

Citizenship Pathways and Border Protection

Australia • Brazil • Canada • China • Germany • India • Italy
Japan • Mexico • Russian Federation • South Africa
Spain • United Kingdom
EU Schengen Area

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Contents

Comparative Summary	1
Australia.....	17
Brazil.....	27
Canada.....	39
China.....	50
Germany.....	59
India	67
Italy	75
Japan	84
Mexico	90
Russian Federation.....	96
South Africa.....	111
Spain	122
United Kingdom.....	129
EU Schengen Area.....	147

Comparative Summary

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I. Introduction

This report describes the different legal approaches taken by thirteen countries with regard to immigration, citizenship, and border control, and the European Union (EU) border control and visa regime for the Schengen area. The individual reports cover laws and regulations dealing with pathways to citizenship for immigrants, border management and security measures, and penalties for unlawful entry and overstays by aliens. The surveyed countries are Australia, Brazil, Canada, China, Germany, Spain, India, Italy, Japan, Mexico, Russia, the United Kingdom (UK), and South Africa.

II. Overview of Immigration Laws

Australia

In Australia, the law provides for two main types of visas, temporary and permanent, which are further divided into classes and subclasses. The criteria for each visa subclass are defined by regulation and the government is able to limit the number of visas made available each year. A short-term visit to the country is possible under a tourist or other types of visa. Student visas are available for various levels and types of study. Special "working holiday" visas are available to young people (aged eighteen to thirty years) from specific countries, with holders able to stay in Australia for one year and work for limited periods. Work visas prioritize skilled workers, and the process for temporary skilled workers to obtain permanent residency has recently been simplified. A program for seasonal workers enabling foreigners from selected jurisdictions to come to Australia and work for a certain period of time has recently been implemented. New Zealand citizens are able to live, work, and study in the country indefinitely due to special arrangements between the two countries.

Brazil

In the absence of an international agreement between Brazil and a foreign country waiving the visa requirement, an alien must first obtain a visa to enter into the country. The types of visa available include transit, tourist, temporary, permanent, courtesy, official, and diplomatic. To obtain a visa, a person must be at least eighteen years old and cannot be considered harmful to the public order or national interests; have been previously expelled from Brazil, except when the expulsion has been revoked; have been sentenced or prosecuted abroad for crimes conducive to extradition under domestic law; or fail to meet the health standards established by the Ministry of Health. Aliens must have specific authorization to work, and the bearers of tourist, transit, or temporary visas, as well as their dependents, cannot work. An employer of unauthorized aliens is subject to fines.

Canada

In general, a valid passport and visa are required to enter Canada. Visas available for foreigners include, business, tourist, student, immediate relatives (parents and grandparents of citizens or permanent residents), and work-related visas. Reforms to the immigration system designed to boost the economy with skilled workers were recently introduced as well as a stricter immigration policy driven by the needs of the labor market. Biometric identity screening of nationals of selected jurisdictions is expected to be implemented in 2013.

China

In China there are four categories of visas currently available to foreigners: diplomatic, courtesy, service, and ordinary. Ordinary visas are further subdivided into eight different types, which consist of permanent resident, work, student, short-term business, private purposes, transit, crew member, and foreign journalist visas. An ordinary visa may also be issued for the purpose of attracting high-skilled workers to the country after a new exit and entry law takes effect on July 1, 2013.

The new exit and entry law, enacted on June 30, 2012, unifies two previously existing laws that managed the border crossing of Chinese citizens and foreigners, respectively. The new law will regulate the exit and entry of Chinese citizens and foreigners, a foreigner's stay in China, and inspection of vehicles crossing the border.

Germany

Any entry into Germany requires a visa or residence permit. A Schengen visa is issued by one Member State of the Schengen Agreement and entitles the holder to travel throughout the Schengen area (most of the European Union). A Schengen visa entitles the holder to remain in the Schengen area for three months within a six-month period. Tourist visas are generally Schengen visas. German residence permits can be granted for a variety of statutorily specified purposes, which include study, research, family reunification, employment, and entrepreneurial activity.

Germany is a Member State of the European Union (EU) and its immigration system applies to citizens from third (non-EU) countries. Citizens and long-term residents of EU countries have the right to reside and work in Germany. Since 2011 this freedom of movement has applied to East European countries. Immigration from non-EU countries is limited to skilled workers, who are admitted for a certain period of time. However, it is possible for such workers to renew their work permits provided that they have a job, comply with German laws, and are not a burden on the country's social services. Permanent residence can be obtained after five years of work and residence in the country and requires the ability to be self-supporting and integration into the German way of life. For highly-skilled workers, the path to permanency is shorter.

India

India offers several types of visas, including tourist, employment, business, student, entry, research, journalist, medical, return, project, conference, and transit visas. All foreigners, including foreigners of Indian origin, visiting India for more than 180 days on a student, medical, research, or employment visa are required to register, within fourteen days, with the concerned jurisdictional Foreigners Regional Registration Officer.

Italy

To enter Italy, an alien needs a valid passport and a valid visa. Residence permits may also be used to gain access to the country in cases where there is an international agreement in place. The duration of the permit varies according to each category available, which includes business or tourism, temporary work, study, certified training, autonomous work, or family reunification. The maximum number of work visas, however, is limited by the authorities on an annual basis.

Japan

A foreigner needs a valid passport along with a transit, temporary visitor, working, general, specified official, or diplomatic visa to enter Japan. Once the requirements to enter the country are verified at airports and seaports, landing permission is stamped on the alien's passport showing the person's status of residence. An alien can only perform activities that conform to his status of residence. Several statuses of residence are available, including for employment, training, and permanent residence.

Under a specific status, second- and third-generation Japanese descendants are allowed to stay and work in the country for five years, which can be extended, provided that the alien can obtain a police certificate showing no criminal activity in the country where the alien previously lived.

Mexico

To enter Mexico an alien usually needs a valid passport and a visa. Several types of visas are available, including visitor (with or without work permit), adoption purposes, temporary resident, student, and permanent resident visas. The government may deny a visa to an alien with a criminal record or who presents a threat to national security or public safety. International agreements or unilateral decisions of the Mexican government may exempt a foreigner from the visa requirement. Nationals of certain countries are eligible for a special immigration status that allows them to visit Mexico's border regions for up to three days or work for up to one year in certain Mexican states.

Russia

Constitutional principles coupled with federal regulations regulate the admission of aliens into Russia and their employment in the domestic labor market. Federal law determines that a valid passport and a valid visa issued by a Russian consular office outside the country are the main documents needed by an alien to enter the country. Five categories of visas are available:

ordinary, official, transit, diplomatic, and temporary residence. Subtypes of ordinary visas include business, tourist, work, student, humanitarian, private, or political asylum visas. Single- or double-entry visas are usually issued for periods of up to three months, while multi-entry visas are available for periods exceeding three months. Specific visas valid for one-year periods may be issued to students or journalists. In exceptional circumstances, and as a matter of reciprocity, business and humanitarian visas can be issued for a five-year term.

Assistance to returning countrymen in their relocation to Russia from abroad, protection of minorities, better integration of refugees and asylum seekers, and the creation of more efficient mechanisms for regulating labor migration are the main purposes of a recently adopted migration policy. To implement this policy, several measures have been proposed, including, *inter alia*, changes in legislation and in the system of state oversight of migration processes.

The federal government defines the number of work visas that are made available annually. A foreign national who does not need a visa to enter the country can stay for ninety days or for the duration of the person's work authorization.

South Africa

To be admitted to South Africa, an alien is required, among other things, to obtain one of thirteen different types of temporary residence permits. At the port of entry, immigration authorities determine whether the person should be granted entry and for how long. Work permits are available to aliens, but on a limited basis. The issuance of a work permit is conditioned on the lack of qualified South African citizens and is issued for a specific amount of time. Permanent residency is possible if an alien meets certain requirements.

Spain

Transit, short-stay, residence, residence and work, seasonal residence and work, and study and research are the types of visas available to foreigners seeking to enter Spain. The visa system in the country is tailored to curb illegal immigration and to attend to the needs of the labor market. Nationals of countries with which Spain has a bilateral agreement or from EU Member States do not need a visa. In addition to a visa, an alien must present at an authorized port of entry a valid passport or travel document, the reasons for and conditions under which he or she is entering the country, and evidence of financial support for the period of stay in the country or the ability to procure such funds legally. Humanitarian needs, public interest, or commitments undertaken by Spain are also grounds for admission into the country.

United Kingdom

Citizenship and nationality fall under the responsibility of the Parliament at Westminster in London despite the existence of separate legislatures in the countries that comprise the United Kingdom. Under current law, nationals of several countries must obtain pre-entry clearance and a visa at a British Embassy, Consulate, or Commission in the individual's country of residence. Nationals who are not required to obtain pre-entry clearance may obtain a visa to enter the United Kingdom at a port of entry if their visit is for less than six months and the purpose of the

visit is not for employment or study on a course that requires a work placement. Nationals of Member States of the European Economic Area (EU Members plus Iceland, Liechtenstein, and Norway) are not required to obtain a visa to enter the country.

For economic purposes, the country's migration policy currently focuses on skilled workers. To that effect, a points-based program, which was inspired by the Australian method, has been implemented. The program was designed to provide a simplified immigration system and attract migrants who will contribute to the country.

III. Unlawful Entry and Overstays

Australia

An alien who does not have a valid visa must leave the country, otherwise detention and removal procedures may be applicable. Bridging visas are available to overstayers, which allow them to remain in the country while their immigration status is resolved. Federal agencies monitor illegal employment and improper welfare claims. Employers of illegal aliens are subject to sanctions. A government operated system allows employers to check a person's work rights and a service provided by the immigration authority enables the general public to report illegal aliens.

Brazil

An alien who illegally enters or irregularly stays in Brazil and does not depart voluntarily is subject to deportation. At the request of the Minister of Justice, the alien may be imprisoned for up to sixty days pending deportation. The Federal Police is the competent agency that arrests and deports aliens. Current legislation does not establish any criminal sanctions against aliens who illegally enter or illegally stay in Brazil.

In the past, Brazil has granted amnesty to immigrants who were in an illegal situation in the country. The last amnesty program occurred on July 2, 2009, when Brazil issued a new law allowing immigrants who were in an irregular migratory situation and who entered the country before February 1, 2009, to request provisional residency. The law considered being in an irregular migratory situation to include those aliens who had entered the country illegally; those for whom the period of stay had expired following legal entry; or the beneficiary of the provisions of the earlier amnesty program of 1998 who had yet to complete the necessary procedures to obtain permanent resident status.

Once approved, the provisional residency was valid for two years. Within ninety days prior to the expiration of the provisional residency, an alien could request its conversion into permanent status upon establishing that he practiced a profession or employment, or lawfully owned sufficient assets to maintain himself and his family; had no tax debts and no criminal record in Brazil and abroad; and had not been out of the country for a period exceeding ninety consecutive days during the period of provisional residence.

Canada

Unlawful entry and overstay are not specifically criminalized in Canada, but may fall within general offenses. Usually, such offenses are sanctioned with a fine. However, depending on the seriousness of the violation, including the foreigner's intention and prior record, such offenses may also lead to imprisonment for six months. In practice, violators of the country's immigration laws are either ordered to leave Canada or deported. Hiring undocumented aliens is also punished with a fine, which can be excused if the employer shows due diligence during the hiring process.

Using forged documents for immigration purposes and withholding material facts, providing misleading information, and refusing to answer questions during legal proceedings are considered crimes under immigration regulations and punishable with fines and jail time.

China

The increasing interest in China has forced the country to adopt a new entry and exit law. According to the new law, the sanctions for an alien who illegally enters, stays, or works in China can include a warning, fine, order to leave China within a specified time, or expulsion. Depending on the seriousness of the violation, detention may also be imposed. Chinese citizens who help foreigners gain illegal access to the country or who harbor them are subject to a fine, confiscation of illegal gains, and detention. Fines and confiscation of illegal gains are also imposed on Chinese employers who hire illegal aliens.

Germany

Any entry into Germany without a visa or residence permit, and any overstaying of the period permitted by the visa or permit is a criminal offense and may lead to deportation. Germany has no special programs for allowing illegal immigrants to become legal.

India

Unlawful entry and overstay are considered crimes in India. A person who unlawfully enters, overstays, or attempts to enter the country on a forged passport or visa is subject to imprisonment and/or a fine. In addition, the criminal alien may need to obtain a clearance issued by the appropriate authority to leave the country.

Italy

Noncompliance with legal requirements and posing a threat to national security or international relations are grounds for barring an alien's entry into Italy. Foreigner who enter the country illegally are subject to expulsion, as are holders of a residence permit who do not register their presence in Italian territory within sixty days of entry, overstay their permit, or remain after their permit has been revoked or annulled. Once expulsion has been ordered, the person must leave the country within fifteen days from the date of the order. Conviction for certain crimes, especially those considered socially dangerous, constitute grounds for deportation. In order to reenter Italy

after being expelled from the country, an alien needs to either wait for the end of the prohibition period or obtain a special authorization for this purpose. Violations are punishable with two to six months in prison and deportation.

Japan

Violations to immigration law give cause to criminal prosecution and deportation, which may also be imposed on aliens who illegally enter the country, overstay, or commit document fraud. In specific situations, instead of imposing deportation procedures on an illegal alien, a departure order to leave Japan within fifteen days may be issued, provided that certain conditions are met. In exceptional cases, under very specific circumstances, an illegal immigrant may be able to stay in the country if the person is able to secure a special permission issued by the Ministry of Justice.

Mexico

Aliens who enter Mexico without authorization may be subject to deportation. Foreigners who overstay their visas or who violate their visas by performing unauthorized activities may obtain legal status after paying a fine and fulfilling other legal requirements.

Russia

Aliens who unlawfully enter the country by either using false documents or avoiding border control points and who overstay or violate the purpose of their visas are considered illegal immigrants. Such individuals are subject to fines, forceful deportation, and a five-year ban. Illegal entry is criminally punished with up to four years in prison. A Russian employer who hires an illegal alien is subject to fines and may have its authorization to employ foreigners revoked.

The government's approach to resolve the issue of illegal immigration relies on the development of a specific legal framework encompassing regulation of the labor market, migration legislation, increased cooperation with neighboring states, development of the border control infrastructure, and better control of the country's borders with former Soviet republics.

South Africa

Aliens present in South Africa who are in violation of immigration regulations are subject to deportation. However, certain aliens who overstay their visas have the option, before being deported, to ask for an authorization to remain in the country while applying for adjustment of status. If the application is denied, the alien must leave South Africa within fourteen days. If the alien fails to leave within the specified period of time, the person is then subject to deportation. With humanitarian aid exceptions, individuals and institutions are prohibited from aiding and abetting illegal aliens. Fines and imprisonment are imposed on violators.

Spain

The sanctions imposed on aliens who either enter Spain illegally or overstay their visas include an administrative fine or expulsion from the country. If an illegal alien is not deported within seventy-two hours after his apprehension, he or she is detained in a Foreigner Detention Facility.

United Kingdom

Illegally entering the country, entering the country by deception, overstaying visas, and violating the terms of a visa such as by working without authorization are considered criminal offenses in the United Kingdom. To assist aliens to illegally enter the country is also considered an offense. Administrative actions or criminal proceedings and deportation are likely to be imposed on the illegal alien and he or she may also be barred from entering the country again.

IV. Citizenship

Australia

A child born in Australia automatically acquires Australian citizenship if one of the parents is an Australian national or a permanent resident. Citizenship is also acquired if the person is born in Australia and spends the first ten years of his or her life in the country, regardless of the immigration status of the parents. A child born outside of Australia to an Australian citizen parent may apply for Australian citizenship by descent.

A person is required to legally live in the country for four years, including one year as a permanent resident, and to pass a citizenship test before obtaining Australian citizenship. Citizenship may be obtained in a shorter period of time if the applicant performs certain works that require citizenship and are of benefit to Australia. A defense service requirement in place of the general residence requirement provides recruits in Australian defense forces and their family members a pathway to citizenship.

Brazil

A child born in Brazil to foreign nationals is considered a Brazilian citizen, provided that the parents are not in Brazil in the service of their home country. A child born abroad to a Brazilian father or to a Brazilian mother is considered a Brazilian citizen provided that either of them is in the service of the Federative Republic of Brazil. In addition, a child born abroad to a Brazilian father or to a Brazilian mother is considered a Brazilian citizen provided that he comes to reside in Brazil and opts for Brazilian nationality at any time.

Several conditions must be satisfied before a permanent resident can apply for citizenship, including civil capacity according to Brazilian law; registration as a permanent alien; continuous residence for at least four years immediately preceding the application for citizenship; the ability to read and write the Portuguese language; the practice of a profession or holding enough possessions to guarantee his and his family's maintenance; proof of good behavior; no record of indictment or conviction in Brazil or abroad for a felony; and good health. The residence

requirement may be reduced to three years if the alien possesses real estate or an enterprise in Brazil; two years due to the alien's professional, scientific, or artistic abilities; and one year if the alien has a Brazilian spouse, a Brazilian child, a Brazilian parent, or has performed a relevant service for Brazil.

In exceptional circumstances, Brazilian citizenship can also be obtained upon request if a person has continuously resided for more than fifteen years in the country and does not have any criminal conviction. An alien admitted to Brazil before the age of five who permanently lives in the country may, within two years after reaching adulthood, apply for naturalization. A foreigner who came to reside in Brazil before reaching the age of majority and has obtained a degree from a national institution of higher education may, within one year after graduation, apply for naturalization.

Canada

With the exception of children born to foreign diplomats working in Canada, all persons born in the country are generally granted Canadian citizenship. Recent changes in the citizenship law grant a person who was born abroad the right to obtain citizenship if at least one parent is a Canadian citizen who was either born or naturalized in Canada. However, the acquisition of citizenship by descent to children born or adopted outside Canada is limited to one generation only.

Naturalization is available to aliens who meet several requirements, including a minimum age of eighteen years, no violations of permanent residency status, a specific period of residence in the country, adequate language knowledge of either French or English, no recent criminal history, and knowledge of Canada. A parent or guardian may also apply for a permanent resident child under the age of eighteen years to be naturalized.

China

Citizenship by birth is acquired when a child is born in China to at least one Chinese parent or if the parents are settled in China and are stateless or their nationalities cannot be determined. Children born outside the country to at least one Chinese parent are considered citizens provided that the parents did not settle in a foreign country and the child did not acquire foreign citizenship at birth. Acquisition of citizenship through naturalization is possible, normally through marriage or a great contribution to the country. By law, foreign and stateless persons may acquire citizenship if they are close relatives of Chinese nationals, have settled in China, or have other legitimate reasons.

Germany

Birthright citizenship applies to a child who was born in Germany to alien parents, provided that one parent has been a lawful resident of Germany for at least eight years and also has a permanent residence permit. However, German citizenship is granted conditionally if the child acquires another nationality at birth. To retain German citizenship, the child is required to relinquish the other citizenship within five years after reaching eighteen years of age.

German citizenship can also be acquired after an alien lawfully resides for eight years in the country. The person is required to be a permanent resident at the time of the application, be law abiding, integrated, not a dual citizen, and financially self-sufficient. During the alien's residence period in Germany, the person could not have been a burden to society or endangered the country and its population; in addition he must be socially and linguistically integrated. For naturalization purposes, the law defines financial self-sufficiency as the applicant's ability to support himself and his dependents without requiring unemployment or welfare benefits.

India

In India, citizenship can be acquired by birth, descent, registration, or naturalization. The date the person was born determines whether Indian citizenship is automatically acquired or whether it instead depends on a myriad of factors, such as whether the person was born outside of India, whether either of the parents was an Indian citizen at the time of the birth of the child, whether the newborn acquired other nationality abroad, or whether the birth was registered at an Indian Consulate within a certain period of time. Citizenship by registration is available to persons of Indian origin, provided that they fall under one of several regulatory categories. A foreigner may acquire Indian citizenship after residing in the country for twelve years. The applicant must meet specific requirements, which can be waived if, in the opinion of the Central Government, the applicant is a person who has rendered distinguished services to the country.

Italy

Descendants of Italian citizens automatically acquire citizenship, as well as minor children living with their parents at the time the parents acquire or reacquire Italian citizenship. Children born in Italian territory whose parents are unknown or stateless, persons whose filiation is judicially recognized, and adopted persons may also acquire Italian citizenship.

Italian descendants within the second degree who perform military services, obtain public employment (with limitations), or reside in Italy for two years after reaching the age of majority may also obtain citizenship. Foreigners born in Italian territory may obtain citizenship after legally and continuously residing in the country until reaching the age of majority. Italian spouses may also acquire citizenship provided that they meet specific requirements.

Citizenship can also be obtained by certain individuals through naturalization, who must reside in the country for a specific period of time. In exceptional cases, foreigners who have rendered services considered to be of national interest can also acquire Italian citizenship. Special laws grant nationals of specific countries Italian citizenship, provided that certain criteria are met.

Japan

A child born to a Japanese father or mother is considered a Japanese citizen. Foreigners may acquire Japanese citizenship if they are legally domiciled for five consecutive years or more in the country, are twenty years of age or older and have full capacity pursuant to the domestic laws of their country of origin, have good conduct, are able to financially support themselves, agree to relinquish their original nationality, and are not a threat to the country. Under certain

circumstances, some of these requirements may be waived or relaxed. Some of these conditions include, but are not limited to, having a Japanese spouse or relative, or cases where an alien cannot relinquish his current nationality because the country of origin does not allow it. Relevant services to Japan may lead to naturalization without compliance with the general requirements

Mexico

Constitutional principles determine that a child born in Mexico automatically acquires citizenship, regardless of the nationality of the parents. A child born abroad to a Mexican parent and a child born aboard a Mexican vessel or aircraft also acquires Mexican citizenship by birth.

Naturalization is available for an alien who legally resides for five years in the country, speaks Spanish, knows the history of Mexico, is integrated into the country's culture, takes an oath of allegiance, renounces any other nationality, and submits a naturalization application to Mexico's Department of Foreign Affairs. The residence requirement may be reduced to either two years or one year if certain conditions are met.

Russia

Russian citizenship can be acquired by birth, descent, registration, or naturalization. A minimum age of eighteen years, five years of residence in the country, language proficiency, and knowledge of the Constitution are the requirements that a foreigner must meet in order to obtain citizenship through naturalization. The residence period requirement may be reduced for refugees; former citizens of the Soviet Union or Russia; individuals of high achievement in science, technology, and culture; and those who have rendered services to the Russian Federation. Individuals who pose a threat to the country and convicted felons may have their applications for naturalization refused.

South Africa

A child born in the national territory or abroad to a South African parent is considered a citizen. A stateless child born in the country is considered a citizen provided that the birth is registered with the appropriate authorities. The child of a permanent resident who was born in South Africa and had his birth registered according to the applicable law may obtain citizenship after living in the country upon attaining majority. Persons adopted by South African citizens are also considered citizens. Citizenship may also be acquired through naturalization, which is conditioned on several requirements, including permanent residency and language skills.

Children born in the national territory to non-South African parents or non-permanent residents may apply for naturalization upon reaching the age of majority. To qualify, the person must have lived in the country until attaining the age of majority and the birth have been properly registered in South Africa.

Spain

Children born in Spain acquire Spanish citizenship after living in the country for one year. Children born abroad to a Spanish mother or father also acquire Spanish citizenship. Foreigners and refugees may acquire Spanish citizenship after legally and permanently living for specific periods of time in the country. Citizenship may also be acquired through marriage to a Spaniard as well as by being a widow or widower of a Spanish citizen. In addition to the residence period, statutory requirements must be fulfilled, including good civic character and an acceptable degree of integration into Spanish society.

United Kingdom

Persons born on or after January 1, 1983, in the country or in a former colony of the United Kingdom to British parents or to parents who have settled in the United Kingdom are entitled to British citizenship. Adoption, descent, naturalization, and registration may also lead to British citizenship.

Citizenship is only granted to children born in the country if one of the parents is a British citizen or has settled in the United Kingdom. A child born in the country to non-British citizens may become a citizen if either parent becomes a British citizen or an application is made to register the minor as a British citizen while the child is still a minor. Children born outside the country are considered British citizens if at the time of birth one of the parents is a British citizen. Several requirements must be met before an individual can become a British citizen through naturalization, including, *inter alia*, that a person be over eighteen years of age; have legally resided in the United Kingdom for a period of five years; be able to communicate effectively in either English, or Welsh, or Scottish Gaelic; and have sufficient knowledge of life in the country.

V. Border Management and Security

Australia

In January 2013, Australia launched a National Security Strategy for the purpose of, *inter alia*, meeting current and future border protection and security challenges. Essential elements of the response to the security outlook were defined in the Strategy, including increasing the use of risk-based systems to target threats; enhancing cooperation across border security, law enforcement, and intelligence agencies; and cooperation with regional partners to counter people smuggling. As people smuggling has become a major concern in the country, the government has passed more severe laws to stop human smugglers and established several mechanisms designed to repress smuggling and other unauthorized entrances. For border management, Australia has many systems designed to verify that people are authorized to travel across Australia's borders and to deter or prevent those who are not. The layers of the system include, but are not limited to, advance passenger processing, the continuous checking of visa applicants against a watch list prepared by security and law enforcement agencies, the maintenance of arrival and departure records in a database, and increasing use of biometric technology at borders.

Brazil

Brazil has borders with ten neighboring nations (Argentina, Bolivia, Colombia, French Guiana, Guyana, Paraguay, Peru, Suriname, Uruguay, and Venezuela). In 2011, Brazil created a Strategic Border Plan for the purpose of strengthening the prevention, control, inspection, and repression of cross-border crimes and offenses committed in Brazilian border areas, which include coordination of the activities of public safety agencies, the Internal Revenue Service, and the Armed Forces, and coordination with neighboring countries.

Canada

To ensure Canada's security and prosperity, the agency in charge of border management and security controls the access of people and goods into the country. To this effect, the agency's duties include, but are not limited to, the enforcement of laws that regulate the admission of people, goods, plants, and animals into and out of Canada; detention and removal of people; execution of trade laws and trade agreements; enforcement of trade remedies against dumped and subsidized imported goods; and collection of taxes on imported goods.

China

A foreigner entering or leaving China is required to go through an inspection performed by officials at the country's border inspection stations, who, among other formalities, check the passport and the validity of the visa or travel document. The stations are located at major Chinese airports, seaports, and land borders.

Armed police are charged with the duty of border, coastal, and maritime public security administration; entry-exit frontier inspection at ports; preventing of illegal and criminal acts in border and coastal areas; and the organization of and participation in counterterrorist and emergency management operations in border and coastal areas.

Germany

As a member of the Schengen regime, Germany has no border controls at the internal borders within the Schengen area and relies largely on the border controls carried out by the Schengen members having an external border. The only external border for which Germany is responsible is the maritime border on the North Sea and the Baltic Sea, and border control at international airports. Despite the absence of systematic border checks at the borders with neighboring countries, Germany still maintains a Federal Police Force whose mission includes the protection of German borders against the illegal entry of aliens, in cases where such aliens circumvent the border controls of another Schengen member country.

India

The activities performed by the authority in charge of managing borders and coastal borders include, among other things, the construction of fencing, floodlighting and roads along the Indo-Pakistan and Indo-Bangladesh borders; development of integrated checkpoints at various

locations on the borders of the country; and construction of strategic roads along the Indo-China, Indo-Nepal, and Indo-Bhutan borders.

The socioeconomic development of border areas also plays a role in the strategy to secure the country's borders. To prevent transnational crime, paramilitary forces, law enforcement agencies, and military forces secure the borders with several different countries. However, the interaction of different forces under different commands is a challenge.

Italy

Italy is part of the Schengen Agreement, which provides a common visa policy to the Member States designed to facilitate movement across shared borders. The Minister of Interior is in charge of issuing the necessary measures for the unified coordination for the control of maritime and land borders in the country.

The protection of borders also encompasses the inspection of vessels that can be utilized by aliens to gain access to or leave the country. Several forces under the command of a central service are responsible for combating illegal immigration, either on land, air, or sea. Immigration enforcement is also regulated by a law that establishes as its main purpose the cooperation with other States. Organized crime, human trafficking, and several other subjects are the dominant areas of cooperation.

Japan

Coastal security in Japan, an island nation, is performed by the Japan Coast Guard. The duties of the Guard involve, inter alia, suppressing smuggling and illegal immigration practiced by criminal organizations and enforcement operations, including inspection of incoming vessels.

Mexico

Mexico's border security policy revolves around the protection of its borders as well as the protection of the human rights of the population, including local inhabitants and immigrants who live in border regions. The strategy developed by the government to implement such policy included the creation of federal and regional police units assisted by military forces for the purpose of protecting the country's borders and its inhabitants and the creation of communication channels with neighboring countries designed to control immigration flows, protect the rights of migrants, and combat international crime and terrorism. A new national force is expected to be created for the purpose of strengthening the control of borders, ports, and airports.

Russia

Federal law regulates border control in Russia and determines, inter alia, border crossing procedures. A federal agency is in charge of the protection of the national borders, which consists of ensuring the security of the ground, air, and maritime borders. Intelligence and counterintelligence services as well as the protection of the existing government system are also

part of the main duties of the federal agency. Review of documents and the performance of law enforcement functions are some of the border control procedures carried out at designated crossing points by the federal agency. Admission to the country is made by border control officers, who take into account several factors related to the country's national and public security.

South Africa

South Africa shares borders with six countries (Mozambique, Zimbabwe, Botswana, Namibia, Lesotho, and Swaziland). Until not long ago, border protection was also used as a means of racial segregation. A transitional period, marked by the end of a political regime, decreased the presence of defense forces at the borders. Recently, border security has been reinforced with the deployment of soldiers and engineers throughout the country's borders to rebuild damaged fences, and an advanced system to monitor the movement of citizens and visitors in and out of the country has been installed.

Spain

Spain makes use of personnel and technology at entry points to control its borders. In the technology arena, the country has adopted the system used by the United States that provides authorities with information regarding passengers who are about to arrive at Spanish ports and airports from outside the Schengen area of the EU. American technology was also applied in the construction and enhancement of the country's fences located at specific border areas. An advance surveillance system installed in two coastal areas provides information obtained through sensor stations that detect seacraft from a long distance (close to six miles). The system transmits a televised signal to two Central Commands, which then perform rescue and interception operations. As a matter of strategy to control illegal immigration, Spain has adopted the visa system as a pre-entry control to be applied to nationals of countries with high numbers of immigrants coming to Spain.

United Kingdom

The United Kingdom makes use of several means to protect its borders, including technical measures, intelligence services, checks at ports of entry, passport inspections and visa requirements. The country checks the fingerprints of visa applicants to prevent persons with a criminal background from entering the country and to check for fraudulent visa applications.

Applications to enter the country are refused if the applicant is subject to a deportation order or if a previous leave (permission) to enter or remain was obtained by deception. Conviction of an offense punishable with imprisonment for twelve months or more is another ground used to deny entry.

EU Schengen Area

The Schengen area is composed of twenty-six European countries with no internal borders; free movement of EU citizens, their families, and qualified third-country nationals; and a common external border. A Convention implementing the Schengen Agreement was signed in 1990, and

in 1999 it was incorporated into the legal framework of the EU. The main purpose of the Agreement was to gradually eliminate the border controls between the signatory countries and at the same time establish more secure external borders.

A key feature of the Schengen area is the Schengen Information System (SIS), a large database used by competent national authorities to maintain public safety and security within the Schengen area and provide effective management of the external border.

Australia

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SUMMARY Australia has a universal visa system with various visa options available for visitors, students, skilled workers, business people, and investors. The work visa system is primarily focused on enabling skilled workers to live in the country either temporarily or permanently and includes avenues for such workers to meet the needs of different regions in the country. The main visa for temporary employer-sponsored skilled workers allows for accompanying family members and provides a pathway to permanent residence. Permanent residence for at least twelve months during at least four years of legal residence is one of the requirements for people to obtain Australian citizenship. A program for seasonal workers from certain countries is in place, but does not allow participants to apply for further visas while in Australia and requires that they leave at the end of their employment period. New Zealand citizens can work in the country indefinitely, but must obtain a permanent visa to gain certain rights and in order to apply for Australian citizenship.

Persons in the country unlawfully are required to leave and could face immigration detention and removal. Bridging visas are available to provide time for people to resolve visa issues. Movement and visa records are maintained in databases, with both incoming and outgoing passenger information being recorded. A range of other border management measures are used to prevent and deter illegal entry into the country, including alert lists, the use of biometric technology, and advance passenger processing.

I. Australian Immigration Law

A. Overview of the Visa System

Australia's immigration system is governed by the Migration Act 1958 and associated regulations.¹ The laws provide for a universal visa system with visas divided into two main types (temporary and permanent), several classes, and multiple subclasses.² Visa subclasses are set out in Schedule 2 of the Migration Regulations 1994, which also includes the criteria for each

¹ Migration Act 1958 (Cth), <http://www.comlaw.gov.au/Details/C2012C00855>; Migration Regulations 1994 (Cth), <http://www.comlaw.gov.au/Details/F2013C00062>. Multiple additional subsidiary instruments apply under the Migration Act, see *Legislative Instruments – All – by Title – Mi*, COMLAW, <http://www.comlaw.gov.au/Browse/Results/ByTitle/LegislativeInstruments/Current/Mi/0>.

² Migration Act 1958 (Cth), ss 30–38B; Migrations Regulations 1994, regs 2.01–2.04.

subclass.³ Under the Migration Act, the Minister of Immigration and Citizenship is able to “‘cap’ or limit the number of visas which can be granted each year in a particular visa subclass.”⁴

Tourist and other visitor visas are available for short-term visitors to Australia.⁵ There are a range of student visas available depending on the level or type of study.⁶ “Working Holiday”⁷ and “Work and Holiday”⁸ visa programs are also available for passport holders from various countries.⁹ These visas allow people aged between eighteen and thirty years to stay in Australia for up to twelve months and study or work for a limited number of months within that period. The “Work and Holiday” program involves agreements with certain countries (including the United States) with criteria and conditions dependent on those agreements.¹⁰ Working holiday visas do not allow for family members to be included in applications.

Australia’s work visa system is primarily focused on providing avenues for skilled workers in various occupations to work in the country.¹¹ In recent years, there has been particular focus on meeting the needs of different regions in the country for migrants to fill skilled positions.¹²

³ Migrations Regulations 1994 (Cth), sch 2.

⁴ *Fact Sheet 21 – Managing the Migration Program*, DEPARTMENT OF IMMIGRATION AND CITIZENSHIP (DIAC), <http://www.immi.gov.au/media/fact-sheets/21managing.htm> (last reviewed Sept. 2012); see also Migration Act 1958 (Cth), s 85.

⁵ See generally *Visitors*, DIAC, <http://www.immi.gov.au/visitors/> (last visited Feb. 8, 2013).

⁶ See generally *Students*, DIAC, <http://www.immi.gov.au/students/> (last visited Feb. 11, 2013); *Fact Sheet 50 – Overseas Students in Australia*, DIAC, <http://www.immi.gov.au/media/fact-sheets/50students.htm> (last reviewed Oct. 2012).

⁷ Migration Regulations 1994 (Cth), sch 2, subclass 417; *Fact Sheet 49 – Working Holiday Program*, DIAC, <http://www.immi.gov.au/media/fact-sheets/49whm.htm> (last reviewed Sept. 2012).

⁸ Migration Regulations 1994 (Cth), sch 2, subclass 462; *Fact Sheet 49a – Work and Holiday Program*, DIAC, <http://www.immi.gov.au/media/fact-sheets/49awhp.htm> (last reviewed Sept. 2012).

⁹ See generally *Working Holiday*, DIAC, <http://www.immi.gov.au/visitors/working-holiday/> (last visited Feb. 11, 2013).

¹⁰ See *Work and Holiday Visa (Subclass 462)*, DIAC, <http://www.immi.gov.au/visitors/working-holiday/462/>; *Working Holiday Visa (Subclass 417)*, DIAC, <http://www.immi.gov.au/visitors/working-holiday/417/> (both last visited Feb. 11, 2013).

¹¹ See generally *Fact Sheet 24 – Overview of Skilled Migration to Australia*, DIAC, http://www.immi.gov.au/media/fact-sheets/24overview_skilled.htm (last reviewed July 2012). For a recent overview and comparison of all skilled visas see DIAC, SKILLED VISAS FOR AUSTRALIA, <http://www.immi.gov.au/skilled/pdf/overseas-skilled-options.pdf>. Note that various changes relating to skilled migration came into effect in July 2012 and January 2013: see Press Release, Chris Bowen MP, Simplifying Sponsorship for Permanent Skilled Migrants (Mar. 9, 2012), <http://www.minister.immi.gov.au/media/cb/2012/cb183639.htm>; *Changes to the General Skilled Migration Visas from 1 January 2013*, DIAC, <http://www.immi.gov.au/skilled/general-skilled-migration/changes-gsm-010113.htm> (last visited Feb. 11, 2013).

¹² See generally *Regional Initiatives*, DIAC, <http://www.immi.gov.au/skilled/regional-employment/>; *Regional Migration Agreements*, DIAC, <http://www.immi.gov.au/skilled/regional-migration-agreements.htm> (both last visited Feb. 11, 2013). See also *Fact Sheet 26 – State Specific Regional Migration*, DIAC, <http://www.immi.gov.au/media/fact-sheets/26state.htm> (last reviewed July 2012).

There is a range of temporary¹³ and permanent¹⁴ visa options available, including for independent workers,¹⁵ those with employer sponsorship,¹⁶ or workers nominated by a state or territory.¹⁷ Different visas are also available for businesspeople and investors.¹⁸

Skilled worker visas generally allow for family members (partners and dependents) to be included in the relevant application, with such people therefore also able to work in the country.¹⁹ There are also visa options that allow Australian citizens and permanent residents to sponsor family members for permanent residence.²⁰ There are pathways to permanent residency for holders of temporary skilled visas,²¹ with recent changes made to simplify the process for employer-sponsored temporary workers.²²

¹³ The main temporary visa for employer-sponsored skilled workers is subclass 457 (Temporary Work (Skilled)): *SkillSelect: Subclass 457 Visa*, DIAC, <http://www.immi.gov.au/skills/skillselect/index/visas/subclass-457/>; *Temporary Work (Skilled) – Standard Business Sponsorship (Subclass 457)*, DIAC, <http://www.immi.gov.au/skilled/skilled-workers/sbs/> (both last visited Feb. 11, 2013).

¹⁴ See generally *Skilled Worker Permanent Visa Options*, DIAC, <http://www.immi.gov.au/skilled/skilled-workers/visa-permanent.htm> (last visited Feb. 11, 2013).

¹⁵ See *SkillSelect: Skilled Independent (Subclass 189) Visa*, DIAC, <http://www.immi.gov.au/skills/skillselect/index/visas/subclass-189/> (last visited Feb. 11, 2013).

¹⁶ See *SkillSelect: Employer Nomination Scheme (Subclass 186)*, DIAC, <http://www.immi.gov.au/skills/skillselect/index/visas/subclass-186/>; *Regional Sponsored Migration Scheme (Subclass 187)*, DIAC, <http://www.immi.gov.au/skills/skillselect/index/visas/subclass-187/>; DIAC, PERMANENT EMPLOYER SPONSORED PROGRAM, <http://www.immi.gov.au/skilled/skilled-workers/pdf/skilled-migration-diagrams.pdf> (all last visited Feb. 12, 2013).

