
THE CORPORATE IMMIGRATION REVIEW

EDITOR
CHRIS MAGRATH

LAW BUSINESS RESEARCH

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PREFACE

This book, the first edition of *The Corporate Immigration Review*, is the first major guide to global immigration issues of the 21st century.

The prevailing global economic uncertainty since the 2008 financial crisis has ignited significant debate across the world's media and political classes on the desirability of bringing foreign nationals into local jurisdictions to participate in local labour markets. Immigration remains at the forefront of political debate in Europe, the Americas and Asia. The impact of migration on the availability of work for resident workers, and the effect on social infrastructures of mass migration, are debated in all the jurisdictions in this Review.

Political campaigns in numerous countries have been dominated by immigration policy. In the UK it was a major topic in the 2010 election resulting in considerable discomfort for leading politicians during the campaign. Consequently, the new coalition government has introduced a quota system for economic migration for the first time. In France the National Front, with its protectionist and anti-immigration message, has enjoyed resurgence in the polls, with its new leader, Marine Le Pen, predicted to be a major force in the 2012 presidential election.

In the US, President Obama has brought the immigration debate to the top of his 2011 agenda. He has described the immigration system as 'broken' and reiterated a commitment to comprehensive immigration reform that strengthens security at the borders and restores accountability. Key concerns, shared by many jurisdictions around the world, include educating 'the best and brightest' but finding that the talent is shipped overseas, concerns over the ability of businesses to hire and retain a legal workforce, and the need to level the playing field for workers by ending underground labour markets. India, in particular, with its outstanding educational opportunities within new technologies has suffered from the departure of some of its most talented graduates.

The conflict between the perceived burdens of mass migration, and the need to develop free economies led by the world's best talent, is nothing new. All systems seek to attract businesses and highly skilled individuals into the economy while protecting the state from potentially costly immigration. Most policies aim to create an immigrant population that descends from multinational corporations, professionals and entrepreneurs. Hong Kong, for example, has resolved historical problems with immigration from countries such as China and Vietnam, and introduced myriad economic migration routes to enhance its economy. The focus in Hong Kong is to promote the economy and increase business competitiveness. It has, to a large part, been successful in this endeavour.

Alongside tougher regimes designed to limit the flow of migrant labour we see in a number of jurisdictions flexibilities introduced to encourage inward investment. For example, in the UK, the Tier I routes for entrepreneurs and investors have been amended to include an expedited route to settlement for those investing the largest sums. But the Tier I route for highly skilled migrants looking to enter the workforce has been abandoned entirely.

The purpose of each chapter is to introduce the immigration framework of a given jurisdiction, including an outline of government policy and the types of visas available. The introductory paragraphs set out the key mechanisms and authorities that administer immigration control in the host country with reference to primary legislation, relevant policy guidelines, published immigration rules, etc. This is followed by an outline of the main public authorities in administering immigration control.

The central focus of each chapter is on the procedure and rules that apply to economic migrants, such as sponsored workers, highly skilled individuals, entrepreneurs and investors. While it is beyond the realms of possibility for the text to provide a comprehensive and authoritative guide to all the immigration systems of the world, we believe that sufficient detail and guidance is given to create a highly useful reference tool for immigration practitioners advising in the global market.

Given that this is an annual publication, a section dedicated to a review of the key developments over the preceding 12 months is included. This includes reference to changes to primary legislation, processes, procedures, and key cases that have been determined by the relevant courts. Contributors make reference to the political developments and policies that have been witnessed over the relevant period and each chapter concludes with an outlook for the future.

Perhaps more than in any other legal discipline, immigration lawyers grapple with constant changes to regulatory, procedural and statutory frameworks. As our globalised economy continues to develop, immigration systems will vary and change, as will the nature of the professional legal advice needed to resolve the issues. This annual review will be invaluable to those who wish to keep abreast of the changing systems.

We wish to thank the many contributors to this book who have devoted considerable time and expertise in clearly setting out the essential elements of the immigration system of their countries, and for their support and cooperation in preparing this Review.

Chris Magrath and Ben Sheldrick
Magrath LLP
London
July 2011

Chapter 20

UNITED STATES

*Stephen J O Maltby and Ellen L Poreda**

I INTRODUCTION TO THE IMMIGRATION FRAMEWORK

i Legislation and policy

US immigration policy has multiple goals. First, it reunites families by admitting immigrants whose relatives are already in the US.¹ Second, it admits foreign workers to perform labour generally taking into consideration the availability and working conditions of US workers.² Third, it provides a refuge for those facing persecution on account of their race, religion, nationality, membership in a particular social group or political opinion.³ Finally, it promotes diversity in the immigrant pool by randomly providing visas to immigrants from countries with low rates of immigration to the US.⁴

This policy provides two pathways for admission to the US: aliens may be admitted as immigrants on a permanent basis or as non-immigrants for a temporary period.⁵ Immigrants are called lawful permanent residents ('LPRs') and have an immigrant visa often referred to as a 'green card'. LPRs have full civil rights to work in the US. In 2009 more than 1.13 million new immigrants were admitted to the US.⁶ Non-immigrants are admitted for a particular activity and for a finite period. Certain non-immigrants

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1 Immigration & Nationality Act ('INA'), Section 203(a).

