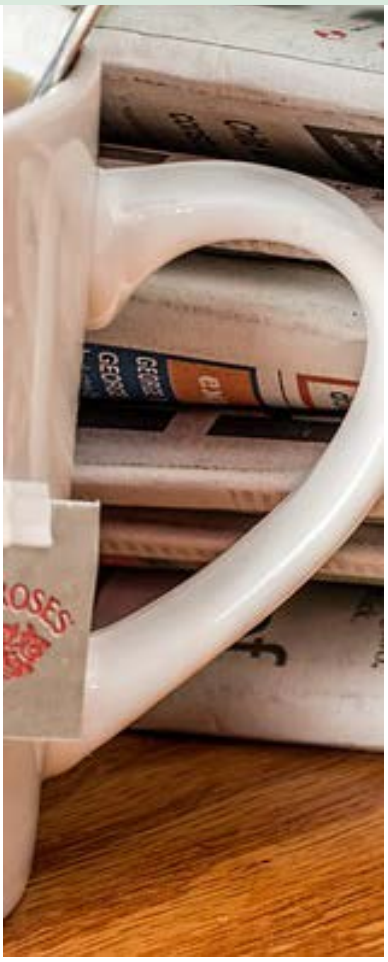
Global Migration Section

AILA Global Migration Section Digest



WELCOME

By Noriko Kurotsu
Noriko is an attorney at McCown & Evans LLP in San Francisco, California.

Welcome to the last GMS Digest of 2017. The GMS Publications Committee hopes that you will enjoy reading our winter global immigration digest edition. We are pleased to release our ongoing Spotlight Interview series; an update from recent consular tours in London; a comparison of how EU Directive 2014/66 has been implemented in various EU countries; and country updates from International Associates who are based in Canada, Estonia, Nigeria, CARICAM countries**,** Switzerland, and the United Kingdom.

We thank all of the authors who have contributed to this Digest and welcome contributions to future Digest editions.

Special thanks also go out to our Publications Committee Members: Chrystal Green, Poonam Gupta, Mark C. Holthe, Dana Imperia, and Susanne Turner for their work in producing this digest.

Happy Holidays, everyone, and see you in 2018!

AILA GMS Spotlight Interview Series

Spotlight interview with AILA GMS Member, Gabriela Lessa
Gabriela is a Counsel at the law firm of Veirano Advogados practicing at its Rio de Janeiro office in Brazil.

1. **How is the practice of immigration regulated in your country? Do you have immigration specific law(s)?**

   Immigration laws in Brazil were recently changed and as of November 21, 2017 are governed by Law No. 13,445/17, regulated by Decree No. 9,199/2017. Additional norms will be issued by different Ministries (Justice, Foreign Relations and Labor), as needed.

   The National Council of Immigration issued 12 new Normative Resolutions regulating the temporary visas and authorization of residence to work on December 8, 2017 and more are expected in the coming weeks.

2. **Does your jurisdiction have any quotas or other general requirements, such as registrations of a company, to be able to send employees?**

   Article 354 of the Brazilian Labor Code ("CLT") promulgated in 1943 requires at least 2/3 of the employees must be Brazilian (also known as the "Law of 2/3"). The Brazilian Federal Constitution promulgated in 1988 guarantees no discrimination between Brazilians and foreigners resident in Brazil.

Call for Articles:
Interested in getting involved in GMS? Consider publishing an article in the Digest or participating in a Spotlight Interview! We publish the digest quarterly and welcome articles and immigration updates from all non-U.S. jurisdictions. For more information regarding Digest guidelines, please contact a member of the Publications Committee.

For purposes of the Law of 2/3, foreign nationals who have been living in Brazil for 10 years or more and are married to a Brazilian citizen or have a Brazilian child, Portuguese citizens irrespective of any other individual situation, and nationals of the MERCOSUL countries who live in Brazil with a residency granted under the MERCOSUL Agreement, are counted as Brazilians.

When hiring foreign nationals, each company must respect the "Law of 2/3", i.e.:

(i) the total sum of the salaries earned by the Brazilian workers must correspond to at least double the total sum of the salaries received by the foreign workers; and

(ii) there must be at least two (2) Brazilian workers for every foreigner hired.

Currently, there is no registration requirement for a company to hire any foreigners.

3. **Please describe the basic immigration process for a business wanting to send an employee on an intracompany transfer.**

a. How does your jurisdiction define an intra-company transfer?

There is no specific definition of an intra-company transfer. All transferred employees are subject to the local labor legislation depending on the type of visa which decides whether or not a local employment agreement will be required.

b. Are there any pre-requisites?

Normative Resolutions 1 and 2, of December 8, 2017 define the pre-requisites for visas.

Foreign nationals applying for a temporary visa or a residence permit to work under an employment contract must prove that they have education, qualification and professional experience compatible with the function to be exercised in Brazil. Education and qualification are evidenced by diplomas and/or certificates or experience in lieu of a college diploma [a minimum of twelve (12) years of study and four (4) years of experience].

Candidates whose, artistic or cultural, activities do not depend on formal education a minimum experience of three (3) years in the exercise of the profession must be proven.

Professional experience may be evidenced by a letter or any other means admitted by law, supporting a minimum experience of three (3) years for medium-level candidates, two (2) years for candidates who hold a bachelor's degree and one (1) year who have attended a post-graduate course with a minimum of 360 class-hours. Holders of master's or Ph.D. degrees, do not need to submit letters of experience.

All documents issued overseas must be legalized either through apostille, for those countries that are under The Hague Convention of October 5, 1961, or, for other countries, notarized and legalized by the Brazilian Consulate where the documents were issued. After the legalization process the documents must be translated in Brazil by a sworn public translator.

c. Is a local employment contract required?

This will depend on the function, duties and length of the assignment for which the company intends to bring the employee.

d. How long is the permit generally valid and can it be extended?

The term of the temporary visa and residence permit will be up to two (2) years, and it may be extended, or transformed. Requirements for the renewal and transformation will be published in a future Normative Resolution.

e. What are the average processing times?

The legal processing time for a prior authorization of residence for a temporary visa and residence permit to work is set at thirty (30) days under the new legislation. For visa issuance the average processing time is five (5) business days but will vary with the consular workload.

f. Can the employee bring dependents? If so, are there any pre-requisites.

Yes, employees can bring dependents and they are eligible to work. To obtain a dependent visa, it is mandatory to provide evidence of the relationship by submitting birth certificates, marriage certificates, stable union documents, as well as any additional documents required by the immigration authorities. All foreign documents must meet the legalization and translation process described above. Ministry of Foreign Affairs will advise through an act when these documents must be submitted.