¹⁷ See *SkillSelect: Skilled – Nominated (Subclass 190) Visa*, <http://www.immi.gov.au/skills/skillselect/index/visas/subclass-190/>; *SkillSelect: Skilled – Nominated or Sponsored (Provisional) (Subclass 489) Visa*, DIAC, <http://www.immi.gov.au/skills/skillselect/index/visas/subclass-489/> (both last visited Feb. 11, 2013).

¹⁸ See generally *Business People – Visa Options*, DIAC, <http://www.immi.gov.au/skilled/business/visa-options.htm>; *SkillSelect: Business Innovation and Investment (Provisional) (Subclass 188) Visa*, DIAC, <http://www.immi.gov.au/skills/skillselect/index/visas/subclass-188/> (both last visited Feb. 11, 2013).

¹⁹ See generally *GSM – Adding and Withdrawing Family Members*, DIAC, <http://www.immi.gov.au/skilled/general-skilled-migration/adding-family-members.htm>; see, e.g., *Temporary Work (Skilled) – Standard Business Sponsorship (Subclass 457): Family Members (Secondary Visa Applicants) Eligibility*, DIAC, <http://www.immi.gov.au/skilled/skilled-workers/sbs/eligibility-family.htm> (both last visited Feb. 11, 2013).

²⁰ See generally *Family Members*, DIAC, <http://www.immi.gov.au/migrants/family/> (last visited Feb. 12, 2013); *Fact Sheet 29 – Overview of Family Stream Migration*, DIAC, http://www.immi.gov.au/media/fact-sheets/29overview_family.htm (last reviewed Sept. 2012).

²¹ See *Pathways to Permanent Residency*, DIAC, <http://www.immi.gov.au/skilled/general-skilled-migration/sir.htm> (last visited Feb. 11, 2013).

²² The process, known as the Temporary Residence Transition stream, applies to subclass 457 workers “who have worked with an Australian employer for at least the last 2 years and their employer wants to offer them a permanent position in the same occupation.” *SkillSelect: Permanent Employer Sponsored Program Definitions*, DIAC, <http://www.immi.gov.au/skills/skillselect/index/employer-definitions/>. See also Mei Hoong, *Changes to the Permanent Employer Sponsored Program*, MIGRATION BLOG (May 7, 2012), <http://migrationblog.immi.gov.au/2012/05/07/changes-to-the-permanent-employer-sponsored-program/>.

The management of the skilled worker programs involves the maintenance of lists of skilled occupations by the government.²³ One list “determines which occupations are eligible for independent and family sponsored skilled migration.”²⁴ A further consolidated list sets out occupations in relation to both state and employer nomination schemes.²⁵ These lists are relevant to the points system that applies to some types of visas.²⁶ A new electronic system that allows applicants to submit online expressions of interest for “General Skilled Migration” points-based visas and some other visas was launched in July 2012.²⁷ People using this system can then be invited to apply for the relevant visas where their skills and experience match with the needs of Australian employers and states or territories and where they meet any necessary point requirements.

Between September 2008 and June 2012, Australia piloted a guest worker program that enabled people from certain Pacific Island countries to come to Australia for seasonal horticultural work.²⁸ Following the pilot, the Seasonal Worker Program came into effect in July 2012.²⁹ The program involves agreements with several countries³⁰ where people aged between twenty-one and forty-five years can apply for special visas³¹ to work for approved employers for a set period. Under this program, seasonal workers are able to work in Australia for fourteen weeks to six months and can return to Australia to work in future years if they comply with visa conditions. Individual visa holders must work for the specific employer on their visa and pay for

²³ See *Skilled Occupation Lists (Formerly Known as Form 1121i)*, <http://www.immi.gov.au/skilled/sol/>; Migration Regulations 1994 (Cth), reg 1.15I (skilled occupation).

²⁴ DIAC, ANNUAL UPDATE OF SKILLED OCCUPATION LIST – 1 JULY 2012, <http://www.immi.gov.au/skilled/pdf/updated-sol.pdf>; see also DIAC, SKILLED OCCUPATION LIST (SOL): SCHEDULE 1 (July 2012), <http://www.immi.gov.au/skilled/pdf/sol-schedule1.pdf>.

²⁵ DIAC, CONSOLIDATED SPONSORED OCCUPATION LIST (CSOL): SCHEDULE 1 AND 2 (July 2012), <http://www.immi.gov.au/skilled/pdf/sol-schedule1-2.pdf>.

²⁶ See DIAC, GENERAL SKILLED MIGRATION POINTS TEST UNDER SKILLSELECT (June 2012), <http://www.immi.gov.au/skilled/general-skilled-migration/pdf/points-tested-migration-fact-sheet.pdf>; *What is the Points Test?*, DIAC, <http://www.immi.gov.au/skilled/general-skilled-migration/points-test.htm>; *New Skilled Visa and Points Test Arrangements*, DIAC, <http://www.immi.gov.au/skilled/general-skilled-migration/new-skilled.htm> (both last visited Feb. 11, 2013); Migrations Regulations 1994 (Cth), regs 2.26AA–AC & sch 6B–6D.

²⁷ *SkillSelect*, DIAC, <http://www.immi.gov.au/skills/skillselect/>. See generally blog posts on the topic of SkillSelect at Migration Blog, DIAC, <http://migrationblog.immi.gov.au/category/skillselect/> (last visited Feb. 11, 2013).

²⁸ See Press Release, Chris Bowen MP, Visa for Pacific Island Seasonal Worker Scheme (Sept. 23, 2008), <http://www.minister.immi.gov.au/media/media-releases/2008/ce08090.htm>; *Pacific Seasonal Worker Pilot Scheme*, Department of Education, Employment and Workplace Relations (DEEWR), <http://deewr.gov.au/pacific-seasonal-worker-pilot-scheme> (last visited Feb. 11, 2013).

²⁹ See *Seasonal Worker Program*, DIAC, <http://www.immi.gov.au/skilled/seasonal-worker/>; *Seasonal Worker Program*, DEEWR, <http://deewr.gov.au/seasonal-worker-program> (both last visited Feb. 11, 2013).

³⁰ The program is currently only available for citizens of East Timor, Kiribati, Nauru, Papua New Guinea, Samoa, Solomon Islands, Tonga, Tuvalu, and Vanuatu who have been sponsored by an employer.

³¹ *Seasonal Worker Program – Eligibility*, DIAC, <http://www.immi.gov.au/skilled/seasonal-worker/eligibility.htm> (last visited Feb. 11, 2013); Migration Regulations 1994 (Cth), sch 2, subclass 416.

their own living expenses and part of their travel costs. They are not permitted to apply for another visa while in Australia and cannot bring family members with them to the country.³²

New Zealand citizens are able to remain in Australia indefinitely owing to special reciprocal arrangements between the two countries.³³ New Zealanders automatically receive a Special Category visa (SCV) when they enter Australia.³⁴ This is a temporary visa that provides rights to live, work, and study in Australia but does not confer the same rights and benefits as those possessed by Australian citizens or permanent residents.³⁵ Eligible New Zealand citizens can apply for a permanent residence visa.³⁶

B. Illegal Immigrants

Unlawful noncitizens must leave (or be removed from) Australia, unless they are granted a visa.³⁷ The Migration Act 1958 provides for persons who are in Australia unlawfully to be detained in immigration detention facilities.³⁸ According to the Department of Immigration and Citizenship website, “[c]ompliance officers locate people who have become ‘unlawful non-citizens’ or who are commonly known as ‘overstayers’”. If there is no legal entitlement for them to remain, they are expected to depart Australia.³⁹

³² *Seasonal Worker Program – About This Program*, DIAC, <http://www.immi.gov.au/skilled/seasonal-worker/swp.htm>; *How This Program Works*, DIAC, <http://www.immi.gov.au/skilled/seasonal-worker/how-program-works.htm> (both last visited Feb. 11, 2013).

³³ *See Fact Sheet 17 – New Zealanders in Australia*, DIAC, <http://www.immi.gov.au/media/fact-sheets/17nz.htm> (last reviewed Oct. 2012).

³⁴ Migration Act 1958 (Cth), s 32; Migration Regulations 1994 (Cth), sch 2, subclass 444; *New Zealand Citizens Entering Australia*, DIAC, <http://www.immi.gov.au/allforms/travel-documents/new-zealand.htm> (last visited Feb. 11, 2013).

³⁵ The status and rights of New Zealanders in Australia has recently become the subject of debate. A joint inquiry by the Australian and New Zealand Productivity Commissions in 2012 noted that the lack of rights of the more than 100,000 New Zealanders on “indefinite temporary” visas to Australian welfare payments and student loans, and the right to vote, could create a strain on the relationship between the two countries. The report recommended that the Australian government create new pathways to permanent residency and/or citizenship for Special Category visa holders living in Australia long-term. AUSTRALIAN PRODUCTIVITY COMMISSION & NEW ZEALAND PRODUCTIVITY COMMISSION, STRENGTHENING TRANS-TASMAN ECONOMIC RELATIONS 149–158 (Final Report, Nov. 2012), <http://transtasman-review.pc.gov.au/sites/default/files/trans-tasman.pdf>. *See also* Simon Collins, ‘Aussie’ Kiwis May Get Back Welfare Rights, THE NEW ZEALAND HERALD (Dec. 14, 2012), http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10853931; Audrey Young, *PM Warns of Limited Rights in Australia*, THE NEW ZEALAND HERALD (Feb. 5, 2013), http://www.nzherald.co.nz/politics/news/article.cfm?c_id=280&objectid=10863569; *New Zealanders “Treated as Second-Class Citizens,”* 9NEWS NATIONAL (Feb. 5, 2013), <http://news.ninemsn.com.au/national/2013/02/05/08/02/treatment-of-nzers-in-australia-on-table>.

³⁶ *New Zealand Citizens Entering Australia*, *supra* note 34.

³⁷ Migration Act 1958 (Cth), s 198; *see also* *Background to Immigration Detention*, DIAC, <http://www.immi.gov.au/managing-australias-borders/detention/about/background.htm>; *Expired Visas*, DIAC, <http://www.immi.gov.au/managing-australias-borders/compliance/staying-legally/expired.htm> (both last visited Feb. 11, 2013).

³⁸ *Background to Immigration Detention*, *supra* note 37. *See* Migration Act 1958 (Cth), pt 2, divs 6 & 7.

³⁹ *Expired Visas*, *supra* note 37; *see generally* *Compliance*, DIAC, <http://www.immi.gov.au/managing-australias-borders/compliance/> (last visited Feb. 11, 2013).

The Department of Immigration and Citizenship, Centrelink (the agency that disburses social security payments), and the Australian Taxation Office share information in order to locate noncitizens who are illegally employed or who claim welfare payments to which they are not entitled.⁴⁰ The Department also works with the Australian Federal Police and state police authorities to locate illegal workers, and has a range of initiatives aimed at addressing noncompliance in the agriculture sector.⁴¹

In recent years, the Australian government has increased its emphasis on encouraging voluntary compliance with immigration laws. For example, people who have overstayed their visa can contact the Department's Community Status Resolution Service in order to seek to resolve their status.⁴² The CSRS can grant bridging visas, which allow people to remain in the country (or to leave and return) after their substantive visa expires and while their application for a new substantive visa is being processed.⁴³

The Department also operates a system called "Visa Entitlement Verification Online," which employers can use to check a person's work rights.⁴⁴ Individual visa holders can also check their visa status online using the system.⁴⁵ Organizations and individuals must register and be approved to access this system. The Department also runs an "immigration dob-in service," which enables members of the public to provide information on persons who they think are in the country illegally.⁴⁶

Employers face sanctions under the Migration Act 1958 for recruiting illegal workers.⁴⁷ Proposed amendments to the law introduced in the federal Parliament in 2012 include new nonfault-based civil penalty provisions and would allow the Department to issue infringement notices and penalties.⁴⁸

⁴⁰ *Fact Sheet 86 – Overstayers and Other Unlawful Non-citizens*, DIAC, <http://www.immi.gov.au/media/fact-sheets/86overstayers-and-other-unlawful-non-citizens.htm> (last revised Mar. 2012).

⁴¹ *Fact Sheet 87 – Initiatives to Combat Illegal Work in Australia*, DIAC, <http://www.immi.gov.au/media/fact-sheets/87illegal.htm> (last reviewed Sept. 2010).

⁴² *Community Status Resolution Service*, DIAC, <http://www.immi.gov.au/managing-australias-borders/compliance/community-status-resolution/> (last visited Feb. 11, 2013).

⁴³ Migration Act 1958 (Cth), s 37 & pt 2, div 3, subdiv AF; Migration Regulations 1994 (Cth) pt 2, div 2.5 & sch 2, subclasses 010, 020, 030; *see also* sch 3 (additional criteria applicable to unlawful non-citizens and certain bridging visa holders); *Bridging Visas*, DIAC, <http://www.immi.gov.au/visas/bridging/> (last visited Feb. 11, 2013).

⁴⁴ *Visa Entitlement Verification Online (VEVO)*, DIAC, <http://www.immi.gov.au/e-visa/vevo.htm> (last visited Feb. 11, 2013).

⁴⁵ *Id.*; *see also About Your Visa*, DIAC, <http://www.immi.gov.au/visas/about-your-visa.htm> (last visited Feb. 11, 2013).

⁴⁶ *Immigration Dob-In Service*, DIAC, <http://www.immi.gov.au/contacts/dob-in/> (last visited Feb. 11, 2013).

⁴⁷ Migration Act 1958 (Cth), pt 2, div 12, subdiv C. *See About the Employer Sanction Legislation*, DIAC <http://www.immi.gov.au/managing-australias-borders/compliance/employer-obligations/about.htm>; *see also 2010 Howells Review of Employer Sanctions*, DIAC, <http://www.immi.gov.au/media/publications/compliance/review-employer-sanctions/> (last visited Feb. 11, 2013).

⁴⁸ *See Migration Amendment (Reform of Employer Sanctions) Bill 2012*, PARLIAMENT OF AUSTRALIA, http://aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r4889. *See also* Press

II. Australian Citizenship Law

The Australian Citizenship Act 2007 sets out the requirements for the recognition and granting of Australian citizenship. Persons born in the country will automatically be Australian citizens by birth only if one parent is an Australian citizen or permanent resident.⁴⁹ In addition, a person will be a citizen by birth if he or she was born in Australia and is “ordinarily resident” in the country throughout the first ten years of his or her life, regardless of the immigration status of his or her parents.⁵⁰ Persons born outside of Australia to an Australian citizen parent can apply for recognition as an Australian citizen by descent.⁵¹

Holders of permanent residence visas who satisfy residence requirements, are of good character, possess a “basic knowledge of the English language,” and have “an adequate knowledge of Australia and of the responsibilities and privileges of Australian citizenship” can obtain Australian citizenship.⁵² Passing a citizenship test that is designed to assess the latter two criteria is required by law.⁵³ A pledge of commitment is made by the person following their citizenship application being approved by the Minister.⁵⁴

The general residence requirements are that the person was legally present in the country for at least four years before applying for citizenship, including as a permanent resident for at least twelve months immediately before the day the application is made.⁵⁵ A special, shortened residence requirement may be applied where the applicant is engaged in particular kinds of work that are of benefit to Australia and for which citizenship is required.⁵⁶ In addition, overseas lateral recruits in Australian defense forces can satisfy a “defence service requirement” in place of the general residence requirements.⁵⁷ As a result of an amendment to the law in 2012, accelerated citizenship is also available for family members of such recruits.⁵⁸

Release, Chris Bowen MP, New Legal Sanctions Against Noncompliant Employers (Sept. 18, 2012, <http://www.minister.immi.gov.au/media/cb/2012/cb189943.htm>).

⁴⁹ Australian Citizenship Act 2007 (Cth), s 12(1)(a), <http://www.comlaw.gov.au/Details/C2013C00008>.

⁵⁰ *Id.* s 12(1)(b).

⁵¹ *Id.* s 16.

⁵² *Id.* s 21. *See generally Migrant with Permanent Residence*, DIAC, http://www.citizenship.gov.au/applying/how_to_apply/migrant_perm_res/ (last visited Feb. 11, 2013).

⁵³ Australian Citizenship Act 2007 (Cth), s 23A. *See generally Citizenship Test*, DIAC, http://www.citizenship.gov.au/learn/cit_test/ (last visited Feb. 11, 2013).

⁵⁴ Australian Citizenship Act 2007 (Cth), ss 26–27.

⁵⁵ *Id.* s 22. Periods of overseas absence are permitted under this section. Time in prison or in a psychiatric institution does not count towards the relevant periods, subject to Ministerial discretion.

⁵⁶ *Id.* ss 22A–22C.

⁵⁷ *Id.* s 23(1).

⁵⁸ Press Release, Chris Bowen MP, Accelerated Citizenship for Families of Defence Recruits (Sept. 11, 2012), <http://www.minister.immi.gov.au/media/cb/2012/cb189803.htm>; Australian Citizenship Act 2007 (Cth), s 23(2) and (3).

Prior to February 2001, New Zealand citizens holding Special Category visas could apply for Australian citizenship if they met the general requirements that applied at the time. Currently, however, such people must first acquire permanent resident status in order to apply for citizenship under the standard rules.⁵⁹ Children who are born in the country to New Zealand citizen parents would become citizens after ten years of residence under the provisions described above.

III. Border Management and Security

Australia's overarching approach to meeting current and future border protection and security challenges is included alongside other areas in an integrated National Security Strategy that was launched in January 2013.⁶⁰ The Strategy states that key aspects of the response to the security outlook relating to increasing movement of people and goods to Australia, growth in transnational crime, and "ongoing irregular migration patterns" include:

- Increasing use of risk-based systems to target threats
- Enhancing cooperation across border security, law enforcement and intelligence agencies
- Cooperating with our regional partners to counter people smuggling
- Implementing the recommendations of the *Report of the Expert Panel on Asylum Seekers*⁶¹

The Strategy also states that an Australian Border Management Strategy currently being developed by relevant agencies will be released.⁶²

People smuggling, particularly through the use of boats to carry asylum-seekers into Australian waters, has become a major concern in Australia in recent years. The Australian government has introduced stricter laws to deter people smugglers⁶³ and implemented various initiatives aimed at curbing smuggling and other unauthorized arrivals.⁶⁴ These include onshore and offshore intelligence officers and operations,⁶⁵ immigration services and monitoring in remote areas,⁶⁶

⁵⁹ See *New Zealand Citizens Living in Australia*, DIAC, http://www.citizenship.gov.au/applying/how_to_apply/nz/ (last visited Feb. 11, 2013).

⁶⁰ AUSTRALIAN GOVERNMENT, STRONG AND SECURE: A STRATEGY FOR AUSTRALIA'S NATIONAL SECURITY 16, 18, 42–43 (Jan. 2013), available at http://www.dpmc.gov.au/national_security/national-security-strategy.cfm.

⁶¹ *Id.* at 33.

⁶² *Id.* at 43.

⁶³ See Kelly Buchanan, *Australia: Legislation to Combat People Smuggling Passed*, GLOBAL LEGAL MONITOR (Law Library of Congress, May 20, 2010), http://www.loc.gov/lawweb/servlet/lloc_news?disp3_l20540_1995_text; Detering People Smuggling Bill, Bills Digest No. 82 2011–12, Parliament of Australia (Nov. 21, 2011), http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/bd/bd1112a/12bd082.

⁶⁴ See *Illegal Entry Prevention*, DIAC, <http://www.immi.gov.au/managing-australias-borders/border-security/irregular-entry/> (last visited Feb. 13, 2013).

⁶⁵ See *Combating People Smuggling and Unauthorised Arrivals*, DIAC, <http://www.immi.gov.au/managing-australias-borders/border-security/irregular-entry/combat.htm> (last visited Feb. 13, 2013).

joint operations involving the Australian Federal Police and other agencies as well as funding for dedicated liaison positions in certain countries,⁶⁷ and engagement in bilateral and regional cooperation efforts.⁶⁸

In terms of specific measures relating to border management, Australia currently has various systems in place “to ensure people are authorised to travel across Australia’s borders and to deter or prevent those who try to enter Australia illegally.”⁶⁹ The different layers of the system include:

- Continuous checking of all visa applicants against a Central Movement Alert List (CMAL), which is a “watch list contributed to by security and law enforcement agencies as well as other Commonwealth [federal] agencies.”⁷⁰ The list includes biographic information on criminals; people who pose a security risk; people barred from entering Australia because of immigration breaches or health issues; and details of lost, stolen, and fraudulent travel documents;⁷¹
- A Security Referral Service, which “allows electronic processing between the department [of Immigration and Citizenship] and the Australian Security Intelligence Organisation (ASIO);”⁷²
- Airline Liaison Officers posted at a number of overseas airports;⁷³
- Advance Passenger Processing (APP) for both air and sea arrivals, which involves carriers checking whether travelers have current valid authority to enter Australia;⁷⁴
- A Regional Movement Alert System, which is integrated with the APP system, that provides checks on all U.S. and New Zealand passports used to travel to Australia;⁷⁵
- Increasing use of biometric technology at borders, including facial recognition and fingerprint-matching technology;⁷⁶

⁶⁶ See *Remote Area Management*, DIAC, <http://www.immi.gov.au/managing-australias-borders/border-security/irregular-entry/combat.htm> (last visited Feb. 13, 2013).

⁶⁷ See *People Smuggling*, AUSTRALIAN FEDERAL POLICE, <http://www.afp.gov.au/policing/human-trafficking/people-smuggling.aspx> (last visited Feb. 13, 2013).

⁶⁸ See *People Smuggling and Trafficking in Persons*, DEPARTMENT OF FOREIGN AFFAIRS AND TRADE, <http://www.dfat.gov.au/issues/people-trafficking.html> (last visited Feb. 13, 2013).

⁶⁹ *Border Security and Entry Requirements*, DIAC, <http://www.immi.gov.au/managing-australias-borders/border-security/> (last visited Feb. 12, 2013).

⁷⁰ *Fact Sheet 70 – Managing the Border*, DIAC, <http://www.immi.gov.au/media/fact-sheets/70border.htm> (last reviewed Dec. 2012).

⁷¹ *Id.* See also *Fact Sheet 77 – The Movement Alert List (MAL)*, DIAC, <http://www.immi.gov.au/media/fact-sheets/77mal.htm> (last reviewed June 2012).

⁷² *Fact Sheet 70 – Managing the Border*, *supra* note 70.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

- Various automated entry processing systems, including SmartGate for Australian and New Zealand passport holders and U.S. Global Entry Program members;⁷⁷ an Electronic Travel Authority system for passport holders of a number of countries;⁷⁸ eVisitor, which allows for multiple entries over a twelve-month period by passport holders from European countries for tourism or business purposes;⁷⁹ and an electronic tourist visa system for eligible tourists.⁸⁰
- A requirement for all people entering Australia to fill out an Incoming Passenger Card and present this along with their travel documents to an immigration officer;⁸¹
- A requirement for all people leaving Australia to fill out Outgoing Passenger Cards and provide them to an immigration officer;⁸²
- Maintenance of arrival and departure records in a Movement Reconstructions database, which is strictly protected. Information-sharing arrangements are in place with various government agencies in relation to border security, law enforcement, entitlement and identity verification, etc.⁸³

⁷⁶ *Id.* See also *Biometric Collection*, DIAC, <http://www.immi.gov.au/allforms/biometrics/> (last visited Feb. 12, 2013).

⁷⁷ *Fact Sheet 71 – SmartGate Automated Border Processing*, DIAC, <http://www.immi.gov.au/media/fact-sheets/71smartgate.htm> (last reviewed Jan. 2013).

⁷⁸ *Fact Sheet 55 – The Electronic Travel Authority*, DIAC, http://www.immi.gov.au/media/fact-sheets/55_eta.htm (last reviewed Sept. 2010).

⁷⁹ *Fact Sheet 53 – Australia’s Entry System for Visitors*, DIAC, http://www.immi.gov.au/media/fact-sheets/53entry_system.htm (last reviewed May 2010).

⁸⁰ *Id.*

⁸¹ See *Arrival at an Australian Airport*, DIAC, <http://www.immi.gov.au/managing-australias-borders/border-security/air/airport.htm>; *Passenger Cards*, DIAC, <http://www.immi.gov.au/managing-australias-borders/border-security/travel/passenger-cards/>; *Passenger Cards*, AUSTRALIAN CUSTOMS AND BORDER PROTECTION SERVICE, <http://www.customs.gov.au/site/passengerCards.asp> (all last visited Feb. 12, 2013). Immigration clearance and information requirements are set out in Division 5 of Part 2 of the Migration Act 1958 (Cth) and in Division 3.1 of the Migration Regulations 1994 (Cth). See also AUSTRALIAN CUSTOMS SERVICE, PRACTICE STATEMENT NO. PS2008/35 (PRIMARY CLEARANCE) (July 28, 2008), <http://www.customs.gov.au/webdata/resources/files/PS200835-PrimaryClearance.pdf>.

⁸² *Passenger Cards*, *supra* note 81; Migration Act 1958 (Cth), s 175(1)(a)(ii).

⁸³ *Movement Records*, DIAC, <http://www.immi.gov.au/managing-australias-borders/border-security/systems/movement-records.htm> (last visited Feb. 12, 2013).

Brazil

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SUMMARY Constitutional principles grant rights and duties to aliens living in the country. Federal law regulates immigration issues in general, and an immigration agency subordinated to the Ministry of Labor is in charge of immigration matters.

Citizenship is acquired by birth on Brazilian soil and through naturalization or a continuous period of residence in the country.

The federal government, through the Federal Police, is in charge of performing maritime, air, and border police services.

Brazil is in the process of changing its immigration legislation, which was enacted in 1980 and designed to align with Brazil's national security needs at that time. Today, human rights are being emphasized in proposed legislation under consideration in the Chamber of Deputies.

I. Legal Framework

According to the Brazilian Constitution, everyone is equal before the law, with no distinction whatsoever, guaranteeing to Brazilians and foreigners residing in the country the inviolability of the rights to life, liberty, equality, security, and property, according to the terms defined in article 5 of the Constitution.¹ The law may not establish any distinction between native and naturalized Brazilians, except in cases provided for in the Constitution.² Article 22 grants to the Union (Federal Government, União) the exclusive power to legislate, inter alia, on nationality, citizenship, and naturalization,³ as well as on emigration, immigration, entry, extradition, and the expulsion of foreigners.⁴

Law No. 6,815 of August 19, 1980, the Foreigner's Statute (*Estatuto do Estrangeiro*), defines the legal situation of the foreigner in Brazil, and Decree No. 86,715 of December 10, 1981, regulates all immigration matters concerning Law No. 6,815 and creates the National Council of Immigration.

¹ CONSTITUIÇÃO FEDERAL [C.F.] art. 5, http://www.planalto.gov.br/ccivil_03/Constituicao/Constituicao.htm.

² *Id.* art. 12(§2).

³ *Id.* art. 22(XIII).

⁴ *Id.* art. 22(XV).

II. General Immigration Policy

In order to travel to and enter Brazilian territory, an alien needs a visa, which can be one of the following types: transit, tourist, temporary, permanent, courtesy, official, and diplomatic.⁵

An alien under the age of eighteen, unaccompanied by his legal representative or without express authorization, cannot obtain a visa. The same rule applies to aliens considered harmful to the public order or national interests; aliens previously expelled from Brazil, except when the expulsion has been revoked; aliens sentenced or prosecuted abroad for crimes conducive to extradition under domestic law; or aliens that do not meet the health standards established by the Ministry of Health.⁶ The visa requirement may be waived only in cases where there is an international agreement between Brazil and the requesting national's country of origin, as a matter of reciprocity.⁷

The visa granted to the alien by the consular authority does not imply any guarantee of entrance or permanent residence in Brazil.⁸ Additionally, an alien who does not present a valid travel document or any other form of identification valid in Brazil; who presents identification that has expired, that has been tampered with, or that has indications of forgery; or who presents a consular visa that does not observe the conditions established in Law No. 6,815 and in Decree No. 86,715 cannot be admitted into the country.⁹

The resident alien enjoys all rights recognized to Brazilian citizens according to the Constitution and its domestic laws.¹⁰ The alien must also show proof of legal immigration status in the Brazilian territory as required by any authority.¹¹ Aliens must have specific authorization to work,¹² but the bearers of tourist, transit, or temporary visas, as well as their dependents, cannot work.¹³ An employer of unauthorized aliens is subject to fines.¹⁴

The National Council of Immigration (*Conselho Nacional de Imigração—CNIg*), which is subordinate to the Ministry of Labor, is the government body in charge of immigration matters.¹⁵ Its organization and functions are regulated by Decree No. 840 of June 22, 1993.¹⁶

⁵ Estatuto do Estrangeiro, Lei No. 6.815, de 19 de Agosto de 1980, art. 4, http://www.planalto.gov.br/ccivil_03/Leis/L6815compilado.htm.

⁶ *Id.* art. 7.

⁷ *Id.* art. 10.

⁸ *Id.* art. 26.

⁹ Decreto No. 86.715, de 10 de Dezembro de 1981, art. 51, http://www.planalto.gov.br/ccivil_03/decreto/Antigos/D86715.htm.

¹⁰ Lei No. 6.815, art. 95.

¹¹ *Id.* art. 96.

¹² *Id.* art. 97.

¹³ *Id.* art. 98.

¹⁴ *Id.* art. 125(VII).

¹⁵ Decreto No. 86.715, art. 142.

CNIg is responsible, inter alia, for the orientation and coordination of immigration activities; preparation of immigration policies; creation of immigrant selection rules designed to provide the many sectors of the economy with specialized workmanship; promotion of studies related to immigration problems; elaboration of immigration plans; conducting of periodic surveys related to the needs for qualified international workmanship, whether permanent or temporary; settlement of disputes and solution of cases unforeseen by immigration law in regards to the admission of immigrants; and provision of opinions on proposals to change immigration legislation.¹⁷

III. Sanctions for Unlawful Entry and Overstaying

An alien who illegally enters or irregularly stays in Brazil and does not depart voluntarily is subject to deportation.¹⁸ At the request of the Minister of Justice, the alien may be imprisoned for sixty days until the deportation is put into effect.¹⁹ The Federal Police is the competent agency that arrests²⁰ and deports an alien.²¹

By the same token, an alien who in any way acts against national security, the political and social order, the public morality, or the popular economy, or whose behavior becomes harmful to the national interest, will be expelled.²²

Under the Brazilian Foreigner's Law, an alien who practices fraud in order to enter or stay in Brazil is subject to expulsion.²³ Making a false declaration during an immigration procedure or for the acquisition of a foreigner's passport, laissez-passer, or exit visa subjects an alien to one to five years detention²⁴ and expulsion from the country.²⁵

In cases of expulsion, the Ministry of Justice may require, at any time, the imprisonment of an alien for ninety days, and to assure the conclusion of a legal inquiry or to guarantee the fulfillment of the expulsion, the imprisonment may be extended for an additional ninety days.²⁶

¹⁶ Decreto No. 840, de 22 de Junho de 1993, http://www.planalto.gov.br/ccivil_03/decreto/D0840.htm.

¹⁷ Decreto No. 86.715, art. 144.

¹⁸ Lei No. 6.815, arts. 57, 125(I).

¹⁹ *Id.* art. 61.

²⁰ Decreto No. 86.715, art. 110(I).

²¹ *Id.* art. 98(§1).

²² Lei No. 6.815, art. 65.

²³ *Id.* art. 65(a).

²⁴ Article 33 of the Brazilian Penal Code determines that a detention sentence must be served in a semiopen or open regime, except where there is a need for a transfer to a closed regime. CÓDIGO PENAL [C.P.], Decreto-Lei No. 2.848, de 7 de dezembro de 1940, art. 33, http://www.planalto.gov.br/ccivil_03/Decreto-Lei/Del2848compilado.htm.

²⁵ Lei No. 6.815, art. 125(XIII).

²⁶ *Id.* art. 69.

An expelled alien who reenters the Brazilian territory is subject to reclusion²⁷ for a maximum period of four years and a subsequent expulsion after serving his time.²⁸

Under criminal law, an alien who uses a name other than his own to enter or stay in Brazil faces one to three years of detention and a fine.²⁹ An alien who claims a false attribute to promote his entrance into Brazilian territory can be punished with one to four years of reclusion and a fine.³⁰ Additionally, aliens who use passports or any other document that is not their own, as well as persons who facilitate or supply such documentation, are subject to detention of four months to two years and a fine, if this action does not constitute an element of a more serious crime.³¹

Other sanctions in the Brazilian Penal Code that apply to Brazilian citizens as well as to aliens include the forgery of public documents, with a punishment of two to six years of reclusion and a fine;³² and the destruction, suppression, or concealment for the person's own benefit, for the benefit of a third party, or to the detriment of a third party, of a public or private document that should not be used, with a punishment of up to six years of reclusion and a fine.³³

The current legislation does not establish any criminal sanctions against aliens who illegally enter or illegally stay in Brazil.

IV. Sanctions for Hiring Undocumented Workers

The Brazilian Labor Law establishes that no company may admit into its service an alien worker that does not present a duly noted alien card.³⁴ The employment of aliens who have an irregular situation or are unauthorized to work subjects the employer to a fine.³⁵

The Ministry of Labor is responsible for the enforcement of the labor legislation, which provides for inspections performed by competent authorities of the Ministry of Labor and inspectors of the National Institute of Social Security in order to verify compliance with laws and regulations.³⁶

²⁷ A reclusion sentence must be served in a closed, semiopen, or open regime. C.P. art. 33.

²⁸ *Id.* art. 338.

²⁹ *Id.* art. art. 309.

³⁰ *Id.* art. 309 (sole para.).

³¹ *Id.* art. 308.

³² *Id.* art. 297.

³³ *Id.* art. 305.

³⁴ CONSOLIDAÇÃO DAS LEIS DO TRABALHO [C.L.T.] art. 359, http://www.planalto.gov.br/ccivil_03/Decreto-Lei/Del5452compilado.htm.

³⁵ Lei No. 6.815, *supra* note 5, art. 125(VII).

³⁶ C.L.T. art. 626.

V. Acquisition of Citizenship

In order to apply for Brazilian citizenship, an alien must satisfy certain conditions.³⁷ The alien

- (I) must have civil capacity³⁸ according to Brazilian law;
- (II) must be registered as a permanent alien in Brazil;
- (III) must be in continuous residence in Brazilian territory for at least four years immediately before applying for citizenship;
- (IV) must read and write the Portuguese language, evaluated on the basis of the social and intellectual situation of the applicant;
- (V) must practice a profession or have enough possessions to guarantee his and his family's maintenance;
- (VI) must have good behavior;
- (VII) cannot have been indicted or convicted in Brazil or abroad for a felony; [and]
- (VIII) must be in good health[.]³⁹

The four-year residence requirement may be reduced to three years if the alien possesses real estate or an enterprise in Brazil; two years because of the alien's professional, scientific or artistic abilities; and one year if the alien has a Brazilian spouse, a Brazilian child, a Brazilian parent, or has performed a relevant service to Brazil.⁴⁰

The residency requirement is dispensed with in cases where the alien spouse is married to an active Brazilian diplomat for more than five years, or the alien is employed by a Brazilian diplomatic mission or Brazilian Consulate for more than ten continuous years. In these cases, the only requirement is a thirty-day stay in Brazil.⁴¹

Extraordinarily, Brazilian citizenship can also be obtained upon request if a person has continuously resided for more than fifteen years in Brazil and does not have any criminal conviction.⁴²

³⁷ Lei No. 6.815, art. 112.

³⁸ Article 5 of the Brazilian Civil Code (CÓDIGO CIVIL, Lei No. 10.406, de 10 de Janeiro de 2002, http://www.planalto.gov.br/ccivil_03/LEIS/2002/L10406.htm) determines that minority ceases at the completion of eighteen years of age, when the person is then fully capable of practicing all acts of civil life. Paragraph 1 of article 5 further establishes that a minor's incapacity may also cease by the concession of the parents, or one of them in the absence of the other, through a public instrument, independently of judicial sanction or judicial decision of a sixteen year-old minor (*Id.* art. 5(§1)(I).); by marriage (*Id.* at II); effective exercise of public employment (*Id.* at III); graduation from an institution of higher education (*Id.* at IV); commercial or civil establishment, or the existence of an employment relationship that provides a sixteen-year-old minor with economic support. *Id.* at V.

³⁹ All translations are by the author.

⁴⁰ Lei No. 6.815, art. 113.

⁴¹ *Id.* art. 114.

⁴² C.F. art. 12(II)(b).

The application for naturalization is filed with the local agency of the Department of Federal Police,⁴³ which is subordinate to the Ministry of Justice, and must indicate whether the applicant intends to have his name translated or adapted to the Portuguese language. The application must also include the documents listed in article 119 of Decree Law No. 86,715 of December 10, 1981.⁴⁴

An alien who is admitted to Brazil by the age of five and permanently lives in the country may, within two years after reaching adulthood, apply for naturalization.⁴⁵

A foreigner admitted to Brazil during the first five years of his life and who permanently lives in the country may, while still a minor, require through his legal representative the issuance of a provisional certificate of naturalization.⁴⁶ An alien who is the holder of such a provisional certificate of naturalization and wants to confirm his intention to continue to be a Brazilian citizen must manifest such intention to the Minister of Justice within two years after reaching majority.⁴⁷

A foreigner who comes to reside in Brazil before reaching the age of majority and has obtained a degree from a national institution of higher education may, within one year after graduation, apply for naturalization.⁴⁸

A. Birth and Descent

A child born in Brazil to foreign nationals is considered a Brazilian citizen provided that the parents are not employed in the service of their country.⁴⁹ A child born abroad to a Brazilian father or mother is considered a Brazilian citizen provided that either of them is employed in the service of the Federative Republic of Brazil.⁵⁰ In addition, a child born abroad to a Brazilian father or mother is considered a Brazilian citizen provided that he comes to reside in Brazil and opts for the Brazilian nationality at any time.⁵¹

⁴³ Decreto No. 86.715, de 10 de Dezembro de 1981, art. 125, http://www.planalto.gov.br/ccivil_03/decreto/Antigos/D86715.htm.

⁴⁴ *Id.* art. 119.

⁴⁵ *Id.* art. 120.

⁴⁶ *Id.* art. 121.

⁴⁷ *Id.* art. 122.

⁴⁸ *Id.* art. 123.

⁴⁹ C.F. art. 12(I)(a).

⁵⁰ *Id.* at b.

⁵¹ *Id.* at c.

B. Language Requirements

In order to obtain Brazilian citizenship, an alien is required to read and write the Portuguese language⁵² at a level that accords with his social and intellectual situation.⁵³ The knowledge of the Portuguese language is measured by asking the alien applicant to read excerpts of the Constitution.⁵⁴

C. Integration of Immigrants

Brazilian legislation does not establish any specific provision concerning the integration of immigrants into the society.

VI. Legalization of Illegal Immigrants

In 1988⁵⁵ and 1998⁵⁶ Brazil granted amnesty to immigrants who lived in the country illegally. Recently, on July 2, 2009, Brazil issued a new law allowing immigrants who were in an irregular migratory situation and had entered the country before February 1, 2009, to request provisional residency.⁵⁷

For the purposes of Law No. 11,961, an alien was considered to be in an irregular migratory situation when he⁵⁸

- (I) had entered the country illegally;
- (II) had been regularly admitted to the national territory but the period of stay had expired; or

⁵² Estatuto do Estrangeiro, Lei No. 6.815, de 19 de Agosto de 1980, art. 112(IV), http://www.planalto.gov.br/ccivil_03/Leis/L6815compilado.htm.

⁵³ Fraga, Mirtô, O NOVO ESTATUTO DO ESTRANGEIRO COMENTADO: LEI NO. 6,815, DE 19.08.1980, ALTERADA PELA LEI NO. 6,964, DE 09.12.1981, 424 (Rio de Janeiro: Forense, 1985).

