GLOBAL MOBILITY

An Overview for Human Resource Professionals

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LawQuest
Advocates & Solicitor (E & W)

THIRD EDITION

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Foreword

There are many complex concerns surrounding the assignment of staff across the globe, not the least of which is figuring out what you need to know and understand.

Poorvi Chothani Esq., a triple degree holder with more than 25 years of experience in general business and global immigration laws is the Editor of this book. Poorvi who is the founder and managing partner of LawQuest has worked closely with us over the last eight years. Poorvi's team at LawQuest has the legal expertise and extensive specialized knowledge of global immigration, which has helped Serco BPO Private Limited through various phases of expansion overseas.

Each chapter is authored by distinguished lawyers, who are immigration experts in their respective country/jurisdiction. The insights provided by each author are highly informative and extremely valuable from a business perspective.

The *Global Mobility Handbook, Third Edition* is a ready reckoner helping us understand the visa and work permit needs for key locations.

We hope that this practical and focused publication gives you a head start on your global journey.

Manuel D'Souza

Chief Human Resource Officer
Serco BPO Private Limited

Foreword

"Creating harmony amidst diversity is a fundamental issue of the twenty first century. While celebrating the unique characteristics of different peoples and cultures, we have to create solidarity on the level of our common humanity, our common life. Without such solidarity, there will be no future for the human race. Diversity should not beget conflict in the world, but richness". - Daisaku Ikeda

What makes a country rich? Conventionally, statisticians and economists have relied on factors of national income like GDP or monetary measures like Net National Wealth to define the pecking order of rich and rising nations. Others argue that given the surging demand for commodities over the last century, the die is cast in favor of countries gifted with abundant natural resources, like Brazil, Russia or Australia.

But what if we took a holistic view? One more in tune with the sensibility and sentiment of our times. A view which allows us to look at general wealth as an equation made up of both monetary and non-monetary assets. I believe this isn't a purely academic exercise. In fact it has deep meaning, because we increasingly live in a world where digital flows rival material flows, intellectual assets challenge physical assets and perhaps most importantly, national wellbeing trumps sedentary wealth. A country today, where residents have access to health, happiness and meaningful education and where communities put a premium on harmony, integration and equality, is far better off than one with vast material wealth built on widening income inequality or increasing functional illiteracy.

At a systemic level too, we have developed a more nuanced worldview. Polarized constructs of allies and enemies are fading rapidly, as economic and political rule books increasingly follow divergent principles. A seamless flow of goods, services and technology now necessitate a world built on communication, negotiation and collaboration.

As a direct consequence, our world now requires a new lexicon of leadership skills. In specific, skills which promote conservation, sustainability, diversity, empathy, re-learning, rapid pivots and co-creation. But more than any other, the need of the hour are future leaders with a finely developed global perspective. This is where mobility becomes a key tool for both national and organizational success. And I am not the only one saying this. The World Economic Forum, in their recent Outlook on the Global Agenda 2015, rated *"global perspective"* as the number one leadership skill needed in the three largest economic theatres on this planet: North America, Europe and Asia. And our best and brightest talent want this. A flurry of recent evidence shows that

on one hand corporate talent mobility is expanding at over 20 percent per annum, whilst on the other, young university graduates are now more open to working overseas than ever before. In fact many see it as a key milestone in developing their long term careers. To make this happen, Human Resource Managers must become masters of mobility management, with deep skills in workforce enablement and planning. And in the same vein, HR experts need to rapidly build capability to map and read global talent economics.

Remember, in a technology driven world, not only is talent more nomadic, jobs are increasingly portable too. Today, talent mobility and job mobility form two sides of the same equation. Resources such as the 2015 Guide to International Mobility are key tools which help us shape a world rich in diversity, experience, capability and talent. It has the power to assist organizations, policymakers and individuals in understanding how the ebb and flow of global mobility will reshape our global economy in the days to come. I wish the book, its editor and collective group of authors all success.

Gyan Nagpal

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Winning and Losing the Global War for Talent.
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Global Mobility – An Introduction

Poorvi Chothani

As organizations in many regions struggle to source the talent they need, business leaders are focusing on specific groups of the workforce and personalizing their recruitment and retention strategies to suit them. The millennial generation expects to work on their own terms with an emphasis on experiences and opportunities instead of career stability and loyalty to employers. They do not think twice before changing employers for career growth or even moving to different countries. In fact, according to several studies more than 50 percent of employees in certain groups want to work 'abroad.' With a view to recruiting and retaining talent, many companies offer international work opportunities as an incentive. The need for a global staff is further exacerbated by demographic changes across the world – countries like India, Pakistan and the Philippines are getting 'younger' while many countries in Europe as well as countries like Japan and China are getting 'older.' Added to this companies are rapidly going global and many of these are Indian companies; leading to a need to post employees abroad at short notice. In view of tax, social security and most importantly immigration challenges, this is easier said than done.

Companies are required to deploy their staff at short notice, however, tax, social security and immigration requirements are conscientious and often stand in the way. Further, there are constant changes across the globe considering the politics involved and the political unrest which in turn would affect global mobility strategies. Subsequently, governments and all the involved supervisory bodies will have to accept the economic benefits in order to stimulate economic growth rising out of talent mobility. Such acceptance would definitely pave the way for a much better collaboration between governments and businesses to remove the hurdles to mobility across the globe.

Keeping the future in mind, businesses should create better global mobility strategies to enable to deploy workforce to different jurisdictions at short notices keeping with the ever changing constraints of global immigration law.

The line between international assignments and business travel is becoming more blurred as time moves on. It would therefore make sense for the companies to manage and deal with business travel and global mobility on the same platform which would help reduce any compliance risk.

To meet these corporate challenges, the HR staff at companies are required to manage compliance and risk, while ensuring that the employee's experience is good as otherwise it could affect his tenure with the company. Further, their other tasks include, finding best value for money from the service provider, develop and manage teams to look after

the global mobility functions, obtain information from service providers at short notice etc.

The pressure on HR to provide evidence and insight to support mobility decisions will only increase in the future, and this means developing a predictive way of thinking – and embracing the technical data techniques that support it. The use of predictive analytics in HR is still in its relative infancy, but an increasing number of organizations are beginning to embrace the concept. The data is available, but more sophisticated analysis would provide valuable trend information and the potential to identify risks. Predictive analysis is already commonly used in other business functions such as sales and marketing, but our research suggests that 95 percent of organizations have only an ad hoc approach to analytics in HR if any at all. This has to change. This third edition of *Global Mobility – An Overview for Human Resource Professionals* is LawQuest's continuing endeavor to provide preliminary guidance to HR professionals. This book serves as a ready tool to help HR meet the demands of this function.

The authors for this book have included recent immigration changes, which affect work permits for their jurisdictions. To list out a few of these changes: The Swiss government recently announced about quotas for highly qualified foreign national workers from the European Union (EU) or assimilated countries, as well as for nationals from other countries and also revised quotas for EU and European Free Trade Association (EFTA) nationals whereas India launched its electronic visa system which would facilitate certain country nationals to obtain Tourist Visa on Arrivals (TVoA). Further, the United Kingdom (UK) has also recently increased the maintenance amounts for its Tier 2 and Tier 5 migrants and the Canadian Government has introduced a new permanent residence application management process called Express Entry (EE), which is a two-step process designed to match Canadian employers with foreign national workers and to streamline the application management process etc.

Going forward, mobility strategies will need to be more sophisticated to deal with growing deployment demands, while simultaneously managing the different needs and expectations of different generation of workers. The best mobility strategies will be responsive, adaptable and constantly evolving to meet the specific requirements of the business and different groups of employees. Also, technology will play a key role in global working arrangements and help to support compliance obligations; however, technology will not erode the need to have people deployed 'on the ground'. The position of HR professionals is becoming increasingly pivotal in providing accurate information to help business units make well informed mobility decisions while HR is required to manage program costs.

ANGOLA

Ana Pedro de Castro and Inês Duarte Galvão

Summary

The Republic of Angola is a country located on the western coast of the African continent, bordered by the Democratic Republic of the Congo, Zambia, Namibia and the Atlantic Ocean on the west. The enclave of Cabinda borders the Republic of the Congo to the north and the Democratic Republic of the Congo to the south. With a population of approximately 16.9 million, Angola covers an area of roughly 1,246,700 square kilometers. The official language is Portuguese and the national currency is the Kwanza (AKZ).

Located on the Atlantic coast, Luanda is the capital of Angola, whilst also serving as the main port and administrative center of the country, which is divided into 18 provinces.

Angola is a member of various international organizations, including the African Union (AU), the United Nations (UN), the Organization of Petroleum Export Countries (OPEC), the World Trade Organization (WTO) and the Southern African Development Community (SADC).

Angola is currently a multi-party republic headed by José Eduardo dos Santos, acting both as Chief of State and Head of Government. The President performs his duties with the assistance of a government and a vice-president. The President is competent to promulgate all legislation enacted by the National Assembly. Specific matters may also be regulated through acts enacted by the President or the Government.

Legal System

The Republic of Angola is a civil law country with a legal system based on legislation and statutes enacted by the National Assembly and other legislative authorities. Case-law and legal doctrine are deemed to be secondary sources of law and are therefore not binding per se.

Court hierarchy and rules of litigation are mainly established in the Angolan Civil Procedure Code, which provides for municipal courts and provincial courts. The Supreme Court is the highest instance of the Angolan judicial order.

A growing number of disputes are settled through alternative means of resolution, most notably, arbitration. However, it should be noted that Angola is not a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Arbitral awards are therefore subject to a specific confirmation or revision procedure to be considered valid and enforceable in the country.

Visas

Under the applicable general immigration legal framework, enacted by Law no. 2/07, August 31, 2007, different types of visas may be envisaged by applicants, depending on the scope or purpose of the visit. In general, the Law foresees a number of consular visas, including the following:

- Short-term visa;
- Ordinary visa;
- Privileged visa;
- Work visa;
- Temporary stay visa; and
- Residence visa.

Angolan Law establishes that foreign nationals are allowed to enter the country as long as they:

- hold a passport or equivalent international id card valid in Angola;
- hold the appropriate visa; and
- they are not subject to entry restrictions or prohibitions.

It is also necessary to provide evidence of sufficient means of subsistence, which generally correspond to USD 200.00 (or equivalent in other currencies), per day of stay in the country. This is perceived as a guarantee that foreign nationals have the means to support themselves during their stay in Angola. However, the above is not mandatory when a foreign national proves that he or she has food and accommodation provided by means of a written statement signed by:

- a national citizen;
- a foreign national resident; and
- the entity or company inviting the foreign national to enter Angola, taking responsibility for the foreign nationals stay.

Additionally, all documents submitted to Angolan authorities have to be in Portuguese or translated into Portuguese.

Ordinary or Business Visa

A foreign national wishing to enter Angola for family or business prospection activities may apply for an ordinary visa with the Angolan diplomatic mission with jurisdiction over his or her place of residence or origin.

This visa allows its holder to stay in Angola for 30 days. It is extendable twice for an additional 30 day period, up to a maximum of 90 days. Extensions are handled by Angolan Immigration Authorities *Serviço de Migração e Estrangeiros* (SME) in Angola.

This visa does not allow its holder to undertake any remunerated activity in the national territory or to become a resident in Angola. Document requirements vary in accordance with the specific Consulate or Embassy which will process the application.

Short Term Visa

Foreign nationals wishing to enter Angola on an urgent basis may apply for a Short-Term Visa, which allows for a stay of seven days, extendable once for an equal period. This visa is granted by the relevant Angolan Consulate or Embassy within 72 hours as of the submission of the request. Extensions are handled by the SME in Angola.

This visa does not permit its holder to undertake any remunerated activity or to become a resident in Angola.

Privileged Visa

Privileged Visas are granted to foreign national investors, representatives or proxies of investing companies in order to facilitate their entry into Angolan territory to implement and execute investment projects approved by National Agency for Private Investment *Agência Nacional para o Investimento Privado* (ANIP). These are generally granted by Consular Missions with jurisdiction over the country of origin or residence, although they may also be requested to the SME in Angola.

Privileged visas must be based on a duly approved investment project and the number of privileged visas which can be granted to a company varies according to the investment amount invested in that company's project, the zone and the sector chosen for the implementation of the private investment project.

Privileged visas allow for multiple entries into the country during a two year period and may be extended for one equal period, for a total maximum stay of four years. Extensions are handled by the SME in Angola. Foreign citizens obtaining this type of visa may subsequently apply for a residence permit.

Work Visa

The appropriate visa to perform temporary and remunerated activities, either in the interest of the State or for another employer, is the Work Visa.

The Work Visa entitles its holder to multiple entries and to stay in the Angolan territory until the end of the Employment Agreement term. In general, this corresponds to a minimum of one year, extendable twice for equal periods of time, to the limit of a 36 month cycle. Extensions are granted by the SME in Angola.

The foreign national who wishes to apply for a work visa needs to submit an employment contract or a promissory employment contract and comply with several additional requirements established by law.

Work Visa holders can only perform the professional activity for which the visa was granted. They are also limited to the carrying out of activities for the employing entity which has requested it. The work visa does not entitle its holder to become a resident in the national territory of the Republic of Angola.

Temporary Stay Visa

Temporary Stay Visas are usually granted to dependents of holders of:

- Privileged visas
- Work visas
- Resident cards

They are also granted to foreign nationals by the Angolan Consular Missions on the following grounds:

- performance of humanitarian activities;
- performance of religious missions;
- scientific work and research;
- family members of study and medical treatment visa holders; and
- spouses of Angolan citizens.

This visa does not entitle its holder to undertake remunerated activities or to apply for a residence permit in Angola. However, Temporary Stay Visas granted to spouses of Angolan citizens and dependents of holders of a valid resident card may be permitted to carry out remunerated activities. These visas are granted for up to 365 days, extendable for equal periods until the situation which has justified the granting of the visa terminates. These visas are granted for multiple entries.

Residence Visa

Residence Visas are specific titles issued by the SME in Angola to foreign nationals notably meeting the following requirements:

- to be present in the Republic of Angola;
- to hold a valid visa for the establishment of residence;
- to have refrained from committing action which would have been considered as an obstacle to his or her entering the country, should these actions have been known by Angolan authorities;
- to be free of any major criminal convictions; and
- to provide evidence of sufficient means of subsistence and housing conditions.

In addition to the above, the granting of the residence title to the foreign national should be of national interest for the country. A specific visa – visa for the establishment of residency in Angola – should be obtained by the applicant prior to applying for a residence title.

Employment and Labor Law

Although the Angolan Legislation regarding employment and labor matters is dispersed, the most important law, the one that lays down the main principles, rules and definitions, is Law no. 2/00, of February 11, 2000, entitled General Labor Law.

In accordance with this Law, an employment agreement may be entered into for an indefinite period of time (which are not required to be written) or for a fixed-term (which must be in written form, despite some exceptions). Fixed-term employment agreements may only be entered into for a maximum limit of 36 months, however, upon request from the employer, renewal of the contract is allowed. Furthermore, general working hours are limited to 44 hours per week and eight hours per day is foreseen, apart from specific cases, as shift-work, modular or variable work schedules, or when the work is intermittent, whereby it is possible to extend the working week to more hours.

In regards to the worker's income, it includes the base salary, benefits and supplements, paid directly or indirectly. In addition, all workers are entitled to holiday and Christmas bonus of 50 percent of the base salary or pro rata if the worker has not yet been employed for at least a year. Angolan Law also anticipates that workers commonly have 22 business days of paid holiday leave per calendar year.

There is no doubt that Angolan Laws complies with the principle of equal rights, duties and guarantees for Angolan and foreign nationals, however, it is advisable to bear in mind that there are some exceptions and that foreign workers are separated into residents and Non-residents. Employment agreements entered into with resident workers are regulated under the General Labor Law. Non-residents are governed by specific regulations (namely, Decree-Law 6/91, of January 19, 1991) and supplementary by the General Labor Law. Consistent with Article 2 of this Decree, a non-resident is a foreign citizen not residing in Angola who has professional, technical or scientific qualifications that Angolan nationals do not have, and who is hired to exercise his professional activity on national territory for a limited period. It is worth mentioning that there are limits to hiring foreign nationals. First of all, companies hiring foreign workers shall have a minimum quota of 70 percent of local national employees and a maximum of 30 percent of foreign national employees (Decree no. 5/95, of April 7, 1995) - principle of "Angolanization". This means that foreign nationals shall only be hired upon demonstration that there were no qualified Angolans available for that job.

Foreign nationals are allowed to be hired only if they meet all the requirements foreseen in the law, namely they must have professional,

technical or scientific qualifications; be mentally and physically fit and not have a criminal record.

The employment agreement must be for a fixed-term and may be entered into between a minimum of three months and a maximum of 36 months. Foreign national employees shall return to his or her country of origin after the end of the contract.

Income Tax and Social Security Contributions

The Personal Income Tax is payable by those whose income results from services rendered to individuals or companies with domicile, headquarters and place of effective management or permanent establishment in Angola.

Even though a new Personal Income Tax Code has been recently approved by Law no. 18/14, of October 22, 2014 – in force since January 1, 2015 – this income is still taxed on the basis of progressive rates in accordance with values indicated on a list attached to the Code and the maximum rate applicable to the Group A (which includes the remuneration paid by an employer entity under an employment contract entered into in accordance with the Labor Law), as well as the remuneration earned by public servants, which stands at 17 percent.

In line with this new regulation, monthly wages lower than Angolan Kwanza (AKZ) 34,450,00 are exempt from personal income tax, increasing the number of taxpayers who benefit from the exemption of taxation. No personal income tax is due over the compensation payments made to employees for employment agreements termination up to the maximum ceilings predicted in the Law. Likewise, no tax is due for the daily payments, representation, and travel and accommodation supplements credited to public employees - provided that they do not exceed the legal limits foreseen.

In addition, meals and transport expenses paid to thecompany's employees are not subject to this tax up to the total limit of AKZ 30,000,00 as well as holiday and Christmas supplements that are not subject to personal income tax up to the limit of 100 percent of the employee's salary.

Non-compliance with personal income tax rules, namely the absence, inexactness and omissions in tax returns, is subject to penalties foreseen in the General Tax Code.

The social security rate in Angola stands at 11 percent. It is shared between the employer (eight percent) and employee (three percent).

Expatriate employees are not required to contribute to the Angolan social security system provided that they are able to prove that they remain covered by the social security system of their country of origin. However, national and resident foreign national employees are subject to the Angolan Social Security system.

ARGENTINA

Héctor Gabriel Celano

Summary

Argentina is a federation of 23 provinces and one federal city, situated in South America. The autonomous city of Buenos Aires is the capital and the largest city. It is the eighth-largest country in the world by size and the largest Spanish speaking nation. The estimated Population is 40,000,000 and it covers an area of 1,068,302 square miles.

Legal System

The Argentine legal system derives from Civil Law. The two principal pillars of the civil system are the Argentine Constitution (1853) and the Civil Code (1871). Argentina's Constitution, like that of most Latin American countries, is very explicit and it's the fundamental source of Argentine law. The Constitution entitles the Congress to enact the Codes concerning civil, commercial, criminal, mineral, labor and social security matters.

The National Government Comprises of Three Branches:

Legislative: The bicameral Congress, made up of the Senate and the Chamber of Deputies, makes federal law, declares war, approves treaties and has the power of impeachment.

Executive: The President is the commander-in-chief of the military and appoints the members of the Cabinet and other officers, who administer and enforce federal laws and policies.

Judicial: The Supreme Court and lower federal courts, whose judges are appointed by the president with Senate approval, interpret laws and overturn those they find unconstitutional. There are two court systems, the Federal Court System and the Provincial Court System.

Visas

The Argentine Immigration Law n° 25,871 was enacted in January 2004 and it guarantees immigrants the right to equal treatment, non-discrimination and access to educational, medical and social services. The Immigration Law sets forth the conditions immigrants must comply with in order to enter and stay in Argentina under four different categories:

- Permanent Residency;
- Temporary Residency;
- Transitory Residency; and
- Provisional Residency.

The regulation of the Immigration law was enacted in May 2010 with decree 616/2010, providing an interpretation and a clearer explanation on how the Immigration Law should be applied by the Immigration Department. Visitors from many countries do not need visas to enter Argentina as tourists (transitory residency) so they can enter the country just presenting their passport at the border or airport checkpoint. Tourist visitors from Australia, United States and Canada are required to pay a “reciprocity fee” when visiting Argentina as tourists but visas are not required. The authorized stay for tourists is generally up to 90 days (depending on the citizenship of the visitor) and this term can be extended for another 90 days at the Immigrations Department. For most residencies or visas other than tourist, a formal filing must be submitted at the Argentine Consulates abroad or the Immigration Department, in order to obtain the appropriate residency visa.

Temporary Residency

Temporary residencies are established in provision 23 of the Immigration Law n°25,871, where more than 12 different subcategories are set forth (artists, students, investors, retirees, etc.) including the employment

residency in provision (23 a). Temporary residencies are typically granted for an initial period of 12 months, and renewable thereafter in similar increments. Temporary residents have an unrestricted right to work only during the term authorized by the Immigrations Department. Employers who hire foreign nationals without the proper immigrations work permits are subject to fines up to United States Dollars (USD) 20,000 approximately per employee as of the date of this publication.

Employment Residency

The Argentine Immigration Law n°25,871 sets forth in provision 23 item ¨A¨ the employment residency visas as a "temporary residency" subcategory.

The work visas or employment residencies petitions can be processed at the Argentine Consulates abroad with an Entry Permit issued by the Immigrations Department or within the Argentine territory if the applicant has already entered Argentina typically as a tourist or a student, since the regulations do allow petitioners to adjust their status from tourists and/or students to workers without having to exit Argentina, in this last case the filing is done directly at the Argentine Immigrations Department in Argentina without the intervention of the Consulates abroad. The physical presence of the applicant is required the day the petition is submitted since biometric data (fingerprints) will be taken for the issuance of the National Identity Card (DNI).

Any employer willing to hire foreign nationals to work in Argentina and sponsor them for a work temporary residency 23 ¨A¨ must first be registered at the Registry of Sponsors of Foreign Nationals (RENURE).

In all cases, applicants of work residencies need a "sponsoring employer" willing to offer them a work contract which will have to be filed at the Immigrations Department along with the proof of registration of the employer at RENURE. Self-employed applicants are not eligible for employment residency.

Employers sponsoring an applicant for a work residency do not have to go through labor certification (prove that they are not displacing Argentine workers) nor they have to prove that the foreign nationals have high levels of professional skills or qualifications needed by the Argentine labor market. There are neither restrictions nor quotas of foreign employees that companies or individuals can hire. Therefore the regulations are quite relaxed in this respect.

Employers who wish to hire foreign nationals, as previously mentioned, must fulfill the registration at the RENURE and eventually immigrations

could request the employer to prove sufficient economic capacity to pay the salaries of the sponsored worker. The salaries offered to foreign nationals by the employers must fulfill the minimum salary established by law or by the collective work agreements of the workers union.

It's required that all applicants submit their criminal records background check from the countries where they have lived during the past three years prior to the petition. Names recorded in these records must be complete and stated identically as the names in the applicants' passport.

Translation of documents that will be filed at the Argentine Immigrations Department must be translated by Official Public Translators of Argentina and legalized by the Association of Public Translators in Argentina, any other type of foreign and/or unofficial translations are not accepted.

Something that is worth mentioning is that the Argentina regulations allow the worker to start working right from the first day he or she entered the petition of work residency or visa at the Immigration Department assuming that the petitioner is already present in the Argentine territory. This means that while the file is under review and pending, until a decision has been made, the applicant receives a provisional residency called *"Precaria"* that allows him or her to start working right away and to obtain a social security number called CUIL at the local Social Security office called ANSES. If the petition is denied, this provisional authorization will be revoked.

During the processing of the work visa, immigration randomly conducts inspections at the employer's premises to corroborate that the worker is actually fulfilling on site the work relation that has been reported to immigrations with the petition. In the event of inspections it is important that foreign nationals have their proper documents with them: valid provisional residency, valid temporary residency and/or valid national identity card to prove their legal status.

Upon termination of the employment agreement either by quitting or dismissal, the employer has 15 days to inform the RENURE about this termination and the circumstances related to it under penalty of fines and other sanctions.

Sponsoring employers must keep their RENURE registrations up to date and have an obligation to serve notice to immigrations of any change in the work relationship with the worker such as dismissal or quitting. Failing to inform the Immigrations Department of any changes in the employment relationship can result in the cancellation of the registration as a sponsor.

Steps to Obtaining a Work Residency within Argentina:

- proof of registration of the employer at the RENURE;
- employment contract;
- foreign and Argentine criminal background check; and
- a proof of domicile.

The filing fee of a work residency done within Argentina at the Immigrations Department is about USD 75. Once filed the work residency petition, immigrations will issue the provisional residency that will allow the employee to obtain the social security number (CUIL) and later on to be registered as the employee of the company before the Tax Agency (AFIP). Once fulfilled the petitioner must inform Immigrations he or she is included in the payroll and duly registered at AFIP, so that Immigrations can grant the residency and after that issue the National Identity Card that will be received via mail in the declared address.

Business Visas

Resolution 1.171/2010 regulates the entry of foreign nationals to Argentina to conduct businesses or market research for investments. These Business Visas are considered to be the type mentioned under provision 24 item (H) of the Immigration Law.

The type of activities allowed by this Business Visa are making business, trade or financial negotiations and it also includes those entering the country in order to participate in exhibitions or fairs.

The term of stay for these business visas is two months and one extension for a term of equal length is permitted, making it a total of four months stay for the petitioner.

The filing is initiated at the Argentine Immigrations Department Entry Permit Unit by a representative of the employer and when the entry permit is issued, the applicant must present him or herself at the Argentine Consulate in the country where he lives, to have his passport stamped. Each Argentine Consulate abroad has some specific procedures that change from Consulate to Consulate on how to apply resolution 1.171/2010, so it must be checked on a case per case basis. The inviting company or institution will be required to be registered at RENURE.

Steps for Obtaining a Business Visa:

- letter from sponsoring or inviting organization indicating nature of applicants business, duration of stay. The sponsoring

organization or company must show Proof of registration in the Registry of Sponsors of Foreign Nationals (RENURE);

- tax ID number (CUIT);
- last payment of VAT, Income Tax, and Profits Tax;
- indication of the Argentine Consulate where the passport will be stamped with the business visa;
- commercial or professional references of the applicant;
- complete copy of the petitioner's passport; and
- certificate issued by competent authority of the country where the company is registered, certifying the existence of the company of which the petitioner is owner or member.

Intra-company Transfers

An intra-company transfer (ICT) is a type of temporary residency established in provision 23 item (e) of the Immigration Law.

Those petitioners who are dedicated to scientific, technical, research and advice activities and are hired by public or private entities to carry out works of their particular expertise, must submit a contract with their hiring company or institutions as well as documentation certifying their professional qualifications and skills including a *Curriculum Vitae* (CV).

Those transferred to Argentina in the field of managerial, technical or administrative tasks to work for foreign companies settled in Argentina must submit a letter of transfer and supporting evidence that the petitioner works for the sponsor abroad (salary receipts, human resources letter, etc.). The local company receiving the transferee must also comply with the registration at the RENURE at the Immigration Department (pursuant to resolution n° 54618/08). As explained in the employment residency title, labor certification is not required for an ICT either. The same rules apply to this category as to employment residencies with respect to extensions and obligations of the sponsoring employers.

Accompanying Spouses

Spouses and dependent children who accompany and reside with immigrant foreign national workers on an employment or business visa in Argentina are issued visas that are dependent to the visa of the principal applicant. Unlike most other countries, spouses can be employed with these type of dependent visas and conduct all other commercial activities. Considering that Argentina recognizes same sex

marriage since 2010, spouses in same sex marriages do receive the same immigration benefits than any other married couple. If same sex marriage is not available for partners in their home countries, they can marry in Argentina and this marriage will be considered valid in the whole Argentine territory and immigrations benefits will cover the spouse.

Extensions and Modifications:

Employment visas are normally issued for the duration of the labor contract but up to 12 months even when the duration of the employment is longer than that. After this first 12 months has passed, the applicant must renew his residency in increments of one year.

For the extension of the working residency it is normally required to present the last 12 months salary receipts, proof of social security payments and a letter from the sponsoring employer confirming that the foreign national will continue to be employed by the sponsor for the next following 12 months. Extensions can be requested up to 60 days prior to expiration, once expired the petitioner will have a 30 days grace period to request the renewal. Foreign nationals who fall into irregular status are always given the chance to try to regularize their status within a certain term, after that, if the immigrant fails to become regular, immigrations can initiate deportation proceedings. Deported immigrants are banned to enter Argentina for a minimum of five years.

Permanent Residency Visas

Permanent residence is available to those who wish to settle permanently in the country. The law specifically recognizes that a spouse, child, or parent of an “Argentine citizen” may obtain permanent residence. Also, foreign nationals who are already “permanent residents” can obtain permanent residency for their spouse, child or parents.

The temporary residents of Mercado Comun Del Sur (MERCOSUR) are eligible for permanent residency after two years.

For NON-MERCOSUR citizens, it is also possible for work residency or visa holders to adjust status from these temporary annual employment residencies to permanent residency after working in Argentina for three years and having had these yearly work visas renewed uninterruptedly during this period.

When permanent residency is granted, new National Identity Cards are issued with the new status stated in the card. Even when the permanent residency doesn’t expire, permanent residents must avoid staying out of

Argentina for more than two years in a row in order to maintain their permanent status.

Individuals from MERCOSUR and Associated Countries

Immigration Law n° 25.871 sets forth in provision 23 item “L”, that foreign nationals from countries that belong to MERCOSUR will be granted with an authorization to remain in the country for two years.

The above mentioned provision 23 item “L” includes countries that are members of MERCOSUR (Argentina, Brazil, Paraguay, Uruguay and Venezuela) as well as the Associated countries, such as Peru, Bolivia, Chile, Colombia and Ecuador.

Therefore, all citizens of the MERCOSUR and associated countries are eligible for temporary residence for two years and subsequent permanent residence. The exceptions are Brazilian Citizens who are entitled to request permanent residency right from the first initial petition avoiding the first two years of temporary residency.

This regulation allows such nationals to obtain a temporary residence by just presenting their passport as evidence of nationality of one of these MERCOSUR or associated countries, without the need for being “sponsored” by any company during their stay. This immigration benefit significantly increases immigration from these countries.

Therefore, the residency granted via provision 23 item “L” implies authorization to work without it being necessary to involve a third party such as employers or sponsors.

MERCOSUR petitions can be initiated within Argentina at the Immigrations Department or at Argentine Consulates abroad when the petitioner is not yet present in Argentina.

For these petitions, criminal background checks from Argentina and the country of origin must be submitted, along with proof of domicile, and USD 35 filing fee.

National Identity Cards

Foreign nationals with an approved work visa will receive the local National Identity Cards (DNI). It normally takes 30 days after the approval of the residency for the DNI to arrive in the domicile of the petitioner, both filings are done at the same time when the filing is submitted at the Immigrations Department, but the issuance of the DNI

will be subject to the approval of the residency first. The expiration of the DNI will match the expiration on the residency.

Employment and Labor Law

Labor matters are subject to a territoriality principle in Argentina and, therefore, any foreign national who works in Argentina is subject to the Argentine labor law. Employment, labor and social security in Argentina are highly regulated by several statutes that determine work conditions, wages and allowances, labor relations and social security.

In the judiciary we find courts that are specially designated to intervene in work related disputes only, called Employment Courts (*Juzgados de Trabajo*). The Employment Contract Law n° 20,744 is in effect in the whole country and is therefore a national law. Pursuant to Employment Contract Law n° 20,744, the rule is that employment contracts are executed for an indefinite period of time. In practice, this is the most common alternative used by employers for hiring employees in Argentina.

Even in these cases, the immigration department will grant residencies for 12 months with the possibility of extension, as explained earlier.

Indefinite term contracts do not need to be executed in writing, and it is not customary for employers to issue offer letters or employment contracts, except if they hire foreign nationals, in this case it is required by immigrations to submit written contract in order to obtain a work residency.

Other than what was mentioned in this title, there are no other significant differences between hiring a citizen and/or a national and a foreign national worker. Under the scope of work legislation, the same rules apply to national and foreign national workers, except for those aspects related to authorized term and the sponsorship needed for the Immigrations Department.

Law n° 24,557 provides the coverage to accident or illness related to the job (accidents on the way to or back from the workplace are also covered). Employers must provide workers with workers' compensation insurance. There are insurance companies particularly created for this purpose called ART.

Income Tax and Social Security Contributions

All individuals earning income in Argentina are subject to income tax. Residents are taxed on worldwide income and Non-residents are taxed

on Argentine source income. An individual is a resident when he lives in Argentina for a 12 months period. Employment income, including employment benefits is taxable, although some deductions are granted for medical expenses, retirement annuities and other specific allowances. Income tax rates are progressive from nine percent to 35 percent.

The employee social security rate is 17 percent. The employer social security rate varies between 23 percent and 27 percent, depending on the employer's activity and annual turnover, and is calculated by considering the total compensation without a cap.

It's the employer's duty to withhold a certain amount from the employee's salary and make the pertinent deposit with the Federal Tax Authority and the Labor Union (if appropriate).

Social Security and International Workers

In general terms, foreign nationals employed in Argentina must pay social security taxes, pursuant to the Argentine Retirement and Pension Law. The only cases in which they are exempted from these contributions are foreign nationals appointed as corporate directors who must pay contributions as independent workers and also foreign scientists, professionals or technicians that are allowed to request an exemption to pay contributions at ANSES (Social Security Administration) but only up to a maximum of two years.

AUSTRALIA

Maria Jockel

Summary

As a nation of some 23 million people, Australia's Migration Program is part of "nation building". Only Australian citizens have the right to enter Australia at any time without restriction. All non-citizens must have a temporary or permanent visa to enter and remain in Australia. Permanent visa holders, if they are overseas, must have a visa to re-enter Australia.

Legal System

Australia's immigration law, legislative and regulatory framework

Australia's immigration laws are highly codified, complex and subject to frequent and ongoing change. The Migration Act 1958 (Commonwealth) (the Act) contains the structure for controlling the entry, stay and departure of non-citizens. The Migration Regulations 1994 (Commonwealth) (the Regulations) are subordinate legislation that set out the requirements for entry to Australia and related matters and the requirements of entry through the operation of a visa system that acts as a screening process to manage the movement of non-citizens across Australia's borders.

The legislative framework consists of over 3,000 pages. It is underpinned by layers of regulation and sub-delegated legislation (Ministerial

Directions, Legislative Instruments and such like). There are 97 visa categories and nine bridging visa categories.

The Australian Department of Immigration and Border Protection (the Department) is the authority given the statutory discretion and decision-making powers under the regulatory scheme. The Department has developed extensive policy guidelines in regard to the interpretation and administration of the Act and the Regulations and which guidelines provide considerable guidance to Departmental officers on the exercise of decision making powers.

The Department's policy documents contain detailed and extensive guidelines for its officers on all aspects of the legislative and regulatory scheme. These guidelines are over 16,000 pages and are subject to ongoing change.

The migration and citizenship legislation, regulations and policy guidelines contain over 400,000 individual pages of information of which approximately 100,000 pages relate to citizenship.

The Department receives over 13,000 applications each day worldwide. In the financial year 2013-2014, it raised revenue from visa fees of about Australian Dollars (AUD) 1.7 billion.

While Australia’s immigration laws are second only in complexity to the Australian Taxation Act legislative scheme, in Australia both lawyers and non-lawyers are permitted to practice immigration law provided that they are registered migration agents with the office of the Migration Agents Registration Authority. Most registered migration agents are not lawyers.

The Role of the Department

The Department has responsibility for the administration of the legislative scheme and the Government's policy under the direction of the Minister of Immigration and Border Protection. It manages, administers and provides advice on migration and humanitarian policy, border control and security, Australian citizenship, multicultural affairs and settlement services. In addition to issuing visas to those entitled to lawfully enter Australia, it has a significant budget to prevent and deter non-compliance with immigration law. The Department has over 9,500 staff working at about fourteen locations in Australia. It has offices in some 60 countries, which are usually attached to an Australian Embassy, Consulate or High Commission.

Australia's Migration Program

The Australian Government determines the size and composition of Australia's Migration Program. The Migration Program focuses on Skilled,

Business, Family and Humanitarian outcomes. For the year 2014-15, the Migration Program will provide for 190,000 places with a particular focus on the Permanent Skilled Migration Program. The Migration Program increasingly aims to meet Australia's population and skilled labor force needs, given the ageing of the Australian population, zero population growth and declining workforce participation.

Visas

The Regulations lists the visa sub-classes which are divided into Permanent, Temporary, Bridging, Protection, Refugee and Humanitarian classes.

The classes consist of a number of visa subclasses.

Schedule 1 of the Migration Regulations 1994 sets out how a non-citizen must apply for a visa of a particular class. This includes the fees, the forms and the documentary evidence to support the visa application.

Temporary Visa

There are a number of temporary entry visas for skilled persons who will benefit Australia by contributing to the economic development of the Australian community.

On November 24, 2012, the subclass 457 Business (Long Stay) Temporary Visa Program became known as the subclass 457 (Temporary Work (Skilled)) Visa. It enables Australian and overseas businesses to sponsor skilled overseas workers to work in Australia for that business on a temporary basis for up to four years.

The aim of the subclass 457 visa program is to address genuine targeted skill shortages in the Australian Labor market, without displacing employment and training opportunities for Australian citizens and Australian permanent residents and ensuring that the employment of overseas workers is not to the detriment of the employment and training opportunities for Australian workers.

The terms and conditions of employment provided to the skilled temporary overseas worker residents must be no less favourable than those provided to an Australian citizen or Australian permanent resident to perform work in an equivalent position in that business's workplace.

The subclass 457 visa program is demand-driven. It may either continue to increase in response to industry demands; may stabilize or reduce in number.

Subclass 457 Visa Requirements

There are three main steps in the approval process for an overseas skilled worker as set out below.

Sponsorship Application

The employer must lodge a sponsorship application which meets the following requirements:

- the company is actively and lawfully operating the business;
- it is able to comply with sponsorship obligations;
- there is no adverse information regarding the sponsor;
- it has a strong record of, or commitment to, employing local Labor and non-discriminatory employment practices; and
- it meets the training benchmark as part of its commitment to the ongoing training of its Australian citizen and permanent resident staff.

Nomination Application

The employer must lodge a nomination application which meets the following requirements:

- the nominated position the company is seeking to fill must be on the Consolidated Sponsored Occupation List (CSOL);
- it will be the direct employer or "related to" the direct employer of the nominee;
- the base salary must meet or exceed the Temporary Skilled Migration Income Threshold (TSMIT) which is currently AUD 53,900 gross per annum for a 38 hour week in addition to superannuation of 9.5 percent;
- the pay and conditions of employment must accord with the "Market Salary Rate" for that occupation in the workplace's regional locality;
- the position must meet the minimum skills threshold for that occupation;
- details of the person nominated to fill the position must be provided; and
- if the position is subject to Labor Market Testing (LMT), the sponsor must demonstrate that no suitably qualified and

experienced Australian citizen or permanent resident is available to fill the position.

Visa Application

The person nominated to fill the position must lodge a visa application and:

- demonstrate they have the requisite skills and experience for that position;
- be offered employment at the relevant market salary rate (which cannot be below the TSMIT);
- if necessary, provide evidence that they have vocational English;
- if necessary, provide a skills assessment;
- if necessary, undertake a health check; and
- if necessary, provide a police check.

Sponsorship Obligations of Approved Sponsors

Once a sponsorship is approved, as the approved standard business sponsor, the employer must meet its sponsorship obligations relating to sponsored workers who hold subclass 457 visas. The obligations aim to ensure that the subclass 457 program is being used to meet genuine skill shortages, and not to undermine local employment opportunities and conditions of employment and to protect sponsored workers from being exploited.

The sponsorship obligations include an obligation to:

- co-operate with inspections;
- ensure equivalent terms and conditions of employment;
- pay travel costs to enable sponsored persons to leave Australia;
- pay costs incurred by the Commonwealth to locate and remove unlawful non-citizens;
- keep records;
- provide records and information to the Minister;
- provide information to the Department when certain events occur;
- ensure a primary sponsored person does not work in an occupation other than an approved occupation;

- not to recover certain costs from a primary sponsored person or secondary sponsored person; and
- require the prescribed training requirement to be met.

Sponsors are monitored on the basis of a risk-based auditing program namely on the industry, the sector, the risk profile of the visa holder, the salary level paid and other risk matrices. Sponsorship monitoring intends to establish that there have been no significant changes in regard to the business sponsorship, the nature of the business and that there have been no adverse findings or penalties imposed against the business.

The Department has significant powers in regard to the monitoring of sponsors, gathering of information, conducting site visits, enforcement and sanctions. It includes civil and criminal liability with provisions for substantial pecuniary measures (fines of up to AUD 51,000 per breach), as well as in certain cases, provision for imprisonment.

Failure to produce information or documents required by the inspectors is a criminal offence punishable by a maximum penalty of imprisonment of six months. The Department can also gather information including the power to obtain documents from the Australian Taxation Office (ATO) and other government agencies as part of its enforcement of Australia's immigration laws.

Specialist Temporary Entry Visas

On November 24, 2012 (12) Temporary Work Visa Subclasses were repealed and three new temporary work subclasses were introduced. The subclass 401 (Temporary Work (Long Stay Activity)) visa replaced the Exchange (subclass 411) visa, the Sport (subclass 421) visa, and the Religious Worker (subclass 428) visa. It also established a single Long Stay Activity sponsorship.

This new visa has three streams:

- Exchange Stream (for applicants participating in an exchange of staff);
- Sport Stream; and
- Religious Worker Stream.

The Subclass 402 (Training and Research) visa replaced the Occupational Trainee (Subclass 442) visa, the Visiting Academic (Subclass 419) visa, and the Professional Development (Subclass 470)

visa and established a single Training and Research sponsorship. This new visa has three streams:

- Research stream;
- Occupational Trainee stream (requires nomination by a Training and Research sponsor); and
- Professional Development stream (requires nomination by a Professional Development sponsor).

The new subclass 403 (Temporary Work (International Relations)) visa replaced the subclass 406 (Government Agreement) visa, the subclass 415 (Foreign Government Agency) visa, the s426 (Domestic Worker – Diplomatic or Consular) visa. This subclass does not require sponsorship and has four streams.

- Government Agreement stream, for applicants covered by an international government agreement, or who direct the operations in Australia of certain language institutes;
- Foreign Government Agreement stream, for applicants who are to be employed as representatives of certain foreign government agencies or as foreign language teachers in Australian schools;
- Domestic Worker (Diplomatic or Consular) stream, for applicants who undertake domestic duties in the households of holders of diplomatic visas; and
- Privileges and Immunities stream for applicants accorded privileges and immunities.

The subclass 420 (Temporary Work (Entertainment)) visa was amended so that provisions relating to overseas film crew previously in the subclass 423 (Media and Film Staff) visa became part of the subclass 420 visa.

These changes are part of the Department's ongoing visa simplification process which aims to reduce the number of temporary work visa subclasses by 50 percent and to streamline the requirements for sponsorship, nomination and visa applications and grants.

The sponsorship framework in regard to temporary residence visas aims to strengthen the integrity of these visas, while protecting employment and training opportunities for local Labor.

Skilled Sponsored Permanent Visas

The Employer Nomination Scheme (ENS) (subclass 186) visa and the Regional Sponsored Migration Scheme (RSMS) (subclass 187)

visa came into effect on July 1, 2012 and allow Australian employers to nominate skilled workers from overseas for permanent residence in Australia.

The Employer Sponsored Permanent Visas has three streams

- Temporary Residence Transition stream;
- Direct Entry stream; and
- Labor Agreement stream.

The ENS process has two steps

Step 1: The employer nominates the employee to fill a nominated position in the business; and

Step 2: The person nominated to fill the position lodges the visa application.

Nomination Application

The first step of the ENS process requires the employer to establish that there is a need for an employee to fill the nominated position in the business; that the business is actively and lawfully operating in Australia, and the employer has a commitment to training its Australian citizen or permanent resident employees.

The employer must also establish that the position nominated exists within a business operated by it; that the appointment is full-time and for a term of at least two years; that the working conditions of the nominated position are no less favorable than relevant Australian legislative standards for wages and working conditions; and that the nature of the work performed in the position corresponds to a position on the CSOL.

Visa Application

The second step of the ENS process depends on whether the applicant applies under the Temporary Residence Transition stream or the Direct Entry stream.

An applicant for an ENS under the Temporary Residence Transit on stream must have the skills and three years' relevant work experience,

and have worked in Australia for at least the last two years as a primary subclass 457 visa holder in the nominated occupation with the nominating employer prior to the lodgement of the ENS nomination application. Further, and unless the applicant and/or nominated position falls within a specified exemption, the person must be under 50 years of age and have vocational English (at least 5.0 on each component of reading, writing, listening and speaking) under the International English Language Testing System (IELTS).

An applicant for an ENS under the Direct stream must have the skills (and, if necessary, a skills assessment from the relevant authority) and three years' relevant work experience. Further, and unless the applicant and/or the nominated position falls within a specified exemption, the person must be under 50 years of age, and have competent English (at least 6.0 on each component of reading, writing, listening and speaking) under the IELTS.

For both the Temporary Residence Transition stream and the Direct Entry stream and unless the applicant and/or the nominated position fall within a specified exemption, the person must have functional English (at least 4.5 overall under the IELTS) otherwise a second instalment charge is payable which is currently AUD 9,800 for the primary applicant, and AUD 4,890 for each dependant aged 18 years or over.

The RSMS is designed to increase migration to regional Australia to boost population in those regions. Regional Australia is defined by postcode. There are three streams under the subclass 187:

- Temporary Residence Transition stream;
- Direct Entry stream; and
- Labor Agreement stream.

The RSMS process has three steps

Step 1: The Employer's nomination is certified by an authorized regional authority;

Step 2: The Employer nominates the employee to fill a nominated position in the business; and

Step 3: The person nominated to fill the position lodges the visa application.

Skilled Sponsored Permanent Visas are a significant part of the Permanent Skilled Migration Program and aim to meet Australia's population and skilled labor force needs.

Employment and Labor Law

All Australian employers must comply with the Fair Work Act 2009 (Commonwealth) which provides for a safety net of minimum terms and conditions of employment through the National Employment Standards (NES).

There are 10 minimum workplace entitlements in the NES, namely:

- a maximum standard working week of 38 hours for full-time employees, plus ‘reasonable' additional hours;
- a right to request flexible working hours to care for a child under school going age, or a child (under 18) with a disability;
- parental and adoption leave of 12 months (unpaid), with a right to request an additional 12 months;
- four weeks paid annual leave each year (*pro rata*);
- 10 days paid personal or carer’s leave each year (*pro rata*), two days paid compassionate leave for each permissible occasion, and two days unpaid carer’s leave for each permissible occasion;
- community services leave for jury service or activities dealing with certain emergencies or natural disasters. This leave is unpaid except for jury service;
- long service leave;
- public holidays and the entitlement to be paid for ordinary hours on those days;
- notice of termination and redundancy pay; and
- the right for new employees to receive the ‘Fair Work Information Statement.

In addition to the NES, an employee may be covered by a modern award or enterprise agreement which contains terms about minimum wages, types of employment, and hours of work, classifications, allowances, superannuation and such like.

Australia's employment laws aim to provide workers with rights and the ability to enforce them where an employer has taken adverse action against the employee. This includes dismissing the worker, refusing to employ the worker, negatively altering the position or treating the worker differently for discriminatory reasons.

Requirements

As stated earlier, the Fair Work Act 2009 (Commonwealth) and the NES set out the minimum terms and conditions of employment.

From January 1, 2010, the ‘Fair Work Information Statement’ must be provided to all new employees by their employers as soon as possible after the commencement of employment. The Fair Work Information Statement provides basic information on matters that affect the person's employment. This includes the NES. It also includes information about the Fair Work Ombudsman and Fair Work Australia.

Contracts of Employment

With some exceptions, contracts of employment must comply with the Fair Work Act 2009 Commonwealth and the NES. Also, there are modern awards which cover an industry or occupation and provide additional enforceable minimum employment standards.

Enterprise agreements are negotiated between the employer, the worker or the worker's representative (such as a union or other bargaining representative). Enterprise agreements must be approved by Fair Work Australia and, once approved, provide for changes in the terms and conditions of employment that apply to that workplace.

A contract of employment generally includes standard provisions including in regard to recitals, interpretation, the period of appointment, the term of appointment, the general duties, the remuneration (including basic salary and salary review), leave entitlements (including accrued leave), payment during absence on medical grounds (namely, sick leave entitlement), confidentiality provision, intellectual property rights, restraint of trade (for higher level positions), termination (including payment in lieu of notice, obligations on termination) and general provisions relating to notices, governing law and jurisdiction, prohibition, enforceability and severance and such like.

For standard business sponsors under the subclass 457 Visa Program, the sponsored worker must be provided with the same entitlements as those which are provided to Australian citizens and permanent residents performing the same or similar work in the employer's workplace. This means they must be paid at the relevant "Market Salary Rate" which cannot be below the TSMIT.

Income Tax and Social Security Contributions

Broadly, for individual taxpayers, Australia levies taxes on three sources of income. These are personal earnings (salary and wages), business income and capital gains.

A threshold issue for income tax purposes is Australian residency. Australia taxes its residents on their worldwide income.

From July 1, 2006, the Income Tax Assessment Act 1997 Commonwealth was amended to provide a tax exemption for temporary residents for:

- all ordinary and statutory income derived from a foreign source;
- net capital gains made on assets that do not have the necessary connection to Australia; and
- interest withholding tax obligations associated with amounts owing to foreign lenders.

Temporary residents are normally taxed on Australian income from Australian sources.

These rules do not affect the application of any of Australia's double taxation agreements.

“Temporary Resident” Concept:

An individual will be a "temporary resident" of Australia if three criteria are satisfied, namely:

- the individual holds a temporary visa granted under the Migration Act 1958 Commonwealth;
- the individual is not an Australian resident within the meaning of the Social Security Act 1991 (Commonwealth); and
- the individual's spouse is not an Australian resident within the meaning of the Social Security Act 1991 (Commonwealth).

Under section 7(2) of the Social Security Act 1991 (Commonwealth), a "resident" is defined as a person who resides in Australia and is an Australian citizen, the holder of a permanent visa or a protected special category visa holder.

Foreign national workers are liable to pay tax on their taxable income earned over an income year. An "income year" runs from July 1 of one year to June 30 of the next.

Assessable income is the income on which tax may be assessed (including salaries and wages) less any allowable deductions against the assessable income (such as clothing required for work purposes).

Social Security Payment

Under the Social Security Act 1991 (Commonwealth) only a resident of Australia is entitled to payments and benefits under that Act. A resident is defined as a person who resides in Australia and is an Australian citizen, the holder of a permanent visa or a protected special category visa holder.

For Australian permanent residents, the Social Security Act 1991 (Commonwealth) provides for a range of payments and allowances.

There are a range of provisions in regard to the period that the person must have been a permanent resident in order to meet the requirements of "qualifying Australian resident", for example for qualification for the Aged Pension.

Other Statutory Deductions: Superannuation

Regardless of the "normal residence" of a subclass 457 visa holder and where the salary is paid, if the services are performed in Australia, then there is an obligation on the employer to pay superannuation contributions under the Superannuation Guarantee (Administration) Act 1992 (Commonwealth).

This has the practical effect that an employer must contribute 9.5 percent of "ordinary time earnings" as superannuation for the employee into a superannuation fund during the person's employment. There are some exemptions from superannuation obligations for a temporary resident which are limited to executive management employees, such as a chief executive officer, general manager and managing director.

A former temporary resident can claim superannuation contributions accumulated while working in Australia after the temporary resident visa has expired or been cancelled and once they permanently depart Australia. This payment is called a Departing Australia Superannuation Payment (DASP).

Proportionality between Local and Foreign National Employees

As the temporary entry visas for skilled overseas workers must benefit Australia by contributing to the economic benefit of the Australian community, there is no requirement relating to the proportionality between local and foreign national employees. However, there is a quota (or cap) in respect of persons who wish to migrate permanently to Australia - either by applying from overseas or by applying to change their status from temporary to permanent residence in Australia.

Brazil

Renê Ramos & Guilherme Dias

Summary

The Federative Republic of Brazil is the largest country in South America and in the Latin American region. With a territory of 8,514,876.599 square meters and a population of over 193 million people, it is the fifth largest country in the world, both by geographical area and population. Brazil is one of the world's largest growing major economies, and as of 2011 it was the sixth largest by nominal GDP and the seventh largest by purchasing power parity.

Legal System

Immigration law in Brazil is regulated in the country by the Foreign National Statute (Federal Law N.º 6.815/80) and by the Decree N.º 86.715/81. In addition to this, the Foreign National Statute established the National Immigration Council, which is a collegiate public agency that aims at developing rules to enable immigration to Brazil through Normative Resolutions which also compose the legislation regarding this matter in Brazil.

The Brazilian legislation foresees several different kinds of visas depending on the activity that the foreign national will perform in Brazil, the time he or she will spend in the country and the place where the remuneration will be paid.

Visas

Business Visa

The business visa in Brazil is applicable to people who come to Brazil for a short time period. It is regularly granted for a period of five years and enables the foreign national to stay in the country for up to 90 days.

The most important activities that may be performed with this kind of visa are:

- searching for new business opportunities;
- attending meetings, conferences and seminars;
- signing agreements on behalf of the foreign company; and
- studying the Brazilian market, among other activities.

People who enter Brazil under this visa category cannot work for the Brazilian company that they have visited (they must work only on behalf of the foreign company). The foreign national cannot receive any kind of remuneration from the Brazilian company for any work that he or she may have undertaken while in Brazil.

There are numerous countries that have bilateral agreements with Brazil and due to this a business visa is not required by foreign nationals from these countries prior to their entry in the country. In case of these countries, the foreign national need only inform the Brazilian authorities that he or she is entering Brazil under the condition of business visitor.

In addition to this, foreign nationals from some countries are able to extend the 90 day sojourn in Brazil for an additional 90 days by fulfilling certain legal requirements.

The list of the countries which its nationals are dismissed of presenting the business visa for the Brazilian immigration authorities and are able to extend their sojourn in the country is available in the website of the Brazilian Ministry of Foreign Affairs.

Technical Work Visas

There are three kinds of technical work visas:

- One year technical work visa;
- 30 days technical work visa; and
- 90 days technical work visa.

The one year technical work visa is applicable to people who come to Brazil to provide technical support in machines, equipments, assist with the plant installation and render technical assistance to Brazilian companies. In addition to these activities, it is mandatory that the foreign national that receives this kind of visa provides technical training to the Brazilian team involved in the activities that will be performed in the country.

The most important requirements for the one year technical work visa are:

- proof that the service will be rendered between the foreign company that will send the technician and the Brazilian company that will receive him or her;
- training program; and
- reference letter of the foreign national that shows that he or she has more than three years of experience in the field that he or she will work in.

The technicians sent to Brazil under this condition cannot receive any kind of remuneration in Brazil. The total of their remuneration must be kept abroad.

The person who comes to Brazil under this condition may also require that his or her dependents receive a visa to accompany him or her to the country. The visa of the dependent person will have exactly the same validity of the visa of the holder.