4. **Does your jurisdiction allow a company to send newly hired employees?**

Yes, Brazil allows a company to send newly hired employees and the same rules regarding the pre-requisites, local employment contracts, validity period, processing times, document legalization processes as well as rules for dependents apply as above.

5. **Do partners or same sex spouses qualify for dependent status in your jurisdiction?**

Yes, partners or same sex spouses qualify for dependent status in our jurisdiction.

a. What is the age limit for children?

Under the new law and decree there is no age limit for children.

b. Can parents accompany as dependents or must they seek independent status?

Under the new law and decree parents remain eligible for a dependent visa.

6. **What advice would you give a client thinking about sending employees to your jurisdiction? Are there any tips you might want to share (e.g. select employees with a university degree if possible, etc.)?**

Clarity on an employee's assignment, position and role in Brazil is critical to define the best type of temporary visa, or residence permit to work in Brazil. Recent changes in the Brazilian Labor Code may have a direct impact on the most appropriate temporary visa, or residence permit for the employee and the employer. Prior to sending an employee to Brazil, it is advisable to have a Brazilian labor and immigration attorney review the offer letter to define the best course of action to avoid future liabilities.

7. **Are there any hot topics or trends you wish to share?**

On November 21, 2017, both the Migration Law No. 13,445/2017, as well as Decree No. 9,199/2017, which regulates said law, entered into effect. The new law provides for the rights and duties of migrants and visitors and regulates their entry and stay in Brazil. In addition, it establishes the principles and guidelines for public policies for the emigrant.

Additional Normative Resolutions are expected in the coming weeks and till their publication the filing and analysis of specific applications is temporarily suspended.

The new Normative Resolutions will regulate the requirements for a visitor to apply for a residence permit to work in Brazil without having to go to a Consulate abroad to apply for a work visa, as was required in the past.

In addition, under the terms of the new law, regardless of one's immigration status, the migrant may apply for a residence permit in case he fulfills the requirements to obtain it (including having a work offer), thereby regularizing his migratory condition.

The most significant changes introduced by the new law are:

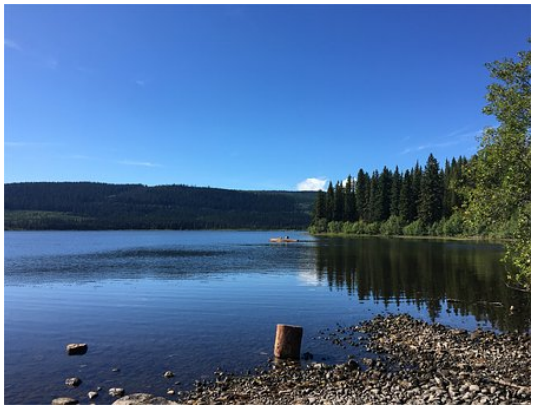
- The creation of a visitor's visa, which includes different types of visas (tourism, business, transit, artistic activities and sports of short duration, without employment relationship in Brazil), provided for in the previous legislation;
- The creation of humanitarian reception and health treatment visas, previously only granted on the basis of resolutions of the National Council of Immigration;
- In the hypothesis of strategic professional capacities for Brazil, to be defined by a joint act of the Ministries of Justice, Labor and Foreign Affairs, subject to consultation with the National Council of

Immigration, the waiver of an employment offer prior to obtaining a residence permit, provided that the migrant has a bachelor's diploma or equivalent degree;

- The extinction of the permanent visa and the creation of the residence permit;
- The possibility of requesting and issuing visas electronically. As of now, available only to Australians [as of November 21, 2017], Japanese [as of January 11, 2018], Canadians [as of January 18, 2018] and U.S. citizens [as of January 25, 2018)]; and
- The need to obtain a prior authorization residence to work, before applying for a temporary work visa, or residence permit.

CONSULAR SPOTLIGHT: CANADA

This feature is part of a series based on information gained during GMS consular tours in London, United Kingdom.



GMS members had the benefit of meeting with Angela Gawel, Minister Migration, and Area Director N. Europe, Gulf States at the High Commission of Canada in London and her Deputy Director following the AILA RDC Fall Conference in London, United Kingdom. Ms. Gawel gave an overview of the visa processes they oversee, including recent updates to the processes and common challenges faced.

Canada now completes much of its processing online, so a case filed by someone in London could be routed through Canada and back. While this enhances efficiencies and improves processing times, it can take a bit of time to locate the current "host location" of an application that has been lodged. If an application is filed in London, consular officers there will be able to locate the application if necessary in case of issues/queries as they still retain responsibility for it.

Recent updates: Individuals who apply for a visitor visa while resident in one country (e.g. the United Kingdom) can actually submit their passports for visa stamping in another country if they happen to travel while processing is under way. A member of the GMS meeting delegation could vouch for the effectiveness of the service as she had already used it for several Brazilian citizen clients who applied for Canadian Temporary Resident Visas (TRVs) while living and working in the United States. Due to the length of processing times and need for travel, the Brazilian citizens have applied for visas to Canada while in the United States, then traveled to Brazil and have submitted their passports to the Canadian authorities in Brazil. The passports with Canadian visas have been returned promptly and the visas have been correct.

Upcoming changes: The Canadian Government is continually analyzing how to increase efficiency and service levels in the assignment of work between Ottawa and the various embassies and consulates abroad so further changes in work allocation are likely.

CONSULAR SPOTLIGHT: OMAN

This feature is part of a series based on information gained during GMS consular tours in London, United Kingdom.

GMS members also met with Razan Kandi at the Embassy of Oman in London following the AILA RDC Fall Conference in London, United Kingdom. This was the first visit by a GMS delegation to an Omani post and we were very graciously received. Ms. Kandi provides support for a number of different functions at the Embassy in addition to visa processing, so gave a very high-level overview of Omani visa matters. There is only one individual at the Embassy who is in charge of visa processing. Ms. Kandi has offered to serve as a conduit to obtain information for GMS as necessary, and we will have the opportunity to submit a GMS visa questionnaire in order to gather more specific information about the visa process. Various changes are coming up in Omani visa processing, including the expansion of e-visa and visa on arrival processing for tourist visas for select nationalities. The Embassy is interested in making visa processing and travel to Oman easier given the economic benefits of travel for Oman.

BREXIT – A CHALLENGE FOR INDIVIDUALS AND EMPLOYERS ALIKE

By Jennifer Stevens
Jennifer is a Partner at Laura Devine Attorneys and is based in London, United Kingdom.

Talk of "Brexit" has been swirling in the news cycle almost continuously since the result of the UK's EU referendum was announced in June 2016. Unfortunately, in the year that has followed, more questions have been raised than have been answered by the UK government.

