Norway); they also enjoy freedom of movement and are solely obliged to get registered.

Swiss nationals are entitled to move freely throughout the European Union and are on a par with EU nationals.

Nationals of central and eastern European Member States

The same applies for nationals of central European and eastern European Member States which became part of the European Union with effect from 1 May 2004 and 1 January 2007 (see above), the so-called 'new' Member States. As far as entry and residence are concerned there are no limitations. According to Article 18 EU Treaty *any* EU national is entitled to enter any Member State and to stay there at will. This also applies to nationals of the new Member States. In particular they do not require visas, are entitled to get a so-called certificate of residency right and must keep their passports with them while crossing the border and show it to public officials if asked to do so.

Privileged nationals

Finally, the citizens of certain (mostly industrial) states enjoy a privilege with regard to entry and residence. Due to a so-called positive list, nationals of certain countries (eg, Argentina, Brazil, Canada, Israel, Japan, United States) are exempted from the general obligation to apply for a visa before crossing the external borders of the European Union if they are not going to stay for more than 90 days. As this privilege is laid down in an EU regulation ('Council Regulation (EC) No 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement'), nationals from the listed countries benefit from it when going to any of the EU Member States.

Third-country nationals

All other citizens eg, citizens that have neither EU nor EEA nationality nor the nationality of a privileged country do require visas. They have to apply for such visas before entering any EU Member State. According to EU laws and regulations these so-called third-country nationals do not benefit from any privilege with regard to entry and residence. However, this is subject to multilateral and bilateral agreements dealing with such privileges on a 'lower' than European level between the countries.

Possible options to non-existing EU work permits

As a matter of principle, any third-country national, before starting to work in Europe, needs to be granted a residence and work permit which, in principle, will only be granted if no privileged employees from the old Member States of the European Union, the EEC and Switzerland are available to do the job. However, there are some possible options if certain conditions arise.

No option (!): business visa

First, despite what many people think – and practise (!) – the business visa category is not an option to obtain a work permit in any of the EU Member States. Employees of internationally operating companies often use a visitor's visa for business trips in Europe without being aware of which activities are actually permitted under this visa and which are not. Even if such violation of the legal provisions on residence and work permits is often unnoticed and consequently not punished there are considerable consequences for all persons concerned if an illegal residence is detected by the responsible authorities. The following provides initial support for all persons concerned, companies as well as their employees, with regard to the definition and correct assessment of their conduct.

The grant of a business visa is regulated in the provisions of § 6 Residency Law as well as by the regulations of the Schengen Implementation Convention and its implementing regulations. The Member States of this Convention are Belgium, Denmark, Germany, France, Finland, Greek, Italy, Ireland, Luxemburg, the Netherlands, Norway, Austria, Portugal, Sweden and Spain. For the time being the provisions of the Schengen Convention are not or are only partly applicable to the new Member States which joined the European Union since 1 May 2004 and 1 January 2007 (see above).

Under certain circumstances a foreigner can, on the basis of these regulations, be granted a Schengen Transit Visa or a Schengen Visa permitting stays in the signatory states of the Convention for a period of up to three months. The visa for short-term stays can also be granted for several stays for a period of validity of up to five years; provided that the duration of stay does not exceed a period of three months within a six-month period, counting from the first day of entry.

The applicant must be in possession of a valid passport and, if required to do so, hold a valid visa unless there is an exemption from the duty to obtain a visa. He/she moreover is obliged to produce such documents upon request in order to substantiate the purpose and circumstances of his/her stay. Which documents are required in the particular case depends on the possible risk of illegal immigration and the respective conditions.