2 INA, Section 203(b).

3 INA, Sections 207 to 208.

4 INA, Section 203(c).

5 INA, Section 101(a)(15).

6 US Department of Homeland Security, Office of Immigration Statistics, *2009 Yearbook of Immigration Statistics (2010)*, at 10, www.dhs.gov/xlibrary/assets/statistics/yearbook/2009/ois_yb_2009.pdf.

may work in the US depending on their visa classification. In 2009 more than 162 million non-immigrants were admitted to the US.⁷

Immigration legislation

US immigration laws can be found in the Immigration and Nationality Act of 1952 ('the Act'), as amended.⁸ The Act brought together all the nation's statutes on immigration and naturalisation and it remains the basic body of immigration law. The Act included a national origins quota system of immigrant selection, quota-free restrictions for the western hemisphere, quota preferences for relatives and skilled persons, and security protections against criminals and subversives.

Since 1952 the Act has been amended by countless legislation, although its structure has remained intact. Significant amendments are outlined, *infra*.

In 1965 the Immigration and Nationality Act of 1965 abolished the national origins system and set annual limits on immigration and a per country quota.⁹ By equalising immigration policies, the effect was to shift immigration from Europe to Asia and to South and Central America.

In 1986 the Act was amended again by the Immigration Reform and Control Act ('the IRCA').¹⁰ To curtail the rising tide of illegal immigration, the law imposed civil and criminal penalties on employers who knowingly hired aliens not authorised to work and required employers to verify the identity and work eligibility of all employees through the completion of Employment Eligibility Verification Form I-9 at the time of hire.

In the same year, the Immigration Marriage Fraud Amendments Act was passed to prevent marriages intended solely to gain immigration benefits.¹¹ It established a two-year period of 'conditional residence' for foreign nationals who marry a US citizen, at the end of which the US citizen spouse must petition the government to remove the conditional status.

The Immigration Act of 1990¹² substantially changed the preference system for immigrants by establishing new categories with separate caps for employment-based immigration and family sponsored immigrants. It removed quotas for immediate relatives and established a diversity programme for immigrants from countries with low rates of immigration. It also created a cap on H-1B and H-2B non-immigrant workers and required employers to file a labour condition application ('LCA') with the US Department of Labor ('the DOL') regarding wages and other working conditions for H-1B workers. The law also created new non-immigrant visa categories: the O visa for persons of extraordinary ability and the P visa for certain types of entertainers.

7 *Id.* at 65.

8 INA, Pub. L. No. 82-414, 66 Stat. 162 (1952).

9 INA, Pub. L. No. 89-236, 79 Stat. 911 (1965).

10 Immigration Reform and Control Act, Pub. L. No. 99-603, 100 Stat. 3359 (1986).

11 Immigration Marriage Fraud Amendments, Pub. L. No. 99-639, 100 Stat. 3537 (1986).

12 Immigration Act, Pub. L. No. 101-649, 104 Stat. 4978 (1990).

In 1996 the Illegal Immigration Reform and Immigrant Responsibility Act ('IIRIRA')¹³ was passed, which expanded the categories of offences for which aliens could be deported, eliminated certain waivers of deportation and established a new three and ten-year bar to admission for aliens who had been unlawfully present in the US for six months or one year, respectively.

In addition to federal immigration law, the US has witnessed the proliferation of state and local immigration laws.¹⁴ These have emerged due to the perceived failure of the federal government to control the migration of undocumented persons to the US or the removal of persons unlawfully in the US. But under the Commerce Clause of the US Constitution,¹⁵ the regulation and enforcement of immigration matters fall within the purview of the federal government and federal courts have historically struck down state and local attempts to regulate immigration.¹⁶

ii The immigration authorities

Several US agencies implement and enforce immigration law.

Through its Bureau of Consular Affairs, the US Department of State processes immigrant and non-immigrant visa applications.¹⁷

In 2003, the US Department of Homeland Security was created with separate branches to administer immigration laws:¹⁸

- a* US Citizenship and Immigration Services ('USCIS') are responsible for the processing of all immigrant and non-immigrant visa petitions and applications by aliens who are already in the US;
- b* US Customs and Border Protection ('USCBP') operates at the nation's borders, airports and seaports and is responsible for determining the admissibility of arriving aliens and for determining the length of stay; and
- c* US Immigration and Customs and Enforcement ('ICE') has authority to detain and remove illegal aliens and enforces the IRCA.