The one year technical work visa may be extended once for up to one year. Moreover, this kind of visa cannot be converted into a permanent one.

Regarding the 90 days work visa, it is applicable to foreign nationals who come to Brazil for a period of up to 90 days to provide technical support in machines, equipments and plant installation in Brazil. Training Brazilians is not required.

Nowadays, the requirements to get this work visa are basically:

- an invitation letter by the Brazilian company following the immigration legislation; and
- proof of enrollment of the Brazilian company with the Brazilian taxpayer register (CNPJ).

The technicians sent to Brazil under this condition cannot receive any kind of their remuneration in Brazil. The total of their remuneration must be kept abroad.

It is not possible to include dependents on this kind of visa, neither may it be extended.

In order to avoid abuse in the use of this kind of visa, the Brazilian government determined a grace period for it: the same foreign national can only apply for the 90 days technical visa for each 180 days period.

At last, the 30 days technical visa is applicable to foreign nationals who need to visit Brazil to resolve emergencies that may result in damage to life, environment or interruption of the production.

Due to this, the most important requirement for this kind of visa is the proof of one of the emergency situation above.

As in case of the other technical work visas, the technicians sent to Brazil under this condition cannot receive any kind of their remuneration in Brazil. The total of their remuneration must be kept abroad.

Since this visa is only for a short time period, it is not possible to include the dependents of the technician in visa request and it cannot be extended.

Work Visa Based Labor Agreement in Brazil

This kind of visa is applicable to the foreign nationals who come to Brazil to be hired as local employees by the Brazilian company.

The most important requirements for this kind of visa are:

- proof of the candidate's professional experience; and
- proof of the academic level of the candidate.

The proof of these two requirements may follow the formula below:

Proof of nine years of studies + two years of experience.
Proof of graduation in university + one year of experience.
Proof of master degree, PHD degree or post graduation degree with more than 360 hours of course without proof of experience.

Considering that the foreign national must have a labor agreement with the Brazilian company at least a portion of his remuneration must be paid in Brazil.

This kind of visa may be granted for up to two years and may be extended or converted into a permanent one depending on each case.

Anyway, after two years with this kind of visa, it is mandatory for its conversion into a permanent visa.

During the first two years with the temporary visa and during the first two years with the permanent visa, the foreign national shall be linked to the company that hired him or her and that required his work authorization to the Brazilian government. After this, the visa becomes the private property of the foreign national and he may change his or her employer if he or she wants to without losing the visa.

The dependents of the candidate may also receive a temporary visa to accompany him or her which will be valid for the same time of his or her work visa.

The dependents of this kind of visa are able to work in Brazil if they require a special authorization for the Ministry of Labor in Brazil and receive a work visa that enables their work.

The date when the foreign national is officially registered as employee is very important: the Brazilian companies that hire a foreign national employee are obliged to register him or her as an employee within 30 days after his arrival in Brazil with the work visa.

Permanent Visa

The permanent visa is applicable to foreign nationals who come to Brazil as managers of a Brazilian organization.

The immigration legislation has different kinds of permanent visas for different circumstances. However in this chapter only the two most relevant kinds of permanent visas will be focused on:

- the director permanent visa regulated by the Normative Resolution 62/2004; and
- the permanent visa for investors.

The director permanent visa regulated by the Normative Resolution 62/2004 is applicable to a foreign national who comes to Brazil as a manager in a Brazilian-profit centric enterprise. It is mandatory for a foreign national who enters Brazil on this visa to receive at least a percentage of his or her remuneration within Brazil.

The most important requirements for this kind of visa are:

- proof of a minimum investment in the Brazilian company of Brazilian Real (R$) 600.000,00 or more per foreign national who wants to come to Brazil; and

- the corporate act that engages the foreign national as a manager of the company after the permanent visa is granted by the Brazilian government.

If the Brazilian company has an investment lower than R$ 600.000,00, but higher than R$ 150.000,00 it is also possible to apply for a permanent visa. However, in this case, the Brazilian company must commit to hiring at least 10 Brazilian employees in the two years after the permanent visa is granted.

The validity of this kind of visa is up to five years depending on the validity of the mandate for which the candidate is appointed as the manager of the Brazilian company. His or her dependents may also obtain a visa to accompany him or her while in Brazil. However, in case the visa is granted based on an investment lower than R$ 600.000,00, the permanent visa will be granted for only two years.

At the end of the five year period, the foreign national has the option to renew his or her permanent visa for an undetermined period of time provided that he or she continues to be the manager of same Brazilian company that requested his initial permanent visa and that the minimum investment aforementioned is still with the Brazilian company. In addition to this, if the company receives an investment lower than R$ 600.000,00 it is also mandatory to prove that the Brazilian company hired the Brazilian employees as promised in the initial application of the visa.

Under this kind of visa, it is possible for a foreign national to become the manager of more than one company in Brazil. However, this is only possible if the other company or companies belong to the same economic group as the initial sponsoring company. In order to simultaneously become the manager of more than one company, prior authorization from the Ministry of Labor is required.

In addition to this, it is also possible that the foreign national who initially comes to Brazil as the manager of one specific company is transferred to another company of the same economic group to become its manager, however, it is mandatory that the Ministry of Labor is notified about this transference.

On the other hand, the Brazilian legislation also has a permanent visa for investors, which is applicable to foreign nationals who come to Brazil to become one of the partners of a Brazilian company or its owner.

The most import requirements for this kind of visa are:

- foreign investment of R$ 150.000,00 totally paid up in the Brazilian company;

- an investment plan that the Brazilian company shall follow — which must include the commitment to hire Brazilian employees during the first year after the permanent visa is granted; and
- the corporate act appointing the foreign national to the position of manager after the permanent visa is granted.

The investment in Brazil is essential for granting a permanent visa. However, more important than the investment, is the investment plan which must include the hiring of Brazilians as local employees in the company that requires the visa.

It is necessary to prove the relevant social interest to the Brazilian government for granting a permanent visa intended for the foreign national who will be investing in the Brazilian company.

This kind of visa is valid for up to three years and after this period it is possible to renew the visa for an undetermined period of time provided that:

- the foreign national proves that he or she are still one of the partners of the Brazilian company or its owner;
- the investment plan is being executed; and
- that Brazilian employees are being hired by the Brazilian company.

Brazilian Documents

All foreign nationals who enter Brazil, including those with 90 days technical visas, may require Brazilian documents that enable them to get identified in Brazil as local residents, pay taxes and drive in Brazil.

The Most Important Brazilian Documents are:

- RNE: ID card for foreign nationals;
- CPF-MF: this is a fiscal identification document (taxpayer register) that is necessary for paying taxes in Brazil;
- CTPS: it is a small book in which includes all information related to the performance of the work of an employee in Brazil, such as the job position, salary, change of job position, promotions, among other; and
- CNH: Brazilian driver’s license.

Below is a summary of the documents that are required for the holder of each kind of visa in Brazil:

Visas	RNE	CPF-MF	CTPS	CNH
30 and 90 days technical visa	Mandatory	Not mandatory	NA	Mandatory depending on the nationality of the holder of the visa
One year technical visa in case its holder stays in Brazil for more than 182 days	Mandatory	Not mandatory	NA	Mandatory
Temporary visa based on local labor agreement	Mandatory	Mandatory	Mandatory	Mandatory
Permanent visa for managers	Mandatory	Mandatory	Not mandatory	Mandatory
Permanent visa for investor	Mandatory	Mandatory	Not mandatory	Mandatory

Income Tax and Social Security Contributions

As in many other countries, the incidence of tax on any individual or entity depends on residential status and taxpayers may be classified as residents or Non-residents.

An individual or entity that is resident in Brazil is subject to tax on his or her worldwide income.

An individual who resides permanently in Brazil is deemed to be a Brazilian tax resident. Also foreign nationals who come to live in Brazil are deemed to be Brazilian tax residents as of the date of their arrival in Brazil, if they come with a permanent visa or a temporary visa with an employment contract in Brazil, or after 183 days of actual stay in Brazil in any given 12 month period, if they come with a temporary visa without an employment contract in Brazil, or at any time, whenever they acquire a permanent or a temporary visa with an employment contract.

Personal income tax is levied by the Federal Government, and the rates for 2013 vary between 7.5 percent and 27.5 percent depending on the individual's income.

Other Relevant Pension Schemes

It is also possible for companies to establish private pension fund schemes for their employees, but there is no obligation for the companies to do so.

Social Security and International Workers

If a foreign national is registered as an employee of a Brazilian company, both the company and the employee must contribute to the official social security system, except for the nationals of countries with which Brazil has signed an agreement.

At present, the following social security agreements are already in effect: Ibero-americano (already valid for Bolivia, Chile, Ecuador, Paraguay, Spain and Uruguay), MERCOSUL (Argentina, Paraguay and Uruguay), Cape Verde, Chile, Greece, Italy, Luxembourg, Portugal and Spain.

Brazil has recently signed social security agreements with Belgium, Germany and Japan, but these are still pending ratification by the Brazilian National Congress.

The international social security agreements aim mainly at guaranteeing the social security rights in the legislation of the two countries to the respective workers and legal dependents, who are resident or living temporarily in a country other than their original one. These agreements establish the conditions for the granting of welfare benefits, which does not imply in any modification to the country's legislation, it being incumbent on each contracting State to analyze and decide upon the welfare benefits which are applied for, based on its own legislation and on the specific agreement.

CANADA

Jacqueline R. Bart

Summary

Canada is a country located in the northern part of North America consisting of 10 provinces and three territories. It is the second largest country in the world, covering a geographical area of 9,984,670 square kilometers and has a population of about 35 million people.

Legal System

The main sources of law in Canada are the Constitution, statutes (legislation), and case law.

The statutes are enacted by the Parliament, provincial legislatures and territorial legislatures.

Each province has its own court system with both original and appellate level courts that exercise inherent jurisdiction. Decisions of the appellate courts are only binding on the lower courts of the same province.

There is also an original and appellate level federal court. Unlike the provincial courts, the federal courts do not have inherent general jurisdiction; the federal courts' jurisdiction is defined by statute.

The federal courts will not have jurisdiction over a matter unless the following criteria are met:

- the subject matter must be assigned to the federal Parliament under the Constitution;
- there must be an actual, existing, and applicable federal law; and
- the administration of that law must have been conferred upon the federal courts.

The federal courts hold exclusive jurisdiction to review the actions of most federal offices, boards, commissions, and tribunals, including, but not limited to, decisions regarding the following:

- immigration;
- refugees;
- elections;
- official languages;
- privacy and access to information;
- passports; war veterans;
- federal prisoners; public works;
- national defense;
- public service employment;
- aeronautics and transportation;
- oceans and fisheries;
- first nations; and
- intellectual property rights.

As with the provinces, decisions of the appellate court are only binding on the lower federal court.

The Supreme Court of Canada is Canada's final court of appeal, and holds appellate and advisory jurisdiction. Its decisions are binding on all courts within Canada. In order to appeal an appellate decision to the Supreme Court, a party will generally be required to obtain leave to appeal from a panel of three judges of the Supreme Court, unless there is an appeal "as of right", such as certain criminal cases and appeals from opinions pronounced by courts of appeal on matters referred to them by provincial governments.

Visas

In order to gain admission to Canada, visitors must have a valid travel document, be healthy, provide evidence of ties to their home nation, and have sufficient funds for the duration of their visit. Additional evidence may be required to gain temporary entry to Canada, including a medical examination or a letter of invitation from a Canadian resident.

In addition, many foreign nationals will require a temporary resident visa in order to enter Canada. Applications for a temporary resident visa are extensive and must be made outside of Canada. Temporary resident visas must be extended from within Canada, provided the visa is still valid at the time of the application.

Visa officers possess significant discretion in the issuance of a temporary resident visa, although they are bound by the principles of procedural fairness. An individual may be refused entry to Canada for reasons of inadmissibility, including cases where an individual is likely to cause excessive demands on health or social services, or cases where an individual was convicted of an offence which is punishable by a maximum of 10 or more years of imprisonment.

Temporary Visas

Work without a Work Permit

There are a number of work-related activities in which a foreign national may engage without obtaining a work permit. Work permit exempt foreign nationals include business visitors engaging in business or trade activities, trainees and trainers with a Canadian office of a multinational corporation, members of a board of directors, certain foreign representatives, students employed on campus, performing artists, athletes, reporters, public speakers, convention organizations, clergy members, expert witnesses, certain crew members, and emergency service providers.

The steps to obtain entry to Canada as a work-permit exempt foreign national are:

Applicants may submit their applications supported with documents including, but not limited to, a letter from the applicant's employer or inviting organization indicating nature of applicant's business and duration of stay. Applicants may apply for entry to Canada to engage in these activities at a Canadian port of entry, unless a temporary resident

visa is also required, in which case the foreign national must apply for a temporary resident visa outside of Canada at a visa office.

Labor Market Impact Assessments

The most common manner of entering Canada as a foreign national is to obtain a work permit based on a positive Labor Market Impact Assessment (LMIA) from Service Canada. However, there are a number of circumstances in which an LMIA is not necessary. If a foreign national is not engaging in a work permit exempt activity in Canada, the LMIA exempt categories should then be considered. If no exempt category is applicable, the employer must submit an application to Service Canada for an assessment of the genuineness of the job offer and whether the employment of the foreign national is likely to have a positive or neutral economic effect on the labor market in Canada. The opinion issued by Service Canada is referred to an LMIA.

Under the Immigration and Refugee Protection Regulations, Service Canada decisions are based on a number of factors, including:

- whether the employment of the foreign national is likely to result in direct job creation or job retention for Canadian citizens or permanent residents;
- whether the employment of the foreign national is likely to result in the creation or transfer of skills and knowledge for the benefit of Canadian citizens or permanent residents;
- whether the employment of the foreign national is likely to fill a labor shortage;
- whether the wages offered to the foreign national are consistent with the prevailing wage rate for the occupation and whether the working conditions meet generally accepted Canadian standards; whether the employer has made reasonable efforts to hire or train Canadian citizens or permanent residents; and
- whether the employment of the foreign national is likely to adversely affect the settlement of any labor dispute in progress or the employment of any person involved in the dispute.

Once Service Canada has issued a neutral or positive LMIA, visa officers will accept the LMIA as the basis for approving a work permit, assuming that the foreign national qualifies for the position and meets general immigration requirements.

Steps to obtain a neutral or positive LMIA from Service Canada are:

Employers must provide detailed information in writing to Service Canada. The application form contains questions related to a number of issues, including business information, number of employees in Canada, number of foreign nationals employed, number of workers laid off in the past 12 months, information on the job offer, salary and benefits, reasons why the foreign national is required, a description of attempts made to recruit Canadians and permanent residents and the results of those attempts, and the potential benefits to the Canadian labor market.

Employers must also provide a transition plan outlining how the employer plans to reduce its reliance on foreign nationals in the future. This transition plan must outline at additional efforts that the employer will make to recruit, retain or train Canadians or permanent residents and engage an organization serving underrepresented groups to identify candidates for recruitment and training. Alternatively, the transition plan can outline how the employer will facilitate the permanent residence application of a foreign national.

Labor Market Impact Assessment Exemptions

The Immigration and Refugee Protection Regulations provide the authority for officers to issue a work permit to certain foreign nationals who have not obtained an LMIA. First, persons coming to Canada to work pursuant to an international agreement between Canada and a foreign country, between the provinces and a foreign country, or an agreement entered into by the Minister with a province or group of provinces do not require an LMIA.

Also, an LMIA is not required in cases where an LMIA is not available and there is no specific exemption applicable, but the social, cultural or economic benefits to Canada are so compelling that the need for an LMIA can be overcome. This assessment is conducted on the basis of the nature of the benefit and whether the benefit is financial, intellectual, cultural, or skill or service-related. There must be a clear and de facto benefit to Canada that will not impinge on Canadians.

Foreign nationals can qualify for an exemption from the requirement to obtain an LMIA if the work of the foreign national would create or maintain reciprocal employment of Canadian citizens or permanent residents of Canada in other countries. This category is useful for friendly corporate exchanges, not involving intra-company arrangements, where the foreign jurisdiction would issue a visa to the Canadian citizen or permanent resident.

There are also foreign nationals who come to Canada to perform work that has been designated by the Minister as being work that can be performed by a foreign national. This includes a foreign nationals engaging in work in furtherance of a number of programs related to a research, educational or training program, or those who require limited access to the Canadian labor market for reason of public policy relating to the competitiveness of Canada's academic institutions or economy, including spouses or common law partners of foreign nationals or students.

Those who are entering Canada as charitable or religious workers to perform duties for a Canadian charitable or religious organization may also qualify for an LMIA exemption. In order to qualify under this exemption, the worker must not receive remuneration, other than a small stipend for living expenses, and their duties must not compete directly with Canadian citizens or permanent residents in the labor market.

Persons in Canada seeking refugee or protected-person status, as well as those subject to an unenforceable removal order, are eligible to apply for an open work permit without obtaining an LMIA, provided that they are unable to support themselves without working.

Certain foreign nationals in Canada may be eligible for an LMIA exemption, including certain live-in caregivers, members of the spouse or common-law partner in Canada class, protected persons, those who have received a waiver of an eligibility or admissibility requirement on humanitarian and compassionate grounds, and the family members of the above who are in Canada.

Finally, there is an LMIA exemption for certain foreign nationals for humanitarian reasons. This exemption applies to foreign students who have become temporarily destitute through circumstances beyond their control and beyond the control of any person on whom that person is dependent for the financial support to complete their term of study. This exemption also applies to temporary resident permit holders valid for at least six months and who cannot support himself or herself without working.

Work Permit Applications

Regardless of whether a foreign national has been issued a positive or neutral LMIA, or whether the foreign national falls within one of the LMIA exemption categories listed above, the foreign national must obtain a work permit prior to engaging in any work in Canada.

In most cases, there are limits placed on the number of years that a foreign national may work without applying for and receiving permanent residence.

For foreign nationals with work permits issued on the basis of an LMIA, a foreign national's stay may not exceed four years.

Work permits issued to professionals under North American Free Trade Agreement (NAFTA) may be issued for three years, with renewals at three-year increments. Under other free trade agreements, work permits are initially issued for one year and are renewed by one-year increments. Provided the foreign national continues to comply with the requirements, there is no limit on the number of extensions that can be obtained. Under the General Agreement on Trade in Services (GATS), there is a 90-day limit per 12-month period.

For intra-company transferees under the Immigration and Refugee Protection Regulations or free trade agreements, work permits may be issued for three years, and can be renewed in increments of up to two years. Executives and managers are not permitted to work within Canada for more than seven years, and the stay of specialized knowledge workers may not exceed five years.

There are a number of categories of work permits with validity periods that may not be exceeded. Foreign nationals who require an LMIA must leave Canada for a period of 48 months before obtaining another work permit. For those who have obtained their work permits under the categories of various international agreements, the foreign nationals must leave Canada for a minimum of one full year after the limit has been reached before re-applying.

The duration of work permits issued to spouses or common-law partners of foreign nationals or students must not exceed the duration of the principal applicant's stay in Canada.

Post-graduate work permits may only be issued once for a maximum period of three years, based on the applicant's length of study in Canada.

For students and temporary resident permit holders who are issued a work permit for humanitarian reasons, the duration of the work permit should not exceed the duration of the study or temporary resident permit.

Foreign nationals that require a temporary resident visa in order to enter Canada must submit an application for a work permit at a visa office. If a foreign national is already in Canada, the application must be submitted to the Case Processing Centre in Vegreville, Alberta. However, foreign nationals who are outside of Canada and who do not require a

temporary resident visa to travel to Canada may apply for a work permit at a port of entry, provided the employer has already been issued an LMIA if an LMIA exemption does not apply.

Steps for obtaining a work permit are:

Work permit applications made at a visa office outside of Canada or at the Case Processing Centre in Vegreville, Alberta, require completion of an application form. The application should be supported by either a positive or neutral LMIA or documentation demonstrating that the foreign national meets the requirements of the applicable LMIA exemption.

Permanent Visas

Federal Skilled Workers

Until recently, persons who were skilled workers could apply for permanent residence under the Federal Skilled Workers category. A skilled worker was defined as a person with at least one year of experience in the 10 year period prior to the application in an occupation listed in either Skill Type 0 (i.e. management occupations) or Skill Level A (generally professional occupations) or B (technical, skilled trades and paraprofessional occupations) of the National Occupation Classification, a government classification system that describes occupations in the Canadian labor market.

There was a list of 50 eligible occupations for which applications for federal skilled workers would be accepted. If an applicant's occupation was listed as eligible, the skilled worker would then be assessed on six selection criteria: education, languages, experience, age, arranged employment in Canada, and adaptability.

Effective January 2015, the Minister of Citizenship and Immigration is introducing a new Express Entry system that will replace the current Federal Skilled Worker application process.

Federal Skilled Trades

Also until recently, persons who were skilled tradespersons could apply for permanent residence under the Federal Skilled Trades category. A skilled tradesperson was defined as a person with at least two years of experience in the five year period prior to the application in an occupation listed in either Major Group 72 (i.e. industrial, electrical and

construction trades), Major Group 73 (i.e. maintenance and equipment operations trades), Major Group 82 (i.e. supervisors and technical jobs in natural resources, agriculture and related production), or Major Group 92 (i.e. processing, manufacturing and utilities supervisors and central control operators) of the National Occupation Classification.

In addition to the required work experience, a foreign national must meet a number of additional criteria, including plans to live outside the province of Quebec, meeting required levels of English or French language abilities, meeting all job requirements for the selected skilled trade, and obtaining an offer of employment for a total period of at least one year or having a certificate of qualification in that skilled trade issued by a provincial or territorial body.

Effective January 2015, the Federal Skilled Trades Program will also be affected by the introduction of the Express Entry system.

Canadian Experience Class

This category of permanent residence is meant to facilitate the transition from temporary to permanent residents for those who have worked or studied within Canada. Applicants must hold valid temporary status as workers, students, or temporary resident status holders.

In order to qualify under this class, applicants must have Canadian employment experience, intend to reside in a province or territory other than Quebec, and have maintained temporary resident status during their qualifying period of work experience as well as during any period of full-time study or training in Canada.

This is the third category of permanent residence applications that will be directly affected by the introduction of the Express Entry system in January 2015.

Express Entry

Commencing in January 2015, the new Express Entry application system will manage all applications for permanent residence in the Federal Skilled Worker, Federal Skilled Trades, and Canadian Experience Class categories.

The Express Entry system will introduce a two-step application process. Foreign nationals seeking to apply for immigration under one of these categories will be required to create an online Express Entry profile outlining their skills, work experience, language ability, education and other details.

Those who meet the criteria for one of the categories will be placed into a pool of candidates and ranked. Only those with the highest ranking and those with qualifying offers of arranged employment or provincial or territorial nominations will be invited to apply for permanent residence.

If a candidate does not already have a valid job offer, the foreign national must register with the Government of Canada's Job Bank to be connected to an eligible Canadian employer.

Once a foreign national receives an Invitation to Apply for permanent residence, the candidate has sixty days to submit an electronic application for permanent residence under the applicable category.

Foreign nationals placed in the pool that do not receive an Invitation to apply after 12 months, may re-submit their profile and re-enter the pool, provided they still meet the criteria based on the information provided.

Family Class Applications

Foreign nationals may also be selected as permanent residents on the basis of their relationship to a Canadian citizen or permanent resident. Members of the family class include:

- spouses, common-law partners or conjugal partners;
- dependent children, including adopted children from overseas;
- parents;
- grandparents;
- orphans under the age of 18 who are the sibling, niece or nephew, or grandchild of the sponsor; children under the age of 18 to be adopted in Canada; and
- any other relative, provided there is no member of the family class who is a Canadian citizen, Indian, or permanent resident or who could otherwise be sponsored.

In order to act as a sponsor for a member of the family class, the sponsor must be a Canadian citizen or permanent resident who is at least 18 years of age, resides in Canada, and has filed a sponsorship application. Sponsors must also sign an undertaking indicating that they will provide sponsored persons with basic requirements starting the date on which they enter Canada until the term of the undertaking ends. This obligation continues throughout the duration of the term of the undertaking, even if there is a divorce or other change in circumstances. The term of the undertaking varies extensively. Terms for undertakings in relation to spouses, common-law partners and conjugal partners and

dependent children over the age of 19 are for three years, while terms for undertakings in relation to dependent children under the age of 19 years are for 10 years or until the child reaches the age of 22, whichever is earlier. Terms for undertakings in relation to parents or grandparents are for 20 years. For all other members of the family class, the terms of undertaking are for a period of 10 years.

Sponsors must meet a minimum income requirement, unless the sponsored person is one of the following: the sponsor's spouse, common-law partner or conjugal partner and has no dependent children; the sponsor's spouse, common-law partner or conjugal partner and has a dependent child with no dependent children; or a dependent child of the sponsor who has no dependent children.

Sponsorship applications for persons who would otherwise be members of the family class due to their relationship to the sponsor will be barred if they were not examined as part of the sponsor's application for permanent residence.

Applications for sponsorship can be submitted either within Canada or outside of Canada. Sponsored spouses, common-law partners, and their dependent children can be landed from within Canada. For applications submitted outside of Canada, the sponsorship undertaking of the sponsor must first be approved. The sponsorship approval is then forwarded to the visa office responsible for applications from the country where the sponsored person resides or is a national. The visa office then determines that the sponsored person and all accompanying dependents are admissible to Canada, including meeting all medical and security requirements, and have a qualifying family class relationship with the sponsor. The visa office will also determine the *bona fide* nature of the sponsored person's relationship with the sponsor, in the case of spouses, common-law partners, and conjugal partners.

For applications submitted within Canada, both the sponsorship undertaking and the permanent resident application can be filed together at the case processing centre. This centre will determine both the sponsor's undertaking application as well as the sponsored person's admissibility to Canada.

All permanent resident applications must include evidence of the qualifying relationship between the sponsor and the sponsored person, such as a birth or marriage certificates, or court guardianship, custody or adoption orders. Occasionally, genetic testing may be requested to prove a qualifying relationship.

Self-Employed Persons

A self-employed person is a foreign national who has relevant experience for a minimum of two years in the five years prior to the application, and who has the intention and ability to be self-employed in Canada and to make a significant contribution to specified economic activities in Canada.

Relevant experience must have been obtained in one of the following areas:

- self-employment in cultural activities or in athletics;
- participation at a world-class level in cultural activities or athletics; or
- farm management experience.

To apply under the self-employed category as a farmer, the foreign national is required to purchase and manage a farm within Canada.

Foreign nationals are required to demonstrate that they have the intention and the ability to be self-employed in Canada and to make a significant contribution to the specified economic activity in Canada.

The adaptability of the foreign national will also be assessed. A maximum of six points for adaptability will be awarded for the following criteria:

- educational credentials of the spouse or common-law partner;
- previous qualifying study in Canada by the application or their spouse or common-law partner; previous qualifying work experience in Canada by the applicant or their spouse or common-law partner; and
- qualifying family of the applicant or the spouse or common-law partner residing in Canada as a citizen or permanent resident.

Provincial Nominee Programs

Each province is permitted to establish its own provincial program based on its own selection criteria. There are almost no legal restrictions placed on the provinces in developing these provincial programs.

In order to apply for permanent residence as a provincial nominee, foreign nationals must have received provincial nomination through the receipt of a nomination certificate issued by the province in which the applicant intends to reside.

Visa officers maintain discretionary decision-making powers to override a nomination of a province and substitute their own decision, with

concurrence by a second officer, if the officers do not believe that the applicant possesses the ability to become economically established in Canada.

Humanitarian and Compassionate Applications

In cases where applicants would suffer excessive hardship if they do not obtain permanent residence, but none of the above categories are applicable, visa officers possess discretion to grant permanent residence on humanitarian and compassionate grounds. Issuance of permanent residence on humanitarian and compassionate grounds is highly discretionary and rare.

In exercising their discretion, visa officers will consider a number of factors, including:

- family ties in Canada;
- assets in Canada and abroad;
- community involvement;
- non-reliance on social assistance;
- absence of links to country of origin;
- best interests of Canadian born children; and
- hardship resulting from removal to country of origin.

Employment and Labor Law

Canada's labor and employment system was developed based on the British common law. This system tends to protect and favor the rights of employees.

In a non-unionized setting, employment relationships are governed by the common law, implied terms of contract, and written contracts between employers and employees. Each province has also legislated minimum working standards for all employees through an Employment Standards Act (The Act). The Act clearly delineates employee and employer rights and obligations and address issues such as vacation, minimum wage, termination, severance pay, mandated breaks, maximum hours of work and overtime, and public holidays. For the protection of employees, parties cannot contract out of these legislated minimum standards. These employment standards apply to all employees, except for certain areas of federal commerce, which are regulated by federal law.

Income Tax and Social Security Contributions

Taxation

Income tax must be paid by all residents of Canada on any money earned. Typically, income tax will be deducted from an employee's paycheck by the employer. All residents of Canada must also file an Income Tax and Benefit Return annually in April, which indicates how much money the resident earned and how much was paid in income taxes. The Canadian government will issue a refund to the resident if too much tax was paid. In cases where residents have not paid sufficient taxes, the residents will be notified of the outstanding taxes, which must be paid on a timely basis.

Social Security

Canada's social security system consists of almost universal benefits, social insurance plans, social assistance programs, and a variety of health and social services. Under the Canadian constitution, both the federal and provincial governments are responsible for social security.

Employment and Social Development Canada administers federal programs related to income security, including Old Age Security and the Canada Pension Plan. Service Canada is responsible for providing these benefits to Canadians, as well as delivering the Employment Insurance Program.

The Canada Revenue Agency is responsible for collecting contributions for the Canada Pension Plan and employment insurance, and for delivering the Canada Child Tax Benefit. The Department of Veterans Affairs administers pensions and allowances for veterans and their dependents.

Social assistance programs administered by the provincial government vary from province to province. The provinces are also responsible for the provision of Workers' Compensation plans, and a number of provinces have additional programs for seniors to supplement the federal Old Age Security Program.

Individuals who are living or working in another country, or who are the surviving spouses or common-law partners of individuals who have lived or worked in another country, may be eligible for benefits from Canada or the foreign country pursuant to a social security agreement.

Social Insurance Numbers

In order to work in Canada, a temporary foreign national must submit an application for a social insurance number to Service Canada immediately upon arrival in Canada. This number must then be provided to the employer. This number is required in order to file income tax returns and to receive government benefits and allowances.

Health Care

The provinces are responsible for the administration of Canada's health care program. Each province has its own insurance plan, and as a result, coverage will vary between jurisdictions.

In general, temporary foreign nationals who hold valid work permits may be entitled to health insurance coverage from the province in which the temporary foreign national resides. There is also a minimum residency requirement; which varies from province to province. Additional applicable criteria should be verified with the provincial or territorial ministry of health.

FRANCE

Karl Waheed

Summary

France is a republic divided into 22 regions and further subdivided into 96 administrative districts (*départements*) and the overseas districts and territories. Its immigration structure involves a number of state ministries, as well as regional and local agencies and municipalities.

Corporate immigration regulations were introduced by the government in 2006 with the aim of responding to the needs of business in an increasingly global economy. Since then the regulations have continued to evolve positively for international business choosing France as the location of their world or regional headquarters, investment, or delivery of goods and services.

The issuance of visas to foreign nationals is overseen by the Ministry of Foreign Affairs (*Ministère des Affaires Etrangères*), through its consulates abroad. Immigration compliance at the point of entry is verified by the Police of Frontiers (PAF).

Work permits are adjudicated by the Regional Labor Administrations (*DIRECCTE*). Each administrative district has its own *DIRECCTE*. This body implements the regulations under the supervision of the Ministry of Interior's Immigration Section. The *DIRECCTE* have one or more teams of labor inspectors who participate in the work permit adjudication

process and carry out inspection on work sites in order to verify labor and immigration compliance. In the event a labor inspector is convinced of non-compliance, he or she may issue an administrative sanction or engage legal action against the employer.

The Migrant Administration (OFII) plays a role at various points during the immigration process. It formally communicates the approval of an application for work authorization to French consular authorities abroad, as a prerequisite to a foreign national's visa application. OFII is also responsible for coordinating the medical examination required of foreign nationals who will remain in France for more than three months pursuant to a temporary residence permit. In the case of foreign nationals who are high-level executives and managers entering to work for a French entity, OFII plays a central role in coordinating the various approvals and permits required for the stay of the foreign national and accompanying family members.

After the foreign national arrives in France, his or her stay is overseen by the Prefecture with jurisdiction over his or her place of residence. The prefecture is responsible for issuing the individual's temporary residence permit, or *carte de séjour temporaire*, if the foreign national will remain in France for more than three months. Local prefectures also adjudicate applications to extend a stay and have preliminary responsibility for applications to change status to a different category of stay (in conjunction with the local *DIRECCTE*, which will adjudicate any work permit necessary for a change of status). The prefecture also preliminarily accepts and investigates applications for permanent residence permits and naturalization.

Legal System

France has a civil law legal system, where law is codified in the corpus of a multitude of codes. The most pertinent for us would be the Code of Entry and Stay of Foreign Nationals and Right of Refuge (CESEDA) which provides the regulations which govern the rights of foreign nationals to entry and stay in France. These rights may arise from a work permit, family and personal ties in France, or be on humanitarian grounds. This code provides the administration with adjudication criteria for residence permits, as well as regulations governing sanctions for violations and deportation.

Code of Administrative Justice provides for the foreign nationals right to appeal and remedies against the government's decisions on work and residency permits.

The laws and decrees contained in the above codes are supplemented by ministerial circulars and bulletins issued by French administrative bodies, which provide further guidance on implementation of the law. These guidance documents are usually (but not always) made public by means of publication in the Official Gazette of the French government.

European Union (EU) directives, regulations and case laws are applicable in France, which is a member state of the EU. Directives which create freedom of movement of EU citizens are fully applicable, and exempt EU citizens from being subject to work permits in France (with the exception of Romanians and Bulgarians who are subject to transitory provisions).

International treaties to which France adheres may also create right to entry, stay and work under certain conditions.

Visas

Employer or Sponsoring Entity

Work permit applications are sponsored by the foreign national employer or the French host entity before the Labor Authorities (*DIRECCTE*), with the exception of the Skills and Talents category.

Temporary Visas

Business Visas

Indian nationals, who will be carrying out allowed business visitor tasks, must enter France under a business visa (also referred to as *Schengen* visa).

There is no legal definition of allowed business tasks, which are tasks that Labor authorities will tolerate, as an exception to the general rule of all work in France requiring work permits.

Indian nationals entering France as business visitors are usually permitted to perform a range of activities which do not produce immediate economic value, including:

- attending business meetings and contract negotiations;
- attending conferences and seminars; and

- making sales calls to potential clients, provided that the Indian national is representing a commercial entity that is located outside of France.

Such tasks must be carried out for the account of the Indian employer's or the Indian national's own account. Such tasks should not be part of a product or service acquired by the French host entity.

To qualify as a business visitor, the Indian national must maintain a residence and an employer outside of France. He or she may not receive compensation from a French source, except for incidental expenses such as meals, travel or accommodation. The Indian national must also demonstrate that he or she has sufficient funds for the visit and that his or her Indian employer will provide health insurance coverage during the visit.

The business visa can have a very short validity allowing a stay in France for 30 days or less with a single entry, or be valid for up to 12 months for multiple entries. However the stay in France may not be any longer than a total of 90 days within a period of 180 days which starts on the first day of entry. Any time spent outside the *Schengen* Area during this period will not enter the count.

As of April 5, 2010, long stay D Visas, of three to 12 months validity, allow their holders to travel inside the *Schengen* Area for stays of up to three months within six-month periods.

The consular authorities have very wide discretionary powers to determine whether they will issue a visa, and if so, the length and type of entry (single or multiple). Consular authorities scrutinize the application to avoid the risk of overstay and unauthorized work. They will take into consideration primarily the profile of the applicant (employment, income, assets, family ties etc.), the frequency of previous trips to France, profile of the applicant's employer and coherence of the information provided.

Employment Visas

Employment visa category and length of validity will be issued in accordance with the length and type of work permit issued by the Labor authorities.

The employment of Indian nationals must be allowed by the appropriate work permit issued by the *DIRECCTE*. Work permit applications are sponsored by the foreign national employer or the French host entity, with the exception of the Skills and Talents category, which is made by the Indian national directly at the consular level.

The French authorities will authorize a work permit to a foreign national if his or her future employer is able to demonstrate that the foreign national possess qualifications or skills which are not available on the French labor market, unless the work permit application is made for one of the employment categories which is exempted from labor market regulation.

Exempted categories

There are six exempted categories.

Intra-company Transfers for Temporary Assignments (*salarie en mission*)

Persons qualifying under this category will be transfers of employees from a foreign affiliate to the French affiliate. Such assignees of multi-national corporate groups will be issued a three year combined work and residence permit. This work permit also allows the assignee's spouse to work in France (the length of the assignment must however be for at least six months). Any renewal beyond three years remains at the discretion of the Labor administration. To obtain this work permit, the assignee must:

- have worked under employment contract with an entity of the group outside France for at least three months prior to applying;
- have a minimum gross monthly salary of 1.5 times the French minimum legal gross salary (*salaire minimum interprofessionnel de croissance*) and be in compliance with what is considered as a peer salary;
- the foreign entity must have a "real and significant" business activity outside France and the employee's assignment must be "temporary" for the purpose either of providing expertise to the French branch or subsidiary, or for receiving training needed for a project in the home country;
- the place of work must be the premises of the French affiliate; and
- the assignee may be seconded and remain on home country employment contract or be on a French employment contract.

This work permit category has recently become available for short term assignments, with validity of one year, which will allow the assignee to work in France for a maximum of 90 days cumulated by periods of 180 consecutive days from the initial date of entry.

Secondment in the Framework of an International Service Agreement

A foreign national employer may assign his employees to a French client in the framework of an international service agreement, for the purpose of delivering a service to such client.

The French Labor Authorities will scrutinize the application, including the service agreement, to determine that the purpose of the agreement is indeed the delivery of a fixed scope service and not a (disguised) provision of Labor.

The work permit will be issued for the period of assignment, up to 12 months. Annual renewal will usually be allowed to the extent justified by the service agreement. Although there is no maximum period written into the texts, the authorities are reluctant to renew the work permits beyond 36 months.

Assignee's spouse may accompany him or her on "visitor" status, to the extent that the assignee meets certain salary thresholds, which are updated annually. This status does not provide automatic right to work.

Trainees

Individuals who will be receiving training without being involved in any productive work will not be subject to a work permit, provided they are subject to a training contract approved by the authorities. If the trainee will participate in productive work, he or she may need to qualify under the intra-company transfer category above.

Skills and Talents

This category was created to attract foreign nationals with exceptional skills or talents who would contribute in a significant and lasting manner to the economic development or intellectual, scientific, cultural, humanitarian or sporting progress of France and the applicant's home country.

The application is usually filed by the foreign national, at the French consulate in the applicant's home country. If the consular authorities approve the application and issue the appropriate visa, the applicant may enter France and will be issued a three-year combined residence and work permit. This permit is renewable, although the renewals are subject to restrictions for certain nationalities.

Job Categories on Shortage Lists

French authorities maintain a list of job categories which can not be adequately satisfied by local Labor market, and which may be filled by third country nationals. Work permit applications for a listed job category will be exempted from Labor market test.

Blue Card

France has created an immigration category by implementing the European Blue Card directive, in order to attract skilled workers from third countries and facilitate the mobility and permanent residence of such workers within the EU.

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

- employment contract with duration of one year or more;
- 1.5 times the average salary of reference (to be determined by the Minister of Interior on an annual basis, this threshold salary amount is Euro (EUR) 52,750 per annum for 2014); and
- a three year higher education diploma or equivalent knowledge through five years of experience. The qualifying Indian national will be issued a joint residency and
- work permit for the length of employment, with maximum validity of three years. This permit is renewable. Accompanying spouse will be issued a Private and Family Life category work permit which authorizes work.

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

The Blue Card holder and his or her spouse would qualify for the EU long term resident permit after five years of residence under the Blue Card in the EU of which only the last two years must be in France.

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

Non-Exempt Categories

The principle purpose of requiring foreign nationals to obtain a work permit is to protect the Labor market from competition from foreign nationals. The work permit is issued by the authorities, once they have been shown that the position cannot be filled by employment seekers on the French Labor market, and the foreign national qualifies under one of the above categories exempted from Labor market testing.

If the foreign national does not qualify under one of the exempted categories, he or she may make an application under common law secondment or local hire work permit.

Secondment Work Permit

This category of work permit is appropriate for an assignee who will remain on his or her home country payroll, while the assignee is sent to a French business for a short assignment and with tasks limited in scope. The assignee will continue to report to his or her home company. The Labor Administration may reject the application if it considers that the position may adequately be filled by a job seeker on the local Labor market.

The authorization will be for a period up to 12 months. Extension may be granted at the discretion of the Labor administration.

Local Hire Work Permit

This category of work permit is appropriate for the foreign national assigned to be on the French payroll or to perform tasks which are of local (or day to day management) nature. The Labor administration may reject the application if it considers that the position may adequately be filled by a job seeker on the local Labor market. The authorization is issued by 12 month increments, and may be renewed indefinitely.

Indian nationals are subject to visa requirements, regardless of the purpose and length of their visit.

Permanent Visa

Indian nationals who qualify for a visa under family reunification rights will be issued a long-stay visa, which will allow them to obtain a five year residence permit. This residence status may also be available to an

Indian national making an exceptionally high investment in the French economy.

Employment and Labor Law

The Labor Code

This provides the regulations concerning who is to hold a work permit and the qualification criteria for issuance and renewal of such work permits by the Labor administration. Here we will also find the corpus of laws which provide for:

- the protection of the rights of workers including foreign nationals working in France; and
- the mechanism of verification of compliance with labor laws and sanctions for violations.

Employment

An Indian national can only be employed in France if he or she is authorized by a work permit and has entered France under the appropriate visa.

Indian nationals under a secondment assignment will maintain their Indian employment contract. Other assignees may be subject to a French employment contract. Such contract may be for a fixed term or may be unlimited in duration. The appropriate term and the contents of the French employment contract are determined by the applicable section of the French Labor code, and applicable collective bargaining agreements.

Laws Relating To Employees

Employers employing foreign nationals under work permits must comply with dispositions of Labor laws, regulations and collective bargaining agreements. The following aspects of French Labor law apply to foreign nationals:

- individual and collective liberty in work relations and the right to be on strike;
- reasonable work hours, compensatory rest, holidays, annual vacation, leave for family events, maternity leave, paternity

leave, conditions of contributions to leave for inclemency of weather;

- minimum salary and payment of salary, including increases for over time;
- conditions of availability and guaranties owed to workers of companies in the business of providing temporary workers;
- regulations concerning the security, health, and hygiene at work, and medical surveillance;
- discrimination and professional equality between women and men, protection of maternity, minimum age for work, working minors, work hours and night work for young workers; and
- illegal work.

Independent Contractors and Entrepreneurs

A contractor or entrepreneur will not be bound by an employment contract with his or her client in France, if he or she is truly independent from the client. He or she must be properly registered with his or her trade organizations and commercial registries.

Income Tax and Social Security Contributions

Income Tax

The French income tax system has been designed to be attractive to foreign corporate and individual investors, and yet support the government's rather high public spending in all spheres of French life.

France and India have agreed to avoid double taxation under a treaty which has been in force since August 1, 1994. Indian nationals who are considered Non-residents under this treaty will be subject to French taxes from French sources only. Indian nationals who are domiciled outside of France, but received income from French sources or have a dwelling in France must file a tax return in France. Such nationals may be subject to withholding taxes. The thresholds which trigger the withholding taxes and their brackets are revised annually. Indian nationals, who become French residents from the tax perspective, will be taxed on their world-wide income.

Corporate business activity which is taxable in France will be subject to the corporate income tax rate of 33.33 percent, unless the corporation qualifies for lower rates applicable to small companies. The personal

income tax rates for the year 2013 were in the range of 5.5 percent to 45 percent.

Social Security Payment

The ratification of the treaty between France and India on social security coverage occurred on March 22, 2011. This treaty is now in effect and will allow Indian nationals assigned to France to avoid contribution to retirement funds under the French social security system, while on secondment assignment in France. They will nevertheless be required to make contributions to French social security for health coverage.

Other Statutory Deductions

Indian nationals on French payroll will be required to make contributions towards unemployment insurance.

Proportion of Local to Foreign Employees

There is no formal rule on proportionality. However the Labor authorities will *de facto* take into account the proportion of foreign nationals to French workers, when adjudicating a work permit application.

GERMANY

Dr. Gunther Mävers

Summary

The Federal Republic of Germany (Germany) has been established after the Second World War. According to its Basic Law (*Grundgesetz*) Germany is a Republic with 16 federal states (*Bundesländer*). The capital of Germany was previously in Bonn (where still a couple of ministries are located) but has been transferred to Berlin following the re-unification of East Germany and West Germany. Germany is a founding member of the European Union (EU) with no less than 28 member countries as on date. Germany is located in Middle Europe and covers a territory of 357.021 square miles with a population of approximately 82 million (Germany has the largest population of any EU member state).

For further information check http://www.germany.info/ .

Legal System

General Background:

Germany is a constitutional state in compliance with the principle of separation of powers and the rule of law. The power is split between the legislative authority, the executive authority and judiciary, whereas, in principle, the competency to set laws is with the federal states. A large

majority of Acts are passed by the German parliament on a federal level. Moreover, a significant portion of the law is largely influenced by the EU Laws. Both individuals and legal entities have access to all kinds of appeals that are available.

Sources of Law:

The key immigration law in Germany is the German Residence Act (*Aufenthaltsgesetz*), which regulates granting of residence titles to foreign nationals and the German Citizenship Act (*Staatsangehörigkeitsgesetz*). Furthermore, the Employment Regulation (*Beschäftigungsverordnung*) set out the conditions for the grant of residence titles for the purpose of employment (see below for further details). Finally, both the Federal Ministry of Internal Affairs (*Bundesministerium des Inneren*) and the Federal Labor Office (*Bundesagentur für Arbeit*) have issued detailed instructions on how to apply the aforementioned laws and regulations.

Moreover, the EU has authority to create some laws that affect all member nations with direct effect (e.g., the visa waiver program that waives the need for a visa for citizens of most industrialized countries for a maximum stay of 90 days in any EU member state) or the EU Visa Code (dealing with the conditions and procedures for issuing visas for short stays in maximum of three months during any six-month period and transit through the member states of the EU and the associated states applying the *Schengen acquis* in full). Furthermore, there are some (sort of "grey") areas where it cannot be said anymore whether its source is European or national law. 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 transposed into national law in order to implement a certain framework set by the EU directives.

Authorities:

With regard to corporate immigration matters the following authorities are involved: The main immigration authorities concerned with applications for visas are the German Embassies or Consulates abroad as well as the local foreign national's offices (*Ausländerbehörde*) and the local labor offices (*Agenturen für Arbeit*) respectively the Center for the Recruitment of Foreign and Expert Staff (*Zentralstelle Auslands-und Fachvermittlung-ZAV*) in Germany. The process is as follows: Except for nationals of some privileged states, a residence permit is to be obtained by means of a visa prior to entering Germany. When filing the application the responsible diplomatic representation abroad, example - the German

Embassy or Consulate, is solely responsible for the applicant, which nevertheless reconciles internally with the local foreign national's office and the latter with the Federal Employment Office (*Bundesagentur für Arbei*) and the Center for the Recruitment of Foreign and Expert Staff (ZAV). Nevertheless, in order to facilitate proceedings further, a pre-approval application has been implemented effective July 1, 2013 and since then it is possible to file an application upfront with the labor authorities in order to find out whether consent is needed and - if so - will be granted if that would help to expedite matters.

Visas

In principle, any third country national from states excluding the EU or the European Economic Area (EEA) has to file an application with the German Embassy or Consulate in order to get a residence title abroad in his or her home country. However, due to a so-called positive list, nationals of some countries are exempt from this and have got the privilege to enter Germany without having to apply for a visa first unless they stay in the country for more than 90 days (EU visa waiver program). This applies to nationals of for example Australia, Canada, Israel, Japan and the United States (U.S.). Since India is not on this list, any Indian national will have to apply for a visa before crossing the borders of the EU respectively the *Schengen* territory.

Employer or Sponsoring Entity

In principle, any Indian applicant, before entering Germany for business purposes, requires not only a visa, but also a company that is willing to sponsor his or her stay, either for the purpose of coming as a business visitor or for the purpose of employment. The individual can be sponsored by his or her employer, but also by another company or sponsoring entity (when coming for other purposes, for example attending business meeting etc).

Temporary Visas

Business Visas

Requirements for a business visa:

Employees of internationally operating companies often use a visitor's visa for business trips to Germany 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 grant of a business visa is regulated in the provisions of Regulation (EC) No. 810/2009 dated July 13, 2009 establishing a Community Code on Visas (Visa Code) as well as by the regulations of the *Schengen* Implementation Convention and the regulations issued under these Conventions. The member states of this convention are Belgium, the Czech Republic, Denmark, Germany, Estonia, France, Finland, Greece, Hungary, Italy, Ireland, Iceland, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Norway, Austria, Poland, Portugal, Slovakia, Slovenia, Sweden, Switzerland and Spain. For the time being the provisions of the *Schengen* Convention are not partially or solely applicable for some of the new member states that have joined the EU effective May 1, 2004 (Cyprus), effective January 1, 2007 (Bulgaria, Romania) and effective July 1, 2013 (Croatia). Finally, the United Kingdom (UK), Ireland and Denmark are not applying the *Schengen* regime at all.

Under certain circumstances a foreign national can, on the basis of these regulations, be granted a *Schengen* Transit Visa or a *Schengen* Visa permitting short-term stays in the signatory states of the convention for no more than three months within a reference period of six months the latter counting from the date of initial entry (short-term stays). 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 so, hold a valid visa unless there is an exemption from the duty to obtain visa. He or she moreover is obligated to produce such documents upon request in order to substantiate the purpose and circumstances of his or her stay. The kind of documents required in a 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 foreign national is not affecting or endangering the interests of the Federal Republic of Germany. In order to make a decision on the application the personal interests of the applicant and humanitarian issues shall be considered as well as the security interests of Germany and the *Schengen* partners and the assessment made by the representation abroad concerning the traveler's willingness and possibility to return. Therefore each application is examined on a case-by-case basis. The applicant shall moreover

prove that his or her stay in the Federal Republic of Germany is financially secured. Above all he or she may not rely on the use of public funds for his or her stay in Germany. If he or she is not in the position to finance his or her trip and stay from personal funds, a host residing in Germany may assume liability for any costs arising from the visitor's stay in Germany, including the costs for possible medical treatments. The German local foreign national's office at the place of residence of the person inviting shall be responsible for the recording of such a declaration of commitment.

Moreover, to file a proof of having sufficient health insurance coverage is required according to Art. 15 Visa Codex; the stipulation reads as follows:

Article 15 - Travel medical insurance

- applicants for a uniform visa for one or two entries shall prove that they are in possession of adequate and valid travel medical insurance to cover any expenses which might arise in connection with repatriation for medical reasons, urgent medical attention and/or emergency hospital treatment or death, during their stay(s) on the territory of the Member States.
- applicants for a uniform visa for more than two entries (multiple entries) shall prove that they are in possession of adequate and valid travel medical insurance covering the period of their first intended visit. In addition, such applicants shall sign the statement, set out in the application form, declaring that they are aware of the need to be in possession of travel medical insurance for subsequent stays.
- the insurance shall be valid throughout the territory of the Member States and cover the entire period of the person's intended stay or transit. The minimum coverage shall be Euro 30.000. When a visa with limited territorial validity covering the territory of more than one Member State is issued, the insurance cover shall be valid at least in the Member States concerned.
- applicants shall, in principle, take out insurance in their country of residence. Where this is not possible, they shall seek to obtain insurance in any other country. When another person takes out insurance in the name of the applicant, the conditions set out in paragraph three shall apply.
- when assessing whether the insurance cover is adequate, consulates shall ascertain whether claims against the insurance company would be recoverable in a Member State.
- the insurance requirement may be considered to have been met where it is established that an adequate level of insurance

may be presumed in the light of the applicant's professional situation. The exemption from presenting proof of travel medical insurance may concern particular professional groups, such as seafarers, who are already covered by travel medical insurance as a result of their professional activities.

- holders of diplomatic passports shall be exempt from the requirement to hold travel medical insurance."

Such insurance should preferably be purchased by the applicant in his home country, but can also be obtained by the person inviting. In any case this should be taken care of in due time so that the policy or an equivalent certificate - preferably in German or English language - can be submitted when the application is filed.

Such insurance should preferably be purchased by the applicant in his or her home country, but can also be obtained by the person inviting the applicant. Entry to the *Schengen* territory shall be denied if the applicant has been previously registered in the *Schengen* information system for denied entry.

Third country nationals holding a visa which is not limited to a certain location or region (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 other states who are also fully implementing the *Schengen* convention within the scope of validity and in compliance with the purpose of visa. They are also not subject to controls when crossing internal borders.

A visa for Germany (national visa) shall be required for stays of longer duration, whereby this visa needs to be obtained prior to entry. Issuance shall be based on the regulations applying to the residence permit, the settlement permit; (*Niederlassungserlaubnis*) and the EC long-term residence permit (*EU - Niederlassungserlaubnis*). The duration of lawful stay with a national visa shall be offset against the periods of possession of a residence permit, settlement permit or EC long-term residence permit.

Prohibition against Taking up Employment

In practice, very often no attention is paid to the fact that there is no entitlement for taking up employment (i.e. for taking-up a dependent employment) deriving from a visitor's visa which is granted for example on the occasion of a business trip. The term "employment" is not defined by law.

Any activity implying dependent employment is not permitted. This particularly applies for, but is not limited to the following activities:

- participation in trainings (except for intra-company trainings, cf. above for further details);
- organization of training courses for the transfer of knowledge; and
- participation in the operational business or production; and performance of services.

However, under certain conditions, a training for foreign nationals who are specialists being employed by a group company in Germany is possible without the consent of the labor office, cf. below the section dealing with "Employment Visas" for further details. On the other hand, the following activities are admitted:

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

If it is unclear whether the intended activity is still covered by a visitor's visa or if obtaining a residence permit for the purpose of employment is obligatory, it is recommended to contact the responsible foreign national's office. In each individual case the office will, if so required, contact the labor office (the latter being responsible for the internal approval of the intended employment).

The content of the above restrictions are especially problematic if the individual entered the country with a visitor's visa in order to take-up an employment at a later date. Insofar the sanctions against such commencement of work without a residence title for the purpose of employment have recently been tightened with lasting effect. If no attention is paid thereto the administrative fines of up to Euro (EUR) 500.000 can be imposed. According to § 404 Social Security Code III fines up to the following amounts may be imposed:

- EUR 500.000 - to employers that let other companies assign a significant amount of staff to work on their premises whilst knowing or whilst he or she could have known that these companies do employ foreign nationals without having a legal residence permit for the purpose of employment work (§ 404 par. 1 no 1, par. 3 Social Security Code III)
- EUR 30.000 - to employers that employ foreign nationals that do not have a legal residence permit for the purpose of employment (§ 404 par. 2 no 3, par. 3 Social Security Code III); and

- EUR 5.000 - to foreign nationals engaging in employment without having a legal residence permit for the purpose of employment (§ 404 par. 2 no 3, par. 3 Social Security Code III).