The visa may only be granted if the presence of the

foreigner does not affect or endanger the interests of the Federal Republic of Germany. In order to make a decision on the application the following matters are considered: the personal interests of the applicant and humanitarian issues, the security interests of Germany and the Schengen partners, and the willingness of the traveller to return home. Therefore, for each application the individual case is examined. The applicant must prove that his/her stay in the Federal Republic of Germany is financially secured. Above all he/she may be dependent on obtaining public funds for his/her stay in Germany. If he/she is not in a position to finance his/her trip and stay from own funds, a host residing in Germany may assume liability for any costs arising from the visitor's stay in Germany, including the costs of possible medical treatments. The German resident's registry office at the place of residence of the person inviting shall be responsible for the recording of such a declaration of commitment. As a result of a decision of the European Council travel health insurance with cover of €30,000 is required for all Schengen states. Such insurance should preferably be taken out by the applicant in his/her home country, but can also be done by the person inviting. In any case it should be effected in good time so that the policy or an equivalent certificate – preferably in German or English – can be submitted when the application is filed. Entry to Schengen territory will be denied if the applicant is registered in the Schengen database for refusal.

Third-country nationals holding a visa which is not limited in space (visits and business stays of up to three months during a six-month period as well as transit and airport visas) and which is issued by a state which has implemented the Schengen *acquis* to its full extent, are allowed to stay in the other states that are fully implementing the Schengen Convention within the scope of validity and in compliance with the purpose of the visa; they are also not subject to controls when crossing internal frontiers.

In practice very often no attention is paid to the fact that there is no entitlement for taking up gainful employment (ie, for taking up dependent employment) deriving from a visitor's visa which is granted eg, on the occasion of a business trip. Against this background any activities implying such dependent employment are not admitted. This particularly applies, but is not limited, to the following activities:

- participation in training;
- organisation of training courses for the transfer of knowledge;
- participation in the operational business, resp. in production;
- performance of services.

Accordingly, the following activities are admitted:

- participation in meetings;
- conducting negotiations;
- purchase of goods;
- conclusion of contracts with German business partners.

If it is not clear whether the intended activity is still covered by a visitor's visa or if the prior acquisition of a residence permit for the purpose of gainful employment is obligatory, it is recommended that the responsible resident's registry office be contacted. In each individual case the office will, if so required, contact the employment office which is responsible for the internal approval of the intended employment.

Ignoring the aforesaid restrictions is especially problematic if the country was entered with a visitor's visa in order to take up gainful employment at a later date. As far as Germany is concerned, the sanctions against such commencement of work without a residence title for the purpose of gainful employment have recently been tightened. If they are ignored, administrative fines of up to €500,000 can be imposed; in individual cases the person concerned can be expelled from the country and a (re)entry ban can be imposed.

Option: Van der Elst - visa

In principle, in Europe a work permit is usually only granted if the applicant has successfully passed a job market test or is subject to any regulation allowing exemption from such test. In Germany, the latter applies inter alia too. However, if certain conditions are met there might be a possibility for third-country nationals to come to EU Member States without having to apply for a work permit and having to pass such job market test first. This is due to the so-called 'Van der Elst – visa' which is based on the case law of the European Court of Justice (ECJ) rendered with regard to Article 49 EU Treaty. In Germany, this is reflected in Section 15 of the Employment Regulations ('Beschäftigungsverordnung') as follows:

> '§ 15 Service delivery
>
> For the grant of a residence title to persons who are ordinarily employed in the residence country of a company that is based in a Member State of the European Union or in a contracting state of the treaty on the European Economic Area and shall be relocated to the Federal Republic in order to perform services no approval is required.'

The regulation implements the case law of the ECJ which stipulates that a temporary relocation of employees who are third-country nationals for the purpose of cross-border services is generally protected by the freedom of services pursuant to Articles 49 *et seq* EC Treaty (starting with the legal matter C-43, 93

– 'Vander Elst' of the ECJ). The amendment, which became effective on 11 July 2007, was required as a consequence of the judgment given by the ECJ in C-244/04. For a visa application the agencies abroad check whether the preconditions stipulated in the ECJ case law guidelines are fulfilled. Different from the previous regulation there is no need to have had a previous employment for a certain time in the country where the employee has been employed before the assignment (such regulation being regarded as non-compliant with EU laws and regulations by the ECJ in January 2006). However, the visa scheme is only applicable if there is an employment between the third-country national and the service provider having its seat in another EU country and if the assignment is going to last for a certain period of time. In case of any uncertainties as to whether or not this scheme works it is recommended that competent authorities are involved in order to get a clearance certificate.