The DOL's Employment and Training Administration¹⁹ processes permanent labour certification applications filed by employers seeking to employ foreign workers permanently in the US. It also processes LCAs filed by employers wishing to employ H-1B workers.

13 Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104–208, 110 Stat. 3009 (1996).

14 See American Immigration Lawyers Association ('AILA'), 'Navigating the Immigration Debate: A Guide for State and Local Policymakers and Advocates' (2009), available at www.aila.org/content/fileviewer.aspx?docid=24681&linkid=172618.

15 US Constitution Article 1, Section 7, cl. 43.

16 *Head Money Cases*, 112 US 580 (1884).

17 INA, Sections 221 to 222.

18 INA, Section 103.

19 INA, Section 212(a)(5)(A), (n).

Finally, the US Department of Health and Human Services²⁰ determines the admissibility of aliens on health grounds.

II INTERNATIONAL TREATY OBLIGATIONS

i Immigration benefits pursuant to treaties of friendship, commerce and navigation

The US has entered into treaties of friendship, commerce and navigation ('FCN') with 80 countries.²¹ Nationals of these countries may be eligible for non-immigrant E visas as traders or investors, or employees of qualifying trader or investor enterprises.

The individual or enterprise must submit an application to the US consulate in the country of their nationality to qualify the trading or investment activity. The following criteria²² must be met:

- a* The visa applicant must be a citizen of the treaty country.
- b* If applicable, the trading or investment enterprise must also be a national of the treaty country (citizens of the treaty country must own at least 50 per cent of the business).
- c* Treaty trader applicants must show they will be in the US solely to carry on substantial trade, which is international in scope, principally conducted between the US and the foreign state of which the alien is a national.
- d* Treaty investor applicants must show they have invested or are actively in the process of investing a substantial amount of capital in a *bona fide* enterprise in the US (not a small amount of capital in a marginal enterprise merely to earn a living) and are seeking entry solely to develop and direct the enterprise.
- e* Employees of trading and investment enterprises must serve in a managerial/ executive role or as employees with 'essential skills.'

E visas may be valid up to five years and holders are admitted to the US for two years upon each entry.²³ Holders must leave the US after termination of status, but there is no upper time limit on renewal or extension of stay.

Spouses and children under 21 are entitled to 'E-derivative' visas. Spouses may apply for work authorisation upon arrival in the US.²⁴

ii Immigration benefits pursuant to trade agreements

Immigration benefits accrue to certain nationals under trade agreements with the US, as follows:

20 INA Section 212(a)(1).

21 For a list of countries with FCN treaties, see 9 Foreign Affairs Manual (FAM) 41.51 Exhibit 1, available at www.state.gov/documents/organization/87221.pdf.

22 INA Section 101(a)(15)(E); 8 C.F.R. Section 214.2(e).

23 8 CFR, Section 214.2(e)(19).

24 INA, Section 214(e)(16).

North American Free Trade Agreement ('NAFTA')

In 1994, the US implemented NAFTA with Canada and Mexico.²⁵ NAFTA is an historic accord governing the largest trilateral trade relationship in the world and covers trade in goods, services and investments. NAFTA facilitates the movement of US, Canadian and Mexican businesspersons across each country's border through streamlined procedures.

Pursuant to NAFTA, citizens of Canada and Mexico are eligible for temporary US work visas in the following categories:

- a* Trade NAFTA ('TN') visa:²⁶ the TN is limited to Canadian or Mexican professionals. A professional is a businessperson seeking entry to engage in a business activity at a professional level in one of 60 professions set forth in Appendix 1603.D.1 to Annex 1603 of NAFTA. These include medical professionals, scientists, teachers and a broad range of other general professionals such as accountants, computer systems analysts, landscape architects and social workers. The qualification requirements are specified in NAFTA and generally include a baccalaureate degree in a directly related field, with some exceptions. Services must be rendered for an entity in the US; self-employment is not permitted.
- b* L-1 Intracompany Transfer visa and E-1/E-2 Treaty Trader and Investor visas:²⁷ pursuant to NAFTA, Canadian and Mexican citizens may qualify for L-1 intracompany transferee visas, meeting the same criteria as discussed in Section IV under the L-1 visa category, or the E-1 Treaty Trader or E-2 Treaty Investor visa as previously set forth under FCN treaties.