⁵⁴ Decreto No. 86.715, de 10 de Dezembro de 1981, art. 129(I), http://www.planalto.gov.br/ccivil_03/decreto/Antigos/D86715.htm.

⁵⁵ Lei No. 7.685, de 2 de Dezembro de 1988, http://www.planalto.gov.br/ccivil_03/LEIS/L7685.htm#art1. Article 1 of Law No. 7,685 determined that immigrants who had entered the country before December 2, 1988, could request provisional registration. The provisional registration was valid for two years (*Id.* art. 2). Ninety days prior to the two-year period, the immigrant could file for an extension for two additional years provided that he could prove that he had a job; had good behavior; had no fiscal debts and no criminal records; and was in good health (*Id.* art. 5). At the end of the extension period, the immigrant could file for a permanent visa (*Id.* art. 6).

⁵⁶ Lei No. 9.675, de 29 de Junho de 1998, http://www.planalto.gov.br/ccivil_03/LEIS/L9675.htm. Article 1 of Law No. 9,675 amended Law No. 7,685 of December 2, 1988, and extended the amnesty period to request provisional registration until June 29, 1998.

⁵⁷ Lei No. 11.961, de 2 de Julho de 2009, art. 1, http://www.planalto.gov.br/ccivil_03/_Ato2007-2010/2009/Lei/L11961.htm. Law No. 11,961 is regulated by Decree No. 6,893 of July 2, 2009, http://www.planalto.gov.br/ccivil_03/_Ato2007-2010/2009/Decreto/D6893.htm.

⁵⁸ *Id.* art. 2.

- (III) was the beneficiary of the provisions of Law No. 9,675 of June 29, 1998 but had yet to complete the necessary procedures to obtain permanent resident status.

The request for provisional residency had to be filed with the Ministry of Justice within 180 days after publication of Law No. 11,961. The request had to comply with the provisions of the regulation of Law No. 11,961 and contain the following documents:⁵⁹

- (I) the original document proving the payment of the Alien Identity Card fee in the amount corresponding to 25% of the amount charged for the first-time issuance of Permanent Alien Identity Cards;
- (II) the original document proving the payment of the registration fee;
- (III) an affidavit stating that the person was not subject to criminal prosecution or had been criminally convicted in Brazil or abroad;
- (IV) a proof of entry into Brazil, or any other document that enabled the authorities to verify the alien's entry into the country before February 1, 2009; and
- (V) other documents required by regulation.

Aliens who applied for provisional residency were exempt from payment of fines or any other fees besides those provided for in article 4 of Law No. 11,961.⁶⁰ Once the request for provisional residency was approved, the Ministry of Justice would issue an Alien Identity Card valid for two years.⁶¹

Within ninety days prior to the expiration of the Alien Identity Card, an alien could request its conversion into a permanent identity card as long as the request was in accordance with the regulation's provisions and the alien established⁶²

- (I) the practice of a profession or employment or lawful ownership of sufficient assets to maintain himself and his family;
- (II) that he had no tax debts and no criminal record in Brazil or abroad; and
- (III) that he had not been out of the country for a period exceeding ninety consecutive days during the period of provisional residence.

The provisional or permanent residence would be declared null and void if, at any time, it was verified that the information provided by the alien was false.⁶³ The provisions of Law No. 11,961 did not apply to aliens who were expelled or who, according to the law, were considered dangerous or undesirable.⁶⁴

⁵⁹ *Id.* art. 4.

⁶⁰ *Id.* art. 5.

⁶¹ *Id.* art. 6.

⁶² *Id.* art. 7.

⁶³ *Id.* art. 8.

⁶⁴ *Id.* art. 9.

VII. Border Protection

A. Constitutional Principles

The Brazilian Constitution confers on the Union the power to perform maritime, air, and border police services,⁶⁵ and the federal police exercise these functions⁶⁶ by investigating criminal offenses against the political and social order.⁶⁷

B. Federal Police

The federal police's jurisdiction extends to property damages, to the services and interests of the Union and its autonomous government entities and public companies, and to other offenses with interstate or international effects that require uniform repression as established by the law.⁶⁸

The federal police prevent and repress smuggling and the illegal traffic of narcotics and illicit drugs without prejudice to actions by the treasury authorities and other government agencies in their respective areas of competence.⁶⁹

C. Northern Border Protection

In an effort to control and defend Brazil's borders, in 1985 the federal government launched a program called *Projeto Calha Norte*. Initially, the program's objective was to install military units along border strips in the northern part of Brazil to support the civil population and, consequently, prevent and discourage illicit activities in the area.⁷⁰

Today the program is subordinate to the Ministry of Defense and has been renamed *Programa Calha Norte*. Its main purpose is to maintain Brazilian sovereignty in the Amazon region, promote the Amazon's orderly development, increase in the Amazon the presence of the appropriate public authorities, and contribute to the national defense.⁷¹

A demographic decrease in more remote areas and the increase of illegal practices in the region has led to the expansion of the program. In this context, the need for border surveillance and protection of the population has grown substantially. By providing assistance to the local people and promoting socially just and ecologically sustainable activities, the program aims to encourage the population to remain in the Amazon. For this to happen, it is essential that, along with national interests, regional characteristics be respected.⁷²

⁶⁵ C.F. art. 21(XXII).

⁶⁶ *Id.* art. 144(§1)(III).

⁶⁷ *Id.* art. 144(§1)(I).

⁶⁸ *Id.*

⁶⁹ *Id.* art. 144(§1)(II).

⁷⁰ PROGRAMA CALHA NORTE, *O que é*, Ministério da Defesa, <https://www.defesa.gov.br/index.php/programas-e-projetos/programa-calha-norte>.

⁷¹ *Id.*

⁷² *Id.*

Currently, the program covers 194 municipalities in six states (*Acre, Amapá, Amazonas, Pará, Rondônia, and Roraima*), with ninety-five of these municipalities extending over 10,938 km (6,796 miles) of the frontier strip. The program has an area of operation corresponding to 32% of the country, and the eight million people who live there include up to 30% of the indigenous population of Brazil.⁷³

D. Amazon Surveillance

In 1990 the federal government began developing SIVAM (*Sistema de Vigilância Aérea da Amazônia*), a program designed to reinforce the protection of the Amazon region. SIVAM began operating in 2002 and consists of a network of radar receivers that enable the detection of clandestine aircraft and such illegal activities as drug trafficking, deforestation, and forest burning.⁷⁴

E. Airspace Protection

1. Brazilian Code of Aeronautics

The Brazilian Code of Aeronautics determines, inter alia, that aviation or tax authorities or the Federal Police may detain an aircraft⁷⁵

- (I) when it is flying in Brazilian airspace in violation of international conventions or acts, or authorization for such purpose;
- (II) when it disregards mandatory landing at an international airport after entering Brazilian airspace;
- (III) for the purpose of verifying certificates and other documents;
- (IV) to check the aircraft's load for conformity to legal restrictions (article 21 of Law No. 7,565) or for possession of prohibited equipment (*Id.* article 21 (sole para.)); [and]
- (V) to investigate illicit activities.

Paragraph 1 of Law No. 7,565 establishes that aviation authorities may employ any means deemed necessary to compel an aircraft to land at an indicated airport.⁷⁶ Once all the coercive methods provided by law have been exhausted, the aircraft will be classified as hostile and subject to destruction upon approval of the Brazilian president or the person to whom such

⁷³ PROGRAMA CALHA NORTE, *Área de Atuação*, Ministério da Defesa, <https://www.defesa.gov.br/index.php/area-de-atuacao>.

⁷⁴ CÂMARA DOS DEPUTADOS, *O Que é o Sivam?*, <http://www2.camara.leg.br/camaranoticias/noticias/57804.html>.

⁷⁵ CÓDIGO BRASILEIRO DE AERONÁUTICA, Lei No. 7.565, de 19 de Dezembro de 1986, art. 303, http://www.planalto.gov.br/ccivil_03/LEIS/L7565compilado.htm.

⁷⁶ *Id.* art. 303(§1).

power has been delegated to.⁷⁷ The aviation authorities mentioned in article 303(§1) are liable for the use of excessive force.⁷⁸

2. Decree No. 5,144 of July 16, 2004

On July 16, 2004, Brazil promulgated Decree No. 5,144, regulating the Brazilian Code of Aeronautics, specifically paragraphs 1, 2, and 3 of article 303 of Law No. 7,565 of December 19, 1986. Decree No. 5,144 establishes the procedures to be followed in relation to hostile aircraft or aircraft suspected of transporting illegal drugs, as these aircraft may present a threat to public security.⁷⁹

For the purposes of Decree No. 5,144, an aircraft is considered suspect of trafficking in narcotic drugs if it⁸⁰

- (I) enters the country without an approved flight plan, coming from regions known to be sources of production or distribution of illegal drugs; or
- (II) omits information to the organs of air traffic control that is necessary for identification purposes, or does not follow the decisions of these organs if utilizing routes presumably used for distribution of illegal drugs.⁸¹

Such aircraft are subject to progressive measures of coercive investigation, intervention, and persuasion, to be carried out by an interception aircraft. The objective of these measures is to compel the suspicious aircraft to land at an indicated airport and submit to control measures of the federal or state police on the ground.⁸²

When all attempts to persuade the suspect aircraft to land fail and all procedures established in the decree are complied with, the intercepting aircraft may apply a destructive measure by firing at the suspect aircraft to produce damage and prevent it from continuing to fly.⁸³

F. Strategic Border Plan

Overall, Brazil has 16,866 kilometers (10,500 miles) of borders with ten neighboring nations (Argentina, Bolivia, Colombia, French Guiana, Guyana, Paraguay, Peru, Suriname, Uruguay, and Venezuela).⁸⁴

⁷⁷ *Id.* art. 303(§2).

⁷⁸ *Id.* art. 303(§3).

⁷⁹ Decreto No. 5.144, de 16 de Julho de 2004, art. 1, http://www.planalto.gov.br/ccivil_03/_Ato2004-2006/2004/Decreto/D5144.htm.

⁸⁰ *Id.* art. 2.

⁸¹ Translated by the author.

⁸² *Id.* art. 3.

⁸³ *Id.* arts. 4, 5.

⁸⁴ *Defesa e Segurança Pública*, BRASIL.GOV.BR, <http://www.brasil.gov.br/sobre/o-brasil/defesa-e-seguranca-publica>. (Last visited Feb. 4, 2013.)

In an effort to increase the protection of the country's borders, on June 8, 2011, Brazil issued Decree No. 7,496 creating the Strategic Border Plan (*Plano Estratégico de Fronteiras*) for the purpose of strengthening the prevention, control, inspection, and repression of cross-border crimes and offenses committed in the Brazilian border areas.⁸⁵

The Plan's guidelines include⁸⁶

- (I) the integrated performance of public safety agencies, the Internal Revenue Service of Brazil (*Secretaria da Receita Federal*), and the Armed Forces, and
- (II) integration with neighboring countries.

The Plan's goals are⁸⁷

- (I) the integration of the actions of public security, customs control, and the Armed Forces with the action of states and municipalities located along the border;
- (II) implementation of joint activities among federal and state law enforcement agencies, the Internal Revenue Service of Brazil, and the Armed Forces;
- (III) the exchange of information between federal and state law enforcement agencies, the Internal Revenue Service of Brazil, and the Armed Forces;
- (IV) the creation of partnerships with neighboring countries to implement the measures provided for in article 1 of Decree No. 7,496; and
- (V) the expansion of staff personnel and the organizational structure for the prevention, control, inspection, and repression of crime along the border.

VIII. New Immigration Law

The current Brazilian immigration law was developed during the period of military dictatorship, which occurred in the late sixties and the seventies, and has a national security perspective. At present, legislation prepared by the Ministry of Justice and tailored with a human rights perspective is under consideration in the Chamber of Deputies.⁸⁸ The bill's provisions relate to the entry, stay, and exit of aliens; naturalization; coercive measures; definitions of offenses; and other matters.

⁸⁵ Decreto No. 7.496, de 8 de Junho de 2011, art. 1, http://www.planalto.gov.br/ccivil_03/_Ato2011-2014/2011/Decreto/D7496.htm.

⁸⁶ *Id.* art. 2.

⁸⁷ *Id.* art. 3.

⁸⁸ CÂMARA DOS DEPUTADOS, Projeto de Lei 5655/2009, <http://www.camara.gov.br/proposicoesWeb/fichadetramitacao?idProposicao=443102>.

Canada

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SUMMARY In Canada, immigration is primarily regulated by the Immigration and Refugee Protection Act (IRPA). Canada admits several categories of immigrants, including economic, family, and refugee migrants. Nationality law is governed by the Citizenship Act, which provides for three pathways to citizenship, namely through birth, descent, and naturalization of permanent residents.

Persons born in Canada are generally recognized as citizens. A person born abroad is subject to a one-generation rule, where at least one of the parents must either be a citizen by birth or a naturalized citizen. In order to become a Canadian citizen through naturalization a person must meet requirements relating to age, permanent resident status, length of residence in Canada, language abilities, criminal history, and knowledge of Canada.

I. Immigration and Citizenship Overview

Immigration to Canada is predominantly regulated by the Immigration and Refugee Protection Act, 2001 (IRPA).¹ Canada had been known to have a fairly broad and generous immigration policy, but since 2006 the government has pursued reforms to “focus Canada’s immigration system on fuelling economic prosperity” and to place “a high priority on finding people who have the skills and experience required to meet Canada’s economic needs.”² Since 2008, Canada has been tightening its immigration policies and focusing on economic class and short-term labor market needs.³

Canada accepts several categories of immigrants for permanent residence. In addition to economic immigrants (skilled or business immigrants), Canada admits family members, provincial nominees, adopted children, refugees, and others, such as immigrants admitted on humanitarian or compassionate grounds.⁴ The Canada Border Services Agency (CBSA) is responsible for border enforcement, immigration enforcement, and customs services, while Citizenship and Immigration Canada (CIC) manages immigration and citizenship issues.

¹ Immigration and Refugee Protection Act, S.C. 2001, c. 27, <http://laws-lois.justice.gc.ca/eng/acts/I-2.5/FullText.html>.

² *Notice—Transforming the Immigration System*, CITIZENSHIP AND IMMIGRATION CANADA (CIC) (May. 25, 2012), <http://www.cic.gc.ca/english/department/media/notices/notice-transform.asp>.

³ NAOMI ALBOIM & KAREN COHL, SHAPING THE FUTURE: CANADA’S RAPIDLY CHANGING IMMIGRATION POLICIES iv (Maytree, Oct. 2012), <http://maytree.com/wp-content/uploads/2012/10/shaping-the-future.pdf>.

⁴ *See generally Immigrate to Canada*, CIC, <http://www.cic.gc.ca/english/immigrate/index.asp> (last updated Jan. 8, 2013).

Canada's nationality law is governed by the Citizenship Act.⁵ Under the law, there are three pathways to citizenship, namely through birth, descent, and naturalization of permanent residents. CIC administers the application process and guides applicants through the steps to becoming Canadian citizens. CIC staff also "process citizenship applications, requests for proof of citizenship and searches of citizenship records."⁶ According to CIC, "[e]very year approximately 160,000 people become Canadian citizens and take an oath of citizenship at ceremonies across the country."⁷

II. Visas for Tourists, Students, Businesspersons, and Other Categories

Canada issues visas to visitors on business, tourists, students, parents and grandparents of citizens or permanent residents, and workers.⁸ Only persons from certain countries are required to obtain a visa prior to their arrival as a visitor.⁹ However visa-exempt travelers are still required to meet other requirements, such as holding a valid passport.¹⁰

According to CIC, in 2013 Canada will introduce "biometric identity screening" for nationals of twenty-nine countries and one territory when they apply for a temporary resident visa, study permit, or work permit.¹¹

III. Permanent Residency

According to CIC, "[a] permanent resident is someone who has acquired permanent resident status by immigrating to Canada, but is not yet a Canadian citizen."¹² However, if they meet the requirements they can become citizens through naturalization.

Permanent residents "have rights and privileges in Canada even though they remain citizens of their home country."¹³ In order to retain permanent resident status, "they must fulfill specified residency obligations."¹⁴ According to CIC, "[a] person in Canada temporarily, such as an international student or a temporary foreign worker, is not a permanent resident."¹⁵

⁵ Citizenship Act, R.S.C. 1985, c. C-29, <http://laws-lois.justice.gc.ca/eng/acts/c-29/page-1.html>.

⁶ *What We Do*, CIC, <http://www.cic.gc.ca/english/department/what.asp> (last updated Oct. 19, 2012).

⁷ *Id.*

⁸ *Visit Canada*, CIC, <http://www.cic.gc.ca/english/visit/index.asp> (last updated Dec. 7, 2012).

⁹ *Find Out if You Need a Visa to Enter Canada as a Visitor*, CIC, <http://www.cic.gc.ca/english/visit/visas.asp> (last updated Jan. 25, 2013).

¹⁰ *Visa Exempt Travelers*, CIC, <http://www.cic.gc.ca/english/visit/visa-exempt.asp> (last updated Oct. 12, 2013).

¹¹ *Visit Canada*, *supra* note 8.

¹² *Understand Permanent Resident Status*, CIC, <http://www.cic.gc.ca/english/department/what.asp> (last updated Oct. 1, 2012).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

As noted above, Canada provides permanent residence visas to eligible applicants in different categories.

Family class immigrants are awarded residence based upon their relationship to their sponsor. According to CIC, “[i]f you are a Canadian citizen or a permanent resident of Canada, you can sponsor your spouse, conjugal or common-law partner, dependent child (including adopted child) or other eligible relative to become a permanent resident.”¹⁶ There are two different processes for sponsoring family members under this class. One is used for sponsoring a spouse, conjugal or common-law partner, and/or dependent children, and the other is used to sponsor other eligible relatives.¹⁷

Canada admits three types of business immigrants as part of its Business Immigration Program: investors, entrepreneurs, and self-employed persons.¹⁸ However, CIC has temporarily stopped accepting new applications for its investors and entrepreneurs program. Business immigrants are not assessed on the points system that is used for other skilled migrants. Canada’s provinces have their own Nomination Programs for business immigration programs.

In addition, Canada admits skilled workers through its Federal Skilled Workers Program, which is based on a points system. Canada also grants permanent residency to skilled workers under its Federal Skilled Trades Program and the Canadian Experience Class (CEC). The Federal Skilled Trades Program is for persons “who want to become permanent residents based on being qualified in a skilled trade.”¹⁹ This relatively new program started on January 2, 2013, to deal with labor shortages of skilled traders in some regions of the country.²⁰ Under the CEC program, any skilled workers who have twelve months of skilled work experience in Canada in the three years before they apply and the requisite language skills can transition from temporary to permanent residence (additional requirements apply).²¹

The Canadian government has signed agreements with a number of Canada’s provinces that allow the provinces to sponsor immigrants²² under their respective Provincial Nominee Program (PNP) “who will meet specific local labour market needs.”²³ They receive priority processing

¹⁶ *Family Sponsorship*, CIC, <http://www.cic.gc.ca/english/immigrate/sponsor/index.asp> (last updated Feb. 28, 2013).

¹⁷ *Id.*

¹⁸ *Investors, Entrepreneurs and Self-Employed Persons*, CIC, <http://www.cic.gc.ca/english/immigrate/business/index.asp> (last updated Dec. 1, 2010).

¹⁹ *Determine Your Eligibility—Skilled Trades*, CIC, <http://www.cic.gc.ca/english/immigrate/trades/apply-who.asp> (last updated Feb. 6, 2013).

²⁰ *News Release—New Federal Skilled Trades Program Accepts Applications Starting Today*, CIC, <http://www.cic.gc.ca/english/department/media/releases/2013/2013-01-02.asp> (last updated Jan. 2, 2013).

²¹ *Determine Your Eligibility—Canadian Experience Class*, CIC, <http://www.cic.gc.ca/english/immigrate/cec/apply-who.asp> (last updated Jan. 25, 2013).

²² *Provincial Nominees*, CIC, <http://www.cic.gc.ca/english/immigrate/provincial/index.asp> (last updated Oct. 22, 2012).

²³ *Fact Sheet—Provincial Nominee Program*, CIC, <http://www.cic.gc.ca/english/resources/publications/employers/provincial-nominee-program.asp> (last updated Mar. 28, 2012).

time from CIC. The criteria for admitting immigrants vary by province and territory. According to CIC, “[i]n the last ten years, the PNP has become the second largest source of economic immigration to Canada. In 2011, more than 38,000 provincial nominees (including their spouses and dependants) were admitted to Canada, an almost six fold increase since 2004.”²⁴

All the provinces and territories except Quebec and Nunavut have signed nominee agreements with the federal government. Quebec has a separate arrangement under the Canada-Quebec Accord. The Province of Quebec administers its own immigration program, which “establishes its own immigration requirements and selects immigrants who will adapt to living in Quebec.”²⁵ Quebec uses a points system that is similar to the federal government’s points system to assess its applicants, but it awards a higher number of points for fluency in the French language. Applications accepted by Quebec are submitted to the federal government for medical examinations and background checks.

Canada also admits refugees as permanent residents. In the last few years Canadian refugee policy has been generally seen as relatively generous and lax, to such an extent that many critics contend it invites fraud and abuse. However, in the past year, in an effort to thwart “bogus” refugee claims, Canada’s Parliament passed Bill C-31, also known as Protecting Canada’s Immigration System Act.²⁶

IV. Citizenship Pathways

A. Citizenship by Birth in Canada

Similar to the United States, persons born in Canada are generally granted citizenship.²⁷ The only exception is children of foreign diplomats, who are not granted Canadian citizenship even if they are born in Canada.²⁸ There has been some discussion in the past year about whether there should be changes to the law to target “birth tourism.”²⁹

B. Citizenship by Descent

As a result of 2009 amendments to the Citizenship Act, a person who is born abroad can obtain citizenship³⁰ only if at least one parent is a Canadian citizen who was either born or naturalized in Canada.³¹ According to CIC, “under the old rules, it was possible for Canadians to pass on

²⁴ *Id.*

²⁵ *Quebec-Selected Skilled Workers*, CIC (Nov. 9, 2009), <http://www.cic.gc.ca/english/immigrate/quebec/index.asp>.

²⁶ Protecting Canada’s Immigration System Act, S.C. 2012, c. 17, http://laws-lois.justice.gc.ca/eng/AnnualStatutes/2012_17/page-1.html.

²⁷ Citizenship Act § 3(1)(a), R.S.C. 1985, c. C-29, <http://laws-lois.justice.gc.ca/eng/acts/c-29/page-1.html>.

²⁸ *Id.* § 3(2).

²⁹ See Prithi Yelaja, “Birth Tourism” May Change Citizenship Rules, CBCNEWS (Mar. 5, 2012), <http://www.cbc.ca/news/canada/story/2012/03/02/birth-immigration-citizenship.html>.

³⁰ Citizenship Act § 3(1)(b).

³¹ *Id.* § 3(3).

their citizenship to endless generations born outside Canada. To protect the value of Canadian citizenship for the future, the 2009 law generally limits citizenship by descent to one generation born outside Canada.”³² The rule changes may also “affect children adopted by Canadian parents outside Canada, depending on how the child obtained, or will obtain, citizenship.”³³

The 2009 amendments also attempt to address the problem of “lost Canadians;” persons who have either lost their citizenship or never had it due to provisions in existing and former citizenship laws.³⁴

C. Naturalization or Permanent Residency

According to CIC, in order to be eligible for Canadian citizenship through naturalization, a person must meet certain requirements related to (1) age, (2) permanent resident status, (3) residence in Canada, (4) language abilities, (5) criminal history, and (6) knowledge of Canada.

1. Age

A person must be at least eighteen years old to apply for Canadian citizenship.³⁵ According to CIC, in order for a child under eighteen to apply for citizenship, the following requirements must be met:

- the person applying must be the child’s parent, adoptive parent, or legal guardian;
- the child must be a permanent resident “but does not need to have resided in Canada for three years;” and

³² *Changes To Citizenship Rules As Of April 2009*, CIC, http://www.cic.gc.ca/english/citizenship/rules_2009.asp (last updated Sept. 24, 2012) (click *Why Was The Law Changed?*). On its website, CIC has included scenarios relating to how the change in citizenship rules under the new law “affects a child born to a Canadian parent outside Canada on or after April 17, 2009: 1) Jackie was born in Canada. While living outside Canada, Jackie gives birth to Angela. Angela’s father is not a Canadian citizen. Angela is born in the first generation outside Canada and is a Canadian citizen at birth. Jackie and Angela return to Canada. When in university outside Canada, Angela has a son, Edward. Edward’s father is not a Canadian citizen. Edward is not a citizen of Canada. Angela may apply to sponsor Edward to immigrate to Canada as a permanent resident (if she intends to move back to Canada). If he is granted permanent residence, Angela can apply on her son’s behalf to be granted citizenship immediately. *If Angela returns to Canada to give birth to her son, Edward would automatically be Canadian, by virtue of being born in Canada. 2) Sarah was born in Canada. While living outside Canada, Sarah gives birth to Jessica. Jessica’s father is also a Canadian citizen. Jessica is a Canadian citizen at birth and is born in the first generation outside Canada. Sarah and Jessica continue to live outside Canada. Years later, not long after she begins working for the private sector outside Canada, Jessica has a daughter, Chelsea, with her partner, Sam. Sam immigrated to Canada and was naturalized (granted citizenship) there years earlier. Chelsea is a Canadian citizen at birth and is born in the first generation outside Canada. Chelsea remains outside Canada and when she grows up, she has a child named Peter. Peter’s father is not Canadian. Peter is not a citizen of Canada. *If Chelsea comes to Canada to give birth to her son, Peter would automatically be Canadian, by virtue of being born in Canada.” *Id.*

³³ *Id.* (click *Understanding the First Generation Limitation*).

³⁴ *Id.* (click *Why Was The Law Changed?*).

³⁵ *Determine Your Eligibility – Citizenship*, CIC, <http://www.cic.gc.ca/english/citizenship/become-eligibility.asp#age> (last updated Feb. 6, 2012).

- one parent (including in the case of adoptive parents) must already be a Canadian citizen or be applying to become a citizen at the same time.³⁶

2. *Permanent Residence Status and Residence in Canada*

In order to become a Canadian citizen, a person must also have permanent resident status in Canada, “and that status must not be in doubt.”³⁷ This means he or she must not be “the subject of an immigration investigation, an immigration inquiry or a removal order (an order from Canadian officials to leave Canada).”³⁸

Moreover, adults eighteen years or over must have resided in Canada for at least three years (1,095 days) in the past four years before applying. As noted above, children under the age of eighteen do not need to meet this condition. According to CIC, “[y]ou may be able to count time you spent in Canada before you became a permanent resident if that time falls within the four-year period.”³⁹

3. *Language Abilities*

English and French are the two official languages of Canada. To become a citizen, “you must show that you have adequate knowledge of one of these languages.”⁴⁰ This includes having documents to prove one’s ability to speak and understand English or French. In addition, a CIC staff member or citizenship judge will interview applicants to see whether they understand basic spoken statements and questions, and are able to express basic information and answer questions.⁴¹

According to CIC, when talking to CIC staff or being interviewed by a citizenship judge, a person must show that he or she is able to

- take part in short, everyday conversations about common topics;
- understand simple instructions and directions;
- speak using basic grammar, including simple structures and tenses; and
- show that one knows enough common words and phrases to express oneself.⁴²

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

4. *Criminal History*

According to CIC, a person cannot become a citizens if he or she

- has been “convicted of an indictable (criminal) offence or an offence under the Citizenship Act” in the three years before making the citizenship application;
- is “currently charged with an indictable offence or an offence under the Citizenship Act;”
- is “in prison, on parole, or on probation;”
- is “under a removal order (have been ordered by Canadian officials to leave Canada);”
- is under investigation for, charged with, or been convicted of a war crime or a crime against humanity; or
- has had his or her “Canadian citizenship taken away in the past five years”.⁴³

5. *Knowledge of Canada*

According to CIC, “[t]o become a citizen, you must understand the rights, responsibilities and privileges of citizenship, such as the right and responsibility to vote in elections. You must also demonstrate an understanding of Canada’s history, values, institutions and symbols.”⁴⁴ Applicants must sit a written citizenship test, with CIC providing a study guide to help people to study for the test.⁴⁵

V. Penalties for Violating Immigration Laws

A. Sanctions for Unlawful Entry and Overstaying

The IRPA does not specifically criminalize unlawfully entering the country or unlawfully overstaying a visa. Both of these types of actions, however, fall under the general prohibition against contravening the law without exercising due diligence to prevent doing so.

Crown prosecutors have discretion to try general IRPA offenses either by way of an indictment or in summary proceedings. The distinction between indictable and summary offenses is similar to the distinction between felonies and misdemeanors in the United States, and a crime that can be tried either by way of an indictment or in summary proceedings is considered to be a “hybrid” offense. The maximum penalty for a person who commits such a general offense as entering the

⁴³ *Id.* Also according to CIC, “[i]f you are on probation or are charged with an offence and are awaiting trial, you should wait until after the probation has ended or the trial is over to apply for citizenship. If you have spent time on probation, on parole or in prison in the last four years, you may not meet the residence requirement for citizenship. Time in prison or on parole does not count as residence in Canada. Time on probation also does not count as residence in Canada if you were convicted of an offence. If you have spent time on probation from a conditional discharge, it may be counted toward residence.” *Id.*

⁴⁴ *Id.*

⁴⁵ See *Prepare for the Citizenship Test*, CIC, <http://www.cic.gc.ca/english/citizenship/cit-test.asp> (last updated Oct. 2, 2012).

country unlawfully or unlawfully overstaying a visa is a fine of Can\$50,000 and imprisonment for two years, if prosecuted by way of an indictment, and a fine of \$10,000 and imprisonment for six months, if prosecuted in summary proceedings.⁴⁶ Crown prosecutors usually base their decisions as to whether a defendant should be tried by way of an indictment or in summary proceedings upon such factors as the seriousness of the violation, the defendant's intentions, and the defendant's prior record.

Most persons caught violating the general provisions of the immigration laws are deported or ordered to leave Canada. CBSA administers the detention and removal of illegal immigrants and persons who overstay their visa. According to a November 2010 CBSA report,

[i]ndividuals who are removed from Canada are removed in priority if: they pose a threat to the security of Canada; they are involved in crime, organized crime or crimes against humanity; they are failed refugee claimants; or they are otherwise inadmissible (e.g., expired visas, misrepresentation of their identity, including marriages of convenience and fraudulent documents).⁴⁷

B. Sanctions for Hiring Undocumented Workers

Another general offense under the IRPA is hiring undocumented workers. Section 124(1)(c) states that anyone “who employs a foreign national in a capacity in which the foreign national is not authorized under this Act to be employed” is guilty of an offense. The maximum penalties for this offense are the same as those for entering the country illegally or overstaying a visa illegally. A person is not guilty of the offense of illegally hiring an undocumented worker if he or she exercised “due diligence.”⁴⁸ The Act and its regulations do not specify what the accused must show in order to prove that he or she did in fact exercise due diligence.

The IRPA also makes both counseling misrepresentation and general misrepresentation criminal offenses. Misrepresentation can be committed by withholding material facts, giving misleading information, and refusing to answer questions in legal proceedings.⁴⁹ These offenses are punishable with a maximum fine of Can\$100,000 and imprisonment for five years, if prosecuted by way of an indictment, and a maximum fine of Can\$50,000 and two years of imprisonment, if prosecuted in summary proceedings.

In addition to criminalizing misrepresentation, the IRPA has special provisions for using, exporting, and dealing in forged documents that purport to establish a person's identity.⁵⁰ Possessing a forged document is punishable with up to five years of imprisonment, while using, exporting or dealing in forged documents is punishable with up to fourteen years of

⁴⁶ Immigration and Refugee Protection Act, S.C. 2001 c. 27, § 124(1)(a).

⁴⁷ CBSA, CBSA DETENTIONS AND REMOVALS PROGRAMS – EVALUATION STUDY: FINAL REPORT (Nov. 2010), <http://www.cbsa-asfc.gc.ca/agency-agence/reports-rapports/ae-ve/2010/dr-rd-eng.html>.

⁴⁸ Immigration and Refugee Protection Act, S.C. 2001, c. 27, § 124.

⁴⁹ *Id.* § 127.

⁵⁰ *Id.* § 122(1).

imprisonment.⁵¹ Canada has had numerous problems with forged passports. In several reported cases, international incidents have arisen out of discoveries that international criminal or terrorist groups were using forged Canadian passports.⁵²

Along with the penalties for hiring illegal immigrants, Canada also has strict laws against human smuggling and trafficking. A person who smuggles fewer than ten persons into the country is liable on a first offense to a fine of up to Can\$500,000 and imprisonment for up to ten years.⁵³ For a subsequent offense, the maximum fine is doubled and the maximum period of imprisonment is raised to fourteen years.⁵⁴ Those who smuggle more than ten persons into the country are liable to a fine of up to Can\$1 million and imprisonment for life.⁵⁵ Moreover, the Act also provides for mandatory minimum punishments for smuggling of persons fewer and greater than 50 persons.⁵⁶ Disembarking persons at sea is a separate offense⁵⁷ that is also punishable with a fine of up to Can\$1 million and imprisonment for life.⁵⁸ In determining the appropriate sentence for persons who engage in human trafficking or disembarking of persons, judges must consider such aggravating factors as whether the aliens died or suffered any bodily harm or the crime was committed under the direction or association of a criminal organization.⁵⁹

VI. Border Security

Unlike many other jurisdictions, border security and management is primarily the responsibility of a single agency, the Canada Border Services Agency (CBSA). Its mandate is to ensure “the security and prosperity of Canada by managing the access of people and goods to and from Canada.”⁶⁰ The CBSA’s legislative, regulatory, and partnership responsibilities include

- **administering** legislation that governs the admissibility of people and goods, plants and animals into and out of Canada;
- **detaining** those people who may pose a threat to Canada;
- **removing** people who are inadmissible to Canada, including those involved in terrorism, organized crime, war crimes or crimes against humanity;

⁵¹ *Id.* § 123(1).

⁵² Paul Koring, *Canadian Passports: The Disguise of Choice For International Dirty Deeds* THE GLOBE & MAIL (Feb. 5, 2013), <http://www.theglobeandmail.com/news/world/canadian-passports-the-disguise-of-choice-for-international-dirty-deeds/article8282163/>.

⁵³ Immigration and Refugee Protection Act § 117(2)(a)(i).

⁵⁴ *Id.* § 117(2)(a)(ii).

⁵⁵ *Id.* § 117(3).

⁵⁶ *Id.* § 117(3.1), § 117(3.2).

⁵⁷ *Id.* § 119.

⁵⁸ *Id.* § 120.

⁵⁹ *Id.* § 121(1).

⁶⁰ *About the CBSA*, CANADA BORDER SERVICES AGENCY (CBSA), <http://www.cbsa-asfc.gc.ca/agency-agence/menu-eng.html> (last updated June 7, 2011).

- **interdicting** illegal goods entering or leaving the country;
- **protecting** food safety, plant and animal health, and Canada's resource base;
- **promoting** Canadian business and economic benefits by administering trade legislation and trade agreements to meet Canada's international obligations;
- **enforcing** trade remedies that help protect Canadian industry from the injurious effects of dumped and subsidized imported goods;
- **administering** a fair and impartial redress mechanism;
- **promoting** Canadian interests in various international forums and with international organizations; and
- **collecting** applicable duties and taxes on imported goods.⁶¹

Since its establishment in 2003, the CBSA has “brought together customs, immigration, and food inspection/biosecurity functions from three separate agencies. Customs and biosecurity clearance is now carried out by a single border guard.”⁶² Canada has invested “over \$10 billion in border security and emergency preparedness since September 2001.”⁶³

Since 9/11, Canada and the US have made substantial investments in coordinating border security and management. In 2001, Canada and the United States “strengthened their joint management of the border on the basis of the 30-point Smart Border Declaration and Action Plan.”⁶⁴ The agreement is said to have “enhanced cooperation in the following areas: the secure flow of people; the secure flow of goods; secure infrastructure; and coordination and information sharing. It has been a model for other countries on how to work together on border issues.”⁶⁵

In August 2009, at the North American Leaders’ Summit in Guadalajara, Canadian Prime Minister Stephen Harper, U.S. President Barack Obama, and Mexican President Felipe Calderón “affirmed that our integrated economies are an engine of growth. We are investing in border infrastructure, including advance technology, to create truly modern borders to facilitate trade and the smooth operation of supply chains, while protecting our security.”⁶⁶

On February 4, 2011, Prime Minister Stephen Harper and President Barack Obama announced the Beyond the Border Declaration, which “outlines joint priorities to strengthen shared security

⁶¹ *What We Do*, CBSA (Mar. 27, 2012), <http://www.cbsa-asfc.gc.ca/agency-agence/what-quoi-eng.html> (emphasis in original).

⁶² New Zealand Ministry for Primary Industries, Cabinet Paper on Future Direction for the Border Sector, Appendix Four—Structure of Border Management In Other Countries (Sept. 2012), <http://www.biosecurity.govt.nz/files/biosec/sys/appendix-4-structure-border-mgmt-other.pdf>.

⁶³ *Canada-US Border Cooperation*, CANADA’S ECONOMIC ACTION PLAN, GOVERNMENT OF CANADA, <http://actionplan.gc.ca/en/page/bbg-tpf/canada-us-border-cooperation> (last visited Mar. 11, 2013).

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

and improve the legitimate flow of people, goods and services across our borders.”⁶⁷ This action plan “sets out joint priorities for achieving that vision within the four areas of cooperation identified in the Beyond the Border Declaration: addressing threats early; trade facilitation, economic growth and jobs; cross-border law enforcement; and critical infrastructure and cybersecurity.”⁶⁸

⁶⁷ *Perimeter Security and Economic Competitiveness*, CANADA’S ECONOMIC ACTION PLAN, GOVERNMENT OF CANADA (Feb. 4, 2011), <http://actionplan.gc.ca/en/content/perimeter-security-and-economic-competitiveness>.

⁶⁸ *Beyond the Border Action Plan*, CANADA’S ECONOMIC ACTION PLAN, GOVERNMENT OF CANADA (Feb. 4, 2011), <http://actionplan.gc.ca/en/page/bbg-tpf/beyond-border-action-plan>.

China

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SUMMARY In general, every foreigner needs a visa to enter China unless otherwise provided by law. There are four categories of visas: diplomatic, courtesy, service, and ordinary. According to the rules for ordinary visas currently in effect, there are eight types of ordinary visas issued in accordance with the purposes of visits.

Chinese nationality law basically follows the principle of *jus sanguinis*. A foreign national or stateless person who is willing to abide by China's Constitution and laws and who is a close relative of Chinese nationals, has settled in China, or has other legitimate reasons may be naturalized as a Chinese citizen upon approval of his application.

Foreigners illegally entering, staying, or working in China may be deported. Administrative punishments provided by the Exit and Entry Law include a warning, a fine, an order to leave China within a specified time, and expulsion from China. The Law also punishes Chinese citizens who assist foreigners in entering the country illegally, hide such foreigners, provide accommodations to them, or employ them.

The Exit and Entry Law expressly allows taking biological identification information, such as fingerprints, from people who exit or enter China. To provide for its border and coastal defense, China practices a system of sharing responsibilities between the military and civilian authorities and makes use of border control troops, border inspection stations, and the People's Liberation Army border control units.