This visa category should exist in more or less the same manner in every EU Member State so this is an EU-wide option; however, this should be checked with local counsel.

Option: EU blue card?

Another option in the future might be the 'EU blue card'. On 24 July 2008 the responsible ministers of the EU Member States discussed the Commission's guideline proposal regarding immigration law which is dated 23 October 2007. Amongst other things the Commission proposed to the Council to facilitate the immigration of highly-qualified staff from third countries by implementing a so-called 'blue card' in order to make Europe attractive to skilled employees. Throughout Europe standard requirements shall be implemented with a view to the immigration of skilled employees. Besides a recognised diploma, for the blue card proof is also required of a minimum professional experience of three years and a one-year contract in the European Union with salary amounting to not less than triple the minimum salary. Then the applicant and his/her family are granted a residence permit of up to two years which can be extended. At the same time the regulations providing for facilitation of entry as currently applied in the Member States will be retained. The implementation of a blue card will in the first instance have no factual influence on the legal situation in Germany where numerous special rules have already been enacted regarding the entry of highly-qualified staff. The proposal may be accepted by the Member States by the end of the French EU Council Presidency at the end of 2008. Unanimity of the European Council is required.

Outlook

Currently, there is indeed no EU immigration law, but different national immigration laws in each of the Member States that are to a large extent influenced by EU laws and regulations. Nevertheless, it can be stated that the impact of the EU laws and regulations is getting more and more important. However, there is no way that the European Union is setting a legal framework beyond the powers entitled to the Union by the Member States. Against this background it has to be seen whether the Member States are willing to agree to the EU blue card and other future proposals.

Is it work? Or isn't it?

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The Immigration and Refugee Protection Act ('IRPA')[1] and its Regulations have been in effect since 28 June 2002, and provide more flexibility to hire foreign workers than previous immigration legislation. However, employers should plan carefully when considering international relocations, to avoid the pitfalls that plague the system, including misunderstanding as to who can work in Canada and for how long, delays at visa processing posts overseas and compliance with Service Canada requirements for obtaining Labour Market Opinions ('LMOs').

Definition of 'work'

A foreign worker may be authorised to work in Canada without a permit or may be required to obtain one. The first step in determining whether a work permit is needed, is to consider the nature of the activities to be performed by the foreign worker. 'Work' is defined in Section 2 of the IRPA Regulations as an activity for which wages or commission are earned, *or* which competes directly with Canadian citizens or permanent residents in the labour market.

If a foreign worker performs an activity that will result in receiving remuneration, he or she will be engaging in 'work'. This includes salary or wages, commissions, receipts for fulfilling a service contract, or any other situation where foreign nationals receive payment for the performance of services. Even if the foreign worker does not receive remuneration, the activities performed may still constitute 'work' if there appears to be an element of competition with the local labour force. To determine which activities could be considered 'work', ask yourself the following questions:

- Will the foreign worker be doing something that a Canadian or permanent resident should really have the opportunity to do?
- Will the foreign worker be engaging in a business activity that is competitive in the marketplace?

The answers to these questions are not always obvious. Some examples of 'work' may include but are not limited to:

- technical personnel coming to Canada to repair machinery or equipment, even if they are paid outside Canada by a third party contractor;
- a foreigner who intends to engage in self-employment, either directly or by receiving commissions or payment for services.

On the other hand, the following activities are not considered to be 'work':

- volunteer work for which a person would not normally be paid, such as activities for charitable or religious institutions;
- helping a friend or family member with housework or childcare in the home;
- attending meetings on behalf of a foreign employer to discuss products or services, take orders or specifications for a manufacturer abroad.