Perhaps somewhat understandably, the UK government does not wish to "give away its hand" before exit negotiations with the European Union are fully underway. As a direct consequence of this deliberately tight-lipped approach, there continues to be a substantial amount of uncertainty surrounding the status of European Economic Area (EEA) nationals in the United Kingdom (and similarly, UK nationals in the European Union). This has made forward planning very difficult, not only for EEA nationals who have made the UK their home, but also for the many employers throughout the United Kingdom who currently enjoy unfettered access to the EEA hiring pool.

The limited information released by the government to date has indicated that all EEA nationals in the UK at the "cut-off date" will need to apply for "settled status" in order to remain in the United Kingdom. Unfortunately, the relevant cut-off date (perhaps the most crucial variable in the announcement) has not yet been confirmed, although many consider that it is likely to be the date that the United Kingdom actually exits the European Union, which is scheduled for March 29, 2019. While it is not yet clear what the application process will entail, the Prime Minister has confirmed that the process of applying for "settled status" will be a "streamlined digital process" which will cost no more than applying for a UK passport (currently £72.50).

Importantly, the Prime Minister has confirmed that any EEA citizen who holds permanent residence under the existing pre-Brexit Regulations will undertake a "simple process" in order to swap their current status for UK settled status. This process should be far more straightforward than if the EEA national had not obtained the document certifying permanent residence pre-Brexit, and it is therefore recommendable that all those who are currently able to obtain a document certifying permanent residence do so as soon as possible.

For employers, planning for the post-Brexit landscape is also very tricky. Currently, free movement provisions make the process of hiring an EEA national almost identical to hiring a UK national. However, a leaked Home Office paper published by *The Guardian* in September 2017 appears to finally confirm that free movement as we know it is set to end. The newspaper's article proposes a three-phased approach to immigration control. The first phase, before Brexit, involves the introduction of an immigration bill. The second phase is a temporary implementation period of at least two years following Brexit, which will lay the foundations for the future permanent system. The final phase will involve the establishment of a new long-term approach to EEA migration, the format of which is yet to be decided. *The Guardian* also indicates that for those entering the United Kingdom during the second phase, the government plans to prioritize highly skilled EU migrants over low-skilled workers. The former is likely to be granted immigration permission for a period of three (3) to five (5) years, while the latter will only be granted two (2) years.

While *The Guardian* states that the government does not currently plan to require employers to be licensed to sponsor EEA migrants during the implementation period, some employers have already begun to proceed with sponsoring EEA nationals under the existing Points Based System (PBS) rather than rely on their EEA status. For large, global employers who already have a sponsor license in place (a requirement for employing sponsored workers under the PBS), this presents little difficulty. However, for smaller companies and start-ups, the onerous requirements of obtaining and maintaining a sponsor license mean that this is not a "quick fix" solution. While the process of hiring an EEA national is virtually free, hiring a worker under Tier 2 (the main PBS category for sponsoring migrant workers) for a period of five years costs in the region of £8,000

(not including any legal fees). If family members are also applying, the fees involved rise substantially. This can be starkly contrasted to the current process of hiring an EEA national, which is completely free.

As the Brexit landscape continues to develop, we should begin to have a clearer understanding of the UK government's stance on the status of EEA nationals in the United Kingdom going forward. In the meantime, individuals and businesses alike continue to struggle to plan due to the lack of clear guidance issued by the UK government. For EEA nationals currently in the United Kingdom, taking immediate action to obtain evidence of their current status in the United Kingdom is recommended and can only strengthen their position.

IMMIGRATION UPDATE FOR SWITZERLAND

By Nina Perch-Nielsen
Nina is an Immigration Lawyer based in Zürich, Switzerland.

The practice of Swiss immigration law and thus the realities to be considered for companies and individuals aspiring to recruit or assign staff to the country should take the following changes into consideration for the upcoming year.

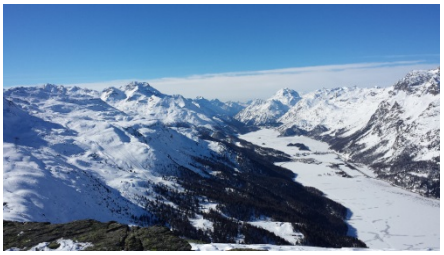
2018 Permit Quotas

Following a slight increase in work permit quota numbers last year, the Swiss Federal Council has in late September 2017 decided to further augment the numbers for 2018. With this decision, the government acknowledges the requests for such an increase from the Swiss economy as well as the public authorities in multiple cantons.

- In 2018, Swiss companies can recruit foreign specialists from non-European Union/European Free Trade Association (EU/EFTA) countries to the amount of 3,500 B category (long-term) permits and 4,500 L category (short-term) permits. This means an increase of 500 B permits, which will be held in reserve on Federate level for distribution according to specific requests by the cantons.
- The quotas for assignees from EU/EFTA countries to Switzerland (those who are in the country for more than 90 days and remain on their home employment contract) are 3,000 L permits and 500 B permits. This means an increase of the permit quota numbers for these categories to the levels of 2014, before the large quota cuts were made.

Safeguard Clause invoked for citizens from Romania and Bulgaria

Since June 2016, citizens from Romania and Bulgaria have full access to the Swiss employment market according to the bilateral agreements between Switzerland and the European Union. The Safeguard Clause contained in the same agreements can be invoked if immigration from a specific country exceeds thresholds within a certain timeframe. This was the case for immigration from Romania and Bulgaria, which increased significantly in the years 2016 to 2017.



In May 2017, the Swiss Federal Council therefore decided to invoke the Safeguard Clause for citizens from Romania and Bulgaria. This means that during the 12 months following that decision, citizens from these two countries have limited access to the Swiss employment market if they wish to start to work in the scope of a long-term B permit (either employed or self-employed). Such permits are limited to a quota of 996 units for the mentioned timeframe.

The temporary reintroduction of a quota for B permits does not mean that a labor market test needs to be shown for citizens from Romania and Bulgaria to receive work and residence permits. Rather, they are issued B permits until the quota is used up. After that, short-term L permits are likely to be granted, which can be converted to B permits at a later date.

THE EU ICT DIRECTIVE – WHAT IT REALLY MEANS FOR MOBILITY WITHIN THE EU

By Susanne C. F. Turner, L.L.M.
Susanne is based in Frankfurt, Germany and is Partner, Global Immigration at Deloitte Legal mbH.