Singapore and Chile Free Trade Agreement H-1B1

In 2004 the US enacted Free Trade Implementation Acts relating to Singapore and Chile.²⁸ These acts created a new H-1B1 Specialty Occupation visa category with an annual cap of 5,400 visas for Singaporeans and 1,400 visas for Chileans. The 6,800 quota is counted against the annual 65,000 H-1B quota, described in Section IV. The criteria for the H-1B1 visas are the same for the H-1B visa.

Australian E-3 specialty occupation

In 2005 the US entered into a free trade agreement with Australia.²⁹ As a result, the E-3 visa category became available to Australian nationals who will be employed in the US in a specialty occupation. There is an annual quota of 10,500 E-3 visas, but

25 North American Free Trade Agreement Implementation Act, Pub. L. No. 103–182, 107 Stat. 2057 (1993).

26 INA, Section 203(e)(2); 8 CFR, Section 214.6(c).

27 8 CFR, Section 214.2(l)(17)(i).

28 United States–Chile Free Trade Agreement Implementation Act, Pub. L. No. 108–77, 117 Stat. 909 (2003); United States–Singapore Free Trade Agreement Act, Pub. L. No. 108–78, 117 Stat. 948 (2003).

29 United States–Australia Free Trade Agreement Implementation Act, Pub. L. No. 108–286, 118 Stat. 919 (2004).

the quota has never been met. To qualify, the US position generally must require a specific baccalaureate or higher degree (or its equivalent) as the minimum entry-level requirement, and the employee must possess such a degree, or its equivalent, through well-documented employment experience.

E-3 visas may be issued for up to two years. There is no limit on extensions.

Spouses and children under 21 are entitled to E-3 derivative visas. E-3 spouses may apply for work authorisation upon arrival in the US.³⁰

III THE YEAR IN REVIEW

2010 passed without the enactment of a comprehensive immigration reform bill, stated goals of both President Bush and President Obama. The continued delay in finding a legal solution, such as legalisation or amnesty, to the approximately 11 million undocumented persons living in the US spawned many state and local immigration laws.³¹ In addition, the Obama Administration stepped up enforcement of employer worksite compliance obligations to deter the hiring of aliens not authorised to work in the US. Finally, as the effects of the 2008–2009 recession continued to be felt, lawmakers continued their efforts to impose new restrictions on employers wishing to hire foreign workers on non-immigrant visas.

The most significant consequence of the lack of comprehensive immigration reform has been the proliferation of state and local immigration laws. These laws have several goals, including:

- a* restricting immigrants' access to public benefits and housing;
- b* mandating verification of employment eligibility;
- c* restricting congregations of day labourers;
- d* establishing 'English-only' policies;
- e* imposing restrictive housing policies;
- f* requiring state and local police to serve as immigration agents; and
- g* restricting immigrants' access to driving licences.

The most celebrated state initiative to take control of immigration matters has been in Arizona, where on 23 April 2010 the state enacted an immigration law, SB 1070,³² providing police with broad powers to check the immigration status of any person they reasonably suspect to be in the US without authorisation. The District Court found that four sections of SB 1070 were likely to be pre-empted by federal law and issued a preliminary injunction.³³ An appeal of this order is presently before the Ninth Circuit Court of Appeals.³⁴

30 INA, Section 214(e)(16).

31 See AILA, *Navigating the Immigration Debate*; see also footnote 14.

32 Ariz. Rev. Stat. Section 11–1051 (2011).

33 *United States v. Arizona*, 703 F.Supp.2d 980, 987 (D. Ariz. 2010).

34 *United States v. Arizona*, No. 10–16645 (Ninth Circuit filed 29 July 2010).

The absence of federal legislation to reform immigration law has not, however, deterred the federal government from its enforcement of existing laws. During 2009 and 2010 there were three distinct trends in the enforcement of immigration worksite compliance obligations by ICE: an increase in the number of Form I-9 audits; an enforcement strategy focused on employers; and the use of criminal statutes to prosecute employers and their representatives.

On 19 November 2009 ICE announced the issuance of notices of inspection ('NOIs') to 1,000 employers across the country to compel the production of Forms I-9 and other hiring and business records.³⁵ On 17 September 2010 ICE again announced that it was issuing more than 500 additional NOIs.³⁶ Employers are subject to civil monetary penalties based on a fine matrix for technical and substantive Form I-9 verification violations.³⁷ Criminal penalties including fines, probation, imprisonment and forfeiture of assets may apply to charges for knowingly hiring unauthorised workers, and for bringing in and harbouring aliens in reckless disregard of their unlawful status.³⁸

Employer worksite obligations do not end with the Form I-9. Since 8 September 2009 certain employers who are federal contractors have been required to enrol in E-Verify, a federal government programme whereby employers submit online queries to verify the identity and work eligibility of employees against government databases.³⁹ Numerous states have also enacted E-Verify worksite laws that fall into three categories:⁴⁰ those that require all employers in the state to E-Verify; those that require public or state employers to participate; and those that require employers contracting with the state or political subdivisions within the state to participate.

