Union Internationale des Avocats
*Droit de l'Immigration et Nationalité*
Immigration Law and Nationality
Derecho de la Inmigración y Nacionalidad



VOLUME 3
NUMBER 1
February 2014

**Demystifying the OCI**
*Shalini Agarwal / Milan Zala*
**2**

**Mexican Immigration Regime**
*Enrique Arellano*
**5**

**Sephardic Jews / The Spanish Golden Visa**
*Marla Vanessa Bojorge Zúñiga*
**6**

**Update on Chinese immigration laws**
*June Cheng*
**10**

**No Invasion. Now What?**
*Laura Devine*
**12**

**Initiative "against mass immigration": Swiss vote to set limits on immigration including from the EU**
*Rayan Houdrouge / Jeremy Nacht*
**15**

**The Overlooked H-3 Visa – An Alternative to the H-1B Visa**
*Mark A. Mancini*
**18**

**United States Citizenship and Immigration Services (USCIS) Expands Worksite Inspection Program to L-1 Employers**
*Ellen Yost*
**20**

***Message from Laura Danielson, co-editor of this newsletter***

Dear members of the UIA Immigration and Nationality Law Commission:

Thank you for the opportunity to co-edit this newsletter. I am pleased to be a part of the UIA's immigration community, and to participate in this publication highlighting the ever-changing and diverse laws monitoring the comings and goings of people across the globe.

This issue of the UIA newsletter includes excellent contributions from India (Shalini Agarwal), Mexico (Enrique Arellano), Spain (Marla Bojorge), China (June Cheng), the U.K. (Laura Devine), Switzerland (Rayan Houdrouge/Jeremy Nacht), the U.S. (Mark Mancini), and the U.S. (Ellen Yost). Nearly all of these articles highlight recent reforms in legislation or policy, illustrating the rapidly changing world in which we all live.

Mexico, China, and the U.K. have all undergone major transitions, and Spain has taken significant strides to recognize the positive contribution of immigrants by developing new categories for business people, entrepreneurs and those with high levels of talent. The U.S. lags behind in failing to reform a scheme it has clearly overgrown, but instead continues to expand its workforce inspection and compliance programs. India struggles with whether or not to allow dual nationality but in the alternative has developed programs to encourage former Indian citizens to migrate back.

In the quarter of a century that I have practiced immigration law, we have seen a significant increase in global migration, including frequent and temporary business transfers that require careful monitoring and compliance. Our business clients need assistance with their constantly shifting personnel, just as our family clients need help with reunification and humanitarian relief. We can't do it alone any longer. As immigration lawyers we have had to adapt, adjust, and build close networks and affiliations with our colleagues throughout the world. I write this as a personal case in point from my Shanghai office desk across the Huangpu River from my American daughter, my Dutch/Turkish son-in-law, and my one year old China-born grand-daughter who has already visited three continents and is being raised up in three languages.

Thank you for the opportunity to be involved in the UIA and I look forward to seeing many of you in Toronto from April 24 – 26 for a AIJA/UIA jointly sponsored seminar on Business Travel and Short Term Mobility.

Cordially,

**Laura Danielson**

# Demystifying the OCI

**Shalini Agarwal / Milan Zala***

*Increasingly, many persons with a connection to India are looking to take advantage of the various benefits that that an OCI card provides. Senior executives, looking to relocate to India with lucrative job offers are keen to minimise visa restrictions and often find the so called "OCI-route" attractive, because of the freedom and flexibility that the OCI provides in relation to living and working in India. Companies are also well advised to explore the possibility of their employees, with Indian ancestors, to obtain an OCI card, even for business visits – thereby avoiding the need to apply for business visas on an ongoing basis.*

The Overseas Citizen of India Card (OCI) was introduced by the Indian Government to help those with ancestral connections to India remain in continued contact with their heritage - by allowing free movement in and out of India.

It has been popular for many Indians based around the world and allows greater freedoms than the Person of Indian Origin card (PIO), which was the predecessor to the OCI and now is available alongside the OCI.

Set out below are some practical and salient points about the OCI, and we hope this brief article will help to demystify some of the confusion surrounding this status.

1) The OCI card is NOT a citizenship card: India does not yet recognise dual citizenship and thus an Indian passport cannot be retained alongside that of another country. The OCI card does not entitle you to Indian citizenship. You continue to hold your "foreign" citizenship. Further, the OCI does not give you a right to vote or apply for certain official jobs.

2) The OCI Card is a lifelong visa: Unlike the PIO card which entitles the holder to a visa for 15 years, the OCI is a lifelong visa in the form of a "U" category sticker in your passport and a blue OCI booklet or card.

3) No FRRO Registration Required: The OCI card does not require you to register with the local Foreigners Regional Registration Office (FRRO) for stays in excess of 180 days in India. The PIO card, on the other hand, requires registration for each stay in excess of 180 days. Failure to register can result in penalties or other action against the PIO cardholder.

4) Change of Foreign Passports: The OCI booklet is associated with your current foreign passport. The OCI is strictly passport specific and the Ministry of Home Affairs has made it clear that because of facial changes, minors should have their OCI cards and "U" stickers updated with a new OCI booklet and "U" Sticker for each new passport up to the age of 18 years of age.

5) Proving Indian Origins: In a nutshell, this is the biggest area of concern for most applicants, not least because documents discarded years, if not decades ago are required to prove Indian ancestry. In many cases critical documents are misplaced or discarded as irrelevant. It is, therefore, important to keep all records and documents in a safe place, as well as make extra copies of key documents for future use.