Introduction

The European Union's "new" ICT Permit Directive 2014/66 and the short-term mobility options that it offers have been a hot topic of discussion for many corporations. The European Council (EC) approved the intracompany transfer (ICT) directive on May 13, 2014, and determined that all Member States of the European Union (except for Denmark, Ireland, and the United Kingdom) should implemented the directive into local legislation by November 9, 2016.[1] Most countries have not been able to comply with this deadline, but we are slowly seeing an increase in the implementation of this Directive EU-wide.

The EU Directive applies to "entry and residence of third-country nationals in the framework of an intra-corporate transfer"[2] and, for the first time in EU history, attempts to simplify movement for work purposes within EU Member States by creating less bureaucratic short-term mobility options for non-EU citizens who are posted on assignments in EU countries. Under the Directive, ICT permit holders who need to work in other EU countries will not require a work permit. Instead they will benefit from simpler notification procedures or minimal formalities, depending on the length of their stay. The current challenge lies in the fact that not all EU Member States have implemented the EU ICT Directive. Further, many countries continue to offer other types of permits that might still make the EU-Directive-based ICT permit less attractive for individuals who don't need to take advantage of the inter-EU short term mobility offerings.

Who Benefits from the new EU Directive?

According to the EU Directive, third-country-nationals (not citizens of the European Union or EEA Member States)[3] who fill the roles of manager, specialist, or trainee and who are transferred for more than ninety (90) days and less than three (3) years from a corporation established outside the territory of a EU Member State to an entity established in an EU Member State belonging to the same corporation, are eligible for the new ICT permit. At the time of the application, the employee must reside outside the territory of the Member State.[4] The Directive defines these roles as follows:

- **Manager:** *A person holding a senior position, who primarily directs the management of the host entity, receiving general supervision or guidance principally from the board of directors or shareholders of the business or equivalent; that position shall include: directing the host entity or a department or subdivision of the host entity; supervising and controlling work of the other supervisory, professional or managerial employees; having the authority to recommend hiring, dismissing or other personnel action;*[5]
- **Specialist:** *A person working within the group of undertakings possessing specialized knowledge essential to the host entity's areas of activity, techniques or management. In assessing such knowledge, account shall be taken not only of knowledge specific to the host entity, but also of whether the person has a high level of qualification including adequate professional experience referring to a type of work or activity requiring specific technical knowledge, including possible membership of an accredited profession; and* [6]

[1] See Press release of the European Council from May 13th, 2014

[2] 2014/66/EU

[3] See Art. 20 (1) TFEU

[4] Art. 2 ICT-Directive (2014/66/EU)

[5] Art. 3 (e) ICT-Directive (2014/66/EU)

[6] Art. 3 (f) ICT-Directive (2014/66/EU)

- **Trainee Employee:** *A person with a university degree who is transferred to a host entity for career development purposes or in order to obtain training in business techniques or methods, and is paid during the transfer.*[7]

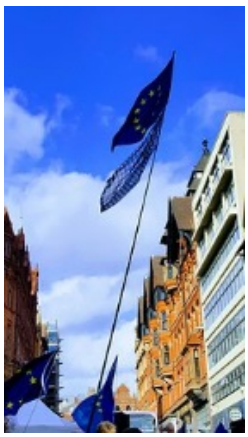
More Practical National Work-Authorization Schemes Continue to Exist

In theory, the EU Directive has restricted the application of parallel national schemes since all foreign nationals who fall inside the scope of the Directive must make use of the ICT permit. Existing national intracompany transfer schemes can remain in place only for applications concerning intra corporate transfers that are outside the scope of this directive. Effectively, many countries, for example Germany, are not yet applying these restrictions. Therefore, other, sometimes more practical national schemes, might still be available as in the case of Germany.

Validity Period of EU-Directive-Based ICT Permit

An ICT permit under the above-mentioned conditions can be issued for the duration of the transfer, but can only be issued for the maximum period of validity of three (3) years for specialists and managers and a maximum period of validity of one (1) year for trainees.[8] When the maximum period of validity is reached, an extension of the ICT-permit is not possible. After a specific "cooling-off-period", a new ICT permit can be issued. The Member states of the European Union can require a "cooling-off-period" of up to six (6) months.[9] Family reunification on the basis on a valid ICT-Permit is possible under Directive 2003/86/EC.[10]

Highlights of Intra-EU Mobility Options for Corporations



The Intra-EU Mobility options that are now available within the meaning of the ICT directive can be particularly beneficial to corporations. Third-country nationals, holding a valid ICT permit in one of the Member States of the European Union can, during the period of validity of the ICT permit, enter, stay or work in one or several Member States of the European Union. Conditions are, inter alia, that the longest stay of the transferred employee is in the first Member State of the European Union, where the employee holds the main ICT permit and that the work in any other Member State needs to be an inter-corporate transfer to another entity belonging to the same group of companies.

Intra-EU Mobility within the meaning of the ICT directive allows not only short-term mobility (stays up to 90 day) but also long-term mobility (stays longer than 90 days but shorter than 180 days) to other Member States of the European Union. Short-term mobility is possible without an application for a new ICT permit in the other Member State as only a simplified and rapid notification procedure to the competent authority is necessary for short-term mobility solutions. Long-term mobility requires a single application procedure. As both options are based on the main ICT permit application, where the general granting prerequisites have already been checked, both procedures can be characterized as accelerated and simplified. Furthermore, these intra-EU-mobility options are outside of the normal Schengen rules. That means a holder of an ICT permit in a Member State can be transferred within the meaning of the ICT directive to another Member State without using existing visa-free Schengen travel to other Schengen countries. The short- or long-term mobility options do not count into the regular rule that visitors must limit their stays in the Schengen zone to 90-days within a 180-day period.

Below is a brief summary of how the EU Directive have been implemented in various EU countries.

	DE	AT	NL	IT	CZ	FR
Contributed by:	Sevim Demirbilek Partner, Deloitte GmbH Wirtschaftsprüfungsgesellschaft	Sabine Straka Austrian lawyer, Law Office Straka	Marcel Reurs Advocten, Everaert	Alessia Ajelli Associate LCA Studio Legale	Veronika Plešková, Senior Associate Havel, Holásek & Partners	Stephane Coulaux & Valerie MARICOT CMG LEGAL
Implementation Status	Implemented on Aug. 1, 2017	Implemented on Oct. 1, 2017	Implemented on Nov. 29, 2016	Implemented on Dec. 29, 2016	Implemented on Aug. 15, 2017	Implemented on Nov. 1, 2016

[7] Art. 3 (g) ICT-Directive (2014/66/EU)

[8] Art. 13 Nr. 2 ICT-Directive (2014/66/EU)

[9] Art.