On top of increased enforcement of worksite compliance obligations, employers could find little to celebrate in the proposed immigration bills⁴¹ that died in the 111th Congress, which came to a close on 22 December 2010. Reflecting the effects of the recession on the labour market, these bills proposed new restrictions on the H-1B and L-1 non-immigrant visa programmes. They included new obligations on employers of H-1B workers to recruit US workers before an H-1B petition could be filed, prohibitions on the placement of H-1B workers at third-party sites and new wage requirements for L-1 workers. Another legislative proposal in the Senate known as the Employ America Act⁴² proposed to require employers of H-1B workers to certify that they had not had a

35 www.gibney.com (search 'Immigration Alert: ICE Issues Notices of Inspection to 1000 US Employers').

36 See AILA, 'ICE to Serve More Than 500 New Notices of Inspection', published on AILA InfoNet at Doc. No. 10091660 (posted 16 September 2010).

37 US Immigration & Customs Enforcement, Fact Sheet: Form I-9 Inspection Overview (1 December 2009), www.ice.gov/doclib/news/library/factsheets/pdf/i9-inspection.pdf.

38 INA Section 274.

39 www.uscis.gov (search 'E-Verify').

40 See AILA, *Navigating the Immigration Debate*, see also footnote 14.

41 See H.R. 4321, 111th Cong. (2009); S. 3932, 111th Cong. (2010).

42 S. 2804, 111th Cong. (2009).

mass lay-off under the Worker Adjustment and Retraining Notification Act⁴³ and that they did not have plans for a mass lay-off. If an employer issues a notice of mass lay-off, all existing visas approved in the prior 12 months would expire 60 days after the notice and affected foreign nationals would be required to leave the US within the 60 days.

The failure of Congress to pass immigration legislation did not translate into a lack of administrative activity. On 8 January 2010 the USCIS issued a guidance memorandum which took strict new positions on when an H-1B employee may be placed at a third-party site.⁴⁴ The guidance emphasised the importance of the need for an actual employer–employee relationship between the petitioner and the H-1B worker and, applying common law principles of master-servant, listed the criteria and types of evidence necessary to demonstrate that the employer controlled the actions of the employee. If the H-1B worker is to be placed in multiple locations, the petition will need an itinerary of the employee’s activities including the locations where the worker will be placed. The guidance has made clear that use of the H-1B to fulfil a staffing contract where control over the worker is exercised by the client would not be appropriate.

IV EMPLOYER SPONSORSHIP

i Non-immigrants

In addition to non-immigrant visas offered through the treaties described in Section II, *supra*, US immigration law offers several other non-immigrant visa classifications that may be used for new hires or intracompany transferees.

For each classification, US employers must file a petition with USCIS to demonstrate eligibility.⁴⁵ The petition is typically adjudicated within three months, although employers have a 15 day premium service option at an additional cost of \$1,225. After approval, the foreign worker must apply for a visa at a US consulate.⁴⁶ Workers already in the US may also be eligible for a change of status. If the petition is denied by USCIS, an appeal may be filed with USCIS’s Administrative Appeals Office. Adverse decisions on visa applications by the US Consul are generally non-reviewable.

Useful non-immigrant visa classifications include the following.

H-1B visa

H-1B visas are available to ‘specialty occupation’ workers.⁴⁷ To qualify, the position in the US generally must require a specific baccalaureate or higher degree (or its equivalent) as

43 Worker Adjustment and Retraining Notification Act, Pub. L. No. 100–379, 102 Stat. 890 (1988).

44 USCIS Memorandum, D. Neufeld, ‘Determining Employer-Employee Relationship for Adjudication of H-1B Petitions, Including Third-Party Site Placements’ (8 January 2010), published on AILA InfoNet at Doc. No. 10011363 (posted 13 January 2010).

45 INA, Section 214(c)(1).

46 INA, Section 212(a)(7)(B).

47 INA, Sections 101(a)(15)(H), 214(i)(1).

the minimum entry-level requirement; and the employee must possess such a degree, or its equivalent through well-documented employment experience.

There is an annual quota of 65,000 first-time H-1B visa recipients. An additional 20,000 H-1B visas are available for graduates of US universities with master's degrees and higher. These visas are allocated in the order in which the petitions are received. Petitions are accepted on 1 April each year for the fiscal year starting on 1 October.

Spouses and children under 21 are entitled to H-4 visas. H-4 spouses are not eligible for employment.