   Here are some further useful tips.

   a) If an applicant is born in India:

i) The applicant will invariably have had an Indian passport in the past. If so, they would need to have surrendered the passport within 3 months of acquiring foreign citizenship as Indian law does not allow dual citizenship. If they did this at the local foreign mission they would have received a Surrender Certificate, which needs to be submitted with the OCI application, along with other supporting evidence, such as copies of original birth certificates and/or school leaving certificates (see below).

ii) If they still have their original cancelled Indian passport, this will need to be surrendered at the local Indian mission to obtain a Surrender Certificate before applying for the OCI. (NB: There are penalties for using an Indian passport after 3 months from acquiring foreign citizenship).

iii) If applicants are unable to produce the Indian passport for surrender for any reason (loss/theft) they need to provide a notarised affidavit in original explaining the circumstances for not having the passport along with their proof of Indian origin (i.e. the Indian Birth certificate).

iv) If they do not have either their original Indian passport because it was impounded by the Foreign Home Office, a letter from the Home Office confirming the details of the Indian passport that was impounded, together with a copy of the passport will suffice to obtain a "Deemed Surrender Certificate" before applying for the OCI. In the absence of both of these, the only route would be a Nativity Certificate, unless the applicant can rely on the documents of their parents or grandparents (see below).

b) If an applicant is born outside India and/or relying on the documents of their parents / grandparents, the following will suffice:

i) The applicant will need to produce original birth certificates and/or school leaving certificates of the parents/grandparents;

ii) Copies of the parents'/grandparents' Indian passports;

iii) Domicile Certificate of the applicant (if born outside India) or that of the parents/grandparents confirming residency in India.

All original documents must be made available at the time of the OCI applications. Also, additional documents will be required to prove the family connection, such as the applicant's own birth certificates proving the parental connection and also those of the parents if relying on the grandparents' connections.

c) Birth Certificates / School Leaving Certificates: These must be in their original form to be acceptable. If either has been lost or stolen and it is known that they exist, then a post-dated certificate can be obtained from the locality in India where the birth was registered or the school attended. Further formalities are often required to certify these documents prior to submission.

d) Nativity Certificate: If all else fails, the only option to prove Indian origin is to obtain a Nativity Certificate from the locality of the birthplace of applicant's ancestors. This involves making an application in the principality where the parents/grandparents were born and supplying as much information and supporting documentation, together with any current family connection details that would enable the local authorities to make the necessary enquiries and verify the information before issuing a Nativity Certificate. Certification and stamping is also required.

6) Not a Spousal Right: Contrary to popular belief, the OCI is not a spousal right, unlike the PIO card. The spouse must be eligible in his or her own right and all stipulated requirements must be fulfilled.

7) Minors: Once parents of minors obtain an OCI, then minors are also entitled to an OCI card and the foreign passports of the parents (including the "U" sticker visa page), together with the parent's OCI booklet MUST also accompany the OCI application for the minor along with any other required documentation.

    a) Re-acquiring Indian Citizenship: In instances where Indian nationals, having relinquished their Indian citizenship in favour of foreign citizenship, wish to re-acquire Indian citizenship, a prescribed process must be followed. Generally once Indian citizenship has been relinquished the routes to re-acquire Indian citizenship are not straight forward. Residence in India for between 1 and 7 years may also be required, depending on the facts and circumstances of an application.

8) Procedural update: Only family applications (husband, wife and minor children) can be submitted in person by a member of the family. Thus knowing what to submit, to whom and by whom, can save a lot of time and effort!

*__Shalini Agarwal__, Partner Clasis Law, New Delhi, India, and *__Milan Zala__, Indian Immigrations Specialists
Shalini heads the Corporate Immigration practice at Clasis Law, a full service Indian law firm.

Website: www.clasislaw.com

Email: shalini.agarwal@clasislaw.com / milan.zala@clasislaw.com

# Mexican Immigration Regime

**Enrique Arellano***

A year after the enactment of the new Migration Act in Mexico, the economic scenario is particularly positive. The country is currently the 14th largest economy in the world and the second largest in Latin America. According to the Central Bank, Mexico has grown 3.5% during 2013 and forecasts a growth of 3.8% for 2014, which is largely due to the electronics industry. In recent years the Mexican manufacturing sector has become highly sophisticated, which also contributes to the positive growth projections.

Pursuant to the World Bank's publication "Doing Business in 2013", Mexico is ranked 48th among countries with an encouraging business environment. This places Mexico above emerging countries such as Brazil, China and India.

The current immigration regime is going through rather difficult times, since new immigration laws were enacted in November 2012 and replaced the regimen that was in effect for almost 40 years. Application of these new laws has not always been consistent and there are loopholes and discrepancies between the laws and their implementing regulations and policies. Therefore it is highly relevant to clearly separate the two.

The autonomy previously held by the National Immigration Institute ("Instituto Nacional de Migración" or INM) has been de-centralized and certain powers related to visa issuance have been transferred to the Ministry of Foreign Affairs through their consular representatives around the world. Previously these visas were exclusively issued by the INM.

Several government training programs were carried out with public officers from the INM as well as from the Ministry of Foreign Affairs to consolidate the new provisions, since during the first six months after the change, a generalized unawareness of the new laws was evident.

Historically, Mexico has been a hospitable country that has allowed the entry of foreigners without the requirement of a visa for up to 6 months as a visitor (i.e. for tourism or business) without many restrictions as to the type of activities that are allowed under such status. Now that it is easier to track people electronically, reforms have been put into place that authorize immigration authorities to more closely monitor foreign visitors and workers. In summary, modernized immigration policies have been implemented in Mexico with the goal of reducing bureaucracy and encouraging foreign tourism and business visitors. It is expected that these measures will become more efficient in the next year and will significantly improve functioning of the Mexican Immigration Institute.