Moreover, as foreseen by Section 18 par. 6 Employment Regulation the authorities may deny the grant or the extension of a residence permit for the purpose of employment in case either the applicant or the company have been in infringement with the aforementioned stipulations and have been condemned accordingly.

Finally, in individual cases the person concerned can be expelled from the country and (re-)entry ban can be imposed.

Proceeding

An application shall be examined and decided on by the consulate of the competent Member State in whose jurisdiction the applicant legally resides, for example the German Embassy or Diplomatic Representation abroad. The visa application has to be presented to the Embassy or Diplomatic Representation of the country of main destination (determined by the purpose of the journey and the length of stay). If the main destination cannot be ascertained, the *Schengen* state through which the applicant will enter the territory of these countries is responsible for granting the visa.

In general, the following information will have to be presented when applying for the business visa:

- passport: valid for the period of the planned stay and three months thereafter (single entry) respectively until the last intended date of departure (multiple entry);
  - a) shall contain at least two blank pages;
  - b) shall have been issued within the previous 10 years
- application form for a "*Schengen* visa" in duplicate;
- two biometrical photographs;
- official affidavit of support, to confirm covering the costs of immigration and emigration (*Verpflichtungserklärung*);
- letter of the inviting person or company confirming and supporting the planned purpose and duration of stay;
- documentation about the financial situation of the applicant (copies of the bank account statements of the last six months);

- certificate confirming the residential status of the applicant;
- certificate about health insurance coverage for all *Schengen* countries for the planned period of stay (coverage: EUR 30.000,); and
- proof of hotel reservation and airline reservation.

This is a sample listing only; but further verification with the responsible Embassy or Diplomatic Representation abroad is required. In principle, the applicant must make a personal appearance when the application is filed for the first time. At the time of submission of the first application, the applicant shall be required to appear in person. At that time, the following biometric identifiers of the applicant shall be collected: a photograph, scanned or taken at the time of application and his or her 10 fingerprints taken flat and collected digitally. In spite of this applicants have recently been able to file applications online. However, one should make use of this online proceeding only if applications are filed repeatedly and if it is certain that the requirements are fulfilled due to the fact that during online proceedings it is not possible to answer probable queries of public authorities, which might then cause delays in proceedings.

Applications shall be lodged no more than three months before the start of the intended visit. However, holders of a multiple-entry visa may lodge the application before the expiry of the visa valid for a period of at least six months. The fee for the visa amounts to Euro 60. The process regularly takes two to 10 days once the application is filed; however, the process can also be shorter for example during the high travel season - longer in particular cases. Finally it must be pointed out that obtaining a visa is not the right of the applicant; granting it is subject to the discretion of the responsible authority and this is obligatory.

Further information:

http://www.india.diplo.de/Vertretung/indien/en/06__Consu__Visa/visa__new/VISA__ENGLISH.html

Employment Visas

If the activities that the foreign national is to be assigned to in Germany are not covered by the business visa category as described above, then any third country national needs to file an application with regard to a residence title for the purpose of employment. Since, as previously mentioned, Indian nationals do not benefit from the European visa waiver

program they have to file such an application with the German Embassy in New Delhi or with the Consulate near their residence in India.

In principle, the Embassy or Consulate requires consent from the local labor authorities with regard to employing a foreign national. Such requests need to be made via the local foreign national's office. Nevertheless, for some visa categories it is regulated by governmental ordinance that no such consent is needed for the grant of the residence title. This applies to the following visa categories:

EU Blue Card Visa Category:

For applicants holding a German university degree or a foreign university degree that is recognized in Germany or comparable to a German university degree, or that have a comparable qualification that is proven by professional experience of at least five years, and that shall earn a salary of at least two-thirds of the social security contribution ceiling for the statutory pension scheme (EUR 48,400 as per January 1, 2015), or 52 percent of said ceiling for certain job categories in shortage occupations (e.g., natural scientists, mathematicians, engineers, doctors or IT consultants (EUR 37,752 as per January 1, 2015).

Executive Visa Category: Applicable to

- executives with complete authorization or "*Prokura*" (= proxy);
- members of the organ of a legal entity, who are authorized to legally represent the company;
- associates of a trading company or members of another trading partnership (GmbH; KG; GmbH & Co. KG), as long as they have been appointed by law, rules or by contract of a company, in order to represent the trading partnership or the business management; and
- executives of a company also active outside Germany, for employment at the level of a board of directors, management and a management board or for an occupation in other leading positions that are essential for the development of a company. A permit can be granted without the consent of the labor office.

Commercial Activities Visa Category: Applicable to

- foreign nationals who are either employed abroad in a commercial division by an employer whose domicile is in the home country;

- hold meetings or negotiations in the home country for an employer whose domicile is abroad, or who conclude contracts or purchase merchandise for exportation; and
- for an employer whose domicile is abroad, to establish, control or steer a part of the company in Germany.

If – that applies to all the three cases - the applicants do keep their residential address abroad and do not stay for a period of more than three months within a reference period of 12 months. A permit can be granted without the consent of the labor office.

Short Term Assignment Visa Category: Applicable to

Employed foreign nationals that are assigned to Germany for a period of up to three months, within an overall period of 12 months for certain activities as listed (including that is, implementing software sold). A permit can be granted without the consent of the labor office.

EU Service Delivering Visa Category: Applicable only to

- companies established within the EU; and
- who are assigning one of its employees (including third country nationals) to another EU member state. A permit can be granted without the consent of the labor office.

Self-Employment Visa Category: Applicable only to

Given the lack of any investor visa category, investors from third countries must comply with the immigration laws related to self-employment, according to § 21 para 1 of the Residence Act (*Aufenthaltsgesetz*). In principle, residence permits may be granted only if there is a higher economic interest or a certain local requirement, the activity is expected to have positive effects on the economy; and the financing of the implementation is assured by equity or promised credit.

Academic Persons Visa Category: Applicable only to

Academics holding a German graduate degree or graduates from German schools abroad with a recognized degree with regard to a job adequately matching the academic background.

If consent from the labor authorities is required they also have to check whether this job can be filled from the local labor market (job market test)

and if a concrete job offer with the usual working conditions is presented. This applies to the following visa categories:

Academic Persons Visa Category: Applicable only to

Graduates who hold a foreign university degree or a higher qualification or any similar qualification recognized as comparable to a German degree, may be granted a residence title for the purpose of employment within their field of expertise to conditions of employment that must be comparable to those that would be offered for the position to a local person, and finally there must be no job-seekers from the EU job market available.

Executive Staff and Specialist Visa Category: Applicable only to

Foreign nationals employed having an outstanding specialization with regard to an employment in a field of expertise covered by the specialization a permit may be granted for up to three years.

Intra-company Transfer Visa Category: Applicable only to

Foreign nationals having a university degree or higher education or similar qualifications, who shall be assigned to Germany within an intra-company transfer (ICT) inside a worldwide-acting company or group company. The permit may be granted for up to three years.

Long-term assignment Visa Category: Applicable only to

Foreign nationals that are assigned to Germany for a period of more than three months and up to three years with regard to certain activities as listed:

- that the foreign national's livelihood is secured;
- that the foreign nationals identity is established, and also their nationality, if they are not entitled to return to another state;
- that no grounds for expulsion apply;
- insofar as the foreign national has no entitlement to a residence permit, that the foreign nationals residence does not compromise or jeopardize interests for any other reason; and
- that the passport obligation pursuant to § 3 Residence Act is met.

Further information:

http://www.india.diplo.de/Vertretung/indien/en/06__Consu__Visa/visa__new/NATIONAL/NATIONA html

Training Visas

With regard to training, it should be noted, that there is no specific training visa category available in Germany except for ICT's. In particular, the business visitor visa category does not cover participating in trainings since this would go beyond the purposes covered by the business visitor category and would rather be qualified as an employment. Despite this (and in spite of the administrative sanctions in place), in practice very often no attention is paid to the fact that the business visitor visa holder is not entitled to participate in trainings. However, under certain conditions, it is possible for the foreign national's office to grant a permit with regard to a training of foreign national specialists being employed by a group company in Germany without the consent of the labor office. According to § 2 par. 3 Employment Regulation, a residence title can be granted for up to three months within a referencing period of 12 months to specialists being employed abroad if these employees are assigned to Germany for the purpose of internal trainings within the company.

Intra-company Transfer Visas

In principle, the labor authorities may only consent to grant a work permit by the foreign national's office after having carried out a job market test. As described above such test would include (i.e.) to check if the position can be filled from within the local job market and if the conditions of employment offered are at least comparable to those that would be offered to an applicant having the same background from the local labor market. However, in case of an ICT of an employee having an academic background (university degree or higher education or similar qualifications), no such consent will be needed. This is due to the consideration that in case of an exchange of personnel between companies belonging to the same group the local job market will not be affected.

As usual Indians have to file their applications with the German Embassy or Consulate at their place of residence. From there on the file will be transferred to the local foreign national's office who will then forward the request to a special department, Center for the Recruitment of Foreign and Expert Staff (*"Zentralstelle Auslands - und Fachvermittlung - ZAV*") being responsible for intra-company transfers.

The ICT application process is likely to take six - 10 weeks after all documentation has been compiled and the application has completely been filed. The permit will be granted for a period of up to three years.

No Visa Waiver for Indians

As previously mentioned nationals of some countries do benefit from a visa waiver program that has been set on an EU level. Based on this program, nationals from the countries listed on a so-called positive list have the privilege to enter the member states of the EU without having to apply for a visa first unless and until they stay in the country for more than 90 days (EU visa waiver program). This for instance, applies to nationals of the following countries: example Australia, Canada, Israel, Japan and USA. However, since India is not on this list, any Indian national will have to apply for a visa before crossing the borders of the EU.

Permanent Visas

1) Regular Settlement Permit

The settlement permit as regulated by the German Residence Act (*Niederlassungserlaubni*) is a permanent residence title that shall be granted to foreign nationals in order to enable them to stay in Germany both for commercial and family related reasons. The settlement permit allows its holder to take up employment and may only be supplemented with a subsidiary provision in those cases that are expressly permitted by law. According to § 9 of the Residence Act, a foreign national shall be granted the settlement permit provided that:

- he or she has held a residence permit for five years;
- his or her livelihood is secure;
- he or she has made compulsory or voluntary contributions into the statutory pension scheme for at least 60 months or furnishes evidence of an entitlement to comparable benefits from an insurance or pension scheme or from an insurance company (Time off for the purposes of child care or nursing at home shall be duly taken into account);
- the granting of such residence permit is not precluded by reason of public safety or order, giving full consideration to the severity or the nature of the breach of public safety or order or the danger emanating from the foreign national, with due regard

to the duration of the foreign nationals stay to date and the existence of ties in the federal territory;

- he or she is permitted to be employed, insofar as he or she is employed;
- he or she is in possession of the other permits that are required for the purpose of the permanent pursuit of his or her economic activity;
- he or she has an adequate knowledge of the German language;
- he or she possesses a basic knowledge of the legal and social system and the way of life in the federal territory; and
- he or she possesses sufficient living space for himself or herself and the members of his or her family forming part of his or her household.

If an individual meets these conditions, he or she may remain in the country indefinitely and then apply for a permanent status.

2) Highly Skilled Settlement Permit

Highly qualified persons do not need the approval of the Federal Employment Office. Compare § 3 of the Employment Regulation with § 19 of the Residence Act (*Aufenthaltsgesetz*). They can directly be granted permission for a permanent residence permit (*Niederlassungserlaubnis*). This is intended to enable highly qualified persons to be able to plan reliably, and to give them an incentive for establishment in Germany. According to the legal definition in § 19 para. 2 of the Residence Act, a highly qualified person is:

- scientist with special theoretical knowledge; and
- A teacher or professor having high standards; or scientific assistant having high standards.

Against the background that Germany has a special economic and social interest in staffing the top positions in the fields of economics and science, the employment of highly qualified persons is possible without prior permission. However, the requirements of the law concerning foreign nationals must be complied with, especially with respect to integration into the standards of living in the Federal Republic of Germany and meeting living expenses without state subsidy. The foreign national's office may grant a permanent residence permit, but is not obligated to do so. The foreign national is entitled only to a decision without abuse of discretion.

3) Self-Employed Settlement Permit

As mentioned above, the period of validity of the residence permit for the purpose of self-employment is limited to three years, according to § 21 para. 4 of the Residence Act. However, by way of derogation from this stipulation, a settlement permit (*Niederlassungserlaubnis*) may be issued where the foreign national has successfully performed the planned activity and the support of the foreign national and the dependents living with him or her as a family unit and whom he or she is required to support is ensured by an adequate income.

Employment and Labor Law

Whereas compliance with German labor laws is not imperative to each visa category, many visa categories can only be used if the conditions of employment are at least comparable to those that would usually be offered to applicants from the German job market. Moreover, many labor laws do apply regardless of the choice-of-law clause in a contract since there are parts of the indispensable bit of German regulations dealing with the conflicts of laws subject to labor law matters.

Most of the visa categories are linked to the requirement of presenting a binding offer of employment or employment contract for the duration of the intended stay in Germany.

Contract of Employment

Contracts of employment can be concluded orally but are generally in writing. However, according to the Documentary Evidence Act (*Nachweisgesetz*), the employer is obligated to set the important conditions of the contract down in writing, to sign this document and to then hand it over to the employee one month after commencement of the employment relationship at the latest. This document has to include details of the parties involved, duration of employment and details about the job, its location, and payment of salary, vacation periods, notices and termination among other things.

Most employment contracts in Germany are entered into for an indefinite period of time. Thus, the contractual relationship continues, in principle, either until the contract ends by mutual agreement or is terminated by one party.

It is common practice that parties of an individual employment contract agree upon a probationary period of up to six months. During this period,

either party may terminate the employment relationship by observing the minimum statutory notice period of two weeks; therefore no specific reason for termination is required.

Employment contracts may also be entered into for a fixed term. However, German labor courts have established substantial restrictions for fixed term employment contracts in order to protect employees.

According to the law, a fixed term employment contract can be entered into for a duration of up to two years regardless of whether there is any reason for the specific time limitation or not.

The key laws relating to employees hired by a company include: The Working Time Act (*Arbeitszeitgesetz*); The Federal Vacation Act (*Bundesurlaubsgesetz*); The Continuation of Remuneration Act (*Entgeltfortzahlungsgesetz*); The General Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz*); and The Act Against Unfair Dismissal (*Kündigungsschutzgesetz*).

Income Tax and Social Security Contributions

Income Tax

According to the principles of International Personal Income Tax Law, in principle, any person being employed in any country will have to pay Personal Income Tax on his or her worldwide income in the country of employment. However, generally speaking one can say that there is an exemption on bilateral basis if the foreign national is not staying in a country for more than 183 calendar days per year and if the employee has filed an application to be freed from the taxation. Anyhow, the regulations of the Agreement between the Federal Republic of Germany and the Republic of India for the Avoidance of Double Taxation with respect to Taxes on Income and Capital dated June 19, 1995 should be checked.

The rate of income tax in Germany ranges from zero percent to 45 percent. The German income tax is a progressive tax, which means that the average tax rate (that is, the ratio of tax and taxable income) increases monotonically with increasing taxable income.

Social Security Payments

Every foreign national working in Germany is subject to the German social security system unless there is a specific bilateral social security agreement between the foreign national's country of residence and Germany. However there is no such agreement between Germany and India and therefore the German social security system is fully applicable.

The German social security system falls into five different categories:

- health insurance (*Krankenversicherung*);
- unemployment insurance (*Arbeitslosenversicherung*);
- old age pension (*Rentenversicherung*);
- old age medical insurance (*Pflegeversicherung*); and
- social insurance for occupational accidents (*Unfallversicherung*).

Membership is compulsory except for rare cases where an exception is possible. Some enterprises provide for company pension schemes which, however, are not mandatory. Employee's and employer's social security contributions are approximately 20 percent of gross remuneration respectively.

Furthermore employers are obliged to pay an additional contribution for insolvency protection (*Insolvenzgeldumlage*). From 2012 the German government reactivated the additional contributions for insolvency protection with a relatively low percentage rate of 0.04 percent.

The social security contributions to be paid by the foreign national will be withheld from the agreed salary. The social security contributions to be paid by the employer will be added to the agreed gross salary. The employer is obligated to pay both the employer's and the employee's total contributions towards the social security (*Gesamtsozialversicherungsbeitrag*). Nevertheless, the employer is entitled to make a claim on the foreign national for the share of his or her contributions to be borne by the foreign national.

Proportionality between Local and Foreign Employees

Unlike many other countries Germany has no such quotas and hence, it does not make any difference if one files for a visa at the beginning, during or at the end of the year. Subject to meeting the conditions for the grant of the permit under the visa category in question, the likelihood of receiving a visa is the same for each applicant.

HONG KONG

Catherine Lau

Summary

The Hong Kong Special Administrative Region (Hong Kong) is a vibrant and multinational business center located in the southern part of the People's Republic of China (PRC). With its historical background as a British Colony, Hong Kong has been one of the favorite cities for expatriates and foreign nationals for many years.

Hong Kong is currently a special administrative region of the PRC, it adapts a special set of immigration rules and regulations separate from the immigration rules that apply in the PRC. The immigration rules and regulations in Hong Kong are governed under the Immigration Ordinance. All immigration applications are processed by the Hong Kong Immigration Department (HKID).

Legal System

Hong Kong's legal system is completely independent from that of Mainland PRC. In contrast to mainland PRC's civil law system, Hong Kong continues to follow the English Common Law tradition established under British rule. Hong Kong's courts may refer to decisions rendered by courts of other common law jurisdictions as precedents, and judges from other common law jurisdictions are allowed to sit as non-permanent judges of the Court of Final Appeal.

Structurally, the court system consists of the Court of Final Appeal, the High Court and the District Court, which includes the Family Court. Other adjudicative bodies include the Lands Tribunal, the Magistrates' Court, the Juvenile Court, the Coroner's Court, the Labor Tribunal, the Small Claims Tribunal, and the Obscene Articles Tribunal. Justices of the Court of Final Appeal are appointed by Hong Kong's Chief Executive.

Visas

Employer or Sponsoring Entity

An employer or sponsoring entity in Hong Kong is required for all employment or training visa applications. In general, the employing company in Hong Kong will act as the sponsor for its employee's Hong Kong employment or training visa application. However, it may be possible that an overseas establishment seeking to send an employee to Hong Kong for employment or training purposes does not have any entity in Hong Kong. Under such circumstances, the employment or training visa application should be sponsored by the employer's counterpart in Hong Kong. For example, an overseas entity may be required to send its employee to Hong Kong to carry out work duties at a client's premises in Hong Kong. Under these circumstances, the client's company in Hong Kong should act as the sponsor for the applicant's Hong Kong employment visa application.

The sponsor in Hong Kong is required to inform the HKID on any cessation to the applicant's employment or training in Hong Kong. In addition, the sponsor in Hong Kong is responsible for the repatriation of the applicant if he fails to leave Hong Kong after the validity of stay granted by the HKID.

Business Visas

Hong Kong welcomes business visitors, and it currently offers visa-free entry to nationals of more than 160 countries around the world. The duration of the visa-free period varies between different nationalities. Please visit the HKID's official web site at http://www.immd.gov.hk/ehtml/hkvisas_4.htm for an updated list on the visa-free countries, and the duration of stay granted to different nationalities.

Citizens from the visa-free countries may enter Hong Kong visa-free to carry out business activities (upon satisfaction of all requirements for a

foreign national to enter Hong Kong as a visitor). A visitor to Hong Kong may generally engage in business activities which include concluding contracts or submitting tenders; examining or supervising the installation and/or packaging of goods or equipment; participating in exhibitions or trade fairs (except selling goods or supplying services directly to the general public), settling compensation or other civil proceedings; participating in product orientation; and attending short-term seminars or other business meetings.

Visa Waivers for Indians

Under the current immigration arrangements, Indian nationals may enter Hong Kong visa-free as a visitor for up to 14 days, provided the traveler satisfies the requirements for entering Hong Kong as a visitor.

If a foreign national does not enjoy the visa waiver concession, or if he would like to stay in Hong Kong for a period longer than the period of stay granted on the visa waiver basis, the foreign national should apply for and secure a visitor visa prior to his proposed entry to Hong Kong. The current visa processing time for a visitor visa is approximately four weeks from the date of application submission.

Hong Kong Special Administrative Region Travel Pass

Hong Kong SAR Travel Pass (Travel Pass) enhances the mobility of business travelers to Hong Kong. The Travel Pass is a machine readable document valid for three years and is good for multiple entries to Hong Kong for a stay of a maximum period of two months on each entry. The holder of a Travel Pass may use the Hong Kong resident counter upon arrival in Hong Kong and it simplifies the immigration clearance procedures and shortens the processing time by about 40 percent.

Travel Pass application is open to frequent visitors who hold valid passports and are eligible to come to Hong Kong without a visa or entry permit for visit purpose. Applicants should have genuine needs to frequently visit Hong Kong, and have entered Hong Kong trouble-free on at least three occasions (other than return from side trips to the Mainland of the PRC or Macau) in the 12-month period before the application or can satisfy that their visits may bring substantial benefits to Hong Kong.

The processing time for a travel pass at the HKID is approximately four-six weeks from the date of application submission.

Employment Visa – General Employment Policy (GEP)

All foreign nationals, aside from those with permanent resident status in Hong Kong, must first secure approval from the HKID prior to commencing work in Hong Kong. This is regardless of the location of the employer, the duration of the proposed employment and/or assignment in Hong Kong, and whether the foreign national is paid or unpaid for services rendered in Hong Kong.

The HKID will assess an employment visa application based on whether the applicant possesses skills and experience not readily available in Hong Kong, and whether the applicant's presence in Hong Kong will be beneficial to not only the employer but also the interests of Hong Kong. In addition, the HKID will consider whether the presence of the employer is beneficial to the interests of Hong Kong.

An employment visa is employer specific, change of employer is prohibited in Hong Kong without prior approval from the HKID.

The current processing time for a Hong Kong employment visa at the HKID is approximately four-six weeks from the date of application submission. The initial Hong Kong employment visa will be granted for a maximum period of 12 months. Further extension of the employment visa will be granted provided the employment status between the applicant and his employer remains valid.

Admission Scheme for Mainland Talents and Professionals

While the GEP is applicable to foreign nationals or Chinese nationals residing overseas, Chinese nationals residing in PRC should apply for Hong Kong employment visas under the Admission Scheme for Mainland Talents and Professionals (Admission Scheme).

The general assessment criteria for an employment visa application under the Admission Scheme are similar to the assessment criteria under the GEP. However rather than entering into Hong Kong with a PRC passport, after the approval of the visa application under the Admission Scheme, the Chinese national applicant is required to travel to Hong Kong with a Exit-Entry Permit for Travelling to and from Hong Kong and Macau (EEP), together with an appropriate exit endorsement issued by the Public Security Bureau Office in Mainland PRC where the applicant’s household registration is kept.

The processing time for an employment visa application under the Admission Scheme is approximately four-six weeks from the date of application submission.

Immigration Arrangements for Non-local Graduates

Foreign nationals (including PRC nationals) may apply for an employment visa under the Immigration Arrangements for Non-local Graduates (IANG) upon obtaining a degree or higher qualification in a full-time and locally accredited programme in Hong Kong. The visa is extendable provided the applicant remains employed in a job that is normally taken up by degree holders, and that the remuneration package is set at a market level.

Employment (Investment) Visas

An employment (investment) visa allows foreign nationals to reside, establish and manage their business in Hong Kong. While employment visas are required for foreign nationals seeking to work in Hong Kong, employment (investment) visas are for business owners or shareholders seeking to establish and manage their business in Hong Kong. When assessing an employment (investment) visa application, the HKID will assess the application based on whether the applicant has good academic and professional background, and whether the applicant and his business in Hong Kong is in a position to make contribution to the economy of Hong Kong.

The current processing time for an employment (investment) visa application at the HKID is approximately four-eight weeks from the date of application submission.

Upon approval of the employment (investment) visa application, the applicant will initially be granted permission to enter Hong Kong to manage his business for a maximum period of 12 months. The employment (investment) visa is generally renewable.

Training Visas

A training visa allows a foreign national to receive training in Hong Kong for the purpose of acquiring skills and knowledge that is not available in his country or territory of domicile. The training visa will be granted for a maximum period of 12 months. After completion of the training in Hong Kong, the applicant should return to his place of origin to continue his studies or career.

Generally, training visas will be applicable to foreign students wishing to complete an internship in Hong Kong, or employees of an overseas company requiring training in Hong Kong.

Similar to the Hong Kong employment visa application, a local sponsor is required in support of a Hong Kong training visa application. The current processing time for a Hong Kong training visa application is also approximately four-six weeks from the date of application submission.

Intra-company Transfer

There is no special visa type for intra-company transferees in Hong Kong. Intra-company transferees should firstly secure a Hong Kong employment visa before commencing working in Hong Kong. However, the Hong Kong employment visa applications for intra-company transferees will usually be assessed favorably as intra-company transferees generally have the requisite knowledge and skills in the internal management of the employing or sponsoring entity in Hong Kong.

Working Holiday Scheme

This scheme allows foreign nationals of participating countries (Australia, Canada, France, Germany, Ireland, Japan, Republic of Korea, New Zealand and United Kingdom to name a few) to stay in Hong Kong temporarily for holidays, and to take up short–term employment and/or enroll in a short educational course during their stay in Hong Kong. The applicants must be between 18 and 30 years of age.

Capital Investment Entrant Scheme

Introduced in 2003, the Capital Investment Entrant Scheme (CIES) allows foreign national investors and their dependent family members (spouse and unmarried children under 18 years old) to reside in Hong Kong via a qualifying capital investment of not less than HKD 10 million. The investment of HKD 10 million must remain invested in permissible investments in Hong Kong throughout the participation in the scheme. Please note that the CIES is currently not applicable to PRC nationals unless they hold a valid overseas permanent residence status.

Eligibility Criteria:

- the applicant must have net assets with a market value of not less than HKD 10 million to which he or she is absolutely beneficially entitled throughout the two years preceding the CIES application; and

- the applicant must invest HKD 10 million in permissible assets within six months prior to application submission, or within six months after obtaining an approval-in-principle from the HKID.

Permissible Investments in Hong Kong under the CIES:

Financial Investment products listed below:

- equities;
- debt securities;
- certificates of deposits;
- subordinated debt; and
- eligible collective investment.

Quality Migrant Admission Scheme

The purpose of the Quality Migrant Admission Scheme (QMAS) is to attract highly skilled and talented candidates to settle in Hong Kong. This Scheme is quota-based and applications under this Scheme are adjudicated on point-test basis. Applicants must also fulfill the prerequisites which include age, financial requirement, good character, Chinese or English language proficiency, educational qualification. Applicants who qualify for the prerequisites can select to be assessed under the General Points Test or Achievement-based Points Test.

For the General Point Test, points are allocated to five point-scoring factors which are age, education or professional qualifications, experience, language skill and family background. Different points are allocated to different factors and the current passing point is 80. Please refer to the HKID's official website for more details http://www.immd.gov.hk/ehtml/QMAS_8.htm.

Applicants with exceptional talent and outstanding achievement may select to be assessed under the Achievement-based Points Test. The assessment requirement is very high. Points may be awarded if the applicant has been awarded with a national or international award; or the applicant's work has been acknowledged by his professional peers or has contributed significantly to the development of his profession.

Dependent Visas

Applicants for employment visa, employment (investment) visa, training visa, IANG, QMAS and the resident visa under the CIES may sponsor

dependent visa applications for accompanying dependent family members (spouse and unmarried children under 18 years old) so that the family members can reside with the principal applicant during his stay in Hong Kong. The dependent visas should be renewable provided that there is no change in the marital relationship between a couple, and that the validity of stay of the principal applicant (being the sponsor) remains valid.

Right of Abode (Permanent Residence Status)

A foreign national (including PRC nationals) is eligible to apply for a right of abode in Hong Kong after ordinarily residing in Hong Kong for a continuous period of at least seven years.

INDIA

Poorvi Chothani

Summary

The Republic of India is a country in the South Asian peninsula. It is the seventh largest country covering a geographical area of 3,287,263 square kilometers and the second most populated country with a population of about 1.2 billion people.

Legal System

The main sources of law in India are the Constitution, statutes (legislation), customary law, and case law. The statutes are enacted by Parliament, state legislatures and union territory legislatures.

Because India is a land of diversity, local customs and conventions that are not against statute or morality or otherwise undesirable are, to a limited extent, also recognized and taken into account by the courts while they administer justice in certain spheres. Also, people of different religions and traditions are governed by different sets of personal law with respect to matters relating to family affairs.

A unique feature of the Indian Constitution is the judicial system. A single integrated system of courts administers both union and state laws. The Supreme Court of India, seated in New Delhi, is the highest body in the entire judicial system. Each state or a group of states has High Court under which there is a hierarchy of subordinate courts.

The Supreme Court has original, appellate and advisory jurisdiction. Its original jurisdiction extends to the enforcement of fundamental rights given by the Constitution and to any dispute among states and the Government of India. The decisions of the Supreme Court are binding on all courts within the territory of India.

Visas

Most foreign nationals require an appropriate visa to visit India. Foreign nationals coming to India need to have a valid passport, a visa, or other accredited travel documents to enter through authorized check posts or at an international airport, and are subject to immigration checks.

Temporary Visas

Business Visas

Business visas are generally issued with a validity of six months and individuals of certain nationalities maybe issued visa with a validity of up to ten years with multiple entries to foreign national business persons who have set up or intend to set up business ventures in India. A first-time applicant is generally granted a business visa with a validity period of six months and may subsequently apply for a longer-duration visa. The period of continuous stay in India for each visit is limited to 180 days. The applicant's financial background and expertise in the field of intended business are checked prior to granting a business visa. In addition, the applicant should not be seeking to visit India to undertake "a business of money lending or for running a petty business or petty trade or for full time employment in India." The Consular Post considering the application will also check the documentary proof of company registration or registration with an institute like the State Industries Department or the Export Promotional Council.

In order to obtain a business visa, applicants should submit their applications supported by documents including, but not limited to, a letter from the sponsoring or inviting organization indicating nature of applicant’s business, duration of stay, places and organizations to be visited and a guarantee showing the ability to meet maintenance expenses and details of any joint venture in India.

Employment Visas

Foreign nationals with high levels of professional skills and qualifications may be granted visas to take up employment in India. They will not

be granted visas for jobs for which qualified Indians are available or for routine, ordinary, secretarial or clerical jobs. All employment visa applications must be sponsored by an entity in India. Foreign nationals who are employed and working in non-IT positions may be issued an employment visa for an initial period of up to two years, which may be extended within India for a total validity period of up to five years from the visa's initial date of issuance. Employment visas may be granted with a validity of up to three years to take up employment in the IT, software, or ITES sectors. This can be extended for up to five years from the date of issue of the initial visa. Visas to work on specific projects continue to be issued for the duration of the project. Employment visas are processed on a case-to-case basis and are generally granted for one year even if the duration of employment is longer than a year. On the expiry of the initial year, it is possible to get an extension of the visa in India for a longer period. The extension process and processing time differs in every jurisdiction, within India.

Employment visas are generally job specific, which prevents foreign nationals from seeking new jobs on the same visa. Any foreign national who needs to change his or her employer within India requires the implicit approval of the Ministry of Home Affairs (MHA). The change of employer is permitted no more than once during the five year tenure of the original employment visa.

The MHA on the other hand will consider approving the application, subject to the following:

- The foreign national holds a senior position within an organization in India or is in a position that requires high level of skills;
- When the change in employment is between: A registered holding company and its subsidiaries; and
- A no objection letter from the original company that the foreign national was employed by.

Furthermore, the visa is dependant on the employment contract and it follows that if the contract is terminated the visa is no longer valid, and the foreign national is required to leave the country.

Steps For Obtaining an Employment Visa Are:

An application for this visa should be supported with documents, including but not limited to, an appointment letter, employment contract, the applicant’s resume, proof of authenticity of the employing organization in India and a covering letter from the employer justifying the necessity for the foreign national.

It is important for the employer to provide information to establish that the employee is employed on terms commensurate to his qualifications, experience and job profile and complying with the minimum salary requirements.

Intra-company Transfers

Though there is no special intra-company transferee visa in India, visas are granted to employees of a foreign company who needs to transfer to an Indian branch of the same organization or to a business affiliate. There has to be an Indian entity that sponsors the visa even if the foreign national continues to be on the payroll of a foreign entity. Visas are granted on a case-by-case basis at the discretion of the Indian visa officer and will, as with work permits in general, take into account the availability of native Indian workers.

Project Visas

The Indian Government issues a Project (P) visa to foreign nationals seeking to work in the Power or Steel Sectors. The number of foreign national workers who can work on a project visa in any unit in these industries is restricted to numeric caps. The cap varies depending on the unit's activities and production capacity. P visas are valid for one year, or for the duration of the project, whichever is less. A person who has been granted a project visa cannot be employed by the company that executed the project for a period of two years from the date of commissioning of the project.

Accompanying Dependents

Spouses and dependant children who accompany and reside with persons on a long term employment or business visa in India are issued visas that are co-terminus to the visa of the principal applicant. However, if an accompanying spouse wishes to be employed in India or conduct any other activities which would require a visa, the accompanying spouse will need to obtain an appropriate, independent visa.

Registration of Foreign Nationals

The consular post abroad often indicates details about the registration requirements on the visa at the time of issuance.

To complete the registration process with the Foreign nationals Registration Office (FRO) or Foreign nationals Regional Registration Office (FRRO), the Indian company as the employer or business venture entity will have to provide an undertaking through an authorized Indian national that it will be responsible for the activities and conduct of the foreign national during his or her stay in India. In the undertaking the Indian company or an Indian individual also has to assume the responsibility of repatriating the foreign national employee if anything adverse occurs during his or her stay in India. Once the registration is complete, the eligible foreign national is issued a resident permit that is co-terminus with the visa validity and facilitates multiple entries into India.

Failure to register is an offence under the Registration of Foreign national's Act, 1939 and the offender may be imprisoned for a maximum period of one year and be subject to a fine. An additional fee is levied if there is any delay in registering with the FRO or FRRO.

Extensions and Modifications: Certain employment and business visas maybe extended within India. Modifications to visas are generally not allowed. However, in extraordinary circumstances the MHA may consider a request for modification, which the applicant should submit himself or herself. Applications for extensions should be submitted to the appropriate FRO or FRRO which in turn usually forwards most of the applications to the MHA.

Permanent Visas

Persons of Indian Origin (PIO) Card

Earlier, a foreign national, who could prove his or her Indian origin up to three prior generations (or the spouse of a citizen of India or person of Indian origin), was eligible for a PIO card, which was valid for fifteen years from the date of issue. Citizens of Pakistan, Bangladesh and other countries as specified by the Central Government were not eligible to receive these cards.

The PIO Card gave the holder visa-free entry into India for fifteen years, the right to take up employment without a visa, and exemption from registration with an FRO if the period of stay in India did not exceed 180 days. In addition, PIO card holders enjoyed parity with Non-Resident Indians (NRI's) from time to time in economic, financial and educational fields. PIO card holders could acquire, hold, transfer or dispose of immovable properties in India (except agricultural or plantation properties), open Indian Rupee (INR) bank accounts, lend INR to Indian residents and make investments in India. Children of PIO card holders could also obtain

admission in educational institutions in India on parity with NRI's. However, they could exercise any political rights, visit restricted or protected areas without permission, or undertake mountaineering, research, or missionary work without additional permission.

The PIO card was earlier issued to eligible applicants through the Indian Posts in the country of their citizenship. On January 9, 2015, the Government of India declared that the PIO cards are now deemed to be OCI cards. Consequently, now no PIO cards are issued by the Indian Government in the country or at any of its consular posts. Those PIO cards issued prior to the Government notification of January 9, 2015 are still valid but they are automatically converted into an OCI card[1] - Overseas Citizen of India (OCI) Card.

In January 2006, the Indian Government implemented a law regarding registration of eligible foreign nationals as Overseas Citizens of India (OCIs). Eligible foreign nationals include, among a few other categories, certain persons of Indian origin and individuals whose parents or grandparents migrated from India after January 26, 1950, and their minor children. This is subject to the applicant being a citizen of a country that allows dual citizenship in some form. This provision is extended to such citizens of all countries other than those who had ever been citizens of Pakistan and Bangladesh.

Registration as an OCI is a one-time process that grants a lifelong multi-entry, multi-purpose visa to visit, live or work in India, and no travel restrictions within the country or employment visa requirements that earlier applied apply to PIOs. An OCI is not required to register with an FRO for any length of stay in India.

The entire OCI registration process is to be initiated online, at the MHA's website, and completed by sending the supporting documents to the appropriate office. An application fee must be submitted with the hard copy of the application. Individuals holding PIO cards may pay reduced fees.

An OCI card is issued to the applicant within a few weeks unless there is a criminal background, which may result in delays. All applications are scrutinized by the Central Government of India. The registration is subject to cancellation if it is found that such a registration was made with the aid of fraud, false representation or concealment of any material fact. Individuals may register as OCIs at the Indian Mission or Post in the country where they reside or even while they are in India.

Indian nationals who have recently acquired nationality of another country are required to surrender their Indian passport to the Post

1 See explanation for OCI cards

for cancellation at the time of applying for an Indian visa for the first time with their foreign passport. Certain foreign nationals may acquire citizenship of India by naturalization, if they have resided in India for the prescribed duration. Under the OCI scheme, eligible OCIs may acquire Indian citizenship after staying in India for one year provided they have been registered as an OCI for five years. To avail of Indian citizenship, a foreign national will have to relinquish his or her foreign nationality.

Electronic Visas

India launched its electronic visa system, for nationals of Australia, Brazil, Cambodia, Cook Islands, Djibouti, Fiji, Finland, Germany, Indonesia, Israel, Japan, Jordan, Kenya, Kiribati, Laos, Luxembourg, Marshall Islands, Mauritius, Mexico, Micronesia, Myanmar, Nauru, New Zealand, Niue Island, Norway, Oman, Palau, Palestine, Papua New Guinea, Philippines, Republic of Korea, Russia, Samoa, Singapore, Solomon Islands, Thailand, Tonga, Tuvalu, United Arab Emirates (UAE), Ukraine, United States of America (U.S.), South Africa, Vanuatu and Vietnam. Recently there have been talks by the Ministry of Tourism regarding extending this facility to Italy, Spain, France, the United Kingdom (UK) and even China. This however is still to be confirmed as there have been security concerns raised by the MHA.

This facility may be used for several listed activities but is referred to as a Tourist Visa on Arrival (TVoA). This electronic travel authorization must be obtained before arriving at designated airports in India.

The guidelines state that an international traveler whose sole purpose of visiting India is recreation, sightseeing, casual visits to meet friends or relatives, short duration medical treatment or casual business may avail of this facility. Due to the ambiguous reference to "casual business", practitioners are advising clients to restrict business activities to those that are incidental when using such a visa for one of the other listed, permitted activities. Further clarification from the government on this point is expected soon.

It is very important to note that:

Registration

Foreign nationals have to register with the concerned District FRO or FRRO within 14 days of their arrival in India, if they hold an employment

or business visa of certain validity. FRROs are located in Mumbai, New Delhi, Bengaluru (Bangalore), Hyderabad and Kolkata; there are also state-level offices in individual states.

Employment and Labor Law

India does not have one single law that governs employment, but works with a network of laws that regulate matters like conditions of service and work, wages and allowances, labor relations, social security and welfare. Under the Constitution of India, labor matters are regulated by the Central Government and the State Governments. Government policies in this area have been evolving in response to the changing needs of economic development and social justice.

The laws relating to labor and employment in India are broadly categorized as 'Industrial Laws', which are applicable to 'workmen', as defined under the provisions of the Industrial Disputes Act, 1947 (the Industrial Dispute Act). Employees whose duties are predominantly managerial or supervisory are usually excluded from the definition of 'workman'. Therefore most managers, executives and senior employees are generally subject to contractual terms of employment. However, employees who perform clerical, skilled, unskilled, manual, technical and operational duties fall within the ambit of the definition 'workman' and come under the purview of industrial laws. Almost all foreign nationals employed in India are not covered by industrial laws as only highly skilled and educated foreign nationals maybe issued employment visas.

In 2010, the Indian government introduced a new provision that required all employers to pay foreign national employees a minimum annual salary of USD 25,000. Any perquisites like housing, telephone, transport, entertainment, etc., which are received in kind, should not be included when computing the salary of the individual.

Income Tax and Social Security Contributions

The incidence of tax on any individual or entity in India depends on residential status. Broadly, taxpayers may be classified as residents or Non-residents.

An individual or entity that is resident in India is subject to tax on his or her global income. More details on individual and corporate taxes are presented below.

An individual's residential status is determined by the person's period of stay in India during a given financial year. An individual maybe classified as a resident, Non-resident or 'ordinarily resident'. The last category occurs when the person has been physically present in India:

- For 182 days or more in a year;
- For more than 365 days in the previous four years; and
- For 60 days or more in the current year.

Both residents and individuals who are 'ordinarily resident' in India are taxed on their world income.

Foreign nationals working in India are generally taxed only on their Indian income subject to the criteria mentioned above. However, remuneration for work done in India is subject to taxation in India irrespective of the place of receipt or payment of such remuneration.

Personal income tax is levied by the Central Government and is administered by the Central Board of Direct Taxes under the Ministry of Finance in accordance with the provisions of the Income Tax Act, 1961. The maximum effective rate of tax for individuals is approximately 33.99 percent; though these rates often vary from year to year.

Social security has always been one of the key components of labor welfare in India. It is included in the Indian Constitution under the Directive Principles of State Policy. It thus requires the nation to bear the primary responsibility for developing an appropriate system to protect and assist its workforce. The division of power deals with the framing of a social security policy for workers, administration of all the legislations relating to social security and implementation of the various social security schemes.

The social security provisions broadly cover two categories of labor welfare measures, covering the spectrum of preventive, promotional and protective measures for labor welfare i.e.:

- Those relating to medical facilities, compensation benefits and insurance coverage for employees; and
- Those relating to provident fund and gratuity provisions.

The following laws pertaining to social security are federal laws with the States having primary responsibility for their implementation:

- The Employees' State Insurance Act, 1948, which provides for sickness, maternity, disablement and medical benefits;

- Employees' Provident Fund and Miscellaneous Provisions Act, 1952 (the EPF Act), which seeks to protect the future of industrial workers after retirement and in case of;
- Retrenchment, and extends this protection to their dependents in case of early death;
- The Workmen's Compensation Act, 1923, which provides for compensation to injured workmen of certain categories and in the case of fatal accidents to their dependants, if the accidents arose out of and in the course of their employment. It also provides for payment of compensation in the case of certain occupational diseases;
- The Maternity Benefit Act (described earlier); and
- The Payment of Gratuity Act, 1972, under which gratuity is a one time payment towards retirement benefits accruing to an employee when he or she retires or leaves the employer. However, under this statute, gratuity is even payable to an employee who resigns after completing at least five years of service.

Other Relevant Schemes

With the view to providing effective social security benefits to the employees, the Employees Provident Fund Office (the EPFO) was established in the year 1952, after the enactment of the EPF Act.

At present there are three operational schemes under the EPF Act:

- The Employees' Provident Fund Scheme, 1952;
- The Employees' Deposit Linked Insurance Scheme, 1976; and
- The Employees' Pension Scheme, 1995 (replacing the Employees' Family Pension Scheme, 1971).

Under current law, most establishments in India that employ more than twenty individuals have to register under the EPF Act. Once an establishment has been under the purview of the EPF Act, it continues to be covered under that law, even if the number of employees is less than twenty at a later date. Since the EPF Act applies automatically to qualifying establishments, employers must complete formalities for registration and allotment of a business number.

The Employees Provident Fund Scheme (the EPF Scheme) is the most prominent social security program in India. It is mandatory to provide this scheme to employees that are paid less than Indian Rupees (INR) 15,000 monthly, but it is widely used by most employers and employees because of its tax benefits. A deduction of twelve percent of

the employee's wages is deposited in the Provident Fund with an equal contribution from the employer. The funds are placed in a retirement pension plan, or may be used to make lump sum payments for a workman's death or disability.

Additionally, there is the Employees State Insurance (ESI) program, mandatory for employees in specific industries making under INR 25,000 a month. The ESI program provides relief to workers and their family in times of death or disability as well as during sickness and maternity.

The EPF Act allows certain exemptions from its ambit which are determined on a case-to-case basis. Apart from granting exemption to an establishment from the operation of a particular scheme, the EPF Act also provides for the exemption of an individual employee or a class of employees.

Social Security and International Workers

Until now foreign nationals working in India and Indian nationals working outside the country were not required to contribute to any social security or pension scheme in India. On October 01, 2008 by a notification in the Official Gazette, the Ministry of Labor and Employment in India has extended the scope of the EPF Act to include international workers (both Indians working outside the country and non-Indian citizens working in India). These workers are now required to contribute twelve percent of their basic salary plus Dearness Allowance, the cash value of food concessions and retaining allowance (matched by a twelve percent amount payable by the employer) to the EPFO that implements the EPF Scheme, irrespective of the contributions they may be making to such schemes in other countries.

Expatriate employees are allowed to withdraw accumulated contributions on acquiring fifty-eight years of age. They could make withdrawals in keeping with a Social Security Totalization Agreement if they belong to one of the countries that have such an agreement with India, or if the employee's home country has a reciprocal arrangement which permits withdrawals by Indian employees in their country. This is expected to encourage more countries to establish Social Security Totalization Agreements (SSA) with India. India has such agreements which have been in effect for a few years now with Belgium, France Germany (for posted workers only), the Netherlands, Switzerland, Denmark, Luxembourg, Hungary, the Czech Republic, Canada, Norway, Japan, Finland, Germany (comprehensive SSA) and Sweden.

ITALY

Marco Mazzeschi

Summary

Italy is divided into 20 regions and each region is further divided into more than 100 provinces. Immigration matters are handled by local provincial offices.

Italy was one of the original members of the European Union (EU). It also became and remains to this day a member of the Group of seven (G7) and Group of eight (G8) industrialized nations with a Gross National Product (GNP) of approximately Euro (EUR) 1.8 trillion and a Gross National Income per capita of EUR 24,700.

In 2002, Italy converted its currency from the Lira to the Euro. Italy has the fourth largest economy in Europe, which is primarily fueled by the production of high quality consumer products, engineering products, agriculture, and tourism. In fact, over 42 million tourists visit Italy annually.

The Italian government has a bicameral structure. The Parliament, having legislative power, is composed of two Houses: the Chamber of Deputies and the Senate. The Prime Minister is the head of the government. As such, he has the power to issue orders on specific matters and decrees.

Legal System

Immigration issues at the national level are governed by the *"Dipartimento per le libertà civili e per l'immigrazione"* within the Ministry of Internal Affairs (www.interno.it). The Ministry provides instructions to the various provincial departments regarding the interpretation and implementation of the law.

Each province has an Immigration Office (*Sportello Unico per l' Immigrazione*). Immigration and permits are generally handled within the office of that region. In order to issue any kind of permit, the Immigration Office must first receive the necessary clearances from the Labor Office (*Direzione Provinciale del Lavoro* or DPL) and from the Police (*Questura* – www.poliziadistato.it).

Immigration law is enforced by the *Prefetto* (a Government representative in each province), the various police authorities (Police, *Carabinieri, Guradia di Finanza* and *Polizia Municipale*) and by the Department of Labor.

A person who enters or takes up residence in Italy illegally may be deported if any of the following circumstances apply:

- entering Italy without passing border controls;
- remaining in Italy without requesting a permit of stay, as prescribed by the i.l. (exception: if the delay is due to *force majeure*);
- the permit of stay has been either revoked or annulled; and
- remaining in Italy when the permit of stay has expired beyond 60 days and the renewal has not yet been requested.

A foreign national may be granted leave to appeal an order of deportation within 60 days by petitioning the judge in the pertinent court.

Heavy sanctions and penalties are imposed on companies and employers aiding the illegal entry of foreign nationals as well as hiring foreign nationals without complying with immigration and labor laws.

Visas

Temporary Visas

Citizens of countries with which Italy has a visa waiver program (India is not one of them), can enter Italy on business and stay up to 90

days without needing to obtain a visa. All other foreign nationals need to obtain a business visa to enter the country even for a few days. Business activities include:

- carrying out commercial activities;
- conducting negotiations and stipulating agreements, attending seminars; and
- installing products and equipment sold by the sending company.

In general terms, business visitors cannot carry out any activities for the benefit of the Italian host company but must work solely for the benefit of their own employer.

Long Term Visas (more than 90 days)

A 'Long Term' stay is defined as a stay in Italy, for work purposes, that is longer than 90 days duration.

Subordinate Workers (*Lavoratori Dipendenti*)

The direct hiring of a non-EU citizen by an Italian company is subject to the availability of quotas which are released annually by the government in limited quantities. The Italian company will need to first obtain clearance from the Department of Labor and the Police and then obtain a work permit from the Immigration Office. It is important to note that each time the government does release a new set of quotas, there are several hundred thousand applicants seeking to receive these quotas and as such, the wait for a work permit is very extensive, often lasting beyond a year.

Autonomous Workers (*Lavoratori Autonomi*)

Autonomous workers are basically independent consultants who come to Italy to do consulting work for a company, to set up a new company, or to function as a legal representative in Italy for an already existing entity. The work permits for this type of work are also subject to the availability of government quotas with a few exceptions. The application must be filed personally by the worker (and not by the company) or by proxy with some supporting documents issued by the company.

Each consulate has a certain amount of discretion when issuing an autonomous work visa and therefore the issuance of a work permit does not automatically guarantee the subsequent issuance of the pertinent visa.

Assigned Workers (*Lavoratori Distaccati*)

The temporary transfer of nationals from a foreign company to an Italian company, when the employee remains hired by the sending company, is a preferential route as it is not subject to the availability of yearly quotas. The temporary assignment can be initially for a maximum period of two years with the possibility of:

Intra-company Transfers

If the foreign national employee has at least six months' experience in the same sector, has special skills (usually proven by a diploma) or a manager, and if the foreign company and the Italian company are both part of the same group of companies, the foreign national employee can obtain an intra-company work permit.

Service Agreement Assignments

If the foreign company and the Italian company are not part of the same group, an intra-company transfer (ICT) is not allowed. However, the two companies can enter into a service agreement regulating the terms and conditions of the assignment. The Italian company will need to inform the local Unions and additional documents must be submitted to the Immigration office following which the employee can obtain a work permit.

Fast-track Procedure for Intra-company Transfers

The Ministry of Interior (*Ministero dell'Interno*) implemented a fast-track procedure for the companies willing to host non-EU highly specialized workers coming to Italy on intra-company assignments. This consists of a registration with the Ministry of Interior that allows the companies to file online work permit applications without pre-approval from the Italian Labor Board. These applications are, in fact, directly processed by the Immigration Office, which should not require any document to be submitted for the application to be approved.

To register with the Ministry, employers must satisfy certain mandatory compliance requirements and must execute a framework agreement with the Ministry. Once registered, employers receive a password to access the online system and check on the status of their applications.

EU Blue Card

Non-EU nationals with a highly specialized job profile can be hired by Italian companies without being subject to the quota system. The issuance of Blue Card Work Permits for subordinate work is, in fact, not affected by the Government limitations typical of the standard Subordinate Work Permit applications. The foreign national must be in possession of a University Degree obtained from a post-secondary study program with a minimum duration of three years and must be offered an employment contract with minimum annual salary of Euro 25,000. After eighteen months under Blue Card status in one EU country, workers can move to Italy without obtaining a visa; within one month after their entry into Italy, the employer must apply for a work permit.

The Italian Government is currently implementing a fast-track procedure for Blue Card applications on the model of the one for ICT.

Special Types of Work

If a foreign national seeking to come to Italy is employed as a journalist, athlete, artist, or nurse, or other forms of skilled labor, then he or she may be treated as a specialist. Different procedures apply, depending on the relevant activity.

Training or Internship

A separate category of visas is required for attending training and internships wherein it is necessary to submit a training program to the local authorities for their approval.

Start-up invalidity pension or disablement benefit visa

Italy has recently implemented the Start-up Visa program, aiming to attract foreign investors in Italy. The program is directed at non-EU nationals interested in establishing innovative startups in Italy. To apply for the relevant self-employment visa, the foreign national must first apply for a 'Certificate of No Impediment' issued by the Italia Start-up Visa Technical Committee, proving the availability of at least Euro 50,000 to develop their innovative start-up and submitting a business plan for the start-up they wish to establish. The entire application procedure is carried out online in an effort to streamline the bureaucracy usually involved in Italian Immigration process, and can be filed either (a) by the applicant, or (b) through a "certified incubator" sponsoring the applicant's project.

The issuance of start-up visas is subject to the availability of Government quotas.

Employment and Labor Law

Hired by Company

Under Italian law, it is mandatory to apply labor regulations to all employees working within Italy, regardless of whether the company is Italian or foreign. Employment relationships in Italy are governed by the provisions of:

- the Italian Civil Code (sections 2094 and ff.);
- special labor laws;
- the applicable National Collective Labor Contract (the CCNL); and
- local agreements with the labor unions where applicable.

In particular, the CCNL provides for most of the basic terms of the employment relationship, such as working hours, supplementary working hours, overtime, night and shift work, holidays and salary increments.

Employees are classified into seven different categories. Level One is the highest and Level Seven the lowest. Classification within a category will determine minimum salary levels, holiday allowances, notification periods in case of termination of an employment relationship, and duration of the trial period. Executives (*dirigenti*) are subject to a set of substantially different provisions.

Minimum salary levels are fixed according to the classification level. Market salary levels often exceed by far the minimum salary levels established by law. According to the CCNL, salary is usually paid on a monthly basis, with double pay in July and December, constituting 14 monthly salaries.

Italian law prescribes limits on the ability of employers to dismiss employees. In case of dismissals without cause, the employer must generally allow for a notice period. Specific and more protective provisions for the workers are established for companies which have more than 15 employees.

Independent Contractors

In consideration of the costs related to employment practices in Italy, many companies prefer to offer independent contractor positions to their staff operating in Italy. Retention of independent contractors needs to be analyzed on a contract-by-contract basis. Labor law may apply despite how the parties name the contractual relationship.

Each contractor should have an autonomous VAT position (Partita IVA) and should invoice the company for services he or she is providing (invoices are submitted to a 20 percent VAT taxation). Generally contractors have more than one client to work for, and while they could be hired with a contract containing a 'no competition' clause, it is generally recommended that contractors not work on an exclusive basis to avoid any claims that Italian employment regulation applies.

Entrepreneurs

Foreign nationals who are shareholders or are appointed directors of an Italian company are entitled to obtain an autonomous work visa (see 4.2(b)). In the event that the company sponsoring the permit is newly established and cannot provide sufficient financial guarantees (in some cases the Office will request legalized documents proving the good financial status and standing of the parent company), it may be difficult to obtain a working visa.

Additional Laws Applicable to Foreign Nationals

After obtaining a permit of stay (registration with the Police), foreign nationals are obligated to apply to the nearest Town Hall to declare permanent residency. Keep in mind that permanent residency is mandatory for the following activities:

- lower fees on bank accounts;
- paying the mandatory garbage tax;
- buying a car;
- issuance of an Italian ID Card (carta d'identità);
- getting a parking permit if living in a historic centre;
- registering for the National Health Service; and
- shipping of personal goods into the country duty free.