I. Introduction

A. Legislative Framework

China is not a country that has traditionally attracted large numbers of immigrants. There is no comprehensive immigration and nationality statute in place. The 1980 Nationality Law has not been updated since its adoption. It contains only seventeen general articles, which govern the acquisition and loss of Chinese citizenship.¹

On November 22, 1985, the Standing Committee of the National People's Congress adopted two laws to regulate the exit and entry of Chinese citizens and foreigners: the Law on the Control of the Exit and Entry of Citizens, and the Law on the Control of the Entry and Exit of Aliens

¹ Zhonghua Renmin Gongheguo Guoji Fa [The PRC Nationality Law] (promulgated by the National People's Congress (NPC) on Sept. 10, 1980, and effective the same day), THE LAWS OF THE PEOPLE'S REPUBLIC OF CHINA (1979–1981) [LAWS OF CHINA 1979–81] 182–83.

(Aliens Entry and Exit Law).² The Aliens Entry and Exit Law and its implementing rules have become the primary legal instruments regulating the entry and stay of foreigners in China.³

Provisions regarding immigration are also found in regulations and rules issued by the State Council and relevant ministries, in particular the Ministry of Public Security and the Ministry of Foreign Affairs. For example, the rules on permanent residency were first officially introduced into Chinese law in 2004, when the Measures for the Administration of the Examination and Approval of Foreigners' Permanent Residence in China were issued by the two ministries jointly.⁴ Employment of foreigners is regulated by the Provisions on the Administration of the Employment of Foreigners, jointly issued by several departments under the State Council in 1996.⁵

In 1995, the State Council issued the Regulations on Frontier Exit and Entry Inspection, which governs the inspection of individuals and vehicles entering and exiting the border.⁶ The Ministry of Public Security in 2002 issued a set of Measures for Implementing Administrative Punishments in Frontier Exit and Entry Inspection, specifically regulating the punishments for border control violations by individuals and vehicles crossing the border.⁷

B. New “Unified” Exit and Entry Law

The fast economic growth in the past three decades has brought in more international travelers than ever before, and along with them challenges to the immigration law system and border control. Official statistics show that a total of 1.46 million foreigners entered or exited China in 1980; the number jumped to 20.26 million in 2000 and then to 54.35 million in 2012, thus rising

² Gongmin Chujing Rujing Guanli Fa [Law on the Control of Exit and Entry of Citizens] (promulgated by the NPC Standing Committee on Nov. 22, 1985, effective Feb. 1, 1986), LAWS OF CHINA 1983–1986, 197–200; Waiguo Ren Rujing Chujing Guanli Fa [Aliens Entry and Exit Law] (promulgated by the NPC Standing Committee on Nov. 22, 1985, effective Feb. 1, 1986), LAWS OF CHINA 1983–1986, 191–96.

³ Waiguo Ren Rujing Chujing Guanli Fa Shishi Xize [Implementation Regulations of the Law on the Entry and Exit of Aliens] (approved by the State Council on Dec. 3, 1986, *last amended* Apr. 24, 2010), http://www.gov.cn/zwqk/2010-04/27/content_1593708.htm.

⁴ Waiguoren Zai Zhongguo Yongjiu Juliu Shenpi Guanli Banfa [Measures for the Administration of the Examination and Approval of Foreigners' Permanent Residence in China] (Order No. 74 of the Ministry of Public Security and Ministry of Foreign Affairs, Aug. 25, 2004), http://www.gov.cn/gongbao/content/2005/content_64214.htm.

⁵ Waiguo Ren Zai Zhongguo Jiuye Guanli Guiding [Provisions on the Administration of the Employment of Foreigners in China] (issued by the Ministry of Labor, Ministry of Public Security, Ministry of Foreign Affairs, and Ministry of Foreign Trade and Economic Cooperation on Jan. 22, 1996, amended Nov. 12, 2010) (hereinafter, Provisions), <http://fgk.chinalaw.gov.cn/article/bmgz/201011/20101100336545.shtml>.

⁶ Regulations on Frontier Exit and Entry Inspection (State Council, Sept. 1, 1995). The text is available in Chinese on the central government's official website, http://www.gov.cn/banshi/2005-08/31/content_27714.htm; English translation provided by Asian Legal Information Institute (Asian LII), <http://www.asianlii.org/cn/legis/cen/laws/roeaefi515/>.

⁷ Chujing Rujing Bianfang Jiancha Xingzheng Chufa Shishi Banfa [Measures for Implementing Administrative Punishments in Frontier Exit and Entry Inspection] (issued by the MPS on Apr. 28, 2002), http://www.xm.gov.cn/zt/xmhcbgq/zcfg/bfjc/200806/t20080620_235242.htm (in Chinese).

about 10% per year over the past decade.⁸ Meanwhile, the Ministry of Public Security reported that 2,614 foreigners were caught trying to illegally cross the border in 2012 alone.⁹

As a response to the increasingly complex situation of both citizens and foreigners crossing the border, the Standing Committee of the National People's Congress adopted the Law on the Administration of Exit and Entry (Exit and Entry Law) on June 30, 2012.¹⁰ The new Exit and Entry Law “unifies” the previous two laws in that it is applicable to

- the exit and entry of Chinese citizens and foreigners;
- foreigners' stay in China; and
- inspections of vehicles crossing the border.¹¹

When it takes effect on July 1, 2013, the new Exit and Entry Law will replace both the Law on the Control of the Exit and Entry of Citizens and the Law on the Control of the Entry and Exit of Aliens.¹² Other immigration regulations and rules are also expected to be updated by the State Council and the ministries in accordance with the authority granted by the Exit and Entry Law.¹³

C. Overview of the Visa System

In general, every foreigner needs a visa to enter China unless otherwise provided by the Exit and Entry Law.¹⁴ There are four categories of visas: diplomatic visas; courtesy visas (issued to foreigners who merit courteous treatment because of their special status); service visas (issued to foreigners entering China for official service reasons); and ordinary visas.¹⁵

The State Council is authorized by the Exit and Entry Law to formulate detailed rules for ordinary visas. Issuance of diplomatic, courtesy, and service visas are to be determined by the

⁸ Yang Huanning, *Guowuyuan Guanyu Waiguoren Ruchujing ji Juliu, Jiuye Guanli Gongzuo Qingkuang de Baogao* [Report of the State Council on the Administration of Entry-Exit, Residence, and Employment of Foreigners], NATIONAL PEOPLE'S CONGRESS (Apr. 25, 2012), http://www.npc.gov.cn/wxzl/gongbao/2012-08/21/content_1736409.htm.

⁹ *Gongan Bu: 2012 Nian Bianfang Jianchan Jiguan Chahuo 2614 Ming Toudu Zhe* [Ministry of Public Security: Frontier Inspection Organs Caught 2,614 Individuals Trying to Illegally Cross the Border in 2012] (Jan. 17, 2013), http://jiangsu.china.com.cn/html/law/political/41571_1.html.

¹⁰ *Zhonghua Renmin Gongheguo Chujing Rujing Guanli Fa* [The Exit and Entry Administration Law of the People's Republic of China] (promulgated by the Standing Committee of the National People's Congress June 30, 2012, effective July 1, 2013), http://www.gov.cn/flfg/2012-06/30/content_2174944.htm (in Chinese; English translation, WESTLAWCHINA).

¹¹ *Id.* art. 2.

¹² *Id.* art. 93.

¹³ *E.g., Id.* arts. 41 & 47.

¹⁴ *Id.* art. 15.

¹⁵ *Id.* art. 16.

Ministry of Foreign Affairs.¹⁶ According to the rules for ordinary visas currently in effect, there are eight types of ordinary visas issued in accordance with the purposes of visits:

- D visa: issued to permanent residents;
- Z visa: work visa, issued to foreign workers and their accompanying family members;
- X visa: student visa, issued to students and others coming to China for training or internship for a period of six months or more;
- F visa: issued to persons invited to come to China to give lectures or for official visits; business, scientific, technological, or cultural exchanges, or short-term studies or internships lasting less than six months;
- L visa: issued to persons entering China for tourism, to visit relatives, or for other private purposes;
- G visa: transit visa;
- C visa: issued to crew members performing duties on board an international train or aircraft, and their accompanying family members; and
- J visa: issued to foreign journalists.¹⁷

D. New Trend: Talent Visa

As part of China's efforts in recent years to attract highly skilled talents, the new Exit and Entry Law adds "attracting talent" as one of the purposes for an ordinary visa.¹⁸ Accordingly, the State Council may add a new type of talent visa under the category of ordinary visa when the time comes to formulate new rules for ordinary visas in accordance with the Exit and Entry Law.

II. Citizenship and Permanent Status

A. Citizenship by Birth

Chinese nationality law basically follows the principle of *jus sanguinis*. According to the Nationality Law, a child born in China is a Chinese citizen if at least one of his parents is a Chinese citizen, or if his parents are settled in China and the parents are stateless or their nationalities cannot be determined.¹⁹ A child born outside China with at least one Chinese citizen parent is a Chinese citizen, unless the Chinese citizen parent has settled in a foreign country and the child has acquired foreign citizenship at birth.²⁰ China does not recognize dual

¹⁶ *Id.*

¹⁷ Waiguo Ren Rujing Chujing Guanli Fa Shishi Xize [Implementation Regulations of the Law on the Entry and Exit of Aliens] (approved by the State Council on Dec. 3, 1986, *last amended* Apr. 24, 2010) art. 4, http://www.gov.cn/zwqk/2010-04/27/content_1593708.htm.

¹⁸ Exit and Entry Law art. 16.

¹⁹ *Id.* arts. 4 & 6.

²⁰ *Id.* art. 5.

nationality. The Nationality Law states that after being naturalized as a Chinese citizen, a foreigner cannot retain his foreign citizenship.²¹

B. Naturalization

Naturalization is possible under the Nationality Law, although in practice it is rare other than through marriage or a great contribution to the country. According to the Nationality Law, a foreign national or stateless person who is willing to abide by China's Constitution and laws and who is a close relative of Chinese nationals, has settled in China, or has other legitimate reasons, may be naturalized as a Chinese citizen upon approval of his application.²²

In recent years, many foreigners obtained Chinese nationality in Hong Kong, where the Special Administrative Region (SAR) government has been accepting naturalization applications systematically since the establishment of the Hong Kong SAR in 1997.²³ According to Hong Kong's Secretary of Security, out of 15,518 applications received the Hong Kong SAR government has approved 12,658 foreigners to be naturalized as Chinese nationals.²⁴

The Hong Kong SAR government judges each naturalization application on its own merits, and considers the following factors in making a decision:

- whether the applicant has a near relative who is a Chinese national having the right of abode in Hong Kong;
- whether the applicant has the right of abode in Hong Kong;
- whether the applicant's habitual residence is in Hong Kong;
- whether the principal members of the applicant's family (spouse and minor children) are in Hong Kong;
- whether the applicant has a reasonable income to support himself/herself and his/her family;
- whether the applicant has paid taxes in accordance with the law;
- whether the applicant is of good character and sound mind;
- whether the applicant has sufficient knowledge of the Chinese language;
- whether the applicant intends to continue to live in Hong Kong in case the naturalization application is approved; and
- whether there are other legitimate reasons to support the application.²⁵

²¹ *Id.* art. 8.

²² *Id.* art. 7.

²³ Press Release, News.gov.hk, LCQ2: Applications for Naturalisation as Chinese Nationals (Dec. 12, 2012), <http://www.info.gov.hk/gia/general/201212/12/P201212120342.htm>.

²⁴ *Id.*

²⁵ *Id.*

C. Permanent Residency

According to the 2004 Measures for Administration of the Examination and Approval of Foreigners' Permanent Residence, the following categories of individuals may apply for permanent residency in China:

- investors who have made direct investments in China with stable operations and good tax payment records for three successive years;
- corporate executives, professors, and researchers who have held a post in China for at least four consecutive years, have been physically present in China for a minimum period of three cumulative years within the four years, and have good tax payment records;
- foreigners who have made great and outstanding contributions to China and those who are especially needed by the country;
- immediate family (spouse and unmarried children under the age of eighteen) of an individual mentioned in the previous three categories;
- a person who has been married to a Chinese citizen or permanent resident for at least five years, has at least five consecutive years of residency in China, is physically present in China for at least nine months each year, and has a stable source of livelihood and a dwelling in China;
- a Chinese citizen's unmarried children who are under the age of eighteen; and
- a person aged sixty or older who is joining direct relatives in China, has no direct relatives overseas, has resided in China for at least five consecutive years, is physically present in China for at least nine months each year, and has a stable source of livelihood and a dwelling in China.²⁶

For investors, the Measures require a minimum registered capital actually paid to China in accordance with the industries and locations the investment goes to:

- US\$500,000 in any industry encouraged by the State;
- US\$500,000 in western China and any key poverty county as determined by the State;
- US\$1 million in central China; or
- US\$2 million in any other places in China accumulatively.²⁷

²⁶ Waiguoren Zai Zhongguo Yongjiu Juliu Shenpi Guanli Banfa [Measures for the Administration of the Examination and Approval of Foreigners' Permanent Residence in China] (Order No. 74 of the Ministry of Public Security and Ministry of Foreign Affairs, Aug. 25, 2004) art. 6, http://www.gov.cn/gongbao/content/2005/content_64214.htm.

²⁷ *Id.* art. 7.

III. Illegal Immigration

Illegal immigration has been spurred in recent years by an increase in foreigners coming to the country to seek employment and long-term stays. One of the focuses of the new Exit and Entry Law is to place restrictions on foreigners who illegally enter, stay, or work in China, rhetorically expressed as the “three illegals” (*san fei*). The public security organs (police) have launched campaigns to attack the “three illegals” in the big cities.²⁸

According to the Exit and Entry Law, foreigners illegally entering, staying, or working in China may be deported.²⁹ Administrative punishments provided by the Exit and Entry Law include a warning, a fine, an order to leave China within a specified time, and expulsion from China.

A. Illegal Entry

Illegal entry, which includes entering China with forged exit-entry documents, with others’ exit-entry documents, or by evading border inspection will be fined between 1,000 and 5,000 yuan (about US\$160–800); where circumstances are serious, the foreigner may be detained for five to ten days and fined up to 10,000 yuan.³⁰

B. Illegal Stay or Residence

Staying in the country illegally may provoke a warning from the government; where the circumstances are serious, the foreigner may be fined 500 yuan for each day of the illegal stay, up to a maximum of 100,000 yuan, or be detained for five to fifteen days, according to article 78 of the Exit and Entry Law.³¹ While many Chinese parents living outside the country send their foreign-citizen children back home to be cared for by their Chinese grandparents, the article contains a section specifically punishing guardians of foreign-citizen children illegally staying in China with a warning and a small fine (less than 1,000 yuan).³²

C. Illegal Employment

Alien workers employed in China without a proper employment permit or residence permit are deemed illegal by the Law and are subject to a fine. The Exit and Entry Law raises the fine from the current amount (under 1,000 yuan) to between 5,000 and 20,000 yuan.³³ Where the public security organs deem the circumstances to be serious, the alien may also be detained for five to fifteen days.³⁴

²⁸ *Sanfei Waiguo Ren, Beijing Bu Huanying [Three Illegals Not Welcome in Beijing]*, XINHUANET (May 19, 2012), http://news.xinhuanet.com/society/2012-05/19/c_111987262.htm.

²⁹ Exit and Entry Law art. 62.

³⁰ *Id.* art. 71.

³¹ *Id.* art. 78.

³² *Id.*

³³ Exit and Entry Law arts. 43 & 80.

³⁴ *Id.* art. 80.

A foreigner whose presence is deemed undesirable may be ordered to exit China within a specific time. If a foreigner violates the Exit and Entry Law but not seriously enough to be criminally punished, the Ministry of Public Security may order him expelled. The Ministry of Public Security has the final decision.³⁵

D. Sanctions Against Persons Helping Illegal Immigrants

The Exit and Entry Law also punishes Chinese citizens who assist foreigners in entering the country illegally, as well as anyone who hides such foreigners or provides accommodations to them. Such activities are subject to a fine up to 20,000 yuan and detention for up to fifteen days. Any illegal gains will be confiscated.³⁶ Illegally employing aliens is subject to a fine of 10,000 yuan for each illegal alien employed, up to a maximum of 100,000 yuan, and any illegal gains are confiscated.³⁷

IV. Border Protection

A. Biometrics

According to the Exit and Entry Law, foreigners upon entering China must submit their passports and visas to the border inspection organs for examination and go through prescribed formalities. Upon exiting the country, they must submit their passports for examination and go through prescribed formalities.

The above-mentioned formalities may include taking fingerprints, which is expressly allowed by the Exit and Entry Law. According to the Law, upon approval by the State Council, the Ministry of Public Security and the Ministry of Foreign Affairs may set forth regulations on taking biological identification information, such as fingerprints, from people who exit or enter China.³⁸

B. Border Protection Bodies

With regard to border and coastal defense, a 2010 white paper on China's national defense stated that China practices a system of sharing responsibilities between the military and civilian authorities.³⁹ The State Commission of Border and Coastal Defense, which is under the "dual leadership" of the State Council and the Central Military Commission (CMC), coordinates the nation's border and coastal defenses.⁴⁰

³⁵ *Id.* art. 81.

³⁶ *Id.* arts. 72 & 79.

³⁷ *Id.*

³⁸ *Id.* art. 7.

³⁹ CHINA'S NATIONAL DEFENSE IN 2010, http://www.china.org.cn/government/whitepaper/2011-03/31/content_22263510.htm (last visited Feb. 28, 2013).

⁴⁰ *Id.*

1. *Border Control Troops*

The Public Security Border Control Troops (*gongan bianfang budui*), also known as the People's Armed Police Border Control Troops (*wujing bianfang budui*), are the primary armed law enforcement body for China's land and coastal borders. The troops are under the administration of the Border Control Department of the Ministry of Public Security.⁴¹

The main responsibilities of the Border Control Troops are: border, coastal and maritime security administration; border inspection at ports; prevention of and crackdown on illegal and criminal acts in border and coastal areas, such as illegal border crossing, drug trafficking and smuggling; and organization of and participation in counterterrorist and emergency-management operations.⁴²

2. *Border Exit and Entry Inspection Stations*

The border control duties at major Chinese airports, seaports, and land border stations are taken on by the border exit and entry inspection stations, which are staffed with professional police. In 1998, the Ministry of Public Security introduced professional police into its border police force, which resulted in General Border Inspection Stations (*chu ru jing bian fang jian cha zong zhan*) being set up in nine major cities,⁴³ these being Beijing, Tianjin, Shanghai, Guangzhou, Shenzhen, Zhuhai, Xiamen, Haikou, and Shantou.⁴⁴

The nine General Border Inspection Stations supervise the lower-level border inspection stations set up at the airports, seaports, and land border checkpoints in the nine previously mentioned cities. The General Border Inspection Stations are subordinate to the Bureau of Exit and Entry Administration of the Ministry of Public Security.⁴⁵

3. *People's Liberation Army (PLA) Border Control Units*

The PLA Border Control Units are mainly tasked with maintaining coastal and maritime security and safeguarding the borders against such activities as foreign intrusions, encroachments, and illegal border crossing, including at places where there are no ports or border inspection stations.⁴⁶

⁴¹ *Gong'an Bianfang Jianjie* [Introduction of Public Security Border Control] (Apr. 29, 2008), <http://www.mps.gov.cn/n16/n80254/n80271/index.html>.

⁴² 2010 China's National Defense White Paper, http://www.china.org.cn/government/whitepaper/2011-03/31/content_22263510.htm (last visited Feb. 28, 2013).

⁴³ LIU GUOFU, CHINESE IMMIGRATION LAW 18 (Ashgate, 2011).

⁴⁴ *Zhongguo Gong'an Churujing Guanli Jigou Shezhi yu Zhize Fengong* [Organizations and Allocation of Work of China Public Security Exit and Entry Administration] (July 3, 2008), MPS website, <http://www.mps.gov.cn/n16/n84147/n84165/1291532.html>.

⁴⁵ *Id.*

⁴⁶ 2010 China's National Defense White Paper, *supra* note 42.

Germany

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SUMMARY Germany's immigration system limits long-term admittance to skilled workers to the extent that they are needed by German employers and to entrepreneurs investing in Germany. Residence permits are first granted on a temporary basis (usually for one to three years), but they can be renewed as long as the conditions for their granting continue to exist. For aliens admitted as workers, this means that they must be employed, law-abiding, and not in danger of becoming a burden for Germany's social services. Generally, aliens can become permanent after having resided in Germany for five years and if they live up to the requirements of being self-supporting and integrate into the German way of life. For highly skilled workers, the path to permanency is shorter.

Germany is a Member State of the European Union (EU), and its immigration system applies to citizens from third (non-EU) countries. Citizens and long-term residents of EU countries have the right to reside and work in Germany. Since 2011 this freedom of movement has also applied to the East European countries. Prior to 2011 Germany admitted unskilled seasonal workers from Eastern Europe for short periods of time through programs based on bilateral agreements, but these have become obsolete with EU expansions in Eastern Europe.

Germany aims at controlling immigration through a detailed system of visas and permits. Any entry into Germany requires a visa or residence permit, and any entry into Germany without a visa or residence permit or any overstaying the period permitted by the visa or permit is a criminal offense and may lead to deportation.

The much-used Schengen visa is issued by any Member State of the Schengen Agreement and entitles the holder to travel throughout the Schengen area (most of the European Union and some contiguous countries). A Schengen visa entitles the holder to remain in the Schengen area for three months within a six-month period. Tourist visas are generally Schengen visas.

German residence permits can be granted for a variety of purposes, including study, research, family reunification, employment, and entrepreneurial activity. The terms of the permits are tailored to the envisioned purpose, and a strict dividing line is drawn between merely temporary purposes and those that can lead to a permanent status in Germany.

The path to citizenship is gradual, requiring a lawful residence of six to eight years, depending on the degree of integration of the immigrant. Also required is a permanent residence permit which, depending on the desirability of the immigrant, is granted after thirty-three months to five years of temporary status. Throughout this path to permanency and then citizenship a high degree of acculturation is required, as is a solid status of financial self-sufficiency, which includes adequate health insurance and housing.

As a member of the Schengen regime, Germany is surrounded by other Schengen countries. Consequently, Germany has no border controls on the internal borders within

the Schengen area and relies largely on the border controls exercised by the Schengen members having an external border. The only external borders for which Germany is responsible are the maritime border on the North Sea and the Baltic Sea, and international airports. Despite the absence of systematic border checks at the borders with neighboring countries, Germany still maintains a Federal Police Force, whose mission includes the protection of German borders against the illegal entry of aliens who have been able to circumvent the border controls of another Schengen member country.

I. Immigration System

A. Immigration Policy

In the 1960s, Germany recruited and admitted large numbers of foreign workers in order to increase German industrial production. At the time it was generally assumed that the then admitted “guest workers” would eventually leave.¹ Instead, these workers, most of them Turkish, remained in Germany and brought their families, so now about ten percent of the German population has a migrant background.² Since 1973 Germany has pursued an immigration policy that limits immigration to skilled or highly skilled workers³ and admits unskilled workers only for short periods, thus preventing them from becoming permanent or bringing their families.⁴

The current immigration system is based on the Residence Act of 2004.⁵ This was the first German legislation that embraced the integration of Germany’s immigrant population. Prior to 2004, Germany had adhered to the slogan “Germany is not a country of immigration.”⁶ As compared to previous legislation, the Residence Act of 2004 promotes integration by shortening the periods of residence required before granting permanent status and by requiring language skills and acculturation for renewals of residence permits.

¹ *Anwerbung von Arbeitskräften*, BUNDESMINISTERIUM DES INNEREN, http://www.zuwanderung.de/ZUW/DE/Zuwanderung_hat_Geschichte/Anwerbung/Anwerbung_node.html#doc921694bodyText3 (last visited Feb. 20, 2013).

² H. Hartnell, *Citizenship and Migration in the European Union and Germany*, 24 BERKELEY J. INT’L L. 330 (2006). Work-related immigration was not the only path by which foreigners flocked to Germany. Many refugees and asylum seekers also came to Germany and were able to remain there. *Id.*

³ Martin Strunden & Michaela Schubert, *Deutschland gibt sich Blue-Card “Plus,”* ZEITSCHRIFT FÜR AUSLÄNDERRECHT UND AUSLÄNDERPOLITIK [ZAR] 270 (2012); Günter Renner, *Ausländerrecht in Deutschland* 25 (1998).

⁴ *Anwerbung*, *supra* note 1; JAN BERGMANN ET AL., AUSLÄNDERRECHT 412 (9th ed. 2011).

⁵ Aufenthaltsgesetz [AufenthG] [Residence Act], July 30, 2004, BUNDESGESETZBLATT [BGBl.] I at 1950, repromulgated Feb. 25, 2008, BGBl. I at 162, as amended, § 18(2) & (3), current version at http://www.gesetze-im-internet.de/aufenthg_2004/index.html.

⁶ Ulrike Davy, *Integration of Immigrants in Germany: A Slowly Evolving Concept*, 7 EUR. J. MIGRATION & L. 123 (2005).

B. EU Citizens

German immigration law distinguishes between non-Germans who are citizens from Member States of the European Union (EU) and those who originate from third (non-EU) countries. Citizens of Member States enjoy freedom of movement in Germany.⁷ They are entitled to take up residence in Germany if they pursue a gainful occupation there, study or look for work, or are financially independent.⁸ After five year's lawful residence they are entitled to a permanent residence permit. The bulk of the provisions of the Residence Act does not apply to EU citizens. Instead, it applies only to citizens of third countries, as discussed below.

C. Third Country Citizens

1. Visas and Residence Permits

Germany's immigration system is based on the concept that any entry into the country requires not only a valid passport⁹ but also a visa or residence permit.¹⁰ Entering the country without a valid visa or permit is a criminal offense, as is the overstaying of a visa or permit.¹¹ Such conduct may lead to deportation.¹²

A visa for new entrants will often be given in the form of a Schengen visa.¹³ It entitles the holder to travel throughout the Schengen, which comprises twenty-three EU Member States and some other adjacent countries.¹⁴ Schengen visas are granted for three months out of a six-month period. They serve as tourist visas and grant short-term entry to business travelers.

In contrast to the Schengen visas, the German titles permitting a sojourn for a specific purpose are called residence permits. These are granted under various conditions and for varying periods of time, depending on the purposes for which they are granted. Among these purposes is study or research in Germany, entrepreneurial activity, employment, and refuge or asylum.¹⁵

⁷ Consolidated Version of the Treaty on the Functioning of the European Union [TFEU], 2012 OFFICIAL JOURNAL OF THE EUROPEAN UNION (O.J.) (C 326) 47, art. 21, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2012:326:0047:0200:EN:PDF>.

⁸ Freizügigkeitsgesetz /EU, July 30, 2004, BGBl. I at 1950, as amended.

⁹ AufenthG § 3.

¹⁰ AufenthG § 4.

¹¹ *Id.* § 95.

¹² AufenthG §§ 54–55.

¹³ Council Regulation (EC) No. 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement, O.J. (L 81) 1.

¹⁴ Regulation (EC) No. 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code), Sept. 9, 2009, O.J. (L 243) 1.

¹⁵ AufenthG §§ 16–21.

Permits that give the applicant the right to work in Germany are generally only given to skilled workers, and only if there is an actual need for the employee;¹⁶ highly skilled workers are admitted under preferential conditions.¹⁷ In the past, permits for unskilled temporary guest workers (mostly seasonal workers) were given under arrangements between the German Federal Employment Office and authorities in East European countries. Since 2011 these arrangements have become obsolete owing to enlargements of the European Union in 2004 and 2008.¹⁸ Since then, East European workers have enjoyed freedom of movement in Germany.¹⁹

Generally residence permits for new entrants are granted as temporary permits²⁰ for periods of one to three years.²¹ Renewals are possible and permanent status may be granted after five years of temporary status.²² Throughout the resident's sojourn in Germany, he must be financially self-sufficient and make an effort to become integrated. These requirements, which also apply to naturalization, are described below (Part II(D) Financial Self-sufficiency, and Part II(E), Integration).

2. Refugees

Germany grants asylum as a constitutional right to those persecuted in their country of origin, yet limits this rights to petitioners who reach Germany without traversing another Member State of the European Union or the Schengen Agreement.²³ In addition, Germany also allows refugees to remain in Germany, at least temporarily, if they do not technically qualify for asylum but still require protection according to EU and international law standards.²⁴

¹⁶ AufenthG §§ 18–19a.

¹⁷ AufenthG §§ 18–19a, as last amended by Gesetz zur Umsetzung der Hochqualifizierten-Richtlinie der Europäischen Union [Act on the Transformation of the European Union Directive on Highly Qualified Employment], June 1, 2012, BGBl. I at 1224. This Amending Act brought many changes that allow highly qualified workers to be admitted to Germany, to look for work there, and to become permanent after reduced waiting periods. See Strunden & Schubert, *supra* note 3.

¹⁸ In 2004 the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovakia, and Slovenia became Member States of the European Union. In 2008, Bulgaria and Romania were admitted. See *From 6 to 27 Members*, EUROPEAN COMMISSION, http://ec.europa.eu/enlargement/policy/from-6-to-27-members/index_en.htm (last visited Mar. 18, 2013).

¹⁹ Rainer Schlegel, *Arbeitnehmerfreizügigkeit für EU-8 seit Mai 2011*, ARBEIT UND RECHT 384 (2011).

²⁰ AufenthG § 7. In exceptional cases a highly qualified worker may start out with a permanent residence permit: AufenthG § 19.

²¹ AufenthG §§ 17 & 21.

²² AufenthG §§ 8 & 9.

²³ GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [BASIC LAW], May 23, 1949 BGBl. 1, as amended, § 16a, translation at http://www.gesetze-im-internet.de/englisch_gg/index.html. For the Schengen Agreement, see *Schengen Area*, EUROPEAN COMMISSION, HOME AFFAIRS, http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/schengen/index_en.htm (last visited Mar. 18, 2013).

²⁴ AufenthG § 60.

3. Family Reunification

The immigration of spouses and children of resident aliens is possible albeit limited to aliens of a somewhat solidified status.²⁵ Spouses of aliens may be granted a residence permit only if the alien resides in Germany under a residence permit that is intended to be applicable for at least one year.²⁶ Dependent children will be admitted only if both of the parents or the parents with sole custody have a German residence permit and the center of the child's life is being moved to Germany. The duration and renewability of residence permits for children and spouses who join a resident alien are strongly tied to the person and the status of the originally admitted sponsoring alien.²⁷

II. Path to Citizenship

A. Birthright Citizenship

In Germany birthright citizenship is an exception to the generally applicable rule of *jus sanguinis*, that is, acquisition of citizenship by descent from a German parent.²⁸ Birthright citizenship applies to the children born in Germany to alien parents if one parent has been a lawful resident of Germany for at least eight years and also has a permanent residence permit.²⁹ In essence, birthright citizenship is only granted to the children of aliens who have a parent who qualifies for naturalization. Birthright citizenship, however, is granted conditionally to those who acquire another nationality at birth. They lose the German citizenship unless they opt to relinquish the other citizenship after reaching majority. To make this choice, the law grants the young dual citizen a period of five years from the time he reaches the age of eighteen until he is twenty three years old.³⁰

B. Requirements for Naturalization

An alien who has lawfully resided for eight years in Germany is entitled to become a German citizen, provided he is a permanent resident at the time of application and lives up to various statutory criteria that purport to establish that the applicant is law-abiding, integrated, not a dual citizen, and self-supporting.³¹ Throughout the entire period during which an alien resides in Germany on his path to permanent status and/or citizenship, German law is very insistent that he not become a burden to society, not endanger the country and its inhabitants, and be socially and linguistically integrated. Each renewal of a residence permit as well as the granting of a

²⁵ AufenthG, §§ 30–34.

²⁶ AufenthG § 30(1)(3)(e).

²⁷ AufenthG §§ 31 & 34.

²⁸ StAG § 4(1).

²⁹ StAG § 4(3).

³⁰ Staatsangehörigkeitsgesetz [StAG] [Citizenship Act], July 13, 1913, REICHSGESETZBLATT 583, as amended, § 10, <http://www.gesetze-im-internet.de/rustag/>.

³¹ StAG § 29.

permanent residence permit are dependent on the continued existence of these conditions, which are very similar to those required for becoming permanent (see above part I Immigration).

C. Statutory Waiting Period

During the eight-year waiting period for the right to be naturalized, the alien must have been a legal immigrant; periods during which the alien petitioned for asylum may count only if asylum has been granted.³² Germany has no special programs for converting illegal immigrants into legal ones. In each individual case, a residence permit would have to be issued according to the generally prevailing criteria, yet it is possible that offenses against immigration law³³ that call for deportation may prevent an alien from being admitted as a legal resident³⁴

The statutory waiting period can be shortened to seven years for applicants who have successfully taken a governmentally offered course on integration. For applicants having a greater degree of integration, in particular a superior knowledge of German, the period can be reduced to six years.³⁵ Shorter periods of residence suffice for the spouse and children who are to be naturalized with the applicant.³⁶ Spouses qualify if they have resided in Germany for four years and have been married to the applicant for two years.³⁷

Moreover, the German authorities have discretion to naturalize someone who has resided in Germany for less than eight years.³⁸ It appears that this period can be shortened in individual cases to three years, particularly in the case of economically desirable applicants.³⁹

D. Financial Self-Sufficiency

For the purpose of naturalization, the law describes the financial self-sufficiency of the applicant by stating that he must be able to support himself and his dependents without requiring unemployment or welfare benefits.⁴⁰

In order to obtain a permanent residence permit (which is required for naturalization), an applicant must also be able to support himself, and this requirement is only met if he carries adequate health insurance by either being insured in the statutory (social) health insurance scheme or carrying private health insurance.⁴¹ In addition, the applicant must have accumulated

³² Manuel Manhart, *Wirtschaftliche Hürden für Einbürgerungsbewerber*, ZAR 239 (2012).

³³ AufenthG § 95.

³⁴ AufenthG §§ 11, 51, 52, and 53.

³⁵ StAG § 10(3).

³⁶ StAG § 10(2).

³⁷ KAY HAILBRONNER & GÜNTER RENNER, *STAATSANGEHÖRIGKEITSRECHT* 573 (4th ed. 2005).

³⁸ StAG § 8.

³⁹ Manhart, *supra* note 32.

⁴⁰ StAG §10(1) (no. 3).

⁴¹ AufenthG, § 9(2) (no. 2) in conjunction with § 2(3).

sixty months of enrollment in the statutory old-age pension system (social security) or made equivalent contributions to a private old-age pension system.⁴² The sixty months of contributions to the social security system allow an enrolled person to become vested in the system, thus guaranteeing that he will receive an old-age benefit.⁴³ Moreover, to become a permanent resident, an applicant must have sufficient housing for himself and his dependants.⁴⁴

E. Integration

A prerequisite for naturalization is the willingness of the alien to renounce his former citizenship.⁴⁵ In addition, he must have a sufficient knowledge of the German language and must also be knowledgeable about the German legal and political system and the German way of life.⁴⁶ Aliens are also required to work toward this degree of integration throughout their sojourn in Germany. A certain degree of integration is required for a renewal of a temporary residence permit,⁴⁷ and even more integration is required for a permanent residence permit.⁴⁸ The vehicle for acquiring the required knowledge and level of skills is governmentally sponsored integration courses.⁴⁹

Various integration courses are offered by the Federal Office on Migration.⁵⁰ They include language instruction, civics education, and social and cultural education. Some courses are geared to particular professions and to audiences of various educational backgrounds. Certificates are granted to those who pass the courses, and these are important documents for residence permit extensions and improvements and for naturalization.

III. Border Protection

Germany is a member of the Schengen Agreement⁵¹ and surrounded by other Schengen countries. Consequently, Germany's borders with these countries are all internal borders within the meaning of the Schengen regime, and for these Germany does not maintain border checkpoints. Instead, Germany relies on the Schengen countries with external borders to enforce

⁴² AufenthG § 9(2) (no.3).

⁴³ BERGMANN, *supra* note 4, at 253.

⁴⁴ AufenthG § 9(2) (no.9) in conjunction with § 2(4).

⁴⁵ StAG § 10(1)(4).

⁴⁶ StAG § 10(1)(6) & (7).

⁴⁷ AufenthG § 8(3).

⁴⁸ AufenthG §§ 9(2) (nos. 6 & 7), 9(3).

⁴⁹ AufenthG § 43.

⁵⁰ *Integration Courses—What are They?* FEDERAL OFFICE FOR MIGRATION AND REFUGEES, <http://www.bamf.de/EN/Willkommen/DeutschLernen/Integrationskurse/integrationskurse-node.html> (last visited Mar. 4, 2013).

⁵¹ *Schengen Area*, EUROPA, EUROPEAN COMMISSION, HOME AFFAIRS http://ec.europa.eu/home-affairs/policies/borders/borders_schengen_en.htm (last visited Feb. 20, 2013). The Schengen area includes the EU Member States Austria, Belgium, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Slovakia, Slovenia, Spain, as well as Sweden, Norway, Iceland, and Switzerland.

immigration and customs laws. Germany's only external borders are the maritime coast on the North Sea and the Baltic Sea and international airports throughout the country.⁵²

On her external borders, Germany is obligated to live up to the Schengen regime by checking the visa status of entrants and issuing Schengen visas to new entrants who qualify.⁵³ For these and other purposes, Germany contributes to and makes use of Schengen databases, particularly the Schengen Information System (SIS)⁵⁴ and the Visa Information System (VIS).⁵⁵ The German Federal Police are in charge of the external border controls.⁵⁶

Although Germany relies on other Schengen countries to protect its internal borders, the German Federal Police still have the mission of protecting the borders against various forms of illegality.⁵⁷ The methods by which the Federal Police guard against the entry of illegal immigrants are somewhat limited because systematic border controls at checkpoints are no longer possible under the Schengen regime. Instead, the Federal Police may conduct random checks of entrants into the border areas to avert potential dangers; the border areas are defined as reaching thirty kilometers into the country from a border with a neighboring state and fifty kilometers land-inward from a maritime border.⁵⁸

⁵² MICHAEL DREWES ET AL., BUNDESPOLIZEIGESETZ 126 (4th ed. 2010).

⁵³ Regulation (EC) No. 562/2006, March 15, 2006, 2006 O.J. (L 105) 1, http://eur-lex.europa.eu/Result.do?T1=V2&T2=2006&T3=562&RechType=RECH_naturel&Submit=Search.

⁵⁴ *The Schengen Area and Cooperation*, EUROPA, http://europa.eu/legislation_summaries/justice_free_dom_security/free_movement_of_persons_asylum_immigration/133020_en.htm (last updated Aug. 3, 2009).

⁵⁵ Visa Information System (VIS), EUROPEAN COMMISSION, HOME AFFAIRS, http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/visa-information-system/index_en.htm (last visited Mar. 4, 2013).

⁵⁶ Bundespolizeigesetz [BPolG] [Federal Police Act], Oct. 19, 1994, BGBL. I at 2978, as amended, § 2.

⁵⁷ DREWES ET AL., *supra* note 52, at 40.

⁵⁸ BPolG § 2(2)(3).

India

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SUMMARY Citizenship in India is largely characterized as *jus sanguinis* and a person can become a citizen by birth, descent, registration, and naturalization. The Foreigners Division of the Ministry of Home Affairs (MHA) formulates and administers policies, statutes, and rules related to visas, immigration, and citizenship, including “overseas citizenship.”

Border Protection and Security is administered by the Department of Border Management of the Ministry of Home Affairs. However, a variety of law enforcement, paramilitary, and military forces under both the Ministry of Defence and the Ministry of Home Affairs protect the borders, which has reportedly lead to issues of coordination, accountability, and “turf battles.”