***Enrique Arellano**, Founder and Senior Partner, Enrique Arellano Rincón Abogados, S.C.

Website: www.arellanoabogados.com.mx

Email: earellano@arellanoabogados.com.mx

**Marla Vanessa Bojorge Zúñiga***

# News in matters of Nationality: "Sephardic Jews"

On February 7, 2014, Article 23 of the Spanish Civil Code was amended to confer Spanish nationality on Sephardic Jews who can justify their qualifications and special relationship to Spain. As of the date of this article we are awaiting official publication of this bill. The word "Sephardic" comes from "Sefarad", which means "Spanish" in both classical and contemporary Hebrew. The law defines "Sephardic" as Jews who lived in the Iberian Peninsula and particularly their descendants, who after the Edict of 1492 were compelled either to convert to Christianity or be expelled from Spain within two months. Spanish nationality will be granted regardless of ideology, religion or beliefs and can be acquired in two ways:

1) By proving Sephardic origin and legal residence in Spain for 2 years; or

2) By proving Sephardic origin and the existence of a special relationship with Spain, regardless of legal residence.

In both cases, the applicant does not need to renounce his or her previous nationality and can retain current nationality while acquiring Spanish nationality.

Applications must be made within two years after the bill goes into effect. This provision may be extended for another year, for a total of three years.

# News in matters of Immigration: "The Spanish Golden Visa"

On September 28, 2014, Spain issued new immigration rules regarding investment and talent, which is a first for Spain. While there are still several areas in Spanish immigration law needing improvement, this change is an important beginning.

Spain's economic crisis resulted in a greater awareness that it is a part of Europe and needed to encourage immigration, while not losing its national identity and cultural values. Traditionally, immigration has not been embraced, but now Spain has launched a new standard recognizing that immigration fosters economic progress and immigrants bring intelligence, experience, professionalism, investment, and entrepreneurship.

Spain is an interesting country in terms of gastronomy, tourism, culture, sports, and economic potential. The year-long sunshine makes Spain a nice country to stay and visit frequently, but over-regulation, suspicion of foreigners, and the lack of an entrepreneurial culture has made it difficult to carry out immigration reforms with agility. Therefore this new legislation has been a breakthrough and we hope that the government continues these improvements.

The new law facilitates and expedites visas and residence permits in order to attract investment and talent to Spain. The measure is aimed at investors, entrepreneurs, workers engaged in an intracompany move, highly qualified professionals, and researchers, as well as their spouses and children. The process is meant to be efficient and fast, under a single authority, and visas and residence permits are granted for varying lengths of time depending on the specific case. Such residence permits are valid throughout the national territory of Spain.

**Facilitation of entry and residence on the basis of economic interest**

Applicants must demonstrate that they are:

a) Investors;
b) Entrepreneurs;
c) Highly qualified professionals;
d) Investigators; or
e) Workers engaged in an intracompany transfer within the same company or group of companies.

The law does not apply to EU citizens or to those foreigners who have the right under the EU to apply as beneficiaries. Spouses and children under 18 years of age (or older children unable to provide for their own needs because of health), can join or accompany principal applicants.

**General requirements**

Applicants must demonstrate the specific prerequisites for each visa or permit and comply with laws related to the prevention of money laundering and terrorist financing as well as meet tax and corresponding Social Security obligations.

**Residence visa for investors**

1) Nonresidents who intend to enter Spanish territory in order to make a significant capital investment may apply for an entry visa, or if applicable, residence.

2) A significant capital investment must meet the following requirements:

   a) An initial investment equal to or greater than 2 million euros in Spanish government bonds, worth equal to or greater than one million euros in stocks or shares in Spanish companies, or bank deposits equal to or greater than one million euros at Spanish financial institutions;

   b) The acquisition of real estate of at least 500,000 euros, free of any liens or encumbrances. The portion of the investment that exceeds the amount required may be subject to liens or encumbrances; or

   c) A business venture that will be developed in Spain and is demonstrated to be in the public interest, and for which at least one of the following conditions is fulfilled:

      i) Job creation;
      ii) A positive socio-economic impact in the geographical area in which the activity will develop; or
      iii) An important contribution to scientific innovation and/or technology.

3) In addition, a significant capital investment is deemed to be made by the foreign visa applicant when the investment is made by a legal entity, domiciled in a territory which is not considered to be a tax haven according to Spanish law. The investor must directly or indirectly own the majority of voting rights and have the power to appoint or remove a majority of the members of its board.

The grant of a residence visa for investors will allow them to reside in Spain for at least one year. Foreign investors wishing to reside in Spain for more than one year may be granted a residence permit for investors, which will be valid throughout the national territory. The initial residence permit for investors shall have a duration of two years. Once that period is completed, two year renewals may be requested.

**Entrepreneurs**

Foreigners may apply for a visa to enter and stay in Spain for a period of one year for the sole or main purpose of developing a business.

An entrepreneur may be eligible for residency status without the need to apply for a visa and without requiring a minimum prior period of stay. He or she must prove that there has been effective launch of the business in order to qualify for the visa. An entrepreneur will be provided with a residence permit for business, which will be valid throughout the country

**Definition of Entrepreneurial and Business activity**

Entrepreneurial activity is that which is innovative and of special economic interest for Spain, as determined by the relevant body of the General Administration of the State. The following points will be taken into account in this assessment, with special consideration and priority given to the creation of jobs in Spain:

a) The applicant's professional profile;
b) The business plan, including market analysis, definition of products or services, and financing; and
c) The added value to the Spanish economy and innovation or investment opportunities.