After one year of residency in Italy, a foreign national's driver's license is no longer valid. Getting an Italian driver's license becomes mandatory after this first year. Only foreign nationals from certain countries (does

not include India) can convert their driver's license into an Italian one, all others must apply for an Italian license.

Income Tax and Social Security Contributions

Income Tax

For tax purposes, individual income tax is classified into the following categories:

- income from real estate;
- income from capital;
- income from employment;
- income from independent work;
- business income; and
- miscellaneous income.

Individual taxation is levied on the aggregate income from all categories, after excluding income subject to "substitute taxes" and income subject to separate taxation and after deducting allowable personal expenses. Currently the income tax rates range from a minimum of 23 percent (for an income up to EUR 15,000) to a maximum of 43 percent (for an income in excess of EUR 75,000).

The above rates are increased by a regional surtax ranging from 0.9 percent to 1.4 percent. The rates may be further increased by a municipal and provincial surtax, determined by each municipality. Income from employment comprises all amounts including gratuitous payments, and in general any value received during the tax year from the employer, or from third parties for any reason, with regard to the employment relationship. Non-residents are generally taxed on the income they produce in Italy.

Social Security

Social Security taxes are regularly deducted by the employer from the employee's salary. The standard total tax for each individual employee is about 10 percent of their gross salary, while the employer's tax for each of their employees is about 30 percent of an employee's salary.

Social Security within the EU is governed by the EU Regulation 1408/71 according to which an employee who is working for an EU member may remain under the social security system of the home country. The same

is extended to nationals of those countries who are not already covered by the provisions solely on the ground of their nationality, as well as to members of their families, provided that they are legally resident in the territory of a Member State.

Italy has agreements in place with 40 countries including members of the EU, Canada and the United States (U.S.) but does not include India. This allows foreign national employees from these countries to remain under their own Social Security system for up to five years. The company for whom the employee is working will be required to pay a reduced Social Security fee for this employee, approximately nine percent of the employee's salary. With this arrangement, the company is responsible for providing evidence that the employee is in fact paying the Social Security taxes abroad.

Employees from those countries with whom Italy does not have an agreement (such as India), must pay the Social Security taxes under the Italian tax system, which in the aggregate is approximately 39 percent of the employee's salary.

JAPAN

James Minamoto

Summary

Japan is an island nation in East Asia located in the Pacific Ocean. Japan is surrounded by the Sea of Japan, China, North Korea, South Korea and Russia, stretching from the Sea of Okhotsk in the north to the East China Sea and Taiwan in the south. Japan is an archipelago of 6,852 islands and covers an area of 377,835 square kilometers with over 127 million people.

Legal System

Since adopting its revised constitution in 1947, Japan has maintained a unitary constitutional democratic, parliamentary government with an Emperor at the head. The Emperor is a figure head with no powers relating to the government which is handled by an elected parliament called the Diet. They have a Civil Code Legal system and Courts of General Jurisdiction that include the District Court, the High Court and the Supreme Court.

Visas

Temporary Visitors Visa (Business Visitor Visa)

A Temporary Visitor's Visa can be applied for short-term business meetings, contract signings and training course work or for non-paid

work related to preparation for business establishments. The validity for this visa is determined by the Japanese Embassy for either 15 or 30 or 90 days. This application can be made at the Japanese Consulate in India by paying Indian Rupees (INR) 500 as visa application fees for either a single entry or a multiple entry visa.

Scope of Activities

Temporary Visitor Visa holders may not engage in any “work” activities or receive remuneration in Japan. The concrete examples of their permitted activities would include participating in conferences or short-term business meetings, business negotiations or contract signing or other short-term activities.

Application Process

A Temporary Visitor's Visa application should include an invitation letter along with a detailed itinerary from the inviting company in Japan. A guarantee letter along with a certified corporate registration should also be provided if the company is bearing the entire cost during the assignment.

The documents to be included from the applicant and his or her employer in India would include the following:

- passport;
- visa application form;
- photo;
- round trip ticket and hotel reservation confirmation (if requested);
- certificate of current employment in India; and
- a letter from the foreign national visitor's employer in India certifying that the employer is responsible for all necessary costs.

For any specific documents the applicant must contact the Japanese Consulate. Generally, the applicant must personally visit the consulate nearest to his or her home to apply, though some consulates may accept filing by proxy. The consulate may request additional documents or make further enquiries.

Other categories of Temporary Visitor's Visa would include the spouse or relatives of residents in Japan or Temporary Visa holders. This visa

maybe obtained to visit relatives or for tourism. Consular processing time would approximately be seven working days.

From July 2014, a multiple entry Temporary Visitor's Visa has been issued to Indian nationals who satisfy either of the following requirements:

- he or she has entered Japan as a temporary visitor in the past three years and has no record of violations of Japanese laws and regulations (including any immigration laws and regulations);
- he or she has been employed by an entity in India and has the financial ability to cover the expenses for each stay in Japan; and
- he or she is a spouse or child of the person mentioned above.

The permitted period of stay is 15 days per visit and the validity period of the multiple entry visas is one or three years.

Employment Visa Type 1: Intra-company Transferee Visa

Intra-company Transferee Visas were granted to over 560 Indian nationals in 2013. The foreign national applying for an Intra-company Transferee Visa should have completed a minimum employment period of one year with his current company. The processing time at the Japanese Immigration Bureau (IB) for obtaining a Certificate of Eligibility would be one to three months and no application fee is required to be paid for this. The visa validity is for three months to five years and it can be renewed on expiry. The salary decided for the applicant applying for an Intra-company Transferee Visa in Japan should be equal to or greater than what a Japanese national earns for comparable work. The Sponsoring Employer will be required to submit a tax form indicating the total Japanese income tax paid by all employees. An important point is whether the amount is at least Japanese Yen (JPY) 15 million for the prior fiscal period.

It should be noted that Intra-company Transferee Visa permits employment only with the company identified in the visa application. In particular, it is generally not possible to depute Intra-company Transferee Visa holders to customer sites to work.

An application for Intra-company Transferee Visa can be made at: (i) A Japanese Embassy or Consulate in India, (ii) the IB in Japan. Practical processing time at the IB is significantly shorter because consulates may need additional time to contact ministries in Japan for confirmation of details.

If the application is made at the Japan IB, a Certificate of Eligibility will be issued, confirming visa issuance requirements have been met. The applicant must present the Certificate of Eligibility to the Japanese Consulate and enter Japan with the newly-issued visa within three months from date of Certificate of Eligibility issuance. The discussion below assumes that the application is to be filed at the Japan IB.

The application can be submitted by the applicant or by a person working on a full-time basis at a Japanese host company or on the applicant's behalf by an attorney or licensed immigration specialist.

Required Documents:

- Employment Agreement: Original employment agreement indicating responsibilities in Japan, term of employment, position and monthly or annual salary;
- Employment Certificate: Certificate of employment issued by the home company confirming employment period (more than one year), position, salary and responsibilities;
- Diploma or Transcripts: A copy of university diploma or transcripts certifying specialized knowledge related to responsibilities in Japan (not necessary but recommended for Intra-company Transferee Visas); and
- Tax Form: This is a key document. A copy of the tax form (*Hotei-chosho-gokei-hyo*) showing total salary and income tax for all receiving company employees for the preceding year. If income tax paid by all employees is more than JPY 15 million, IB will be satisfied with the company's financial stability. If the amount is below JPY 15 million, additional information may be required.

All documentation must be submitted in Japanese or English with Japanese translation.

Processing Time

One to three months for the IB to issue a Certificate of Eligibility plus one week's consular processing.

Employment Visa Type 2: Engineer Visa

In the year 2013 there were about 5,380 Engineer Visa holders out of which approximately 1,000 were Indian nationals. A foreign national can

apply for this visa category for a period of three months to five years and later can apply for renewal. There is no application fee to be paid for obtaining a Certificate of Eligibility and the processing time would take about one to three months. The salary to be decided for an applicant applying for an Engineering Visa should be equal or greater to what Japanese national earns for comparable work.

The requirements for an Engineer Visa largely overlap with the Intra-company Transferee Visa. The main differences include:

- a university-level degree in the relevant technical area is required (may substitute alternative 10-year experience requirement); and
- an employment agreement with the Japanese company.

From April 1, 2015, the Engineer Visa will be integrated into “Engineer or Specialist in Humanities or International Services” Visa, which will allow university graduates to work in Japan based on their specialized knowledge or background. The official English name of this visa will be disclosed in due course.

Employment Visa Type 3: Skilled Labor Visa

In 2013, the number of Skilled Labor Visa holders was 2,030 out of which approximately 190 were Indian nationals. An applicant can apply for this visa for a period of three months to five years and can renew it on expiry. There is no application fee to be paid for obtaining a Certificate of Eligibility and the processing time would take about one to three months. The salary to be decided for an applicant applying for a Skilled Labor Visa should be equal or greater to what Japanese national earns for comparable work.

The requirements for obtaining Skilled Labor Visa partly overlap with Intra-company Transferee or Engineering visa. Main difference falls within the list of applicable occupations which are set forth in the Ministry of Justice Ordinance No.16 of May 24, 1990; for example the list includes a chef or cook and an architect who has been engaged in a related field for more than 10 years.

Other Visa Types

There are currently 27 types of Japan visa residence categories. Three of these categories, and their requirements, are:

Investor or Business Manager Visa

An Indian national who wishes to invest in a foreign company in Japan, or is a Business Manager, should set up a business that either employs two full-time employees or annually invests JPY 5 million in the business. It is recommended that only executives who serve as a President or Representative Director of a Japanese subsidiary should apply for this category of visa as it is more difficult to qualify under this category.

From April 1, 2015, the name of this visa will be changed to “Business Management” and it will allow foreign nationals to invest in or manage the business of a Japanese company instead of being limited to that of a foreign company. The official English name of this visa will be disclosed in due course.

Dependent Visas

It must be noted that dependents may not work or remain in Japan after the primary visa holder leaves.

Permanent Resident Visas

The number of Permanent Resident applications which were approved in 2013 was over 45,000 out of which only 378 were Indian nationals. This visa does not restrict the stay length or type of work; however, the processing time for this visa may be around six months or more. The approval or denial of the Permanent Resident Visa is published anonymously by the Ministry of Justice and the case precedents are set forth on their website.

Re-entry Permits

Foreign nationals who have a valid passport and Residence Card showing a current visa status and the permitted period of stay are allowed to depart and return within one year (or within the expiry date of the effective term of their Residence Card) without obtaining a re-entry permit from the IB.

If the foreign national expects to return to Japan after the one-year period they must obtain a re-entry permit in advance (even if it is within the expiry date of the effective term of their Residence Card).

- Single entry permit : JPY 3,000;
- Multiple re-entry permit: JPY 6,000; and
- Validity Period: five years or end of current period, whichever is less.

Applications for Extension or Change of Status While in Country

A work visa holder may apply for extension or status change in Japan. Upon application to IB, the visa applicant may remain in Japan for two months after expiration date or until application result is received, whichever is earlier. A temporary visit may or may not apply for status change or extension while in Japan, except if unavoidable. However, if a Certificate of Eligibility is issued in a timely manner, the IB may accept applications for change to work visa status. It generally takes one month to receive application results, during which period the applicant may not work. If someone wishes to change from a temporary visit visa to a work visa, it may be more efficient upon receipt of Certificate of Eligibility from IB to leave Japan and present it to the home country consulate.

Priority System for Foreign Nationals with a High Degree of Education and Experience

In 2012, a priority system for foreign national professionals was introduced in order to utilize their expertise and experience to develop Japanese society. The system is to evaluate each applicant's educational background, employment history, and annual income, based on a prescribed chart and certify such an applicant as a high-skilled professional. The score should be 70 or more for the applicant to get certified.

A high-skilled applicant is allowed to:

- engage in broader range of business activities;
- apply for a permanent residency status after he or she has stayed in Japan for 4.5 years;
- accompany the applicant's parent or spouse's parent to take care of the applicant's child or children under the age of three;
- accompany the applicant's domestic helper who has been employed by the applicant for more than a full year; and
- employ a new domestic helper if the applicant has a child or children under the age of 13 or a spouse who is unable to do household chores.

In addition, a high-skilled applicant's spouse is allowed to work in Japan even if he or she does not satisfy the work visa requirements.

From April 1, 2015, High-level Profession Visa will be introduced for such high-skilled applicants. Those who have stayed in Japan for three years or more under this visa may be permitted to stay in Japan for an indefinite period. The official English name of this new visa will be disclosed in due course.

Residence Card Requirements

An identity card (ID) called "Residence Card" will be issued to foreign nationals who are permitted to stay in Japan for more than three months. This will be issued at the airport itself. Foreign nationals arriving at a port or an airport other than Narita, Haneda, Chubu and Kansai will receive their ID card by registered mail within 10 days after they register their residential address in Japan at the municipal or ward office. The registration must be completed within 14 days from the date when they obtained their address. If their Residence Card has already been issued on arrival at the airport before the address registration procedure, the card needs to be brought to the municipal or ward office.

Residence Cards must be updated when registered items such as name, nationality, occupation, visa category (status of residence), and permitted period of stay, workplace, and workplace address change, and marital status (divorced or widowed if the applicant's visa status is Dependent or Spouse of a Japanese National). The change of the address of the applicant's residence must be reported to the municipal or ward office within 14 days from the date of change. In addition, other changes must be reported to the Immigration office within 14 days from the date of change.

Immigration Enforcement and Penalties for Visa Violations

The IB conducts investigations at locations where foreign nationals gather. The IB also acts on tips and reports of possible illegal stay. It cannot conduct compulsory searches or seizures without a court-issued warrant, but may take into custody, suspects, on its own authority.

A foreign national deported from Japan is barred from re-entry for a period of five years.

In addition, a valid visa may be revoked:

- if a foreign national fails to register his or her address within 90 days from the date of entry into Japan or date of move; and/or

- if the spouse of a Japanese national or permanent resident continues to stay in Japan for more than six months after divorce or death of a spouse without any reasonable reason.

Employment and Labor Law

Requirements

Japanese employment laws apply to all workers regardless of the employee's citizenship or country of employer. The Japanese law applies to establishments and validity of employment contracts, when any employee is expected to provide services in Japan.

According to Article 16 of the Employment Contract Act No. 128 of 2007, there is no "at will" employment in Japan. Also, an employer must have "just cause" to terminate an employment contract. In order to maintain flexibility in expanding or downsizing, employers often utilize fixed-term employment contracts, such as for six to 12 months which terminate automatically at expiration, unless renewed.

According to the Labor Standards Act No. 49 of 1947, an employer with ten or more employees in one work place must establish Rules of Employment, and file them with the local Labor Standards Supervision Office.

Overtime

To have employees work overtime, employer must enter into an "Article 36 agreement" with a representative of its employees in relation to maximum required overtime and reasons for overtime, and file the agreement with the local Labor Standards Supervision Office. In addition, an employer must pay overtime wages. Additional pay must also be paid for holiday and late-night work (between 10 pm and 5 am).

Overtime or holiday pay is not required for "managerial employees" who are expected to work beyond stipulated working hours and clearly differ from ordinary rank-and-file employees. Note that a "managerial employee" is a legal category which may differ from the regular business understanding of a "manager".

Contract of Employment

It is not mandatory to execute written employment contracts. However, it is common practice to enter into such written agreements regarding important working conditions. Also, it is not required to enter into the

contract in Japanese. If the employee understands English, the contract can be in English.

Laws Relating To Employees

Hired By Company: An employment contract is established when an employee agrees to provide labor for the employer and the employer agrees to pay compensation in return. Such an employment relationship is subject to various laws and regulations.

Independent Contractor: When a company hires an individual, he or she is usually an employee. However, sometimes a company may wish to hire an independent contractor, who is not protected by various laws and regulations. A company has to pay the independent contractors for completed services and the contractor has the discretion as to the time and manner of performance. Note that a Contractor (especially an individual) may be deemed an employee entitled to labor law protection in certain circumstances.

Entrepreneur: If a foreign national wants to setup a business in Japan, he or she can either start a sole proprietorship or incorporate a company on an appropriate visa. Although there are several types of companies that may be established, the most popular is a joint-stock company, or *Kabushiki Kaisha* (KK). To establish a KK at least one representative director must reside in Japan.

Income Tax and Social Security Contributions

Income Tax

Any individual (regardless of employment or visa status) owes income tax according to residential classification. For a "resident", all or worldwide income is subject to taxation; and for a "Non-resident", only the income earned in Japan is subject to tax.

Whether classified as resident or Non-resident, remuneration paid for services in Japan is subject to income tax in Japan. So long as the salary is paid in Japan, the employer must withhold salary for both "resident" and "Non-resident" employees.

Social Security

Welfare Pension Insurance: An employer is required to cover an employees' Welfare Pension Insurance which is government regulated

17.120 percent of the employee's salary must be paid into this scheme. When Indian nationals return to India, he or she may claim partial refund if premiums were paid for at least six months. The minimum refund amount is approximately JPY 49,000 and increases depending on a number of factors such as the total length of the coverage period and the total monthly compensation.

Health Insurance: An employer must pay for injury or health insurance benefits for all employees at the rate of 9.97 or 11.69 percent of the total annual salary (in case of Tokyo).

Employment Insurance: An employer must pay Employment Insurance (or unemployment benefits) except for those employed outside of Japan and transferred to Japan.

Workers Accident Compensation Insurance: All workers must join the Worker's Accident Compensation Insurance Scheme.

Proportion of Local to Foreign National Employees

No proportion of local to foreign national employees is required. There is no percentage or cap which needs to be adhered to.

MALAYSIA

Suganthi Singam and Ivy Aw Moon Cai

Summary

Malaysia was a British colony that gained independence in 1957. Malaysia then subscribed to the common law system which has two administrations of governance, namely the Federal and State levels. Malaysia, divided into Peninsular Malaysia and East Malaysia, comprises 11 states and two federal territories; Kuala Lumpur and Putrajaya. Sabah, Sarawak and a third federal territory, the island of Labuan, are situated on the island of Borneo in East Malaysia. The official language in Malaysia is Malay. Employment and Industrial Relations law in Malaysia is primarily based on common law principles and governed by four main pieces of legislation; the Employment Act 1955, the Industrial Relations Act 1967, the Employees Provident Fund Act 1991 and the Employees Social Security Act 1969.

Legal System

Malaysia follows a unitary state system governed under a Constitutional Monarchy and a Parliamentary system, with its seat of government in Putrajaya. The written Constitution of Malaysia provides for three separate branches of government - the Executive, Legislative and Judiciary on which the doctrine of the separation of powers is premised. The office of the Prime Minister decides on the policies for the country in

consultation with the Cabinet, but has no outright power to influence the legislation. Only after the Malaysian Monarch who is known as the *Yang Di-Pertuan Agong* has been consulted, a Royal Assent will be granted and a law is passed and gazetted.

Visas

Foreign nationals from some countries require a visa for entry. For a foreign national who requires a visa to enter Malaysia, he or she may apply for a single entry visa or a multiple entry visa which is normally valid for a period between three to 12 months from the date of issuance. Whether a single entry visa or a multiple entry visa is granted depends on the nationality of the applicant and the relevant designated Malaysian consular post. The stay in Malaysia granted to each holder of a single entry visa or a multiple entry visa is generally up to 30 days only.

Social Visit Pass

At the point of entry for all foreign nationals, a Social Visit Pass (SVP) will be given and endorsed on the passport of each foreign national, the period of which depends on the nationality of the foreign national. The SVP is commonly known as the "Visit Pass (Social)". Apart from social purposes such as visiting friends, relatives and sight-seeing, the Social Visit Pass would enable the foreign national to remain in Malaysia for restricted business activities, such as attending meetings or business discussions, inspecting factories, auditing company's accounts, signing agreements, surveying business opportunities and setting up companies. A casual business visit to clients is also permitted under a SVP.

However, if a foreign national enters Malaysia to visit existing or prospective counter-parties with the intention to provide advice or conduct activities other than those permitted under a SVP, he or she must have a valid work permit no matter how brief the business trip is.

Notwithstanding that the activities of a foreign national visiting Malaysia may be limited to the activities allowed under an SVP, if the foreign national generates profit for the host entity, receives compensation from the host entity or takes any direction from the host entity; an appropriate work permit will still be required.

It should not be assumed that the SVP is sufficient for any given business trip from the restricted business activities stated above. The application of each pass very much depends on the facts of each case.

Professional Visit Pass

The Professional Visit Pass (PVP), which is also commonly referred to as the "Visit Pass (Professional)" is applicable to foreign nationals entering Malaysia to take on technical roles for a Malaysian company. This Malaysian company will be the local sponsor company that will sponsor the foreign national for the PVP application.

The maximum duration, for which a PVP can be granted, is up to 12 months. However, the approval of the duration for each application depends on the merits of the application and the work schedule detailing the job scope of the foreign national in Malaysia for the Malaysian company.

Assignments for the purpose of installation, maintenance and repair of machinery or installation of new products, external experts in mining activities, airplane simulator testers and practical training, would qualify for a PVP. Supporting documents such as the original purchase invoice for machinery, the relevant customs department form, letter of confirmation from the Customs Department, approval letter or support letter from the relevant government body are required to be produced for purposes of these technical roles under a PVP application. For the purposes of practical training in Malaysia, a copy of the training schedule or details of the relevant job functions throughout the foreign national's stay in Malaysia are required.

A PVP application should be submitted by the company where the foreign national will work. If the foreign national will work from the client's site, a contract or agreement evidencing the contractual relationship between the client and the local sponsor company is required. A copy of the duly completed and signed Professional Services Agreement (PSA) or Purchase Order where the foreign national will work during their assignment period is also required to be submitted to the Malaysian Immigration Department and Malaysian Inland Revenue Board. This is to indicate the contractual relationship between the client and the local sponsor company.

A basic requirement of the PVP application is that the foreign national must at all times remain on the payroll of the foreign employer who is sending the foreign national to work at the Malaysian company. There is no minimum salary requirement for the foreign national who will be working for the Malaysian company under a PVP. For this purpose, the foreign employer must issue an Acceptance Letter and a Confirmation Letter to the Malaysian company detailing the nature of work to be performed and the monthly salary that will be paid to the foreign national.

In the event that the foreign national's assignment is completed before the expiry date of the PVP and the individual will be leaving Malaysia

before the expiry date of the PVP, the local sponsor company has the responsibility to notify the Malaysian Immigration Department of the foreign national's imminent departure in advance. The local sponsor company also has to request that the duration of the PVP be shortened to the date of the foreign national's departure date from Malaysia. For this purpose, the Malaysian Immigration Department requires a copy of the confirmed e-ticket showing the foreign national's departure date before canceling the foreign national's PVP.

Whilst the local sponsor company has to ensure that the foreign national complies with the conditions of a PVP, namely that the foreign national must only perform the work stated in his PVP application for the duration approved by the Malaysian Immigration Department and not otherwise, the local sponsor company must also ensure that the foreign national observes and complies with all other applicable Malaysian laws. To this end an express provision to this effect can be incorporated into the contract of employment.

Employment Pass

An Employment Pass (EP) is a long-term work permit granted to foreign nationals with assignments that extend beyond a one year in Malaysia. The EP can be valid for a period of up to five years, in accordance with the employment contract and subject to the discretion of the Malaysian Immigration Department. All EP applications must be submitted by the Malaysian company or by the local sponsor company that will be legally responsible for the assignment of the foreign national with the Malaysian company and the repatriation of the foreign national from Malaysia, if necessary.

All EP applications are processed in two stages:

- Stage one involves securing the approval of the specific position that the foreign national will hold in the Malaysian company or the local sponsor company from the Malaysian Immigration Department, or the relevant designated government body. Depending on the nature of business for each company, the stage one EP application must be submitted to the relevant government body.

  The other relevant government bodies for the purposes of stage one EP submission are as follows:
- Malaysian Investment Development Authority (MIDA);
- Multimedia Development Corporation Sdn Bhd (MDeC);
- Public Service Department (PSD);

- Central Bank of Malaysia (BNM);
- Securities Commission (SC); and
- Expatriate Committee (EC).

There are requirements if the Malaysian company or the local sponsor company wishes to apply for EPs for the foreign nationals. Amongst others is the minimum paid up capital of the company. If the local sponsor entity is wholly owned by locals, its paid up capital must be at least Malaysian Ringgit (RM) 250,000; if the sponsor entity is jointly owned by locals and foreign nationals, its paid up capital must be at least RM 350,000; if the sponsor entity is wholly owned by foreign nationals, its paid up capital must be at least RM 500,000.

In addition, the minimum monthly salary that the foreign national must receive is RM 5,000.

After the stage one EP application has been approved by the relevant government body, depending on the nationality of the foreign national, he or she can enter Malaysia for the stage two process.

For a visa waiver national, an entry visa is not required. The foreign national who comes from a country that has a visa waiver agreement with Malaysia can enter the country after the stage one EP application has been approved and submitted to the Malaysian Immigration Department for the EP endorsement together with the payment of the government fees. At the point of entry into Malaysia, the visa waiver national will be granted an SVP by the Malaysian Immigration Department.

For a foreign national who comes from any country that requires visas such as an Indian national, there are two options to enter Malaysia. The two options are as follows:

Reference Visa

The Malaysian company or the local sponsor company will have to request a visa with a reference letter from the Malaysian Immigration Department addressed to the designated Malaysian consular post in the home country for the foreign national immediately after a stage one EP approval has been obtained. The visa with a reference letter will then be sent to the foreign national at the home country or current place of residence whereupon the foreign national will bring the visa with the reference letter to the designated Malaysian consular post for a single entry visa to be given and endorsed onto the passport of the foreign national to enter Malaysia.

Once the foreign national has entered Malaysia with the single entry visa, he or she can thereafter submit the passport to the Malaysian Immigration Department for an EP endorsement; together with the payment of government fees.

Journey Performed Visa

The foreign national can obtain a tourist visa at the designated Malaysian consular post and use this visa to enter Malaysia once the Stage one EP application is approved. Once the foreign national enters Malaysia, he or she will have to provide a copy of the entry stamp on his their passport for the Malaysian company or the local sponsor company to request in writing for a Journey Performed Visa (JPV) for them. If this approach is adopted, an additional fee of RM 500 (per person) will be paid to the Malaysian Immigration Department for a JPV and a single entry visa fee in lieu of a Reference Visa.

The Malaysian company or the local sponsor company must apply to the Malaysian Immigration Department for permission to pay for JPV. This application must be supported by a strong reason or reasons as to why the foreign national did not wait until the EP application was approved and apply for a reference visa after approval was obtained before travelling to Malaysia. If the Malaysian Immigration Department is satisfied with the reason(s) given, they will allow the payment for a JPV to be made, else the foreign national will need to leave Malaysia and return with a reference visa before the Malaysian Immigration Department will endorse an EP onto the foreign national's passport. The application for permission to pay for a JPV cannot be made upfront and can only be made at the time of submission of the foreign national's passport for EP endorsement.

After the Immigration Department has approved the request for a JPV, the visa national can thereafter submit the passport to the Malaysian Immigration Department for an EP endorsement together with the payment for government fees.

As soon as the EP has been endorsed onto the foreign national's passport, the foreign national is deemed an employee of the Malaysian company or the local sponsor entity for the duration of which was approved. The foreign national must observe and comply with all other applicable Malaysian laws at all times during his or her employment with the Malaysian company or the local sponsor company.

Employment and Labor Law

The Employment Act 1955

The Employment Act 1955 (the Act) provides for the minimum terms and conditions of employment to be adhered to for those employed in the private sector. It covers all those who are earning a monthly salary that does not exceed RM 2,000 as well as those who are engaged in manual work or in the supervision of those performing manual work in and throughout the course of their employment although their monthly salary may exceed RM 2,000. Contracting parties can elect to provide for more enhanced benefits; however, the minimum must adhere to the basic provisions of the Act.

For those outside the scope of the Act, it is left to the contracting parties to determine the terms and conditions of employment to be adopted under the contract of employment.

The Industrial Relations Act 1967

The Industrial Relations Act 1967 (the Act) accords protection to all employees irrespective of their monthly earnings, position or whether they are Malaysian nationals or foreign nationals. Essentially under the provisions of the Act, any employee who considers himself or herself to have been dismissed without just cause or excuse can file a representation within 60 days of his or her dismissal to the Industrial Relations Department contending that he or she has been dismissed without just cause or excuse. Sole reliance cannot be placed on the contractual notice provisions of the contract of employment in effecting the termination of an employee.

Should the matter be referred for adjudication before the Industrial Court, the potential liability that an employer could face if unable to justify the dismissal is back wages (up to 24 months of the employee's last drawn salary) and reinstatement. If reinstatement is not ordered, the Court has the discretion to award compensation in lieu of reinstatement at the rate of one month's salary for each year of service in addition to the back wages component.

The Employees Provident Fund Act 1991

The Employees Provident Fund Act 1991 (the Act) in essence provides for retirement funds for employees where both the employee and

employer are statutorily obliged to make contributions to a national fund in accordance with the prevailing statutory rates. The fund governs Malaysian nationals; however, foreign nationals have the option to elect to contribute towards the same.

The Employees' Social Security Act 1969

The Employees' Social Security Act 1969 (the Act) provides for social security in case of employment injuries suffered by employees within its purview. There are provisions for claims for invalidity pension or disablement benefit, and funeral benefits amongst others. Like the Employees Provident Fund Act 1991, the contributions under the Social Security Act 1969 are at rates which are statutorily prescribed.

Income Tax and Social Security Contributions

Income Tax

The Malaysian company or the local sponsor company is required to comply with the Malaysian tax requirements for PVP and EP applications.

Penalties for Non-Compliance

Failure by the foreign national to comply with Malaysian laws may result in the relevant work permit being canceled by the Immigration authorities and/or prejudice any future work pass applications.

The Malaysian company or the local sponsor company may also be liable to pay for all costs and expenses associated with deporting the foreign nationals and any government costs incurred in detaining the foreign nationals pending deportation. Additional penalties may be applied if the Malaysian company or the local sponsor entity gives false information or makes a false declaration regarding a foreign national.

An employer who employs foreign nationals without a valid work permit will be fined an amount that could range between RM 10,000 to RM 50,000 or subject to imprisonment for up to one year for each violation. If more than five unauthorized persons are employed at one time, the employer will be liable to a term of imprisonment for six months to five years and whipping of not more than six strokes. Where the employer is a company, any person who at the time of the commission of the offence was a member of the board of directors, a manager, a secretary

or a person holding an office or position similar to that of a manager or secretary of the company shall be guilty of the offence and shall be liable to the same punishment to which the company is liable.

Latest Enforcement of Company Registration Application

Before the Malaysian company or the local sponsor company can submit any EP or PVP application to the Malaysian Immigration Department, the Malaysian company or the local sponsor company must first register themselves with the Expatriate Services Division of the Malaysian Immigration Department via the Expatriate Services Division portal at https://esd.imi.gov.my/esd/portal/en/

In this regard, an employee from the management of the local sponsor company will need to key-in the required company information and upload company documents on the portal.

After the company registration has been submitted and approved by the Expatriate Services Division, a Director of the Malaysian company or the local sponsor entity will then have to sign a Letter of Undertaking in the presence of an immigration officer at the Malaysian Immigration Department. After this has been duly attended to, the Malaysian company or the local sponsor company can then submit the EP and the PVP application online.

With effect from November 1, 2014, all renewal applications are also required to be submitted online.

As such, completion and approval of the company registration application is a pre-requisite for purposes of applying for the EP or PVP applications in Malaysia.

MEXICO

Enrique Arellano

Summary

Mexico (officially the United States of México) is a federal constitutional republic with a population of approximately 115 million people and a territory of approximately 2,000.00 square kilometers which is comprised of 32 states.

The capital is Mexico City and the official language is Spanish. The currency is the Mexican Peso (MXN). Mexico has about 1,834 airports, ranking second in the number of airports in North America, and third in the Americas. The main airports are the Mexico City International Airport, also called Benito Juarez International Airport, Del Norte International Airport is an airport located in Apodaca, Nuevo Leon, Mexico near to the city of Monterey and Guadalajara International Airport, also known as Miguel Hidalgo y Costilla International Airport.

The country registers around 350 million annual legal crossings. In the southeast, there are 1,200 kilometers of borders with Belize and Guatemala. To the east the country is bordered by the Gulf of Mexico and the Caribbean Sea and to the west by the Pacific Ocean. Mexico also is amongst the most populated countries in the world.

Recently, Mexico has been adapting its immigration policies in response to the important flow of foreign nationals in and out of the country. The tourist visa category is the most used category, as Mexico ranks as a premier tourist destination. With respect to international interchanges,

cultural as well as economic, Mexico's geographic position in relation to the United States of America (U.S.) and Canada has turned Mexico into an important bridge for business between diverse countries that conform to the North American Free Trade Agreement (NAFTA).

NAFTA does not, necessarily imply a free circulation of people; However, in April, 2010 the Mexican government opened its borders allowing the entrance of foreign nationals who hold a U.S. visa, on a visa-exempt entry basis either as tourist or business person.

Interestingly, Mexico is not only a country on the receiving end of foreign nationals but is equally a country with considerable emigration with hundreds of thousands of people leaving Mexico for the U.S. Around 400,000 illegal crossings are recorded annually from this border.

Mexico is also within the first 20 economies of the world, signatory to more international agreements than most countries and member of numerous groupings. Mexico is party to: NAFTA, UN, OAS, the OECD, APEC, G-3, Group of River, IMF, WB, AEC, IAEA, OLADE, INTERPOL, OMS, BRIMC, UNESCO, OEI, ABINIA, OMPI, OMT, OACI, OMI, UIT, UPU, OMM, BID, CFI, UNCTAD, ONUDI, WTO, ALADI, UL, G-20, G-5, G-8+5 etc.

The United Mexican States (Mexico) are a federation whose government is representative, democratic and republican. The constitution establishes three levels of government: the Federal Union, the State and the bicameral Congress of the Union, composed of a Senate and a Chamber of Deputies. Seats to federal and state legislatures are elected by a system of parallel voting that includes plurality and proportional representation.

The Executive is the President of the United Mexican States, who is the head of State and government, as well as the commander-in-chief of the Mexican military forces. The President also appoints the Cabinet and other officers. The President is responsible for executing and enforcing the law and has the authority of vetoing bills.

The Judiciary branch of government is the Supreme Court of Justice, comprised of 11 judges appointed by the President with Senate approval, who interpret laws and judge cases of federal competency. Other institutions of the judiciary are the Electoral Tribunal, collegiate, unitary and district tribunals, and the Council of the Federal Judiciary.

Legal System

The foundation of Mexico's immigration law is the Immigration Act, which governs the entry, stay, and departure of foreign nationals and

grants Mexico's Interior Department the authority to govern immigration functions and to promote jointly with the Ministry of Foreign Affairs international immigration instruments and to receive, process and respond to visa applications, in accordance with applicable laws and regulations. The law regulates any issue that affects population in terms of its volume, structure, dynamics, and distribution within Mexico's national territory.

The Immigration Act supersedes the former General Population Act, which was abrogated after remaining valid and effective for more than 40 years. It was published in the Official Gazette of the Federation on May 25, 2011 but enforced until November 9, 2012 as the Regulations, which were originally foreseen for November 2011 was finally published on September 28, 2012.

The law is implemented by the Immigration Act Regulations, the Guidelines for Immigration Procedures and the General Guidelines for the Issuance of Visas by the Ministry of the Interior and Foreign Affairs, among other provisions by means of which officials of Mexico's National Immigration Institute (NII) and Consular authorities determine the requirements to be fulfilled in connection with immigration applications, response periods within which immigration authorities may render a resolution, representation acts and immigration forms.

Mexican nationality, including acquisition of Mexican citizenship by naturalization or registration, is governed by the Mexican Constitution and by the Nationality Act.

Mexico has established in its Constitution and, in particular, the Immigration Act, the legal status in which a person is not considered a national for purposes of establishing the terms and conditions for admission, stay and departure. Foreign nationals are subject to these legal terms and conditions when they enter, remain in and leave the country, under denominated conditions of stay.

Mexico's immigration system comprises three conditions of stay. This is the legal status assigned by immigration authority to a foreign national depending on his or her "residence intention" and is divided as follows:

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

In accordance with Article 40 of the Immigration Act, any foreign national that intends to enter into the Mexican territory must present any of the following visas:

- Visitor not authorized to conduct economic activities;
- Visitor authorized to conduct economic activities;
- Visitor with adoption intentions;
- Temporary resident;
- Temporary resident - student; and
- Permanent resident.

Short-term stays are available to Indian nationals entering Mexico on tourism or business visits with a previously approved visa stamped on their passports at any Mexican Consulate. Any foreign nationals entering Mexico to work or reside in a visitor or temporary resident condition on a long-term basis, must proceed through a multipart immigration process that in many cases begins with an application for advanced approval for the foreign national's activities in Mexico (such as employment) submitted to Mexico's immigration agency, the National Immigration Institute (NII). After approval of the application for advance authorization, the foreign national applies for the appropriate immigration permit at a Mexican diplomatic post. Upon entry to Mexico, some categories of foreign nationals are required to register with a local office of the immigration agency.

Immigration Authorities

Mexico's immigration system is overseen by the NII, a department of the Ministry of Interior and the Ministry of Foreign Affairs through the Mexican Consulates.

The NII has authority over the entry and exit of foreign nationals at Mexican ports-of-entry and is responsible for adjudicating applications for foreign nationals who require advance permission from the immigration authorities. Visa requests must be filed through the NII when there is a job offer from a company established in Mexico, for family reunification and humanitarian reasons, including employment authorizations and visa issuance authorizations for nationals of countries that are identified for heightened security scrutiny. The *Instituto Nacional de Migración* (INM) (Spanish for National Institute of Migration) is a unit of the government of Mexico dependent on the Secretariat of the Interior that controls and supervises migration in the country. The INM also adjudicates applications for extensions and changes of immigration status and applications for permanent residence. The INM has 32 regional delegations throughout Mexico. These regional offices may also have local sub-offices.

The issuance of visas is governed by the Ministry of Foreign Affairs through its diplomatic posts around the world. The Ministry of Foreign

Affairs is also responsible for adjudicating applications for Mexican citizenship by naturalization.

Visas

Employer or Sponsoring Entity

All foreign nationals who engage in employment in Mexico must be sponsored by a Mexican or an overseas employer. In most cases, the employer will be required to seek the NII's advance authorization in order to employ the foreign national.

Advance authorization is typically required if the foreign national engages in "remunerated activities", which Mexican immigration law defines as activities that are compensated from a Mexican source. Employment is deemed to be remunerative where the foreign national will be directly hired and compensated by a Mexican employer or will be transferred to a home country employer's branch or affiliate in Mexico and will be paid by the Mexican affiliate. Applications for advance authorizations are made to the NII office having jurisdiction over the place of employment in Mexico.

Advance authorization is not required if the foreign national will engage in "non-remunerative activities"- for example, activities that are compensated from a source outside Mexico - but wherein the foreign national will reside in Mexico during his or her period of employment.

If authorization is granted, the foreign national must apply for the correspondent visa at their closest diplomatic posts.

Business Visa

Indian nationals may apply for a Business Visa at any Mexican Consulate that allows them to enter the country for short stays of less than 180 days consecutively and it does not allow them to be on the payroll of a legal entity established in Mexico. The business visa falls under the category of visitor-not authorized to engage in lucrative activities and must be applied for at the Mexican consulate.

This type of visa is intended to people who enter the country as technician, trader and investor, and personnel transfers among companies. It allows them to perform the following activities:

- trading of goods or render services;
- investment of foreign capital;

- render specialized services previously agreed or contemplated in a contract of transfer of: technology, patents and licenses, buying and selling of machinery and equipment, technical development of personnel or any other process of production of a company established in Mexico;
- attend Board of Directors meetings of companies legally established in Mexico; and
- perform managerial activities that entail specialized knowledge in a company or any of their subsidiaries established in the country.

The Immigration form called Multiple Immigration Format (*Formato Migratorio Múltiple* (FMM)) is provided to all foreign nationals upon their entry into Mexico with intent to prove his or her legal stay in Mexico. This is however subject to the fact that their stay in the country will not exceed 180 days.

The FMM visa is typically obtained at the port-of-entry upon arrival to Mexico and the documents required for the permit are:

- completed Immigration form, which is made available at the port-of-entry;
- valid passport; and
- if the applicant is a lawful permanent resident of the U.S. or Canada, evidence of that status.

Upon departure from Mexico, the permit holder must surrender the FMM to the Mexican immigration authorities at the port-of-exit. Failure to surrender the permit may jeopardize the foreign national's future entries to Mexico and can also subject him or her to fines.

Employment Visas

Temporary Resident

Every foreign national that intends to work in Mexico for more than 180 days, receiving his or her income from an in-country source, must obtain a Temporary Resident status with lucrative activities.

This permit allows the foreign national to enter Mexico and remain for a period from one to four years with the option of renewal, but not exceeding the four-year term.

The Temporary Resident visa is available for a range of employment related classifications including executives, managers and administrators,

provide technical assistance, to make or oversee direct investments, training, intra-company transfers, journalists, professionals, scientists and technicians, artists and athletes.

Classification in a Temporary Resident employment category is appropriate for foreign nationals who will be directly hired by a Mexican entity.

As mentioned previously, the Mexican Consulates are not allowed to issue Temporary Resident cards, but are only allowed to issue a visa that will be exchanged for the Temporary Resident card within 30 days upon the arrival of the foreign national to Mexico.

Transition from FM3 and FM2 to Temporary Resident

Those foreign nationals who still have an FM3 or FM2 visa are to be considered Temporary Residents and their documents will be exchanged for the new cards upon their renewal.

Given the above, after having elapsed the four-year term allowed under the Temporary Resident status, a foreign national will either have to leave the country or apply for a Permanent Resident status.

Visa Waiver for Indians

Indian nationals who come to Mexico for business and tourism purposes can enter without a previously approved visa as long as they are holders of a valid U.S. visa stamped on their passport and show it at the port of entry. They can also enter under this condition if they have permanent residence in Canada or the U.S.

It will be possible to obtain a Visitor visa to enter into Mexico under this status for frequent travelers and will be valid for a 10-year period. This will allow foreign nationals to avoid the need to apply for a business visa each time they are in need to visit the country during this 10-year period.

Permanent Resident Visa

Currently, in order to be eligible to apply for a permanent residence, a foreign national must first have a pre-resident status, a FM3 or FM2 visa for four consecutive years. Once the third renewal has expired they may apply for permanent resident status which normally takes from three-six months.

Additionally in compliance with Article 54 of the New Immigration Law, a permanent resident status can be granted to a foreign national under the following circumstances:

- for humanitarian reasons such as politic asylum or under refugee;
- to preserve family union;
- retired foreign nationals who wish to come to Mexico to live with their retirement pension;
- the applicant has a direct blood relative who is Mexican (father, mother, son, husband or wife);
- a holder of a temporary residence for four years; and
- achieves the accumulation of points in the new points system such as foreign nationals who have done outstanding actions for the benefit of the country, investors, etc.

Point Grading System

A point grading system shall be implemented to enable foreign nationals to become permanent residents prior to the expiration of a four-year residence period. This system takes into consideration the skills and characteristics of applicant as follow:

- education level;
- labor experience;
- skills in science, research and technology related fields; and
- international recognition and skills to conduct activities required in Mexico.

With respect to foreign nationals under a temporary or permanent stay status, diplomat staff, and aircraft crews, the FMM is only for statistical purposes.

Employment and Labor Law

As mentioned previously, every foreign national aiming to work in Mexico for more than 180 days, receiving their income from an in-country source, must obtain a Temporary Resident visa via the National Immigration Institute to perform their activities.

Laws Relating To Employees

The Mexican Constitution contains provisions that protect employee rights and govern labor relations, the right to associate, the right to collective bargaining and the right to strike and lockout. These provisions are undertaken in Article 123, but Articles 6 and 9 also deal with individual rights, such as freedom of expression and freedom of association.

All labor relations in Mexico, regardless of nationality, are governed by the Federal Labor Law and Social Security Law.

The principal employment law in Mexico is the Federal Labor Law and applies to all employees and employers in Mexico regardless of their nationality, the place where the salary is paid or where the agreement is executed.

This law also sets forth the employee and employer rights and obligations and regulates labor authorities as well as their responsibilities.

Independent Contractor

Entrepreneur

The business visitor comprised under the Visitor-not authorized to engage in lucrative activities category is allowed to explore business opportunities, open a bank account at certain banks and open a legal entity in Mexico. This visa allows the foreign national to remain in the country for up to 180 days.

Additional Laws Applicable To Foreign Nationals

Mexico, as a member of the International Labor Organization (ILO), is obliged to homogenize and respect the minimum conditions for their domestic workers and foreign national workers, this with the intention of developing a comprehensive system of instruments relating to employment and social policy to tackle all kinds of problems in its implementation at national level.

The Federal Labor Act Article 56

According the Federal Labor Act Article 56 (the Act), the working conditions in any case cannot be inferior to those established in this

Act and shall be proportionate to the importance of services and equal for equal work, without being able to settle differences by race, sex, nationality, age, religious belief or political opinions, except the categories expressly set forth in this Act.

Income Tax and Social Security Contributions

For tax purposes, foreign nationals are individuals or juridical persons (commercial companies, associations or civil companies, among others) who are ruled by the legislation of another country for reasons of nationality, domicile, and residence or operations center. Under this foreign nationals are separated as residents in Mexico and foreign national residents.

Income Tax

In the case of the income of a resident in Mexico, tax will be paid through tax withholding, carried out by the person who makes the payment or even if he or she is a Non-resident with a permanent establishment in national territory.

On the contrary, the Non-resident taxpayer will pay before the Tax Administration Service (SAT), whether through a banking window or the internet, within the next 15 days following that in which income was obtained. The tax payment is divided as follows:

Income Tax: Mexicans or foreign nationals, who reside abroad and obtain income in Mexico, are obliged to pay income tax.

Value Added Tax: It is paid if the income is obtained from the disposition of property or from the lease of real property different from residential property. It must also be paid if it has to do with leasing of furnished real property, hotels or boarding houses.

Tax on Corporate Assets: Non-residents are obliged to the tax on corporate assets when they have a permanent establishment in Mexico, for the property or the assets that are used in said establishment.

Social Security Payment

The Social Security Law regulates the labor rights and obligations. This regime is mandatory for all employees regardless of the type of relationship with the employer or its organization, even when the employer may be exempt from payment of taxes or duties.

The types of insurance are:

- Occupational Risk Insurance;
- Health and Maternity Insurance;
- Disability and Life Insurance;
- Retirement Pensions, Unemployment, Advanced Age and Old Age Insurance; and
- Day Care.

Proportionality between Local and Foreign National Employees

Quotas

The current Mexican legislation in labor matters in regards to the treatment of foreign nationals in this area is regulated by the following articles:

Article 18 of the Immigration Law provides that the Ministry of the Interior shall dictate, prior to relevant demographic studies, the number of foreign nationals who can enter the country, either by activity or area of residence, and subject to the conditions as it considers appropriate, the immigration of foreign nationals, depending on their potential to contribute to national progress.

Article 7 Work Federal Law

According the Article 7 of the Work Federal Law, in every company or establishment, the employer must hire at least 90 percent Mexican workers. In the categories of technicians and professionals, workers must be Mexican, unless they do not exist in a particular specialty, in which case the employer may temporarily hire foreign national workers at a rate not exceeding 10 percent of the specialty. The employer and foreign national workers have the joint obligation to train Mexican workers in the specialty concerned. Physicians to serve the companies must be Mexicans. The provisions of this Article are not applicable to directors, managers and general managers.

PORTUGAL

Bruna Garcia do Fôjo and Susana Brito Guerreiro

Summary

Located in southwestern Europe and bordered by the North Atlantic Ocean and Spain, Portugal is a European parliamentary democracy with approximately 10 million inhabitants. The Portuguese territory covers an area located in the Iberian Peninsula, which constitutes mainland Portugal, as well as Madeira and Azores, two archipelagos in the Atlantic Ocean benefiting from a special administrative autonomy status. Portuguese is the official language spoken in Portugal.

In 1986, Portugal joined the European Economic Community (EEC), which would later become the European Union (EU). Accession to the EU allowed the country to improve and develop its national economy through, *inter alia*, easier access to foreign markets and structural or cohesion support from the EU.

In addition to being a founding member of both the North Atlantic Treaty Organization (NATO) and the Organization for Economic Co-operation and Development (OECD), Portugal is also a member of several international organizations, including the following:

- The United Nations (UN);
- The International Monetary Fund (IMF);
- The World Trade Organization (WTO);
- The International Labor Organization (ILO); and
- The Community of Portuguese Language Countries (CPLP).

Legal System

Portugal is headed by a President elected for a five year term by direct and universal suffrage. The President is also Commander-in-Chief of the Armed Forces. Presidential powers include the appointment of the Prime Minister and Members of Government, dissolving the Assembly of the Republic (*"Assembleia da República"*), vetoing legislation and declaring a State of War. The Government is headed by a Prime Minister appointed by the President, who names a Council of Ministers to act as government and cabinet.

Portugal has a civil law legal system resting mainly on the 1976 Constitution and codified legislation, including the Portuguese Civil Code and Criminal Code. Legislation is enacted by a unicameral Parliament (i.e., the Assembly of the Republic), by the Government (depending on the underlying subject matter) or the Regional Legislative Assemblies and subsequently promulgated by the President. A Constitutional Court composed of 13 justices performs a review of the legislation enacted by Parliament and promulgated by the President.

Courts are divided into First Instance and Appeal Courts, which may also be competent to rule on certain particular matters. The Supreme Court is the highest instance of the judicial system.

Visas

The Portuguese immigration legal framework comprises a number of domestic and EU legal instruments, resulting in a complex legal and regulatory system. Types of visas and migrants' rights must notably be assessed in light of supranational legislation enacted by EU institutions, as well as any applicable bilateral treaties or conventions. Visa requirements and rights of entry, stay and exit of foreign nationals in the Portuguese territory mostly vary depending on whether the migrant is (i) a third country citizen or (ii) an EU national.

Third Country Citizens

Short Term Visas

Short Term Visas (STV) are generally granted to third country foreign nationals with a view to allowing for the carrying out of activities which are admitted by Portuguese authorities despite not justifying the issuance of a specific type of visa. This is notably the case of activities such as

tourism, business visits and transit as well for accompanying family members holding a temporary visa.

STVs may be issued for a period of up to one year. However, the total duration of the foreign nationals stay may not, in general, exceed a maximum period of 90 days over each 180 day period. This duration is computed with reference to the date of first entry in Portuguese territory.

STVs are ordinarily issued by the relevant Portuguese diplomatic mission with jurisdiction over the foreign national applicant's place of residence or origin, upon request.

Long-Term Visas and Titles

Employment-Related Residence Visas

EU Blue Card

EU Directive 2009/50/CE introduced an EU-wide[1] immigration mechanism specifically designed for highly skilled third country foreign nationals. This title, commonly known as the "EU Blue Card", is a specific type of residence permit and is not to be confused with any other work visas provided for under the domestic legislation of each Member State.

Implementation of the "Blue Card" Directive was to be finalized by EU Member States until 2011. However, in some countries, including Portugal, implementation measures resulting in an amendment to Law no. 23/2007 of July 4, 2007, which establishes the general principles governing immigration matters in Portugal, were adopted at a later stage, in 2012.

Holders of an EU Blue Card are entitled to reside and conduct highly qualified activities in Portugal. Family regrouping is one of the main advantages of these types of permits.

Third country foreign nationals wishing to apply for an EU Blue Card with a view to carrying out remunerated activities in Portugal must meet the following general requirements:

To have an employment agreement or promissory agreement in which the duties described are compatible with the highly qualified skill of the employee. This employment agreement must be concluded for a minimum period of one year. Depending on the activities to be

[1] Excluding the United Kingdom, the Republic of Ireland and Denmark.

performed, the amount of remuneration established in the employment agreement should correspond to at least 1.2 or 1.5 times the average gross annual national income:

- to have valid health insurance or alternatively, to provide evidence of registration with the national Health Care system;
- to be registered with the Social Security authority;
- if the profession is not specifically regulated, to submit evidence of the high qualifications required for carrying out the corresponding activities or work in the specific activity sector; and
- if the profession is regulated, to submit evidence of the relevant professional certification.

Additional and specific conditions apply to both the applicant and the hiring entity.

The application should be filed by the applicant or the hiring entity with Portuguese Immigration authorities (*Serviços de Estrangeiros e Fronteiras* – SEF). EU Blue Cards are issued for one year, and may be renewed for successive two-year periods.

Residence Visa Issued for Employment Purposes

Third country foreign nationals wishing to enter and stay in Portugal for the purposes of employment must request and obtain a specific residence visa.

The issuance of these visas is notably dependent on the existence of employment opportunities which have not been filled by:

- Portuguese nationals;
- EU or EEC citizens; and
- nationals of a country which has entered into a particular bilateral Agreement with Portugal.

Residence Visa Issued for Independent or Entrepreneurial Activities

Independent professionals and entrepreneurs with third country citizenship are eligible to apply for a specific residence visa with a view to developing their activity in Portugal.

Independent professionals are notably required to meet the following requirements:

- to have a written services agreement or promissory agreement in the liberal professions' sector and to be qualified to develop the underlying independent activity (if applicable).
- entrepreneurs wishing to invest in Portugal must, *inter alia*, (i) prove that they have performed investment operations; and (ii) provide evidence of sufficient financial means in Portugal.

Investment Residence Title (Golden Visa)

In a bid to boost foreign investment in the country, the Portuguese immigration legal framework was amended in 2012 to include a privileged immigration regime specifically designed for third-country investors (Golden Visa), corresponding to a special Residence Authorization. Though the general conditions of this special regime are set forth in Law no. 23/2007 of July 4, 2007 (as amended by Law no. 29/2012, of August 9, 2012), specific rules deriving from Orders enacted in 2012 and 2013 further regulate this matter.

This specific type of visa grants its holders numerous advantages, including the following:

- free movement within the *Schengen* area, without requiring any additional visa(s). Note that the United Kingdom (UK) is not part of the *Schengen* area;
- possibility of acquiring a Permanent Residence after five years, in accordance with the applicable legal framework;
- possibility of obtaining Portuguese citizenship, after six years, in accordance with the applicable legal framework; and
- possibility of benefiting from family regrouping.

Despite the above, foreign nationals holding a Golden Visa are subject to the following restrictions:

- the establishment of a residence within the *Schengen* area is limited to the Portuguese territory; and
- circulation within the *Schengen* area (excluding Portugal) is limited to 90 days over each 180-day period. Each country may establish different conditions applicable to the entry of foreign nationals.

Only third country foreign nationals are eligible to apply for a Golden Visa. Third country foreign nationals holding a participation interest in a company with registered office or branch or liaison office in Portugal may likewise be considered.

General requirements for applying for this type of visa are as follows:

- holding a valid passport;
- absence of any fact which could jeopardize the issuing of a visa, should Portuguese authorities become aware of it;
- being in Portuguese territory;
- having sufficient means of subsistence, as defined in the applicable legal framework;
- having accommodation for the stay;
- being registered with the national Social Security authority (if applicable);
- not having been convicted of a crime punishable with a prison term of more than one year in Portugal;
- not being subject to any entry prohibition in Portuguese territory following expulsion;
- not being identified in the Schengen Information System (SIS); and
- not being identified in the information system run by Portuguese immigration authorities.

Additional specific requirements may apply.