I. Overview of Immigration Laws

In India, the entry, stay, and exit of foreign nationals are primarily regulated by the Passport Act 1920,¹ Foreigners Act 1946,² and the Registration of Foreigners Act 1939.³ The Foreigners Division of the Ministry of Home Affairs (MHA) administers all matters, including policies, statutes, and rules, related to visas, immigration, citizenship, and “overseas citizenship.”⁴

A. Available Visas

According to the Consular, Passport and Visa Division (CPV) of the Ministry of External Affairs, the “[v]isa regime is implemented abroad by Indian missions & posts and in India by Foreigners Regional Registration Offices (FRROs), home departments & district administrators in the states besides immigration posts. PV-II Section of CPV Division provides the interface with MHA in formulation and implementation of visa policy and is also entrusted with advising Indian Missions/Posts on visa matters.”⁵

¹ Passport (Entry into India) Act, No. 34 of 1920, available at <http://indiankanoon.org/doc/1715361/>.

² Foreigners Act, No. 31 of 1946, <http://www.mha.nic.in/pdfs/The%20Foreigners%20Act,%201946.pdf>.

³ Registration of Foreigners Act, No. 16 of 1939, <http://www.mha.nic.in/pdfs/The%20Registration%20of%20Foreigners%20Act,%201939.pdf>. Additional laws, regulations, and codes are also relevant. See *Regulations Applicable to Foreigners in India*, MINISTRY OF HOME AFFAIRS – FOREIGNERS DIVISION, <http://mha.nic.in/foreignDiv/pdfs/Regulations-Foreign-11.pdf>.

⁴ *About Foreigners Division*, MINISTRY OF HOME AFFAIRS – FOREIGNERS DIVISION, <http://mha.nic.in/foreignDiv/abtDiv.html> (last visited Mar. 4, 2013).

⁵ *Visa Services*, MINISTRY OF EXTERNAL AFFAIRS – CONSULAR, PASSPORT & VISA DIVISION, <http://passportindia.gov.in/AppOnlineProject/online/visaServices> (last visited Mar. 7, 2013).

In India, the types of visas include tourist, employment, business, student, entry, research, journalist, medical, return, project, conference, and transit.⁶ All foreigners⁷ (including foreigners of Indian origin) visiting India for more than 180 days on a Student, Medical, Research or Employment Visa are required to register with the Foreign Registration Office within fourteen days of arrival.⁸

B. Permanent Residency

Permanent residency in India appears to be only available to persons of Indian origin through either the Persons of Indian Origin (PIO) program⁹ or the Overseas Citizenship of India (OCI) program.¹⁰

II. Citizenship Requirements and Pathways

In India, citizenship requirements and pathways are predominantly regulated by the Indian Constitution¹¹ and the Citizenship Act, 1955.¹² Under current law, Indian citizenship is largely determined by the rule of *jus sanguinis* (citizenship of the parents) as opposed to *jus soli* (place of birth), and India “provides for a single citizenship for the whole of India.”¹³ A person can be a citizen by birth, descent, registration, and naturalization.

Articles 5 to 11 of India’s Constitution include provisions that regulate citizenship at the commencement of the Constitution.¹⁴ The Citizenship Act regulates the acquisition, determination, and termination of Indian citizenship after the commencement of the Constitution.¹⁵

⁶ *Id.*

⁷ Separate registration requirements exist for Pakistan and Afghan nationals.

⁸ *Registration of Foreign Nationals Visiting India*, MINISTRY OF HOME AFFAIRS – FOREIGNERS DIVISION, <http://mha.nic.in/foreignDiv/pdfs/RegForeigners-11.pdf> (last visited Mar. 7, 2013).

⁹ *Frequently Asked Questions about the Persons of Indian Origin (PIO) Card Scheme*, MINISTRY OF HOME AFFAIRS, <http://mha.nic.in/pdfs/ForeignD-FAQs-PIO-Crd.pdf> (last visited Mar. 7, 2013).

¹⁰ *Overseas Citizenship of India (OCI)*, MINISTRY OF HOME AFFAIRS – FOREIGNERS DIVISION, <http://mha.nic.in/foreigndiv/oci.html> (last visited Mar. 7, 2013).

¹¹ INDIA CONST. arts. 5–11, <http://lawmin.nic.in/olwing/coi/coi-english/coi-indexenglish.htm>.

¹² The Citizenship Act, No. 57 of 1955, http://mha.nic.in/pdfs/ic_act55.pdf.

¹³ *India Policy*, HIGH COMMISSION OF INDIA – LONDON, <http://hcilondon.in/indianpolicy.html> (last visited Mar. 8, 2013). This site explains that “[e]very person who was at the commencement of the Constitution (26 January 1950) domiciled in the territory of India, and (a) who was born in India, or (b) either of whose parents was born in India, or (c) who has been ordinarily resident in India for not less than five years, became a citizen of India.”

¹⁴ *Id.*

¹⁵ *Id.*

A. Citizenship by Birth

According to the 1955 Act, a person born in India on or after January 26, 1950, and before July 1, 1987, is a citizen by birth “irrespective of the nationality of his parents.”¹⁶ A person born in India on or after July 1, 1987, but before December 3, 2004, “is considered a citizen of India by birth if either of his parents is a citizen of India at the time of his birth.”¹⁷ A person born in India on or after December 3, 2004, is considered citizen of India by birth “if both the parents are citizens of India or one of the parents is a citizen of India and the other is not an illegal migrant at the time of his birth.”¹⁸

B. Citizenship by Descent

Different time periods are also important in determining citizenship by descent. A person born outside of India on or after January 26, 1950, but before December 10, 1992, is a citizen of India by descent, “if his father was a citizen of India by birth at the time of his birth.”¹⁹ However, if the father was a citizen of India by descent only, “that person shall not be a citizen of India, unless his birth is registered at an Indian Consulate within one year from the date of birth or with the permission of the Central Government, after the expiry of the said period.”²⁰

Secondly, a person born outside of India on or after December 10, 1992, but before December 3, 2004, is considered a citizen of India “if either of his parents was a citizen of India by birth at the time of his birth.”²¹ If either of the parents was a citizen of India by descent, that person is not considered a citizen of India, “unless his birth is registered at an Indian Consulate within one year from the date of birth or with the permission of the Central Government, after the expiry of the said period.”²²

Thirdly, a person born outside of India to an Indian citizen parent on or after December 3, 2004, is not a citizen of India, “unless the parents declare that the minor does not hold passport of

¹⁶ *Acquisition of Indian Citizenship (IC)*, MINISTRY OF HOME AFFAIRS – FOREIGNERS DIVISION, <http://indiancitizenshiponline.nic.in/acquisition1.htm>; see also The Citizenship Act § 3(a). For more information on Citizenship rules see *Online Indian Citizenship*, MINISTRY OF HOME AFFAIRS – FOREIGNERS DIVISION, <http://indiancitizenshiponline.nic.in/>; Indian Citizenship Law; Annex H, UK BORDER AGENCY, <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/nationalityinstructions/nichapter14/ch14annexh?view=Binary>. For information on citizenship procedures see *Procedure For Applying Online For Indian Citizenship*, MINISTRY OF HOME AFFAIRS – FOREIGNERS DIVISION, http://indiancitizenshiponline.nic.in/Ic_GeneralInstruction.pdf (all last visited Mar. 7, 2013).

¹⁷ *Acquisition of Indian Citizenship (IC)*, *supra* note 16 (construing The Citizenship Act § 3(b)).

¹⁸ *Id.* (construing The Citizenship Act § 3(c)).

¹⁹ *Id.* (construing The Citizenship Act § 4).

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

another country and his birth is registered at an Indian consulate within one year of the date of birth or with the permission of the Central Government, after the expiry of the said period.”²³

C. Citizenship by Registration

Persons of Indian Origin (PIOs)²⁴ can also be registered as Indian citizens. Section 5 of the Citizenship Act stipulates that the Central Government can register as a citizen, on application, a person (who is not an illegal immigrant) who belongs to the following categories, namely,

- a person of Indian origin who is ordinarily resident in India for seven years before making an application (including throughout the period of twelve months immediately before making an application and for six years in the aggregate in the eight years preceding the twelve months);
- a person of Indian origin who is ordinarily resident in any country or place outside undivided India;
- a person who is married to a citizen of India and is ordinarily resident in India for seven years before making an application for registration;
- minor children of persons who are citizens of India;
- a person of full age and capacity whose parents are registered as citizens of India;
- a person of full age and capacity who was (or has a parent who was) previously a citizen of independent India, and who has been residing in India for one year immediately before making an application for registration; and
- a person of full age and capacity who has been registered as an overseas citizen of India for five years, and who has been residing in India for one year before making an application for registration.²⁵

D. Citizenship by Naturalization

In India, citizenship by naturalization can be acquired by “a foreigner (not illegal migrant) who is ordinarily resident in India for twelve years (throughout the period of twelve months immediately preceding the date of application and for eleven years in the aggregate in the fourteen years preceding the twelve months).”²⁶ The applicant must also meet the qualifications

²³ *Id.*

²⁴ For more information on Persons of Indian Origin (PIO) and the associated card program, see *Frequently Asked Questions about the Persons of Indian Origin (PIO) Card Scheme*, MINISTRY OF HOME AFFAIRS, <http://mha.nic.in/pdfs/ForeigD-FAQs-PIO-Crd.pdf> (last visited Mar. 7, 2013). According to the FAQ, a person is a PIO if “(i) the person at any time held an Indian passport; or (ii) the person or either of his/her parents or grand parents or great grand parents was born in, and was permanently resident in India, provided further that neither was at any time a citizen of any of the aforesaid excluded countries; or (iii) the person is the spouse of a citizen of India or a person of Indian origin covered under (i) or (ii) above. Presently, the specified countries in this regard are Pakistan, Bangladesh, Sri Lanka, Bhutan, Afghanistan, China and Nepal. Citizens of these countries are not eligible to get PIO cards.” *Id.*

²⁵ The Citizenship Act § 5.

²⁶ *Acquisition of Indian Citizenship (IC)*, *supra* note 16.

specified in the Third Schedule of the Act.²⁷ These requirements, however, can be waived if “in the opinion of the Central Government, the applicant is a person who has rendered distinguished services to the cause of science, philosophy, art, literature.”²⁸

The person to whom a certificate of naturalization is granted shall, “on taking [an] oath of allegiance in the form specified in the Second Schedule, be a citizen of India by naturalization as from the date on which that certificate is granted.”²⁹

E. Overseas Indian Citizens

The Overseas Indian Citizens program does not actually grant persons Indian citizenship, and all the rights it entails, because India’s Constitution does not recognize dual citizenship. According to the Ministry of Overseas Indian Affairs,

[a] registered Overseas Citizen of India is granted multiple entry, multi purpose, life-long visa for visiting India, he/she is exempted from registration with Foreign Regional Registration Officer or Foreign Registration Officer for any length of stay in India, and is entitled to general ‘parity with Non-Resident Indians in respect of all facilities available to them in economic, financial and educational fields except in matters relating to the acquisition of agricultural or plantation properties’.³⁰

III. Illegal Entry and Overstay

In India, illegal entry and overstay are criminally prohibited. According to rule 3 of the Passport (Entry into India) Rules, 1950, “no person proceeding from any place outside India shall enter, or attempt to enter, India by water, land or air” unless “he is in possession of a valid passport conforming to the conditions prescribed.”³¹ Any person who contravenes the above rule or “or attempts to enter, India on a forged passport or visa” shall be “punishable with imprisonment for a term which may extend to three months or with fine or with both.”³² According to section 14 of the Foreigners Act, 1946, whoever “remains in any area in India for a period exceeding the period for which the visa was issued to him”³³ shall “be punished with imprisonment for a term which may extend to five years and shall also be liable to fine.”³⁴

²⁷ *Id.*

²⁸ *Citizenship in India*, MINISTRY OF HOME AFFAIRS, <http://censusindia.gov.in/2011-Act&Rules/notifications/CitizenshipAct1955.pdf> (last visited Mar. 7, 2013).

²⁹ *Id.*

³⁰ *Overseas Citizenship of India Scheme*, MINISTRY OF OVERSEAS INDIAN AFFAIRS, <http://moia.gov.in/services.aspx?id1=35&id=m3&idp=35&mainid=23> (last visited Mar. 7, 2013).

³¹ Passport (Entry into India) Rules, 1950, Rule 3.

³² *Id.*, Rule 6.

³³ Foreigners Act, No. 31 of 1946, § 14, <http://www.mha.nic.in/pdfs/The%20Foreigners%20Act,%201946.pdf>.

³⁴ *Id.*

According to the State Department Bureau of Consular Affairs, “[i]f you overstay your Indian visa, or otherwise violate Indian visa regulations, you may require a clearance from the Ministry of Home Affairs in order to leave the country. Generally you will be fined, and in some cases may be jailed, until deportation can be arranged.”³⁵ It appears that short overstays (of up to three months) when there is a reasonable explanation can be regularized by Foreigner Regional Registration Offices but still be subject to a small overstay fine.³⁶ According to the Airports Authority of India, “[c]ases of overstay exceeding 3 months are decided by MHA.”³⁷

IV. Border Management and Security

India’s land borders extend over 15,107 km (9,387 miles) and it has a coastline 7,517 km (4,671 miles) in length.³⁸ A total of ninety-two districts, spread over seventeen states, are classified as border districts.³⁹ India shares a total of “14,880 kilometres of boundary with Pakistan (3323 km), China (3488 km), Nepal (1751 km), Bhutan (699 km), Myanmar (1643 km), and Bangladesh (4096.7 km).”⁴⁰

The Department of Border Management of the Ministry of Home Affairs deals with managing borders, including coastal borders.⁴¹ A 2007 report by the South Asia Terrorism Portal describes some of the Department’s initiatives and programs:

As a part of the strategy to secure the borders as [sic] also to create infrastructure in the border areas of the country, several initiatives have been undertaken by the Department of Border Management. These include expeditious construction of fencing, floodlighting and roads along [the] Indo-Pakistan and Indo-Bangladesh borders, action for development of Integrated Check Posts (ICPs) at various locations on the international borders of the country, [and] construction of strategic roads along [the] Indo-China border.”⁴²

In addition to security measures, the Department is also involved in “socioeconomic development of the border areas” in order “to meet the special developmental needs of the

³⁵ *India Country Specific Information*, U.S. DEPARTMENT OF STATE – BUREAU OF CONSULAR AFFAIRS, http://travel.state.gov/travel/cis_pa_tw/cis/cis_1139.html (last visited Mar. 7, 2013).

³⁶ *Frequently Asked Questions*, AIRPORTS AUTHORITY OF INDIA: CHENNAI INTERNATIONAL AIRPORT, <http://www.airportsindia.org.in/chennai/faq.jsp> (last visited Mar. 7, 2013).

³⁷ *Visa Extension/Conversion*, AIRPORTS AUTHORITY OF INDIA: CHENNAI INTERNATIONAL AIRPORT, <http://www.airportsindia.org.in/chennai/visaextensions.jsp> (last visited Mar. 7, 2013).

³⁸ AVIOTECH, INDIA’S BORDER SECURITY INFRASTRUCTURE: LAND BORDERS 3 (Thought Leadership Series, Jan. 2012), http://www.aviotech.com/pdf/Aviotech_Thought_Leadership_Series_India-Border-Security-LAND-borders_Jan_2012.pdf.

³⁹ *Id.*

⁴⁰ INDIA’S BORDER MANAGEMENT 1 (Pushpita Das ed., Institute for Defence Studies and Analyses, Apr. 2010).

⁴¹ *Department of Border Management: Border Management Division*, MINISTRY OF HOME AFFAIRS, http://mha.nic.in/uniquepage.asp?Id_Pk=450 (last visited Mar. 7, 2013).

⁴² SOUTH ASIAN TERRORISM PORTAL, BORDER MANAGEMENT para. 3.4, <http://www.satp.org/satporgtp/countries/india/document/papers/MHA09-10/3.pdf>.

people living in remote and inaccessible areas situated near the international border”⁴³ through its Border Area Development Programme (BADP).⁴⁴

The Border Security Force (BSF), which is administratively run by the MHA, is a paramilitary force mandated to guard India’s land borders during peacetime and prevent transnational crime.⁴⁵ Other border paramilitary or law enforcement forces controlled by the MHA include the Indo-Tibetan Border Police (ITBP)⁴⁶ for security along the India’s border with the Tibet Autonomous Region of China, and the Sashastra Seema Bal (SSB) for the Indo-Nepal and Indo-Bhutan borders.⁴⁷ The Assam Rifles, a paramilitary force that is administratively run by the MHA but operationally controlled by the Indian military, is responsible for guarding the Indo-Myanmar border.⁴⁸ The Indian army also plays a significant role in securing India’s borders, particularly disputed boundaries with Pakistan and China. Border security along the Line of Control (LOC) and the Line of Actual Control (LAC) is its responsibility. According to a 2007 report by IPCS, “India’s borders continue to be manned by a large number of military, paramilitary and police forces, each of which has its own ethos and each of which reports to a different central ministry at New Delhi, resulting in almost no real coordination in managing the borders.”⁴⁹

This situation has also lead on some occasions to “turf battles” between the Home Ministry and Defense Ministry over border management.⁵⁰ A 2001 Group of Ministers report held that border management should be “re-fashioned on a one-border-one-force principle so as to obviate problems of conflict in command and control and lack of accountability arising from a multiplicity of forces on the same border.”⁵¹

⁴³ *Border Area Development Programme*, MINISTRY OF HOME AFFAIRS, http://mha.nic.in/pdfs/BM_BADP%28E%29.pdf (last visited Mar. 7, 2013).

⁴⁴ *Border Area Development Programme*, MINISTRY OF HOME AFFAIRS, <http://mha.nic.in/pdfs/BADP.pdf> (last visited Mar. 7, 2013).

⁴⁵ *Welcome to Border Security Force*, BORDER SECURITY FORCE, <http://bsf.nic.in/> (last visited Mar. 7, 2013).

⁴⁶ *History and Role of ITBP*, INDO-TIBETAN BORDER POLICE (ITBP), <http://itbpolice.nic.in/itbpwebsite/mar.html> (last visited Mar. 7, 2013).

⁴⁷ *See generally History*, SASHASTRA SEEMA BAL (SSB), <http://www.ssb.nic.in/index.asp?linkid=59&sublinkid=32> (last visited Mar. 7, 2013).

⁴⁸ Shivananda H., *Why Replace the Assam Rifles along the Indo-Myanmar Border?*, INSTITUTE FOR DEFENCE STUDIES AND ANALYSES (IDSA) (July 29, 2011), http://www.idsa.in/idsacomments/WhyReplacetheAssamRiflesalongtheIndoMyanmarBorder_shivanandah_290711.

⁴⁹ Gurmeet Kanwal, *Indian Border Security Poor Management in Evidence 1* (Institute of Peace and Conflict Studies Issue Brief No. 55, Oct. 2007), http://www.ipcs.org/pdf_file/issue/380296651IPCS-IssueBrief-No55-GurmeetKanwal.pdf.

⁵⁰ Rajat Pandit, *Turf Battle over Control of Border*, THE TIMES OF INDIA (July 21, 2011), http://articles.timesofindia.indiatimes.com/2011-07-21/india/29799738_1_border-management-task-force-large-land-borders-myanmar-border.

⁵¹ *Group Of Ministers' Report On "Reforming The National Security System,"* PRESS INFORMATION BUREAU (May 23, 2001), <http://pib.nic.in/archieve/lreng/lyr2001/rmay2001/23052001/r2305200110.html>.

A report by an Indian Aerospace and Defense advisory firm, Aviatech, states that “[l]arge tracts of India’s political borders are either disputed, poorly demarcated or not demarcated by natural features. In addition to the risk of conventional international disputes, these uncertain borders also present the challenge of cross-border infiltration, illegal migration, smuggling and other forms of criminal activity.” Moreover, according to Arvind Gupta, Director General of the Institute for Defence Studies and Analyses (IDSA), “[t]he absence of co-ordination among various agencies, lack of technological resources, difficulties of co-ordination between states and the centre, the lack of mobile teams, sparse use of cyber technologies, and the absence of co-operation with neighbouring states are some of the obvious weaknesses in the Indian system.”⁵²

According to IDSA, “[t]ravel along India’s borders with Bangladesh, Myanmar and Bhutan highlights the porous nature of these borders, which pass through difficult terrain of forest, rivers and mountains and make the task of guarding all the more challenging.”⁵³

In the last few years India has held a series of bilateral meetings with some of its neighbors, including Bangladesh, Myanmar, China, Nepal, and Bhutan, to coordinate and enhance border management and security. The issue of illegal economic migration from Bangladesh appears to be one of the most serious issues facing border management and security in India. In 2011, India and Bangladesh signed a series of agreements on managing their common border. In March 2011, in response to the Border Security Force’s (BSF’s) “shoot to kill” policy against Bangladeshi nationals crossing the border illegally, India agreed to the non-use of lethal weapons by the BSF.

In July 2011, India and Bangladesh agreed to a Coordinated Border Management Plan, which aimed to “enhance [the] quality of border management as well as ensure cross-border security” by addressing “challenges to the peace and sanctity of the border posed by human and drug trafficking, gun running and cross border crimes. Under the Plan, India and Bangladesh have agreed to conduct joint coordinated patrols in areas susceptible to trafficking and other crimes based on shared intelligence inputs.”⁵⁴ On March 13, 2012, Border Guard Bangladesh (BGB) and the BSF started “coordinated patrolling” and “night coordinated patrolling” at 120 border points pursuant to the Coordinated Border Management Plan (CBMP).⁵⁵

⁵² Arvind Gupta, *India Can Learn From the US Experience in Securing its Borders*, IDSA (Dec. 14, 2009), http://www.idsa.in/idsacomments/IndiacanlearnfromtheUSexperienceinsecuringitsborders_agupta_141209.

⁵³ Shanthie Mariet D’Souza, *Border Management and India’s North East*, IDSA (July 18, 2006), http://www.idsa.in/idsastrategiccomments/BorderManagementandIndiasNorthEast_SMDSouza_180706.

⁵⁴ Pushpita Das, *The India-Bangladesh Border: A New Beginning*, THE DAILY STAR (Oct. 15, 2011), <http://www.thedailystar.net/newDesign/news-details.php?nid=206540>.

⁵⁵ S. Binodkumar Singh, *India – Bangladesh Relations: Continuous Consolidation – Analysis*, EURASIA REVIEW (Feb. 5, 2013), <http://www.eurasiareview.com/05022013-india-bangladesh-relations-continuous-consolidation-analysis/>.

Italy

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SUMMARY Italy has a comprehensive legal framework dealing with citizenship pathways and mechanisms for border management and security. While Italy still relies on the ancient “right of the soil” (*jus soli*) and “right of blood” (*jus sanguinis*) principles to determine citizenship, for at least the last twenty years it has extended the acquisition of citizenship to other justifying situations, including grounds such as adoption, service in the Italian Armed Forces, marriage, and the reacquisition of lost citizenship due to the displacement caused by World War II.

Italy’s borders are generally open to immigration, but under very stringent requirements. The Italian Ministry of the Interior has general enforcement powers over immigration that it shares with several subordinate agencies, which in turn enjoy broad police powers to grant admission into the Italian territory and order deportation. Finally, as a member of the European Union, Italy benefits from and has a duty to apply all of the rights and obligations concerning the right of entry and residence held by other European citizens, and the Italian state is also bound by common regulations and policies affecting other European Union Member States.*

I. Immigration Law

A. Constitutional Framework

According to the 1947 Constitution of the Italian Republic,¹ the Italian State has exclusive legislative powers concerning immigration matters. Nevertheless, Italy has obligations under European Union (EU) law and Italy has transposed various directives on immigration law² by incorporating their content into the *Testo unico* (Single Text) on immigration, a compilation of immigration laws.³ In addition, EU citizens have freedom of movement in Italy, thus limiting

* At present there are no Law Library of Congress research staff members versed in Italian. This report has been prepared by the author’s reliance on practiced legal research methods and on the basis of relevant legal resources in both English and Italian currently available in the Law Library and online.

¹ CONSTITUTION OF THE ITALIAN REPUBLIC art. 117(b) (Apr. 2009), http://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf (English version published by the Parliamentary Information, Archives and Publications Office of the Senate Service for Official Reports and Communication).

² Most recently Council Directive 2009/50/EC of 25 May 2009 on the Conditions of Entry and Residence of Third-country Nationals for the Purposes of Highly Qualified Employment, 2009 O.J. (L 155) 17, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:155:0017:0029:en:PDF>.

³ Decreto legislativo 25 luglio 1998, no. 286, *Testo unico delle disposizioni concernenti la disciplina dell’immigrazione e norme sulla condizione dello straniero* [Legislative Decree No. 286 of July 5, 1998, Consolidated Text of the Provisions Concerning the Field of Immigration and Rules on the Conditions of Foreigners] (hereinafter *Testo unico*), <http://www.altalex.com/index.php?idnot=836>.

the bulk of Italian immigration law to citizens of third countries (non-EU countries) (see below, Subpart G).

B. Visas for Entry into the Italian Territory

Visas to enter into the Italian territory are issued by the diplomatic or consular offices in the foreigner's country of residence.⁴ Foreigners in possession of a residence permit may re-enter the national territory without prior notification to the Border Police.⁵

The following persons are forbidden from entering the national territory

- Those who do not comply with established requirements
- Those considered a threat to public order or the security of the state, or from a country with which Italy has signed a treaty for the suppression of internal border controls and the free circulation of persons
- Those convicted for certain crimes, particularly those related to narcotics, sexual conduct, abetting illegal immigration into Italy or illegal emigration from Italy
- Those convicted for crimes involving the recruitment of persons for prostitution, the exploitation of prostitution, or the use of minors in illicit activities⁶

Residence permits based on employment are allowed for the duration of the employment relationship,⁷ and may not exceed nine months in the case of seasonal employment contracts; one year in the case of fixed-term employment contracts; and two years for open-ended employment contracts.⁸ Foreigners may stay in Italy for periods no longer than two years pursuant to first-time residence permits for self-employment.⁹ Annual quotas for various categories of workers can be established by decree.¹⁰ In 2012, the quota allowed for the admission of a maximum of 35,000 seasonal workers.¹¹

⁴ *Id.* art. 4.

⁵ *Id.* art. 4(2).

⁶ *Id.* art. 4(3)–(6), in conjunction with arts. 13–19.

⁷ *Id.* art. 22(11).

⁸ *Id.* art. 5(3-*bis*).

⁹ *Id.* art. 5(3-*quarter*).

¹⁰ *Id.* art. 3(4).

¹¹ Notizie [Notice], Ministero Dell'Interno, Decreto flussi stagionali 2012: disponibile l'applicativo per la compilazione delle domande [Decree on Seasonal Workflow: Application Forms Available] (Mar. 21, 2012), http://www.interno.gov.it/mininterno/export/sites/default/it/sezioni/sala_stampa/notizie/immigrazione/00000038_2012_03_21_flussi_2012.html.

Residence permits are also permitted for family reasons. Residence permits issued for reasons of marriage are immediately revoked when it is proven that marriage is not followed by cohabitation, unless children are born.¹²

Residence permits are renewable for a period equal to their original duration, as long as the conditions for granting residence still exist.¹³ Permanent residence permits can be granted to those who have resided in Italy under a qualifying residence permit for five years, have sufficient income to support themselves and their dependents, have adequate housing, and pass an Italian language test.¹⁴

C. Administrative Expulsion

An executive decree may order the expulsion of foreigners who are subject to criminal procedures even if judicial procedures are pending, with very limited exceptions.¹⁵ The police execute the expulsion measure.¹⁶ A foreigner who has been expelled may not reenter the national territory without a special authorization issued by the Minister of the Interior. In case of violation, the foreigner is subject to arrest and expulsion.¹⁷ In the case of reentry when expulsion has been decided by a judge, a term of imprisonment is imposed.¹⁸

D. Criminal Provisions

Several types of conduct related to immigration are punishable in Italy including, among others,

- illegally aiding the entry of a foreigner into the Italian territory;¹⁹
- activities aimed at procuring the illegal entry of another person into the territory of a state of which the person is not a citizen or does not have permanent residence;²⁰ and
- recruiting aliens for prostitution or sexual exploitation purposes or procuring minors for illicit activities.²¹

E. Special Rules Concerning European Union Citizens

Legislative Decree No. 30 of 2007²² transposes European Union Directive 2004/38,²³ thereby providing that EU citizens and their relatives who move to or reside in Italy have the right of free

¹² Testo unico art. 29.

¹³ *Id.* art. 5(4)–(6).

¹⁴ *Id.* art. 9.

¹⁵ *Id.* art. 13(3)–(3-*quater*).

¹⁶ *Id.* arts. 13(4), 14.

¹⁷ *Id.* art. 13(3-*quinqüies*).

¹⁸ *Id.*

¹⁹ *Id.* art. 12(1)–(3).

²⁰ *Id.* art. 12(1)–(3).

²¹ *Id.* art 12(3-*ter*).

circulation and stay in Italian territory.²⁴ EU citizens who remain in the Italian national territory legally and continuously for at least five years have the right to obtain a permanent stay permit.²⁵ This right is lost in the case of absence for more than two consecutive years.²⁶

II. Citizenship Pathways and Requirements

Currently, the acquisition, loss, and reacquisition of Italian citizenship is regulated by Law No. 91 of 1992,²⁷ and its implementing regulations: Decree No. 572 of 1993,²⁸ and Decree No. 362 of 1994.²⁹ This legislation emphasizes the importance of personal choice in the acquisition or loss of Italian citizenship, and recognizes the possibility of multiple citizenships. This legislation specifically addresses the acquisition of Italian citizenship by (a) descendants of Italian citizens who wish to acquire Italian citizenship; (b) foreigners who wish to become Italian citizens; and (c) persons who, after being born Italian, have lost their Italian citizenship and wish to recover it.³⁰

²² Decreto Legislativo n. 30 di 6 febbraio 2007, Attuazione della direttiva 2004/38/CE relativa al diritto dei cittadini dell'Unione e dei loro familiari di circolare e di soggiornare liberamente nel territorio degli Stati membri [Legislative Decree No. 30 of February 6, 2007, Implementation of Directive 2004/38/CE Related to the Right of European Citizens and Their Relatives to Freely Circulate in the Territory of the Member States], G.U. No. 72, Mar. 27, 2007, <http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legge:2007-02-06:30>.

²³ Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004, on the Right of Citizens of the Union and Their Family Members to Move and Reside Freely Within the Territory of the Member States, Amending Regulation (EEC) No. 1612/68 and Repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC, and 93/96/EEC, 2004 O.J. (L 158) 77, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:158:0077:0123:en:PDF>.

²⁴ Legislative Decree No. 30 of 2007, art. 3(1).

²⁵ *Id.* art. 14(1).

²⁶ *Id.* art. 14(4).

²⁷ Legge 5 febbraio 1992, n. 91 Nuove norme sulla cittadinanza [Law No. 91 of February 5, 1992, New Rules on Citizenship], G.U. No. 38, Feb. 15, 1992, up-to-date version at http://www.interno.gov.it/mininterno/site/it/sezioni/servizi/legislazione/cittadinanza/legislazione_30.html.

²⁸ Decreto del Presidente della Repubblica di 12 ottobre 1993, n. 572, Regolamento di esecuzione della legge 5 febbraio 1992, n. 91, recante nuove norme sulla cittadinanza [Decree of the President of the Republic of October 12, 1993, No. 572, Regulations for the Implementation of Law No. 91 of February 5, 1992, Concerning New Rules on Citizenship], G.U. No. 2, Jan. 4, 1994, <http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.del.presidente.della.repubblica:1993-10-12:572!vig>.

²⁹ Decreto del Presidente della Repubblica di 18 aprile 1994, n. 362, Regolamento recante disciplina dei procedimenti di acquisto della cittadinanza italiana [Decree of the President of the Republic of April 18, 1994, No. 362, Regulations on Procedures for the Acquisition of Italian Citizenship], G.U. No. 136, June 13, 1994, <http://www.normattiva.it/atto/caricaDettaglioAtto?atto.dataPubblicazioneGazzetta=1994-06-13&atto.codiceRedazionale=094G0368>.

³⁰ See *Cittadinanza* [Citizenship], MINISTERO DEGLI AFFARI ESTERI, http://www.esteri.it/MAE/IT/Italiani_nel_Mondo/ServiziConsolari/Cittadinanza.htm (last visited Feb. 11, 2013).

A. Automatic Acquisition of Italian Citizenship

Italian citizenship is automatically acquired

- by descent from an Italian citizen³¹ (minor children living with their parents when the parents acquire or reacquire Italian citizenship also automatically acquire citizenship³²),
- by birth in the Italian territory (persons whose parents are not known or are stateless³³ and those abandoned in Italian territory whose citizenship is impossible to determine are also Italian citizens³⁴),
- by voluntary or judicial recognition of filiation by/with an Italian citizen while the child is a minor³⁵ (adult children have a right to opt for Italian citizenship within one year from recognition of their filiation³⁶), and
- through adoption of foreign minor children by an Italian parent or through an adoption made overseas that is recognized under Italian laws³⁷ (adopted adult children have a right to opt for Italian citizenship after five years of legal residence in Italy from the date of adoption³⁸).

B. Acquisition by Declaration

Foreigners or stateless persons descending from Italian citizens by birth within the second degree may obtain Italian citizenship by a voluntary declaration in the following situations: (a) performance of military services in the Italian Armed Forces;³⁹ (b) assumption of employment by the state, even when performed abroad;⁴⁰ and (c) residence in Italy for at least two continuous years after reaching the age of majority.⁴¹

Foreigners not descending from Italian citizens but born in the Italian territory and legally and continuously residing there from birth until the age of majority may also acquire Italian citizenship upon an express declaration.⁴²

³¹ Law No. 91 of 1992, art. 1(1)(a).

³² *Id.* art. 2(1).

³³ *Id.* art. 1(1)(b).

³⁴ *Id.* art. 1(2).

³⁵ *Id.* art. 2(1).

³⁶ *Id.* art. 2(2).

³⁷ *Id.* art. 3(1).

³⁸ *Id.* art. 9(1)(b).

³⁹ *Id.* art. 4(1)(a).

⁴⁰ *Id.* art. 4(1)(b).

⁴¹ *Id.* art. 4(1)(c).

⁴² *Id.* arts. 2(1) & 4(2).

The foreign spouse of an Italian citizen may acquire Italian citizenship subject to the following requirements: (a) two years of legal residence after marriage (or three years if residing overseas),⁴³ with these periods reduced by half if the couple has children;⁴⁴ (b) a valid marriage and an ongoing conjugal relationship up to the time of acquisition of citizenship;⁴⁵ (c) no convictions in Italy for offenses punishable by three or more years of imprisonment, or convictions by foreign judicial authorities for nonpolitical crimes that carry a term of imprisonment exceeding one year;⁴⁶ (d) no convictions for various crimes against the state, such as attacks against the integrity, independence, or unity of the state, or treason, in Italy;⁴⁷ and (e) the absence of impediments concerning the security of the Republic.⁴⁸

C. Naturalization

Legal residence in Italy is a requirement in order to obtain Italian citizenship by naturalization. The following periods of residence are required: (a) three years for the foreign descendants of Italian citizens by birth up to the second degree, and for foreigners born in Italian territory;⁴⁹ (b) four years for European Union citizens;⁵⁰ (c) five years for adult foreigners adopted by Italian citizens,⁵¹ stateless persons,⁵² and refugees;⁵³ (d) seven years for persons related to an Italian citizen before the entry into force of Law 184 of May 4, 1983;⁵⁴ and (e) ten years for non-European citizens.⁵⁵

No period of residence is required for foreigners who have rendered outstanding services to Italy, or when there is an exceptional interest of the Italian state.⁵⁶

⁴³ *Id.* art. 5(1).

⁴⁴ *Id.* art. 5(2).

⁴⁵ *Id.* art. 5(1).

⁴⁶ *Id.* art. 6(1)(b).

⁴⁷ *Id.* art. 6(1)(a) (citing PENAL CODE bk. 2, tit. I, chs. 1–3).

⁴⁸ *Id.* art. 6(1)(c).

⁴⁹ *Id.* art. 9(1)(a).

⁵⁰ *Id.* art. 9(1)(d).

⁵¹ *Id.* art. 9(1)(b).

⁵² *Id.* art. 9(1)(e).

⁵³ *Id.* art. 16(2).

⁵⁴ Law No. 91 of 1992, art. 21 and Legge 4 maggio 1983, n. 184, Diritto del minore ad una famiglia [Law No. 184 of May 4, 1983, on the Right of Minors of a Family], G.U. No. 133, May 17, 1983, <http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:1983-05-04;184!vig>.

⁵⁵ Decree No. 362 of 1994; Law No. 91 of 1992, , art. 9(1)(f).

⁵⁶ *Id.* art. 9(2).

D. Recognition of Italian Citizenship Pursuant to Special Legislation

Law No. 379 of 2000⁵⁷ extends Italian citizenship to persons born and already resident in the territories of the former Austro-Hungarian Empire and their descendants, who must meet certain requirements.

Law No. 124 of 2006⁵⁸ relates to the recognition of Italian citizenship for nationals residing in the former Istria, Fiume, and Dalmatia between 1940 and 1947 who lost their Italian citizenship when these territories were ceded to the Republic of Yugoslavia under the Treaty of Paris (Trattato di Pace di Parigi) of February 10, 1947, and the Treaty of Osimo (Trattato di Osimo) of November 10, 1975, and their descendants.⁵⁹

E. Dual Citizenship

The acquisition of a foreign citizenship does not cause the loss of Italian citizenship, unless the Italian citizen expressly renounces his Italian citizenship⁶⁰ without prejudice to international treaties.

III. Immigration Management and Security

A. Governmental Structure

Border control is entrusted to the Border Police (Polizia di frontiera),⁶¹ and for purposes of defining the scope of Border Police authority the term “border” encompasses all access and departure points into and out of the country, whether by land, air, or sea.⁶²

The Italian Ministry of the Interior (Ministero dell’Interno) is at the top of the political and administrative hierarchy for immigration and border management and security. Subordinate agencies include the Department of Public Security (Dipartimento della Pubblica Sicurezza), to which the State Police (Polizia di Stato) is subordinated. The Central Directorate of the

⁵⁷ Legge 14 dicembre 2000, n. 379 Disposizioni per il riconoscimento della cittadinanza italiana alle persone nate e già residenti nei territori appartenuti all’Impero austro-ungarico e ai loro discendenti [Law No. 379 of December 14, 2000, Provisions for the Recognition of Italian Citizenship by Persons Born in and Already Residents of the Territories Belonging to the Austro-Hungarian Empire, and Their Descendants], G.U. No. 295, Dec. 19, 2000, <http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:2000;379>.

⁵⁸ Legge 8 marzo 2006, n. 124 Modifiche alla legge 5 febbraio 1992, n. 91, concernenti il riconoscimento della cittadinanza italiana ai connazionali dell’Istria, di Fiume e della Dalmazia e ai loro discendenti [Law No. 124 of March 8, 2006, Amending Law No. 91 of February 5, 1992, Concerning the Recognition of Italian Citizenship for Nationals of Istria, Fiume, and Dalmatia, and their Descendants], G.U. No. 73, Mar. 28, 2006, <http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:2006;124>.

⁵⁹ Law No. 91 of 1992, art. 17-bis.

⁶⁰ *Id.* art. 11(1).

⁶¹ *La polizia di frontiera* [The Border Police], POLIZIA DI STATO, <http://www.poliziadistato.it/articolo/view/23463/> (last visited Mar. 21, 2013).