**Highly qualified professionals**

A residence permit for highly qualified professionals, which will be valid throughout the national territory, may be sought by companies incorporated in Spain for highly qualified management personnel, when the company meets any of the following:

1) An average workforce during the three months immediately preceding the filing of the application of more than 250 workers in Spain, in the corresponding Social Security scheme;

2) An annual net volume of business in Spain greater than 50 million euros, or volume of equity or net worth in Spain greater than 43 million euros;

3) A gross annual average investment, from outside, of not less than 1 million euros in the three years immediately preceding the filing of the application;

4) Companies with a stock value of greater than 3 million, according to the latest data from the Foreign Investment Registry of the Ministry of Economy and Competitiveness; or

5) Small and medium-sized businesses in Spain belonging to a sector considered strategic.

Alternatively, management or highly qualified personnel will qualify if the business venture is considered to be within the public interest, according to the following:

1) A significant increase in job creation by the recruiting company;

2) Jobs are safeguarded;

3) A significant increase in job creation in the sector or geographical area in which the workforce will be developed;

4) An extraordinary investment with relevant socio-economic impact in the geographical area in which the workforce will be developed;

5) Concurrence with Spanish trade and investment policy; or

6) A significant contribution to scientific innovation and / or technology.

Finally, graduates and post graduates from respected universities and business schools will also be eligible to apply as highly qualified professionals.

**Training, Research, development and innovation**

Foreigners who engage in training, research, development and innovation in public or private entities shall be provided with the appropriate visa or a residence permit for training or research, which shall be valid throughout the national territory

*__Marla Vanessa Bojorge Zúñiga__, International Corporate and Immigration Lawyer, Bojorge & Associates, Valencia, Spain.

Website: www.visalawspain.com

Email: marla@visalawspain.com

# Update on Chinese immigration laws

**June Cheng***

The Chinese government continues to tightly control the issuance of journalist's permits and visas. The New York Times has not been able to obtain visas for its journalists since publishing a story about the wealth of then-premier Wen Jiabao in 2012. The Times and the Bloomberg News have also experienced difficulties obtaining permits and visas for their journalists.

On another topic, China's new immigration law and regulation that took effect in 2013 created a new visa category for foreign "high-level talent". The regulations leave it to "relevant government agencies" to provide further guidance on the eligibility requirements and procedures for this visa category. Pursuant to the Notice Regarding Beneficial Visa and Residence Treatment for Foreign High-Level Talent issued by the Central Organization Ministry, the Human Resources and Social Security Ministry, the Public Security Ministry, and the Foreign Expert Ministry, high-level foreign talent may apply for a 5-year multiple entry visitor visa that allows visits of up to 180 days per entry, and residence permits that are valid for 2 to 5 years, as compared to the general 1-year visas or residence permits that are normally granted to foreign nationals. The Notice provides that central and provincial organizational departments, human resources departments, and foreign expert bureaus have the authority to create or approve various "foreign high-level talent introduction programs". Essentially, central and provincial government agencies may create their own specific high-level talent criteria.

Recently, the Shenzhen Exit-Entry Administrative Bureau issued its "Notice for Foreign High-Level Talent to Handle Visa Certificates", which provides guidance on the implementation of the "foreign high-level talent" visa and its immigration benefits. The Notice indicates that individuals who fall under the following categories may qualify:

1) Foreign high-level talent recognized under the Central Government's "1,000-Elite Program", Guangdong Province's "Leading Talent" or "Young Leading Talent" programs, and those special talents certified by relevant government authorities as being in short supply;

2) Senior advisers invited or employed by provincial-level (ministerial) government agencies, and high-level managerial personnel who execute national or provincial (ministerial) technological collaboration projects, key project agreements, and talent exchange projects signed by the central or local government with foreign countries;

3) Academic and scientific research leaders employed by national, provincial, and ministerial scientific research institutions and key institutions of higher education, as well as key academic and scientific researchers employed by related departments, holding associate professor or associate researcher positions or above, or enjoying the same treatment;

4) Deputy general manager or above employed at the regional headquarters of the Fortune Global 500 companies and multinational companies;

5) Foreign investors whose personal direct investment in China is more than USD $2 million in total; and

6) Foreign investors of high-tech enterprises encouraged foreign-invested enterprises, foreign-invested advanced technical enterprises, and foreign-invested product export enterprises. (See http://www.sz3e.com/view.aspx?id=2197923.)

We expect that more provincial and local governments will issue their policies and procedures regarding the foreign high-level talent introduction program. For instance, the Beijing Human Resources and Social Security Bureau recently announced that Beijing will soon extend high-level foreign experts' permits from 1-year to 2 to 5 years, that high-level foreign experts will be eligible for medical insurance subsidies, and their children may receive beneficial treatment when enrolling in local schools. The Beijing foreign high-level talent introduction program will focus on seven high-tech industries, including alternative energies, alternative materials, biomedicine, and electronics technology.

*__June Cheng__, Immigration Attorney, Fredrikson & Byron, P.A., Minneapolis, United States.

Website: www.fredlaw.com

Email: zcheng@fredlaw.com

# No Invasion. Now What?

**Laura Devine***

According to a recent Ipsos MORI poll, over 60 percent of Britons are unhappy with the way in which the Government is handling immigration and asylum.[1]

This statistic should come as no surprise.