Investment requirements

Not all types of investment are relevant for the purposes of the attribution of a Golden Visa. Under the applicable legal framework, investments carried out by foreign investors wishing to apply for the aforementioned visa in Portugal must meet the following conditions:

- capital transfer of a minimum of EUR 1,000,000 into the Portuguese jurisdiction;
- creation of a minimum of 10 job positions; and
- acquisition of a minimum of EUR 500,000 in real estate.

It should be noted that capital transfers performed with a view to completing the above transactions must necessarily come from abroad. National transfers are not accepted for the purposes of applying for a Golden Visa.

Permanent Residence Title

Long-term third country foreign national migrants may be eligible for permanent residency in Portugal. Permanent residence titles have no validity limit, despite having to be renewed every five years.

To be eligible to apply for a permanent residence title, foreign nationals must have held a temporary residence title (for the purposes of employment, investment or entrepreneurial activities) for a minimum of five years prior to filing the application. Migrants must likewise be free of any criminal conviction(s), punished with prison term(s) exceeding one year, including, in case of a criminal conviction on grounds of terrorism, violent or organized criminal behavior and suspended sentences. Additional requirements, such as:

- the obligation to provide evidence of sufficient means of subsistence;
- housing; and
- mastering the Portuguese language also apply.

Family Regrouping

Third country foreign nationals holding a valid residence title are entitled to family regrouping. Family members of the foreign national residing legally in Portugal, as defined by law, may therefore benefit from certain advantages in what regards visa applications.

EU Citizens

Freedom of movement of EU citizens

Pursuant to the applicable EU legal framework, freedom of movement for workers is secured within the EU. This freedom notably entails the abolition of any discrimination based on nationality between workers of EU Member States as regards employment, remuneration and other conditions of work and employment.

Subject to limitations justified on grounds of public policy, public security or public health, EU workers notably have the right to:

- accept offers of employment actually made;
- move freely within the territory of Member States for this purpose;
- stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action; and
- remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in regulations to be drawn up by the Commission.

Working in Portugal

EU workers enjoy full freedom of movement rights within EU Member States, including Portugal. As a matter of principle, all EU citizens are entitled to enter, exit, stay and work in an EU country other than that of their citizenship, subject to carrying and presenting valid identification documents (passport or national ID card). For stays not exceeding three months, no additional formalities apply. EU citizens intending to stay for longer periods are nonetheless required to register with local authorities.

Additional formalities may apply depending on the specific provisions in force in each jurisdiction.

Family Regrouping

Third country foreign nationals who are also family members of an EU citizen (as defined by law) established in Portugal benefit from specific advantages in the context of family regrouping.

Employment and Labor Law

From an international standpoint, Portugal is a member of the International Labor Organization (ILO) and generally observes the principles contained in Conventions adopted by this organization.

At national level, the Portuguese employment and labor legal framework is made up of principles and rules contained in the Labor Code, enacted by Law no. 7/2009, on February 12, 2009 (as amended), as well as in ancillary legislation and regulations, all of which rest upon a number of fundamental principles and rights provided for under the 1976 Constitution of the Portuguese Republic.

The Portuguese government recently approved Decree-Law no. 144/2014, on September 30, 2014, which raised the minimum national wage to EUR 505.

Income Tax and Social Security Contributions

Portuguese Tax System contemplates direct and indirect taxation and includes taxes on personal income, corporate income, consumption and real property.

The taxation of individual (Personal Income Tax – IRS) considers different types of income, classified according to several categories of taxable income, as follows: employment income, entrepreneurial income, capital investment income, property rent, capital gains and pensions.

A tax resident is supposed to be highly linked or connected to the national territory on an economic and social perspective. The residence principle of taxation is generally accepted by various tax systems, including the Portuguese, as a determinant element of connection to legitimate the right or power to tax.

This connection – the residence – legitimizes resident's taxation on their worldwide income.

Pursuant to the Personal Income Tax Code, the general rule is that natural persons remaining in Portugal for a minimum of 183 consecutive or non-sequential days in a given year are deemed to be residents in Portugal for tax purposes.

Tax residency may also notably be assessed on the following criteria, amongst others:

Individuals remaining in the country for less than the aforementioned period are likewise considered residents in Portugal for tax purposes, in the event that, on December 31 of a given year, they possess housing in the country in such conditions that it may be inferred there is the intention to keep and occupy it as a place of habitual residence and is exercising a broad public function or commission in the service of the Portuguese State.

As a general rule, income is taxed on the basis of progressive rates.

In relation to Corporate Income Taxation (IRC), according to the IRC Code investor's vehicles may be considered taxable persons for corporate income tax purposes as residents, Non-residents and permanent establishment.

Workers, Members of Statutory Bodies (MOE) and the self-employed entrepreneurs will be subject to Social Security Contributions (SSC), which are levied on their remuneration (actual or contractual). Several forms of remuneration are excluded from SSC's tax base, for instance: allowances, supplementary pensions, some transportation expenses, in certain circumstances the profits distributed to workers, amongst other forms of compensation.

The applicable rates vary depending on employees and the company liability. Under the general system the applicable rates are set as follows: 23.75 percent employer and 11 percent for the employee. Responsibility

for the contributions of MOEs working as permanent or administration and distributed as follows, the company 23.75 percent and 11 percent the beneficiaries, in the case of independent work performed by self-employed individuals, under certain assumptions the company five percent and 29.6 percent the individual.

Proportionality between Local and Foreign National Employees

The Constitution of the Portuguese Republic consecrates the principles of equality and non-discrimination. However, in certain matters, such as the concession of residence permits for work purposes, there is a general rule by which the concession of the same depends on the existence of work opportunities that have not been fulfilled by Portuguese nationals, workers of other Member States of the EU, of the EEA, of Third States wherewith the European Community has concluded an agreement of free movement of people, as well as national workers of Third Countries with a legal residence in Portugal.

ROMANIA

Ruslan Bocancea

Summary

Romania is located at the intersection of Central and Southeastern Europe, bordering the Black Sea. It is the largest of the Balkan countries and the ninth largest country of the European Union (EU) by area, and has the seventh largest population of the EU with more than 21 million people. Its capital and largest city is Bucharest, the 10th largest city in the EU. Romania joined the EU on January 1, 2007 and is the 22nd largest economy in Europe (and the 17th in the EU) by total Gross Domestic Product (GDP).

Legal System

Romania is a constitutional republic with a democratic, multi-party, parliamentary system. It promotes principles of the separation of powers (legislative, executive and judicial) and balance of those powers through checks and balances. The bicameral parliament (*Parlament*) consists of the Senate (*Senat*) and the Chamber of Deputies (*Camera Deputatilor*), both elected by popular vote.

The modern legal system in Romania is based on the Napoleonic Code and dates back to the mid-19th century. It is modeled after the French, Belgian, Italian and German systems.

The main source of law in Romania is the Romanian Constitution and it is the supreme law of the land. Every other law passed has to comply with it. Laws can be adopted through decisions of the *Parlament* and other acts of the central and local government, such as ordinances and regulations. EU laws apply, as well as international treaties.

Justice is carried out through various courts, including first instance courts, military courts, tribunals, courts of appeal and the High Court of Cassation and Justice. The High Court of Cassation and Justice is the supreme court of Romania. It is broken up into sections and hears cases concerning civil and intellectual property, criminal cases, commercial cases and fiscal and administrative claims.

Visas

Most foreign nationals require a visa to enter Romania, unless they are citizens of certain countries with which Romania concluded agreements on the abolition of visa requirements or has unilaterally renounced the visa requirement. Romanian visas are generally granted by the Romanian diplomatic missions and consular posts abroad.

Types of Visas

Airport Transit Visa: A

Transit Visa: B or B/CL

Transit visas can be exceptionally granted by border officials, at the state border-crossing points. Such visas are valid and entitle holders to stay on the territory of Romania for five days from the date of entry.

Short-Stay Visas:

- C/A – Business;
- C/TU – Tourism;
- C/VV – Visit;
- C/TR – Transport;
- C/SP – Sports; and
- C/ZA – Cultural, Scientific and Humanitarian Activities; Short-term Medical Treatment or Other Activities.

Short-stay visas can also be exceptionally granted by border officials, at the state border-crossing points. Such visas are valid and entitle holders to stay on the territory of Romania for no more than 90 days within an interval of maximum six months from the date of entry, with no possibility of extension within the country.

Long-Stay Visas:

- D/AC – Commercial Activities;
- D/AP – Professional Activities;
- D/AE – Economic Activities;
- D/AM – Labor Contract;
- D/SD – Studies;
- D/VF – Family Reunification;
- D/CR – Foreign nationals Married to Romanian Citizens;
- D/RU – Religious or Humanitarian Activities;
- D/CS – Scientific Research;
- DS – Diplomatic Reasons; and
- D/AS – Others.

The long-stay visas are granted by the Romanian diplomatic missions and consular posts, only with the previous approval of the Ministry of Internal Affairs – General Inspectorate for Immigration.

The General Inspectorate for Immigration – Ministry of Internal Affairs generally issues the approval within 30-45 days from the date of receiving the visa requests. Long-stay visas for foreign nationals who are family members of Romanian citizens are exempt from consular fees. Visas can be issued for one or more entries. Long-stay visas are valid and entitle holders to stay on the territory of Romania for 90 days, with the possibility of extension within the country which shall be applied for at least 30 days prior to the expiry of the validity of the long-stay visa.

Citizens of the Member States of the EU or the EEA (Norway, Iceland and Lichtenstein) and of the Swiss Confederation can apply to the Ministry of Internal Affairs – General Inspectorate for Immigration for the extension of their right of temporary stay and for residence permits without holding a long-stay visa.

Employment Visas

Non-EEA nationals are permitted to engage in employment in Romania, and get a working visa, after they find an employer who will obtain for

them a work permit from the territorial units of the General Inspectorate for Immigration of the district where the employer has its registered office.

Work Permit and Visa

The general steps of the work permit application procedure are the following:

- the employer acting on behalf of the migrant worker obtains an endorsement of the General Inspectorate for Immigration;
- the migrant worker obtains a long-term residence visa;
- the employer obtains for the migrant worker the work permit;
- the migrant worker concludes an individual labor contract with the employer; and
- the migrant worker obtains a stay permit.

After getting the employment permit by the employer, the migrant worker can apply for a long-stay visa for employment within the next 60 days. The working visa shall be approved by the National Visa Centre within 10 days from submitting the visa application, if the migrant obtains the employment permit from General Inspectorate for Immigration – Ministry of Internal Affairs.

Short-term business visitors are exempt from having to go through the above-mentioned procedures. Instead, they should apply for a special short-term business visa, or C/A visa. It allows the visitor to enter and stay, or re-enter Romania for a period of 90 days. If the visitor frequents Romania on business, a short-term visa granting multiple re-entries is available for 12 months. Regardless, the total stay cannot exceed 90 days in a six month period. Short-term business visas can be acquired if a visitor is traveling to Romania for economic and/or business purposes, for contracts or negotiations, and to learn or to verify the use and operation of goods acquired or sold under the commercial and industrial cooperation contracts. Before entering Romania, the visitor has to submit various documents to the Romanian diplomatic mission in their country of residence, including travel tickets, health insurance, an invitation from a company or public authority, proof of financial means and proof of accommodation.

Approval for a long-term employment stay is more difficult. Applications are submitted in the migrant worker's country of residence. Long term employment visas are granted by the Romanian diplomatic missions and consular offices and have to be approved by the Ministry of Internal Affairs – General Inspectorate for Immigration. The process may take

up to 45 days. Once approved, the migrant worker has authorization to stay in Romanian territory for 90 days, although extensions are available.

The following conditions have to be met for a prospective employer to receive the needed endorsement for the Office for Immigration:

- the employer makes the proof that they carry out a legal activity in Romania, that they are not in debt and that the selection of personnel has been made under the legal provisions in force, with the submission of proof certifying such facts, according to the provisions of the special law regarding employment and temporary professional transfer of aliens on the territory of Romania;
- the alien fulfills the special conditions of professional training, work experience and authorization, is medically able to perform the respective activity, has no criminal record, complies with the annual quota approved by Government Decision, according to the special law on employment and temporary transfer of aliens on Romanian territory and to the provisions of Article 6 (1) a), e) f), g) and h), Article 8 (1) b) to d), Article 27 (2) c) and e).

Once the endorsement is acquired, further documents are needed to complete the application for a long-term stay visa. The applicant must have the working permit obtained by the employer, proof of minimum wage financial means throughout the entire period specified on the visa, their criminal record issued by the proper authorities and proof of medical insurance for the duration of the visa.

Depending on which long-term visa a migrant worker has been approved for, he or she may engage in economic activities (D/AE), professional activities (D/AP), commercial activities (D/AC) and work on the basis of an individual work contract (D/AM).

Work permit (*Avizul de Angajare*) is issues by the General Inspectorate for Immigration at the request of the Romanian employer. Work permits are given for the purposes of employment based on an individual employment contract or self employment and for transfer of a migrant worker to Romania by his or her company.

There are a few categories of migrant workers who do not have to apply for work authorization, such as non-EEA nationals who perform scientific, artistic, or any other category of specific activities, on a temporary basis, in a Romanian institution. Further, work permit is not needed when the migrant worker is transferred by a foreign company to a branch or subsidiary located in Romania. In that case, both the foreign company and the subsidiary have to have the same object of activity and the migrant worker may not work for other Romanian institutions. Finally, a

work permit is also not required in a case where the migrant worker is transferred by a foreign entity to a Romanian entity based on a service contract between the two. Endorsement is still needed in each case.

The long stay visa shall be granted for 90 day period, with one or many trips, with extension possibility. A stay permit must be obtained after entering in Romania. The application must be submitted personally to the territorial units of the General Inspectorate for Immigration from the district the migrant worker will live, with at least 30 days before the expiry of the right to stay granted by the visa.

Employment and Labor Law

The Romanian employment legal framework is governed by Law no. 53/2003 – regarding the Labor Code ("the Labor Code"), Emergency Government Ordinance (OUG) no. 25/2014 regarding the employment and transfer of foreign nationals in Romania, Emergency Government Ordinance (OUG) no. 194/2002 regarding the foreign national's status in Romania.

The Labor Code governs the relationship between employers and employees, including Romanian employees working for Romanian employers at home or abroad and foreign nationals working in Romania. All employers must comply with Romanian labor laws, whether they employ Romanian nationals or foreign nationals.

The Employment Contract

All employment relationships in Romania require a written contract. The contract must include, at a minimum, the following:

- the identity of the parties;
- workplace or, in the absence of a permanent workplace, the possibility of working in several places;
- headquarters or, as appropriate, domicile of the employer;
- job title or occupation according to the Classifications of Occupations in Romania or other legal provisions, as well as the job description specifying the job duties;
- job-related specific risks;
- date when the contract comes into force – in the case of an individual labor contract of limited duration or of a temporary individual labor contract, the specific duration of the contract;

- length of paid leave;
- conditions and duration of notice;
- basic salary, other salary-related essential elements and payment frequency;
- normal working time, expressed in hours per day and hours per week; reference to the relevant collective labor agreement governing the employee's working conditions; and
- length of the probation period (if applicable).

Working Hours

For full-time employees, the normal work time is eight-hour per day and 40 hours per week, the maximum working hours per week are 48, including the overtime. In the case of young people up to 18 years of age, the work week is six hours per day and 30 hours per week. If young people accumulate multiple positions based on individual employment contracts, the work time is added and cannot exceed the total of the above-mentioned limits.

Overtime

Labor provided outside the normal weekly working time is considered overtime. Overtime cannot be provided without the employee's consent, except in major force situations or for urgent works destined to prevent the occurrence of accidents or to remove the consequences of an accident. Overtime is compensated by paid free hours in the following 30 days after the provision thereof. Under such circumstances, the employee benefits from the corresponding salary for the hours provided outside the normal working time.

Should the compensation by paid free hours not be possible within 30 days, overtime shall be paid to the employee by adding a salary bonus according to the overtime duration. The overtime bonus offered under the circumstances mentioned above is established by negotiation, within the collective employment contract or, as the case may be the individual employment contract and cannot be lower than 75 percent of the basic salary. Young people up to 18 years of age cannot work overtime.

Minimum Wage

In Romania, the minimum guaranteed gross salary is Romanian Leu (RON) 975 (approximately EUR 221) per month for a full-time work schedule.

Termination of Employment

Under Romanian law, an employment contract may be terminated in various ways, including through dismissal by employer or resignation.

Income Tax and Social Security Contributions

Income Tax

Romanian citizens domiciled in Romania are taxed on their worldwide income (except for salaries received from abroad for work performed abroad). Previously resident Romanian domiciled citizens, who then become residents of a state which has not signed a Double Tax Treaty with Romania, continue to be taxable in Romania on their worldwide income for the calendar year in which the change of residence occurs, as well as for the next three calendar years.

Foreign nationals present in Romania will, in general, be required to pay Romanian individual income tax on income sourced in Romania, such as: salary received from a foreign employer for work carried out in Romania (irrespective of where the income is paid); employment-related income paid by a Romanian resident company or individual; income from a source situated on Romanian territory (example: rental income from property situated in Romania, dividends from a Romanian company, interest, etc.).

Romanian citizens not domiciled in Romania and foreign nationals that become tax residents in Romania are taxed during the first year of their stay only on income sourced in Romania. All tax resident individuals become taxable on their worldwide income starting with the year following that in which they started their tax residency (while respecting the provisions of the Double Tax Treaties, where applicable) – this is a change from previous years when there was a three year transition period.

The flat income tax rate in Romania is 16 percent. The fiscal year is the calendar year. A resident is a person who:

- is domiciled in Romania;
- has his or her centre of vital interests in Romania; and
- is present in Romania for more than 183 days in any 12 consecutive month intervals ending in the concerned calendar year.

Social Security Contributions

In Romania, all employers and employees, as well as other categories of taxpayers, have to contribute to the state social, health and employment security system. Social and health security covers pensions, child benefits, temporary work disabilities, work accidents and professional illness risks, illness and other social care services, while employment security covers, on one hand, minimal unemployment benefits and on the other hand, grants aimed at generating employment.

The percentages paid by employers and employees are applied to a certain computation base that is capped as provided by the Fiscal Code. The contribution rates can be modified by the Social Security Contributions Law or by the State Budget Law. For 2012, the contribution rates were established as follows:

Employee Contributions:

- social security contribution: 10.5 percent;
- unemployment fund: 0.5 percent; and
- health fund: 5.5 percent.

In 2012, out of the total rate of the individual social security (pension) contribution, 3.5 percent is automatically directed towards private pension funds. The monthly assessment base is the gross income derived from dependent activities (in Romania and abroad).

Employer Contributions:

- social security fund: 20.8 percent; 25.8 percent; 30.8 percent depending on working conditions (capped);
- health fund: 5.2 percent;
- medical leave: 0.85 percent (capped);
- guarantee Fund: 0.25 percent of the salary fund;
- unemployment fund: 0.5 percent; and
- work accidents, risk insurance and occupational disease fund: 0.15 percent to 0.85 percent.

Foreign nationals seconded to Romania generally have the obligation to pay the uncapped health fund contribution of 5.5 percent, calculated on the income that is subject to Romanian income tax. The contribution is tax deductible for individual income tax purposes. However, EU citizens employed by an EU company and seconded to work in Romania are

exempted from paying all social security contributions in Romania (including health fund contribution) if they can make available an E101/A1 certificate from their home country's authorities proving that they continue to contribute to the home country's mandatory social security scheme. Similarly, individuals who fall within the scope of one of the bilateral social security agreements Romania has are exempted from paying all social security contributions in Romania if they can make available a Certificate of Coverage from their home country.

For individuals seconded from the EU to Romania who do not possess an E101/A1 social security coverage certificate, all employer and employee social charges are due on the salary they receive from the foreign national employing them. As there is currently no mechanism available to collect employee and employer social security contributions and the contribution to the unemployment fund from foreign employers, foreign nationals on secondment in practice pay only individual income tax and the health fund contribution (until further clarifications are provided by the Romanian authorities). Individuals receiving salary income, based on employment contracts with Romanian entities, have to pay 10.5 percent employee pension contribution calculated on their entire remuneration, capped at five times the average official wage in Romania.

RUSSIA

Timur Beslangurov

Summary

The Russian Federation or Russia is a country in northern Eurasia. It is a federal semi-presidential republic, comprising 83 federal subjects. At 17,075,400 square kilometers (6,592,800 square miles), Russia is the largest country in the world, covering more than 1/8th of the Earth's inhabited land area. Russia is also the eighth most populous nation with 143 million people. It extends across the whole of Northern Asia and 40 percent of Europe, spanning nine time zones and incorporating a wide range of environments and land forms. It has a population of 142,914,136 (according to official estimates in January 2011) and the official language is Russian. The Russian Federation was founded following the dissolution of the Soviet Union in 1991, but is recognized as the continuing legal personality of the Soviet state.

Legal System

The Russian government has enacted numerous laws, decrees and regulations pertaining to immigration. The foundation of Russian immigration law is Federal Law 115-FZ, on the Legal status of foreign nationals in Russia dated July 25, 2002. In addition to the federal statutes, Russia has adopted numerous decrees pertaining to various aspects of the immigration process, including visa categories, temporary

and permanent residence permits, issuance of migration cards to foreign nationals entering Russia, registration of foreign nationals, employment authorization and employment quotas for foreign nationals. Various ministries and agencies concerned with immigration issues, including the Ministry of Foreign Affairs, the Ministry of Internal Affairs, and the Federal Security Service of Russia, have also adopted regulations with regard to the issuance of visa invitations, visas and migration cards.

Note that Russia's immigration laws are subject to frequent change. In addition, local and federal agencies involved in the immigration process have wide discretion in application of Russian laws and regulations; practices and policies at these offices change often and sometimes without advance notice.

Visas

Nearly all foreign nationals are required to obtain a visa to enter Russia. In most cases, a foreign national will be required to be sponsored for advance authorization to enter in the form of an invitation issued by Russia's migration authority. Limited visa exemptions exist for nationals of designated member states of the Commonwealth of Independent States (CIS). Nationals of Armenia, Azerbaijan, Belarus, Kazakhstan, Kyrgyzstan, Moldova, Tajikistan, Ukraine and Uzbekistan can enter Russia on a visa-free basis.

There are also a number of bilateral agreements between Russia and other countries providing for a limited visa-free travel. Please, note the summary below:

LENGTH OF STAY	CONTRACTING PARTY
14 DAYS	HONG KONG
30 DAYS	BOSNIA AND HERZEGOVINA* *for 30 days out of each 60 days CUBA MACAU MONTENEGRO SERBIA THAILAND* *30 days TURKEY* *90 days out of each 180 days, but not more than 30 days in a row
60 DAYS	SOUTH KOREA* see additional info below

LENGTH OF STAY	CONTRACTING PARTY
90 DAYS	ARGENTINA BRAZIL* *90 days out of each 180 days CHILE* *90 days out of each 180 days COLOMBIA* *90 days out of each 180 days FIJI* *90 days out of each 180 days GUATEMALA* *90 days out of each 180 days ISRAEL* *90 days out of each 180 days MACEDONIA MOROCCO* *90 days out of each 180 days NICARAGUA* *90 days out of each 180 days PERU* *90 days out of each 180 days EL SALVADOR* *90 days out of each 180 days SOUTH KOREA* *90 days out of each 180 days, but not more than 60 days in a row URUGUAY* *90 days out of each 180 days VENEZUELA* *90 days out of each 180 days ECUADOR* *90 days out of each 180 days
CIS * *Stay is allowed for 90 days out of each 180 days;	ARMENIA AZERBAIJAN BELARUS KAZAKHSTAN KYRGYSTAN MOLDOVA TAJIKISTAN UKRAINE UZBEKISTAN
PURPOSES OF VISIT	TOURISM, BUSINESS, PRIVATE

The most commonly used categories of temporary entry are the ordinary visas, including:

- **Tourist and Private Visit Visas:** for foreign nationals entering for tourism or family visits;
- **Business visas:** for foreign nationals entering Russia to conduct business activities without remuneration from a Russian source;
- **Student visas:** for foreign nationals entering to engage in a course of study at a Russian educational institution; and
- **Work visas:** for foreign nationals entering Russia to be directly employed by a Russian or registered foreign legal entity or to work as assigned to Russia employees at a branch, affiliate, or representative office of the overseas employer.

The Russian system also includes a temporary residence permit for foreign nationals who wish to reside in Russia as a preliminary step towards permanent residence.

Employer or Sponsoring Entity

Most foreign nationals seeking to enter Russia on a temporary basis must be sponsored for a visa invitation by a sponsoring entity or individual. The sponsor may be a Russian legal entity, such as a domestic corporation or a foreign corporation accredited to do business in Russia; a Russian municipality or government agency; an educational institution; or a Russian citizen or permanent resident. Legal entities seeking to sponsor foreign nationals are required to register with the Federal Migration Service (FMS) which maintains the entity's business registration documents and other information on file for a period of one year.

Temporary Visas

Business Visas

Business visa is available to foreign nationals entering Russia for business or commercial activities for which they will not receive compensation from a Russian source. Permissible activities include:

- attending meetings, conferences, trade fairs, auctions, or seminars;
- negotiating or signing agreements or contracts;

- attending meetings at the invitation of a government body;
- entering as a representative of a foreign company to install, dismantle, service, or repair the company's products (A special sub-type of business visa will be required: technical support visa. A number of additional requirements apply for procurement of this visa type);
- examining goods to be purchased or purchasing or delivering goods pursuant to a sales contract;
- attending personal professional development and retraining programs;
- giving lectures at institutions of higher academic or professional education;
- 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
- entering as a crew member or transportation service driver.

If a business trip, even if very brief, will involve activities other than those outlined above, a work permit and work visa will typically be required. Additionally, even when activities are limited to those listed above, if the foreign national generates profit for the host entity, receives compensation from the host entity and/or takes direction from the host entity, a work permit may be required. Accordingly, it should not be assumed from the list above alone that a business visit is or is not sufficient for a given case.

The business visa is available in single, double or multiple-entry formats. Single and double-entry business visas are typically valid for visits of up to 90 days. Multiple-entry visas may be issued with validity periods of six or 12 months. Based on bilateral agreements that Russia has signed with the European Union (EU), Republic of Korea, United States of America (U.S.) and other countries, multiple business visas may be issued with a validity of up to five years. The multiple-entry visa allows an unlimited number of entries during the validity period for periods of stay of up to 90 days within any 180-day period. Extension of the business visa is not typically permitted, although in exceptional circumstances the foreign national may apply for a 10-day extension at a local or regional branch of the FMS while present in Russia.

Typically, a sponsoring Russian entity files an application for a business visa invitation on behalf of the foreign national with the local or regional FMS office having jurisdiction over the entity's place of registration. Legal entities seeking to sponsor foreign nationals are required to register with the FMS, which maintains the entity's business registration documents and other information on file. Entities may make multiple sponsorship

applications during each one year registration period. However, starting from June 1, 2007, in accordance with the bilateral agreement between the EU (with the exception of the United Kingdom, Ireland and Denmark) and Russia, new rules permit the sponsoring entity to simply issue an invitation on its own letterhead to the prospective business visitor (coming from the EU country) specifying the purpose and duration of the visit. A similar agreement was signed between Russia and the U.S. in September 2012, allowing U.S. citizens to get three year multiple visas based on company's letter of invite as well.

Upon application approval, the FMS issues an invitation to the sponsor or its authorized agent. The sponsor forwards the invitation to the foreign national for use in connection with his or her business visa application. The visa application is usually made at the Russian diplomatic post with jurisdiction over the foreign national's place of residence abroad.

Dependent Family Members: A business visitor may be accompanied by a spouse and/or unmarried dependent children under 18 years of age. Typically, the sponsoring entity requests family invitation letters as part of its application on behalf of the principal. Each family member who possesses his or her own passport must be issued a separate invitation letter. Upon receipt of the invitation, dependent family members apply with the principal for business visas at the Russia diplomatic post with jurisdiction over their place of residence. Children who do not have their own passports should be included in a parent's visa application.

Change of Status: Business visa holders are not permitted to change to another immigration status while present in Russia. Although a foreign national may be present in Russia while applications for employment authorization and work visa invitation are filed on his or her behalf, he or she must depart Russia, apply for a work visa at a Russian diplomatic post abroad, and reenter Russia on a new basis.

Employment Visas

There are three categories of work visas available in Russia:

- Work visa issued for foreign nationals working for Russian legal entities;
- Work visas issued for foreign nationals working for Representative or Branch offices of foreign legal entities; and
- Work visas issued for highly qualified foreign nationals who are specialists.

Student Visas

Student visas are available to foreign nationals who have been accepted to a course of study at an institution of specialized professional or higher academic education in Russia. A student visa may be used to pursue an academic degree, undertake a language program, or attend a professional course at an educational institution.

The foreign national must be sponsored for a visa invitation letter by the Russian educational institution, although, if the foreign national will study at a military academic institution, the Ministry of Defense, the Federal Security Service, or another government entity must petition for the invitation letter. To request the invitation, the sponsoring institution submits documents to the local or regional FMS with jurisdiction over the institution's location.

Upon approval of the application, the FMS issues an invitation letter to the sponsoring institution, which forwards the invitation to the foreign national for use in connection with his or her visa application.

A visa application with the supporting documents should be filed at the Russian diplomatic post with jurisdiction over the foreign national's place of residence abroad.

If the application is approved, the foreign national will receive a visa that is valid for three months and for a single entry. The foreign national must enter Russia during the visa validity period. After the student is enrolled in the course of study, the academic institution may apply on the foreign national's behalf for an extension of student visa for up to one year and multiple entries. The extension application is made to a local or regional FMS branch office. The foreign national is eligible for additional extensions in one-year increments until completion of his or her course of study.

Student Employment: Foreign nationals holding a student visa are authorized to engage in employment during their stay in Russia without the need to obtain a work permit. During the academic term, the foreign national student is limited to work for the educational institution which he or she is attending; however, no such restriction applies to work during vacation periods. Recently employment of foreign national students has been simplified. Thus, employers other than universities can engage foreign national students having sponsored a work permit for them. No foreign labor quota or corporate work permit is required in this case.

Permanent Visa

The temporary residence permit (first step towards permanent residency and citizenship) authorizes foreign nationals to reside in Russia on a long-term basis as a step toward permanent residence. Temporary residence

permits are subject to a quota set annually by the Russian government. However, certain categories of foreign nationals are exempt from the quota, including individuals who will make a capital investment in Russia (although the amount of investment required is yet to be approved by the Government), spouses and other family members of Russian citizens, disabled individuals who are the parents or children of Russian-born individuals, individuals who were born within Russian territory and were former citizens of the Union of Soviet Socialist Republics (USSR) and foreign nationals who are serving in the Russian military.

A foreign national who seeks the temporary residence permit may apply at the regional or local FMS branch office having jurisdiction over his or her place of actual residence in Russia or at a Russian diplomatic post abroad. Unlike other immigration categories, no sponsoring party is required.

Upon receipt of the application (either as directly filed by the applicant or forwarded by the diplomatic post), the FMS performs a comprehensive background that includes consultation with law enforcement, federal security, tax and health care agencies. Upon approval of the application, the FMS forwards its decision to the foreign national. If the temporary residence permit application is denied, the FMS must state its reasons for the denial; the foreign national may lodge an appeal within three days after receipt of the denial notice. If the foreign national is present in Russia, he or she will retain the right to remain while the appeal is pending unless otherwise provided by the federal law.

If the applicant is present in Russia when the application is approved, he or she must appear at the relevant local or regional FMS office for processing of the permit. If the application is approved and the foreign national is overseas, he or she may apply for a visa to enter the Russia at a diplomatic mission.

Based on the FMS approval of the temporary residence permit, the consulate or diplomatic mission will issue a single-entry visa valid for four months, during which the foreign national must enter Russia. Within three days after entry, a foreign national must apply to the FMS for endorsement of his or her passport with the temporary resident designation. The permit is valid for a period of three years. Starting from 2013, Temporary Residence work permit holders are no longer required to obtain work permits to perform work activities in Russia. No Quota or Corporate Work Permit is required for an employer to engage such foreign nationals.

The temporary resident permit holder is authorized to live only in the location designated on the permit. If the foreign national relocates, he

or she must obtain a new temporary residence permit from a local or regional FMS office in the new jurisdiction. (Note, however, that this restriction does not apply to employees of consulates, diplomatic missions and international organizations or to journalists accredited in Russia.) To travel internationally, the permit holder must obtain an exit visa from the FMS (with the exception of certain countries with which Russia has bilateral agreements; detailed information has been provided in the relevant section).

A foreign national who is present in Russia pursuant to the temporary residence permit is required to renew his or her registration record with the FMS on an annual basis. At re-registration, the foreign national must confirm that he or she continues to reside in Russia and must provide information concerning his or her residence address, employment and record of travel outside of Russia. He or she must also provide documentation of the amount and source of their income, such as a tax report or other financial documentation. The temporary residence permit may be revoked if, in the course of a year, the foreign national failed to receive any income or failed to show adequate means to support himself or herself or dependent family members at the established minimum living standards and without government assistance.

Permanent Residence Permit: A foreign national who is over 18 years of age and has lived in Russia pursuant to a temporary residence permit for at least one year may apply for the permanent residence permit. A parent or legal guardian may apply for a permanent residence permit on behalf of a foreign national under 18 years of age. A permanent residence permit holder may live and work without restriction in any region of Russia. Permanent residence permit also allows visa-free travel to and out of Russia.

An applicant for the permanent residence permit must submit in person a written request to the local or regional FMS over his or her place of registration no later than six months before the expiration of his or her temporary residence permit.

If the application is approved, the foreign national is granted a permanent residence permit that is valid for five years.The permit is renewable in 5 year increments; renewal applications must be submitted no later than six months before the expiration of the current permit.

Employment and Labor Law

In accordance with the internationally recognized principle of *lex loci laboris* Russian labor legislation in full is applicable to foreign nationals who are working in Russia. This is applicable to foreign nationals working

for Russian entities as well as for those who are assigned to work in Russian representative or branch offices of foreign corporations. Labor agreements that such foreign nationals hold should not contradict Russian labor legislation. Moreover, foreign nationals working in Russia are subject to all Human Resource (HR) processing requirements.

General Provision: Employment of foreign nationals in Russia is subject to strict regulation by the FMS and other authorities. Russian government sets a national quota for the maximum number of available work permits and work visas for each year. Quota numbers often vary significantly from year to year, and may be changed during the course of a year. Quota numbers are also allocated among the different regions of Russia, and among specific professions, occupations and nationalities. To obtain quota numbers, an employer should submit an application containing information on their need for foreign nationals to the inter-regional Information Business Centre till July 1 of the current year for employment of foreign nationals for the next year. In case of failure in the application submission, the state authority is likely to refuse the employer the processing of an Employment permit.

The main criterion for a work permit application is the nature of activity carried out by a foreign national, and not the period of stay in Russia. In case the activity in its essence is deemed to be working, the work permit should be obtained from day one.

The principal vehicle for temporary entry into Russia for employment is the ordinary work visa. This visa allows foreign nationals to perform temporary services as employees or independent contractors.

There are two main subcategories of ordinary work visas:

1) the ordinary work visa for foreign nationals who will be directly hired by a Russian legal entity; and
2) the ordinary visa for representative or branch office employees who will be transferred from a home country employer to work for an affiliate, representative or branch office in Russia.

In nearly all cases, the foreign national must be sponsored for the work visa by an employing entity that is registered in Russia. Note, however, that under legislative amendments that became effective January 15, 2007, employment authorization requirements for nationals of most member countries of the Commonwealth of Independent States (CIS) have been eased. Nationals of the visa-exempt CIS countries (Armenia, Azerbaijan, Kazakhstan, Kyrgyzstan, Moldova, Tajikistan, Ukraine, and Uzbekistan) can also submit work permit applications on their own behalf

to the relevant local or regional FMS office with jurisdiction over the place of employment in Russia.

Unlike work permits granted to visa nationals, the work permit granted to visa-exempt CIS nationals allows the holder to work for any employer in the jurisdiction of the FMS office that issued the permit. Note, however, that nationals of two CIS member countries, Georgia and Turkmenistan, remain subject to all visa, employment and work permit requirements. Nationals of Belarus and Kazakhstan are not subject to the work permit or visa requirements based on bilateral agreements.

In addition, the following categories of visa nationals are exempt from the employment permit and work permit requirements:

- Russian permanent and temporary residents (foreign nationals that obtained Permanent residency);
- members of the Government program supporting relocation of former citizens living abroad back to the Russia;
- employees of diplomatic missions and international organizations as well as their domestic employees;
- journalists accredited in Russia;
- students who work during their holidays or spare time;
- employees of overseas entities entering Russia to perform warranty or post-warranty maintenance or installation services in connection with equipment imported into Russia; and
- foreign nationals entering Russia as instructors, teachers, and lecturers pursuant to an invitation from a Russian academic institution (with the exception of religious institutions); and
- refugees and displaced persons (provided they have required documentation to confirm their status);

In order to sponsor a visa national for a work visa, employers must typically proceed through a multi-part process that begins with the filing of a declaration of the employer's prospective need to hire foreign nationals in the following year.

Next, the employer must submit an application to the FMS for a general authorization to employ foreign nationals, known as an employment permit. In adjudicating the employment permit application, the FMS will review the declaration of need and consult with the local labor authority to assess local labor market conditions and determine whether there are suitably qualified Russian workers available to fill the open position.

If the application is approved, the employer will be issued a permit that specifies the maximum number of foreign nationals whom it is authorized

to employ at a given time, the positions that those foreign nationals may occupy and their authorized nationalities. Next, the employer must obtain a work permit for every foreign national and visa invitation letters for the principal and all accompanying family members through the relevant local or regional office of the FMS.

Finally, using the invitations forwarded by the employer, the foreign national and any accompanying family members must apply for a visa at a Russian diplomatic post. Upon the foreign national's entry into Russia on a work visa, the host employer should apply for the modification of single entry work visas to multiple work visas, notify authorities about employment of foreign nationals and register foreign nationals with migration authorities.

Requirements

In order to apply for work permits and invitations on behalf of foreign nationals who are visa nationals, an employer must first obtain an employment permit. The employment permit sets a numerical limitation on the number of foreign nationals employed each year and specifies the occupations and geographical locations in which the foreign nationals may work. Under current regulations issued in July 2008, the employer should submit an application to local labor authorities informing them of the vacancy (job position for foreign national) 30 days before submitting the employment permit application to immigration authorities to offer local workers the opportunity to apply for open positions. During the 30 days period labor authorities may send unemployed Russian candidates that they deem appropriate for an open position to an interview with the employer company. The employer has to provide a justified refusal for not employing a Russian national in order to be able to employ a foreign national.

After 30 days an employment permit application is submitted to immigration service with jurisdiction over the employer's place of registration. The employment permit application is approved by the immigration authorities subject to a positive decision of the labor authorities. Upon final approval of the application, the FMS issues an employment permit with a validity period of up to one year. The permit will specify the number of foreign nationals that the permit holder may employ, the occupations in which such workers may engage, and the locations in which they may work. During the validity period, the employer may apply for individual work permits on behalf of foreign nationals, subject to the limitations set forth in the permit. Note that the host employer may not transfer its employment permit to any other employer or transfer a foreign national employee under its permit to

another employer. Note also that all foreign nationals employed by the employer are counted against the quota set forth in the employment permit; this includes nationals of the CIS.

The Work Permit Process:

There are two main types of the work permit process in Russia:

1) standard work permit process; and
2) work Permit process for Highly Qualified Specialists (Simplified process, existing from 2010. The main requirement is a gross salary of not less than Russian Ruble (RUB) 2,000,000 a year. For IT Companies, the threshold is RUB 1,000,000 a year).

Below, reviewed is a standard work permit process:

The work permit is an employment authorization issued to a foreign national who will be employed in Russia. Once the employment permit is issued, the employer or its authorized agency may apply for an individual work permit for the foreign national. The work permit application is submitted in person by the employer or its authorized representative to a local or regional office of the FMS. If the application is approved, a work permit valid for the foreign national's period of employment, up to one year, is issued. The permit is valid only for employment with the sponsoring employer and only within the jurisdiction of the permit-issuing authority. A work permit issued in Moscow allows the foreign nation to work only in Moscow.

According to the Government Decree dated February 17, 2007, a business trip to a region different from the region where the work permit is valid can be organized, but it cannot exceed a total of 10 calendar days within the validity of a work permit. Foreign nationals occupying certain job positions that require frequent travel are allowed a total of 60 calendar days that they can travel on business throughout Russia during the validity of their work permit. The exact names of such job positions are specified in a Government Decree.

The Invitation Process: Upon issuance of the work permit, the employer must apply to the FMS for invitations on behalf of the foreign national and any accompanying family members. The invitations serve as the basis for the visa applications of the principal foreign national and accompanying dependents.

If the application is approved, the migration service will issue invitations to the employer; the letters are then forwarded to the foreign national and family members for use in connection with their visa applications.

The Work Visa Application Process: After the foreign national has received the FMS invitation, he or she may apply for a work visa at the Russian diplomatic post with jurisdiction over his or her place of residence abroad.

If the application is approved, the foreign national will be issued a work visa that is valid for an initial period of three months and for a single entry. Once the foreign national enters Russia, their employer may apply to the FMS for an extension of the work visa for the period of the employment agreement, up to one year.

Multiple Work Visa Process: Upon arrival in Russia, a foreign national has three months to convert his or her single three month work visa into a multiple visa valid for the exact term as his or her work permit. The application should be filed by the employer at the local or regional department of the FMS. If the application is approved, the migration service will issue a multiple visa valid for the assignment period, of up to one year. Employers, engaging foreign nationals under the standard work permit process should note that starting January 01, 2015, standard work permit applicants will be subjected to three examinations; Russian language, Russian history and basics of legal knowledge.

Contract of Employment

The Labor Code provides a list of conditions which must be included in the labor contract (for example - the term of the labor contract and the reason for concluding the fixed-time labor contract, place of work, start date, position, remuneration conditions). Besides the mandatory information some optional conditions may be included in the labor contract by mutual consent (for example - term of probation period, confidentiality regulations, other conditions which cannot worsen the position of an employee in comparison to the Labor legislation). Where a labor contract concluded between a foreign national and a foreign company contradicts Russian labor legislation, the latter is applied.

It should be noted that the position name of the foreign nationals stipulated in the labor contract should be in strict accordance with the position name specified in the work permit. An employer who specifies a different position in the labor contract from the position approved in the work permit risks the enrollment of the foreign nationals being qualified by the migration authorities as illegal.

Laws Relating to Employees

Hired By Company

Please see the whole description about laws and regulations applicable in this case above in the Employment section.

Independent Contractor

Please see the whole description about laws and regulations applicable in this case above as well, since the procedures are absolutely the same. Please bear in mind that when applying for the Employment permit, the draft of the labor contract should be filed, although at a later stage – the service contract will be signed instead.

Entrepreneur

If by Entrepreneur we mean non-incorporated entrepreneur or individual entrepreneur (we have this status in Russia), it should be mentioned that this status is available only for foreign nationals who have permanent residence permit and as such do not require work permit. However, if by Entrepreneur we mean investor, this category is not separated and the procedure will be the same as that described above.

Additional Laws Applicable To Foreign Nationals

Employers are required to notify territorial labor authorities and the FMS of the foreign national's employment in Russia. If the foreign national is visa-exempt, the notification must take place within 10 days after employment. If the foreign national is subject to the visa requirement, the notification of labor authorities must take place within 30 days after the employment date. Notification of tax authorities should be made within 10 days after employment. The employer is required to notify the FMS if the permit holder fails to commence employment or if the employment is terminated before expiration of the permit; in such cases, the FMS has the authority to revoke the permit. Where the foreign national resigns from the employment, the employer must notify the FMS and tax inspectorate.

In addition to the above, within seven working days of the foreign national's arrival in Russia his or her host party must notify a local or regional office of the FMS. Should the foreign national stay at a hotel, the hotel is responsible for the notification procedure.

The host party or its authorized agent should submit the notification to the local or regional FMS office with jurisdiction over the foreign national's place of stay or to an office of the Federal Postal Service (FPS), which will forward the notification to the FMS.

The FMS processes the application, annotating the arrival notification form with the foreign national's authorized period of stay. The detachable

portion of the notification form is returned to the host entity, which retains one copy of the form and forwards a second copy to the foreign national. Note that the foreign national must submit a new notification each time he or she changes his or her address in Russia and each time that he or she departs and re-enters Russia. Foreign nationals who hold the temporary or permanent residence permit must renew their registration annually.

Compliance with Labor Laws

The main legislative document regulating labor relationships in Russia is the Labor Code which strictly governs almost all aspects of labor relationships (hiring and dismissal of employees, changes of working conditions, working time and holiday regulations, business trips, salary payment, occupational safety, etc.). Employment of foreign nationals must be documented in the same way as the employment of Russian employees. Hence, the employer company must compile personnel record documentation for employment of foreign nationals in accordance with the requirements of the Russian legislation.

The Russian legislation requires documentation of work of foreign nationals in Russia and the basic documents are: a work permit, a subsequent labor contract governed by the Labor Code of Russia (or a service agreement, governed by the Civil Code of Russia. The further comments are on the labor contract only), some other mandatory personnel record documentation.

Income Tax and Social Security Contributions

Income Tax

Individuals, irrespective of citizenship, should pay Russian individual income tax on:

- worldwide income if the individual is a Russian tax resident, that is, who spends 183 or more days in Russia in the calendar year; and
- income for work in Russia or from Russian property and investment if the individual is a tax Non-resident, that is, who spends fewer than 183 days in Russia in a calendar year.

Individual income tax of 13 percent is applied to most types of income of Russian tax residents with the following exceptions:

- interest income above the allowed limits (nine percent for any foreign currency and 13 percent for Russian currency) - 35 percent;
- material gain on interest free or low interest loans (interest levels are similar to the above) and arising from receiving benefits in-kind at below market rate or free – 35 percent; and
- dividend income – nine percent.

Non-residents should pay tax on all types of income at 30 percent tax rate, except tax rate on dividend income – 15 percent. Individual income tax is withheld at source and, if withholding is impossible, paid by the individual upon submitted declaration. Declarations should be submitted by April 30th and should refer to the previous tax year ending July 15th.

Social Security Payment

Employer's taxation is based on payment of contributions to Social Insurance, Medical Insurance and Pension Insurance funds. Contributions to the funds are accrued on income paid under employment contracts, service or work contracts and author contracts.

The aggregate amount of contributions in 2011 is composed of:

- 26 percent on annual cumulative gross income up to RUB 415,000 (no contributions are payable on income exceeding this amount); and
- industrial accident insurance (rate is to be established by Social Insurance fund from 0.2 percent to 8.5 percent depending on the level of professional risk).

No contributions, except for industrial accident insurance, are to be made in respect of foreign nationals temporarily staying in Russia and having neither temporary nor permanent residence permit.

Other Statutory Deductions

Proportionality between Local and Foreign nationals

There are restrictions in certain industries as to the allowed number of foreign nationals in relation to local workers. Restrictions in question and exact numbers are approved by Russian Government every year.

For 2014 the figures are the following:

- retail of alcoholic drinks including beer - allowed percentage of foreign nationals is 15;
- retail of pharmaceuticals - allowed percentage of foreign nationals is 0;
- retail in street-small shops and on markets - allowed percentage of foreign nationals is 0;
- other retail outside of shops - allowed percentage of foreign nationals is 0;
- in sport industry - allowed percentage of foreign nationals is 25; and
- in other industries there are no restrictions.

SOUTH AFRICA

Zahida Ebrahim

Summary

South Africa is located at the southernmost tip of Africa. It has a 2800-kilometer long coastline and a total land area of approximately 1.2 million square kilometers. Although English is widely spoken, it is only the fifth most spoken language of the country's 11 official languages. South Africa is a constitutional democracy in the form of a parliamentary republic. South Africa's Constitution is widely regarded as one of the most progressive constitutions in the world.

Legal System

The South African legal system is grounded in Roman-Dutch and English Law. It has a sophisticated legislative framework and extensive legislation governing and regulating various areas of business. South Africa is signatory to numerous bilateral and multilateral international treaties. As a constitutional democracy, all law and conduct in South Africa, whether flowing from common law or statute, must be consistent with the Constitution. The Constitution establishes a Bill of Rights containing justifiable socio-economic, civil and political rights. The Constitution entrenches fundamental rights and contains several provisions relevant to employment and labor.

The Constitution vests the judicial authority of South Africa in the courts. The highest courts are the Constitutional Court and the Supreme Court of Appeal.

The Superior Courts consist of the High Courts (provincial and local divisions) and other specialized courts such as Tax Courts, the Competition Appeal Court, Labor Court, Labor Appeal Court, Land Claims Court, Electoral Court, Divorce Courts and Equality Courts. Superior Courts have both review and appellate jurisdiction in criminal and civil matters. The Inferior Courts consist of regional and district magistrates' courts.

The admission and departure of foreign nationals to and from South Africa is governed by the Immigration Act 13 of 2002, as amended (the “Immigration Act”). The Immigration Act was amended by the Immigration Amendment Act 13 of 2011, which was however only promulgated on May 22, 2014. New Immigration Regulations (the “Regulations”) also came into effect on May 26, 2014. These regulations have significantly changed visa categories and processes.

Visas

Employer or Sponsoring Entity

Foreign nationals who wish to work in South Africa generally require temporary residence visas as prescribed by the Immigration Act, unless they hold permanent resident, asylum seeker or refugee status. In general, save for persons working on a retired person’s visa, all temporary work visa holders must have a sponsoring employer in South Africa. The employment of holders of intra-company transfer (ICT) visas generally remains with the foreign national employer, although the local branch, subsidiary or affiliate is called upon to provide certain undertakings as the local visa sponsor. Critical skills visa holders need only submit an employment contract as proof that they have secured employment within 12 months of issuance of their visa.

It is a criminal offence to knowingly employ a foreign national in violation of their immigration status. The Immigration Act 2002, as amended, imposes record keeping obligations and sanctions for non-compliance on every employer, regardless of the business’s size or number of employees. Stricter compliance is required for any employer with more than five employees or who has been found guilty of a prior offence under the Immigration Act.

Temporary Residence Visas

No foreign national may perform any work related activity in South Africa without a valid visa authorizing them to do so, irrespective of the duration of their visit. There are a number of visa categories which allow foreign nationals to live or work in South Africa.

Business Visas

One must differentiate between business visitor's visas and business visas.

Business Visitor's Visas

A visitor's visa with consent to work, more commonly known as a business visitor's visa, can be obtained by foreign nationals who wish to render services in South Africa for a period of up to 90 days.

Business visitor's visas are suited to short placements, usually where there is no direct employment relationship between the foreign national and the local employer. The visa is required for all work or business related activities *inter alia*, to attend meetings, workshops, seminars and render technical services or training in South Africa. There is no defined list of activities which may be conducted on such a visa, but the applicant is required to make full disclosure of the nature of the intended activities in the application.

Both visa-exempt and non-visa exempt nationals, such as Indian nationals, must apply for business visitor's visas at the South African Consulate or VFS application office in their country of origin or ordinary residence.

Business Visas

A business visa may be issued to a foreign national who intends to establish, or who has established or invested the prescribed financial or capital contribution which is currently South African Rand (ZAR) 5,000,000 in a business in South Africa, provided that the business does not fall within a category that has been deemed to be undesirable. The funds must originate from abroad.

Businesses in certain industries identified to be in the national interest may apply for a reduction or waiver of the capitalization requirement.

There are a number of other criteria that foreign nationals must comply with in order to obtain a business visa, the most important of which is that the business must employ at least 60 percent South Africans on a permanent basis.

The spouse of a South African citizen or permanent resident can also obtain a visa in terms of S11 (6) of the Immigration Act which would allow them to own and operate a business in South Africa without meeting the aforementioned requirements.

Employment Visas

The Immigration Act provides a number of visa mechanisms which allow a foreign national to work.

Section 19 provides for various categories of work visas, namely general work visas, critical skills visas and intra-company transfer. Section 21 also allows a company to apply for a corporate visa to employ foreign nationals.

General Work Visa

Foreign national workers usually apply for general work visas if they do not qualify to apply under one of the skills shortage categories. This is not to say that they may not have specialized skills, but rather that they do not fall within a defined list of scarce skills identified in the critical skills list.

Foreign nationals who wish to obtain general work visas must compete in the open labor market against South Africans for the same position. As such, the employer will need to:

- clarify why a citizen or permanent resident could not fill the position;
- demonstrate proof of efforts made to obtain the services of the citizen or resident; and
- list details of the unsuccessful candidates.

The Department of Labor is now required to issue a certificate confirming:

- despite a diligent search the employer has been unable to find a South African citizen or Permanent Resident with

qualifications and skills or experience equivalent to those of the applicant;

- the applicant has qualifications or proven skills and experience in line with the job offer;
- the salary is not inferior, the contract of employment is in line with labor standards; and
- the contract of employment is in line with labor standards and is conditional upon approval of the visa.

Applications for a general work visa must also be accompanied, *inter alia*, by a certificate of evaluation of the foreign tertiary qualifications by the South African Qualifications Authority (SAQA) and proof of registration with the professional body governing the industry within which they will work if required by law.

A general work visa can be issued for up to five years and requires a full new application to be renewed.

Critical Skills Visas

The Critical Skills Visa category facilitates employment of foreign nationals in identified skills shortage areas who meet the minimum qualifications and experience listed on the critical skills list. The critical skills list was published on June 3, 2014.

The position to be filled by a critical skills visa holder need not be advertised and one need not be in possession of an offer of employment to obtain the visa.

A foreign national who has not identified a sponsoring employer can obtain a critical skills visa, but must present an employment offer within 12 months.

Applications for a critical skills visa must be accompanied, *inter alia*, by an evaluation of the foreign national's tertiary qualifications by SAQA, proof of application for registration with the professional governing body or board of the industry within which they will work and a letter confirming skills, post-qualification experience and qualifications from a professional governing body, board or government department.

The Department of Home Affairs has, however, issued a directive which provides that an application for critical skills which is accompanied by proof of application for professional registration need not be accompanied by a letter confirming skills, post-qualification experience and qualifications from a professional governing body, board or government department.

Intra-company Transfer Visas

In terms of the Immigration Act, an intra-company transfer (ICT) work visa can be issued to allow a foreign national who is employed by a business abroad to work at such business's branch, subsidiary or affiliate in South Africa for a period of up to four years.

Applications must be accompanied by, *inter alia*, a copy of the original employment contract with the employer abroad, which contract must have been in force for a period of at least six months at the time the ICT visa is applied for and an undertaking to develop a skills transfer plan.

Corporate Visa

A company wishing to employ a number of foreign nationals in designated positions may obtain a corporate visa.

Corporate visas are generally suited to companies who intend to employ a relatively large number of foreign nationals in predetermined positions, particularly in industries where large scale skills shortages exist.

A corporate visa application is a two phase process. The first phase involves the issuing of the corporate visa, which is an umbrella-type visa authorizing the company to employ a specific number of foreign nationals in predetermined positions. This phase is prefaced by applications to the Department of Trade and Industry, as well as the Department of Labor, to obtain endorsement of the need to employ the required number of foreign nationals. The second phase involves application by the individual applicants for corporate worker visas.