[10] Art. 19 ICT-Directive (2014/66/EU)

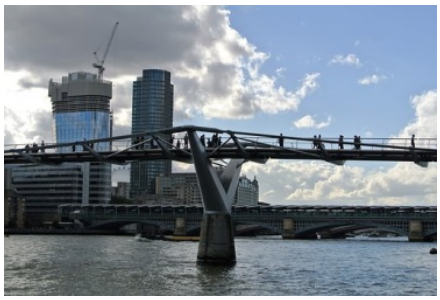
	DE	AT	NL	IT	CZ	FR
Existence of parallel national scheme	Yes, personal staff exchange program and Intra Company Transfer still exists. However, these regulations have different requirements than the ICT	Yes, posting and hiring out of workers exists. However, the requirements are different than for the mobile ICT, which is a third country worker sent as Intra Company Transferee from one EU country to another EU country	Yes, national Intra-company transfer policy still exists as well as options under bilateral treaties	Yes, Intra-Company work permits under Article 27 let. a) of Italian immigration law still exists, however it differs for some requirements	Yes, Employee Card of non-dual nature in conjunction with a Work Permit. However, for this arrangement exist slightly different requirements than for the ICT	Yes, passport-talent for Intra Company Transfer: for local French contract option
Requirement for prior employment experience in group	6 months	9 months for managers and specialists; 6 months for trainees	3 months	3 months	6 months	3 months
Remuneration requirements	Comparable salary for profession	Comparable salary for profession and at least minimum salary according to applicable collective labor agreement	Prevailing salary/bench mark salary in the concerned sector of industry. Salary at HSMP threshold are in principle considered market level.	Comparable salary for profession	Comparable salary and benefits for given profession; whereas the statutory minimum to be followed is at least 15 working hours per week and minimum salary	Comparable salary for profession
Accredited sponsorship	N/A	N/A	Recognized sponsor status is not required. Recognized sponsors will see their applications processed in 2 weeks rather than 90 days.	N/A	Yes	N/A
Duration of stay trainees	max. 1 year	max. 1 year	max. 1 year	max. 1 year	max. 1 year	max. 1 year
Duration of stay of specialists/ mangers	max. 3 years	max. 3 years	max. 3 years	max. 3 years	max. 3 years	max. 3 years
Cooling off periods	6 months	4 months	6 months	3 months	no	N/A
Processing times	1-3 weeks	max. 8 weeks	max. 90 days or 2 weeks for recognized sponsors	45 days for the obtainment of work authorization	a number of documents to be attached + 90 days	1-3 weeks for entry visa 1-3 months for RP card
Short-term mobility	Yes, start date directly after notification	Yes, start date immediately one day after correct ZKO notification is filed	Yes. As from issuing of residence permit. Notification required within 2 business days.	Yes	No	Yes, start date directly after notification
Process required	notification process	Filing of ZKO notification, after 2 weeks EU Posting confirmation will be issued	notification process	The holder of a EU ICT issued by another member state can enter and work for a period of 90 days over 180 days without the need to prior obtain a visa or a work authorization.	n/a	Notification process for ICT mobile worker
Days of prior notice	max. 20 days	Start date immediately as long as correct ZKO notification is filed	n/a	n/a	n/a	20 business days

	DE	AT	NL	IT	CZ	FR
Long-term mobility	Yes	Yes	Yes	Yes	Yes	Yes
Process required	application process	application to be filed at immigration authority	application process	application process	application process	application process for ICT mobile worker
Days of prior notice	max. 90 days	Filing min. 20 days before starting the employment; employment may be preliminary started after 20 days, even if application is still pending.	Processing time for residence permit is a max. of 90 days or 2 weeks for recognized sponsors	n/a	min. 90 days (in practice usually 90-120 days)	max. 90 days
Work on client site	Yes	No; different type of permit.	Yes	Yes	Yes	No
Dependent family members allowed to work	Yes	Yes	Yes	Yes	No	Yes

There will be a more on the ICT directive in various countries as well as other EU options published by the Analytics Committee of AILA's Global Migration Section – coming soon.

THE HOSTILE ENVIRONMENT IN THE UNITED KINGDOM

By Chetal Patel
Chetal Patel is a Senior Associate at Bates Wells Braithwaite in London, United Kingdom



Not a day goes by when immigration is not featured in the UK press, whether it be Brexit, the government's goal of reducing annual net migration to below 100,000, or creating a hostile environment for those who are suspected of being in the United Kingdom illegally.

The term "hostile environment" was coined by the UK Prime Minister, Theresa May, when she was Home Secretary in 2012. The government's intention has been to deny allegedly illegal migrants access to public and other services and benefits.

Impact of illegally working

How are individuals affected?

Illegal working is a criminal offence in the United Kingdom. Anyone working in the United Kingdom when disqualified from working due to their immigration status may face imprisonment of up to fifty-one (51) weeks, an unlimited fine, or both. Illegal workers may also face having their wages seized.

A person is disqualified from working in the United Kingdom if they have not been granted leave to enter or remain in the country, or their leave to enter or remain is invalid, has ceased to have effect, or is subject to a condition preventing the person from carrying out work of that kind. Working can be (amongst other things) under a contract of employment, apprenticeship, or for the provision of services. The definition of "work" is therefore very wide and extends beyond the narrower definition of "employment." The UK Home Office's guidance confirms that the offence of illegal working also applies to self-employment and caters both informal as well as formal work arrangements.

How are employers affected?

UK employers can be prosecuted for employing an illegal worker if they know or have reasonable cause to believe that the person is disqualified from working due to their immigration status. This refers not only to individuals who have no legal right to be in the United Kingdom, but also to those breaching the conditions of their UK visas by, for example, working excess hours or undertaking prohibited types of work.

Any individual or organization found guilty of the offence may face up to five (5) years of imprisonment, an unlimited fine, or both. This criminal liability is in addition to the civil penalty, under which employers can face fines of up to £20,000 per illegal worker.

How else are migrants affected?

Renting

The hostile environment is also evident in the property market with the introduction of the right to rent checks. Landlords must check specified documents and not rent to individuals who are disqualified from renting due to their immigration status and who are subject to the right to rent provisions.

Banking

Since 2014, banks have been required to carry out checks before opening accounts for new customers to verify that they have legal status in the United Kingdom. This obligation was extended in October 2017 to require banks to carry out quarterly checks in relation to individuals who hold specified accounts with certain financial institutions in the United Kingdom and to extend the checks that must be undertaken for new accounts. These checks will be made using CIFAS, which contains the Home Office's database of disqualified persons (i.e. individuals with no right to be in the United Kingdom) and, if a customer's name is flagged, the bank must notify the Home Office. Following investigation, the Home Office may instruct the bank to close the account or apply for it to be frozen.