O-1 visa

The O-1 visa is available to persons of extraordinary ability in the sciences, arts, education, business or athletics.⁴⁸ To qualify, the foreign worker must demonstrate sustained national or international acclaim by satisfying a number of criteria listed in USCIS regulations.⁴⁹

The O visa may be granted for an initial period of up to three years and may be renewed in annual increments without limit.

L-1 visa

The L-1 non-immigrant visa is available for intracompany transferees.⁵⁰ To qualify, the employee must be employed by the company overseas for one full year in the past three years in an executive, managerial or specialised knowledge capacity; and the employee must be transferred to a US branch, subsidiary or affiliate of the overseas company to work in an executive, managerial or specialised knowledge capacity.

Spouses and children under 21 are entitled to L-2 derivative visas. L-2 spouses may apply for work authorisation upon arrival in the US.⁵¹

L-1 petitions are approved for an initial period of three years. L-1B specialised knowledge employees may obtain a two-year extension for a maximum of five years, while L-1A executives/managers may obtain extensions in two-year increments, up to a maximum of seven years.⁵² A specialised knowledge employee promoted to a managerial role may be eligible for a change in classification from L-1B to L-1A, and a corresponding two-year extension, providing the change is made before the employee reaches 4.5 years in L-1 status.⁵³

Certain employers with large offices in the US or who sponsor a significant number of intercompany transferees each year may apply to USCIS for 'L Blanket' approval, which permits them to bypass filing individual petitions with USCIS for each transfer and instead file an L Blanket petition directly at a US consulate. To qualify as an L Blanket employer, USCIS requires evidence that an office in the US has been doing business for at least one year; that the organisation has three or more domestic and

48 INA, Section 101(a)(15)(O); 8 CFR, Section 214.2(o)(1)(i).

49 8 C.F.R. Section 214.2(o)(3)(iii).

50 INA, Section 101 (a)(15)(L); 8 CFR, Section 214.2(l)(1)(i).

51 INA, Section 214(c)(2)(E).

52 8 CFR, Section 214.2(l)(12).

53 8 CFR, Section 214.2(l)(15)(ii).

foreign branches, subsidiaries, or affiliates; and that it is sufficiently large in terms of US employees (at least 1,000) or intercompany transferees (at least 10 in the previous 12 months) or in terms of annual sales (at least \$25 million).⁵⁴

ii Immigrants

For foreign employees, the path to permanent resident status follows two steps: a petition to USCIS to become a preference immigrant; and an application for an immigrant visa.

Preference petition

A preference petition is required for employees intending to immigrate to the US.⁵⁵ The petition classifies the employee within one of the following immigration preference categories:⁵⁶

- a* first employment-based preference ('EB-1'): multinational executives and managers, aliens of extraordinary ability or outstanding professors or researchers;
- b* second employment-based preference ('EB-2'): aliens who possess an advanced degree or have exceptional ability; or
- c* third employment-based preference ('EB-3'): members of the professions possessing a bachelor's degree and skilled workers.

Employment-based immigrant visas are limited to an annual quota of 140,000 visas.⁵⁷ Since demand often exceeds supply, especially in the EB-3 category, immigrant visas can be unavailable for several years.⁵⁸

Application for an immigrant visa

An application for adjustment of status may be filed with USCIS by foreign nationals seeking immigrant visas and their spouses and unmarried children under age 21.⁵⁹ Alternatively, they may apply for immigrant visas at a US consulate in the country of their nationality or last overseas residence.⁶⁰

iii Labour market regulation

The DOL regulates the employment of foreign workers under both non-immigrant and immigrant visas. A labour market test is generally not required to sponsor a non-immigrant worker, but may be required to sponsor a worker for permanent residence.

54 INA, Section 214(c)(2)(A); 8 CFR, Section 214.2(l)(4)(i).

55 INA, Section 204(a).

56 INA, Section 203(b); 8 CFR, Section 204.5.

57 INA, Section 201(d).

58 INA, Section 203(b), (e); see US Department of State, Visa Bulletin (April 2011), www.travel.state.gov/visa/bulletin/bulletin_5368.html.

59 INA, Section 245.

60 22 CFR, Section 42.61(a).

Labour condition applications for non-immigrant H-1B and E-3 visas

Before applying for an H-1B or E-3 visa, the US employer must file an LCA with the DOL.⁶¹ The LCA requires the employer to attest that:

- a* the non-immigrant will be paid the required wage;
- b* the employment of the non-immigrant will not adversely affect the working conditions of workers similarly employed in the area of intended employment;
- c* as of the date of filing the LCA, there is no strike or lockout involving the position; and that
- d* notice of the position has been provided to the bargaining representative or has been posted in a conspicuous place where the non-immigrant will be employed.