To qualify for a corporate visa, a company must demonstrate that at least 60 percent of its employees are South African. A corporate worker may not renew his or her visa, or apply for a change of status in South Africa. The corporate visa and the individual corporate worker visa are limited to a three-year period. Applications for corporate worker visas must be accompanied by a SAQA Certificate and proof of professional registration where required in law.

Training Visas Exchange Visa

An exchange visa can be obtained by a foreign national who participates in a program of cultural, economic or social exchange administered by an organ of state or a learning institution, or by a foreign national who is under the age of 25 years and who has received an offer to conduct work for a maximum period of one year.

Exchange visa holders may be restricted from obtaining permanent residence for a mandatory period, usually one year.

Other Visa Categories Which Allow Work

Some of the less frequently used categories of visas that permit work activities include:

- relatives' visas allow the kin of South African citizens and permanent residents only to reside with them in South Africa. Spouses of South African citizens or permanent residents can, however, obtain spousal work or business visas in terms of Section 11(6) of the Act;
- a holder of a study visa to study at an institution of higher education may undertake part-time work for up to 20 hours a week;
- retired persons' visas allow foreign nationals who can demonstrate a particular net worth to sojourn in South Africa. The holder of a retired person's visa may also apply for authorization to work;
- any foreign national who intends to render voluntary service work in South Africa application must obtain a volunteer visa.
- a number of visitor's visa categories allow work, including academic sabbaticals;
- visitor's visas may also allow certain categories of foreign nationals to work in South Africa for a foreign national employer, pursuant to a foreign contract which partially requires the conducting of certain activities in South Africa including teachers at international schools; entertainment industry professionals such as film and advertisement producers, including actors, cameramen, filmmakers, hairstylists, makeup artists, lighting and sound engineers, lecturers, foreign journalists and artists who wish to write, paint and sculpt; and
- dependents' visas such as accompanying spouse or parent visas allow foreign national spouses and life partners to accompany the main visa holder to South Africa. Spouses and dependents of work visa holders may also obtain a visitor's visa which allows them to work for a foreign employer pursuant to a contract which partially requires the conducting of certain activities in South Africa. This does not preclude the spouse or dependent from applying for an independent visa in any other category under which they may qualify to do so.

Visa Waiver

Tourist visas can be obtained upon entry into South Africa in the case of foreign nationals from visa exempt countries such as the United Kingdom (UK), the United States of America (U.S.), Brazil, the European Union (EU) and nationals from various other countries with which South Africa has visa exemption treaties.

South Africa and India do not have a bilateral treaty arrangement in relation to visa exemption and Indian passport holders are accordingly not visa exempt. As such, they must obtain a visa from the South African consulates in India through the VFS processing offices or, if they reside permanently outside of India, in their country of ordinary residence.

Permanent Visa

The Immigration Act provides various categories under which a foreign national may apply for permanent residence. The Act differentiates between direct permanent residence and permanent residence on other grounds.

Direct permanent residence may be acquired by virtue of:

- holding a work visa for a period of 5 years and having a permanent offer of employment;
- being in a life partnership or marriage with a South African citizen or permanent resident for 5 years;
- being the child of a South African citizen or permanent resident under the age of 21 years; and
- being the child of a South African citizen.

Permanent Residence on Other Grounds Includes Residence Based on:

- having a permanent offer of employment in a specific professional category or within a specific occupational class identified under the critical skills list;
- investing in a business in South Africa as prescribed;
- holding indefinite refugee status in South Africa;
- meeting prescribed minimum retirement funding or minimum net worth criteria; and
- being related to a South African citizen or permanent resident within the first step of kinship.

A permanent resident has all the rights, responsibilities and obligations of a South African citizen, except those rights expressly reserved for South African citizens in terms of the Constitution or other statutory provisions.

Permanent residence can be withdrawn for a number of prescribed reasons, including failure to take up residence within one year of the issuance of a permanent residence visa; being absent from South Africa for a period in excess of three years; termination of the spousal relationship within two years of issuance of the certificate where residence was acquired pursuant to a spousal relationship, conviction of certain offences and breach of any condition attached to the permanent residence.

Employment and Labor Law

South African employment laws apply universally to all employees that fall within their jurisdiction, irrespective of whether they are South African or foreign nationals. This application extends even to foreign nationals who are working in South Africa illegally.

South Africa has a Constitution which entrenches fundamental rights and contains several provisions relevant to employment and labor. The law confers on “everyone” the right to fair labor practices. It also provides for freedom of association for workers and employers and the right to participate freely in the activities of a trade union or employer's organization. Trade unions and employer’s organizations have the right to form and join federations and to engage in collective bargaining. The Constitution provides for the enactment of national legislation to regulate collective bargaining, and the legislation so enacted is the Labor Relations Act 66 of 1995, as amended (LRA).

The LRA also provides for resolution of labor disputes with the establishment of the Commission for Conciliation Mediation and Arbitration (CCMA), the Labor Court and the Labor Appeal Court.

The LRA provides protection for employees against unfair dismissal and unfair labor practices, with further guidelines supplied in Codes of Good Practice. The LRA, itself, extensively regulates dismissals by reason of the operational requirements of the employer (retrenchments) and the rights of employees in the context of the transfer of a business (or part of a business) as a going concern.

Minimum conditions of employment are regulated by the Basic Conditions of Employment Act 75 of 1997 (BCEA). The BCEA applies to all employers and employees except members of the National Intelligence Agency, the South African Secret Service and the

South African National Academy of Intelligence, unpaid volunteers working for charity and directors and staff of Comsec. The BCEA does not set minimum wages; instead, it deals, *inter alia*, with the regulation of working time, leave, particulars of employment and the keeping of records regarding remuneration, termination of employment (notice and severance pay), the prohibition of child and forced labor. It provides for basic conditions to be varied in different ways (such as by collective agreement) and the monitoring and enforcement of the BCEA. It is possible, under the variation provisions, for a particular sector or industry to regulate its own terms and conditions via a bargaining council agreement which then takes precedence over the BCEA. A bargaining council is comprised of representative employers and unions in the industry concerned. In addition, the Minister of Labor has the power to make sectoral determinations for a sector and area, and a number of such determinations have been made. In December 2013, the Basic Conditions of Employment Amendment Act 20 of 2013 was published in terms of which the Minister's powers in relation to sectoral determinations were extended to include giving the Minister the power to publish a sectoral determination to cover all employers and employees who are not covered by any other sectoral determination. This might be used to effectively legislate on a national minimum wage. The Amendment Act came into operation on September 1, 2014.

Discrimination and affirmative action issues are regulated by the Employment Equity Act 55 of 1998 (EEA). The Occupational Health and Safety Act 85 of 1993 (OHSA) imposes on all employers a general duty to provide and maintain a working environment that is safe and without risk to employees' health. In addition, there are a number of specific regulations published under the OHSA. Work-related injuries and illnesses are covered by the Compensation for Occupational Injuries and Diseases Act 130 of 1993 (COIDA).

Unemployment is regulated by the Unemployment Insurance Act 63 of 2001 (UIA) and the Unemployment Insurance Contributions Act 4 of 2002 (UICA). Both the employer and the employee must make monthly contributions to the unemployment insurance fund, which provides unemployment benefits to individuals who are temporarily unemployed. Retirement funding and provision for medical insurance contributions are not regulated in South Africa and are therefore normally provided in terms of private arrangements between an employee and the service provider, unless regulated under a bargaining council agreement.

Most employees in South Africa are employed under contracts of employment, which may either be written, or oral, or a combination of both, and parties are generally free to agree to indefinite or fixed term contracts. Recent amendments to the LRA do, however, place certain

restrictions on the use of fixed term contracts with respect to employees earning below the threshold prescribed by the Minister in terms of Section 6(3) of the BCEA. The LRA is not yet in operation and will only become law on a date still to be pronounced. The existence of a common law contract of employment is not a prerequisite for a valid employment contract to exist because the definition of who qualifies as an employee under most South African employment legislation is wide enough to include persons (excluding independent contractors) who assist in carrying on or conducting the business of the employer even though they may not be formally employed by the employer.

If the terms of a contract of employment were to change, the written information must be revised to reflect the change which was agreed upon between the parties and the employee must be supplied with, and sign, a new copy of the document setting out the change.

Any minimum terms and conditions set by the BCEA (sector-specific rules or a bargaining council agreement) are implied within the employment contracts of all employees to whom the legislation applies.

Any terms and conditions negotiated by collective agreement are implied within the employment contracts of all employees who are members of the trade union that is party to the agreement at the time the agreement is signed, or who become members after the agreement becomes binding. If a trade union represents the majority of employees at a workplace, the collective agreement can also bind non-members if the agreement identifies and expressly binds them.

Income Tax and Social Security Contributions

If a South African resident company employs employees in South Africa, whether the employees are foreign nationals or local, tax must be deducted at source and the employer is responsible for reporting and withholding the employees' tax. South Africa levies income tax using progressive tax rates, with the lowest bracket being taxed at 18 percent. The top rate is 40 percent. These rates and amounts are for the 2015 tax year which runs from March 1, 2014 to February 28, 2015.

Social Security Payment

South Africa does not provide social security or welfare benefits to foreign nationals working overseas.

Other Statutory Deductions

South African employers are liable to make contributions to the Unemployment Insurance Fund, pay a skills development levy and make contributions to the Workmen's Compensation Fund.

Unemployment Insurance

Both the UIA and the UICA apply in relation to unemployment insurance. The purpose of these Acts is to provide for the collection and payment of contributions to the Unemployment Insurance Fund. The Acts apply to all employers and employees except, among others, to an employee and his employer where such employee is employed for less than 24 hours a month.

Unemployment Insurance Fund (UIF) contributions are payable by both, the employer and the employee, and the UIF provides, *inter alia*, unemployment benefits to the employee. The contributions are each one percent of remuneration paid to the relevant employee during any month, but are not required with respect to employees who enter South Africa for the purpose of carrying out a contract of service and who upon termination thereof are required to leave South Africa (that is, expatriates). The employer must pay a total contribution of two percent to the fund (one percent is contributed by the employee and one percent is contributed by the employer). This total contribution is capped at remuneration not exceeding an amount stipulated by the Minister of Finance by notice in the Gazette, which is currently ZAR 142,47872 per month.

Compensation for Occupational Injuries and Diseases

This is regulated by COIDA. This Act provides that every employer carrying on business, as defined in the Act, in the Republic of South Africa must register with the Compensation Commissioner, and must furnish the Commissioner with the prescribed particulars of its business. The employer must also, within a period determined by the Commissioner, furnish any additional particulars that the Commissioner may require.

COIDA provides that failure to comply with this provision is an offence.

An employer must keep a register of the earnings and prescribed particulars of all its employees.

The employer must be assessed or provisionally assessed by the Director-General according to a tariff of assessment calculated on

the basis of the percentage of the annual earnings of its employees as the Director-General, with due regard to the requirements of the Compensation Fund for the year of assessment, may deem necessary.

In the case of office workers, these contributions are generally not more onerous than the contributions under the UICA.

Skills Development Levy

This is provided for in the Skills Development Levies Act No. 9 of 1999. The Act provides that every employer must pay its skills development levy of one percent of the total amount of remuneration, paid or payable, or deemed to be paid or payable by it to its employees during any month. An employer must apply to the Commissioner for South African Revenue Services (SARS), in such manner as the Commissioner may determine, to be registered as an employer for the purposes of the levy and indicate in that application that jurisdiction of the Sector Education and Training Authority (SETA) within which that employer must be classified.

Proportionality between Local and Foreign National Employees

There is no proportionality guideline between local and foreign nationals. Although there is no regulatory restriction on how many foreign nationals an employer may employ, or on the number of work visa categories under which an employer may apply for work visas, the Immigration Act contains certain provisions which ensure that South Africans are given preference in recruitment. For example, General Work Visa applications require certification from the Department of Labor. The employer must also justify the appointment of a foreign national and disclose the details of all unsuccessful South African applicants including reasons for which their applications were unsuccessful.

Business visa and corporate visa holders must employ at least 60 percent South Africans.

SPAIN

Marla Vanessa Bojorge Zuniga

Summary

Spain is located in southwestern Europe, covering an area of approximately 504,030 square kilometers (194,610 square miles). It is divided into 17 *"Comunidades Autonomas"* located in the Iberian Peninsula and two autonomous cities located in Africa (*Ceuta y Melilla*). Spain is similar to a Federal State, but is not a Federal State.

Spain has a long and complex history, with a cultural heritage left by all of the civilizations that have inhabited it and this is reflected in its architecture, food and customs. It is the second largest country in Western Europe and the European Union (EU) after France. Spain has been part of the EU since its inception in 1985, which means that there is free movement of goods, services, people and a single currency Euro (EUR) within the 27 EU countries.

Schengen Countries: Austria, Belgium, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden and Switzerland.

In 2015-2016, Spain has become a non-permanent member of the United Nations Security Council (UNSC).

The UNSC consists of 15 members, five of whom are permanent and have vetoing powers (France, the United Kingdom, China, Russia and the United States), and 10 non-permanent, who are elected by the General Assembly of the United Nations for periods of two years without the right of veto. Each year the General Assembly elects 5 non-permanent members for the next two years. Spain was elected a member on October 16, 2014 for the year 2015-2016.

Legal System

The Spanish Constitution states: “Spain constitutes a social and democratic state of law, which holds as its superior values of legal framework the freedom, justice, equality and political pluralism. The political form of the Spanish State is a parliamentary monarchy. The immigration legislation for the entire nation of Spain is uniform. Its scope is nationwide and applies to the entire Spanish territory (17 *Comunidades Autonomas* and *Ceuta y Melilla*). As established in the Spanish Constitution of December 27, 1978, Article 149 “The State has exclusive jurisdiction over nationality, immigration, emigration, alienage, and the right of asylum.” The Sources of the Spanish Legal System are Statute (law), Custom and the General Principles of Law, in accordance with Article 1 of the Civil Code of 1889. Jurisprudence is not a norm, it is doctrine. The immigration law establishes that foreign nationals who intend to enter Spanish territory must do so with the corresponding valid visa, duly issued and valid, attached to their passport or travel documents.

Citizens of the EU, Switzerland, Norway, Iceland, and Liechtenstein do not need a visa to enter Spain, however if they stay more than 90 days they need to get registered and submit evidence regarding economic support, insurance and purpose of living in Spain (such as an employment contract, a school certificate or a self employment certificate).

Spanish Immigration basically refers to two major categories:

- Swiss, EU and European Economic Area (EEA) nationals and their respective dependents whose status is regulated by the Royal Decree 240/2007, who have right to enter, reside and work in Spain as per the introduction of the free circulation of EU Nationals and the agreement signed among the countries of the EEA and their dependents; and

- Non-EU nationals whose status is governed by the Ley Organica Act 2/2009 and the Royal Decree 557/2011. These groups of nationals, depending on their nationality generally require appropriate visas based on their activity and length of stay in Spain.

Visas

For the purpose of this chapter, the basic visa and work permit categories have been described as simply as possible.

Types of Visas

- Transit Visa;
- Stay Visa;
- Residence Visa;
- Residence and Work Visa;
- Study Visa; and
- Research Visa.

Countries requiring a visa for Spain:

Afghanistan, Angola, Saudi Arabia, Algeria, Armenia, Azerbaijan, Bahrain, Bangladesh, Belarus, Belize, Benin, Bhutan, Burma/Myanmar, Bolivia, Botswana, Burkina Faso, Burundi, Cape Verde, Cambodia, Cameroon, Chad, China, Colombia, Comoros, Congo, North Korea, Ivory Coast, Cuba, Djibouti, Dominica, Ecuador, Egypt, United Arab Emirates (UAE), Eritrea, Ethiopia, Philippines, Fiji, Gabon, Gambia, Georgia, Ghana, Granada, Guinea, Guinea Bissau, Equatorial Guinea, Guyana, Haiti, India, Indonesia, Iran, Iraq, Jamaica, Jordan, Kazakhstan, Kenya, Kyrgyzstan, Kiribati, Kuwait, Laos, Lesotho, Lebanon, Liberia, Libya, Madagascar, Malawi, Maldives, Mali, Morocco, Marshall Islands, Mauritania, Micronesia, Moldova, Mongolia, Mozambique, Namibia, Nauru, Nepal, Niger, Nigeria, Oman, Pakistan, Palau, Papua N. Guinea, Peru, Qatar, The Congo, Rep. Dominican, Russia, Rwanda, Solomon (Islands), Samoa and St.Vicente, Grenadines, Santa Lucia, Sao Tome Principe, Senegal, Sierra Leone, Syria, Somalia, Sri Lanka, South Africa, Sudan, Suriname, Swaziland, Thailand, Tanzania, Tajikistan, East Timor, Togo, Tonga, Trinidad and Tobago, Tunisia, Turkmenistan, Turkey, Tuvalu, Ukraine, Uganda, Uzbekistan, Vanuatu, Vietnam, Yemen, Zambia, Zimbabwe.

Visa Categories under Spanish Immigration Law

Stay Visas

Definition of a Stay Visa: This visa is granted for a short stay when the foreign national does not hold a residence permit and is authorized to stay in Spain for a continuous period or sum of successive periods not exceeding a total duration of 90 days in a semester from the date of first entry. If it is for a transit stay, the duration of stay authorized will correspond to the time necessary for the transit.

Types of Stay Visas

- Uniform Visa: This is valid for transit through the *Schengen* area for no longer than the time required for transit or stay in the *Schengen* area of up to 90 days per semester. Permission granted may be for one or multiple transits or stays with a total duration not exceeding 90 days per semester; and
- Visa with Limited Territorial Validity: This is valid for transit or stay in the territory of one or more of the member states of the *Schengen* area, but not for all of them. The total duration of the transit or stay shall not exceed 90 days per semester. A non-EU national has to apply for a permit or visa that best suits his or her requirements, if his or her activity does not fall within the purview of business or tourism.

Residence Visas

Definition of a Temporary Residence Visa: This visa allows the foreign national to remain in Spain for a period exceeding 90 days but less than five years.

Types of Temporary Residence Visas

a) This visa does not permit work and requires economical support:

- non-lucrative;
- for family reunification; and
- extraordinary circumstances.

b) Work is permitted:

- resident and work for an employer or company: A foreign national older than 16 years of age is allowed to remain in Spain and work for a period exceeding 90 days and less than five years;
- residence and work "research": The foreign national researcher who stays in Spain and whose sole or main purpose is to research projects as part of a hosting agreement signed with a research organization;
- residence and work of highly qualified professionals who holds a blue-EU card: A skilled foreign national who is authorized to perform a work activity requiring higher educational qualifications or a credit of at least five years of professional experience that can be considered comparable to that qualification, related to the activity for which he or she holds the authorization; and
- residence and employment of fixed term: A foreign national who is older than sixteen years of age is allowed to remain in Spain and develop work activities and/or be employed in seasonal or campaign activities.

In all the cases the foreign national will be required to return to the country of origin, once the labor contract ends.

- **Entrepreneur:** A foreign national older than 16 years of age is allowed to remain in Spain and work for a period exceeding 90 days and less than five years and pursue his or her own business activity; and
- **Transnational Services:** Residence and work permit visa for providing transnational services allows the holder (above 16 years of age) to reside in Spain temporarily (for duration of more than 90 days) in order to carry out a lucrative activity, labor or professional, under the category of assistance of transnational services to a company which has not been established in a country belonging to the EU or the EEA.

c) Exceptions:

Individuals exempted from obtaining a work permit and employment authorization:

- foreign nationals who are technicians or scientists hired by a national, regional or local governments or by entities dedicated

to the promotion and development of research promoted or controlled primarily by the former;

- foreign national professors invited or hired by any Spanish University;
- foreign national teachers and directors of cultural institutions, Deans of other States, or private organizations with recognized expertise which are officially recognized by Spain who are developing cultural programs in Spain itself and Deans of their respective countries (as long as their activity is limited to the execution of these programs);
- foreign nationals who are duly accredited media correspondents, carrying out reporting activities;
- members of international scientific missions, who carry out research and work in Spain and are authorized by the State;
- artists entering Spain for specific performances that do not involve any other ongoing activity;
- ministers, religious or representatives of other churches and denomination, duly registered in the Register of Religious Organizations, as long as their activity is limited strictly to religious functions; and
- foreign nationals who are part of the representation, government and administration of internationally recognized unions, as long as their activity is limited strictly to union functions.

Types of Permanent (long term) Residence Visas:

- **Long-term Residence:** A foreign national is in a position of long-term residence if he or she is authorized to reside and work in Spain indefinitely under the same conditions as the Spaniards. Foreign nationals who have lived legally and continuously in the Spanish territory for duration of five years are eligible to obtain this permit; and
- **Long-term Residence-EU:** A foreign national who has been authorized to reside and work in Spain indefinitely in the same conditions as Spaniards and benefits from the provisions of the Directive 2003/109/EC of November 25, 2003, on the status of national third country long term resident is in a position to obtain a long term residence EU visa.

Employment and Labor Law

It is compulsory for employers and foreign national employees to complete the labor conditions stipulated in the Spanish Labor Law. The immigration regulations mentioned above comprise of the main employment conditions applicable to foreign nationals and it also regulates the corresponding penalties (economic or criminal) depending on the level of breach.

The immigration process to work in Spain normally follows three main steps:

- initially a work and residence permit application has to be completed by the employer at the corresponding Spanish immigration office;
- the foreign national then has to apply for a visa at the Spanish Consulate in his or her country of origin; and
- on entering Spain the foreign national must apply for a residence card within the validity period of the visa.

The social security registration must be duly completed within three months of arriving in Spain. If this period elapses the work permit will expire.

There are fast track processes available for directors or highly skilled workers who are to be employed by a company that fulfills one of the following criteria:

- the employing company must have an average of more than 500 employees enrolled in the Spanish security system in the three months prior to this application;
- the company must have an annual business that exceeds EUR 200 million;
- the company must have annualized net fixed assets or equity capital greater than EUR 100 million in Spain; or
- there should have been an average annual gross foreign investment in Spain of at least EUR one million per year in the three years preceding the application; and
- the company should be a small or medium Spanish enterprise in the field of IT, renewable energies, water or water treatment, healthcare, bio-pharma and bio-technology, aerospace or aeronautics.

Additionally the fast track is also available for directors or high skilled workers taking part in a project of public interest and fulfilling one of the following requisites:

- if there is a huge impact in direct jobs creation by the company applying for the work permit;
- if there is large impact on job creation in the business or geographical area where the work will take place;
- there is an extraordinary investment with a significant socio-economic impact in the geographical area where the work will take place; and
- there will be a significant contribution to technological and or scientific innovation.

Technicians, scientists, researchers, professors and artists may also benefit from this fast track facility in certain circumstances.

Income Tax and Social Security Contributions

Spain has signed the Social Security Agreement (SSA) with some countries. Unfortunately, there is no SSA with India. On the contrary there is a non-double taxation agreement between India and Spain signed in New Delhi dated February 8, 1993 which came into force in February 8, 1995.

Social Security Payment

Social security contributions are made monthly by the employer from the date that the foreign national was registered in Spain. In order to renew a residence or work permit, social security payments for a minimum period of six to nine months are required. Other contributions such as unemployment and training contributions are normally deducted from the employees gross salary directly.

Rights: Foreign nationals who are in Spanish territory are obligated to produce as proof, the documentation issued by the competent authorities in their country of origin or provenance with which they had made their entry into Spain. They are required to show these documents as and when required by the Spanish authorities or their agents.

Law in Support of Entrepreneurs and Internationalization 14/2013 (Law 14/ 2013, September 27, 2103)

Update: This new law regulates certain cases which on the basis of economic interest, facilitates and expedites the issuance of visas and

residence permits, in order to attract investment and talent to Spain. The measure is aimed at investors, entrepreneurs and workers who are highly qualified professionals and researchers, as well as spouses and older children. This law through an efficient and fast process under a single authority ensures that visas are expedited for varied lengths of time depending on the specific case. Such residence permits will be valid throughout the national territory. It is important to note that this new law has created better options for applicants.

Timing: Visa applications are verified and applicants are notified within 10 working days. The residence permits are issued within a maximum time frame of 20 days from the date of filing of the application in the immigration office.

Facilitation for Entry and Residence - An Introduction

Entry and residence is entirely on the basis of economic interest. The applicants are those who can demonstrate that they fall into either of the categories of:

- Investors;
- Entrepreneurs;
- Highly qualified professionals; and
- Investigators; and
- Workers engaged in an entrepreneurial activity within the same company or group of companies.

It however does not apply to EU citizens or those foreign nationals who have the right under the EU to apply for this as beneficiaries of the rights of free movement and residence.

Dependent Relatives:

The spouse and children under 18 years of age or older of the visa holder who are objectively unable to provide for their own needs due to health reasons, can join or accompany such foreign nationals.

General Requirements:

Pre-requisites for each visa or permit: Compliance by such parties (individual or company applicant) of the obligations established by law on prevention of money laundering, providing financial assistance to terrorists and tax obligations or corresponding social security.

1) Investors

Residence Visa for Investors:

a. Non-resident aliens who intend to enter Spanish territory in order to make a significant capital investment may apply for an entry visa, or if applicable, a residence visa for investors;

b. a significant capital investment which must meet the following requirements:

   (i) an initial investment equal to or greater than EUR 2 million in Spanish government bonds;

   (ii) an investment equal to or greater than EUR 1 million in stocks or shares in Spanish companies, or bank deposits at a Spanish financial institution;

   (iii) the acquisition of real estate in Spain with an investment equal to or greater than EUR 500,000 per foreign national applicant;

   (iv) the applicant must prove that the real estate investment of EUR 500,000 is free of any liens or encumbrances. Any portion of the investment that exceeds the amount required may be subject to liens or encumbrances; or

   (v) additionally he or she is allowed to submit a property which is not the official residence, but is a place to develop a business at, which is valued at EUR 500,000; or a property and a yacht valued at EUR 500,000; or a property as a second house for holiday season valued at EUR 500,000;

c. A business venture that will be developed in Spain and is considered and demonstrated to be in public interest and for which it will fulfill of at least one of the following conditions:

   (i) job creation;

   (ii) an investment with relevant socio-economic impact in the geographical area in which the activity will develop; or

   (iii) an important contribution to scientific innovation and/or technology.

d. In addition, a significant capital investment is deemed to be made by the foreign national applicant when the investment is made by a legal entity, domiciled in a territory which is not considered a tax haven according to Spanish law, and the applicant owns, directly or indirectly, a majority of the voting rights with the power to appoint or remove a majority of the members from its board.

Impact of the Residence Visa for Investors:

- granting of a residence visa for investors will automatically provide the foreign national a residence visa for Spain for a minimum of one year;
- foreign national investors who wish to reside in Spain for a period that exceeds one year, may be provided with a residence permit for investors, which will be valid throughout the national territory;
- the initial residence permit for investors shall have a duration of two years; or
- once this two year period is completed, the foreign national investor may request a renewal of the residence permit for investors for a further duration of two years.

What is notable is that permanent residency will be granted after a period of five years in Spain and the foreign national from there on can travel freely in and out of Spain. The applicant must demonstrate proof of residence in Spain for that duration. He or she does not need to reside in Spain, and can travel once every year to renew the residence visa, if he or she wants to have the resident card for two or three years.

On the contrary, if the applicant wants to have a permanent resident card after five years of residency, then the applicant should stay in Spain around 180 days or demonstrate reasons and documents of traveling.

2) Entrepreneurs

Entry and stay in order to start business:

Foreign nationals may apply for a visa to enter and stay in Spain for a period of one year for the sole or main purpose of carrying out the procedural formalities to develop a business.

An entrepreneur may be eligible for residency status without the need to apply for a visa and without requiring a minimum prior period of stay, when it is proven that he or she has been effective in launching the business for which the foreign national entrepreneur had applied for the visa.

Residence Entrepreneurs

Foreign nationals who are seeking entry into Spain or who are holders of a residence permit or residence and stay visa and are seeking to initiate,

develop and direct economic activity as an entrepreneur may be issued a residence permit for business, which will be valid throughout the country

What actually constitutes entrepreneurial and business activity?

An entrepreneurial activity is that which is innovative and of special economic interest for Spain and to that end, has a favorable report from the relevant body of the General Administration of the State.

The applicant's professional profile, the business plan, including market analysis, product or service, and financing; and the added value for the Spanish economy, and innovation or investment opportunities will be taken into account during assessment; with a special prioritized consideration given to those entrepreneur that succeed is the creation of jobs in Spain.

3) Highly Qualified Professionals

A residence permit for highly qualified professionals, which will be valid throughout the national territory, may be sought by companies which require foreign professionals to incorporate into Spanish territory for the development of an employment or professional relationship included in any of the following circumstances:

a) Highly qualified management personnel, when the company or group of companies meets any of the following characteristics:

- an average workforce during the three months immediately preceding the filing of the application of more than 250 workers in Spain or in the corresponding social security scheme;
- an annual net volume of business in Spain, greater than EUR 50 million or volume of equity or net worth in Spain, greater than EUR 43 million;
- a gross annual average investment, from outside, not less than EUR one million in the three years immediately preceding the filing of the application;
- companies with a value of the stock investor or position, according to the latest data from the Foreign Investment Registry of the Ministry of Economy and Competitiveness, greater than EUR three million; or
- in the case of small and medium-sized businesses in Spain, belong to a sector considered strategic.

b) Management or highly qualified personnel that form part of a business venture that meets the following points, alternatively and always provided that the following are required on the basis that these conditions are considered as and demonstrated as within public interest:
   - a significant increase in the creation of jobs directly by the recruiting company;
   - safeguarding employment;
   - a significant increase in the creation of jobs in the sector or geographical area in which they will develop the workforce;
   - an extraordinary investment with relevant socio-economic impact in the geographical area in which it will develop the workforce;
   - concurrence with the reasons of interest in Spanish trade and investment policy; and a significant contribution to scientific innovation and/or technology.

c) Graduates, postgraduates from universities and business schools of repute.

4) Training, Research, Development and Innovation

Foreign nationals who intend to enter Spain, or who are holders of a stay and residence permit, wishing to engage in training, research, development and innovation in public or private entities, shall be provided with the appropriate visa or a residence permit for training or research which shall be valid throughout the national territory.

5) Residence permit for Intra-company Transfer

Foreign nationals who travel to Spain as part of an employment relationship, or professional or vocational reasons, with a company or group of companies established in Spain or in another country must be in possession of an appropriate visa corresponding to the duration of the transfer and a residence permit for intra-firm transfer, which will be valid throughout the national territory. The foreign national and company must demonstrate, in addition to the general requirements, the existence of a real business, and in that case, that of the business group, a higher degree or its equivalent or where ever appropriate, a minimum of three years of professional experience, the existence of an employment or professional relationship, that is prior and continuous for three months with one or more of the group's companies and company documentation evidencing the transfer.

Order regarding foreign nationals living in Spain and municipal elections in Spain

Order ECC / 1758/2014 of September 23, 2014 amending the Order EHA / 2264/2010, of July 20, 2010 has set standards and technical instructions for the formation of the electorate of residents in Spain. This order came into force from October 2, 2014.

Foreign national visa holders from those countries with which Spain has established an agreement recognizing the right to vote in municipal elections to the national members referrals States in Spain and the Spaniards in those States may register on the electoral roll for the municipal elections without having acquired Spanish citizenship.

The lists of countries with agreements in force are: Bolivia, Cape Verde, Colombia, Korea, Chile, Ecuador, Iceland, Norway, Paraguay, Peru, Trinidad and Tobago and New Zealand. Registration can also be requested by nationals of other countries who have agreements which take effect before the deadline for the submission of applications established in this order is established.

Law 18/2014 dated October 15, 2014; Approbation of urgent measures for growth, competitiveness and efficiency

General Rule: This new law encourages retail and market units in Spain. As a general rule “the opening, moving or expanding businesses will not be subject to authorization scheme.”

Exception: “Notwithstanding the foregoing, the opening, transfer or extension of commercial establishments may be subject to a single authorization to be granted for an indefinite period where facility or physical infrastructure necessary for the conduct of business are likely to cause damage on the environment, the urban environment and the historical and artistic heritage, and these reasons cannot be safeguarded by filing a sworn statement or prior notification. The authorization shall be motivated enough in the law establishing the scheme.”

Rights: “The authorizations or declarations responsible for opening or expanding the establishment cannot contemplate requirements not specifically linked to the facility or infrastructure and must be justified by overriding public interest. In any case the requirements shall be non-discriminatory, proportionate, clear and unambiguous, objective, made public in advance, predictable, transparent and accessible. In no case may establish requirements for economic, among others, those that do grant authorization to test the existence of an economic need or market demand or excessive commercial offer.”

Timing: “Applications submitted must be resolved and notified in a maximum period of three months, after which the application is deemed to be accepted by administrative silence.”

SRI LANKA

John Wilson

Summary

Sri Lanka, (at the time called Ceylon), became an independent dominion, retaining the British Monarch as its Head of State, on the February 4, 1948. The gaining of independence necessitated the enactment of the Immigrants and Emigrants Act no. 20 of 1948 (“the Act”).

In 1972, Ceylon adopted a Republican Constitution and became the Democratic Socialist Republic of Sri Lanka with the President as Head of State, a Prime Minister as the head of Government and a unicameral Parliament. In 1978 this Constitution was replaced by a new Republican Constitution with an executive Presidency. Elections are periodically held in Sri Lanka at which the people elect the President and Members of Parliament, members of Provincial Councils and of local Government.

The official languages of the country are Sinhala, Tamil and English.

The Department of Immigration and Emigration (DIE) (“the Department”) was established by the Act to implement the provisions of the Act and is the Government Department which handles all matters relating to immigration. The mission of the Department is to be “the best immigration service in the region”.

The Act and regulations gazetted there under constitute the main body of law governing the entry of foreign nationals and their stay

and/or employment in Sri Lanka. The Act read with the Regulations grants authority to the Controller of the Department and certain other officials to issue visas. In practice the issue of visas is often done through Sri Lankan diplomatic missions outside Sri Lanka which issue certain categories of visas to foreign nationals.

The purposes for which the Act was enacted by Parliament are:

- to control the entry into Sri Lanka of persons other than citizens of Sri Lanka;
- to regulate the departure from Sri Lanka of its citizens, and persons other than citizens of Sri Lanka;
- to remove from Sri Lanka persons considered 'undesirable' who are not citizens of Sri Lanka; and
- other matters incidental to or connected with the aforesaid matters.

The Act came into operation from November 1, 1949. The Act has been amended subsequently and administrative practices have evolved with the passage of time from the enactment of the Immigrants and Emigrants Act.

Readers of this guide should keep in mind that administrative practices can and do change from time to time and may differ from the strict wording of the provisions contained in the law and/or regulations. It is therefore always necessary to check what the actual practice of the Department is. While there are said to be internal administrative guidelines, these are not publicly available and the information in this guide is based on the information which is publicly available only and the actual practice may in some cases differ from what is stated herein.

Legal System

The supreme law of Sri Lanka is the Constitution. The common law of Sri Lanka is the Roman Dutch law and in certain areas English law applies. There is also a large body of local statutory law.

At the apex of the judicial system is the Supreme Court and beneath it the Court of Appeal, the High Court, Provincial Courts of Civil Appeal, the Provincial High Court and Courts of first instance such as the District, Magistrates and Primary Courts. Labor Tribunals hear and adjudicate employment disputes.

Visas

Visas and Landing Endorsements

In terms of the Immigrants and Emigrants Regulations gazetted in terms of the Act, there are three types of visas:

- Visit visas;
- Residence visas; and
- Transit visas.

For many years, *bona fide* tourists who were nationals of certain countries were exempted from the requirement of obtaining a visa and upon arriving in Sri Lanka would be permitted to enter Sri Lanka, without payment of any fee, by a landing endorsement being stamped in the passport of the person, which permitted a stay of up to 30 days.

Electronic Travel Authorizations

From January 1, 2012, the landing endorsement system was overlaid with a requirement to obtain an Electronic Travel Authorization (ETA) online or on arrival at the airport which necessitated the payment of a fee by nationals of nearly all countries, except for nationals of Singapore and the Maldives.

The ETA has two categories – tourism and business

1) Business ETAs

In the latter part of 2014, the Department changed its procedures resulting in it no longer being possible for a foreign national arriving in Sri Lanka to apply for a business category ETA online or on arrival at the immigration counters of the two international airports – the Bandaranayake International Airport, Katunayake and the Mahinda Rajapakse International Airport at Mattala.

An application for a business type ETA can be submitted to the Department or obtained through Sri Lankan diplomatic missions. However, it is likely that certain missions in practice may refer an application to the Department, Colombo for confirmation.

An agent with a letter of authorization could act for the applicant and submit the application to the Department in Colombo on behalf of the applicant.

The following documentation is needed for the purposes of applying for a business category ETA:

- return ticket;
- proof of adequate finances to fund the stay in Sri Lanka;
- letter of invitation from the local company;
- identification page of the applicant's passport; and
- completion of the Business ETA application form.

A person who is a national of a country, the nationals of which have been exempted from the requirement of obtaining a visit visa, would, having obtained an ETA, also obtain a landing endorsement.

2) Tourist ETAs

In terms of the administrative practice of the Department, tourism category ETAs can be applied for online. Such ETAs could also be applied for on arrival at the airport and from the Department of Immigration and Emigration.

A tourist who is a national of a country the nationals of which have been exempted from the requirement of obtaining a visit visa, would, having obtained an ETA, also obtain a landing endorsement.

The website of the Department indicates that a tourist category ETA is appropriate for the following activities:

- Visiting Friends And Relatives;
- Sight-Seeing or Holidaying;
- Medical Treatment; or
- Participation In Sports, Cultural Performances.

Full particulars of the ETA arrangements can be found on the website http://www.eta.gov.lk

A landing endorsement is issued for a period of 30 days. An extension can be applied for from the Department. The required form can be downloaded from the website or is available at the Department.

Exemptions and Other Requirements

In the case of persons who are citizens of the Republic of Singapore and the Republic of the Maldives, there is an administrative exemption from the requirement of obtaining an ETA since Sri Lankan nationals are not

required to obtain visas when travelling to those countries. Flight crews of registered airlines and children under the age of 12 are exempt from the requirement of obtaining an ETA and payment of the fees.

As a matter of administrative practice of the Department, it is necessary that the remaining period of validity of a passport of a foreign national, whether entering on a visa or landing endorsement, be a minimum of six months.

Visit Visas (Business Category)

As a matter of administrative practice a visit visa for a business visit can be issued for a single or double entry at the discretion of the Department. In the case of a single entry, the initial period of the visa will be 30 days.

As per the practice of the Department, business visas for the following activities in Sri Lanka are generally automatically granted:

- conferences;
- business meetings;
- short term training; and
- participation in art, music and dance activities.

Any other activities involving work of any nature, paid or unpaid, would necessitate a residence visa with an endorsement permitting employment being obtained. The Act read with the Regulations contains strict rules prohibiting a holder of a visit visa from engaging in any employment paid or unpaid and imposes severe punishment on foreign nationals who are employed in Sri Lanka without the necessary work permit as well as on those who employ such foreign nationals who do not have a work permit.

As a matter of administrative practice a residence visa with work permit will not be granted by the Department without a letter of recommendation. At present Government policy and associated administrative action is generally not very accommodative to the obtaining of letters of recommendation recommending the issue of residence visas with work permits. Visit visas of the business category are however generally readily granted.

An application for a visit visa should be made to the Sri Lankan diplomatic mission in the country of the applicant, or be made to the DIE.

The requirements are as follows:

- letter of invitation from the local company;
- copy of the identification page of the applicant's passport (if to be processed in Colombo prior to arrival);
- return air ticket;
- evidence of adequate finances; and
- completion of the relevant form.

Residence and Entry Visas

As already mentioned, the Act read with the Regulations contains strict rules prohibiting a foreign national from engaging in any employment paid or unpaid and imposes severe punishment on foreign nationals who are employed in Sri Lanka without the necessary work permit as well as on those who employ such a foreign national. As a matter of administrative practice work permits are only granted in conjunction with a residence visa.

A residence visa with work permit will not be granted by the Department without a letter of recommendation. A letter of recommendation has to be applied for from the relevant Line Ministry or Government or State Authority. If the letter of recommendation is issued by the Board of Investment (BOI), clearance must then also be obtained from the Ministry of Defense.

The administrative practice of the Department is such that generally a residence visa will only be granted by the Department in Colombo and it is therefore necessary for the applicant to apply for and enter into Sri Lanka on an entry visa and therefore once the applicant has travelled to Sri Lanka, apply for a residence visa.

Entry Visa

The first step is to obtain the Entry Visa from the Sri Lankan diplomatic mission in the country where the foreign national is from. The diplomatic mission would seek approval from the Department prior to issuing the entry visa. Alternatively, an application for the grant of approval for the issue of an entry visa could be submitted to the Department by an agent in Sri Lanka on behalf of the applicant. If approval is granted, the Department would then communicate its approval to the relevant diplomatic mission.

The letter of recommendation, recommending the grant of an entry and of a residence visa would have to be submitted to the Department.

Residence Visa

After arriving in Sri Lanka, an application for the issue of a residence visa, (including an endorsement permitting employment), must, within 30 days of the date of arrival, be submitted to the Department along with the passport of the employee. As per the administrative practice of Department, the spouse of a person who obtains a residence visa would be entitled to obtain a residence visa. This is also the case for children under 18 years of age. However, the dependant applicant is unable to be employed and a letter of guarantee in this regard has to be submitted by the principal applicant. A residence visa will typically be valid for a period of one year.

The time frames for obtaining a letter of recommendation vary and depend on the Line Ministry or Government or State Department or Authority being dealt with. Assuming that all the documents required by the relevant authority are submitted and found to be in order, the time frame for the issue of a letter of recommendation is approximately three to four weeks for a BOI approved enterprise and one to two months where the letter has to be obtained from a Line Ministry or Government or State Department or Authority.

The documentation which would have to be submitted in order to obtain a letter of recommendation would depend on the particular requirements of the Line Ministry or Government or State Authority or Department as to the documents which have to be submitted in order to obtain a letter of recommendation:

When applying to the Department, the following documentation, at a minimum, would generally have to be submitted along with the passport of the applicant:

- certified copy of the Certificate of Incorporation (where the proposed employer of the applicant is a company);
- certified copy of the Articles of Association (where the proposed employer of the applicant is a company);
- certified copy of the form(s)(issued by the Registry of Companies) or the register of members of the company containing particulars of directors and shareholders;
- copy of the contract of employment;

- educational certificates;
- CV or Bio-data of the applicant;
- two passport size photographs;
- letter of recommendation (from the relevant authority); and
- letter from the applicant stating that any dependants of the applicant will not be employed in Sri Lanka.

If applied for in Colombo, the approval for the applicant to obtain an entry visa would be faxed by the Department to the diplomatic mission on the payment of a small fee within 24 to 48 hours (depending on the country of the applicant). The applicant would have to also submit an application to the relevant Sri Lankan diplomatic mission for the grant of the entry visa and pay the applicable fee.

Administrative Practice in Regard to Obtaining Letters of Recommendation

An application for a letter of recommendation must be submitted to the relevant Line Ministry or Government or State Authority or Department. Except in a few rare instances, there is no statutory or regulatory basis for the allocation of the function of evaluating requests for the issue of letters of recommendation.

Identifying which Line Ministry or Government or State Authority or Department to apply to will depend on the nature of the proposed employer and the business of the proposed employer and/or what the proposed employer does.

The documentation which must be furnished will depend on the administrative requirements of the relevant Line Ministry or Government or State Authority or Department.

The function of evaluating requests for letters of recommendation can change from time to time from one Line Ministry or Government or State Authority or Department to another. For example, in the past, for journalists, the processing of an application for a letter of recommendation was handled by the Ministry of Mass Media. Thereafter this function was allocated to the Ministry of Foreign Affairs.

We now provide a few instances of the most common situations and Line Ministries or Government or State Authorities or Departments which have to be dealt with for the purpose of applying for letters of recommendation. It should be kept in mind that the responsibility for evaluating requests for letters of recommendation can change from time to time depending on then applicable administrative practices and it is

always advisable to verify the requirements or information which follows at the relevant time.

Department of Commerce

The Department of Commerce would generally handle the processing of requests for letters of recommendation for companies involved in export and for liaison and/or branch offices in Sri Lanka of companies incorporated outside Sri Lanka involved in exports and/or sourcing of products for export.

In the recent past, when evaluating applications for letters of recommendation, authorities such as, the Department of Commerce has considerably tightened up its requirements and procedures.

For example:

- a letter of recommendation will currently only be granted if it can be proven that Sri Lankans are unable to fill the position;
- educational certificates must be certified by the professional body/Ministry of Foreign Affairs in the home country and the Sri Lankan diplomatic mission; and
- an advertisement must be run in the local newspapers and details provided of all who applied for the position and the reasons why the position was not filled with one of those applicants must be provided.

The duration of stay in Sri Lanka will depend on the contract of the applicant. A residence visa issued on the basis of a letter of recommendation received from the Department of Commerce would generally be renewable on the basis of the period for which the letter of recommendation is applicable.

A report of the work undertaken by the applicant during his employment in Sri Lanka has to be submitted to the Department of Commerce every six months.

It is the responsibility of the employer to notify the Department of Immigration & Emigration if and when the employment has been terminated or comes to an end.

Letters of recommendation for enterprises approved by the Board of Investment of Sri Lanka

Investors investing in the country would invariably do so through a project company. Where such project company enters into an agreement

with the BOI in terms of section 17 of the Board of Investment Law, the agreement with the BOI would generally contain a clause permitting the company to employ, with the prior approval of the BOI, foreign nationals, the employment of whom is necessary for the efficient functioning of the enterprise.

Where approval has been obtained in terms of section 16 of the Board of Investment Law, this would generally entitle the investor to a letter of recommendation for the grant of a residence visa with permission to work for the enterprise.

Form 45 (in triplicate), which sets out particulars of the application, would be submitted to the Ministry of Defense, and if approval is obtained and a letter of recommendation is issued by the BOI, Form 45 with the Defense Ministry approval endorsed thereon and the letter of recommendation would have to be submitted to the Department of Immigration & Emigration.

As a minimum, the following documentation would have to be submitted to the Department of Immigration and Emigration:

- certified copy of the certificate of BOI registration in terms of section 17 of the BOI Law (or a certified copy of the BOI's Letter of Approval for section 16 approved projects);
- a certified copy of the BOI Agreement;
- a certified copy of the Articles of Association;
- a certified copy of Form 1 (details of directors);
- a certified copy of Form 2A (Certificate of Incorporation);
- a letter of request from the Company;
- Form 45 to be completed in triplicate;
- a copy of the contract of employment; and
- a copy of the passport identification page.

Foreign nationals employed in local banks

A letter of recommendation has to be applied for from the Banking Supervision Department of the Central Bank of Sri Lanka. The criteria are set out in Directions issued in terms of the Banking Act.

NGOs

There are stringent controls in place with regard to the issue of letters of recommendation for the grant of visas to foreign nationals employed

by NGOs. A letter of recommendation must be obtained from the NGO Secretariat in Battaramulla as well as clearance from the Ministry of Defense.

Employment in Diplomatic Missions

Applications for the issue of a letter of recommendation would have to be made to the Ministry of External Affairs and be processed in accordance with the terms of any relevant bilateral agreement.

Members of the Clergy

A request letter from the relevant Line Ministry is required and no fees are charged by the Department of Immigration and Emigration if the Ministry of Buddha Sasana recommends the application. However, clergy of other faiths are not exempt and have to pay the visa fee of Sri Lankan Rupees (LKR) 20,000 fee for a residence visa.

Student Visas

A letter of recommendation from the Higher Education Ministry is required or, as the case may be, the relevant school or institution. A stipulated sum is required each year to be remitted into the country on behalf of the student.

Spouse Visas

A foreign national married to a Sri Lankan citizen can apply for a “foreign spouse” category visa. The Controller has discretion in regard to the period of the visa. There are no charges for a spouse visa.

While the spouse is, as a matter of the regulation not entitled to work in Sri Lanka, (unless expressly permitted to do so), administrative practice has relaxed this prohibition and the Department is currently of the view that such spouse could conduct his or her own business in Sri Lanka and work within his or her own company.

A permit to work in any other entity, (public or private), in Sri Lanka whilst a person resides under the “foreign spouse’” category would not, as per current administrative practice, be granted. If a spouse who is living in Sri Lanka under the ‘spouse visa’ category wishes to work for such an entity, the employer in question would have to apply for and obtain a

letter of recommendation and the spouse would then have to apply in his or her own name for a residence visa with the right to work. Such a residence visa would be issued for one year and be renewable at the discretion of the Department.

Resident Guest Visa Scheme

The Department has for some time granted Resident Guest Scheme (RGS) visas to foreign nationals.

As per information available on the website of the Department, the RGS is a package of incentives for prospective foreign investors and professionals who would contribute to the economic and socio-cultural development of the country. Implementation is through a committee of senior officials of relevant Government Agencies, who meet once or twice a year.

Applications are available at the Department, the Sri Lankan missions abroad or from the website of the department www.immigration.gov.lk

There are two subcategories under this scheme:

- any foreign investor or professional who can contribute to the economic and socio-cultural enrichment of the country is eligible to apply for the grant of a visa under this scheme; and
- if the person intends to make an investment in Sri Lanka during his or her stay in Sri Lanka, and the investment falls within the permitted categories, he or she would be eligible to apply for the grant of a residence visa by registering under the investor category of the RGS visa program.

The RGS visa is valid for a period of five years. This can be extended on the proof of contribution to the socio-cultural enrichment of the country, or, as the case may be satisfactory performance of the project investment. Bank statements etc. would have to be furnished to prove compliance with any inward remittance requirements.

The following remittance requirements would be applicable in this regard:

- if the applicant is a foreign national investor, he or she should remit a minimum of United States Dollars (USD) 250,000 or an equivalent amount in any convertible foreign currency and deposit the funds in a special account in any commercial bank approved by the Central Bank of Sri Lanka;

- if the foreign national investor intends to commence any investment project jointly with another foreign national partner or partners, each such person should invest a minimum of USD 250,000 or an equivalent amount in any convertible foreign currency. A further sum of USD 35,000 should be deposited for each dependent accompanying the investor. In addition to the initial deposits, a foreign national investor should remit regularly sufficient funds for the upkeep of himself and his dependents; and
- if the applicant is a professional intending to reside in Sri Lanka under the scheme he or she is required to remit a minimum of USD 2,000 per month for him or herself and USD 1,000 per month for each of his or her dependants, including spouse.

Funds remitted to Sri Lanka by any foreign national investor should be invested in an approved project. If no satisfactory progress is made by the applicant in making investment in the country within the first two years of his residence in Sri Lanka, the Implementing Agency may cease to allow any further payments of interest on the credit balance in the Special Account of the foreign national investor.

Approved projects for the purpose of this scheme are:

- new ventures subject to approval by the BOI or the relevant authority;
- existing or new companies subject to approval by the relevant authority; and
- shares listed on the Colombo Stock Exchange (CSE web link).

The documentation required is as follows:

- photocopies of the identification pages of the passports of the applicant and of any dependents;
- photocopy of the marriage certificate or marriage contract, (if applicable);
- six photographs (6 cm x 5 cm); and
- details of educational and professional qualifications and experience (if any) to be indicated on a separate sheet in quadruplicate.

Successful applicants are required to undergo medical examination and submit a police report. A qualified investor or professional could bring in his or her spouse, dependent children and his or her parents or the parents of his or her spouse.

A resident guest can apply for citizenship upon completion of three years of residence under and in terms of the Citizenship Act No. 18 of 1948. A Resident Guest who intends to obtain Sri Lankan Citizenship may apply to the Implementing Agency upon completion of three years of residence. However, grant of citizenship would only be considered on the basis of the applicant's contribution to the economic development/socio cultural enrichment of the country during the period of residence.

Resident Guest Scheme applicants are bound by the rules and regulations of taxes of Sri Lanka and they are liable to pay relevant taxes.

Half-yearly bank statements in respect of fixed deposits must be submitted to the Controller, (Visa) of the Department. Any changes in the personal status or personal information of the applicant must be notified to the Department.

My Dream Home Visa Scheme

The Government of Sri Lanka also has in place the My Dream Home visa scheme ("the scheme") which is open to all persons interested in retiring in Sri Lanka subject to the fulfilment of certain criteria. If granted, the visa allows a retiree to live in Sri Lanka on a long term residence visa and the visa is issued for periods of two years. Foreign nationals over 55 years of age may apply for the scheme for themselves, their spouses and unmarried children under the age of 18.

The requirements for an applicant to be eligible for the grant of a My Dream Home visa are:

- the applicant must be over the age of 55 years;
- the applicant must remit a minimum of USD 15,000 or its equivalent in other convertible foreign currency and deposit the said sum in a fixed deposit foreign currency account and this amount should remain in the account as long as the applicant stays in Sri Lanka under the residence visa; and
- a monthly remittance of USD 1,500 for the principal applicant and USD 750 for accompanying spouse and each dependent child for their upkeep in Sri Lanka must be deposited in Sri Lanka Rupees (LKR) savings or current accounts.

The documents required to be submitted to the Department are as follows:

- residence visa form with two passport size photographs;

- a certified copy of passport or travel document;
- a certified copy of latest bank statement and/or other related financial documents to indicate the financial capability to support stay in Sri Lanka;
- details of source of income (pension and/or superannuation) for monthly remittance of USD 1500 for principal applicant and USD 750 for each dependent;
- police clearance certificate not older than six months from the country of domicile; and
- marriage certificate, if applicable.

A foreign national employed in Sri Lanka would be subject to the applicable employment laws in Sri Lanka including the Industrial Disputes Act and the Termination of Employment of Workmen (Special Provisions) Act.

Employment and Labor Law

Gratuity

In the case of employers who employ more than 15 employees, gratuity would be payable in terms of the Payment of Gratuity Act No. 12 of 1983, if the employee has been employed for more than five years. The employer must pay that worker within a period of 30 days, half a month's wages or salary for each year of completed service. The gratuity will be calculated against the last month's wage drawn by that worker.

Income Tax and Social Security Contributions

Pay As You Earn Tax

Depending on the salary level of the employee the employer has to register as a Pay as you Earn (PAYE) employer by completing and filing the requisite form at the Department of Inland Revenue. Once registered, the company will receive a pay-in-slip and a monthly PAYE return form from the Department of Inland Revenue (IRD) every month. The employer has to pay tax for the employee on a monthly basis by deducting such amount from the employee's salary and paying it to the IRD direct - the employee does not have to pay tax himself.

At the end of the tax year, the employer should obtain a standard certificate from the IRD, certifying the total amount of tax deducted for the employee. Such certificate should then be forwarded to the employee for his or her record.

Employees' Provident Fund Contributions and Employees' Trust Fund Contributions

The employer has to register with the Employees' Provident Fund (EPF) and/or Employees' Trust Fund (ETF) Department by submitting the requisite form to the EPF and/or ETF Department along with certain documents from the Registry of Companies in the country where the company is incorporated.

Once registered the EPF and/or ETF Department would send the employer a form (Form C) to fill in each month with payment details.

Both EPF and/or ETF contributions must be paid by the employer to the appropriate fund directly on a monthly basis. The contribution details are as follows:

Employees' Provident Fund (EPF)

- employees contribution: Eight percent is to be deducted from the employee's salary; and
- employers contribution: 12 percent of the employee's salary is to be paid by the employer.

Employees' Trust Fund (only employer is liable to contribute)

- three percent of the employee's salary is to be paid by the employer.