The Home Office expects to identify 6,000 account holders without the right to be in the United Kingdom under this new regime in 2019.

Driving licenses

A pilot scheme is currently in operation in West Yorkshire and Kent in the United Kingdom which enables an authorized officer (who reasonably believes that person is not a lawful resident) to search the person and premises occupied by the subject and to seize and retain their driving license. Figures will be collated from the two areas and it is expected that this new power will be extended across the United Kingdom.

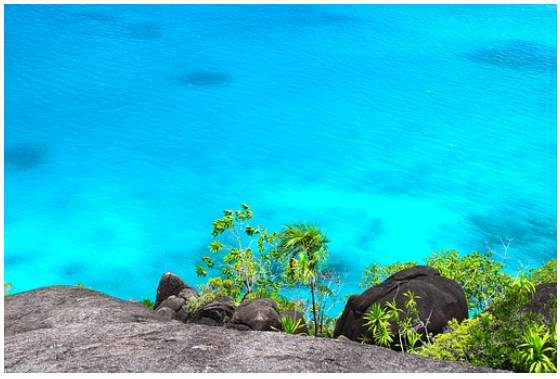
Conclusion

A number of concerns have been raised in relation to these policies, including the United Kingdom turning into a nation of immigration officers, lack of knowledge, and unintended discrimination and mistakes being made due to inaccurate records on databases, leading to difficulties on all aspects of an individual's life in the United Kingdom.

The question remains: will these policies achieve the intended aims of the government?

FREE MOVEMENT OF PERSONS WITHIN CARICOM

By Claire D. Nilson
Claire is Counsel in the London office of Faegre Baker Daniels LLP and is licensed as a lawyer in three jurisdictions: Trinidad & Tobago; New York, USA; and England & Wales.



The Caribbean Community and Common Market (CARICOM) was founded in 1973 in Trinidad and Tobago following the signing of the Treaty of Chaguaramas. As an organization comprising of fifteen full Member States (namely: Antigua and Barbuda, the Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Haiti, Jamaica, Montserrat, St. Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Suriname and Trinidad and Tobago), its aims include promoting greater economic development, strengthening foreign policy and improving social development and security amongst its Member States.

The Treaty was revised in 2002 and the CARICOM Single Market and Economy (CSME) was formed as one of its amendments. There are currently twelve (12) members of the CSME as the Bahamas, Haiti and Montserrat are not yet full participants. Article 46 of the revised Treaty stipulates categories of CSME

nationals entitled to work and move freely throughout the region upon obtaining a Certificate of Recognition of CARICOM Skills Qualification (known as a CARICOM Skills Certificate).

Certificate of Recognition of CARICOM Skills Qualification

In order to obtain a CARICOM Skills Certificate, applicants must demonstrate that they meet the requirements of one of the approved categories of workers and that they originate from a CSME country by providing a valid passport, certified copies of relevant qualifications and a police certificate of character to the relevant Ministry department of their home or host country. Generally, university graduates need only to provide their degrees as "relevant qualifications" to be granted a CARICOM Skills Certificate. Other professionals listed in the Treaty, such as sportsmen, musicians and artists, are required to show other documentation, details of which are provided by the Caribbean Community Skilled Nationals Act. Application and processing fees associated with obtaining the CARICOM Skills Certificate vary between the Member States.

Following the provision of the CARICOM Skills Certificate by the home or host country, the applicant should be granted six (6) months' definite entry into the requested Member State. During this period the receiving Member State reviews the application and makes a determination as to whether the applicant's qualifications have satisfied the requirements to be granted indefinite entry.

The spouse and dependent family members of a person holding a CARICOM Skills Certificate retain the same freedom of movement rights as the certificate holder for the duration of time in which they are granted entry into the country.

Drawbacks associated with the CARICOM Skills Certificate

Despite the efforts of the CARICOM to reduce barriers restricting the freedom of movement of persons within the region through the introduction of the CARICOM Skills Certificate, there have been media reports that immigration officials from several Member States have failed to accept CARICOM Skills Certificates as valid documentation to grant entry into such states. It is reported that nationals from St. Vincent, Jamaica and Guyana have been denied entry into the Bahamas, Grenada, Anguilla and Barbados. Jamaicans are believed to remain the highest group of work permit applicants with a CARICOM Skills Certificate denied the right to work in other Member States, with Guyanese ranking number two according to reports.

Following the implementation of the CARICOM Skills Certificate in 2006, there have been numerous accounts of forged certificates. In March 2017, a forged certificate was discovered in Antigua and Barbuda. As a result, CARICOM released a statement that, as part of its anti-fraud measures, it plans to implement a harmonized Skills Certificate with increased security features. The organization has noted that an electronic system called the CSME Application Processing System (CAPS), which was developed in 2015, is to be used for the application of skills certificates in the interim period until harmonization occurs. So far, CARICOM has advised that CAPS has already been implemented in at least two (2) member states. The goal is that it will be harder to falsify certificates once all CARICOM countries are fully using the system, which will continue to encourage the free movement of persons within CARICOM.

FEDERAL COURT ISSUES DIVERGENT RULINGS ON LABOUR MARKET IMPACT ASSESSMENTS

By Sergio R. Karas
Sergio is the principal of Karas Immigration Law Professional Corporation and is based in Toronto, Canada.

Introduction

Two recent cases highlight the difficulties that exist with the current Labour Market Impact Assessment (LMIA) process. The main question before the court was what kind of evidence regarding labor market conditions can be relied upon by a Temporary Foreign Worker Unit (TFWU) officer, particularly with respect to experience requirements, and how that evidence must be disclosed to an employer.

Seven Valleys Transportation, Inc.

In *Seven Valleys Transportation Inc. v. Canada (Minister of Employment and Social Development)*[11], the question was whether the officer abused her discretion and made an unreasonable decision by considering

[11] 2017 FC 195

extrinsic evidence in refusing a LMIA application. In that case, the employer applied to hire a foreign worker and required a minimum of 1-2 years of experience for a Long-Haul Truck Driver. The officer took issue with this requirement which, in her view, was excessive.

In her refusal, the officer stated that while experience may be considered to be an asset, it was not an essential requirement for the position. The officer's notes revealed that her internal research of occupational requirements disclosed that Long-Haul Truck Drivers typically received "on-road" time along with classroom training and then must pass a licensing exam. Once those conditions were met, the driver would be considered qualified to work in that occupation. While the employer had stated that insurance rates would be lower for drivers with experience, the officer rejected that rationale.