For some time now, the British public has been subjected to a relentless torrent of sensationalist headlines, inaccurate political statements, and misguided immigration policies. As the use of inflammatory rhetoric has risen, the appetite for veracity appears to have sharply declined. Consequently, as one poll noted, the public perception is "massively wrong on many aspects of immigration".[2]

These misperceptions span the spectrum of immigration issues:

- Britons estimate the percentage of foreign-born population at 31 percent, while the official estimate is approximately 13 percent.[3]
- Refugees and asylum seekers are believed to comprise the largest groups of immigrants, though they are among the smallest.[4]
- While it is often stated that migrants disproportionately use benefits, they actually contribute more in taxes than they claim and are less likely to live in social housing than those born in Britain.[5]
- A significant majority of Britons view immigration as a problem nationally, but a much smaller minority perceives it as an issue in their local area.[6]

Remarkably, when Ipsos MORI revealed the correct immigration statistics to participants, the most common response was to not believe the numbers.[7]

It is then unsurprising that six in ten Britons are dissatisfied with the Government's immigration and asylum policies. Indeed, when opinions are based on objectively incorrect information, it is impossible to form well-reasoned responses.

**Romania and Bulgaria**

Romania and Bulgaria, collectively referred to as the A2 nations, acceded to the European Union in 2007. The European Union's single market provides for the free movement of people, goods, services, and capital, allowing EU nationals to live, work, study, or retire in member states.[8] However, as is permitted under EU law, temporary work restrictions were imposed on A2 nationals' access to the UK labour market through 2013.

---

[1] http://www.ipsos-mori.com/Assets/Docs/Polls/feb2014_immigration_topline.pdf
[2] http://www.ipsos-mori.com/researchpublications/researcharchive/3188/Perceptions-are-not-reality-the-top-10-we-get-wrong.aspx
[3] http://www.ipsos-mori.com/researchpublications/researcharchive/3188/Perceptions-are-not-reality-the-top-10-we-get-wrong.aspx
[4] http://www.ipsos-mori.com/researchpublications/researcharchive/3188/Perceptions-are-not-reality-the-top-10-we-get-wrong.aspx
[5] Migrants contribute £25bn to UK economy, study finds. *The Guardian*, 5 November 2013; see also Recent immigrants to UK 'make net contribution. *BBC News UK*, 5 November 2013.
[6] http://www.migrationobservatory.ox.ac.uk/briefings/uk-public-opinion-toward-immigration-overall-attitudes-and-level-concern; see also http://www.ipsos-mori.com/researchpublications/researcharchive/3188/Perceptions-are-not-reality-the-top-10-we-get-wrong.aspx; see also Immigration Attitudes Revealed In Major Ipsos MORI Study. *The Huffington Post*, 2 January 2014.
[7] http://www.ipsos-mori.com/researchpublications/researcharchive/3188/Perceptions-are-not-reality-the-top-10-we-get-wrong.aspx
[8] http://ec.europa.eu/internal_market/top_layer/index_en.htm

In the months preceding the expiration of these limits, tabloid headlines warned that 29 million Romanians and Bulgarians (the approximate combined population of both countries) were poised to descend upon the UK.[9] Indeed, one newspaper falsely reported "Sold out! Flights and buses full as Romanians and Bulgarians head for the UK".[10] As the Romanian Ambassador was quick to point out after no such flood transpired, "The media shapes public opinion" and there is a "clear gap between predictions, perception and reality".[11]

**The fear of others**

Sadly, since then, reports of increased animosity toward Romanians and Bulgarians have emerged.[12]

Here, the price of inflammatory rhetoric and misinformation has been an increase in xenophobia.

For the media's part, the allure of appealing to our coarsest nature with shocking headlines and offensive hyperbole is simple: sensationalism sells and outrage is compelling. For politicians, a group for whom the horizon often spans only as far as the next election, provocative sound bites and aggressive proposals can be an effective tool to attract attention and win votes. Moreover, it helps when the group you are demonizing lacks the ability to judge you at the ballot box.

The fear of immigrants, as wielded by the media and in politics, derives its power from the false promise of nativism, to wit, we must protect "us" from "them". Framed in this way, and served on a plate of supposed patriotism, the exclusion of immigrants can be rationalized as the preservation of national and cultural identity. However, the fear that we are losing the Halcyon days of our Britishness to immigrants is simply untrue. Moreover, immutable cultures do not exist, or at least not for very long. Isolationism is a mistake.

Evidence of this trend can be seen in the offensive programmes targeting immigrants implemented by the Government in recent years. These include the now infamous 'Go Home' vans,[13] apparent racial profiling during nationality spot checks,[14] and, almost comically, the floating of an idea to create an anti-UK ad campaign in order to dissuade Romanians and Bulgarians from immigrating.[15] More recently, Amber Valley MP, Nigel Mills, led an effort to reinstate the work restrictions for A2 nationals until 2018,[16] something which would be contrary to the UK's treaty obligations.[17]

But even as all of these proposals were doomed to failure before they left the gate, the impression that one is acting, rather than the outcome of one's actions, has become the focus. Being seen as tough on immigration is now a staple in any political diet.