SWITZERLAND

Renuka Cavadini

Summary

Switzerland is a federal country. The 26 cantonal governments have the competences that are not vested in the federal government by the constitution. The national languages are German, French, Italian and Romansh. Although English is not an official language, it is widely used in the business environment and even with authorities in the main cities of Geneva, Zurich and Bern.

Legal System

The legal system of Switzerland is the civil law system with codified laws. There are federal, cantonal and communal laws. In most sectors, the main principles are fixed by the Federal constitution and federal laws and the procedures and details are fixed by the cantonal constitutions and laws.

This complexity has been simplified by a civil and criminal procedure common to all cantons, which has entered into force on the January 01, 2011. The codified law for civil matters (covering civil rights, associations, foundations, family, law, inheritance, property law) is the Swiss Civil Code (CC) and the codified law for corporate and contracts law (covering donations, agreements for: loans, employment, service,

edition, mandates, commissions, transport, guarantees, escrow accounts and deposits; Power of attorneys, partnerships, corporate law, accounting and commercial papers) is the Swiss code of obligations (CO).

Visas

A distinction needs to be made in Switzerland between visas and residence and work permits.

Since December 12, 2008, Switzerland is a member state of the *Schengen* Agreement. The current *Schengen* States are: Austria, Belgium, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden and Switzerland.

In order to visit any of the *Schengen* States, a *Schengen* visa is required, which is valid for all the *Schengen* states for a period of 90 days within a six month period, for tourism or business, but not for employment.

Since Switzerland has become a *Schengen* state, the granting of visas has become a longer procedure and the Swiss federal authorities are stricter in examining the conditions for granting a visa.

Work or Residence Permits

In Switzerland, there is a clear distinction between citizens of the European Union (EU) or assimilated countries (Austria, Bulgaria, Belgium, Cyprus, Czech Republic, Denmark, Estonia, Latvia, Finland, France, Germany, Greece, Holland, Hungary, Iceland, Ireland, Italy, Liechtenstein, Lithuania, Luxembourg, Malta, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, United Kingdom (UK)) who are entitled to have a work permit to live and work in Switzerland and citizens of countries that are not part of the EU or assimilated countries such as the United States of America (U.S.), Canada and India.

For purpose of simplification, any reference to a “foreign national” will imply a person who is not a citizen of Switzerland. There are unfortunately no visa waivers in Switzerland for Indians. The conditions for granting work permits to foreign nationals are extremely strict. Each canton has a quota of foreign nationals (not already resident in the canton) it can grant permits to. These quotas do not apply to short term work permits of four months (referred to as “120 day permits”) within

a period of 12 months; permits for artists who will not stay longer than eight months; and cabaret artists.

Quotas for Work Permits in 2015 – An Update:

The Swiss government has recently made an announcement about quotas for highly qualified foreign national workers from the EU or assimilated countries, as well as for nationals from other countries. A partial revision of the Ordinance on Admission, Stay and Employment (OASA) become effective from January 1, 2015. Due to the amendments, the actual announced quotas for 2015 are less than those of 2014 and these are in spite of the fact that the quotas for 2014 have not yet been met.

Revised Quotas for Non-EU and EFTA Nationals

Half of the quota is allotted to the cantons, with the other half kept as a Federal Reserve. 4000 L permits (1000 less than in 2014) and 2500 B permits (also 1000 less from last year) are granted for 2015.

Revised Quotas for EU and EFTA National Assignees

The quotas for assignees from EU and/or EFTA countries to Switzerland have also been reduced likewise: 2000 L permits (1000 less than in 2014) and 250 B permits (100 less from 2014). These quotas will be allocated to the cantons on a quarterly basis, as in the previous years.

For both categories, once the B permit quotas are reached, applicants are issued L permits in its place. The L permits are valid for up to 12 months and convertible into a B permit after two years.

From a practical point of view, the cantonal authorities will always support the permit application of a foreign national that will be creating an innovative industry of particular interest to the canton creating an important number of jobs in the concerned canton.

Conditions for B/L Permits

Any foreign national that intends to come to Switzerland for a stay longer than three months, with or without a lucrative activity, must apply for a permit with the competent authority of the place in Switzerland where he or she intends to reside before entering the Swiss territory.

If the foreign national is already legally in Switzerland and applies for a permit, he or she must leave the Swiss territory while awaiting the

decision of the Swiss authorities, unless the Swiss authorities allow him or her to stay in Switzerland during the procedure. This is the case if the conditions for granting the work permit are evidently fulfilled (for example - the spouse of a foreign national asking for a work permit when the foreign national has already been granted one).

L permits granted to foreign nationals allow them to reside and work only in the canton that has issued the permit. B permits obtained also allow the foreign nationals to live and work in separate cantons or to live and work in another canton, if they fulfil the following conditions:

- the foreign national shall not be unemployed;
- he or she shall not receive social assistance for them and/or their dependents;
- he or she must have a correct legal behavior per Swiss immigration and penal law; and
- he or she must keep the cantonal authorities informed of their current status. Both B and L permits allow the foreign national to travel within Switzerland for short stays.

The permit needs to be requested by the employer based in the concerned canton. The employer must establish that he has not been able to find someone with the same qualifications in not only Switzerland but within the EU. To do so, he needs to post the profile of the job on the official Swiss and European websites, as well as in specialized magazines, newspapers and its own website. The employer needs to explain why the candidates from the Swiss and European market were refused. The salary of the foreign national being employed must be equivalent to the Swiss norms. The compulsory social security payments need to be made by the employer based on the salary. The foreign national must be very qualified or particularly skilled in a sector for which employees are not available in the Swiss and European markets, such as IT specialists. This implies a university degree and experience of several years. When assessing the case of the employee, the authorities check the capacity of the foreign national to adapt professionally and socially to the Swiss environment. Some of the factors include the age, and the linguistic skills of the foreign national. The authorities require a detailed *curriculum vitae* (CV) and original diplomas and work certificates. Finally, the foreign national seeking a work permit must have the possibility of having an appropriate accommodation.

Exceptions to the Conditions for B/L Permits

- Spouses of Permit Holders: The work permit for the spouses of foreign nationals is not subject to the quotas of the cantons;

- Cabaret Artists: There are exceptions for cabaret artists to protect them from being exploited because of their profession; and
- Scientific and Technical Cooperation.

In the context of cooperation projects with developing countries, training permits can be granted to citizens of developing countries based on agreements signed between Switzerland and the concerned country for scientific and technical cooperation. The objective is to allow citizens of the concerned countries to come to Switzerland for a professional specialized training in a sector which is important for the development of their country and for which no training is available in their country.

Foreign National Students

Foreign national students who have been granted student permits for university studies or full-time language courses are permitted to have an accessory professional activity under strict conditions after six months of studies, while continuing their studies. If they are working for the university in which they are pursuing their degree, this activity can begin before the end of the six months.

For diplomas which require practical training, the practical training is only permitted for foreign nationals if the course is full-time. The training period cannot exceed 50 percent of the total course and must be in the same canton where the course was taken, unless a special authorization is obtained. In the context of Masters in applied sciences or scientific doctorates or scholarships, a work permit can be granted for the purpose of specialization.

Foreign national students that have completed their higher studies in Switzerland can be granted work permits if their activity has a scientific or economic importance for the country. This is the case if their skills are not available in the Swiss or European markets. For these students, only the condition of priority of Swiss and Europeans is waived, all other conditions of admission remain applicable.

Foreign nationals who come to Switzerland under a bilateral or multilateral exchange program can be permitted to work in Switzerland if the principal purpose of their presence is the exchange program.

Switzerland has signed agreements for exchange of trainees with 32 countries fixing quotas of the number of trainees and the age limits permitted for each country. Unfortunately, no such agreement has been signed yet with India. These trainees are granted permits without it being

included in the quotas of the cantons. Inter-company transfers (ICT) of executives for international companies and research institutes are not subject to the quotas of cantons.

A work visa (visa D) for a maximum of four months within a year can also be requested. This requires the employee to live outside of Switzerland for at least two months. This permit is not subject to the quotas of the cantons.

Short Term Permits

This type of permit is granted for a maximum of one year, for a specific purpose and can be subject to various conditions. Its validity can be extended for a maximum period of two years. This permit is granted either for a specific employment requirement (in which case a change of employer is only accepted for major reasons) or for trainees, students, or persons requiring a medical treatment.

Once the short term permit expires, a new one can only be granted after an interruption of an appropriate period. When the purpose, for which the short term permit was granted, has been realized, the foreign national is obliged to leave Switzerland, unless he or she obtains another type of work permit. The foreign national must leave the Swiss territory while awaiting the decision of the Swiss authorities unless the conditions for granting another work permit are evidently fulfilled.

C-Permit

A foreign national who has been a resident in Switzerland (with a valid residence or work permit) for a period of 10 years is entitled to get a C-Permit, which is a permanent permit. There is an exception for U.S. and Canadian nationals who can request the C-Permit after a period of five years. A foreign national who is well integrated in Switzerland may request this permit after a period of five years. For foreign minors (under the age of 18 years), the years spent in Switzerland count double. The minor may therefore be entitled to get a C-Permit before his or her parent.

Employment and Labor Law

The employment of any foreign national requires requesting and obtaining of a work permit. However, the lack of a work permit does not make the employment contract null and void and the employer remains

liable for the salary of the employee. The employment contract does not need to be in writing, although it is recommended for the purpose of evidence in case of employment disputes.

The contract of employment under Swiss law is quite liberal and the parties are free to decide the terms of their agreement under the limits of certain imperative provisions of the Swiss code of obligations aimed at protecting either the employee or the employer. The federal and cantonal laws have also fixed certain minimum salaries in professions that need to be protected (for example domestic employees).

The following are some of the important provisions in a Swiss employment contract:

- the right for the employer or the employee to terminate the employment contract at any time, without reason, by respecting a notice period of one, two or three months depending on the duration of the contractual relations. The notice period is of seven days during the trial period if the parties have agreed to have a trial period. The trial period cannot exceed three months;
- the termination is deemed null and void if it is notified to the employee by the employer during certain periods of protection listed in Article 336c (for example - during pregnancy, maternity leave, illness, military service). The termination can be contested by the employee if he or she considers that it was given for an abusive purpose (for example - related to the personality of the employee, unless it is in relation with the tasks of the employee; because the employee rightfully made a claim related to the employment contract, etc.);
- either party can terminate the employment contract with immediate effect for cause. This type of termination needs to be motivated in writing, if the other party asks for a motivation;
- either party can claim damages in case of an unjustified termination of the employment agreement;
- the employee is entitled to a minimum of 20 working days of paid vacation each year, to his or her salary for a limited period of time during illness if the employment was concluded for a period of more than three months or if the employment relation has lasted more than three months and female employees are entitled to 14 weeks of paid absence after delivery;
- the employee may request a work certificate from the employer at any time; and

- an employee, who is over 50 years of age, and who has worked for at least 20 years with the same employer, is entitled to an indemnity from the employer for the long years of service, at the time of the termination of the employment.

The non-compete clause is interpreted very restrictively by Swiss employment courts. It is only considered valid if it has been included in a written employment contract, if it is limited to a certain type of professional activity (without excessively restricting the financial future of the concerned employee), limited in time and geographically.

Foreign nationals, who have a short term permit or a B/L permit, are not allowed to have an activity as an entrepreneur or an independent contractor in Switzerland, unless a specific authorization is obtained from the Swiss authorities. They are permitted to create their own company and be employed by their company. Foreign nationals who have C-permits can be independent contractors or entrepreneurs.

Income Tax and Social Security Contributions

Social Security and Accident Insurance

The employer must deduct from the salary of the employee the compulsory social security deductions due under Swiss law, as well as the tax at source due for foreign national employees. The social security payments are of approximately seven percent of the salary for the employer and the six percent of the salary for the employee. The employer must also conclude an accident insurance for the employee to cover accidents which may occur during his professional activity. The employer can be criminally liable for non-payment of the social security contributions and the accident insurance of the employee.

Income tax

A foreign national is subject to taxes in Switzerland as soon as he or she is resident in Switzerland. Swiss taxes are levied at federal, cantonal and communal levels. Personal income tax is progressive in nature. However, the total rate does not usually exceed 40 percent. The level varies according to the canton and commune of residence.

THE NETHERLANDS

Ted Badoux

Summary

The Netherlands, commonly known as Holland, is a small and densely populated country. It is situated along the North Sea coast, north of Belgium and west of Germany. The total area is about 25,000 square kilometers. Over one-third of the country is below sea level; which is why the French call the Netherlands "*les Pays Bas*".

The present population is around 17 million. Holland is an open and stable economy with moderate inflation. At the end of 2014, the inflation rate was around one percent. Trade, finance, transport, chemicals, oil refinery and agro-food are essential sectors of the Dutch industry. Besides this, Holland is rich in tradition, culture and fine arts.

Legal System

The Netherlands is a constitutional monarchy; since April 30, 2013 the sovereign has been King Willem-Alexander. The political system is a parliamentary democracy. In 1957 the Netherlands, Belgium and Luxembourg entered into the European Economic Community (EEC). Today, the Netherlands is one of the member states of the European Union (EU). The nationals of the EU countries have the right to move freely within the European Economic Area (EEA) to pursue economic

activities and can take up permanent residence for that purpose in any of those countries. They may also stay for education purposes or for retirement if proof of sufficient means of subsistence is provided. Non-European nationals obtain a dependent status if they have family ties with a European national who takes up residence in a European country other than his or her own.

Visas

Entry and Stay

For entry and stay on the European continent including the Netherlands, the main distinction is between short term and long term stay. Short term stay is stay for up to 90 days and long term stay is stay intended to last more than 90 days in a period of six months.

Short-term Stay

Citizens of the EU do not need visas or permits for short term or long term stay in the Netherlands. They derive legal stay from their EU citizenship although for long term stay there are two conditions to be met:

- sufficient health insurance; and
- basic financial means.

A check on public policy and public security compliancy may be part of the registration process in case of long term stay for work.

The same goes for nationals from the EEA countries and Swiss citizens. The following is therefore primarily relevant for third country nationals (that is for people not from EU or EEA or Switzerland), including Indian nationals.

Since May 2010, 26 countries on the European continent share a Visa Code. Based on this Code they have a common visa policy and a common visa for non-European nationals, called a *Schengen* visa. A *Schengen* visa is validated for entry and short term stay on the territories of those European countries; this travel zone is called the '*Schengen* Area'. Please note, Bulgaria, Cyprus and Romania do not share the Visa Code and the *Schengen* Area as yet, but may join in 2015. Also, Ireland and the United Kingdom (UK) are not part of the *Schengen* Area. These countries operate a travel zone known as the 'Common Travel Area' and each operates a national visa policy.

Schengen visas are for short stay for up to 90 days in a period of 180 days. *Schengen* visas are typically granted for a single entry, but may also be granted for multiple entries, provided that the holder of the visa never stays longer than 90 consecutive days at any one time and never longer than an aggregate total of 90 days within a period of 180 days.

Regulation (EU) No. 610/2013 of June 26, 2013, amended the Convention Implementing the *Schengen* Agreement, the *Schengen* Borders Code and the Visa Code and among others re-defined the concept of "short stay" for third-country nationals in the *Schengen* area which is a fundamental element of the *Schengen acquis*.

As of October 18, 2013, a vast majority of the third-country nationals irrespective of being visa required or exempt who intend to travel to the *Schengen* area for a short stay - contrary to reside in one of the Member States for longer than three months - the maximum duration of authorized stay is defined as "90 days in any 180-day period." The date of entry shall be considered as the first day of stay on the territory of the Member States and the date of exit shall be considered as the last day of stay on the territory of the Member States. Periods of stay authorized under a residence permit or a long-stay visa shall not be taken into account in the calculation of the duration of stay on the territory of the Member States. Contrary to the definition which was in force until October 18, 2013 the new concept is more precise by setting the duration in days, instead of months. Moreover, the term "from the date of first entry" which gave rise to many uncertainties and questions (especially after a judgment of the Court of Justice of the EU from 2006 (Case 241/05 "Bot)) has been dropped from the provision. *Schengen* visa with multiple entries may be used to make business trips to several cities in various European countries. In that case, the visa must be applied for at the Consulate or Embassy of the country of first destination or main stay. If you choose the Netherlands as your first destination, application must be filed at the Dutch Consulate in Mumbai or at the Dutch Embassy in Delhi.

The Visa Code lists short stay visa-exempted third country nationals (example: U.S. citizens). They can travel and stay without visa but are also bound to the rules for short stay (90 days out of 180). A check on public policy and public security compliancy may be part of any application for a *Schengen* visa. Any overstay in the *Schengen* Area established at a border control when leaving the *Schengen* Area may generally result in the issue of an official ban on new entries in the travel zone for a period of one to two years. Such ban will be kept on record in the Schengen Information System (SIS). A ban may be lifted upon request when an application for long term stay by way of a residence permit is submitted.

Long Term Stay

As mentioned, for EU or EEA or Swiss nationals, long term stay is not really an issue. Long term stay is primarily a third country national's issue. Within the group of third country nationals the basic distinction is between those requiring an entry clearance visa and those being exempted from this requirement.

Long Term Stay Visa or Entry Clearance Visa (MVV)

Indian nationals planning to come to the Netherlands for a stay of more than 90 days need to apply for entry clearance called MVV (*Machtiging tot Voorlopig Verbljif*). An MVV is issued as *Schengen* visa type D and can be applied for at the Dutch Consulate in Mumbai or the Dutch Embassy in Delhi. For highly skilled migrant employees and their families who need to be sent to the Netherlands on a long term assignment, MVVs are included in the single permit procedure of the Immigration Service (*Immigratie en Naturalisatiedienst* (IND)) implementing the Single Permit Directive 2011/98/EU since June 1, 2013. Such so-called TEV applications are applied for with in the Netherlands by their sponsoring employer who for the purpose of hiring highly skilled migrants has obtained a registered sponsorship status with the IND, for example - the subsidiary or the branch office of the Indian company that wants to send its employees or the company receiving them. The highly skilled migrant employee only needs to address the Dutch Consulate once the IND has sent its approval message to the Consulate. The MVV must be collected within three months and used for first entry in The Netherlands within three months after.

So, an entry clearance visa is granted only as part of the single permit procedure TEV or for example in the category of regular employment - once the applicant has met the requirements for a residence permit (*Verblijfsvergunning*).

Applicants are not allowed, in principle, to be in the Netherlands pending the processing of their entry clearance visa (MVV).

The application is assessed and approved by the visa department of the IND. The Consulate may only grant the visa after express approval by the IND, with an identity check as the only remaining test.

An MVV is issued as a *Schengen* visa type D and validated for multiple business trips up to 90 days in the EU countries of the European continent allowing the applicant to travel back to the country of origin or for short trips in Europe in the first period after arrival, pending the residence permit application.

Exempt from the entry clearance visa requirement are: all countries from the EU or EEA or Switzerland, and several others like Australia, Canada, Monaco, Japan, New Zealand, South Korea, the Vatican and the United States (U.S.).

Residence Permits (*Verblijfsvergunning*)

All Indian nationals who have arrived with an MVV visa, allowing a stay of more than 90 days, need to apply for a residence permit within five days from their arrival date. Those who have arrived under the single permit procedure TEV, report within five days to have their passport photos and fingerprints taken and collect their residence permit ID card some 14 days later. All reporting is in person at the local IND front-office, in some of the major cities located in a so called Expat center.

The processing of any residence permit application is by category. A TEV application procedure for the category of "highly skilled migrants" (*kennismigranten*) may take from two to four weeks, all in. For regular employment (*arbeid in loondienst*) including intra-corporate transfers (ICT), the processing of a residence permit may take from four to six weeks, not including some four weeks for the work permit that needs to be obtained first.

A residence permit procedure for self employment involves a points based evaluation by a specialized agency of the Ministry of Economic Affairs for a professionally drawn up business plan, which may prolong the process easily to the maximum legal duration of 90 days.

A residence permit is applied for in person at the local IND front-office. Applicants obtain a sticker in their passport confirming that the application has been submitted. This application sticker (*sticker verblijfsaantekeningen*) is validated for six months and renewable; it mentions whether the applicant is allowed to work pending the processing of the application and if so, whether an additional work permit is required. Pending a residence permit decision, the applicant is protected against expulsion.

Approximately three weeks after a residence permit has been granted, a residence permit document is printed (a credit card like document). The residence permit mentions whether the holder is allowed to work and if so, whether a work permit is required (*arbeidsmarktaantekening*). The document serves as an ID for the holder and must be kept at all times when at work.

Work Authorization

All Indian nationals with plans to be engaged in employment in the Netherlands, either as self-employed entrepreneurs or as employees on company payroll, will need to obtain a work authorization for the same. In case of a short term stay, different rules apply to different situations, so a case to case assessment is required.

For employment and business activities during a short term stay up to 90 days in a period of 180 days, work permit waivers available for incidental work allow the foreign national to participate in business meetings for up to four weeks in 13 weeks or engage in installation, implementation and user training of software products developed and sold to a Dutch customer by the Indian employer or manufacturer of the software. A similar waiver is applicable for the installation or the repair of machines, devices or tools manufactured in the Indian industry.

Please note that waiver eligibility is determined on a case-by-case assessment.

Citizens of the EU, except Croatian nationals, the EEA countries and Switzerland are entitled to work in the Netherlands without work authorization. Croatian nationals already have the freedom to establish a business in the Netherlands and to provide services. Access to the Dutch labor market is denied until July 1, 2015. Therefore, the information on work authorization for foreign nationals below mainly applies to third country nationals, including Indian nationals.

Employment and Labor Law

Netherlands has a liberal business immigration policy since 2005; many permit schemes are intended to facilitate labor immigration, rather than restricting it. The Dutch government has an accelerated application procedure for highly skilled migrants. In the major cities, the Immigration Service IND has operational front desk offices as a one stop shop immigration desks for labor immigrants in order to improve the service to foreign corporations sponsoring their transferees and new hires and make them feel more welcome in the Netherlands. To achieve the one shop stop purpose, that is to combine residence permit issuance with municipal and tax registration, these immigration desks are located in so called Expat Centers which are staffed and financed by the municipality. The Expat Center of the City of Amsterdam is commercially operated and charges fees for its services, separately from the legal filing fees of the IND.

On the reverse of this liberal Dutch business immigration policy, the government has taken up an increased interest in compliance. Registered sponsors are subject to sanctions for non–compliance with the registered sponsorship duties. Sanctions include fines from Euro 3.000 per employee; sponsorship registration may be struck after three established offences, legal recourse is provided. All employers may be sanctioned for each employee who is not properly authorized to work. Sanctions include fines ranging from Euro 2.250 to Euro 12.000 in 2014-2015, for each employee who is found to have been illegally at work.

In 2014, the Dutch government enacted a new Employment by Foreign Nationals Act, extending EU recruitment efforts by employers and restricting the issue of any labor market validated work permit to a maximum of one year. Highly skilled migrant residence permits do not come under this category.

Employment

The Knowledge Migrant Regulation (KMR scheme)

The Knowledge Migrant Regulation (KMR) scheme is quick and relatively easy. It basically involves only a salary threshold, no skills test and the processing time is two weeks. Applications are only available online and to registered sponsoring employers. Holders of a knowledge migrant residence permit do not need separate work authorization as long as they keep working for a KMR registered sponsoring company.

Registering of KMR Sponsorship

Knowledge migrants' employers have to be registered with the IND. Companies can obtain a registration in four to six weeks. The Dutch government has levied a hefty filing fee of Euro 5.065 for the year 2014-2015. The main requirement is that the company must ensure that it has paid up all wage taxes and social security premiums. For companies based abroad who are still to have their own legal entity in the Netherlands and/or who do not have a Dutch payroll administration; preparatory additional arrangements need to be made, including the submission of an actualized professionally drawn up business plan, to prevent delays or even refusals.

Salary Requirements

As of January 1, 2014 to qualify for a KMR residence permit a KMR registered sponsoring employer needs to pay a monthly gross minimum

salary to the KMR employee. If a KMR salary is paid from both the Indian and the Netherlands payroll, the gross amount must add up to meet this monthly salary threshold. The salary is defined as the amount in a currency established in an employment contract. Salary payments must be made by bank transfer at least once a month.

The minimum monthly gross salaries for KMR employees as per January 1, 2015 are:

- EUR 4.189 - Gross salary per month for those aged 30 or over;
- EUR 3.071 - Gross salary per month for those under the age of 30; and
- EUR 2.201 - Gross salary per month for graduates from Dutch Universities and Polytechnics.

These amounts are exclusive of eight percent vacation allowance mandatory for employment relations governed by Dutch law.

There is a "search period" of 12 months for the mentioned graduates to find a job with a KMR employer, counting from the day they have graduated. During the search period they have full access to the Dutch labor market (i.e. regardless of the salary level and whether the employer is KMR registered or not).

Statutory Wage: It is the salary threshold for researchers at designated universities and research institutes. This salary is related to the salary that is prescribed for the anticipated function or assignment in the institute's statute.

The minimum salaries for the KMR Scheme are indexed every year by the IND; these new salary thresholds are published every year in the States Newspaper (*Staatscourant)* in the month of December. As a rule, amending KMR salaries for compliancy will not be necessary for current employment contracts.

Families

Family members (spouse and under aged children) are allowed to accompany the knowledge migrant and will have full access to the Dutch labor market. The processing time of two weeks also applies to family members' applications, even if they travel separately from the employee.

Highly Educated Can Become Knowledge Migrant

Those with a PhD or Masters can opt for the Dutch Highly Educated program to obtain a residence permit as a highly skilled migrant. The features of this program are as follows:

- masters or PhD from an acknowledged Dutch university or institute;
- masters or PhD abroad from any of the top 200 universities published in the Times Higher Education Supplement or on the list of Jiao Tong Shanghai University;
- visa application must happen within three years from the date of graduation;
- the application assessment is points based, 35 points are required;
- the search year permit is applicable for only one year;
- no extension is possible if the knowledge migrant employer is not located;
- work is only allowed on the basis of a labor market validated work permit; and
- the salary threshold for knowledge migrant employment is EUR 2.201 gross per month for the year 2015.

EU Blue Card

A uniform EU Blue Card has been made available from July, 2011. The Blue Card is the first European work permit. UK, Ireland and Denmark do not issue the Blue Card. Key requirements are:

- an employment contract for a minimum period of one year;
- higher professional qualifications; and
- a threshold salary of 1.5 times the gross national average in the Member State of employment. The indexed salary amount in 2015 for The Netherlands is EUR 4.908 gross per month.

Member States may refuse the work permit by applying a quota and/or national and EU work force priority. Family reunion is allowed and offers access to the national labor market. By comparison, the Dutch national scheme for admission of highly skilled migrants applies a threshold salary as the sole requirement; it allows family reunion and the family obtains access to the Dutch labor market. The Dutch government does not apply a quota for highly skilled migrants.

The interest of the large Indian IT companies in the Blue Card is focused on free movement for seconded employment. After the first 18 months, a Blue Card holder and his family can migrate on to a second Member State to take up a Blue Card employment, but a second or third Member State may also apply a quota or refuse the permit based on national or EU work force priority.

Dutch Work Permit Schemes

The Dutch general work permit scheme prescribes amongst other requirements a full labor market test, which actually refers to a job search for suitable candidates on the European labor market by means of advertising and other appropriate recruitment efforts for at least a period of three months. For business immigration purposes, the practical use of this scheme is limited. Instead, employers should aim at using a preferential work permit scheme including the KMR scheme (see above).

Typical for preferential work permit schemes is a waiver of the full labor market test. Specific sectors of certain industries or categories of employment may be eligible for other waivers like exemption from the minimum wage requirement while specific employment activities may be eligible for other benefits as set out below.

All Dutch work permits are applied for with and issued by the central work permit authority *Uitvoeringsinstituut Werknemersverzekeringen* (UWV) in The Hague.

Preferential Work Permit Schemes

Intra-corporate Transfer Scheme

The ICT scheme allows for temporary assignments of transferees from India based companies with at least one corporate establishment in The Netherlands, owned for at least 50 percent. The annual sales turnover of at least EUR 50 million, is not allowed by EU Directive 2014/66, has as yet not reoccurred in the published executive policies and may therefore be disregarded. So, the ICT scheme can also be used for start-up subsidiaries, by companies who transfer staff for the first time, and by companies who do not yet have a legal entity or payroll in the Netherlands, which makes the scheme a flexible option. The salary thresholds are identical to the KMR scheme.

An ICT work permit can be obtained for a maximum term of three years and are not renewable beyond that term. Processing time for an ICT work permit are some three weeks (the entry clearance visa and/or residence permit process not included).

Spouses and under aged children are allowed to accompany intra-company transferees. Spouses have full access to the Dutch labor market in the sense that if the spouse finds a job, the anticipated employer will obtain a work permit without a labor market test.

Transferees

The definition of transferee holds several elements including salary, education and position. There are four main categories:

- key personnel (subdivided in managerial staff);
- specialist staff;
- trainees; and
- employees assigned in connection with the transfer of specific know-how and techniques.

		Salary	Position	Education	Maximum duration
1	Managerial	KMR < 30	Polytechnic level or higher	no formal req.	three years (maximum)
2	Specialist	KMR < 30	Polytechnic level or higher	no formal req.	three years (maximum)
3	Trainee	KMR > 30	In trainee program	Polytechnic or Degree	less than three years
4	Technical	KMR < 30	Transfer of know- how and techniques	Polytechnic or Degree	less than one year

Quarter Makers

Indian companies who would like to open up a Dutch subsidiary or expand or redirect their existing Dutch business operations, are allowed to transfer their managerial, specialist and technical personnel to supervise and assist the new business development operation. The first work permit will be granted for one year, the permits are renewable for up to a period of three years in total. Salaries must be at the Dutch market level. Applications must be supported by a professionally drawn up business plan and financial justifications which will be evaluated by *Rijksdienst Voor Ondernemend Nederland*, (RVO) a specialized agency of the Ministry of Economic Affairs (MEA).

Interns and Trainees (non-intra-corporate)

Two types of interns coming from abroad are eligible for a work permit: interns (*stagaires*) who are still in college or at a polytechnic and trainees (*practicanten*) who are already working but need further training on the job. See the table below.

	Salary	Purpose	Documentation	Educational Level	Maximum Duration
Intern (stagiaire)	50 percent of legal minimum wage <	to complete education course in home country	statement from education institute in home country; detailed internship program	adequate, sufficiently sector-aimed	one year
Trainee (practicant)	Legal minimum wage	to perfect functioning at sending company	agreement between sending and receiving company; return guarantee	adequate, sufficiently sector-aimed	24 weeks

Companies can only hire a maximum of 10 percent of their entire personnel as foreign interns and have to limit the number of foreign trainees (*practicanten*) insofar as to maintain a "reasonable ratio" of trainees in relation to the total number of employees. This ratio is two out of 10.

Researchers and Lecturers

Various categories of academics are exempt from the labor market test as well, including PhD students and junior researchers. For fellowship lecturers a work permit applicable for one year can be obtained. In all cases the minimum wage is the salary threshold. For spouses who want to work as well, employers can obtain a work permit without labor market testing. For project researchers who remain on payroll of the sending University or Polytechnic a permit for two years can be obtained.

Artists and Sports Persons

There are specific work permit schemes for employed artists and sports persons.

Work Permit Waivers (short term stay)

The most important generic work permit waiver category is the one for incidental work, more specifically its subcategories of software implementation and business meetings. This exemption for “software implementation” includes exemptions for assembling and repairing tools, machines or equipment, supplied by his or her employer established outside the Netherlands, or implementing and adapting software supplied by his or her employer established outside the Netherlands or instructing in the use thereof.

The generic work permit waiver for business meetings allows travel to the Netherlands for business negotiations, conclusion of contracts with companies and institutions and to participate in board meetings at the Dutch headquarters of international companies. The waiver extends to home office communicating outside the meeting room.

The maximum stay with regard to incidental work includes a maximum duration of 12 uninterrupted weeks or 84 calendar days within a period of 36 weeks for software implementation, or a maximum duration of four weeks (uninterrupted or not), within a period of 13 weeks, which from a visa point of view works out to 90 days. From 2015 the maximum stay for business meetings without a work permit will be extended to a total of 90 days within a period of 12 months.

To facilitate trainees of international companies, a work permit waiver for an uninterrupted 12 weeks in a period within 52 weeks is granted, to receive in-company training, instruction on products and services and participating in in-company cultural events. This waiver is also available for company personnel that needs to come to The Netherlands to be trained and instructed on products or equipment developed or manufactured in The Netherlands itself.

An official document confirming or denying in advance that the situation at hand actually qualifies as a waiver situation does not exist. This may present an issue in case of an audit by the labor inspection. Therefore, in case of software implementation, it may be advisable to have the UWV assess the employment in advance by applying for a work permit *pro forma*.

Short-term Work Assignments with Employers of Highly Skilled Migrants

Companies registered as sponsors with the Dutch Immigration Department, recognized for hiring highly skilled migrants (*kennismigranten*) are also facilitated in obtaining UWV work permits for work assignments up to 90 days.

This policy regulation provides for a work permit application process with the following features:

- two weeks of processing as a term of effort;
- no labor market testing;
- no vacancy reporting;
- age flexed salary thresholds of the KMR Scheme;

- proof of wage payment: job description to be evaluated, but submission of CV and degree not required; and
- proof of visa (application) not required.

Please note the Immigration Police registration requirement for foreign national short term visa holder who are not residing in a hotel, has been lifted.

Entrepreneurs

Entrepreneurs and business proprietors are only allowed to undertake assignments if they have a residence permit as an independent entrepreneur. The law otherwise prohibits all labor by foreign nationals, including independents. The general permit scheme for independent entrepreneurs is a points system.

Entrepreneurs are considered independent if they own more than 20 percent of the company. If they own 20 percent or less, they are considered as employees and subsequently they fall under the scope of the work permit schemes or the KMR scheme. The scheme has forsaken the age threshold of 60 years.

As for all independents' schemes, the basic principle is that the applicant serves the Dutch national interest with his or her activity. Points can be earned for personal experiences, business plans or any added value for the Netherlands.

It is possible to earn 100 points per category whereas the required minimum per category is 30 points. A financial investment of EUR 500.000 counts as 30 points under the category of adding value to the Netherlands.

The RVO, an agency of the MEA, assesses the application and gives a non-binding advice to the IND.

Start-up Companies

A new residence permit scheme for entrepreneurs in start-up companies will be enacted as of January 1, 2015. This scheme aims at attracting innovative high-tech business initiatives by foreign nationals from outside the EU and the EEA. It does so by relaxing the above explained points system during the first year of establishment. An application for a start-up residence permit can be granted if the RVO has assessed

the business plan as both innovative and economically feasible. In the first year, income must be guaranteed at the applicable level of the Dutch social subsistence allowance. To be eligible for extension in year two, the applicant must comply with the points system of the generic entrepreneur's category.

Investors

Additionally, as of September 1, 2014 a new residence permit scheme has been set in place for foreign national investors.

Indian nationals of independent means including their spouse and minor children may obtain a Dutch residence permit for one year, renewable, conditional to the following requirements:

- a minimum investment of EUR 1.250.000 in a Dutch company or a seed fund, participation fund or joint venture investing in a Dutch enterprise;
- the investment must be paid into a Dutch or EU bank established in The Netherlands operating under the supervision of the Dutch National Bank and using the so-called European Passport;
- the monies put up for the investment have not come from malafide sources. This negative assessment must be made and confirmed in a report by an accountant registered in The Netherlands. The Immigration Service (*Immigratie en Naturalisatiedienst*, IND) runs a security check on the applicant's record as an investor through its Financial Intelligence Unit; and
- the investment must add merit and value to the Dutch economy. The RVO assesses and advises on the innovation merit and the job creation value of the investment plan.

Certain details of the Investor's Scheme may be amended in 2015 to improve the attractiveness of the policy.

Treaties which may be Important for Indian Nationals

Treaties may convey entitlements to Indian nationals who have an intention of migrating to The Netherlands. Such entitlements may be derived from a family tie with an EU national or follow from the human right to have one's family life respected by the government of any State who is a signatory

party to the European Convention for Human Rights. It is advisable to take expert consultation on how to enforce such entitlements.

Income Tax and Social Security Contributions

Convention of The Hague of 1961 (Apostille Treaty)

Indian nationals and their families who are moving to the Netherlands to take up residence for at least four out of six months are required to register their personal data and residential address in the municipal data base record at the Town Hall of the municipality where they have rented or bought their housing. By this registration they will become Dutch residents and receive a personal civil registration number (*burgerservicenummer, BSN*) for receiving social benefits and tax returns.

To register, foreign nationals are required to submit their legalized full birth certificate and other certificates pertaining to their civil status such as a legalized full marriage certificate.

As from September 2008, the Dutch government has accepted India as a signatory member to the Convention of The Hague of 1961, the so-called "Apostille Treaty". This Treaty provides for acceptance by the member states of personal documents issued by the authorities in another member state if such documents are legalized in a uniform simplified legal format as prescribed by the Treaty, the apostle. Indian nationals need to obtain an apostle on their birth certificate and marriage certificate as applicable.

India and the Netherlands

The governments of both India and the Netherlands have signed an Agreement on Social Security (the Treaty) on October 22, 2009. The Treaty has come into force in 2010. The Treaty provisions seek to coordinate the social security systems of the two countries. It intends to prevent employees' double-coverage or no coverage at all. To achieve this, the Treaty establishes an exclusive competence of the Indian or the Dutch legislation in any situation of cross-border employment between the two countries. The principal rule of the Treaty is that a cross-border employee is insured for social benefits in the host country. An important exception in this Treaty states that posted workers shall remain subject to the social security legislation in the country of their sending employer, on the condition that the foreseeable duration of their work does not exceed 60 months.

Incoming Indian employees on Dutch payroll may be eligible for a 30 percent Dutch Tax ruling benefit. The Dutch Tax Authority has established a special tax regime subject to certain conditions for foreign employees hired to work in the Netherlands from abroad. This special tax rule implies that approximately 30 percent of the income of such employees can be paid tax-free. This reduces an overall tax burden of the total employment income of an employee. Employees can also benefit from some other tax advantages related to the 30 percent ruling (example: interest or dividends not being taxable in the Netherlands).

The Tax Authority decides whether the 30 percent ruling is applicable to an employee. To qualify for the ruling, the following conditions have to be met: Employee is hired from abroad (outside the Netherlands); employee has specific knowledge and skills, which are scarce on the Dutch labor market (for example - more than 2.5 years of experience in same kind of job) and employee is hired by a Dutch employer.

As of January 1, 2012 a bill has introduced a series of important amendments. The bill has introduced a generic salary threshold similar to the salary threshold for knowledge migrants of 30 and over to principally replace the 'specific knowledge' requirement. These minimum salaries for the 30 percent tax ruling appliance are indexed every year by the Tax Authority.

Applicants should have a taxable base salary of EUR 36.705 per annum in 2015, which means you have to add the tax free reimbursement to reach the actual paid out salary level for a successful application; EUR 52.436 in 2015. A 30 percent tax ruling is granted for a maximum of eight years. The number of years of living and working in the Netherlands in the last 25 years are deducted from the maximum grant of eight years. Anyone living within a 150 kilometer radius from the Dutch (land) border will cease to qualify as 'having been hired from abroad'. As a result, employees who have lived in Belgium, Western Germany, parts of Northern France and Luxembourg are excluded from the benefit.

On the other hand, the 30 percent ruling has been opened up for PhD and MA students who have graduated in the Netherlands before turning 30 years of age: if they have found an employer within three months from graduating in the Netherlands, they will be deemed as having been hired from abroad. Also, their salary threshold is set significantly lower at EUR 27.901 per annum in 2015, again this amount refers to the taxable salary, which means you have to add the tax free reimbursement to reach the actual paid out salary level for a successful application; EUR 39.860 in 2015.

Applications for a 30 percent ruling grant by those employed as a scientific researcher may are assessed without a salary threshold.

It is advisable to request for a 30 percent ruling from the Dutch Tax Authority within four months of the foreign national employee having moved to The Netherlands and if approved can be handled retro-actively through payroll.

The People's Republic of China

Frank S. Hong

Summary

China, officially known as the People's Republic of China (PRC), is the world most populous nation with over 1.4 billion people. Taiwan, a province of the PRC, is ruled under a separate system that is not accountable to the PRC. Hong Kong, a former British colony and Macau, a former Portuguese colony are now Special Administrative Regions (SAR) under the PRC. The legal systems in Hong Kong, Macau, Taiwan are different from that in the rest of the PRC, commonly known as mainland China. The discussion in this chapter is limited to global mobility issues with respect to mainland China.

Legal System

The PRC has a highly centralized political and legal system. Leaders at various levels of government are selected by their superiors rather than their constituents. The State claims that the PRC has essentially completed the establishment of the socialist legal system with Chinese characteristics. This legal system can partly trace its intellectual roots to the Continental Civil Law and partly to the American legal influence in modern market economy. In the late Qing dynasty, which was the last dynasty before the first The PRC republic was founded in 1911, reformers attempted to establish legal codes based on European

models. The modernization of the PRC's legal system was marginalized by the ensuing civil wars and Japanese invasion. During the first 30 years of the PRC, legal system was again marginalized by the Party's rule. Today's legal system has a very short history that dates back only to 1978 when the economic reform began.

Visas

The PRC adopted a new Exit-Entry Administration Law in June 2012 replacing the 1985 statutory regime on immigration. The new law, took effect on July 1, 2013, and it covers both Chinese nationals and foreign nationals' exiting and entering the PRC. The new law also enhances the measures against foreign nationals' illegal entry, illegal employment and illegal stay by way of biometrics collection, police registration, on-site inspection, fine, detention, removal among others.

One of the new law's underlying social policies is to attract international talents. The new law mandates the Ministry of Human Resources and Social Security among other agencies to develop a guidance catalog of foreign nationals' occupations in accordance with the needs of social and economic developments and talent supply and demand situation in The PRC. The new law codifies the practice of granting "permanent residency" to qualified foreign nationals such as those who make outstanding contributions to the PRC's social and economic developments. On December 12, 2012, 25 agencies of the Central Government jointly issued a regulation providing a whole host of benefits and privileges to foreign nationals with Permanent Residency including for example, purchasing real estate, children's enrollment in school, applying for professional licenses, etc. The regulation expressly provides that other than political rights or otherwise restricted by law, foreign nationals with Permanent Residency enjoy equal treatment as Chinese citizens.

Common Visa Categories Include:

- **L visa** for those who visit the PRC for tourism or leisure, visiting family or other private matters. Tourists need to present Chinese hotel reservations and other proof of financial resources sufficient for the PRC trip to support their visa applications;
- **F visa** for those who go to the PRC for business meetings and visits, academic meetings or lecturing, commercial transactions, exchange in science, technology and culture, short term training

or internship not exceeding six months. An invitation letter from the Chinese host entity is required. In addition, an official visa notice cable or letter issued by the duly authorized agency is also required in most situations. The duly authorized agency is typically the local Bureau of Commerce or Foreign Affairs Office of the municipality where the Chinese host entity is legally registered. Some major state owned companies also have the authorization to issue such Official Visa Notice letter. In major metropolitan areas such as Shanghai, Beijing, Guangzhou and Shenzhen, local rules provide jurisdictions to different government agencies over specific types of Chinese entities which are subject to classifications based on various criteria. As such, just locating the right local governmental agency requires professional advice.

- **X visa** is for foreign nationals who go to the PRC for study, training or internship. The X visa has sub categories of X-1 and X-2 visa. Applicants can apply for X-1 visa if the stay exceeds 180 days. On the contrary, the X-2 visa is for short-term study and the duration of stay is no more than 180 days.
- **Z visa** is for those who go to the PRC for employment and their family members. Foreign nationals who go to the PRC for commercial artistic performance also apply for Z visa. Alien's Employment License issued by local labor authority, Representative Certificate issued by local Administration of Industry and Commerce, or approval issued by cultural regulatory authority is the prerequisite to Z visa application.
- **G visa** is for foreign nationals who travel to a third country via the PRC. A valid visa to the third country and passenger fare to the third country via the PRC are required in support of G visa application.
- **C visa** is for crew members of international flights, trains or ships.
- **J visa** is for journalists. The PRC regulatory authority's approval is required for J visa application.
- **D visa** is for foreign nationals who go to the PRC for purpose of permanent residency. Foreign nationals who have the following may be granted permanent residency:

Employment Visas

Only duly registered legal entities such as corporations, representative offices of foreign companies, social organizations, universities, research institutes have the legal standing to sponsor employment visa application

on behalf of foreign nationals. Chinese citizens or any naturalized Chinese citizens do not have a right to employ foreign nationals within mainland China.

A whole host of Chinese regulatory authorities review eligibility of foreign nationals' employment visa application based on industry policies, local job market conditions, national security, employer's business scope and financial standing, foreign national applicants' academic and professional qualifications, health conditions, fitness to the job position proposed, among other factors. As a general rule, applicants older than 60 years are not qualified for work permit, which is a prerequisite to employment based residency permit unless they are appointed to senior management positions of foreign, invested enterprises of substantial capital, or qualified as "foreign experts" by one of the duly authorized government agencies.

Typically, the Chinese employer starts the application process by submitting the application for an Alien's Employment License to the local Human Resources and Social Securities bureau. The License is further submitted to the local commerce authority in support of application for Official Z visa Notice Letter. The License and The Official Z Visa Notice Letter are the prerequisite to foreign national's application for Z visa at the Chinese Consulate with jurisdiction over the applicant's residency. In most cases, interview for Z visa application by the Consulate is not required. The Z visa is issued for a single entry typically valid for three months after visa issuance. The duration of stay after entry with Z visa is limited to 30 days. Within the 30-day post entry period, the Z visa holder must:

- obtain medical exam report from the designated medical institution;
- report to the local Human Resources and Social Security bureau to obtain the Work Permit; report to the local police station with jurisdiction over the Z visa holder's residency in the PRC to obtain Alien's Temporary Residency Registration; and
- on the strength of Work Permit and Alien's Temporary Residency Registration, obtain Residency Permit from the local police bureau in charge of immigration matters.

Given the series of formalities that must be completed within 30 days of entry with Z visa, a good planning ahead of entry is the key to a smooth process.

A Residency Permit is the official document providing evidence of the foreign national's right to stay in The PRC and to enter into the PRC without additional visa. For those foreign nationals who seek to purchase

real estate in the PRC or to import household items into the PRC, Residency Permit is also the prerequisite paper. The term for work related Residency Permit ranges from 90 days to five years subject to renewal. Work Permit and Residency Permit are employer-specific. In case of change of Employer or residency address, foreign nationals are required to apply for amendment at the local governmental agencies.

Employment and Labor Law

Under the Soviet style command economy, work or employment was not by choice or agreement. Rather, people were assigned to the so called "working units", often for their entire life. Today's labor law was an essential part of the market oriented economic reform. The Labor Law was promulgated in 1995 when the state decided to lay off massive work force from the inefficient state owned enterprises. The Labor Law provided the framework to transform the would be lifelong workers of state owned enterprises into employees in the sense that they can pursue the best opportunities for their skills. The Labor Law also gives the nascent private enterprises the legitimate framework to employ workers to meet their business needs. Just 15 years ago, private hiring would be considered ideologically objectionable "exploitation".

As an entire generation of people has entered into the workforce under the 1995 Labor Law, the society and economy have become much more sophisticated so much so that the broad strokes in the 1995 Labor Law became insufficient to guide employer and employees in their bargainings. In 2008, after months of legislative debates and general discussions in society at large, the Labor Contract Law was promulgated. This statute and its implementation rules have greatly improved the compliance of labor laws across many sectors of the country. In 2013, the Amendment to the PRC's Labor Contract Law was promulgated to strengthen and secure the interests of Labor Dispatching Workers.

Employment Contract

In the PRC, a written employment contract is legally required whenever an employer hires an employee. The Labor Contract Law provides very detailed rules on probation period, non-competition restriction, duty of confidentiality, work hours, severance pay, and termination for cause, employee resignation among others. In case of labor dispute, either employee or employer may submit the dispute to the local labor arbitration commission for resolution. Either side not satisfying with the arbitration decision may file a law suit at the local court to litigate the matter.

Laws Relating To Employees

The Chinese law recognizes the difference between an employee and an independent contractor. Employee's work method, work place, work process and work results are subject to employer's control. Independent contractor is responsible for delivering the work products in accordance with the service contract with the hiring party, but not answerable to the hiring party for work hours, work process, etc.

The PRC is keen on women protection in employment settings. Detailed laws and regulations are adopted to prevent women from being terminated by employer because of their pregnancy or lactation. In contrast, discrimination on the ground of sexual orientation or religion in the employment context is of lesser importance to the society. In urban office settings, sexual harassment issues are increasingly gaining attention.

Income Tax and Social Security Contributions

Personal income is subject to income tax, commonly known as Individual Income Tax (IIT). The PRC adopts seven-bracket progressive income tax rates ranging from three to 45. The deductible expense is currently set at Chinese yuan (RMB) 3,500 for Chinese nationals. For expatriates in The PRC, the deductible expenses are currently set at RMB 4,800. If housing, transportation or even children's tuition is paid by the employer, then such allowances are not taxable. The amount of taxable income shall be computed as follows:

In case of expatriates in The PRC, a monthly deduction of RMB 4,800 shall be allowed as expenses and the portion in excess of RMB 4,800 shall be subject to IIT. Example: An individual has a monthly salary of RMB 8,000, his Taxable income amounts to RMB 3,200.

The PRC has signed treaty on avoidance of double taxation with the United States (U.S.), among many other nations. Under the Treaty, if an American citizen whose salary is paid offshore, visits the PRC for more than 183 days, then his or her income sourced from the PRC (such as salary earned for work performed in the PRC) is subject to IIT. Tax authorities painstakingly go into details such as reviewing entry or exit stamps on passports to count days of presence in the PRC in order to collect tax. Tax paid in The PRC or America will be subject to credit so that double taxation on the same income will be avoided in accordance with the Treaty.

If an expatriate holds a job position for organizations legally registered under PRC laws, such as Chief Representative for a Representative

Office, General Manager of a wholly owned foreign enterprise of a joint venture company in the PRC, then the expatriate will be subject to IIT for their PRC sourced income from day one of holding such a job position. An exception is that if a Chief Representative has never spent a day physically in The PRC, then the Chief Representative will be exempted from IIT. With this rule in mind, some foreign companies would appoint a person who has no real need to travel to the PRC on business to hold the Chief Representative position for their representative offices in the PRC.

It is important to note foreign nationals who reside in the PRC for more than five years are taxed on their worldwide income starting on the sixth year provided that the foreign nationals continue to reside in the PRC for a full year. To avoid this tax treatment, absence from the PRC continuously for more than 30 days or accumulatively more than 90 days within the sixth year breaks the full year and allows the five year period to be reset.

Employer and its employees before their legal retirement age are both legally required to make social insurance contributions. The social insurance funds include Workers Compensation Fund, Pension Fund and Medical Insurance Fund. The base salary subject to social insurance payments is typically capped at the 300 of the citywide average monthly salary. For example, in 2013, the monthly average salary for employees in Beijing urban area was RMB 5,793 (about USD 927), which records a 10.9 percent increase from 2012. In year 2013, the monthly average salary for employees in Shanghai urban area was RMB 5,036 (about USD 806), which records a 7.3 percent increase from 2012. After experimenting with social security under provisional regulations for about 20 years, the PRC's Social Insurance Law came into effect on July 1, 2011. Effective October 15, 2011, Chinese entities employing expats or having expats seconded from their overseas employers shall register those expats working in the PRC for social insurance contributions. In reality, enforcement of this requirement varies among different cities.

Other Statutory Deductions

Employer and employees are also required to make contributions to Public Housing Providence Fund. Employer, but not employee, is required to make contributions to Materiality Insurance Fund and Workers Compensation Fund.

As social and economic developments vary in different regions in the PRC, social security payments and other statutory deductions vary across different municipalities.

Below please find the rates for Shanghai as an example:

Social Security Contributions in Shanghai

Rates of monthly contributions

	Pension	Medical Insurance	Unemployment Insurance	Maternity Insurance	Workers Compensation	Housing Fund
EMPLOYER	22 percent	12 percent	Two percent	0.5 percent	0.5 percent	Seven percent
EMPLOYEE	Eight percent	Two percent	One percent	0	0	Seven percent

THE PHILIPPINES

Rodelle B. Bolante and Russel L. Rodriguez

Summary

The Republic of the Philippines or the Philippines as it is generally referred to is a country in Southeast Asia situated in the western Pacific Ocean. Luzon, Visayas and Mindanao are its major islands while Manila (located in Luzon), is its capital city.

With an estimated population of about 98 million people, the Philippines is the world's twelfth most populous country covering an area of 343,448.32 square kilometers. An additional 12.5 million Filipinos live overseas. It has a Gross Domestic Product (GDP) of United States Dollars(USD) 272 billion (2013).

Legal System

The Philippines is a republican state, where all government authority emanates from the people and is exercised by representatives chosen by the people. Following a presidential form of government, the Philippines has three branches of government. These are the Executive, Legislative and Judiciary.

The Executive branch is led by the President, with the Vice-President as the successor. The Legislative branch has a bicameral structure with the House of Representatives as the lower house, and the Senate as the

upper house. The people directly vote for the President, Vice President and Members of Congress. Representatives are also chosen through the party list system of registered national, regional and sectoral parties or organizations. Senators are voted by the people at large. Members of the Judiciary are appointed by the President.

The Judiciary is represented by the Supreme Court, which has full authority to annul unconstitutional acts of the Executive and Legislative. Decisions of the Supreme Court form part of the legal system of the country. The legal system is hierarchical, where the Philippine Constitution is supreme. Laws promulgated by the Legislative and implementing rules issued by the Executive must conform to the Constitution.

Visas

Overview

A Philippine Visa is an endorsement made on a travel document by a consular officer at a Philippine Embassy or Consulate abroad denoting that the visa application has been properly examined and that the bearer is permitted to proceed to the Philippines and request permission from the Philippine Immigration authorities at the ports of entries to enter the country. The visa thus issued is not a guarantee that the holder will be automatically admitted into the country, because the admission of foreign nationals into the Philippines is a function of the immigration authorities at the port of entry.

Temporary Visas

Application for a temporary visitor's visa could be made either in person or through mail. Applications should be submitted one month before the intended departure to the Philippines.

Processing of visa applications takes approximately five working days from receipt of the complete requirements.

Note that nationals from certain countries who are traveling to the Philippines for business and tourism purposes are allowed to enter the Philippines without visas for a stay not exceeding 30 days, provided they hold valid tickets for their return journey to port of origin or next port of destination and their passports are valid for a period of at least six months beyond the contemplated period of stay. However, immigration

officers at ports of entry may exercise their discretion to admit holders of passports valid for at least 60 days beyond the intended period of stay. http://www.dfa.gov.ph/index.php/list-of-countries-for-21-day-visa.

The Different Types of Temporary Visas are:

- Single entry visa valid for three months; and
- Multiple entry visa valid for six months.

The above mentioned visas are for entry purposes only. Period of stay (which will not exceed 59 days) will be determined by the immigration officer at the point of entry in the Philippines.

Those who intend to go to the Philippines for any temporary activity which is commercial, industrial or professional in character may apply for a temporary visa. Examples of temporary business activities include: (i) attending scientific, educational or business meetings or conventions, or (ii) those which are in connection with the activities of a traveling salesman.