⁶² *Id.*

Immigration and Border Police (Direzione Centrale della Polizia dell'Immigrazione e delle Frontiere)⁶³ is a part of the State Police, to which the Border Police (Polizia di frontiera), in turn, is subordinated. The Clandestine Immigration Combat Service (Servizi di Contrasto all'Immigrazione Clandestina) utilizes the forces of the Border Police to fight illegal immigration—namely, the Land Border Police (Polizia di frontiera terrestre), Air Border Police (Polizia di frontiera aerea), and Maritime Border Police (Polizia di frontiera marittima).

The Ministry of the Interior, jointly with the Ministry of Foreign Affairs, may send officers of the State Police as experts to assist in Italian diplomatic and consular missions overseas.⁶⁴

B. Italian Law on Border Management and Security

Law No. 189 of 2002 is the basic legislation on immigration enforcement in Italy. It establishes cooperation with other states, particularly European Union states, as a fundamental pillar of immigration enforcement.⁶⁵ Such cooperation focuses on the following areas: organized crime, human trafficking, prostitution, drug and weapons trafficking, judicial and prison matters, and the application of international norms related to navigation security.⁶⁶

The Italian state may review the cooperation and assistance programs in force when the other states fail to take preventative and surveillance measures to avoid the illegal reentry into the Italian territory of expelled citizens.⁶⁷

The monitoring of cooperative activities is entrusted to the Coordination and Monitoring Committee (Comitato per il coordinamento e il monitoraggio), which is presided over by the President of the Council of Ministers.⁶⁸

Italian vessels with police powers that find a vessel in the territorial sea or the contiguous zone may stop and inspect such vessel if there are reasonable grounds to believe that it is used for or involved in the illegal transportation of migrants, and, if sufficient evidence confirms the suspicions, sequester the vessel and escort it to a government port.⁶⁹ Military vessels may be used for such purposes.⁷⁰

⁶³ Legge 30 luglio 2002, n. 189 Modifica alla normative di immigrazione e di asilo [Law No. 189 of July 30, 2002, Amending the Law on Immigration and Asylum] art. 35(1), G.U. No. 199, Aug. 26, 2002, <http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legge:2002-07-30;189!vig>.

⁶⁴ *Id.* art. 36(1).

⁶⁵ *Id.* art. 1.

⁶⁶ *Id.* art. 1(2).

⁶⁷ *Id.* art. 1(3).

⁶⁸ *Id.* art. 2(2).

⁶⁹ *Id.* art. 11(1)(d)(9-bis).

⁷⁰ *Id.* art. 11(1)(d)(9-ter).

C. European Union Regulations and Policies Applicable to Italy

Italy is part of the Schengen Agreement, which creates one contiguous borderless area for twenty-six European countries. These countries provide police and judicial cooperation to each other.⁷¹ Italy shares an internal border with Austria, which is also a Schengen member, and an external border with Croatia, which is not a Schengen member. In addition, Italy is responsible for a large external maritime border.

Pursuant to the Schengen Agreement, which Italy ratified in 1993,⁷² the Minister of the Interior, after consultation with the National Committee for Public Order and Security (Comitato nazionale per l'ordine e la sicurezza pubblica), is in charge of issuing the necessary measures for the unified coordination of the control over the maritime and land borders in Italy. The Minister of the Interior also promotes appropriate coordination measures among the Italian authorities with jurisdiction in matters of immigration control, and the European authorities competent in matters of immigration control.⁷³ The Parliamentary Committee for Monitoring the Implementation of the Schengen Agreement, for the Supervision of the Activities of Europol, and for the Control and Supervision on Immigration Matters, created by the Law of 1993 that approved the Schengen Agreement, is in charge of overseeing the implementation of all domestic legislation and international treaties applicable in Italy concerning immigration.⁷⁴

For an in-depth discussion of the Schengen Agreement as it relates to immigration and border security, see the report, *EU Schengen Area*, below.

⁷¹ The Schengen acquis—Convention Implementing the Schengen Agreement Between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the Gradual Abolition of Checks at Their Common Borders (hereinafter Implementing Convention), 2000 O.J. (L 239) 19, as amended, [http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:42000A0922\(02\):EN:NOT](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:42000A0922(02):EN:NOT). The following materials discuss the existing policies concerning the management of the external borders of the European Union: *Management of the External Borders*, EUROPEAN PARLIAMENT (July 2008), http://circa.europa.eu/irc/opoce/fact_sheets/info/data/policies/freedom/article_7307_en.htm; ISTITUTO AFFARI INTERNAZIONALI, L'UNIONE EUROPEA E LA POLITICA DI SICUREZZA E DI DIFESA COMUNE: ELEMENTI [THE EUROPEAN UNION AND THE COMMON SECURITY AND DEFENSE POLICY: ELEMENTS] (Apr. 4, 2012), <http://www.iai.it/pdf/DocIAI/IAI1204.pdf>; Organization for Security and Co-operation in Europe (OSCE), *Strategia dell'OSCE per far fronte alle minacce alla sicurezza e alla stabilità nel ventunesimo secolo* [The Strategy of the OSCE for Confronting Threats to Security and Stability in the Twenty-first Century], <http://www.osce.org/it/mc/17507> (last visited Mar. 21, 2013); ALESSANDRO ALESSANDRONI & CARLA SIMONETTI, *LE TECNOLOGIE BIOMETRICHE PER IL CONTROLLO DELLE FRONTIERE NELL'UNIONE EUROPEA* [BIOMETRIC TECHNOLOGY FOR BORDER CONTROL IN THE EUROPEAN UNION] (Agenzie Per L'Italia Digitale, 2005), <http://www.digitpa.gov.it/sites/default/files/notizie/Strumenti%20e%20tecnologie%20per%20il%20controllo%20del%20frontiere%20nella%20Unione%20Europea.pdf>.

⁷² Legge 30 settembre 1993, n. 388 Ratifica ed esecuzione: a) del protocollo di adesione del Governo della Repubblica italiana all'accordo di Schengen del 14 giugno 1985 [Law No. 388 of September 30, 1993, Ratification and Implementation of: a) the Protocol of Adhesion of the Government of the Italian Republic to the Schengen Agreement of June 14, 1985 . . .], G.U. No. 232, Oct. 2, 1993, <http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:1993-09-30;388>.

⁷³ Law No. 189 of 2002, art. 10(1-bis).

⁷⁴ *Id.* art. 37(1).

Japan

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SUMMARY Foreign nationals who receive landing permission are required to engage in activities pursuant to their status of residence. In order to work, a foreigner must have an appropriate status of residence. The points-based system provides highly skilled foreign professionals with preferential immigration treatment.

An illegal immigrant may be able to stay in Japan legally only if he or she obtains special permission from the Minister of Justice.

The Japanese Nationality Law is based on lineage. A foreigner may acquire Japanese nationality by naturalization. If a foreigner has certain ties with Japan, he or she is exempted from some of the requirements.

Because Japan is surrounded by the sea, border security means security of the coasts. The Japan Coast Guard is in charge of crimes on the sea, including smuggling and illegal immigration.

I. Overview

Foreigners wishing to enter Japan are, in principle, required to have a valid passport issued by the government of their own country along with a visa issued by the Japanese embassy or consulate.¹ Japan has seven visa categories: transit, temporary visitor, working, general, specified official, and diplomatic.² At an airport or seaport, immigration officers check whether or not the foreign national wishing to enter Japan meets the requirements for entering the country.³ If the requirements are met, the immigration officer grants the foreigner landing permission, which is stamped on his or her passport.⁴ The landing permission shows the status of residence of the foreigner.

Foreign nationals who receive landing permission are required to engage in activities pursuant to their status of residence.⁵ There are twenty-seven statuses of residence,⁶ sixteen of which are for

¹ *Visa System in Japan*, MINISTRY OF FOREIGN AFFAIRS OF JAPAN, http://www.mofa.go.jp/j_info/visit/visa/system/index.html (last visited Feb. 20, 2013).

² *FAQ on Japanese Visa*, EMBASSY OF JAPAN IN THE UNITED STATES OF AMERICA, http://www.us.emb-japan.go.jp/english/html/travel_and_visa/visa/faq_new.htm (last visited Feb. 28, 2013).

³ *Shutsunyūgoku kanri oyobi nan'min nintei hō* [Immigration Control and Refugee Recognition Law] (Immigration Control Law), Order no. 319 of 1951, *last amended* by Law No. 79 of 2009, art. 7.

⁴ *Id.* art. 9.

⁵ *Id.* art. 2-2.

employment of foreigners. Some other statuses of residence also allow employment, such as trainee and permanent resident status. The points-based system provides highly skilled foreign professionals with preferential immigration treatment.⁷ Such foreigners include researchers who engage in academic research activities, persons who engage in advanced specialized or technical activities, and persons who engage in business management activities.⁸

For low-skilled foreigners, there is a “technical intern training” status of residence, though it is not the intention of the law to accept low-skilled workers. The purpose of creating this status was to transfer technical skills to the country where the interns and trainees come from.⁹ An institution that provides training to foreigners can employ them for up to two years after the training.¹⁰ The regulations were recently tightened due to the system being used by some enterprises to acquire cheap labor and some foreign workers being exploited.¹¹

Foreigners who are second- and third-generation descendents of Japanese emigrants, the so-called *nisei* and *sansei*, can stay and work without restriction in Japan under the status of residence for long-term residents.¹² Many of these people are from South American countries, such as Brazil and Peru. The term of this status of residence is for up to five years.¹³ Since April 2006, to obtain or renew this status of residence, a criminal record issued from the police authority in the country they come from is required.¹⁴

⁶ *Id.* art. 2-2 and Annexed Tables 1 & 2. English translation of statuses is available on the website for foreign students managed by the Ministry of Foreign Affairs at http://www.studyjapan.go.jp/en/toj/toj04e_01.html (last visited Feb. 20, 2013).

⁷ *Points-Based Preferential Immigration Treatment for Highly Skilled Foreign Professionals*, IMMIGRATION BUREAU OF JAPAN, MINISTRY OF JUSTICE (MOJ), http://www.immi-moj.go.jp/newimmiact_3/en/index.html (last visited Feb. 19, 2013).

⁸ *Points-Based System That Provides Highly Skilled Foreign Professionals with Preferential Immigration Treatment*, IMMIGRATION BUREAU, MOJ (Dec. 2011), http://www.immi-moj.go.jp/newimmiact_3/en/pdf/01_e.pdf.

⁹ *Aratana kenshū ginō jisshu seido ni kakaru Q&A [Q&A Regarding New Trainee and Technical Intern Training Systems]*, MOJ, Q 1-2, http://www.moj.go.jp/nyuukokukanri/kouhou/nyuukokukanri_07_00011.html, (last visited Feb. 19, 2013).

¹⁰ Immigration Control Law, art. 21. Immigration Control and Refugee Recognition Law Enforcement Ordinance, MOJ Ordinance No. 55 of 1981, *last amended by* MOJ Ordinance No. 40 of 2012, art. 3 and Annexed Table 2.

¹¹ *Gno jisshusei no nyukoku zairyū kanri ni kansuru shishin [Guidelines on Acceptance and Management of Technical Interns' Stays]* (as amended in November 2012), IMMIGRATION BUREAU, MOJ, <http://www.moj.go.jp/content/000102863.pdf>.

¹² *Shutsunyūgoku kanri oyobi nan'min nintei hō dai 7 jō dai 1 kou dai 2 gō no kitei ni motoduki dōhō beppyō dai ni no teijūsha no kō no karan ni kakageru chii o sadameru ken [Regarding Status of Long-Term Residents in Annexed Table of Immigration Control and Refugee Recognition Law Under article 7, paragraph 1, item 2 of the Law]*, MOJ Notice No. 132 of 1990, *last amended by* MOJ Notification No. 37 of 2010.

¹³ Immigration Control and Refugee Recognition Law Enforcement Ordinance, MOJ Ordinance No. 55 of 1981, *last amended by* MOJ Ordinance No. 40 of 2012, art. 3 and Annexed Table 2.

¹⁴ *Zairyū shikaku “teijūsha” de nyūgoku/ zairyū suru nikkeijin no kata no nyūkan tetuduki ni tsuite [Concerning Immigration Procedure for Japanese Descendants Who Enter or Stay in Japan Under the Status of Residence for “Long-Term Residents”]*, MOJ, <http://www.immi-moj.go.jp/keiziban/happyou/nikkei.html> (last visited Feb. 19, 2013).

The Ministry of Justice (MOJ) issues a resident card to foreign nationals residing legally in Japan for the mid- to long-term with resident status. The card contains a portrait photo of the individual as well as his or her name and basic personal information, resident status, and period of permitted stay.¹⁵ When foreign residents wish to change their status of residence after entry or to extend their period of stay, or to obtain permission to engage in activities other than those permitted under the previously granted status of residence, they are required to submit applications for such changes to the regional immigration bureau nearest to their residence in Japan and obtain approval.¹⁶

In addition to criminal prosecution for those who violate the Immigration Control Law,¹⁷ there is a system to deport illegal aliens or order them to depart from Japan. An immigration control officer may conduct an investigation for deportation.¹⁸ The deportation may be forced upon aliens who, among other things, have committed illegal entry, document fraud, or overstay.¹⁹ An immigration inspector may, instead of deporting them, issue a departure order to illegally staying foreigners who have satisfied all of the following conditions:

- they have made a voluntary appearance at an immigration office with the intention of departing from Japan promptly;
- they have never committed a specified crime in Japan;
- they have never been deported or received a departure order; and
- they have proved the certainty of their prompt departure from Japan.²⁰

Such foreigners must depart from Japan within fifteen days.²¹

II. Changing Illegal Immigrant Status

An illegal immigrant may be able to stay in Japan legally only if he or she obtains special permission from the Minister of Justice. Under the Immigration Control Law, the Minister of Justice is authorized to grant special permission to stay to an illegal immigrant.²² Article 50, paragraph 1 of the Law states:

The Minister of Justice may . . . grant the suspect special permission to stay in Japan if the suspect falls under any of the following items:

- (i) He or she has obtained permission for permanent residence.

¹⁵ Immigration Control Law art. 19-3.

¹⁶ *Id.* arts. 20 and 21

¹⁷ *Id.* art. 70.

¹⁸ *Id.* art. 27.

¹⁹ *Id.* art. 24.

²⁰ *Id.* art. 24-3.

²¹ *Id.* art. 55-3.

²² *Id.* art. 50.

- (ii) He or she has had in the past a registered domicile in Japan as a Japanese national.
- (iii) He or she resides in Japan under the control of another as a result of trafficking in persons.
- (iv) The Minister of Justice finds grounds for granting special permission to stay, other than the previous items.

This decision is made individually with respect to each case based on comprehensive consideration of various factors, including the reason for stay, family conditions in Japan, the person's conduct, the person's current situation both at home and abroad, the need for humanitarian considerations, and the impact on other illegal residents.²³ To enhance the transparency and predictability of special permission to stay, the Immigration Bureau released the "Guidelines on Special Permission to Stay in Japan."²⁴ It lists the positive and negative factors taken into account, in addition to items (i) to (iii) above, which are positive elements. For example, if the person has a Japanese parent, child, or spouse, this is considered a positive element.²⁵

III. Citizenship Pathways and Requirements

The Japanese Nationality Law is based on lineage. A child whose father or mother is a Japanese national at the time of his or her birth acquires Japanese nationality.²⁶ A person who is not a Japanese national (foreigner) may acquire Japanese nationality by naturalization.²⁷ In general, the following conditions are required for naturalization:

A foreigner must

1. have been domiciled in Japan for five years or more consecutively;
2. be twenty years old or older and of full capacity to act according to the law of his or her home country;
3. be of upright conduct;
4. be able to secure a livelihood by his or her own property or ability, or those of his or her spouse or other relatives with whom he or she lives on common living expenses;
5. lose other nationalities, if he or she has any, by the acquisition of Japanese nationality; and

²³ Immigration Bureau, MOJ, Japan, 2011 IMMIGRATION CONTROL 100 (2011) <http://www.moj.go.jp/content/000081970.pdf>.

²⁴ *Guidelines on Special Permission to Stay in Japan*, IMMIGRATION BUREAU, MOJ (October 2006, revised July 2009), <http://www.moj.go.jp/content/000048156.pdf>.

²⁵ *Id.* at 1.

²⁶ Kokuseki hō [Nationality Law], Law No.147 of 1950, *last amended by* Law No. 88 of 2008, art. 2.

²⁷ *Id.* art. 4.

6. have never plotted, advocated, or been involved with a political party or other organization that has plotted or advocated the overthrow of the Constitution of Japan or the Japanese government.²⁸

A foreigner may be exempted from one or several items if other conditions are met. If a foreigner has a Japanese spouse or another family relation in Japan, the requirements for naturalization are relaxed.

A foreigner who is presently domiciled in Japan may be exempted from Item 1 if any one of the following apply:

The foreigner

- a. has had a domicile or residence in Japan for three consecutive years or more and is the child of a person who was a Japanese national (excluding a child by adoption);
- b. was born in Japan and has had a domicile or residence in Japan for three consecutive years or more, or his or her father or mother (excluding father and mother by adoption) was born in Japan; and
- c. has had a residence in Japan for ten consecutive years or more.²⁹

A foreigner may be exempted from Items 1 and 2 if he or she

- a. has a Japanese spouse, has had a domicile or residence in Japan for three consecutive years or more, and is presently domiciled in Japan; or
- b. has been married to a Japanese spouse for three years or more and has had a domicile in Japan for one consecutive year or more.³⁰

A foreigner may be exempted from Items 1, 2, and 4 if he or she

- a. is a child (excluding a child by adoption) of a Japanese national and has a domicile in Japan;
- b. is a child by adoption of a Japanese national and has had a domicile in Japan for one consecutive year or more, and was a minor according to the law of his or her native country at the time of the adoption;
- c. has lost Japanese nationality by birth (not obtained by naturalization) and has a domicile in Japan; or
- d. was born in Japan and has had no nationality since the time of birth, and has had a domicile in Japan for three consecutive years or more since then.³¹

Foreigners may be exempted from Item 5 if they cannot deprive themselves of their current nationality because their current country of nationality does not allow it.³² Dual nationality is

²⁸ *Id.* art. 5, para. 1.

²⁹ *Id.* art. 6.

³⁰ *Id.* art. 7.

³¹ *Id.* art. 8.

³² *Id.* art. 5, para. 2.

not permitted in Japan unless the person is a minor who obtained another nationality at the time of birth.³³

Regarding foreigners who have rendered especially meritorious service to Japan, the Minister of Justice may permit their naturalization with the approval of the Diet, without considering general requirements.³⁴

IV. Mechanisms for Border Management and Security

Since Japan is surrounded by the sea, border security means security of the coasts. The Japan Coast Guard (JCG) is in charge of crimes on the sea,³⁵ including smuggling and illegal immigration. Japanese organized crime groups and international crime syndicates are often involved in such activities. “To halt such crimes at the water’s edge, the JCG is working together with the relevant organizations in Japan and overseas and conducts enforcement operations.”³⁶ At international harbors, the JCG conducts on-the-spot inspections of incoming vessels.³⁷

The Coast Guard arrested many foreigners in the 1990s who illegally tried to land in Japan in large groups by coming ashore or hiding in containers.³⁸ Illegal immigrants from the sea come mainly from China. Nowadays, illegal immigrants come to Japan by hiding in secret rooms in cargo vessels or on Korean fishing vessels to which they transferred from Chinese vessels on the sea near Korea.³⁹

³³ *Id.* arts 11 and 12.

³⁴ *Id.* art. 9.

³⁵ Kaijō hoan chō hō [Coast Guard Agency Law], Law No. 28 of 1948, *last amended by* Law No. 71 of 2012, art. 2, para. 1.

³⁶ Japan Coast Guard, JCG, at 10, <http://www.kaiho.mlit.go.jp/e/pamphlet.pdf> (last visited Feb. 19, 2013).

³⁷ Security of International Ships and of International Port Facilities Act, Law No. 31 of 2004, art. 45.

³⁸ *Heisei 17-nen no kaijō hanzai torishimari jōkyō* [Status of Crimes on the Sea in 2005], Japan Coast Guard, 14 (Feb. 22, 2006), available at <http://www.kaiho.mlit.go.jp/info/kouhou/h18/k20060222/h17-tori-shimari.pdf>.

³⁹ *Fuhō nyūkoku jihan no torishimari kyōka* [Enhanced Enforcement of Illegal Entry Cases], JCG, <http://www.kaiho.mlit.go.jp/shisaku/mikkou.htm> (last visited Feb. 19, 2013).

Mexico

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SUMMARY Mexico's Law of Migration provides a broad immigration policy framework, and rules regulating visas, establishing penalties applicable to unlawful entry and overstays, and establishing a legalization process for undocumented immigrants. Mexico's Nationality Law governs naturalization procedures.

The administration of former Mexican President Felipe Calderón had one main objective concerning border security: to protect the security of the borders and the human rights of the inhabitants and immigrants in those regions. In order to achieve these objectives, the administration created units composed of federal and local police officers supported by military forces tasked with protecting the security of Mexicans and the inhabitants of border regions, and created communications channels with neighboring countries in order to exchange information and share strategies concerning border security.

In December 2012, current Mexican President Enrique Peña Nieto indicated that his administration will create a National Gendarmerie tasked with strengthening control of strategic assets, such as borders, ports, and airports.

I. Migration Law and Policy

A. Governing Principles

Immigration in Mexico is primarily governed by the Law of Migration¹ and its regulations. This Law provides a broad set of guiding principles on immigration policy, including

- absolute respect for the human rights of migrants, both nationals and foreigners;
- protection of the rights of foreign migrants in Mexico to the same extent that Mexico demands protection for the rights of Mexican migrants abroad;
- shared responsibility with the governments of other countries on immigration issues;
- hospitality and solidarity with foreign individuals who need a new place to reside, either temporarily or permanently, due to extreme circumstances in their countries of origin that put their lives at risk;
- the facilitation of international mobility of individuals, while protecting security and order;
- complementarity of labor markets with other countries in the region;

¹ Ley de Migración [Law of Migration], DIARIO OFICIAL DE LA FEDERACIÓN [D.O.], May 25, 2011, available on the website of Mexico's House of Representatives, <http://www.diputados.gob.mx/LeyesBiblio/pdf/LMigra.pdf>.

- acknowledgement of the acquired rights of immigrants, where foreigners have earned rights and obligations due to their family, labor, or business relationships established in Mexico, even if those foreigners may have lived in Mexico without immigration status, provided that they have been otherwise law abiding individuals;
- family unity, which is recognized as an element for the integration of a productive social fabric of Mexico's immigrant community; and
- social and cultural integration of nationals and foreigners who reside in Mexico, with respect for the cultures and customs of immigrants, provided they do not contravene Mexican laws.²

The National Institute of Migration (part of Mexico's Department of Governance) has the authority to execute, control, and supervise the acts performed by immigration authorities and to implement immigration policies pursuant to guidelines issued by the Department of Governance.³

B. Visas

The Law of Migration provides that in order to enter Mexico, foreigners generally must present a valid passport and a current visa.⁴ Visas are not required in certain instances, such as when the country of origin of the foreigner is exempt from this requirement pursuant to international agreements or unilateral decisions of the Mexican government.⁵ Alternatively, foreigners who wish to enter Mexico may present a resident card, or a card issued to regional visitors (i.e., nationals from, or residents in, Guatemala and Belize who are allowed to visit Mexico's border regions for up to three days), visitor border workers (i.e., Guatemalan and Belizean nationals who are allowed to work for up to a year in certain Mexican states), and visitors for humanitarian reasons.⁶

There are several types of visas, including visitor (with or without a work permit), adoption purposes, temporary resident, student, and permanent resident visas.⁷ Issuance of visas and permits for entry and stay may be denied for several reasons, including where the alien is subject to criminal proceedings or has been convicted for a serious crime pursuant to Mexican law or applicable treaties, or on national security or public safety grounds related to the foreigner's background in Mexico or abroad.⁸

² *Id.* art. 2.

³ *Id.* art. 19.

⁴ *Id.* art. 37-I.

⁵ *Id.* art. 37-III.

⁶ *Id.* arts. 37-I(c) & 52-III, IV.

⁷ *Id.* art. 40.

⁸ *Id.* art. 43.

C. Penalties for Unlawful Entry and Overstays

Mexico's Migration Law provides that undocumented aliens who enter the country without authorization may be deported.⁹ Aliens who overstay their visas or engage in activities different from those authorized may apply for legal status, provided that applicable requirements are met.¹⁰ Those requirements include paying a fine ranging from twenty to one hundred days of the general minimum daily wage in force in Mexico's Federal District.¹¹ As of March 2013, the general minimum daily wage in the Federal District was \$64.76 Mexican pesos¹² (approximately US\$5.20).¹³

II. Legalization of Undocumented Immigrants

Undocumented aliens may apply for immigration status provided that applicable requirements are met.¹⁴ More specifically, undocumented aliens residing in Mexico have the right to apply for legal status if they

- are married to, or have a common law marriage with, a Mexican national or legal resident in Mexico;
- have Mexican children or parents, or are guardians of Mexican nationals or legal residents in Mexico;
- are identified by Mexican authorities as victims or witnesses of a serious crime committed in Mexico;
- have a level of vulnerability that makes it difficult or impossible for them to be deported; or
- are children and adolescents subject to international abduction and restitution procedures.¹⁵

In addition, aliens who have overstayed their visas, engage in activities different from those authorized, or simply lack the necessary documentation to prove legal status may apply for immigration status provided that applicable requirements are met.¹⁶ Generally, undocumented aliens who wish to apply for legal status must

⁹ *Id.* art. 144(I)–(II).

¹⁰ *Id.* arts. 134(I)–(II), 135.

¹¹ *Id.* arts. 134(I), 135(V), 146.

¹² *Salarios Mínimos Generales por Áreas Geográficas 1992–2013* [General Minimum Wage by Region 1992–2013], COMISIÓN NACIONAL DE LOS SALARIOS MÍNIMOS [NATIONAL MINIMUM WAGE COMMISSION], http://www.conasami.gob.mx/pdf/salario_minimo/sal_min_gral_area_geo.pdf.

¹³ *Mercado cambiario (Tipos de cambio)* [Exchange Market (Exchange Rates)], BANCO DE MÉXICO, <http://www.banxico.org.mx/portal-mercado-cambiario/index.html> (peso to US dollar exchange rate as of Mar. 20, 2013).

¹⁴ Ley de Migración arts. 132, 133.

¹⁵ *Id.* art. 133.

¹⁶ *Id.* arts. 132, 134.

- submit a statement to Mexico’s National Institute of Migration requesting regularization of status and explaining the irregularities incurred by the alien;
- present an official identification document;
- if the application is based on a relationship with a Mexican national or legal resident in Mexico, provide documentation of such relationship;
- in the case of aliens who overstay their visas, present their expired visa and apply for status within sixty days after such expiration occurred;
- pay a fine; and
- fulfill the requirements applicable to the particular status that the alien wishes to obtain.¹⁷

III. Citizenship

Mexico’s Constitution provides that Mexican nationality may be acquired by birth or by naturalization.¹⁸ The Constitution provides that Mexicans by birth are those

- born in Mexican territory, regardless of the nationality of the parents;
- born abroad from a Mexican parent born in Mexico;
- born abroad from a Mexican parent by naturalization; or
- born aboard a Mexican vessel or aircraft.¹⁹

Mexico’s Nationality Law provides that a foreigner who wants to apply for naturalization must demonstrate that he/she has resided in Mexico for at least five years immediately preceding the filing of the application.²⁰ This period of residency in Mexico may be reduced to two years if the applicant

- is a direct descendant of a Mexican national by birth;
- has children who are Mexican nationals by birth;
- is a native of a Latin American country or the Iberian Peninsula;
- has been married to a Mexican national and has lived in Mexico with his/her Mexican spouse for two years; or

¹⁷ *Id.* arts. 134, 135.

¹⁸ CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS [POLITICAL CONSTITUTION OF THE MEXICAN UNITED STATES], as amended, art. 30, D.O., Feb. 5, 1917, <http://www.diputados.gob.mx/LeyesBiblio/pdf/1.pdf>.

¹⁹ *Id.*

²⁰ Ley de Nacionalidad [Law of Nationality], as amended, art. 20, D.O., Jan. 23, 1998, <http://www.diputados.gob.mx/LeyesBiblio/pdf/53.pdf>.

- has provided a service that is beneficial to Mexico in the fields of culture, society, science, art, sports, or business, subject to the discretion of Mexico's Department of Foreign Affairs.²¹

The five-year period of residency in Mexico may be reduced to one year if the applicant for naturalization is adopted by a Mexican national.²²

In addition to the period of residency, applicants for naturalization are required to speak Spanish, demonstrate knowledge of the history of Mexico and integration into its culture, take an oath of allegiance to Mexico, renounce any other nationality, and submit a naturalization application to Mexico's Department of Foreign Affairs.²³

IV. Border Security

The administration of former Mexican President Felipe Calderón, who was in power from 2006 to 2012, had one main objective concerning border security: to protect the security of the borders and the human rights of the inhabitants and immigrants in those regions.²⁴ In order to achieve this objective, the administration (1) created units composed of federal and local police officers supported by military forces that were tasked with protecting the security of Mexicans and the inhabitants of border regions who are exposed to smugglers and human and drug traffickers; and (2) created communications channels with neighboring countries in order to exchange information and share strategies concerning border security, with the goal of controlling immigration flows, protecting the rights of migrants, and combating international criminals and terrorists.²⁵

In 2012, President Calderón informed the Mexican Congress that, pursuant to these two strategies, the federal government (through its Departments of Justice, Foreign Relations, Governance, Defense, and Navy, as well as Mexican state and local authorities) strengthened cooperation mechanisms on security, border development, and communications with the governments of Mexico's three neighboring countries, the United States, Guatemala, and Belize.²⁶

Furthermore, Mexico's armed forces were tasked with patrolling the northern and southern borders in 2011 and 2012, which resulted in the arrest of criminals and seizure of narcotics,

²¹ *Id.*

²² *Id.*

²³ *Id.* art. 19.

²⁴ Ch. 1.9, *Seguridad fronteriza* [*Border Security*], in Plan Nacional de Desarrollo 2007–2012, [National Development Plan 2007–2012], <http://pnd.calderon.presidencia.gob.mx/eje1/seguridad-fronteriza.html>.

²⁵ *Id.*

²⁶ Ch. 1.9, *Seguridad fronteriza* [*Border Security*], SEXTO INFORME DE GOBIERNO [SIXTH GOVERNMENT REPORT (Presidential Report to Congress)] 90 (2012), http://sexto.informe.gob.mx/pdf/INFORME_ESCRITO/01_CAPITULO_ESTADO_DE_DERECHO_Y_SEGURIDAD/1_09_Seguridad_Fronteriza.pdf.

weapons, and currency.²⁷ In addition, Mexico's Department of Justice coordinated a series of law enforcement efforts in Mexico's southern border regions, including drug and human trafficking operations.²⁸ In December 2012, current Mexican President Enrique Peña Nieto indicated that his administration will create a National Gendarmerie tasked with strengthening control of strategic assets, such as borders, ports, and airports.²⁹

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Creación de la Gendarmería Nacional* [Creation of the National Gendarmerie], PRESIDENCIA DE LA REPÚBLICA (Dec. 17, 2012), <http://www.presidencia.gob.mx/creacion-de-la-gendarmeria-nacional/>.

Russian Federation

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SUMMARY Management of migration processes is a significant problem for Russian authorities. For the last twenty years, the country has experienced a growing influx of immigrants, mostly illegal. Administrative programs initiated by the government together with constantly changing legislation are aimed at establishing migration control mechanisms and softening conflicts between ethnic Russians and foreigners. The legislation provides for admission of individuals seeking employment in Russia. Most of the guest workers are required to apply for entry visas based on their labor contracts. The duration of visas usually coincides with the term of employment, and the issuance of visas is based on quotas for hiring foreigners defined by the federal government annually. Guest workers cannot change their employers voluntarily. Except for highly skilled employees, temporary workers are not eligible for permanent residency, public welfare, or admission of other family members. Employers are responsible for their employees' compliance with migration legislation and their departure from Russia after termination of employment. Different legal programs exist for people who do not need to receive visas to enter Russia. Illegal migration is an offense punishable by imprisonment. Employers who use the labor of illegal migrants face heavy fines if caught. The Federal Migration Service monitors the enforcement of migration legislation in the country. Border protection troops are assigned to fight illegal migration on the national borders.

I. Introduction

According to the World Bank, Russia is the second most frequent migrant destination country in the world following the United States, with approximately 12.3 million immigrants who have moved to the country primarily for economic reasons.¹ The Federal Migration Service of the Russian Federation, a government agency in control of the migration process, reported 9.1 million guest workers employed in Russia in 2012, mostly from the former Soviet states, China, Southeast Asia, sub-Saharan Africa, and Eastern Europe.² About one-quarter of officially admitted migrant workers from the countries that have visa arrangements with Russia are unskilled laborers working mostly in the construction and mining industries and providing janitorial services. About 35% of all migrants are concentrated in the city of Moscow.³

Russia does not have a detailed program aimed at inviting and accommodating immigrants. The first formal migration policy was formulated by the government in 2002, its goal being to secure

¹ WORLD BANK, MIGRATION AND REMITTANCES FACTBOOK 2011, at IX, <http://siteresources.worldbank.org/INTLAC/Resources/Factbook2011-Ebook.pdf>.

² Information on Foreign Labor Migration Reported by the Federal Migration Service of the Russian Federation (FMS), <http://www.fms.gov.ru/about/statistics/data/details/53595/> (official website of the FMS; last visited Feb. 19, 2013).

³ *Russia Will Admit 1.74 Million Guest Workers, A Quarter of Whom are Unskilled*, NEWSRU.COM (Nov. 10, 2011), http://www.newsru.com/finance/10nov2011/migrants_print.html (in Russian).

rational distribution of population with the purpose of effective economic development and the elimination of regional social and economic differences.⁴ The recently approved Concept of the State Migration Policy for the Period Until 2025⁵ is aimed at strengthening control over migration and migrants while simplifying procedures for legal labor migration.

Unregulated labor migration and the use of workers who are in Russia illegally is a significant problem. According to the Federal Migration Service, between three and five million foreigners are working in Russia illegally,⁶ and this creates intense pressure on the government and the Russian population in the areas of social protection, health care, residential living, and employment.⁷ Additionally, law enforcement agencies report constantly increasing numbers of crimes committed by foreigners. Guest workers commit 15% of all crimes in Russia and are responsible for every fifth murder, every third theft, and every second rape committed in Moscow.⁸ In 2012, the office of the Prosecutor General investigated 2,682 cases of migration legislation violations,⁹ and each month approximately 2,000 migrant workers who are in Russia illegally are removed from the country.¹⁰

II. General Immigration Policy

Major immigration principles are defined by the Russian Constitution and legal acts regulating the entry of foreigners into Russia and hiring of foreign workers for the domestic labor market. These are the Federal Law No. 159 of August 22, 1996, on Entry into and Exit from the Russian Federation;¹¹ Federal Law No. 115 of July 25, 2002, on the Legal Status of Foreign Individuals in the Russian Federation;¹² and Federal Law No. 109 of July 18, 2006, on Migration Registration of Foreign and Stateless Individuals in the Russian Federation.¹³ These acts were

⁴ Concept of the Federal Migration Policy, SOBRANIE ZAKONODATELSTVA ROSSIISKOI FEDERATSII [SZRF] [RUSSIAN FEDERATION COLLECTION OF LEGISLATION (official gazette)], 2002, No. 12, Item 1458.

⁵ President of the Russian Federation, Concept of the State Migration Policy for the Period Until 2025 (July 13, 2012), <http://www.fms.gov.ru/law/868/details/53252/> (in Russian).

⁶ *Ministry of Health Care and Social Protection Increased Quotas for Labor Migrants*, NEWSRU.COM (Apr. 11, 2012), http://www.newsru.com/finance/11apr2012/migr_print.html (in Russian).

⁷ E.A. Efimova, *Foreign Workers in the Labor Market of the Russian Federation*, PROBLEMY SOVREMENNOI EKONOMIKI No. 1(37) (2011), <http://www.m-economy.ru/art.php?nArtId=3502>.

⁸ *Experts Discussed That Every Fifth Person in Moscow is a Migrant Worker*, NEWSRU.COM (Feb. 6, 2013), http://newsru.com/russia/06feb2013/migranty_print.html (in Russian).

⁹ *Id.*

¹⁰ FMS, *supra* note 2.

¹¹ Federal Law of the Russian Federation on Entry Into and Exit from the Russian Federation, with the Latest Amendments of Dec. 30, 2012, SZ RF 1996, No. 34, Item 4029.

¹² Federal Law No. 115 of July 25, 2002, on the Legal Status of Foreign Individuals in the Russian Federation (Federal Law on the Legal Status of Foreigners), with the Latest Amendments of Dec. 30, 2012, SZ RF 2002, No. 30, Item 3032.

¹³ Federal Law No. 109 of July 18, 2006, on Migration Registration of Foreign and Stateless Individuals in the Russian Federation, with the Latest Amendments of Dec. 30, 2012, SZ RF 2006, No. 30, Item 3636.

substantially amended by Federal Law No. 86 of May 19, 2010,¹⁴ and a series of federal laws passed on December 30, 2012.¹⁵ Numerous implementing regulations issued by the government and individual executive agencies define procedures for recruiting foreign workers¹⁶ and performing the paper work required to secure their legal status in the country.¹⁷

It appears that the current government actions in the field of migration regulation are aimed at minimizing the negative consequences of unregulated migration processes. The recently adopted government concept of migration policy declares its main goals to be assisting returning countrymen who relocate to Russia from abroad, protecting minorities, integrating refugees and asylum seekers more successfully, and creating more efficient mechanisms for regulating labor migration.¹⁸ Among the measures proposed for achieving these goals are making necessary changes in legislation and in the system of state oversight of the migration processes; better cooperation and communication among different federal, regional, and local authorities dealing with migration; and making greater efforts to resolve ongoing and forthcoming conflicts.¹⁹

Most of the migrants arriving in Russia are labor migrants who, as required by law, conclude preliminary agreements with Russian employers before requesting entry visas or rely on services provided by Russian government agencies abroad,²⁰ because Russia presently does not have comprehensive recruitment programs. Most of the recruitment is conducted by employers working closely with migration and labor authorities in the localities.

A. Employers' Responsibilities

Russian legislation makes an employer responsible for the migrants employed. Employers must register labor contracts with the regional employment assistance office and keep that office informed about the contract's duration and/or its dissolution. The employer is required to register the residency of hired migrants and maintain their registration. Also, the employer must inform tax authorities of the foreigner's employment and submit the required tax withholdings. Since July 2010, all foreign individuals permanently working and residing in Russia have been subject to the annual 13% flat income tax, the same as for Russian citizens.²¹ The Law also requires that mandatory health insurance for all foreign workers be paid by their Russian employers.²²

¹⁴ Federal Law No. 86 of May 19, 2010, ROSSIISKAIA GAZETA [ROS. GAZ.] (official publication), May 21, 2010, <http://www.rg.ru/2010/05/21/grajdane-dok.html>.

¹⁵ SZ RF 2012, No. 53(1), Items 7637, 7638, 7640, 7645, 7646.

¹⁶ Government Regulation No. 783 of December 22, 2006, on Defining the Needs of Federal Executive Agencies in Attracting and Using the Foreign Work Force, SZ RF 2003, No. 1(2) Item 247.