In a recent case, the Federal Court had to decide the scope of the term 'work' as defined in the IRPA Regulations. In *Juneja v Canada*,[2] the court was faced with an interesting fact situation: Mr Juneja entered Canada with a study permit, which prohibited his employment unless authorised by Citizenship and Immigration Canada, a standard requirement. During the course of an investigation, Mr Juneja was observed to be working at a local automobile dealership in Edmonton. He was arrested for working without authorisation, contrary to Section 30(1) of the IRPA.[3] An admissibility hearing was then convoked where Mr Juneja was declared to be inadmissible to Canada and issued an exclusion order requiring him to leave the country. Mr Juneja did not dispute the fact that he was not in possession of a work permit; however, he contended that his activity did not constitute 'work' as defined in the IRPA Regulations. Mr Juneja argued that he was not being paid, and that he was only keeping track of his time in case he received the authorisation to work in Canada. Although there was some dispute about the factual context, it was clear from the evidence that the employer had agreed to pay him CAN$8 an hour retroactively for the time he had spent performing his services at the dealership, should he receive his work permit.

At the admissibility hearing, it was determined that this 'contingent' arrangement entered upon between Mr Juneja and the dealership owner was an agreement to bank Mr Juneja's hours and to pay him a wage, albeit conditionally and, therefore, it was either an activity for which wages are paid or reasonably expected, or which is otherwise in direct competition with the employment activities of Canadians or permanent residents. Therefore, the tribunal concluded that, despite the fact that Mr Juneja was not being paid immediately, his activities constituted 'work' as defined in the IRPA Regulations.

Upon judicial review, the Federal Court entertained the question of whether a contingent arrangement

to pay a wage for work performed meets the legal definition of 'work' as set out in the IRPA Regulations. The question was answered in the affirmative. The Court held that Mr Juneja had an expectation of future payment and the dealership had at least a conditional, and perhaps an absolute, legal obligation to pay for the work that he performed. This activity was of a character for which wages are paid or anticipated.

The Court further held that, even if Mr Juneja was correct in arguing that the definition of 'work' sets an absolute standard which is not fulfilled by a conditional arrangement for payment, his conduct was still caught by the second part of the definition, that is, 'the performance of an activity in direct competition with the activities of Canadians and permanent residents' in the Canadian labour market: his employment directly competed with others who were legally entitled to work in Canada, and this was so whether a wage was paid or not. The Court rejected the contention that the second part of the definition of 'work' only applied to self-employed persons, and held that the definition contains no such qualification.

Further, the Court also referred to the Regulatory Impact Analysis Statement (RIAS), published with the regulations in the Citizenship and Immigration department guidelines, indicating that the definition of 'work' includes unpaid employment undertaken for the purposes of obtaining work experience, such as an internship or practicum normally done by a student. This could have serious implications for many small businesses which are not normally familiar with work permit requirements and are rather lax when hiring help.

Lastly, the Court referred to pre-2002 litigation on the matter and noted that the definition of 'work' had been changed, and that the previous provision spoke of 'an activity for which a person received or might reasonably be expected to receive valuable consideration'. That provision made no reference to competing for work that should otherwise be available to Canadians. The Federal Court had already found in the previous case of *Georges v Canada*,[4] that the essential concern of that definition was to protect employment opportunities for Canadians whether wages were paid or not. The Court reasoned that neither *Georges*[5] nor the later case of *Bernardez v Canada*[6] on the same subject could support a finding that Mr Juneja was not working whether under the prior or current definition of 'work'.

In light of this recent Federal Court decision, it is important that individuals not be engaged to perform any services, either paid or where a reasonable expectation of earnings exists, without first obtaining a work permit for a specific employer and activity, in accordance with the IRPA Regulations.

Notes

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1 SC 2001, c27.

2 2007 FC 301.

3 30(1) Work and study in Canada – a foreign national may not work or study in Canada unless authorised to do so under this Act.

4 [1978] FCJ No 140; [1979] 1 FC 349 (ca).

5 *Supra.*

6 (1995) 101 FTR 203; [1995] FCJ No 1927.

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