The employer claimed that the officer breached procedural fairness by relying on information from an internal database and on interim guidelines without disclosing those sources. The court referred to several decisions in examining this issue. In *Frankie's Burgers*[12], it was held that employers have a legitimate expectation that they will be afforded an opportunity to respond to any concerns that an officer may have regarding their credibility or the authenticity of documentation that they supply in support of a request for a positive decision in a LMIA application[13]. Further, the court also referred to the decision in *Kozul*[14] where the Federal Court found that there is a duty to disclose extrinsic evidence if it may have an impact on the outcome of an administrative decision.

In this case (i.e. *Seven Valleys*), the court held that the officer did not unfairly rely on documents from the internal database, and indeed disclosed the information to the employer prior to rendering a negative decision. The employer was made aware of the information relied upon by the officer and was given an opportunity to address it.

However, the court did accept the employer's argument that the officer ignored relevant information presented by the employer. She did not take into consideration the rationale provided by the employer regarding challenging routes, public safety, and the high value of the trucks given to the drivers. In so holding, the court referred to its decision in *Paturel*[15] where it was held that it is unreasonable for an officer to solely rely on one factor and one source of data while ignoring other factors and evidence presented as part of the application. Doing so amounted to unfettered discretion. In light of the officer's failure to take into account the employer's rationale for requiring a foreign worker, the court in *Seven Valleys* found that the officer abused her discretion and quashed her negative decision.

Sky Blue Transport Ltd.

A different result ensued in *Sky Blue Transport Ltd. v. Canada (Minister of Employment and Social Development)*[16]. In this case, the officer refused a LMIA application based on the lack of "genuineness" of the job offer due to the excessive experience requirement. The employer requested that Long-Haul Truck Drivers possess 1-2 years of experience. The employer stated that he was able to hire only one suitable Canadian candidate based on those requirements.

The officer conducted a telephone interview with the employer and questioned him about the rationale for the experience required for the job. The employer explained that it was a requirement of the insurance provider, as well as part of a risk reduction strategy. In a follow-up written submission, the employer reiterated the existence of the written contract with the insurer regarding driver qualifications, which had the effect that insurance for drivers with less than one year of experience was not available, and insurance for drivers with between 1-3 years of experience was costlier. The officer refused the LMIA application due to the employer failure to demonstrate that it had made sufficient efforts to hire Canadians, and failing to demonstrate a reasonable employment need for this position in the business. The officer found that, although experience was an asset, the 1-2 years required by the employer was not an occupational requirement as in the National Occupational Classification (NOC) description for Long-Haul Truck Drivers[17]. It is important to note that the officer made specific reference in her notes to the operational guidelines that stated that if an employer makes

[12] *Frankie's Burgers Lougheed Inc. v Canada (Employment and Social Development)* 2015 FC 27

[13] supra at para 73-75

[14] *Kozul v Canada (Employment and Social Development)*, 2016 FC 1316 at para 10

[15] *Paturel International Company v Canada (Employment and Social Development)*, 2016 FC 541 at para 11-12

[16] 2017 FC 273

[17] NOC 7411

a case that it requires experience for relevant factors related to job performance, these may be accepted if they are reasonable (i.e. experience in driving dangerous goods, challenging routes, etc.). The officer acknowledged that those factors could be taken into consideration.

The employer argued that the officer read the NOC classification for the occupation and the guidelines too narrowly and refused to consider an element not laid out in the classification. That argument was found to be without merit. The court noted that the officer did not foreclose the possibility of deviating from the guidelines or the NOC classification, and she recognized that the employer could have provided significant justification for additional job requirements, but that it had not done so. The court referred to *Frankie's Burgers*[18], where it was held that there was nothing wrong with an officer following departmental guidelines or NOC Classifications so long as they are not considered binding, and are applied in a manner that permits departures where warranted. In this case, the officer specifically recognized that she had the ability to step outside the guidelines in the appropriate case.

In response, the employer relied on *Seven Valleys Transportation Inc.*[19], where the negative LMIA decision was overturned because the officer did not take into account specific demands of the position. However, the court distinguished that case, because in *Seven Valleys* the officer refused to consider the rationale for additional job requirements, whereas in the present case (i.e. *Sky Blue Transport*) the officer took into consideration the employer's rationale but found that it lacked substance, mostly because it was focused on insurance costs for which minimal detail had been provided.

The court in *Sky Blue Transport* ultimately held that the officer's decision was reasonable because the employer failed to provide objective evidence to support the proposed job requirements. In so doing, the court reasoned that a decision-maker is not required to mention every piece of evidence before her. There was little justification for the additional job requirements because the employer never established that a driver with additional experience was required.

The court also rejected the argument that the officer had breached procedural fairness. The court noted that the employer was made aware of the officer's concerns and had an opportunity to address them. The court held that departmental guidelines, whether published or not, do not constitute extrinsic evidence. Reliance on such guidelines or information is not unfair if its substance has been conveyed to an applicant, who has been provided with an opportunity to respond[20].

A final line of attack against the decision was the argument that the employer had successfully applied previously for a LMIA with a similar driving experience requirement. The court rejected that argument as well because none of the facts or evidence related to that application were before the court or before the officer. The court upheld the officer's decision.

Conclusion

Experience requirements in LMIA applications should be reasonable and relate closely to the NOC job classification and to industry standards. While it is true that employers may insist on additional experience requirements, they should never be so unreasonable so as to preclude Canadians from qualifying for the position. It is best practice for employers to consult qualified immigration counsel before undertaking costly advertisements that can result in an unsuccessful LMIA application if not appropriately vetted.

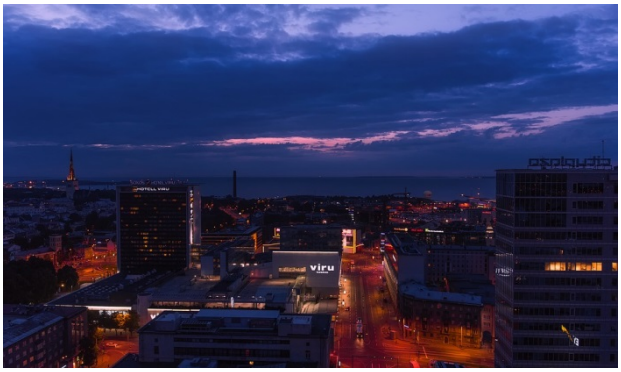
[18] supra, at para 92

[19] supra

[20] Seven Valleys, supra, at para 27

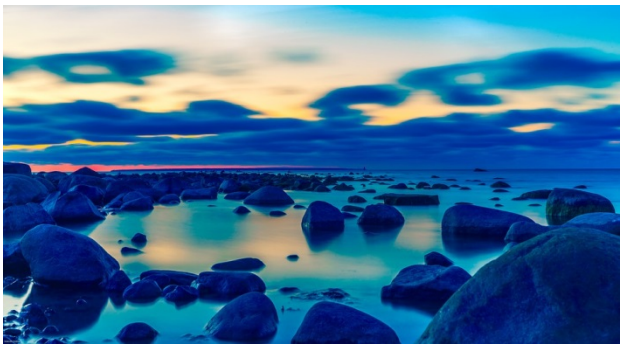
ESTONIAN START-UP VISA FOR NON-EU CITIZENS

By Magnus Romp
Magnus is an attorney at the Gencs Valters Law Firm in Tallinn, Estonia.