¹⁷ Order No. 36 of Feb. 26, 2009, of the Federal Migration Service of the Russian Federation on Issuance of Work Permits to Foreigners, <http://www.fms.gov.ru/law/866/details/37132/> (in Russian).

¹⁸ Concept of the State Migration Policy for the Period Until 2025, *supra* note 5, § III, arts. 21–24.

¹⁹ *Id.*

²⁰ Federal Law on the Legal Status of Foreigners art. 13.

²¹ Federal Law No. 86 of May 19, 2010, ROS. GAZ., May 21, 2010, <http://www.rg.ru/2010/05/21/grajdane-dok.html>.

²² Federal Law on the Legal Status of Foreigners art. 36.

Employers are responsible for monitoring the activities and behavior of the foreign workers they employ. Employers must inform the responsible authorities of all labor contract violations by guest workers and of the termination of any labor contract before its anticipated expiration, as well as report to federal security authorities all instances of a guest worker's absence from his place of work or residence. If the guest worker commits a violation, the labor contract is annulled, and within a three-day period he is notified of whether or not he must leave the country. Employers who violate legislation regulating the use of foreign labor risk the loss of their permits and are subject to fines.²³ If an employer commits a violation, a guest worker may be allowed to change his employment and execute a new labor contract for the remainder of his employment authorization when this period is not less than three months.²⁴

Because under Russian law foreign workers must exit the country immediately after the expiration of their labor contracts (if they do not change their legal status), work authorizations are not issued unless the employer deposits enough funds to secure the transportation of each hired guest worker and his family members from Russia to their native country. After the departure of the guest worker from the Russian Federation, this money is refunded to the employer.²⁵

B. Hiring Procedures

Russian legislation defines three types of procedures for hiring foreign laborers, depending on their country of origin and the type of work they are going to perform, including

- issuance of work permits to those who need visas to enter Russia,
- issuance of work permits to those who do not need visas to enter Russia, and
- issuance of labor licenses to those foreigners who want to perform “individual labor activities” (household work) in Russia and do not need entry visas.

The use of a guest worker's labor is based on two major documents—a permit to hire and use foreign labor and a work authorization for a foreign individual. Both documents are issued by regional branches of the Federal Migration Service.²⁶

1. Hiring Individuals Who Need Visas

The permit to hire and use foreign labor is issued after consultations with the regional authority in charge of employment issues. These permits are issued within the quota annually established by the federal government. Each year, the government defines how many work permits can be issued and how they are to be distributed among the constituent components of the Russian

²³ *Frequently Asked Questions: Legal Issues*, FEDERAL MIGRATION SERVICE, <http://www.fms.gov.ru/treatment/review/list.php?ID=895> (official website; last visited Feb. 25, 2013).

²⁴ Federal Law on the Legal Status of Foreigners art. 5.

²⁵ FEDERAL MIGRATION SERVICE, *supra* note 23.

²⁶ Statute on the Federal Migration Service of the Russian Federation, <http://www.fms.gov.ru/about/condition/> (official website; in Russian).

Federation, depending on the labor market situation and the opinion of Russian labor unions.²⁷ Quotas are divided by regions, professions, and fields of employment. During the last several years, approximately one and a half million guest workers were admitted to the country annually. In 2012, the government ordered the issuance of 1.746 million permits to hire guest workers.²⁸

In order to obtain a permit, an employer must submit a request. The request must be approved by competent local authorities confirming that there is a necessity to hire foreigners. A labor agreement must be drafted, and the employer must pay a fee in an amount equal to US\$150. Employers who have received permits to hire foreign guest workers must inform the Federal Migration Service of the conclusion of a labor contract with the guest worker within one month of obtaining the permit.

Local offices of the Federal Migration Service provide employers with separate work authorizations that are issued for each guest worker. This authorization, in the form of a plastic card, is the main document confirming the foreigner's right to work in Russia. It is also the main document used to substantiate the foreigner's visa application. Foreigners who come to Russia as guest workers under the annual quota cannot change their employer for the duration of the labor contract and are not eligible for hire by another employer after the labor contract's expiration.²⁹

Labor migration within the Commonwealth of Independent States is regulated by a number of multilateral and bilateral agreements aimed at forming a common labor market. The basic legislative policy in this field is determined by the nonbinding regional Convention on Labor Resources Migration, which follows rules and norms accepted by the United Nations and the International Labor Organization.³⁰ Russia has concluded bilateral treaties with Armenia, Kyrgyzstan, Moldova, Tajikistan, Ukraine, and Uzbekistan. As a rule, these agreements are identical, and provide for application of the domestic legal regime to guest workers. The states have obligated themselves to recognize the education, work experience, seniority, entitlement to compensation for damages, and social security contributions of migrant workers.³¹

In order to obtain a work permit in Russia, a foreigner from a country that has a visa-free agreement with the Russian Federation must submit an application with accompanying documents to the local office of the Federal Migration Service and pay an established fee, which presently equals US\$70. An applicant may not be younger than eighteen years of age, and the work permit must be issued within ten business days. If a work permit is issued for more than a three-month period, an individual must find employment within the next thirty days, and pass

²⁷ Federal Law on the Legal Status of Foreigners art. 6.

²⁸ NEWSRU.COM, *supra* note 6.

²⁹ Procedures for the Issuance of Work Permits to Those Who Need Visas to Enter the Russian Federation, Guidelines Issued by the Federal Migration Service, <http://www.fms.gov.ru/documents/withoutvisa/visa.php> (official website; in Russian; last visited Feb. 25, 2013).

³⁰ Approved by the CIS Economic Council on Dec. 15, 2000 (not published officially), *available at* the Consultant legal database, <http://base.consultant.ru/cons/cgi/online.cgi?req=doc;base=INT;n=25224> (by subscription).

³¹ Texts of these agreements are available in Russian at the official Federal Migration Service website, <http://www.fms.gov.ru/law/1131/> (last visited Feb. 20, 2013).

medical examinations proving that he has no socially dangerous infectious diseases. If an individual does not obtain employment within the thirty-day period, he must leave Russia regardless of the fact that his residency registration has not yet expired.³²

2. *Hiring Citizens of the EEC, Who Do Not Need Visas*

Special rules were established in 2011 for the citizens of Belarus and Kazakhstan, countries which together with Russia form the Eurasian Economic Community.³³ According to the three-state agreement, citizens of Belarus and Kazakhstan have the same employment rights as Russian citizens. This agreement means that the existing permit regime is not applicable to citizens of these countries and they can work in the Russian territory without restrictions. Employers who hire citizens of Belarus or Kazakhstan do not need to obtain authorizations required in the case of hiring foreigners. To start employment, a Belarusian or Kazakhstani citizen must submit to the employer documents proving the worker's legal presence in Russia and other documents that are required by Russian labor law for Russian job seekers. More lenient registration rules and procedures for the renewal of a labor contract are provided for Belarusian and Kazakhstani nationals.³⁴

3. *Hiring Household Workers, Who Do Not Need Visas*

Licenses to perform “individual labor activities” in Russia can be purchased by foreigners, and such workers do not need visas to enter the country. This group includes those who will be hired for work within their prospective employer's household, such as gardeners, housekeepers, babysitters, or handymen, and will not be employed by a Russian judicial entity. Since 2011, such workers have been required to purchase their labor licenses independently.³⁵ The licenses cost about US\$40 per month and are valid for three months, with a possible one-year extension. In order to extend the license for another year after the expiration of the first fifteen-month period, the worker must provide proof of income and payment of taxes when submitting the extension petition to the Federal Migration Service. A fine in an amount equal to US\$200 is imposed on those who fail to purchase a license on time. Patrolling local police officers are charged with the duty of checking the legality of foreigners' presence in Russia, their labor licenses, and tax payment receipts, and they have the authority to issue fines on the spot.³⁶

³² Order No. 36 of Feb. 26, 2009, of the Federal Migration Service of the Russian Federation on the Issuance of Work Permits to Foreigners, <http://www.fms.gov.ru/law/866/details/37132/> (official website; in Russian).

³³ Federal Law on the Ratification of the Agreement on the Legal Status of Migrant Workers and Members of Their Families, SZ RF 2011, No. 29, Item 4277.

³⁴ Procedures for the Issuance of Work Permits to Those Who Do Not Need Visas to Enter the Russian Federation, Guidelines Issued by the Federal Migration Service, <http://www.fms.gov.ru/documents/withoutvisa/> (official website; in Russian; last visited Feb. 25, 2013).

³⁵ Federal Law No. 86 of May 19, 2010, ROS. GAZ., May 21, 2010, <http://www.rg.ru/2010/05/21/grajdane-dok.html>.

³⁶ *Id.*

When this Law was passed, it was estimated that about 3.4 million foreign individuals were working in Russia as household assistants without having a formalized work status.³⁷

III. Visas and Admission of Foreigners

A. General Visa Regulations

The entry and exit of foreigners into and from Russia is regulated by Federal Law No. 114.³⁸ This Law states that the passport of an individual and the visa issued by the consular office of the Russian Federation abroad are the main documents that grant an individual access to the Russian territory. In accordance with this Law, the Statute on Visas and Procedures and Conditions of their Issuance was adopted by the Government in 2003.³⁹ There are five categories of visas: ordinary, official, transit, diplomatic, and temporary residence.

An ordinary visa can be of different types, such as a business visa, tourist visa, work visa, student visa, humanitarian visa, private visa, or visa granting entry for the purposes of political asylum. As a rule, visas are issued for a period of up to three months as single- or double-entry visas. Visas for a period over three months can be issued also as multi-entry visas. Specific types of visas (e.g., for students or journalists) are issued for one-year period only. In April 2007, Russian Ministry of Foreign Affairs rejected the idea proposed by the General Consul of the United States in Moscow to simplify U.S.-Russian visa relations and extend the visa validity period.⁴⁰ In some circumstances, business and humanitarian visas can be issued for a five-year term on a reciprocal basis with other countries that have the same term of entry visas for Russian citizens in return.

Written application and official invitation from a Russian party are the grounds for the issuance of a visa. In order to obtain a private or a business visa, a host or a host company must apply to the Russian authorities for an official invitation for the foreigner. This application is filed with the relevant immigration authorities. Only those host companies that have undergone prior registration with these authorities can apply for the issuance of a visa invitation. Special requirements must be met when applying for a multi-entry visa for more than six months. The host company has to provide and justify to the authorities the reasons for issuing such a long-term visa for a particular person. Regardless of the term of the visa, the host or the host company are committed to the very extensive responsibility and liability for the conduct of the invited person.⁴¹

³⁷ Vladimir Pligin, Chairman of the State Duma's Constitutional Law Committee, *Vyedit po Otpechatkam [Migrants Will Enter Based on Fingerprints]*, quoted in Anastasiia Berseneva & Grigori Tumanov, *Migranty*, GAZETA.RU (May 4, 2010), <http://www.gazeta.ru/social/2010/05/04/3362449.shtml>.

³⁸ Federal Law of the Russian Federation on Entry Into and Exit from the Russian Federation, with the Latest Amendments of Dec. 30, 2012, SZ RF 1996, No. 34, Item 4029.

³⁹ Statute on Visas and Procedures and Conditions of Their Issuance, SZ RF 2003, No. 24, Item 2329.

⁴⁰ Marina Lemutkina, *SShA Rastianut Visy [USA Ready to Extend Visas]*, GAZETA.RU (Apr. 17, 2007), at http://www.gazeta.ru/2007/04/17/oa_236894.shtml.

⁴¹ Statute on Visas and Procedures and Conditions of Their Issuance, SZ RF 2003, No. 24, Item 2329.

In order to apply for a visa, a visa application, passport, applicant's photograph, and payment of a visa fee in the amount of US\$100–450, depending on the length of processing and number of entries permitted, must be submitted to the visa section of the Russian embassy in person or by mail. Visa applications for U.S. travelers to Russia are lengthy and intrusive and require full disclosure of personal information about the applicant's and his relatives' employment, education, residence, medical, and travel history.⁴² Depending on the type of visa, a cover letter explaining the trip's purpose, destinations, and terms; a proof of means for staying in Russia; and an HIV test certificate (if one applies for a visa valid for more than three months) must be produced. Applicants can be interviewed at the discretion of a Russian consular officer. Visas cannot be changed or extended, and if travel plans have changed after the visa issuance, a foreign visitor needs to reapply for a new visa.⁴³

Admission of foreigners to Russia is also complicated by the requirement of police registration. If a foreigner is going to stay more than three days at the same Russian location, he must submit in person his passport with visa, his migration card, and the confirmation written by the owner of his/her place of stay (unless this is not a hotel) to the local police station. Hotel administrations are allowed to conduct registration on behalf of the guests. Violation of the registration requirement may entail fines and other complications during exit from the country and may be a reason for denying a visa request in the future. Only citizens of Ukraine are excluded from this requirement.⁴⁴

A foreigner might be denied a Russian visa if documents confirming an applicant's identity expire before the required visa expires. Also, an entry visa might be denied to a foreigner who asks for a visa valid for more than three months if the applicant fails to produce a document proving the absence of the HIV virus. Russian visas granted to drug addicts and those who suffer from contagious diseases that pose a threat to people can be annulled. A visa request can also be denied if a foreigner is suspected of having engaged in disrespectful conduct to Russia's federal bodies of power or Russia's state symbols. Foreigners who cause considerable material damage to the state and whose activities are detrimental to the country's international prestige can be banned from entering the Russian Federation.⁴⁵

1. *Work Visas*

Quotas for the issuance of migrant visas are defined by the federal government annually.⁴⁶ The majority of migrant workers in Russia do not need visas because they arrive from countries for

⁴² *General Visa Information*, EMBASSY OF THE RUSSIAN FEDERATION TO THE UNITED STATES OF AMERICA, <http://www.russianembassy.org/page/general-visa-information> (last visited Feb. 28, 2013).

⁴³ *Id.*

⁴⁴ Federal Law No. 109 of July 18, 2006, on Migration Registration of Foreign and Stateless Individuals in the Russian Federation, with the Latest Amendments of Dec. 30, 2012, SZ RF 2006, No. 30, Item 3636.

⁴⁵ EMBASSY OF THE RUSSIAN FEDERATION, *supra* note 42.

⁴⁶ Federal Law on the Legal Status of Foreigners art. 13.8(4).

which no visa is required to enter the Russian Federation.⁴⁷ They can stay for ninety days without restriction in Russia, and then for the duration of their work authorization.⁴⁸ For those who need visas, Russian entry visas are issued for the term of a work authorization's validity, which initially cannot be longer than one year but may be extended for one additional year after the original visa's expiration. Guest worker visa applications must be submitted to a consular office of the Russian Federation abroad and can be denied on legal grounds.⁴⁹ In an attempt to make Russia more attractive to labor migrants, amendments to the Federal Law on the Legal Status of Foreigners, which entered into force on July 1, 2010, allowed guest workers to extend their work permits and visas without leaving the country, which was previously required.⁵⁰

While knowledge of Russian is not a requirement for obtaining an entry visa, since December 1, 2012, labor migrants who come to Russia from abroad cannot obtain work permits without proving their knowledge of the Russian language. Passage of a special test and the receipt of a certificate serve as proof of such knowledge.⁵¹ According to commentaries on the amendments issued by the Federal Migration Service of the Russian Federation, only those who intend to work in the fields of customer relations, communal and housing services, and retail operations are required to pass the test.⁵² Other official documents can be used as proof of Russian language ability if they are recognized in Russia. For example, a diploma issued by a university in the former Soviet Union will be accepted because at that time all Soviet Republic college-level education was conducted in Russian.⁵³ According to the commentaries, the test was developed by taking into account the specific, typical abilities of migrants. It is relatively short and simple, consisting of twenty-five vocabulary and grammar questions, and the administration time is up to ninety minutes. Three new test-taking facilities were opened in Moscow to offer the exam. The test can be taken in all the constituent components of the Russian Federation.⁵⁴

2. Temporary Residence Permits

Temporary residence permits can be issued to foreign citizens who were born on the territory of Russia and were citizens of the former Soviet Union, foreigners whose working children or incapacitated parents are Russian citizens, foreign spouses of Russian nationals permanently residing in Russia, and foreigners making investments in accordance with federal legislation.

⁴⁷ S. Shohzoda, *Russian Federation*, in ZASHCHITA SOTSIALNYH I TRUDOVYH PRAV MIGRANTOV NA PROSTRANSTVE SNG [PROTECTION OF SOCIAL AND LABOR RIGHTS OF MIGRANTS IN THE CIS] 147 (Apr. 2012), at http://www.mirpal.org/files/files/sbornik_blok_print.pdf (in Russian).

⁴⁸ Federal Law of the Russian Federation on Entry Into and Exit from the Russian Federation, with the Latest Amendments of Dec. 30, 2012, § IV, SZ RF 1996, No. 34, Item 4029.

⁴⁹ *Id.*

⁵⁰ Federal Law No. 86 of May 19, 2010, ROS. GAZ., May 21, 2010, <http://www.rg.ru/2010/05/21/grajdane-dok.html>.

⁵¹ Federal Law of Nov. 12, 2012 on Amending Article 13(1) of the Federal Law on the Legal Status of Foreigners and Article 27 of the Federal Law on Education, ROS. GAZ., Nov. 14, 2012.

⁵² *Migrants' Russian Skills Will Be Tested as of December*, NOVAYA GAZETA, Dec. 3, 2012 (in Russian).

⁵³ *Id.*

⁵⁴ *Id.*

There is no evaluation of migrants because of their profession, education, age, or family status. Temporary residence permits are issued for a three-year period and can be extended.⁵⁵

3. *Student Visas*

A foreign citizen entering the Russian Federation to study at an educational establishment in accordance with an invitation issued by Russian diplomatic representatives or a consular office abroad may receive an ordinary student visa.⁵⁶ The expiration term for this type of visa is three months with possible extension by a local branch of the Ministry of Internal Affairs of the Russian Federation at the place where the foreign student's residence was registered. A student may receive a multi-entry visa for the duration of an education contract concluded under Russian education legislation, but the term for each subsequent visa cannot exceed one year. Possession of a student visa is obligatory for all foreign students, even for those who came from countries that have concluded visa waiver agreements.

In order to obtain a student visa, an applicant submits to the Russian embassy or consular office abroad an educational contract, official invitation to study at a Russian educational institution, valid passport with an expiration date not earlier than one and a half years after the visa takes effect, completed questionnaire, proof of medical insurance valid on Russian territory, and the certificate attesting that the applicant has no HIV virus. The visa must be annulled if the student stops his studies at the designated educational institution. Work permission for a foreign student can be issued upon a separate request.⁵⁷

B. Admission of Family Members

Russian Law on Entry into and Exit from the Russian Federation states that a worker's visa is extended to family members of the applicant only if the migrant is qualified as a highly skilled specialist. Family members are not covered by worker's visas issued to temporary guest workers. In these cases, family members need to apply for regular entry visas, which are issued according to Russian legislation. The work authorization of a migrant worker does not automatically extend to other members of the worker's family.⁵⁸

The right to reunite families exists and is protected by different existing legal provisions. However, family reunification does not create new migration rights and does not allow migrant workers to change their legal status. Russian and foreign individuals permanently residing in Russia are allowed to invite individuals from abroad, but Russian law does not provide for petitioning the authorities with requests to reunite families and does not allow sponsorship or other support for the immigration of relatives. However, foreigners (including migrant workers)

⁵⁵ Federal Law on the Legal Status of Foreigners, SZ RF 2002, No. 30, Item 3032.

⁵⁶ Statute on Visas and Procedures and Conditions of Their Issuance, SZ RF 2003, No. 24, Item 2329.

⁵⁷ *Id.*

⁵⁸ FMS, <http://www.fms.gov.ru/documents/withoutvisa/> (last visited Mar. 4, 2013).

who marry Russian individuals or who have disabled parents who are Russian citizens and reside in Russia may obtain Russian citizenship through a simplified procedure.⁵⁹

IV. Prevention of Illegal Migration

A. Government Control Measures

Measures aimed at fighting illegal migration are at the center of the government's migration policy and affect different aspects of internal political life.⁶⁰ Russia's geographic location between Europe and Asia and between developed and developing countries makes it a natural transit territory for migrants from South and Southeast Asia, as well as a magnet for the continuously unemployed workforce in Russia's neighboring countries where the economic situation is much worse than in Russia. In Russia illegal migrants are those who enter the country illegally by using false documents or avoiding border control points, and those who enter the country legally for transit, study, or tourist purposes but then violate the rules of stay in the country by overstaying their visas or changing their legal status. Most of the illegal migrants are employed in the informal sector of the Russian economy in Moscow, St. Petersburg, several other large cities, and in the border areas with other former Soviet republics. Estimates of the size of the illegal immigrant population vary from 1.5 to 15 million people.⁶¹

The government believes the solution to the illegal migration problem lies in the development of a legislative framework for labor market regulation and migration legislation; increased cooperation with the neighboring states; and the development of the border control infrastructure, especially in the Far East region where Russia borders China, and on the presently porous borders with the former Soviet republics, specifically the borders with Ukraine and Kazakhstan.⁶²

Immigration control and the enforcement of immigration legislation is conducted by the Federal Migration Service.⁶³ In addition to entry control, immigration control includes monitoring the presence and internal relocation of foreign migrants in the country, and the conclusion and performance of labor contracts by foreigners. It also involves the monitoring of Russian employers, who are responsible for the exit of their employees from the Russian territory after labor contracts expire.⁶⁴

⁵⁹ Federal Law of the Russian Federation on Citizenship of the Russian Federation (Law on Citizenship), art. 12, SZ RF 2002, No. 22, Item 2031.

⁶⁰ Galina Vitkovskaia, *Illegal Migration in Russia: Situation and Politics of Counteraction*, in *ILLEGAL IMMIGRATION 11* (Moscow, 2002) (in Russian).

⁶¹ *Id.* at 17.

⁶² Tatiana Kutsenko, *Illegal Migration and Illegal Employment of Foreigners in the Russian Federation*, in *ILLEGAL IMMIGRATION 81* (Moscow, 2002).

⁶³ Statute on FMS, <http://www.fms.gov.ru/about/condition/> (last visited Mar. 4, 2013).

⁶⁴ Kutsenko, *supra* note 62, at 84.

Government control of the illegal use of the foreign workforce is based on monitoring the legality of the presence of migrants in Russia, monitoring both the validity of labor contracts concluded between employers and foreigners and the extension of migrants' work permits, maintaining effective border exit control, and ensuring that Russian citizens receive employment priority over migrant workers. Russian authorities are faced with the serious task of counteracting the illegal use of foreigners by Russian employers. There are several ways control in this area is imposed by immigration authorities, which include collecting information on employers using the foreign work force and on foreigners arriving for work. Systematized information is inserted in a national database.⁶⁵

Because immigration is under the joint jurisdiction of federal and regional authorities, many provincial legislatures have passed their own rules supplementing federal legislation. For example, in the city of Moscow, an employer can hire a foreigner only after transferring into the city's bank account the funds that would be required to deport the foreign employee from the country. In the Far East territory, Chinese agricultural workers can be allowed to work for a Russian business only if the same number of Russian employees are hired by the Russian company.⁶⁶

B. Enforcement of Immigration Laws

Since 2007, the Immigration Control Department of the Federal Migration Service has been in charge of enforcing immigration legislation. Working in cooperation with the regular police force, the Department's officers review the validity of migration documents during raids conducted in the streets and at workplaces, terminate illegal businesses providing services to migrants, and monitor the deportations of illegal migrants.⁶⁷

On December 30, 2012, a series of amendments to the Criminal Code and the Code of Administrative Violations of the Russian Federation were signed by the Russian President. They introduced stricter migration registration procedures; increased punishments for illegal border crossings, illegal migration organizations, and violations of the rules for stay; and extended the grounds for visa denial to include those individuals who previously violated the country's immigration laws.⁶⁸

C. Sanctions for Hiring Undocumented Workers

Companies and individual entrepreneurs employing a foreign workforce are periodically monitored. Such monitoring is sometimes conducted in cooperation with other law enforcement agencies. When minor violations are discovered, a written request with the deadline for correction is issued. If more serious violations are found, the authorization to employ foreign workers can be revoked. Such decisions are forwarded to the FMS, regional migration

⁶⁵ *Id.* at 86.

⁶⁶ *Id.* at 87.

⁶⁷ Immigration Control Department, FMS, <http://www.fms.gov.ru/about/structure/management/imm/> (last visited Mar. 4, 2013).

⁶⁸ SZ RF 2012, No. 53(1), Item 7637.

authorities, police, and consular institutions. If employers violate norms related to hiring foreigners, they can be fined up to \$200,000.⁶⁹ In addition to fines imposed on legal entities, company officers responsible for the violation of hiring rules can be fined as well.⁷⁰

D. Sanctions for Illegal Entry and Overstays

Under the Code of Administrative Violations, individuals located in Russia illegally were subject to a fine in an amount equal to US\$200, forceful deportation, and a ban on entering Russia during the next five years.⁷¹

In order to fight illegal migration, penalties for illegally crossing the Russian state border, being in the country illegally, and organizing illegal migration were increased in December 2012. Amendments to the Criminal Code of the Russian Federation increased the penalty for illegally entering the country to as much as four years of imprisonment; for those who commit this crime within an organized group, the penalty was increased to as much as six years of imprisonment. Moreover, the offense of procuring illegal immigration was made punishable by imprisonment for up to seven years.⁷² The new law allows the government to deny entry into the country for three years to those who are caught in the country illegally or have previously been forcefully removed from Russia.⁷³ Simultaneously, the responsibility of Russian hosts who do not follow immigration registration requirements or otherwise violate the obligations imposed on hosts of foreign visitors or workers was increased, with fines of up to US\$15,000.⁷⁴

V. Acquisition of Citizenship by Migrants

Issues of citizenship are regulated by the Federal Law on Citizenship of the Russian Federation of May 31, 2002.⁷⁵ The Law applies the criteria of both *jus soli* and *jus sanguinis* for the acquisition of Russian citizenship, together with other grounds for citizenship acquisition. The Law provides for varied options for those who have ties with the Russian Federation to acquire Russian citizenship. In addition to recognition of citizenship by birth, descent, or registration, the Law allows for naturalization of foreigners who are eighteen years of age or older and have the legal capacity to apply for Russian citizenship through naturalization.

Those who seek Russian citizenship through naturalization must meet the five-year permanent residence requirement and pass language and Constitution tests. Reduced periods may apply to

⁶⁹ Federal Law No. 315 of December 30, 2012, on Amendments to the Federal Law on the Legal Status of Foreigners, and the RF Code of Administrative Violations, SZ RF 2012, No. 53(1), Item 7640.

⁷⁰ Federal Law on the Legal Status of Foreigners art. 36.

⁷¹ Russian Federation Code of Administrative Violations art. 18.1.

⁷² Federal Law No. 312 on Amending Article 322 of the Russian Federation Criminal Code, SZ RF 2012, No. 53(1), Item 7637.

⁷³ *Id.*

⁷⁴ Federal Law No. 315 of December 30, 2012, on Amendments to the Federal Law on the Legal Status of Foreigners, and the RF Code of Administrative Violations, SZ RF 2012, No. 53(1), Item 7640.

⁷⁵ *Id.*

refugees; former citizens of the Soviet Union or Russia; individuals of high achievement in science, technology, and culture; and those who have rendered service to the Russian Federation. Citizenship may be refused to persons who advocate the forcible change of Russia's constitutional system or other actions threatening the security of Russia, or who have been convicted under Russian law.⁷⁶ The Law does not outline the path to citizenship for migrant workers arriving in Russia because their legal status does not provide for permanent residency in the country. However, their legal status may be changed with a change of circumstances—for example, marriage with a Russian citizen. Highly skilled foreign employees are exempt from these restrictions.⁷⁷

Foreign visitors and individuals temporarily residing in Russia are not eligible for social services provided by government agencies. Migrants who legally resettle in Russia are covered by major welfare programs, however. Thirty-eight temporary settlement centers have been established throughout Russia. Their location depends on the regional economic situation, workforce needs, and population growth. All incoming migrants are eligible for legal assistance, employment and education assistance, temporary housing, food support, and health benefits funded by the federal government. The length of the eligibility period is not determined and depends on the needs of the migrant and his family; however, if an individual continues to stay in a temporary settlement center longer than three years, he is not eligible to change his legal status.⁷⁸

VI. Border Control and Management

Issues of border protection are regulated by Law No. 4730 of April 1, 1993, on the State Borders of the Russian Federation.⁷⁹ The Law defines the legal regime governing the border, border territories, and border crossing points, and establishes major principles governing the conduct of the population residing in the border areas and border crossing procedures. Protection of the national border is conducted by the troops of the Federal Security Service, a government agency in charge of intelligence, counterintelligence, and protection of the existing government system.⁸⁰ The main responsibility of the border protection troops is to maintain the security of the ground, air, and maritime border of the country. They conduct all necessary border control procedures at designated crossing points; review documents of individuals, goods, and transport vehicles crossing the Russian border; and perform law enforcement functions, including the transfer abroad of individuals detained for illegally crossing the border.

⁷⁶ *Id.*

⁷⁷ Federal Law on the Legal Status of Foreigners art. 13.2(27).

⁷⁸ Government Regulation No. 448 of June 7, 2001, on Providing Services to Migrants Placed in Temporary Resettlement Centers, SZ RF 2001, No. 16, Item 1603.

⁷⁹ VEDOMOSTI S'EZDA NARODNYH DEPUTATOV I VERKHOVNOGO SOVETA RSFSR [BULLETIN OF THE CONGRESS OF PEOPLE'S DEPUTIES OF THE RUSSIAN FEDERATION AND SUPREME COUNCIL OF THE RUSSIAN FEDERATION (then the official gazette)], 1993, No. 17, Item 594.

⁸⁰ Decree of the Russian Federation President No. 960 on Federal Security Service, SZ RF 2003, No. 33, Item 3254.

Border control officers make decisions on admitting a foreign national to Russia at border crossing points. Major factors taken into account before permitting entry are national and public security considerations, including a foreigner's health.⁸¹

⁸¹ Federal Law of the Russian Federation on Entry Into and Exit from the Russian Federation, with the Latest Amendments of Dec. 30, 2012, arts. 26 & 27, SZ RF 1996, No. 34, Item 4029.

South Africa

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SUMMARY South Africa's immigration system is governed by the Immigration Act of 2002 and its subsidiary legislation. A nonresident alien may be admitted into South Africa only when issued one of the thirteen different types of temporary residence permits. Each kind of permit imposes a range of requirements.

A holder of temporary permit may apply for a permanent residence permit. A permanent residence permit may be issued on the basis of direct residency, which typically requires five years of residence and securing permanent employment, or a relationship with a citizen or permanent resident by affinity (including a homosexual relationship) or consanguinity. Permanent residence may also be granted on other grounds, such as possession of exceptional skills or qualifications, or business investment.

The immigration law mandates that all illegal foreigners be deported. It is an offence for employers to hire an illegal foreigner, for an educational institution to register an illegal foreigner for classes, for banking and other institutions to provide an illegal foreigner with certain services, and for private citizens to have any dealings with an illegal foreigner other than providing humanitarian assistance. Certain illegal foreigners may apply for status adjustment.

The South African citizenship system is controlled by the Citizenship Act of 1995 and its subsidiary legislation. South African citizenship may be acquired by birth, descent or naturalization. Citizenship by birth is acquired by anyone who has at least one South African parent; anyone born in South African to noncitizen parents but who does not hold or qualify for citizenship in another country; or anyone born to parents who are permanent residents and who has lived in South Africa from the time of his birth through the age of majority. Citizenship by naturalization is granted to an applicant who meets a host of requirements including an extended period of permanent residency and mastery of one of the country's local languages.

Border protection and security in South Africa is a task shared by various government institutions including the South African National Defense Force (SANDF) and the South African Police Service (SAPS). The activities of the participating institutions is coordinated through the Border Control Operational Coordinating Committee (BCOCC).

I. Immigration Law

A. Admission to South Africa

South Africa's immigration system is controlled by the Immigration Act,¹ the principal law, and its subsidiary legislation, the Immigration Regulations.² An alien who is not a permanent resident in South Africa may be admitted to the country only if he or she is issued a valid temporary residence permit.³ South Africa has thirteen different temporary permit classes: visitor's permit; study permit; treaty permit; business permit; crew permit; medical treatment permit; relative's permit; work permit; retired person's permit; corporate permit; exchange permit; asylum transit permit; and cross-border and transit permit.⁴ Visas are issued by the South African missions abroad,⁵ which are part of the Department of International Relations and Cooperation, and upon arrival in the country, immigration officials, who are part of the Department of Home Affairs, makes a determination on whether the person should be granted entry and for how long.⁶

Different requirements apply to different permits. For instance, various requirements apply to the process for applying for and obtaining a work permit. There are four different subclasses of this type of permit: quota work permit; general work permit; exceptional skills work permit; and intracompany transfer work permit.⁷ All forms of work permit are issued to foreigners only if qualified citizens are not available for the relevant positions.⁸

A quota work permit may be issued if an applicant falls into a professional category or occupational class determined by the Minister of Home Affairs.⁹ South Africa has instituted a plan known as the Accelerated and Shared Growth Initiative for South Africa (ASGI-SA) designed to boost the country's economy through, among other things, the recruitment of skilled

¹ Immigration Act No. 13 of 2002, 15 BUTTERWORTHS STATUTES OF THE REPUBLIC OF SOUTH AFRICA [BSRSA] (rev. through 2012). No online source for the current version of the Immigration Act was located. The text of the original Act can be found on the website of the South African government at <http://www.info.gov.za/view/DownloadFileAction?id=68047>.

² Immigration Act, 2002, Regulations on Fees, No. R. 615, GOVERNMENT NOTICE [GN], No. 27725 (June 27, 2005), <http://www.info.gov.za/view/DownloadFileAction?id=62823>; and Immigration Act, 2002, Immigration Regulations (Immigration Regulations), No. R. 616 GOVERNMENT GAZETTE [GG], No. 27725 (June 27, 2005), <http://www.info.gov.za/view/DownloadFileAction?id=62824>.

³ Immigration Act § 9.

⁴ *Id.* §§ 11–24; Immigration Regulations §§ 9–21.

⁵ *South African Representatives Abroad*, DEPARTMENT OF INTERNATIONAL RELATIONS AND COOPERATION, http://www.dfa.gov.za/foreign/sa_abroad/index.htm (last visited Feb. 14, 2013).

⁶ *Applying for South African Visa*, DEPARTMENT OF HOME AFFAIRS, <http://www.home-affairs.gov.za/index.php/applying-for-sa-visa> (last visited Feb. 14, 2013). If a person is granted entry, the visa would be considered a permit. *Id.*

⁷ Immigration Act § 19.

⁸ *Types of Temporary Residence Permits*, DEPARTMENT OF HOME AFFAIRS, <http://www.home-affairs.gov.za/index.php/types-of-temp-res-permits> (last visited Feb. 14, 2013).

⁹ Immigration Act § 19.

foreign workers in key sectors.¹⁰ The number of work permits issued annually for each category is capped.¹¹ Currently, the country has 35,000 open positions in fifty-three different categories.¹² To obtain a permit under this program a person must have an educational qualification in a specific identified category and a minimum of five years practical experience.¹³ Various additional requirements also apply.

A general work permit may be issued to a foreigner who does not meet the requirements under the quota work permit class. In order for a permit in this category to be issued, an employer must convince the Director-General of the Department of Home Affairs that

- he was not able to find a qualified citizen for the job;
- he plans to pay the applicant salary and benefits in accordance to the prevailing market; and
- he plans to notify the Director-General if the employment contract is terminated or the nature of the employment changes.¹⁴

This permit expires with the termination of employment; however, in this instance, the holder of the permit may be granted up to nine months to get his affairs in order before he has to leave.¹⁵

Exceptional Skills work permits are issued to persons with exceptional skills or qualifications and to members of their immediate families.¹⁶ These permits may be issued for three-year terms and the applicant is required to, among other things, submit proof of exceptional skills issued by a South African or foreign government organ or a South African academic, cultural or business body.¹⁷ Additional requirements apply.

Subject to applicable requirements, an intracompany transfer work permit is issued to a foreigner employed by a company that operates in South Africa and whose employment requires him to work in South Africa for a maximum of two years.¹⁸ Additional requirements are applicable.

¹⁰ *Scarce Skills & Work Permit Quotas*, DEPARTMENT OF HOME AFFAIRS, <http://www.home-affairs.gov.za/index.php/scarce-skills-work-quotas> (last visited Feb. 14, 2013).

¹¹ Immigration Act § 19. For instance, in 2009, the year the latest quotas were published, 200 permits were allocated for chemical and material engineers, 1,000 for civil engineers, 150 for structural engineers, 2,000 for school teachers (Math, Science, Design and Technology specializations), and 250 for jewelry designers. Immigration Act, 2002 (Act No. 13 of 2002): Specific Professional Categories and Specific Occupational Classes, No. 605, GN, No. 32261 (May 25, 2009), available at the South African government portal, <http://www.info.gov.za/view/DownloadFileAction?id=108168>.

¹² *Scarce Skills & Work Permit Quotas*, DEPARTMENT OF HOME AFFAIRS, *supra* note 10.

¹³ *Id.*

¹⁴ Immigration Act § 19.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*; Immigration Regulations § 16.

¹⁸ Immigration Act § 19.

B. Permanent Residency

Permanent residence permits may be issued for one of two possible grounds. The first ground is that of direct residence. An applicant for this category of permit must meet at least one of the following requirements:

- he has held a temporary residence permit for at least five years and has secured permanent employment;
- he has been in a marriage/customary union/permanent homosexual relationship with a citizen or holder of a permanent residence permit for five years. The permit is revoked if the relationship terminates within two years of the issuance of the permit except when the cause for termination is death;
- he is under twenty-one years of age and a child of a citizen or a permanent resident. In this case the permit would expire upon the child reaching the age of twenty-one and failing to apply for confirmation; or
- he is a child of a citizen.¹⁹

A permanent residence permit may also be issued

- based on an offer of permanent employment (the job must be one which could not be filled by a citizen and must fall within the applicable available quotas issued for each sector annually);
- based on extraordinary skill and qualifications;
- based on a business investment (the person must have at least South African Rand (ZAR) 2.5 million (around US\$285,000) in cash or capital contribution or a combination of both);
- to a refugee;
- to a person wishing to retire in South Africa (the person must have at least ZAR20,000 (around US\$2,278) monthly income for life);
- to an applicant with a net worth of at least ZAR 7.5 million (around US\$854, 000); or
- to a relative of a citizen or a permanent resident.²⁰

Additional requirements are applicable and a permanent residence permit may be terminated for various reasons, including conviction for certain crimes, failure to comply with the terms of the permit, or prolonged absence from the country.²¹

¹⁹ *Id.* § 26.

²⁰ *Id.* § 27; Immigration Regulations § 23.

²¹ Immigration Act § 28.