For H-1B and E-3 visas, employers must ensure they pay the foreign workers the DOL's required wage for the particular occupation and region.⁶² The LCA attestations, data on the required wage determination and the salary for the position must be maintained in a public access file available for inspection by the public or the DOL's wage and hour inspectors.⁶³ Wage violations may be subject to fines or disbarment from the H-1B (or E-3) programmes, or both of these sanctions.⁶⁴

Labour certification for permanent residents

A labour market test is generally required to sponsor foreign workers in the EB-2 and EB-3 categories noted, *supra*.⁶⁵ Prior to filing the preference petition, an employer must apply for permanent employment certification ('PERM Labor Certification') with the DOL. To obtain a PERM Labor Certification approval, the employer must document the shortage of US workers who are able, willing and qualified to perform the job duties.⁶⁶ Under the PERM regulations, the employer must conduct specified recruitment activities for 60 days.⁶⁷ If no qualified, willing and able US workers are identified through the recruitment efforts, the employer may proceed with the PERM Labor Certification application, which can be completed and submitted online to the DOL. Processing times range from two weeks to six months. The DOL can audit the applications up to five years from the filing date. Audited cases can take over two years for review.

iv Rights and duties of sponsored employees

Non-immigrant workers must be employed in the position described in the sponsoring petition, not work for another employer and ensure they do not remain in the US beyond the date of admission indicated on their arrival/departure record issued by USCIBP. They may apply for an extension or change of visa status with USCIS before the end of their

61 INA, Section 212(n)(1); INA, Section 212(t)(1); 20 CFR, Section 655.730(d).

62 INA, Section 212(n)(1)(A), (t)(1)(A).

63 20 CFR, Section 655.760.

64 INA, Section 212(n)(2)(C),(t)(3)(C).

65 INA, Section 212(a)(5)(A).

66 20 CFR, Section 656.10.

67 20 CFR, Section 656.17(e).

current period of admission. Overstays may bar future entry to the US, as mandated by IIRIRA.⁶⁸

Non-immigrant workers may reside and work in the US for the sponsoring employer for the period of admission as determined by USCBP upon their entry. They may apply for social security numbers⁶⁹ and be eligible for future social security payments.⁷⁰ H-1B employees are entitled to receive the wage indicated in the employer's LCA filed with the DOL (*see supra*). They may lodge a complaint with the DOL if they are not receiving the stated wage or have been 'benched' by the employer.⁷¹

If an employer terminates the employment of an H-1B or O-1 worker before the end of the approved period of validity, the employee is entitled to payment for the cost of transportation to his or her country of residence.⁷²

LPRs generally have full civil rights to work in the US for any employer. They have no political rights, but may apply for US naturalisation having satisfied residence and physical presence requirements.⁷³

V INVESTORS, SKILLED MIGRANTS AND ENTREPRENEURS

i Immigrant investors

Foreign nationals who invest significant sums of money in US enterprises may qualify for permanent resident status in the immigrant investor category, known as the fifth employment-based preference category ('EB-5'). There are two investment options within EB-5:

Creation of a new US enterprise

The primary eligibility requirements are:⁷⁴

- a* investment of at least \$1 million in a 'new commercial enterprise' (or \$500,000 if in a 'targeted commercial area', which includes a rural area or an area that has experienced unemployment of at least 150 per cent of the national average);
- b* creation of full-time employment for at least 10 new workers who must be direct employees of the commercial enterprise; and
- c* active management of the enterprise, through day-to-day managerial control or policy formulation.

68 INA, Section 212(a)(9)(B)(i).

69 See US Social Security Administration, 'Social Security Numbers for Noncitizens,' SSA Publication No. 05-10096 (June 2009), www.ssa.gov/pubs/10096.pdf.

70 Social Security Protection Act, Pub. L. No. 108-203, 118 Stat. 493 (2004).

71 8 CFR, Sections 655.731, 665.710.

72 INA, Section 214(c)(5).

73 INA, Section 316.

74 INA, Section 203(b)(5).

Investment in a regional centre

Regional centres are investment opportunities that have been ‘pre-approved’ by USCIS with respect to the more stringent criteria listed *supra* (new enterprise, job creation, targeted commercial area). Eligibility criteria include:⁷⁵

- a* investment by the foreign national of \$500,000;
- b* the enterprise must create full-time employment for at least 10 new workers; however, indirect job creation is permitted (vendors, contractors, etc.).

The types of investments in regional centres are varied, and include enterprises that rescue troubled wineries in California, farm tropical fruits in Hawaii, and develop tourism industries in Vermont.⁷⁶ Active investment is not required, therefore the foreign national may be a limited partner.