While on temporary visitor status, foreign nationals may apply for: (i) special work permit which is valid for a maximum period of six months, or (ii) a regular working visa as well as, in most cases, an alien employment permit.

Employer or Sponsoring Entity

The Philippine Labor Code (the Labor Code), provides that any foreign national seeking admission to the Philippines for employment purposes and any domestic or foreign national employer who desires to engage a foreign national for employment in the Philippines shall obtain an employment permit from the Department of Labor and Employment (DOLE). The employment permit may be issued to a Non-resident foreign national or to the applicant employer after a determination of the non-availability of a person in the Philippines who is competent, able and willing at the time of application to perform the services for which the foreign national is desired.

For an enterprise registered in preferred areas of investments, an employment permit may be issued upon recommendation of the government agency charged with the supervision of said registered enterprise.

Alien Employment Permits and Employment Visas

A Non-resident foreign national must have an Alien Employment Permit (AEP) and a valid work visa to secure lawful employment in the Philippines.

An AEP is obtained from the DOLE. In general, a duly filed AEP application immediately serves as a provisional permit to work while the AEP and the work visa are being processed. To obtain a permit, the applicant (Non-resident foreign national or employer) must show that no Filipino is competent, able, and willing to take the employment being offered.

The AEP shall be valid for a period of one year, unless the employment contract provides otherwise, which in no case shall exceed five years.

A Non-resident foreign national found working without an AEP or with an expired AEP will be subject to a fine of Philippine Pesos (PHP) 10,000 for every year or a fraction thereof.

The 9(g) visa is the typical working visa for Non-resident foreign nationals who are proceeding to the Philippines to engage in a lawful occupation where a *bona fide* employer-employee relationship exists. It is the most common type of work visa available for Non-resident foreign nationals. It takes about three to four months to process and secure a 9(g) visa. As a general rule, 9(g) work visa is valid for a period co-terminus with the AEP issued by the DOLE. The visa may be extended yearly however, the total extensions shall not, as a general rule, exceed five years.

If the employer is registered with the country's Board of Investments (BOI) or Philippine Economic Zone Authority (PEZA), the Non-resident foreign national may also obtain a 47(a)(2) work visa (otherwise known as a special non-immigrant's visa) from the Bureau of Immigration (BI). It takes approximately three to four weeks to process and secure a 47(a)(2) visa.

Intra-company Transfer Permits

Additional position or a change in position of the foreign national in the same company or subsequent assignment in related companies during the validity or renewal of the AEP will be subject for publication requirement and payment of publication fee. However, a change of employer shall require an application for new AEP.

AEP Waivers

Only the following categories of foreign nationals are exempt from securing an AEP in order to work in the Philippines:

- all members of the diplomatic services and foreign government officials accredited by the Philippine Government;

- officers and staff of international organizations of which the Philippine government is a cooperating member, and their legitimate spouse desiring to work in the Philippines;
- foreign nationals elected as members of the governing board who do not occupy any other position, but have only voting rights in the corporation;
- all foreign nationals granted exemption by special laws and all other laws that may be promulgated by the Congress;
- owners and representatives of foreign principals, whose companies are accredited by the Philippine Overseas Employment Administration (POEA), who come to the Philippines for a limited period solely for the purpose of interviewing Filipino applicants for employment abroad;
- foreign nationals who come to the Philippines to teach, present and/or conduct research studies in universities and colleges as visiting, exchange or adjunct professors under formal agreements between the universities or colleges in the Philippines and foreign universities and foreign government; provided that exemption is on a reciprocal basis; and
- permanent resident foreign nationals, probationary or temporary resident visa holders.

Investor Visas

A Non-resident foreign national seeking to reside and work in the Philippines not as an employee may do so as an investor. The foreign national may stay for an indefinite period under a Special Investor's Resident Visa (SIRV) program. A continuing investment of at least USD 75,000.00 in:

- Manufacturing and Service Sectors;
- Investment Priorities Plans projects of the BOI; or
- Publicly Listed Corporations, is required.

For foreign nationals investing in a tourist related project or in any tourist establishment, investment of not less than USD 50,000 is required.

Special Visas for Employment Generation

There is also a Special Visa for Employment Generation (SVEG) for Non-resident foreign nationals who employ at least 10 Filipinos in a lawful and sustainable enterprise, trade or industry. Non-immigrant

foreign nationals who wish to avail of the SVEG should comply with the following conditions:

- the applicant shall actually, directly or exclusively engage in viable and sustainable commercial investment or enterprise in the Philippines, exercises or performs management acts or has the authority to hire, promote and dismiss employees;
- he evinces a genuine intention to indefinitely remain in the Philippines;
- he is not a risk to national security; and
- his commercial investment or enterprise must provide actual employment to at least 10 Filipinos in accordance with Philippine labor laws and other applicable special laws.

The above-mentioned requirements must be continually satisfied by the foreign national for him or her to continue to be a holder of the SVEG.

Permanent Visas

Quota Immigrant or Preference Visa

Under the Philippine Immigration Act of 1940 (CA 613) (the Immigration Act), there may be admitted into the Philippines immigrants, termed "quota immigrants" not in excess of 50 of any one nationality or without nationality for any one calendar year.

To qualify for a quota immigrant visa, the applicant must establish that:

- he is in possession of a valid passport (or equivalent document) and visa at the time he files his application;
- he does not belong to any class of excludible or deportable foreign nationals under the Immigration Act;
- there is a reciprocity arrangement between his country and the Philippines;
- he is among the preferred classes of foreign nationals:
- he possesses qualifications, skill, or scientific, educational or technical knowledge which will advance and be beneficial to the national interest of the Philippines; and
- he possesses sufficient capital for a viable and sustainable investment in the Philippines.

Non-Quota Immigrant Visa

The following immigrants, termed "non-quota immigrants," may be admitted without regard to numerical limitations:

- the wife or the husband or the unmarried child under 21 years of age of a Philippine citizen, if accompanying or following to join such citizen;
- a child of alien parents born during the temporary visit abroad of the mother, the mother having been previously lawfully admitted into the Philippines for permanent residence, if the child is accompanying or coming to join a parent and applies for admission within five years from the date of its birth;
- a child born subsequent to the issuance of the immigration visa of the accompanying parent, the visa not having expired;
- a woman who was a citizen of the Philippines and who lost her citizenship because of her marriage to an alien or by reason of the loss of Philippine citizenship by her husband, and her unmarried child under 21 years of age, if accompanying or following to join her;
- a person previously lawfully admitted into the Philippines for permanent residence, who is returning from a temporary visit abroad to an un-relinquished residence in the Philippines; and
- a natural born citizen of the Philippines, who has been naturalized in a foreign country, and is returning to the Philippines for permanent residence, including his spouse and minor unmarried children, shall be considered a non-quota immigrant for purposes of entering the Philippines.

Special Retiree's Resident Visas

Non-restricted foreign nationals may also apply for a Special Resident Retiree Visa (SRRV) subject to certain requirements.

Employment and Labor Law

The 1987 Philippine Constitution mandates protection to both employers and employees. Congress has passed various laws relating to labor standards and relations. The most comprehensive law is the Labor Code, which sets the minimum terms of employment, the duties and rights of employers and employees and the rules on collective bargaining. Other labor laws relate to social security, health care, discrimination and harassment and government service insurance system.

The Labor Code contains provisions for hiring, human resource development, working hours, rest periods, wages, employee compensation for work injury, medical care, labor-management relations, unions, retirement and termination of employment.

The implementation of labor laws is within the competence of the DOLE. The DOLE is headed by a Secretary, who serves as the alter-ego of the Philippine President. There are offices within the DOLE that are tasked to deal with employment and employer-employee concerns, such as: wages (including the minimum wage) and other terms of employment (example: work conditions), union registration and cancellation, collective bargaining agreements, and strikes and lockouts. The National Labor Relations Commission exercises jurisdiction over disputes involving unlawful termination and other claims arising from employer-employee relations. However, decisions in labor cases may be ultimately reviewed by the appellate courts, including the Supreme Court in certain cases.

Violations of labor laws may give rise to civil and/or administrative liability on the part of the employer. In addition, violation of certain provisions of labor laws, particularly the Labor Code, may give rise to criminal liability, example - withholding of wages by force, withholding of wages as consideration for continued employment, employment of retaliatory measures, discrimination against certain employees, stipulations against marriage, violation of right against self-organization, and non-payment of retirement benefits.

Employment Contracts

Content and Form

As a general rule, a contract of employment need not be in writing. In fact, a substantial number of such contracts in the Philippines are not in writing.

Like any other contract, a contract of employment exists as long as there is:

- consent of the parties;
- consideration; and
- object certain.

Moreover, the contracting parties need not incorporate the provisions of the Labor Code in the employment contract, as the law is deemed written therein. Changes to an employment contract are by agreement

between the employer and the employee. However, any change cannot fall below the statutory minimum standards. There is no legal requirement to write the employment contract in a local language. However, the employer has the burden of showing that the employment contract is in a language understood by the employee.

Employers and employees are free to stipulate the terms and conditions in the employment contract provided they are not contrary to law, morals, good customs, public order or public policy. The Civil Code (Republic Act Number [RA] 386) provides that labor contracts shall be construed in favor of the safety of and provision of a decent living for, the laborer (Article 1702, Civil Code). Provisions in the employment contract relating to awards of damages, interpretation of a collective bargaining agreement, validity of a waiver, preference of workers claims and fixed-period employment are construed using Civil Code provisions (Cesario A. Azucena, Jr., The Labor Code with Comments and Cases, 6th edition, 2007).

However, the contents of certain employment contracts are specifically governed by special laws. For example, specific undertakings by the employer should be incorporated in contracts affecting: i) Children working in public entertainment or information through cinema, theater, radio, or television (RA 7610 or the Special Protection of Children Against Child Abuse, Exploitation and Discrimination Act, as amended by RA 7658); ii) Seafarers (RA 8042 or the Migrant Workers and Overseas Filipinos Act of 1995, as amended by RA10022); and iii) Employees in Special Economic Zones (RA 7916 or the Special Economic Zone Act of 1995, as amended by RA 8748).

Independent Contractor

Contracting and sub-contracting arrangements are subject to regulation for the promotion of employment and the observance of the rights of workers to just and humane conditions of work, security of tenure, self-organization, and collective bargaining.

Additional Laws Applicable To Foreign Nationals

As a general rule, local law seeks to protect Philippine nationals by prioritizing them in employment. However, local law recognizes that there are certain occupations that require the expertise of foreign nationals. Employment of Non-resident foreign nationals is also encouraged when they provide investment and further employment.

Laws relating to labor standards and employer-employee relations are applicable to foreign nationals employed in the country. An expatriate

employment contract is treated in the same way all other contracts are treated.

Generally, an expatriate employment contract must provide for the duration of employment, services expected, salary (including the currency and manner of payment) and other benefits (example: vacation leaves, health care, and insurance), housing accommodation and transportation services. Provisions on the spouse and dependents, including their recreation and schooling activities, may also be included.

Income Tax and Social Security Contributions

Income Tax

Under the National Internal Revenue Code of 1997, a citizen of the Philippines residing therein is taxable on all income derived from sources within and outside the Philippines. On the other hand, a foreign national individual, whether a resident or not of the Philippines, is taxable only on income derived from sources within the Philippines. As a general rule, expatriates are required to file their annual income tax returns and report all income earned within Philippines, except those - (i) already subjected to final tax, (ii) exempt from tax under the existing tax rules and regulations or (iii) existing tax treaty between the Philippines and the country where such expatriate employees are residents. Expatriate employees falling under the following classifications are not required to file income tax returns provided - (i) they only have one employer during the year; (ii) they received purely compensation income and (iii) their income has been subjected to the correct withholding tax by their employer (i.e., tax due is equal to tax withheld):

- Resident Aliens: These include expatriates who are staying in the Philippines for the purpose of a continued employment for an indefinite time as may be required by the exigency of his position;
- Foreign Nationals employed by Regional Area or Operating Headquarters of Multi-National Companies, Foreign Petroleum Service Contractors and Offshore Banking Units: They enjoy the preferential tax rate of 15 percent on gross income. This is considered a final tax and the employee is no longer required to file an annual income tax to report such income; and
- Non-resident Aliens Not Engaged in Trade or Business in the Philippines: Their income is subject to 25 percent final tax.

Social Security, Employees' Compensation, National Health Insurance Program and Home Development Mutual Fund Contributions:

The Social Security System (SSS) was promulgated in 1954 and was amended in 1997 by RA 8282. It is broadly comparable to the United States system and provides old age, disability and survivor benefits, as well as maternity and sick leave benefits. All employees not over 60 years of age are compulsorily covered. Mandatory coverage means that the employer will have to register its employees and must remit to the SSS both the employer's and employees' shares in the required contributions.

The Employees' Compensation program (EC) provides benefits for work-related injuries, disability and death.

The National Health Insurance Program provides medical and hospitalization benefits through the Philippine Health Insurance Corporation (PhilHealth). Membership in the NHIP is compulsory for all employees. The employers and the employees share equally in the monthly contributions, which, in no case, shall exceed three percent of the employee's monthly salaries. Employers are required to remit their share and withhold and remit their employees share in the monthly contributions.

Coverage is now mandatory for all employees covered by the SSS and the GSIS and their respective employers, notwithstanding any waiver of coverage previously issued.

There are some other statutory deductions with regards to meals, facilities and permitted deductions, example: subsidized meals and snacks.

Proportionality between Local and Foreign National Employees

The 1987 Philippine Constitution directs the State to promote "equality of employment opportunities for all." Similarly, the Labor Code provides that the State shall "ensure equal work opportunities regardless of sex, race or creed."

Causes for Termination

Notwithstanding the rule in civil law on the sanctity of contracts, the Labor Code provides authorized and just causes to terminate employment.

For termination due to just causes, the employee must be given two separate notices before his employment could be validly terminated: (i) a first notice to apprise the employee of the charge against him and (ii) a second notice to communicate to the employee that his employment is being terminated.

Recent Developments

Indian nationals with valid visas for Australia, Canada, Japan, Singapore, The United Kingdom (UK) and The United States (U.S.) or *Schengen* Area countries are visa-exempt for business visits up to 14 days. However, they are not permitted to convert to another visa category while in the Philippines. When entering the Philippines to conduct activities that require a Work Permit. Indian nationals must enter with a Temporary Visitor Visa in order to obtain a Work Permit in the country.

Meanwhile, pursuant to a Memorandum Circular issued by the BOI, holders of temporary visitor's visa may now extend their authorized stay every two months for a total of not more than 24 months for visa-required nationals and 36 months for non-visa required nationals.

The Republic of Panama

Nelson E. Sales

Summary

The Republic of Panama is a country located in the south of Central America. It is known as the Isthmus, since it connects North and South America. The country has a small geographical area, which facilitated the construction of the Panama Canal, expediting the crossing from the Pacific Ocean to the Atlantic Ocean, and vice versa. For its strategic geographic position, many multi-national companies have established their regional hubs in Panama. Panama is also known as the *Crisol de Razas* (Melting Pot), due to the variety of cultures, high immigration, and different nationalities that co-exist in such small territory.

Legal System

The Republic of Panama's sources of law are mainly: the Constitution, legislation or statutes, customary law, doctrine and case law. The Congress (National Assembly) is the body in charge of enacting statutes and legislations. The President has veto power over the statutes and legislation enacted by the Congress.

In Panama, case law serves as precedent. Nevertheless, precedent is not considered mandatory; it does not become part of the law.

Court decisions made by judges should follow, to some degree, past decisions, but mainly, they must be made in accordance to strict interpretation of the statutes and legislations in place. In that sense, precedents should only serve as to understand the reasoning behind particular cases.

Immigration Policies as Response to Economic Growth

Panama's geographic location and establishment as a hub in the Americas for logistic, financial, and transportation services, plus an outstanding economic stability, has made this country an attractive one for foreign investors. Its fast growing economy and almost full employment have created a tight labor market in which qualified professionals and executives are scarce. It should be mentioned that this economic prosperity and increase of foreign investment have not come totally spontaneously. In the last decade, governments have enacted policies with benefits of different nature, drawing attention of multi-national companies to establish their regional headquarters in the Republic of Panama. Immigration flexibility is one of such benefits.

In Panama, the employment of foreign nationals is limited in order to protect the local work force. In general, the rules for employing foreign nationals are as follows:

The Panamanian Labor Code establishes that 90 percent of the total work force of any given employer in Panama must be composed of one or the combination of Panamanian citizens, foreign nationals married to a Panamanian citizen and/or foreign nationals with more than 10 years of residence in Panama. In other words, for every 10 Panamanian citizens and/or foreign nationals married to Panamanian citizen and/or foreign nationals with more than 10 years of residence in Panama, the employer may hire one foreign national as an employee.

This restriction applies not only to the employers' headcount, but also to its payroll. This means 90 percent of the sums of salaries paid to an employers' work force have to be intended for Panamanian employees, and or foreign nationals married to Panamanian citizen and or foreign nationals with more than 10 years of residence in Panama.

For easy reference, let us take the following practical example: A company has 10 Panamanian employees. The sum of the monthly salaries of the said Panamanian employees is United States Dollars (USD) 10,000.00. Under these circumstances, the company is allowed to have one employee whose salary is not higher than USD 1,000.00.

The limitations for foreign employment described above, have an exception. Companies may hire foreign nationals as technical personnel, or in managerial positions, that do not exceed the 15 percent of total headcount and payroll of a given company. Even though the law establishes that the calculation is made on the percentage mentioned above, the authorities have the criteria that for every 15 Panamanian citizens and/or foreign nationals married to Panamanian citizen, and or foreign nationals with more than 10 years of residence in Panama, employers are allowed to hire one technical or managerial foreign national as an employee.

With the restrictions mentioned above, the government seeks to protect and give priority to local work force. Nevertheless, and pursuant to the already mentioned lack of local qualified personnel, government has enacted legislation facilitating the employment of foreign personnel. A few examples are the following:

The Colon Free Zone and Other Free Trade Zones:

Panama has delimited economic areas not considered local territory for customs purposes and other tax benefits. The largest and most popular is the Colon Free Zone. Located in the Colon Province, at the Atlantic side entrance of the Panama Canal and is surrounded by the biggest port system of the country. The Colon Free Zone has become a hub for export of products from all around the world and of different brands. By establishing their presence within the Colon Free Zone, companies are allowed to bring foreign national executives of managing positions, without being subject to local quotas. This means that no restrictions apply to the employment of foreign executives for companies in the Colon Free Zone.

Multi-national Headquarter Regime:

In an attempt to attract foreign entities to establish their regional headquarters in Panama, government enacted a law in 2007, creating the Multi-national Headquarters Regime (MHQ). Under such a regime, multi-national companies may establish in Panama to provide services to their main offices, affiliates or other companies within the same economic group. Generally, MHQs are allowed to bring into the country foreign nationals who are not subject to traditional payroll headcount limitations and with special tax benefits. MHQ visas are granted for a period of five years with the possibility of renewal for the same period of time. Currently, more than 100 multi-national companies (MNCs) have established their regional headquarters in Panama.

Visas

Friendly Nationals Visa:

In 2012, the government created a visa and work permit for nationals of certain countries, that grants them permanent residence and an indefinite work permit. Currently, holders of Friendly Nationals Visa (FNV) are not subject to foreign hire restrictions. Citizens of the following countries are eligible to apply for the FNV: Germany, Argentina, Australia, Austria, Brazil, Belgium, Canada, United States of America (U.S), Spain, Slovakia, France, Finland, The Netherlands, Ireland, Slovenia, Japan, Norway, United Kingdom (UK), Uruguay, Chile, Switzerland, Sweden, Singapore, South Korea, Czech Republic, Poland, Hungary, Greece, Portugal, Croatia, Estonia, Lithuania, Latvia, Cyprus, Malta, Mexico, Serbia, Montenegro, Israel, Denmark, South Africa, New Zealand, Hong Kong, Luxembourg, Liechtenstein, Monaco, Andorra, Marino, Costa Rica, Paraguay and Taiwan.

Foreign Professional Visa:

Panama has enacted legislations allowing foreign nationals to apply for a permanent residence, by providing evidence to the immigration authorities, that they have a diploma corresponding to a profession that is not restricted for practice only to Panamanians (law, medicine, architecture, and engineering, among others). With this visa, foreign nationals do not require local sponsorship, thus visas and work permits are granted without the application of any foreign hire restriction policies.

All of the immigration policies mentioned above have been done to adapt to Panama´s current situation of lacking a qualified workforce.

Employment Law Considerations

Panamanian and foreign nationals working in Panama are subject to local labor laws (with some few exceptions). Thus, it is important for employers to understand the employment law system in the country.

Unlike countries, Panama has no “at will” labor contracts. To the contrary, Panamanian labor law is oriented to maintain stable employment conditions for the employee. Therefore, after two years working for the same employer the employees have “stability” and cannot be dismissed without justified cause. If the employee presents a claim against the employer regarding the dismissal, the employer must prove the justified cause for dismissal.

Causes for justified dismissal are listed in the Labor Code. Unjustified dismissals are subject to an indemnity payment in favor of the employee, which is calculated according to the years of employment (3.4 weeks' salary per year, during the first 10 years, and one week for any additional year).

During the first two years of employment, employees can be dismissed without justified cause. Employers must give or pay the employee a one month notice period and the indemnity (3.4 weeks' salary per year or the proportional amount).

With regards to salary and legal labor benefits, the following relevant matters should be taken into consideration.

The minimum wage depends on company activities and it is approximately USD 2.36 per hour. Salary can be calculated per hour, week or month, calculating the amount according to the minimum wage, but must be paid in periods not exceeding 15 days.

Salary includes payments in cash and also any other benefit received by the employee from his employer because of the labor relation.

All employees are entitled to 30 days annual rest (vacation) with pay, for every 11 months they work. Vacations are granted for the purpose of giving the employee days to rest and the waiving thereof are not permitted in return of remuneration or compensation. However, vacations are accumulative for up to two periods, by agreement between the employer and the employee. If periods in excess of those permitted are accumulated, the employee cannot demand rest for the periods accumulated in excess, but he or she is always entitled to be paid the corresponding amount.

All employees are entitled to a 13 month bonus, corresponding to one month salary divided in three installments, paid on or before April 15, August 15, and the last one on December 15 of the given year.

Income Tax and Social Security Contributions

In Panama, the tax system is territorial based and not global. This means that income generated within Panamanian territory or due to services rendered within Panamanian territory is taxable income. Foreign sources of income are not taxable in Panama.

An individual's tax residential status is determined by the person's period of stay in Panama during the course of 365 days.

Foreign nationals that spend 183 days or more in Panama, in the course of 365 days, will be considered tax residents. This means that the foreign national would have to file tax declarations. Nevertheless, the foreign national will only be subject to pay tax over taxable income as explained above.

Foreign nationals hired as employees in Panama, are also subject to income tax (some exceptions apply). The employer is required to make the retentions and deductions from the salary that corresponds to the applicable taxes.

Income tax rate depends on the annual income as follows:

- up to USD 11,000.00 annual income, no income tax applies;
- from USD 11,000.00 to USD 50,000.00 annual income, income tax applies at a rate of 15 percent; and
- the portion above an annual income of USD 50,000.00 will be taxed at a rate of 25 percent.

All employees must be included in the Social Security Regime. The contribution to that regime is 9.75 percent for the employee and 12.25 percent for the employer, calculated over the total monthly salary. In addition, there is a 1.50 percent educational tax for the employer. The employer is obliged to make the corresponding deductions from the employee's salary, and make payroll and income tax payments, through a monthly payroll reporting.

Panama has become a hub for multi-national companies and a very attractive destination to foreign investors. This has led to the increased trend of inflows of foreign nationals. It becomes relevant for employers established in Panama, to understand immigration policies and restrictions, as well as labor, social security, and tax implications in the hiring of such foreign nationals.

UNITED KINGDOM

Poorvi Chothani

Summary

The United Kingdom (the UK or Britain) is a sovereign state located off the north-western coast of continental Europe.The country includes the island of Great Britain, the north-eastern part of the island of Ireland, Scotland and Wales. It covers an area of 243,610 square kilometers and has a population of approximately 6.3 million. English is the official language.

The UK follows a unitary state system governed under a constitutional monarchy and a parliamentary system, with its seat of government in London.

Legal System

There are four principal sources of law in the UK; Legislation, Common Law, European Union (EU) Law and the European Convention on Human Rights (ECHR). The UK parliament consists of the House of Commons and the House of Lords. The UK parliament is the main legislating body and is situated in London. Common Law is the legal system followed in England and Wales, therefore the decisions of the senior appellate courts become a part of law. As the UK is a member of the EU, the EU laws take precedence over UK law. As the UK is a signatory to the ECHR, it

enables all courts in the UK to protect the rights mentioned in the ECHR. There is a difference between public law and private law. In UK civil law covers areas such as contracts, negligence, family matters, employment, probate and land law. Criminal law defines the boundaries of acceptable conduct and is a part of public law.

Visas

Business Visas

A business visa is granted to those, whose purpose of visit to the UK is to conduct business activities for a maximum period of stay not exceeding six months. This visa does not include any provisions for employment. All foreign nationals must obtain a visitor visa from the appropriate British Diplomatic Post before traveling to the UK, unless a special treaty or agreement indicates otherwise. Business visitors must be able to show that they have adequate funds to cover all the expenses of their journey to the UK. They must show that they have no intention of permanently shifting base to the UK and do not wish to make any sales or take up any academic course. People who wish to travel to the UK on a business visa must have specific plans for their trip. The purpose of the visit and the time of stay must be consistent with each other. A business visa may be used by consultants, advisors, individuals exploring business opportunities and those wishing to attend conferences and trade fairs.

It is important that the applicant is able to establish:

- a *bona fide* intention of a genuine visit for business and not for paid employment;
- that the applicant is of good health and character;
- along with evidence that there are no restrictions on his or her travel to the UK;
- no intention to remain permanently in the UK; and
- a ticket for onward travel from the UK.

This visa allows business people to make short business visits to the UK during the visa validity period. Visas cannot be extended in the country itself.

Employment Visas

The UK Points Based System (PBS) provides for various categories from Tier 1 to Tier 5. This chapter provides a brief introduction to Tier 1 of the

PBS, which does not require sponsorship and an overview of Tier 2 of the Points Based System, which requires sponsorship. This is the most commonly used employment based visa.

Tier 1

1) Exceptional Talent

This is part of the points-based system and is for people who are internationally recognized as world leaders or potential world-leading talent in the fields of science and the arts and who wish to work in the UK.

An individual can apply for a Tier 1 (Exceptional Talent) visa if:

- he or she has been endorsed as an internationally recognized leader or emerging leader in a field in science, humanities, engineering, medicine, digital technology or the arts; and
- he or she is from outside the European Economic Area (EEA) and Switzerland.

There is a two stage application process to get this visa:

- the individual will first need to apply to the Home Office for endorsement as a leader or an emerging leader in a particular field; and
- then, once he or she has been endorsed, one can apply for the visa.

There is a quota applicable under this visa category, with 500 places released on both April 6 and October 1 each year. This visa will allow the individual to remain in the UK for up to five years and four months if the application is made outside the UK and five years if the application is made inside the UK.

2) Investor

This category is for high-net-worth individuals who want to make a substantial financial investment in the UK. The applicant does not require a job offer in the UK and the application is assessed on the applicant's ability to invest Great Britain Pound (GBP) 2,000,000 in the UK.

This visa will allow the individual to remain in the UK for a maximum period of three years and four months and a further extension of two years can be applied for.

3) Entrepreneur

An individual can apply for a Tier 1 (Entrepreneur) visa if:

- he or she wants to set up or run a business in the UK;
- he or she is from outside the EEA and Switzerland; and
- he or she meets the other eligibility requirements.

This category of the points-based system enables non-European migrants who want to invest in the UK by setting up or taking over, and being actively involved in the running of a business or businesses in the UK.

This visa allows an individual to remain in the UK for a maximum of three years and four months. An individual can apply to extend this visa for another two years if he or she is already in this category and three years if he or she is switching to it from another category. It may be possible to apply for settlement (known as 'indefinite leave to remain') once an individual has been in the UK for five years.

Post-Study Work

This category of the points-based system is designed to allow the UK to retain graduates who have studied in the UK. Once the graduates have been granted permission to stay under Tier 1 (Post-Study Work), they can look for work without needing to have a sponsor.

From July 11, 2014, an individual is allowed to make an initial application in the UK only if he or she has specific types of funding or if he or she qualifies under the transitional arrangement below. The individual must have access to GBP 50,000 or more from the following specific types of funding:

- one or more UK entrepreneurial seed funding competitions which is listed as endorsed on the UK Trade & Investment (UKTI) website; and
- one or more UK Government Departments or Devolved Government Departments in Scotland, Wales or Northern Ireland, which is made available by the Department(s) for the specific purpose of establishing or expanding a UK business.

Tier 2

Tier 2 offers an entry route in to the UK for skilled workers who are citizens of countries outside of the EEA. In all cases people applying for

entry under this scheme must have job offer and fulfill other requirements as detailed for the different categories.

General

This category is for people coming to the UK with a job offer to fill a gap that cannot be filled by a settled worker. This category includes applicants going to the UK to fill shortage occupation. Such occupations are listed on an official Shortage Occupation List. There is an annual limit on the number of Certificates of Sponsorship (CoS) that are available under this category. This annual limit of 20,700 will remain at this level until April, 2015. This limit will be divided into 12 equal monthly allocations of 1725 restricted CoS. Employees seeking entry to fill a vacancy with a salary of GBP 153,500 or above are not affected by the limit.

Resident Labor Market Test Changes

The following categories are exempted from advertising in Job Centre Plus for the Resident Labor Market Test (RLMT), but do still have to advertise in one other appropriate medium:

- jobs paid above GBP 70,000 but below GBP 153,000 and Designated PhD. level jobs;
- for designated PhD. level jobs only, recruiters will be able to select the best candidate for the job rather than the most suitably skilled settled worker; and
- for designated PhD. level jobs only, the RLMT time limit will be extended from six to 12 months.

Intra-company Transfers

Tier 2 of the PBS provides for intra-company transferees, which include the deployment of established staff from overseas, the transfer of recent graduates for training in the UK and the transfer of staff to learn skills in the UK. This category is for employees of multi-national companies who are being transferred to the UK affiliate of the same organization they worked for abroad. The two entities have to be linked by ownership or control.

Any UK employer wishing to sponsor a qualifying foreign national for employment must first be registered on the UK Government Sponsorship Register by having applied for a Sponsorship License. Once a sponsor

license is in place, the company can issue Certificates of Sponsorship to the employee (or prospective employee) to progress their application for Entry Clearance and a biometric identity card. In effect it is the company that issues the work permit by way of the CoS. To ensure that Registered Sponsors are issuing its certificates responsibly and correctly, the UK Government carries out periodic checks and conducts random annual audits of employers.

- Established Staff: Established employees may be transferred for a skilled job that cannot be carried out by new recruits from the local workforce. They must be employed abroad with the multi-national entity or its affiliate for a minimum of 12 months immediately before the date of application. Certain exceptions are made with regard to a break in employment due to time off for maternity, paternity, adoption or an illness of long duration. Employees may be transferred either as Long Term Staff enabling them to be employed in the UK for more than 12 months or as Short-Term Staff which allows employees to work in the UK for 12 months or less. Individuals in the Long-Term Staff category may be granted leave to remain in the UK in this category for an initial period of three years with the possibility of extending for a further two years. No extensions beyond this period are permitted and the individual cannot re-apply to return to the UK under the Intra-company Transfer (ICT) category until 12 months after the last leave to remain as an ICT expired.
- Graduate Trainee: This category is for recent graduates who are being transferred under a structured graduate training program, which leads them towards a managerial or specialist role. They must be employed by the company for atleast three months before the date of visa application. They can remain in the UK for a maximum of 12 months after which they must leave the country. They cannot re-apply for a visa under the same category for 12 months after they leave the UK.
- Skills Transfer: If an overseas employee of a multi-national company is being transferred to the UK branch of the same organization in a graduate occupation to learn the skills and knowledge, he or she will need to perform their job overseas, or to impart their specialist skills to the UK workforce. They must be employed for three months before the date of application. They can remain in the UK for a maximum of six months after which they must leave the country and cannot re-apply for this category for 12 months after they have left the UK. The determination with regard to the duration of stay within the UK is based on the leave that was granted and not on the time spent in the UK.

An individual can come to the UK with a Tier 2 (ICT) visa for up to the maximum stay allowed on the visa type, or the time given on the certificate of sponsorship plus one month, whichever is shorter.

The maximum stay for each type of Tier 2 (ICT) visa is:

- long-term staff: five years, 14 days
- graduate trainee: 12 months
- short-term staff: 12 months
- skills transfer: six months

Sports person

An individual can apply for a Tier 2 (Sportsperson) visa if all of the following apply:

- he or she is an elite sportsperson or qualified coach recognized by the sport's governing body as internationally established at the highest level;
- the sport's governing body is endorsing the individual's application;
- the individual's employment will develop his or her sport in the UK at the highest level;
- the individual is from outside the EEA and Switzerland; and
- the individual meets the other eligibility requirements.

The UK Tier 2 (Sportsperson) visa provides for a period of up to three years. The individual can apply to extend this visa for up to another three years to a maximum stay of six years.

Minister of Religion

A Missionary or Member of a Religious Order, or a Minister of Religion wishing to undertake preaching and past oral work, may be sponsored under this category to take up employment or fill a post or role within a religious community.

In some instances, employers are required to undertake a RLMT. Points are granted if the sponsor met the test before assigning a CoS. If the salary that will be paid in the UK to the individual is GBP 153,500 or more the employer is not required to undertake this test. A job can only pass the test, except in a few circumstances, if there is no suitable settled, local worker available for the job.

An individual can come to the UK with a Tier 2 (Minister of Religion) visa for a maximum of up to three years and one month, or the time given on the certificate of sponsorship plus one month, whichever is shorter.

Filing the Application

The visa cum residence permit application has to be submitted to a British Diplomatic Post overseas and not to the Home Office in the UK. It is important to ensure that the application is processed correctly and supported by the necessary original documents. This application at the British Diplomatic Post overseas will then be assessed against a points test. Points are allocated as applicable, for the appropriate salary level; for the CoS; adequate duration of employment with a qualifying entity prior to the date of application; English language competence requirement; maintenance requirement, by which foreign nationals must show proof of financial support up on initial arrival in the UK; and additional points requirement, based on qualifications and projected earnings, for foreign nationals employed for positions not on the Shortage Occupation List, or as ICT's.

Minimum Skill Level Increase

As amended in June 14, 2012, the minimum skill level for new Tier 2 migrants has been raised to NQF6 + (Bachelor Degree Level) from NQF4.

Increase in Maintenance

From July 1, 2014 Tier 2 and 5 migrants are required to show:

- funds of GBP 945 (previously GBP 900) unless and until their A-rated sponsor certifies maintenance for them.

Similarly, Tier 1 (Graduate Entrepreneurs) and Tier 1 (General) Migrants are required to show:

- if the Tier 1 (Graduate Entrepreneur) has been outside the UK or has been present in the UK for less than 12 months, he or she must have GBP 1260.00 to support themselves.
- if the Tier 1 (Graduate Entrepreneur) has been in the UK for 12 months or more, he or she must have GBP 630 to support themselves;

- maintenance of GBP 945 for leave to remain applications (which was previously GBP 900); and
- however, Tier 1 (Investor) or (Exceptional Talent) migrants will be exempt from the maintenance requirement.

Tier 1, Tier 2 and Tier 5 dependents will be required to show:

- if a Tier 1 Migrant has been in the UK for 12 months or more, he or she must have GBP 630 towards financial support;
- if the Tier 1 Migrant has been in the UK for six months and is making an application at the same time for the spouse and two children. They must show that they have GBP 1890 for their spouse and a further GBP 1890 for each child, in addition to GBP 945 required for their own support;
- if the same Tier 1 Migrant and their family had been present in the UK for two years, they would require evidence that they held GBP 2835 (GBP 630 x 3 = GBP 1890 + GBP 945) in available funds; A Tier 2 Migrant must have GBP 630 towards his or her own financial support; and
- if the Tier 2 Migrant is making an application at the same time as their spouse and two children, they must show that they have GBP 630 for their spouse and a further GBP 630 for each child, in addition to GBP 945 required for their own support. In total the family will require evidence that they hold GBP 2835 in available funds (GBP 630 x 3 = GBP1890 + GBP 945).

It must be noted that if a foreign national migrant makes a visa application on or after July 1, 2014 then such an applicant will be subject to the increased maintenance funds requirement even if the CoS was issued before this date.

Compliance with the Points Based System

Under the Points Based System (PBS) the Registered Sponsor needs to ensure that all criteria have been met, all activity and documentation is recorded accurately. The responsibility of administering and monitoring the PBS Tier 2 category lies with the sponsoring company and all non-EEA staff employed in the UK is audited every year.

It is important to remember that there are penalties for non-compliance, which include criminal penalties, civil penalties, automatic bans from entering the UK, downgrading from “A” to “B” rating as a sponsor and possible removal from the sponsorship register, which also triggers a requirement to dismiss all sponsored employees within 60 days.

UNITED STATES OF AMERICA

Poorvi Chothani

Summary

The United States of America (U.S.) situated mostly in central North America, lies between the Pacific and Atlantic Ocean, bordered by Canada to the north and Mexico to the south. It is a federal constitutional republic comprising 50 states and a federal district. At 9.85 million square kilometers and with over 320.09 million people, the U.S. is the third largest by both area and population. The U.S. Economy is the world's largest national economy and English is the official language.

Legal System

The U.S. Constitution is the foundation of the country's judicial system. The Constitution created three separate branches (the Executive, the Legislative and the Judicial branches) of government with each one having its own powers and areas of influence. The country is subject to a federal government that shares sovereignty with the state governments. In addition to the federal government, the people are also subject to a state government and various units of local government like counties, municipalities and special districts.

Visas

The U.S. offers many visa options that facilitate business travel and allow for the temporary employment of foreign nationals. In addition, it also offers a few options that permit employers to sponsor the permanent migration of qualified foreign nationals to work in the U.S. In this section we explore both the temporary and permanent visa options that are relevant to business travel or the employment of foreign nationals.

Temporary Visa Options

Business Visa B-1

Foreign nationals coming to the U.S. on short-term business trips may use the B-1 and/or B-2 business visitor visa. A B-1 visa holder can undertake a broad range of commercial and professional activities in the U.S., including consultations, negotiations, business meetings, conferences and taking orders for goods made abroad. However, employment in the U.S. is not allowed on a B-1 visa. B-1 visas are valid for a fixed amount of time and may be valid for multiple or a specified number of entries. The Customs and Border Patrol officer at the port of entry determines the duration of stay within the U.S., which can be for a few days or several weeks.

People applying for the B-1 visa essentially have to prove that their stay in the U.S. will be temporary in nature. The applicant is also required to show that he has enough funds to cover his trip and that he has a residence abroad that he intends to return to. Citizens of certain countries may travel to the U.S. without a Business visa under the Visa Waiver Program. India is not a part of this program.

J-1 Exchange Visitor Visa

The J-1 exchange visitor visa may be used for on-the-job training among several other purposes. The intention is to allow foreign nationals to receive training that is not otherwise available in their home country which will facilitate their career when they return aboard, while at the same time affording the opportunity for them to more generally exchange information with people in the U.S. about the countries. A structured detailed training program is required.

The U.S. State Department must authorize and administrate the J-1 training, but all of the training itself is generally provided by the

sponsoring U.S. company. Compensation for training is not required but is permitted. This visa requires proof of the applicant's non-immigrant intentions, financial ability to stay without seeking authorized employment and the business purpose of the trip.

The length of stay for such training assignments can be for up to 18 months, including all possible extensions. Some, but not all J-1 exchange visitors are required to return to the home country for at least two years at the end of the J-1 training before being eligible to migrate to the U.S. or return to work under certain non-immigrant visas.

Intra-company Transfer Visas L-1

An L-1 visa is often used to transfer foreign national employees of multi-national companies for temporary assignments to their U.S. parent company, subsidiary, branch or affiliate. The foreign national must have been employed abroad in a managerial, executive or specialized knowledge capacity during one of the last three years prior to transfer in an office of the foreign company. Some companies with large multi-national operations may qualify for blanket L-1 status. This enables the petition to be filed directly with the U.S. Consulate, thus bypassing having to file a petition with the United States Citizenship and Immigration Services (USCIS), which is required for all individual L-1 petitions. The L-1 visa is usually issued for an initial period of three years. Executives and managers can hold L-1 status for up to seven years, whereas foreign nationals working in a capacity involving specialized knowledge are allowed a maximum stay of five years.

Employment in an executive or managerial capacity is generally established when the individual has managed the organization, a department, subdivision, function or component, within the organization. An individual could qualify as an executive or manager if he or she supervises and controls the work of other supervisory, professional or managerial employees, or manages an essential function within the organization or department or subdivision of the organization. The individual must have the authority to hire and fire or recommend personnel action, or function at a senior level within the hierarchy of the company to qualify as a manager. He or she should also exercise discretion over day-to-day operations of the relevant activity or function. To qualify as an executive the individual must direct the management of the organization or a major component or function. He or she should establish goals and policies for the company and exercise wide latitude in discretionary decision making. He or she should only receive general supervision or direction from higher level executives, board of directors or stockholders.

Employment in a specialized knowledge capacity requires proof that the foreign national holds knowledge of the organization's products; its services, research, equipment, techniques and management or an advanced level of expertise in the organization's advanced processes and procedures. The specialized knowledge is different from that which is generally found in a particular industry. It could include knowledge that is gained only through extensive prior experience with that employer or that which is valuable to the employer's competitiveness in the market place.

H-1B Specialty Occupation Visas

The H-1B visa program allows U.S. employers to recruit and hire foreign nationals to work in the U.S. for a specified period of time. The H-1B program allows workers to work in the U.S. for up to a total of six years with an initial approval for three years. A potentially unlimited number of extensions beyond the six years may also be available to qualified H-1B visa holders in the permanent immigration process.

The offered job to qualify for an H-1B must be in a specialty occupation. These are jobs that normally require at least a bachelor's degree in a field related to the job. The foreign national must hold the required degree from an American university or the equivalent. A foreign degree, employment experience, or a combination may be considered equivalent.

It is necessary to document that the position offered is in a specialty occupation and that the foreign national has the appropriate credentials for the job. The employer needs to confirm that the H-1B visa worker is being paid the prevailing wage for the work being performed and that employment of a foreign national will not harm conditions for U.S. workers. Employers must promise to give H-1B professionals wages, working conditions and benefits equal to or greater than those normally offered to similarly employed workers in the U.S. A strike or labor dispute at the place of employment may impact eligibility of the employer to sponsor H-1B workers. It is necessary to maintain detailed records of all the H-1B workers, which may be accessed by the public and or become the subject of government compliance audits.

The number of H-1B visas issued each year is subject to a cap that is determined by U.S. Congress. The current H-1B cap is set at 65,000 plus an additional 20,000 for international students that graduate with a master's degree or higher from a U.S. University. The H-1B cap does not include or affect current H-1B holders transferring their visa to a new employer or fresh applications for an H-1B to work with non-profit organizations, government research organizations, and institution of higher education. H-1B transfers and cap-exempt positions are unlimited and available all year round for applications.

Prospective employers of foreign nationals who are citizens of Singapore and Chile may take advantage of special allocations and more streamlined processing rules. Employers of foreign nationals who are citizens of Canada and Mexico (both of which are beneficiaries of the North American Free Trade Agreement (NAFTA) with the U.S.) can take advantage of the TN visa, which is not subject to any numeric cap. India does not have any trade or investment treaty with the U.S. that offers any visa advantages.

O-Visas

O-visas are temporary visas granted to persons of extraordinary ability in the sciences, arts, education, business or athletics. They are also granted to individuals with extraordinary achievement in motion picture or television industry.

To qualify for an O-1 visa, the individual must demonstrate extraordinary ability by sustained national or international acclaim and must be coming temporarily to the U.S. to continue work in the area of extraordinary ability. Extraordinary ability in the fields of science, education, business or athletics means a level of expertise indicating that the person is one of the small percentage who has risen to the very top of the field of endeavor.

Extraordinary ability in the field of arts means distinction. Distinction means a high level of achievement in the field of the arts evidenced by a degree of skill and recognition substantially above that ordinarily encountered to the extent that a person described as prominent is renowned, leading, or well-known in the field of arts.

To qualify for an O-1 visa in the motion picture or television industry, the individual must demonstrate extraordinary achievement evidenced by a degree of skill and recognition significantly above that ordinarily encountered to the extent the person is recognized as outstanding, notable or leading in the motion picture and/or television field.

Permanent Immigration through a Job

Many people become permanent residents through a job or offer of employment. Some categories require a certification from the U.S. Department of Labor (DoL) to show that there are not enough U.S. workers who are able, willing, qualified and available in the geographic area where the foreign national immigrant is to be employed and that no American workers are displaced by foreign nationals. In other

cases, highly skilled workers, those with extraordinary ability in certain professions, and investors or entrepreneurs are given priority to immigrate through several immigrant categories. In all cases, the process involves several steps.

There are five categories for granting permanent residence to foreign nationals based on employment skills.

- the First Preference (EB-1) category is applicable to priority workers (persons of extraordinary ability, outstanding professors and researchers and multi-national executives and managers);
- the Second Preference (EB-2) applies to members of the professions holding advanced degrees or persons of exceptional ability;
- the Third Preference (EB-3) covers professions, skilled and other workers;
- the Fourth Preference (EB-4) category is applicable to special immigrants (religious workers, court dependents, returning residents and others);
- while the Fifth Preference (EB-5) applies to persons who invest significant funds in the U.S. and create or maintain at least 10 jobs for U.S. workers.

Foreign labor certification programs applicable to EB-2 and EB-3 workers permit U.S. employers to hire foreign nationals on a temporary or permanent basis to fill jobs essential to the U.S. economy. These programs are generally designed to ensure that the admission of foreign nationals into the U.S. on a permanent or temporary basis will not adversely affect the job opportunities, wages and working conditions of U.S. workers.

While there are several federal agencies involved with granting permission for foreign nationals to work in the U.S., employers generally must first obtain certification through the DoL. Certification is usually granted where it can be demonstrated that there are insufficient qualified U.S. workers available and willing to perform the work at wages that meet or exceed the prevailing wage paid for that occupation in the area of intended employment.

Once the application is certified by the DoL, the employer must petition the U.S. Citizenship and Immigration Services (USCIS) to obtain approval to engage the foreign national. The foreign national applicant must also establish that they are otherwise admissible to the U.S.

EB-1 Priority Workers

Foreign nationals with extraordinary ability are those with “extraordinary ability” in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim and whose achievements have been recognized in the field through extensive documentation. They are not subject to labor certification.

Outstanding professors and researchers are those who are recognized internationally for their outstanding academic achievements in a particular field. In addition, an outstanding professor or researcher must have at least three years experience in teaching or research in a particular area and enter the U.S. in tenure, or tenure track teaching or comparable research position at a university or other institution of higher education.

Some executives and managers of foreign companies who are transferred to the U.S. may qualify. A multi-national manager or executive is eligible for priority worker status if he or she has been employed outside the U.S. in the three years preceding the petition for at least one year by a firm or corporation and seeks to enter the U.S. to work for a U.S. affiliate. The petitioner must be a U.S. employer, doing business for at least one year.

EB-2 Professionals with Advanced Degrees or Persons with Exceptional Ability

The EB-2 classification allows members of the professions to permanently reside in the U.S. if they hold an advanced degree or equivalent, or who because of their exceptional ability in the sciences, arts or business will substantially benefit the national economy, cultural or educational interests, or welfare of the U.S. and who has an offer from an employer in the U.S.

The applicant must have a job offer and a labor certification unless it is in the interest of the U.S. to allow the individual to reside in the U.S., in which case the USCIS may waive these requirements. A petition for a foreign national holding an advanced degree may be filed when the job requires an advanced degree (beyond the baccalaureate) and the foreign national possesses such a degree or the equivalent. A U.S. Baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in a specialty occupation shall be considered the equivalent of a master's degree.

Generally petitions under this category must be accompanied by an individual labor certification from the DoL. In addition, the foreign national

must submit documentation to support his or her claim to the education and or experience requirements of the labor certification.

EB-3 Skilled or Professional Workers

This category is available for foreign nationals with at least two years of experience as skilled workers; professionals with a baccalaureate degree; and other workers with less than two years experience, such as unskilled workers who can perform labor for which qualified workers are not available in the U.S.

While eligibility requirements for the EB-3 classification are less stringent than the EB-1 and EB-2 classifications, it is important to note that there is a long backlog for visas in these categories resulting in a wait of several years. Skilled worker positions are not seasonal or temporary and require at least two years of experience or training. The training requirement may be met through relevant post-secondary education. Determination of whether a job is skilled or unskilled depends on the job requirements.

Professionals must hold a U.S. baccalaureate degree or foreign equivalent degree that is normally required for the profession. Education and experience may not be substituted for the degree. Other workers are in positions that require less than two years of higher education, training, or experience.

EB-4 Special Immigrants

These visas are granted to foreign national religious workers and employees and former employees of the U.S. Government abroad among other categories like returning residents, or persons reacquiring U.S. citizenship.

To qualify as an EB-4 special immigrant religious worker, the individual must be a member of a religious denomination that has a non-profit religious organization in the U.S. He or she must have been a member of this religious denomination for at least two years before applying for admission to the U.S. Every petition under this category must be accompanied by an individual labor certification from the DoL. In addition, the foreign national must submit documentation to support his or her claim to the education and/or experience requirements of the labor certification.

The sponsoring religious organization must file a petition in the U.S. along with the documentary evidence and a clear explanation of how

the work will be carried out and how the professional will be paid. It is necessary to establish that the individual will not be dependent upon supplementary income from another job nor will he or she rely on charity for support.

EB-5 Employment Creation - Immigrant Investors

The U.S. Government created this fifth employment-based preference (EB-5) immigrant visa category for qualified foreign nationals seeking to invest in a business that will benefit the U.S. economy and create or save at least 10 full-time jobs. The basic investment amount is United States Dollars (USD) 1,000,000; although that amount is reduced to USD 500,000 if the investment is made in a "Targeted Employment Area." A target area is defined as a rural area or an area that has high unemployment. The Department of Commerce of each state publishes a list of its targeted areas. To encourage immigration through this category, the government further created a program specifically setting aside a portion of the 10,000 visas annually for foreign investors who apply through a USCIS designated Regional Center Investment Program. A Regional Center is a private enterprise or corporation or a regional governmental agency with a targeted investment program within a defined geographic region.

A petition has to be filed in the U.S. and when it is approved the foreign national along with dependents need to apply for immigrant visas at the consular post that has jurisdiction over their place of residence. A conditional green card is issued and the conditions can be removed after two years of business operations.

Visa Processing System

The U.S. Embassy in India has recently implemented a new visa processing system throughout India to standardize procedures and simplify fee payment and appointment scheduling through their new website at www.ustraveldocs.com/in. Visa applicants now have more payment options as the application fees can be paid via Electronic Fund Transfer (EFT) or via mobile phones. The fees can even be paid in cash at more than 1,800 Axis bank or Citibank branches within India. Once the payment is made, applicants receive an SMS message letting them know that their receipt has been activated, and that they can proceed with scheduling their appointments. The new website www.ustraveldocs.com/in is available in English and Hindi and answers queries related to U.S. visa applications. Visa applicants can complete application forms, find out what documents are required, pay visa application fees,

schedule an appointment for biometrics collection, and schedule an interview at a U.S. Embassy or Consulate via this website. Appointments can be scheduled through the new website or by calling the call center. Call center agents in Noida and Hyderabad answer queries in Hindi, English, Punjabi, Gujarati, Tamil and Telugu via telephone, email or online chat.

Applicants require two separate appointments on two separate days, as the biometrics (finger prints) is collected at Offsite Facilitation Centers (OFC), which are close to the Embassy or Consulates but are at different locations. The U.S. Embassy commenced its new system for the delivery of passports, visas, immigrant visa packets and other documents, which are now delivered to 33 document pick-up locations across India within a week at no extra charge.

Further Updates

The INS Zoom Conference held in India had many esteemed speakers and panelists, however the panel consisting of Manav Jain, Non-Immigrant Visa Chief, U.S. Consulate General Hyderabad, Daniel Might, Vice Consul, U.S. Consulate General Chennai, Ms. Sadaf Khan, Vice Consul, U.S. Consulate General Chennai and Bianca Collins, Deputy Non-Immigrant Visa Chief, U.S. Consulate General Chennai was highly relevant from an Indian and U.S. perspective. The presentation was an encapsulation of various "General U.S. Visa Adjudication Processes".

General Facts and Figures - An Introduction

Of the total H-1B applications worldwide, approximately five Indian software companies come in the top ten. These are huge numbers. The total H-1B cap per year is 65,000 visas which exclude 20,000 visas for specialized categories. The U.S. Government receives almost three times this amount. In the year 2014 they received approximately 175,000 applications and in 2015 this figure is expected to touch the 200,000 mark. This has led to a huge gap between the actual requirements for H-1B visas and the cap; consequently many Indian companies have now started applying for visas under the L1 and L2 categories.

The session opened with some important and interesting facts and figures. The U.S. Consulate in Chennai processes 270,000 visas annually. This amounts to almost 25 percent of the world H-1B applications. 67 percent of these 270,000 visas are for the H-1B category

and 28 percent are for the L-1 category. In their endeavor appropriately titled "Mission India" they have already received 100,000 H-1B applications for the 2014 fiscal year.

U.S. Adjudications:

U.S. Consulates in India have introduced group interviews for H-1B visa applicants for a team that is traveling and working together. They adjudicate at an average 1100 L-1 applicants daily. The U.S. Consulate in Chennai also provides for same day biometrics and interview. They have for the very first time introduced an interview waiver program (IWP). All H-1B, H4, L1 and L2 applicant's are eligible for the IWP, off course subject to meeting certain preconditions. They are eligible if:

- the existent visa has expired no more than one year prior to this application;
- the petitioner remains the same; and
- the applicant has already provided their biometrics at some point in the past so that their fingerprints are already part of the U.S. Consulate records.

Additional adjudication includes providing the facility of completing the biometrics in one city and the interview in Chennai. This is an important change and will definitely impact business travelers. Interviews will be conducted jointly for H-1B and H4 (dependent spouse or children) who are traveling at the same time. Traveling together at the same time is the precondition. If they do need to travel separately, then they need to go for individual interviews.

The adjudication that is being introduced is a huge step forward towards expediting the visa process for business travelers to the U.S. It is also a reflection of the recognition of the growing economic ties between the world's largest and oldest democracies.

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Ms. Bart has presented before the WTO, IPBA, IBA, UIA, AILA, INBLF, CBA, OBA, LSUC, Insight, Institute, National Club, and various other bar associations and venues. She has held various positions as an elected executive offer of national and international bar associations.

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Having been admitted to the Bar in India in 1984, Poorvi received an LLM from University of Pennsylvania Law School in 2003. She is licensed to practice in New York and is also a registered, practicing Solicitor, England and Wales.

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The firm also advises foreign and local clients, on a wide range of matters including foreign direct investment, corporate law, commercial law, intellectual property matters, employment law, real estate matters, joint ventures, distribution agreements and franchises, litigation, arbitration and dispute resolution, tax, trusts, private client matters and family law.

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