[9] We're on our way to Britain: A year from now up to 29m Bulgarians and Romanians will have the right to settle in Britain and claim benefits. And these gypsies in the slums of Sofia can hardly wait… *The Daily Mail*, 23 December 2013; see also Now 29m Bulgarians and Romanians can soon move to Britain. *Daily Express,* 29 October 2013.
[10] Sold out! Flights and buses full as Romanians and Bulgarians head for the UK. *The Daily Mail*, 30 December 2014. Refuting this claim, see Daily Mail Guilty of Running 'Entirely Untrue' Stories About Immigration Says Government Peer. *The Huffington Post*, 3 February 2014.
[11] Romanians' Migration to the UK: Predictions Versus Reality. *The Huffington Post*, 2 February 2014.
[12] Romanian and Bulgarian NHS workers feel rising tide of patient hostility. *The Guardian*, 24 January 2014; see also http://www.aarbd.org/
[13] 'Go Home' vans to be scrapped after deemed failure. *The Guardian*, 22 October 2013.
[14] UKBA Immigration Officers At Kensal Green Tube Accused Of Racial Profiling And Heavy-Handedness. *The Huffington Post,* 31 July 2013.
[15] 'Anti British Ads' Could Target Immigrants From Romania And Bulgaria. *The Huffington Post*, 28 January 2013.
[16] Tory rebel pledges to reintroduce work restrictions on EU migrants. *The Guardian*, 23 January 2014.
[17] Cameron moves to head off migration row with Tory rebel backbenchers. *The Guardian,* 23 January 2014; see also David Cameron: Romania and Bulgaria immigration levels 'reasonable'. *The Guardian,* 27 January 2014.

**Damage done**

Official statistics for the number of Romanians and Bulgarians who entered the UK in January after work restrictions were lifted will be released in May.[18] While more accurate figures will not be known until then, it is patently clear that the predicted flood of 29 million Romanian and Bulgarian nationals did not materialize.

In the meantime, those in the UK responsible for creating the shrill hysteria surrounding immigration may have partially succeeded in their efforts. For while the A2 work restrictions are almost certainly never to be reinstated, the perception of the UK as a xenophobic, hostile, and unwelcoming environment may very well endure, potentially leading intelligent, skilled, industrious migrants from around the world to think twice before coming.

*__Laura Devine__, Principal of Laura Devine Solicitors and Laura Devine Attorneys LLC, London, England.

Website: www.lauradevine.com

Email: laura.devine@lauradevine.com

[18] Romanians' Migration to the UK: Predictions Versus Reality. *The Huffington Post*, 2 February 2014.

# Initiative “against mass immigration”: Swiss vote to set limits on immigration including from the EU

**Rayan Houdrouge / Jeremy Nacht***

On 9th February 2014, Swiss citizens narrowly approved, by just 50.3%, the initiative “against mass immigration” which imposes limits on the number of foreigners allowed into the country and may lead to the end of Switzerland’s Agreement on the Free Movement of Persons (“AFMP”) with the European Union (“EU”).

**Introduction**

The AFMP between the EU and Switzerland came into force in 2002 and is a key element of the bilateral agreements between the EU and Switzerland. According to the AFMP, EU and Swiss nationals are entitled to choose their place of residence and work within the signatory States’ territories.

Since the entry into force of the AFMP twelve years ago, migratory flows have consistently increased, in particular over the last five years during which net immigration has run at around 80,000 people per year on average (70% of whom are EU nationals). Foreigners now make up 23% of the Swiss population of around 8 million.

This upsurge in immigration has seen concern grow amongst a fringe of the Swiss population that immigrants are eroding the nation’s distinctive culture and are contributing to rising rents, crowded transport and more crime. In this context, the Swiss People’s Party (UDC/SVP) – known for its anti-foreigner and anti-EU agenda – presented in February 2012 an initiative against mass immigration, which aimed at implementing a restrictive immigration policy (the “Initiative”).

On 9th February 2014, a majority of the Cantons and 50.3% of the Swiss voters approved the Initiative.

**Content of the Initiative**

The Initiative provides for the addition of a new Article 121a in the Swiss Federal Constitution (“SFC”) according to which Switzerland must conduct its own immigration policy autonomously and sovereignly.

In particular, Article 121a SFC requires that yearly quotas be applied to all foreign nationals (without distinction between EU and non-EU nationals). Moreover, all types of permit under the scope of the legislation must be subject to quotas. Further, rights to permanent residence, family reunification and social benefits may be limited.

Article 121a SFC also provides that the yearly quotas must be set by taking into account Switzerland’s global economic interests and Swiss nationals’ prioritisation. Decisive criteria for the granting of permits include most notably a request from an employer, an integration capacity as well as an autonomous source of revenues.

Finally, Article 121a SFC sets forth that no international treaty contrary thereto may be concluded. Also, international treaties contrary to Article 121a SFC must be renegotiated and adapted within a period of three years. If the implementing legislation does not enter into force within three years, the Federal Council must enact, on a temporary basis, the necessary provisions by way of ordinance.

**Consequences**

**1) Swiss Immigration Law**

Article 121a SFC will result in fundamental changes to the current Swiss immigration legal framework and could, in particular, have the consequences described below. That being said, foreigners who are already established in Switzerland benefit from acquired rights and will not be affected by the implementation of the Initiative.

a) Quotas

The yearly quotas will be applicable to all types of permit and to all foreigners, irrespective of their nationality. This will mainly have an impact on EU nationals, given that they have until now only been subject to quotas during the time of application of the safeguard clause (which will apply at the latest until 31st May 2014 with respect to EU nationals except for Bulgarian and Romanian). That being said, quotas have already been in place with respect to third-state nationals (i.e. non-EU nationals) applying for work permits. Therefore, the Initiative will in principle only have a limited impact on these foreigners. However, all permit applications based on family reunification will become subject to quotas, which is not the case today.

b) National preference

The Swiss authorities will have to set the quotas by taking into account in particular Swiss nationals' prioritisation. This may imply, most notably, that companies intending to file work permit applications for EU nationals could first have to demonstrate that there are no good candidates on the local market. Frontier workers will not be considered as part of such a local market. That being said, companies will obviously not be forced to hire Swiss nationals if they do not have the requested work skills and capabilities.

c) Integration capacity

Before approving permit applications, the Swiss authorities will have to examine in particular whether the applicant possesses the requisite "integration capacity". This is not a condition under current legislation and will have to be specified in an implementing provision. However, the "integration capacity" could for instance be understood as a requirement with respect to specific permit applications to speak a national language of Switzerland.

d) Procedure

The work permit application process for EU nationals could become similar to the current process for third-state nationals. Cantonal authorities would make local market assessments and decide whether or not a quota may be granted. Upon a favorable decision from the cantonal authority, the application would be transmitted to the Federal authority for migration, which in turn would also verify that the applicant fulfills the conditions set out under the law. If a favorable decision is issued by the Federal authority, the cantonal authority would finally issue the work permit. In particular, EU workers would not be able to start working before the issuance of a work permit. It may be that the whole procedure would take several months.