There is an annual quota of approximately 10,000 immigrant investor visas, which has never been met.

The permanent resident process for the EB-5 category consists of two parts: the petition to be classified as an investor, and the individual applications of the petitioner and his or her spouse and any unmarried children under the age of 21 for an immigrant visa. After approval of an immigrant investor petition and the immigrant visa applications, conditional US permanent residence is granted for two years.⁷⁷ At the conclusion of this period, the foreign national must demonstrate that the money has been invested, and that the enterprise remains viable and continues to employ 10 workers.⁷⁸ If these conditions are not satisfied the permanent residence will be terminated.

ii Self-sponsored immigrant petitions

Most employment-based routes for permanent residence require an employer to sponsor the foreign national and conduct a labour market test. Two categories permit the foreign national to self-sponsor without the need for a labour certification:

Extraordinary ability

Individuals of extraordinary ability in the sciences, arts, education, business or athletics may apply for permanent residence without an employer sponsor in the EB-1 immigrant category.⁷⁹ The criteria are comparable to those of the O-1 non-immigrant visa,⁸⁰ although USCIS often imposes a higher standard of review due to the permanent immigration benefit that is to be obtained.

75 8 CFR, Section 204.6(m).

76 www.uscis.gov (search ‘Immigrant Investor Regional Centers’).

77 8 CFR, Section 204.6(l).

78 8 CFR, Section 216.6.

79 INA, Section 203(b)(1).

80 INA, Section 101(a)(15)(o).

National interest waiver

Foreign nationals may file petitions in the EB-2 category seeking a national interest waiver (a request that PERM Labor Certification be waived because it is in the interest of the US).⁸¹ Although the jobs that qualify for a national interest waiver are not defined by statute, national interest waivers may be granted to those who have exceptional ability and whose employment in the US would be in the national interest.⁸² Exceptional ability is a degree of expertise that is significantly above that ordinarily encountered in the sciences, arts or business.⁸³

A foreign national seeking a national interest waiver must meet at least three of the criteria listed in USCIS's regulations and demonstrate that the national interest would be greatly served if he or she worked permanently in the US.⁸⁴

As with the EB-5 investor, the permanent resident process for EB-1 extraordinary ability and EB-2 national interest waiver categories consists of two parts: the petition to be classified as an alien of extraordinary ability or an alien eligible for national interest waiver, and the individual applications of the petitioner, his or her spouse and any unmarried children under 21 for an immigrant visa.

VI OUTLOOK AND CONCLUSIONS

The primary immigration issues confronting the 112th Congress relate to border security and the plight of undocumented persons. Until Congress and the President can find common ground on these issues, reform of employment-based immigration laws is unlikely.

Prospects for the enactment of comprehensive immigration reform are not encouraging. The bipartisanship of the former Congress is unlikely to disappear in the near future, especially as the Republicans hold a majority of seats in the House of Representatives and the Democrats hold a majority in the Senate. Furthermore, Representative Lamar Smith,⁸⁵ the new chairman of the House Judiciary Committee responsible for immigration matters, has been an opponent of comprehensive immigration reform and was an architect of IIRIRA. In addition, he has previously supported state and local enforcement of federal immigration laws, and the mandatory imposition of E-Verify on employers. He has also opposed any increases in immigrant and H-1B non-immigrant visa numbers. Representative Elton Gallegly,⁸⁶ appointed by Lamar Smith to serve as head of the House Subcommittee on Immigration, regards border security as an immigration priority. He also supports immigration enforcement with the mandatory use of E-Verify by all businesses.

81 INA, Section 203(b)(2)(A) and (B).

82 8 CFR, Section 204.5(k)(4)(ii).

83 8 CFR, Section 204.5(k)(2).

84 8 CFR, Section 204.5(k)(3); Matter of New York State Dep't of Transp., 22 I&N December 215 (Comm'r 1998).

85 See <http://lamarsmith.house.gov>.

86 See www.house.gov/gallegly.

With respect to employment-based immigration law, the continued effects of the 2008–2009 recession will foster an immigration policy of protectionism and enforcement. With the February 2011 unemployment remaining at approximately 9 per cent,⁸⁷ there is unlikely to be an appetite to increase immigrant visa numbers, thereby providing relief to the heavily oversubscribed third preference category, or to non-immigrant numbers in the H-1B and H-2B visa categories. Furthermore, employers will be hampered in filing PERM Labor Certification applications if they continue to lay off US workers in the same or similar occupations for which labour certification is sought. Finally, employers should not anticipate any easing in government enforcement of worksite compliance obligations.

87 See US Department of Labor, Bureau of Labor Statistics, www.bls.gov/news.release/empstoc.htm (last visited 21 March 2011).

Appendix 1

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