Estonia is a very start-up friendly country, offering opportunities not only for Estonians and EU-citizens with new ideas, but also for non-EU citizens. This can be seen from the amendments made to the Estonian Aliens Act on January 18, 2017, where it states that a non-EU citizen can be granted a residence permit for start-up purposes. Since then it has been easy and inexpensive for non-EU citizens to get a Start-up Visa, compared to visas for traditional business conduct. What is unique about the Start-up Visa is that as an Estonian Start-up it is easy to employ foreign talent through the Start-up Visa program. These persons, however, are not considered when calculating the fulfilment of the immigration quota. Therefore, the fulfilment of the immigration quota does not restrict the residence possibilities of employees of a start-up company.

The application process for a Start-up Visa is quite simple. First, an application is submitted to the Start-up Committee with a presentation of the applicant and the business plan of the start-up. The Start-up Committee reviews and evaluates the start-up based on the application. The Committee's objective is to sort out the traditional businesses. After the Start-up Committee approves the start-up, the applicant can apply for a visa or for a temporary residence permit at an Estonian Embassy or at a Service Point for the Estonian Police and Border Guard Board.



To qualify for a Start-up Visa, the start-up business must be innovative and scalable. In addition to the approval of the Start-up Committee, an income of at least one hundred and thirty (130) EUR per month and a health insurance covering the entire stay in Estonia are required. Visa applicants must have health insurance covering thirty-thousand (30,000) EUR for the entire stay in Estonia and they must provide evidence of accommodation. When applying for a visa or a residence permit the applicant must provide evidence of meeting these requirements and a confirmation document for the payment of the state fee. In order to get a temporary residence permit for up to five (5) years, the applicant must register a company in Estonia. However, the Applicant can apply for a long-term visa (up-to twelve (12) months) before company registration.

If the start-up founder is granted a Start-up Visa, a visa may be granted for the spouse and minor children of the start-up founder. In addition, children of the start-up founder that have reached the age of maturity but who, due to their health status or disability, are not self-reliant can be granted a visa as well. The spouse has the right to work in Estonia on the basis of the residence permit.

Since its launch the Start-up Visa program has been a success. In the first three (3) months alone, a total of one hundred and six (106) applications from twenty-nine (29) different countries were submitted. Estonia currently has the most start-ups per capita in the world.

A REVIEW OF NIGERIA'S NEW "IMMGRATION REGULATIONS 2017"

By Woye Famojuro
Woye is Managing Partner at Famsville Solicitors in Lagos, Nigeria.

The new Nigerian Immigration Regulations 2017 ("the Regulations") was recently released. The objectives of the Regulations are:

- To provide a legal framework for the effective implementation of the Immigration Act 2015; and
- To consolidate existing Immigration Regulations.

The government has emphasized that the new Regulations will aid in controlling the influx of foreign, illegal herdsmen into the country. However, there are other implications arising from the Regulations, especially for businesses and expatriates. This review will highlight the main provisions bordering on businesses and expatriates.

The Introduction of an Investors Residence Permit Program

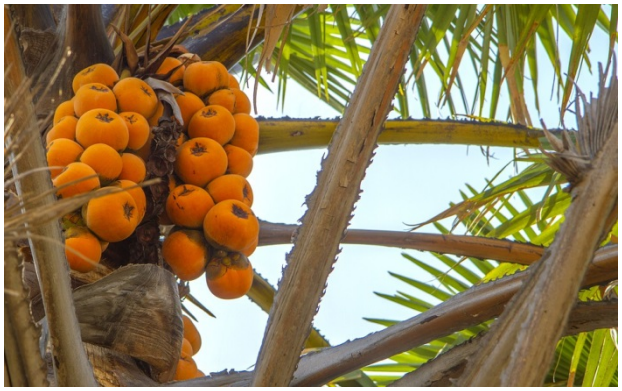
Foreign nationals who have imported an annual minimum "threshold of capital" over a period of time may be issued a Permanent Residence Permit, as long as

- the investment is not withdrawn; and
- there is no failure to comply with other prescribed conditions.

The Regulations do not provide the minimum time-period and the minimum capital requirements to obtain the permanent residence permit. Thus, it is safe to say that more legislative or practice guidelines will be required for this innovation.

Stay of Action Pending Renewal of Expatriate Quotas

Prior to the introduction of these Regulations, Expatriate Quotas could expire during an application for renewal of the Quotas. The Regulations solve this problem by providing that the Minister of Interior can issue a stay of action for such deportations. However, there must be a pending application for renewal of the Quota for a stay to be obtained.



Changes in Business

Changes in the names, nature of businesses or addresses of businesses must be communicated to the Minister or Comptroller-General within twenty-one (21) days of the change.

Foreign Nationals Married to Nigerians

Foreign nationals married to Nigerians can obtain residence permits. These permits will serve as multiple re-entry permits, notwithstanding the class of visa the foreigner holds. Please note that same-sex marriages are illegal in Nigeria. Also, unmarried partners will need to apply independently for visas and residence permits.

Notification Requirements for Immigrants

Registered immigrants are required to give notice to an Immigration Officer in the State where they reside when:

- there is any circumstance which changes the accuracy of their registered information;
- they have to leave their residences for a period beyond seven days;

- they intend to change residence from one state to another; or
- they intend to change residence within the same state.

Specific Expatriate Considerations

Expatriates who fail to apply for renewal of permits or regularization of stay within stipulated periods will be liable to prosecution. One such permit which must be renewed is the Business Permit which, prior to the Regulations, was granted as a one-off permit. There are however no details in the Regulations on the details of this innovation. Furthermore, companies that utilize Expatriate Quotas must ensure that there are Nigerian understudies for each expatriate position. Non-compliance with this provision opens the company to a fine and/or winding-up.

Clearly, the Regulations supplement the current immigration framework in Nigeria. However, we expect that there will be further guidelines or practices that will be developed to ensure that all stakeholders do not inadvertently fall into any legal quicksand arising from the Regulations.

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