**2) AFMP and Bilateral Agreements**

Article 121a SFC provides in particular for the introduction of quotas for EU nationals and for the respect of the Swiss nationals' prioritisation. These two limitations to immigration are contrary to the AFMP and will necessarily lead to a renegotiation/revocation of the AFMP. Important consequences of the approval of the Initiative are therefore likely to arise from this renegotiation/revocation.

Indeed, the denunciation of the AFMP by Switzerland could have an impact on other bilateral agreements, as they are directly linked to the AFMP (which is part of a package of seven agreements). At this stage, however, consequences remain uncertain in the context of bilateral agreements on technical barriers to trade, public procurement markets, agriculture, research, civil aviation, and overland transport.

With this in mind, the European Commission issued a statement on 9th February 2014 expressing its "regret" that the Initiative had been adopted, although it did not give any indication as to the effects that the denunciation of the AFMP by Switzerland may have on the other above mentioned agreements. The European Commission states notably that "this [i.e. the adoption of the Initiative] goes against the principle of the free movement of people between the European Union and Switzerland. The Union will examine the implications of this initiative on Swiss-EU relations as a whole".

**Implementation**

The Initiative provides that the Swiss government and parliament have three years to introduce the implementing provisions necessary for the application of the Initiative's restrictions to the immigration.

Theoretically, the implementing legislation of Article 121a SFC could enter into force before the three years period has lapsed. However, since the implementation process is likely to take some time, one may expect that it will not enter into force before 2017. Until then, EU nationals will continue to benefit from the AFMP except if notice of termination is previously given by the EU (the Swiss authorities have already indicated that they will not terminate the AFMP and will try to renegotiate it in accordance with Article 121a SFC).

The Swiss government has already taken a number of initial decisions regarding the implementation of Article 121a SFC. In this context, an implementation plan will be drawn up by the Federal Department of Justice and Police ("FDJP"), the Department of Foreign Affairs and the Department of Economic Affairs, Education and Research acting together by the end of June 2014 and will constitute the basis for the necessary legislative work. A draft law will then be presented to the Swiss parliament by the end of the year. The FDJP will also draft the necessary implementing ordinances. These ordinances will be enforced if the legislative process is not completed within the stipulated timeframe (i.e. three years). Indeed, Article 121a SFC allows the Swiss government to implement the new immigration system on a temporary basis by way of ordinance. In parallel with work at legislative level, the Swiss government will hold exploratory talks with the EU with a view to conducting negotiations on the AFMP.

Since the Initiative's wording is very general, there are still critical questions to be resolved. Therefore, the Swiss government and parliament will benefit from a certain discretionary power when implementing Article 121a SFC. This is in particular true with respect to the actual numbers of quotas to be granted and how they will be allocated among the different types of permit application. For instance, if high enough quota ceilings are set by the federal authorities regarding work permit applications, the Cantons may be in a position to continue to grant work permits to EU nationals without affecting the business needs of the companies.

*__Rayan Houdrouge__, Partner, Lenz & Staehelin, Geneva, Switzerland.

*__Jeremy Nacht__, Associate, Lenz & Staehelin, Geneva, Switzerland.

Website: www.lenzstaehelin.com

Email: rayan.houdrouge@lenzstaehelin.com / jeremy.nacht@lenzstaehelin.com

# The Overlooked H-3 Visa – An Alternative to the H-1B Visa

**Mark A. Mancini***

As the U.S. economy slowly improves, there has been an overwhelming demand for H-1B visas. Fiscal year 2014 saw an exponential increase in H-1B petitions from U.S. employers, resulting in the exhaustion of the 2014 H-1B visa quota within the first week of the filing period in April 2013. As the H-1B demand in Fiscal Year 2015 is expected to equal, if not exceed, that of Fiscal Year 2014, it may be prudent for employers and practitioners to explore other options for temporary employment visas, such as the under-utilized H-3 visa.

The H-3 visa is available for trainees and participants of special education exchange visitor programs. The H-3 trainee petition in particular can be a flexible alternative to the H-1B visa since there is no minimum education requirement for H-3 trainees and H-3 trainee petitions are not subject to a numerical cap. The H-3 trainee may be petitioned by a U.S. employer for receiving training in any field, including but not limited to, agriculture, commerce, communications, finance, government, transportation, or industrial establishments. Medical students from foreign universities who are coming to the U.S. for externships and nurses may also qualify as an H-3 trainee.

In H-3 visa petitions, the petitioning employer must provide a statement certifying that the beneficiary is fully qualified to engage the training and that it is authorized to provide the training. Also, the petitioner must demonstrate the following:

- The proposed training is not available in the beneficiary's country;
- The beneficiary will not be placed in a position which is in the normal operation of the business and in which US citizens and resident workers are regularly employed;
- The beneficiary will not engage in productive employment unless such employment is incidental and necessary to the training; and
- The training will benefit the beneficiary in pursuing a career outside the United States.

Additionally, the petitioner will also need to provide a description of the training program which includes the following:

- A description of the type of training and supervision to be given, and the structure of the training program;
- The proportion of time that will be devoted to productive employment;
- The number of hours that will be spent, respectively, in classroom instruction and on-the-job training;
- A description of the career abroad for which the training will prepare the beneficiary;
- The reason why such training cannot be obtained in the beneficiary's country and why the beneficiary must be trained in the U.S.; and
- The source of compensation received by the trainee and any benefit which will accrue to the petitioner for providing the training.

The training program may not be approved if it:

- Deals in generalities with no fixed schedule, objectives, or means of evaluation;
- Is incompatible with the nature of the petitioner's business or enterprise;
- Is on behalf of a beneficiary who already possesses substantial training and expertise in proposed field of training;
- Will result in productive employment beyond that which is incidental and necessary to the training;
- Is designed to recruit and train foreign workers for the staffing of domestic operations in the U.S.;

- Does not establish that the petitioner has the physical premises and sufficiently trained manpower to provide the training specified; or
- Is designed to extend the total allowable period of practical training previously authorized a nonimmigrant student (e.g., F-1 international student).

The maximum period of stay an H-3 trainee may receive is 2 years. Once an H-3 trainee has remained in the U.S. for 2 years, he may not further extend his status or change to another nonimmigrant status in the U.S. until he has left the U.S. for at least 6 months. Furthermore, unlike the H-1B visa, the H-3 visa is subject to Section 214(b) of the Immigration and Nationality Act, so the beneficiary must be able to show he intends to return to his home country once he completes the training. Spouses and children of H-3 trainees may accompany the principal H-3 trainees in the U.S. in H-4 status.

The H-3 trainee visa has several advantages over the H-1B visa. As previously mentioned, the H-3 petition does not have a minimum education requirement, unlike the H-1B visa which requires beneficiaries to possess the minimum of a Bachelor's degree or equivalent in the field of specialty. Furthermore, since the H-3 trainee visa is not subject to numerical restrictions, it is much more flexible than the H-1B visa, and may serve as a temporary solution for foreign workers who were unable to obtain H-1B visas due to the annual cap. However, petitioners should remember that the main purpose of the H-3 visa is to provide training and any employment must be incidental to the training. Therefore, training programs which consists primarily of "on-the-job training" or provides substantial compensation may lead to the denial of the H-3 petition. Also, if the H-3 beneficiary is later petitioned for an H-1B visa, the beneficiary needs to be able demonstrate that she had the intent to return to her home country after completion of the training program.

In light of the numerical restrictions on the H-1B visa, the H-3 visa is a good alternative for employers to consider, especially multinational companies or companies which have an existing training program.

*__Mark A. Mancini__, Senior Member, Wasserman, Mancini & Chang, Washington D.C., United States.

Website: www.wmclawfirm.com

Email: wmclawfirm@aol.com

# United States Citizenship and Immigration Services (USCIS) Expands Worksite Inspection Program to L-1 Employers

**Ellen Yost***

USCIS officers have begun to make unannounced workplace visits to L-1 employers under the agency's Fraud Detection and National Security (FDNS) site inspection program. L-1 site visits are not yet widespread, but are expected to become more frequent in the weeks and months to come.

Initial indications are that the agency is focusing on extensions of individual L-1 petitions originally filed at USCIS Service Centers, with special scrutiny of extensions of "new office" L-1 cases. It is not yet known whether FDNS officers will inspect the worksites of L-1 employees in their initial period of employment under a Service Center petition, a blanket L-1 application originally adjudicated by a U.S. consulate or a Canadian L-1 petition approved at the border.

Site inspectors are expected to review L-1 job duties to determine whether they are consistent with the foreign beneficiary's classification as an L-1A executive or manager or an L-1B specialized knowledge worker. Early reports indicate that inspectors are also reviewing the salaries of L-1 employees relative to their job type and experience level.

The expansion of the site visit program comes in the wake of an August 2013 **report of the DHS Inspector General**, which urged USCIS to more closely scrutinize L-1 petitions. Until now, the FDNS program had focused largely on inspection of H-1B petitions.

**What Happens During an FDNS Site Visit**

FDNS site visits are used to verify the existence of the employer, the validity of information in the employer's immigration petitions and whether sponsored foreign nationals are working in compliance with the terms of their admission to the United States.

Site inspectors typically visit the workplace unannounced, though in some cases may contact the employer in advance to arrange an appointment. Inspectors may also communicate with the employer by phone or email. In Fragomen's experience, officers typically spend anywhere from 30 to 90 minutes at the worksite, though longer visits are possible.

The officer usually asks to speak to an employer representative, such as a human resources manager, as well as the foreign beneficiary of the petition in question and his or her direct supervisor or manager. In some cases, the officer will ask to tour the employer's premises and the foreign national's work area, and may want to photograph the premises. The employer may be asked to provide documents like payroll records or paystubs for the foreign national.

After the inspection, the FDNS officer may contact the employer by phone or email to request additional information. If there appears to be any discrepancy between the information provided in an immigration petition and the circumstances at the worksite, USCIS may notify the employer of its intent to revoke the petition and provide the employer with an opportunity to explain any perceived inconsistencies.

**What the Site Visit Expansion Means for Employers**

L-1 employers must be prepared for the possibility of unannounced FDNS site inspections and must take steps to train human resources and administrative staff to respond to reasonable government inquiries and requests. Companies may want to consider the possibility of having counsel present during an inspection.

*__Ellen Yost__, Partner, Fragomen, Del Rey, Bernsen & Loewy, LLP, New York, United States.

Website: www.fragomen.com

Email: eyost@fragomen.com