C. Illegal Foreigners

Foreigners who are in South Africa in contravention of the Immigration Act are deemed to be illegal foreigners and the law mandates that they be deported.²² An immigration officer may arrest an illegal foreigner and has a legal obligation to deport illegal foreigners whether or not they have been arrested.²³ An immigration officer may detain an illegal foreigner pending deportation.²⁴ While the immigration officer may arrest an illegal foreigner without a warrant, a warrant is required for detention and deportation.²⁵ There are additional applicable due process requirements that must be met before an illegal foreigner can be deported.²⁶

Certain illegal foreigners may seek status adjustment. An illegal foreigner whose permit has expired, but who has never been arrested for the purpose of deportation or ordered to depart South Africa may apply to the Director-General for authorization to remain in the country while seeking to adjust his status.²⁷ This person is required to demonstrate that he failed to apply for status adjustment in time for reasons beyond his control and show that he is now able to do so.²⁸ He may also be required to pay a deposit.²⁹ As soon as a decision is made on the application for status adjustment, the Director-General's authorization allowing the illegal foreigner to remain in South Africa pending the application process terminates; if the application is denied the illegal foreigner will have fourteen days to leave the country although this timeframe may be extended.³⁰ If he does not, he is subject to deportation.³¹

Employers are barred from hiring illegal foreigners as well as foreigners whose status does not allow them to seek employment or certain kinds of employment.³² Employers are duty-bound to check the status or citizenship of their employees and to make sure that they do not employ illegal foreigners.³³ If an illegal foreigner is found in any business premises, the law presumes that he was employed by the business and the operator of the business shoulders the burden of proving otherwise.³⁴ If proven (by means other than the legal presumption) that a business

²² *Id.* §§ 1 & 32. Certain foreigners are exempt from the list of illegal foreigners; these include members of a foreign military force issued permission to enter into South Africa or officers and crew of a foreign state-owned mode of transportation. *Id.* § 31.

²³ *Id.* § 34.

²⁴ *Id.*

²⁵ *Id.*; Immigration Regulations § 28.

²⁶ Immigration Act § 34.

²⁷ *Id.* § 32; Immigration Regulations § 26.

²⁸ Immigration Regulations § 26.

²⁹ *Id.*

³⁰ *Id.*

³¹ Immigration Act § 34.

³² *Id.* § 38.

³³ *Id.*

³⁴ *Id.*

employed a foreigner not permitted to work, the employer would be presumed that he knew of the foreigner's status unless he can prove that he employed the person in good faith and that he had made a good faith effort to ascertain the legal the status of the employee.³⁵ Stricter compliance requirements are imposed on businesses that have more than five employees and employers who have a prior conviction for an offense under the Immigration Act.³⁶

Anyone who knowingly hires an illegal foreigner commits an offense and is, on conviction, subject to a fine or up to one year imprisonment.³⁷ A second conviction is punishable by a fine or up to two years imprisonment, while a third conviction is subject to imprisonment of up to three years without the option of fines.³⁸

Learning institutions are prohibited from training illegal foreigners.³⁹ If an illegal immigrant is found in the premises of a learning institution, the law presumes that he was there for training unless the person in charge of the institution can prove otherwise.⁴⁰

Banking and other financial institutions, real estate agents and insurance brokers, private hospitals and clinics, as well as employment agencies have the duty to inquire into the immigration or citizenship status of individuals and must report illegal foreigners to the Director-General's office.⁴¹ However, this duty does not have a blanket application; it is limited to instances in which the customer seeks certain services. For instance, a bank's duty is limited to instances in which the customer is seeking to secure loans and bonds, transfer money, or open a bank account other than an investment account.⁴² Similarly, a private hospital has the duty to check immigration or citizenship status only when admitting or registering a patient.⁴³

Individuals are also prohibited from aiding and abetting illegal foreigners. The law prohibits anyone from "aiding, abetting, assisting, enabling, or in any manner help[ing]" an illegal foreigner.⁴⁴ This includes, but is not limited to, providing accommodation, letting or selling any real estate, or entering into an agreement to conduct business.⁴⁵ There is a humanitarian aid exception.⁴⁶

³⁵ *Id.*

³⁶ *Id.* All employers that employ foreigners are subject to various record keeping requirements. *Id.*; Immigration Regulations § 30.

³⁷ Immigration Act § 49.

³⁸ *Id.*

³⁹ *Id.* § 39.

⁴⁰ *Id.*

⁴¹ *Id.* § 45; Immigration Regulations § 33.

⁴² Immigration Regulations § 33.

⁴³ *Id.*

⁴⁴ Immigration Act § 42.

⁴⁵ *Id.*

⁴⁶ *Id.*

A violation of the any of the above bans by any individuals or institutions constitutes an offence punishable on conviction by a fine or up to eighteen months imprisonment.⁴⁷

II. Citizenship Law

The acquisition of South African citizenship is governed by the 1995 Citizenship Act⁴⁸, the principal law, and its subsidiary legislation, the Citizenship Regulations.⁴⁹ As in the case of the Immigration Act, the Minister and Department of Home Affairs administer the Citizenship Act.⁵⁰ The Minister has wide discretionary powers on an array of issues including with regard to the granting of citizenship to a foreigner; however, all his decisions are subject to judicial oversight.⁵¹

South African citizenship may be acquired by birth, descent, or naturalization.⁵² A person born in or outside of South Africa is a citizen by birth if at least one of his parents is a South African citizen.⁵³ Anyone born in South Africa to non-South African citizens is a citizen by birth if he does not already have or qualify for citizenship of a foreign country and his birth has been duly registered in South Africa in accordance with the applicable law.⁵⁴ In addition, anyone born in South Africa to parents who have been granted permanent residency permits qualifies for citizenship by birth if he has lived in the country from the time of his birth to the time of attaining the age of majority, and his birth has been duly registered in accordance to the applicable law.⁵⁵

A person adopted by a South African citizen in accordance with the applicable law and whose birth has been duly registered in accordance with the applicable law is a citizen by descent.⁵⁶

Finally, a person may apply for and acquire South African citizenship by naturalization if he meets a host of requirements. The Minister has the power to naturalize a foreigner applicant if the applicant can prove that

⁴⁷ *Id.* § 49. The law imposes bans and penalties on additional institutions, individuals, and illegal foreigners. *Id.* §§ 40, 41, 44, & 49.

⁴⁸ South African Citizenship Act No. 88 of 1995, 3 BSRSA (rev. through 2011). No online source for the current version of the Citizenship Act was located. The text of the original Act can be found on the website of the South African government at <http://www.info.gov.za/view/DownloadFileAction?id=71009>.

⁴⁹ Regulations on the South African Citizenship Act, 1995 (Citizenship Regulations), No. 1122, GN, No. 36054 (Dec. 28, 2012), <http://www.info.gov.za/view/DownloadFileAction?id=181229>.

⁵⁰ Citizenship Act §§ 1, 22 & 23.

⁵¹ F. Venter, *Citizenship and Nationality*, in 2(2) THE LAW OF SOUTH AFRICA 127, 133 (W.A. Joubert et al. eds., 2003).

⁵² Citizenship Act §§ 2, 3, & 4.

⁵³ *Id.* § 2.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* § 3.

- he is not a minor;
- he is a permanent resident;
- he has been an ordinary resident in South Africa for ten years and has resided in the country for a continuous period of at least five years immediately preceding his application;
- he is a person of good moral character;
- he has mastered any one of the official languages in South Africa;
- he is from a country that allows dual citizenship, and if not, he has renounced his citizenship of the country in accordance with the applicable laws; and
- he has a satisfactory knowledge of the duties and responsibilities associated with South African citizenship.⁵⁷

If the applicant is married to a South African citizen, or was married to a citizen but was widowed, he must show that he has been lawfully admitted to South Africa for permanent residence and has ordinarily resided in the country for at least ten years during which he has been married to the South African citizen.⁵⁸ Absence from South Africa for more than ninety days in the last five years immediately preceding the application precludes an applicant from eligibility to apply for citizenship.⁵⁹

An application for naturalization of children who are permanent and lawful residents in South Africa may be made by a parent or guardian.⁶⁰ In addition, children born in South Africa to parents who are not citizens or who have not been granted permanent residency in South Africa may apply for naturalization upon reaching the age of majority.⁶¹ To qualify, an applicant in this class had to have lived in South Africa from the time of birth to the day of attaining the age of majority and his birth must have been registered in South Africa in accordance with the applicable laws.⁶²

III. Border Protection and Security

South Africa has vast borders and serious illegal immigration as well as crime problems. It has an extensive land border of about 4,864 Km (3,022.4 miles), which it shares with six countries—Mozambique, Zimbabwe, Botswana, Namibia, Lesotho, and Swaziland.⁶³ Its maritime border is

⁵⁷ Citizenship Act § 5; Citizenship Regulations § 3.

⁵⁸ Citizenship Act § 5; Citizenship Regulations § 5.

⁵⁹ Citizenship Regulations § 5.

⁶⁰ Citizenship Act § 5.

⁶¹ *Id.* § 4.

⁶² *Id.*

⁶³ Etienne Hennop et al., *The Challenge to Control South Africa's Borders and Borderline 4* (Institute for Security Studies, Aug. 2001), <http://www.iss.co.za/pubs/monographs/no57/CONTENT57.HTML>; *Border Countries*, BORDER CONTROL OPERATIONAL COORDINATING COMMITTEE (BCOCC), <http://www.borders.sars.gov.za/BorderCountries/BorderCountries.htm> (last visited Feb. 22, 2013).

about 3,600 Km (2,236.9 miles) and extends 300 nautical miles to the open water.⁶⁴ South Africa also has around 1,200 airfields, airstrips, and airports, which for the purpose of border policing are considered its air borders.⁶⁵ In 2008, there were three to five million undocumented immigrants in the country.⁶⁶ In addition, the border areas continue to experience a widespread crime problem including smuggling, stock theft, poaching, rape, and robbery.⁶⁷

Like many other issues, the question of border security in South Africa involves a painful history. During the apartheid era, the regime in the country had a strict border security program. The country's land borders "were fortified with electric fences, regular army patrols and auxiliary civilian commando units."⁶⁸ However, the regime's actions were not limited to efforts of keeping foreigners out; it was also directed at black South Africans. In 1985, "it installed 2,800-volt fences" to seal off some portions of its international borders (with Zimbabwe, Mozambique, and Lesotho) and borders with three of the ten homelands (Bophuthatswana, Transkei, and Venda), ethnicity-based structures established as states for black South Africans with the idea of carving out an all white South African republic.⁶⁹

In the post-apartheid era, South Africa sought to rectify this history in part by scaling back the involvement of the South African National Defense Force (SANDF), historically a key institution in ensuring border security. In 1994, the South African government put in place a policy for a gradual withdrawal of SANDF from the border areas.⁷⁰ In 2003, President Thabo Mbeki's administration instituted a policy in which the South African Police Service (SAPS) would take over the functions of SANDF over a five-year period with the final transfer of functions slated for 2009.⁷¹ By 2008, SAPS had completely taken over the task of securing the international borders with Namibia, Botswana, and Lesotho.⁷²

⁶⁴ REPORT OF THE AUDITOR-GENERAL ON A PERFORMANCE AUDIT OF BORDER CONTROL AT SOUTH AFRICAN POLICE SERVICE 3 (Jan. 17, 2008), <http://www.agsa.co.za/LinkClick.aspx?fileticket=Y2BiYuYFisI%3D&tabid=36&mid=382>.

⁶⁵ *Id.* at 2.

⁶⁶ *Id.* at 9.

⁶⁷ *South Africa: Troops Reinforcing a Porous and Dangerous Border*, IRIN (May 26, 2010), <http://www.irinnews.org/Report/89262/SOUTH-AFRICA-Troops-reinforcing-a-porous-and-dangerous-border>; Chris McMichael, *The Re-Militarization of South Africa's Borders*, OPEN DEMOCRACY (July 20, 2012), <http://www.opendemocracy.net/chris-mcmichael/re-militarisation-of-south-africa%E2%80%99s-borders>; THE DEMOCRATIC ALLIANCE, SEALING OUR BORDERS: A DEMOCRATIC ALLIANCE PROPOSAL TO TACKLE CROSS-BORDER CRIME AND ILLEGAL IMMIGRATION 8–10 (Apr. 2008), http://www.da.org.za/docs/606/Sealing%20Our%20Borders_document.pdf.

⁶⁸ McMichael, *supra* note 67.

⁶⁹ *Border Policing*, GLOBALSEcurity.ORG, <http://www.globalsecurity.org/military/world/rsa/borderline-policing.htm> (last visited Feb. 22, 2013).

⁷⁰ DEPARTMENT OF DEFENCE, TEMPORARY RESTRICTED AIRSPACE FOR SOUTH AFRICAN NATIONAL DEFENCE FORCE (SANDF) BORDER SAFEGUARDING OPERATION (Feb. 8, 2011), <http://www.dod.mil.za/media/media2011/Air%20space%20control.pdf>.

⁷¹ *Id.*; McMichael, *supra* note 67.

⁷² THE DEMOCRATIC ALLIANCE, *supra* note 67, at 4.

However, when it became clear that SAPS was poorly equipped to effectively secure the borders, in 2009, the South African government overturned its initial decision and ordered the SANDF to resume the function of border security.⁷³ Since then, SANDF has been re-deploying soldiers along various parts of the country's borders in phases with a plan to have fifteen companies deployed along the country's land, maritime and air borders by 2015.⁷⁴ Also part of the re-deployment are two platoons of engineers whose task it is to repair the apartheid-era razor fences that cover certain parts of the land border.⁷⁵ By the time it finalizes its redeployment, SANDF is expected to “cover 4,471 Km (2,778.1 miles) of land border, 2,700 Km (1,677.7 miles) of maritime border, and 7,660 Km (4,759.7 miles) of air border.”⁷⁶

SANDF is not the sole government institution that deals with matters of border security. Various other government institutions also play key roles in border control and security including the National Departments of Home Affairs, Trade and Industry, Transportation, Health, Agriculture.⁷⁷ Also key players are the National Police Service (SAPS) and the South African Revenue Service (SARS).⁷⁸ The activities of all the institutions involved in border control and security are coordinated by the Border Control Operational Coordinating Committee (BCOCC)—part of the Justice, Crime Prevention and Security Cluster put in place in 2005 with the mandate to “strategically manage the South African border environment in a coordinated manner.”⁷⁹ The BCOCC's functions are designated as follows:

- Harmonise and implement legislative and policy frameworks
- Advise policy makers on the border environment
- Develop and implement a National Border Control and Security Strategy
- Develop and maintain PoE [port of entry], bases and borderline
- Coordinate securing of PoE, bases and borderline
- Improve legal flow of persons and goods through PoE

⁷³ McMichael, *supra* note 67; *SA Improves Border Security*, BUANEWS (TSHWANE) (June 25, 2012), <http://www.buanews.gov.za/news/12/12062511451001>.

⁷⁴ DEPARTMENT OF DEFENCE, TEMPORARY RESTRICTED AIRSPACE FOR SOUTH AFRICAN NATIONAL DEFENCE FORCE (SANDF) BORDER SAFEGUARDING OPERATION, *supra* note 70; *SA Improves Border Security*, *supra* note 73; DEPARTMENT OF DEFENCE, EXECUTIVE AUTHORITY'S OVERARCHING ANNUAL STRATEGIC STATEMENT (EA OASS) FOR 2012 at 39 (Mar. 7, 2012), <http://www.dod.mil.za/documents/app/2012/SANDF%20APP%20CD.pdf>.

⁷⁵ DEPARTMENT OF DEFENCE, TEMPORARY RESTRICTED AIRSPACE FOR SOUTH AFRICAN NATIONAL DEFENCE FORCE (SANDF) BORDER SAFEGUARDING OPERATION, *supra* note 70; Speech by Acting Chief of the South African National Defence Force during a Media Briefing Held at Joint Operations Division Regarding SANDF Deployment on the Borders (Apr. 26, 2011), http://www.dod.mil.za/speeches/November2010/Deployment_on_borders%201.htm.

⁷⁶ Speech by Acting Chief of the South African National Defence Force, *supra* note 75.

⁷⁷ *About Us*, BCOCC, <http://www.borders.sars.gov.za/> (last visited Feb. 21, 2013).

⁷⁸ *Id.*

⁷⁹ *Id.*; Introductory Remarks to the Joint Portfolio Committees on Borderline and Border Post Security on Behalf of the Various Government Departments by Commissioner of the South African Revenue Service (SARS) by Mr. Oupa Magashula 6 (Nov. 2011), <http://www.sars.gov.za/Tools/Documents/DocumentDownload.asp?FileID=73171>. See also Eric Pelser & Janine Rauch, South Africa's Criminal Justice System: Policy and Priorities 5 (July 2001), http://mercury.ethz.ch/serviceengine/Files/ISN/104998/ipublicationdocument_singledocument/efc52f45-8b31-496d-9bc5-e94385be5579/en/southafricacriminal.pdf.

- Promote trade, tourism and development
- Coordinate law enforcement actions to combat illegal activities
- Compile and manage the budget for BCOCC strategies.⁸⁰

Each of the institutions involved plays a crucial role in border control and security. For instance, the Department of Home Affairs is the authority in charge of designating the ports of entry in the country and managing the entry and departure of persons.⁸¹ As such, as of 2010, the Department has put in place a sophisticated Movement Control System (MCS) designed both to facilitate the movement of South Africans and visitors in and out of the country, enhance security, and prevent the entry of illegal foreigners into South Africa.⁸² It has also reportedly taken steps recently to secure the place where and the manner in which passports are produced in an effort to curb illicit trade of falsified passports.⁸³

⁸⁰ REPORT OF THE AUDITOR-GENERAL, *supra* note 64, at 7.

⁸¹ Hennop et al, *supra* note 63, at 10.

⁸² DEPARTMENT OF HOME AFFAIRS, STATISTICS UNWTO CAPACITY BUILDING PROGRAMME FOR AFRICA WORKSHOP IV, 25–27 AUGUST 2010 (Aug. 26, 2010), http://statistics.unwto.org/sites/all/files/pdf/dha_0.pdf; *South Africa Ramps Up Border Services*, SOUTHAFRICA.INFO (Dec. 20, 2010), http://www.southafrica.info/travel/border-171210.htm#_USfn8XKwUzQ.

⁸³ McMichael, *supra* note 67.

Spain

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SUMMARY In the last two decades Spain has evolved from a country of emigrants to a country of immigrants. The largest number of immigrants have come from Africa, Latin America, and Eastern Europe. Spain's immigration is based on a visa system, except in cases of immigrants coming from countries with which Spain has bilateral agreements or from European Union Member States.

Naturalization is available to the holders of residence permits, provided they are well-integrated, speak Spanish, and have the required number of years in residence, which vary from one to ten years, depending on the country of origin of the applicant.

Spain has enhanced its border control operations at entry points by making use of high tech tools, such as the US electronic data interchange system, known as the Advance Passenger Information System, and an advanced surveillance system called Sistema de Vigilancia Exterior (SIVE).

I. Immigration System

Since the 1990's Spain has evolved from a country of emigrants to a country of immigrants, with profound social, economic, political, legal, and cultural consequences. The largest number of these immigrants have come from Africa, Latin America, and Eastern Europe.¹ Many of these migrants are low-skilled and come to Spain on a temporary or seasonal work visa.² Since 2010 the flow of immigrants into Spain has decreased considerably owing to the economic crisis, high unemployment, and the financial troubles that the country is still trying to overcome.³

In order to adapt the immigration laws to the new immigration reality and labor market, a comprehensive immigration law was enacted in 2000—Ley Orgánica 4/2000 sobre Derechos y Libertades de los Extranjeros en España y su Integración Social (LODLE) [Organic Law on the Rights and Freedoms of Foreigners in Spain and their Social Integration 4/2000],⁴ which has been amended several times and further implemented by Real Decreto 557/2011 sobre el

¹ S. GARGANTE ET AL., *LA DISCRIMINACIÓN RACIAL, PROPUESTAS PARA UNA LEGISLACIÓN ANTIDISCRIMINATORIA EN ESPAÑA* 5 & 13 (Ceres, Barcelona, 2003).

² PHILIP MARTIN, *TEMPORARY WORKER PROGRAMS: US AND GLOBAL EXPERIENCES* 11–12, (University of California, Davis, Mar. 15, 2008), available at http://canada.metropolis.net/policypriority/migration_seminar/PhilipMartinsPaper_e.pdf.

³ *Disminuye entrada de Inmigrantes a España por Crisis*, LA VANGUARDIA (Mar. 31, 2011), <http://www.vanguardia.com/historico/98903-disminuye-entrada-de-inmigrantes-a-espana-por-crisis>.

⁴ Ley Orgánica 4/2000, de 11 de enero, sobre Derechos y Libertades de los Extranjeros en España y su Integración Social (LODLE), BOLETÍN OFICIAL DEL ESTADO (B.O.E), Jan. 12, 2000, as amended by Organic Law 2/2009, <http://www.boe.es/buscar/act.php?id=BOE-A-2000-544>.

Reglamento de Reglamento de la Ley Orgánica 4/2000, sobre Derechos y Libertades de los Extranjeros en España y su Integración Social, tras su reforma por Ley Orgánica 2/2009 (Regulation of the Organic Law on the Rights and Freedoms of Foreigners in Spain and Their Social Integration 4/2000 (RLODLE)).⁵

Spain's immigration management policy is based on a visa system, except in cases of immigrants coming from countries with which Spain has bilateral agreements or from European Union Member States.⁶ The LODLE establishes a visa requirement to enter and stay for an intended purpose in the country, which is classified according to the following types of visas: transit; short-stay; residence; residence and work; seasonal residence and work; and study and research.⁷

The visa regime aims at restricting illegal migration and providing for the needs of the Spanish labor market. Each type of visa specifies its pertinent rights and obligations.⁸

The LODLE and its regulations provide that aliens entering Spain must do so through an authorized port of entry and must provide a valid passport or travel document that proves their identity under the terms of international agreements signed by Spain.⁹ The foreigners also must provide evidence of the reason for and conditions under which they are entering Spain, as well as evidence of financial support for their time of stay in the country or the ability to procure such funds legally.¹⁰ All visitors need to secure a valid visa to enter Spain, except in those cases where international agreements allow otherwise, or when the foreigner has a foreigner identity card or a return permit.¹¹ Foreigners who do not qualify to enter the country under the conditions outlined above may still be allowed to enter on the basis of humanitarian needs, the public interest, or commitments undertaken by Spain. In these cases, the foreigner will be given the pertinent documents provided for in the applicable regulations.¹²

The entry of non-EU foreigners into Spain may be registered by Spanish authorities in order to control the period of legal stay in the country.¹³

⁵ Real Decreto 557/2011, de 20 de abril, por el que se aprueba el Reglamento de la Ley Orgánica 4/2000, sobre Derechos y Libertades de los Extranjeros en España y su Integración Social, tras su Reforma por Ley Orgánica 2/2009 (RLODLE), B.O.E. Apr. 30, 2011, <http://www.boe.es/buscar/pdf/2011/BOE-A-2011-7703-consolidado.pdf>.

⁶ LODLE art. 25.2

⁷ LODLE art. 25 bis.

⁸ PASCUAL AGUELO NAVARRO, *TODA LA INFORMACIÓN PARA TRABAJAR, ESTUDIAR Y VIVIR EN ESPAÑA 20–21* (Oceano, Barcelona, 2008).

⁹ LODLE art. 25.1.

¹⁰ *Id.* art. 25.1.

¹¹ *Id.* art. 25.2.

¹² *Id.* art. 25.4.

¹³ *Id.* art. 25.5.

II. Criteria for Residence Permits

An initial temporary residence permit entitles the holder to reside and work in Spain for a maximum period of three months, which may be extended for two years.¹⁴ Requirements for this permit include having no criminal record in Spain, the country of origin, or another country in which the individual has resided during the last five years; being free of any disease that might affect the public health; and possessing a signed employment contract. Within one month after notification that the permit has been granted, the applicant must apply for the visa in person at the consulate of Spain in his place of residence.¹⁵

Long-term residence allows for indefinite residence and work in Spain. It is available for those who have legally resided in the country for five years.¹⁶

The RLODLE provides for a residence authorization for social, family, or labor ties.¹⁷ Residence on the basis of labor ties is granted to those who can demonstrate they have stayed permanently in the country for a period of at least two years; have no criminal record in Spain, their country of origin, or the countries they have resided in during the last five years; and have proof of employment for not less than six months.¹⁸

Residence based on social roots is mainly applicable to those who can prove that they not only have ties to Spanish residents but also have engaged in cultural and social integration programs for foreigners.¹⁹ For this residence permit the same requirements have to be met as for the labor ties permit, except that the continuous stay in Spain must be for at least three years and the employment contract for not less than one year. Additionally, applicants must provide proof of family ties to other legal residents or a report issued by local authorities attesting to the applicant's established roots and social integration in the country.²⁰

The residence based on family roots may be issued to parents of Spanish children or children of parents who are Spanish by origin.²¹

Other residence permits may be issued on the grounds of exceptional situations for international or humanitarian protection; cooperation with authorities; national security; public interest; female victims of gender-based violence; and collaboration with authorities against organized crime and human trafficking networks.²² In these cases, the residence authorization is issued for

¹⁴ RLODLE arts. 71–72.

¹⁵ RLODLE art. 70.

¹⁶ RLODLE arts. 147–48.

¹⁷ RLODLE art. 124.

¹⁸ *Id.* art. 124.1.

¹⁹ ALFONSO LLUZAR LOPEZ DE BRINAS ET AL, RÉGIMEN JURÍDICO DEL TRABAJO DE LOS EXTRANJEROS EN ESPAÑA, 119 (Atelier, Barcelona, 2012).

²⁰ RLODLE art. 124.2.

²¹ *Id.* art. 124.3.

²² *Id.* arts. 125–146.

a one-year period, which may be extended for another two years. After five years of continuous legal residence, a long-term residence authorization may be issued.²³

Spain began implementing measures to achieve massive regularization of irregular immigrants in 1985, with the latest enactment in 2005, Real Decreto 2393/2004,²⁴ aimed at providing legal status to the vast majority of irregular immigrant workers who were able to prove residence in Spain for at least six months before Real Decreto 2393/2004 took effect, who have no criminal records, and who have an employment contract for a minimum of six months.²⁵ The initial temporary residence and work permit may be renewed as long as the initial conditions are still being met.²⁶

III. Path to Citizenship

An alien may gain Spanish citizenship through:

- naturalization granted at the discretion of the pertinent authorities through a Royal decree under extraordinary circumstances;²⁷
- residence of ten years, five years for refugees, and two years for nationals of Latin America, Andorra, the Philippines, Equatorial Guinea, or Portugal;²⁸ and
- residence of one year for those born in Spain; for those who have been married to a Spanish national for one year and are not separated; for widows or widowers of a Spanish national if at the time of death they were not separated; and for those born abroad of a Spanish mother or father who were originally Spaniards.²⁹

Once those holding residence or work permits have fulfilled the period-of-residence requirement, they may apply for citizenship in accordance with the rules established in the Civil Code.³⁰ Their residence must have been legal and permanent, and it must have lasted until immediately before the nationality petition was filed. The petitioner must also prove good civic character and an acceptable degree of integration into Spanish society.³¹

²³ *Id.* art. 130.

²⁴ Real Decreto 2393/2004, de 30 de diciembre, por el que se aprueba el Reglamento de la Ley Orgánica 4/2000, sobre Derechos y Libertades de los Extranjeros en España y su Integración Social, BOE Jan. 7, 2005, <http://www.boe.es/buscar/act.php?id=BOE-A-2005-323&p=20110430&tn=1#dttercera>.

²⁵ *Id.* Disposición Transitoria Tercera [Third Transitory Provision].

²⁶ *Id.* For statistics and a detailed analysis of the regularization process, see ANTONIO IZQUIERDO ET AL., *POLÍTICAS DE CONTROL MIGRATORIO—ESTUDIO COMPARADO DE ESPAÑA Y EE.UU.* 44–101 (Ediciones Bellaterra, Barcelona, 2012).

²⁷ CÓDIGO CIVIL, art. 21.1 (La Ley, Madrid, 2000), available at <http://www.boe.es/buscar/act.php?id=BOE-A-1889-4763&tn=1&p=20121114#art22>.

²⁸ *Id.* art. 22.1.

²⁹ *Id.* art. 22.2.

³⁰ RLODLE art. 124.1–3.

³¹ CÓDIGO CIVIL, art. 22.3.

While the residence requirement is easily verifiable, the interpretation of the “integration into Spanish society” clause has posed major difficulties for the courts.³² Knowledge of the Spanish language has been interpreted by the courts as a key element to prove social integration. The Audiencia Nacional (Spain’s highest court) in a 2012 decision stated that a deficient knowledge of Spanish language and culture is evidence of a lack of integration into Spanish society and therefore grounds for denial of Spanish nationality.³³

This judicial reasoning has been later applied in a number of court decisions that mainly conclude that a person who has been residing in Spain for a long period of time with a spouse and children who are Spanish nationals but who does not have an acceptable knowledge of the Spanish language cannot be considered to have integrated into Spanish society since, in the court’s opinion, “language proficiency constitutes the main path of communication and social integration, and [its lack] significantly limits [a person’s] inclusion in other societal and economic sectors.”³⁴

In addition to knowledge of the language, the integration test for purposes of nationality also includes a set of cultural and social values, such as participation in educational, social, and charitable activities that are prevalent in the Spanish way of life.³⁵

The 2011–2014 “Strategic Plan of Citizenship and Integration” (SPCI) adopted by the government provides a policy framework aimed at creating a fair and cohesive society in order to build up a general “feeling of common belonging among all the citizens.”³⁶ The SPCI was the result of the government’s consultation with the main stakeholders in the social process of inclusion, such as immigrant associations, regional authorities, and humanitarian entities like the Red Cross and Caritas. The SPCI provides policy guidelines based on the idea that integration is a two-way process that includes not only the immigrant but the national population as well.³⁷ Integration is aimed at securing the economic, social, educational, and cultural development of immigrants. The SPCI emphasizes the need to reinforce the government-promoted strategy to fight racism and xenophobia,³⁸ and is based on the principles of nondiscrimination, recognition of full civic participation, and interculturalism.³⁹

³² SERGIO CARRERA, IN SEARCH OF THE PERFECT CITIZEN? THE INTERSECTION BETWEEN INTEGRATION, IMMIGRATION AND NATIONALITY IN THE EU, 263 (Martinus Nijhoff Publishers, Boston, 2009).

³³ *Sentencia de la Audiencia Nacional (Sala 3ª. Sección 3ª) de 2 de abril de 2012. Naturalización por residencia: integración en la sociedad española. Argelina que no demuestra el conocimiento de la lengua y la cultura española*, MIGRACIÓN CON DERECHOS, MINISTERIO DEL TRABAJO E INMIGRACIÓN, http://www.migrarconderechos.es/jurisprudencemastertable/jurisprudencia/SAN_02_04_2012;jsessionid=9451541F2E816EC217A22BC94DF0DE98.

³⁴ SERGIO CARRERA, 265.

³⁵ *Id.*

³⁶ PLAN ESTRATÉGICO DE CIUDADANÍA E INTEGRACIÓN 2011–2014, MINISTERIO DE TRABAJO E INMIGRACIÓN, http://extranjeros.empleo.gob.es/es/integracionretorno/Plan_estrategico2011/pdf/PECI-2011-2014.pdf.

³⁷ SERGIO CARRERA, 273.

³⁸ PLAN ESTRATÉGICO DE CIUDADANÍA E INTEGRACIÓN 2011–2014 at 8.

³⁹ SERGIO CARRERA, 274.

IV. Border Control

In the last fifteen years, Spanish governments have adopted a number of strategies to fight against illegal immigration.⁴⁰ Border security in Spain is particularly critical since most of Spain borders the sea. Control strategies are not limited to monitoring arrivals at a linear border but also include reaching out beyond Spanish territory to coordinate with the migratory policies of the immigrants' countries of origin.⁴¹ In this regard, Spain has adopted the visa system as a pre-entry control to be applied to nationals of countries with high numbers of immigrants coming to Spain.⁴²

In regard to border control at entry points, Spain has not only increased the number of personnel assigned to border control operations, but also enhanced the technology used in these operations. For example, it now employs the Advance Passenger Information System, the electronic data interchange system established by US Customs and Border Protection. This system gives the authorities information on passengers who are about to arrive at Spanish ports and airports from outside the Schengen area of the European Union.⁴³ Spain has also fortified the border surrounding the cities of Ceuta and Melilla on the border with Morocco through the use of American fence construction technology.⁴⁴

In addition to border controls that are carried out by Frontex, the European Union agency on external border control, an advance surveillance system (*Sistema de Vigilancia Exterior* (SIVE)) [External Surveillance System] has also been installed in the coastal areas of Gibraltar and the Canary Islands.⁴⁵ SIVE was created at the end of the '90s to provide information obtained through sensor stations that detect seacraft from a long distance, up to ten kilometers, and transmit a televised signal to two Central Commands, currently located in Algeciras in Gibraltar and Fuerteventura in the Canary Islands. Rescue and interception operations are coordinated at these two centers.⁴⁶

The control of Spain's borders is relevant not only for Spain but also for many European countries in the north because of the elimination of the internal borders within the European Union.⁴⁷

⁴⁰ ANTONIO IZQUIERDO ET AL., *POLÍTICAS DE CONTROL MIGRATORIO—ESTUDIO COMPARADO DE ESPAÑA Y EE.UU.* 164 (Ediciones Bellaterra, Barcelona, 2012).

⁴¹ *Id.*

⁴² *Id.* 166.

⁴³ *El sistema de Información Avanzada de Pasajeros ha Detectado desde su Puesta en Marcha a 295 Delincuentes*, LA OPINIÓN (Dec. 27, 2007), <http://www.laopinion.es/tecnologia/2996/sistema-informacion-avanzada-pasajeros-detectado-puesta-marcha-295-delincuentes/120610.html>.

⁴⁴ *Id.* 176.

⁴⁵ *Id.* 177.

⁴⁶ *Id.*

⁴⁷ Jorgen Carling, *The Merits and Limitations of Spain's High-Tech Border Control*, MIGRATION INFORMATION SOURCE (Jun. 7, 2007), <http://www.migrationinformation.org/Feature/display.cfm?ID=605>.

V. Unlawful Entry and Overstay

Foreigners who have illegally entered the country or overstayed their visas are subject to an administrative fine and/or expulsion.⁴⁸ In the event that an irregular immigrant is identified, the immigrant is subject to deportation. If it is not possible to expel him or her within seventy-two hours, the courts intervene and order the immigrant confined in a Foreigner Detention Facility.⁴⁹

⁴⁸ LODLE art. 53.1.

⁴⁹ LODLE art. 57.

United Kingdom

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SUMMARY The United Kingdom has extensive laws relating to immigration and citizenship. It has recently moved to a points-based migration system to help retain talented migrants in the country. Entry through many of the points-based system options provides a path to citizenship, provided a continuous residence period is met. The UK Border Agency is responsible for policing the borders around the UK, and works to ensure that those entering the UK do so with proper authorization. Illegal immigration remains a problem, despite the relatively robust border controls that exist and the hefty civil penalties that individuals who hire illegal immigrants face. There has been criticism over the lack of exit controls, which makes it difficult to ascertain how many people remain in the country illegally. There are a number of criminal offenses that specifically apply to individuals in the country illegally, including entering the country without due authorization, overstaying visas, breaching conditions attached to visas, and assisting illegal immigrants. Illegal immigrants caught in the UK face deportation and/or criminal prosecution.

I. Introduction

The United Kingdom of Great Britain and Northern Ireland is the collective name of four countries: England, Wales, Scotland, and Northern Ireland. The four separate countries were united under a single Parliament in London, known as the Parliament at Westminster, through a series of Acts of Union. The United Kingdom recently has undergone a period of devolution with the creation of a Scottish Parliament, a Welsh Assembly, and a Northern Ireland Assembly (currently suspended) that can legislate in certain areas. Citizenship and nationality¹ are not devolved areas, and thus remain the responsibility of the Parliament at Westminster. The Secretary of State for the Home Department (a member of the British executive branch) and his department, commonly referred to as the Home Office, has responsibility for immigration and nationality issues.

Since 1891 it has been established at common law that “no alien has any right to enter (what is now the United Kingdom) except by leave of the Crown.”² The Aliens Restriction Act 1914,³

¹ “Nationality” refers to the status of those individuals who are British citizens, British subjects with the right of abode in the United Kingdom and thus outside the scope of the United Kingdom’s immigration control, and citizens of British Overseas Territories. In this report, the term “citizenship” is used to include nationality. These terms are commonly interchanged. Nationality has been defined as a person’s international identity that demonstrates they belong to a state, as evidenced by a passport. Citizenship has been considered to be more “a matter of law determined by the facts of a person’s date and place of birth, those of their parents and the application of the provisions of the relevant legislation,” and concerns with the rights, duties, and opportunities that a person has within a state, such as voting rights, military service, and access to healthcare. LAURIE FRANSMAN, *FRANSMAN’S BRITISH NATIONALITY LAW* 12 (2d ed. 1998).

² *Musgrove v. Chun Teeong Toy*, [1891] A.C. 272, followed in *Schmidt v. Home Office*, [1969] 2 Ch. 149.

the Aliens Restriction (Amending) Act 1919,⁴ and Rules and Orders made under these Acts⁵ gave the common law a statutory basis and formed the restrictions on immigration for much of the twentieth century. The statutory regime governing immigration in the United Kingdom (UK) is now contained in the Immigration Act 1971⁶ and the Immigration Rules⁷ made under it. The Immigration Rules are not legislation or regulations per se, but are published as House of Commons Papers and are considered to be part of the law.⁸

The law requires that individuals who are not British or Commonwealth citizens with the right of abode in the UK, nor members of the European Economic Area, obtain leave to enter the UK from an immigration officer upon their arrival.⁹

II. Immigration Law

The law governing, and policy surrounding, immigration in the UK is highly complex. The government has attempted to balance the needs of genuine visitors and the contributions they make to the economy of the UK against those that wish to enter for undesirable purposes. The government has recently shifted back to a policy of managed migration “in the interests of the economy”¹⁰ in which the skills and benefits that migrants bring to the country are emphasized, with particular support for skilled workers.¹¹

A. Points-Based Migration

Points-based immigration is a fairly recent development in the UK. A pilot Highly Skilled Migrant Programme (HSMP) entered into force for a trial period of one year in 2002 and was formally incorporated into the immigration system of the UK in 2003 and later expanded upon. This program, modeled on the Australian system, has been cited as “the most dramatic development in commercial immigration law for the past 30 years.”¹² Prior to the introduction

³ Aliens Restriction Act, 1914, 4 & 5 Geo. 5, c. 12.

⁴ Aliens Restriction (Amendment) Act, 1919, c. 92, <http://www.legislation.gov.uk/ukpga/Geo5/9-10/92/contents>.

⁵ Aliens Order, (1920) Stat R. & O. 448 (as amended).

⁶ Immigration Act 1971, c. 77, <http://www.legislation.gov.uk/ukpga/1971/77/contents>.

⁷ *Immigration Rules*, UK BORDER AGENCY, <http://www.ukba.homeoffice.gov.uk/policyandlaw/immigrationlaw/immigrationrules/> (last visited Mar. 11, 2013); *R v. Chief Immigration Officer, Heathrow Airport*, ex. p. *Salamat Bibi*, [1976] 3 All ER 843 (CA), per Roskill, L.J.: “these rules are [not administrative practice and are] just as much delegated legislation as any other form of rule making activity . . . [and] to my mind, are just as much a part of the law of England as the 1971 Act itself.”

⁸ *Id.*

⁹ Immigration Act 1971, c. 77 § 3, <http://www.legislation.gov.uk/ukpga/1971/77/section/3>.

¹⁰ HOME OFFICE, CONTROLLING OUR BORDERS: MAKING MIGRATION WORK IN BRITAIN, FIVE YEAR STRATEGY FOR ASYLUM AND IMMIGRATION, 2005, Cm. 6472, <http://www.archive2.official-documents.co.uk/document/cm64/6472/6472.pdf>.

¹¹ *Id.*

¹² MACDONALD’S IMMIGRATION LAW AND PRACTICE ¶ 10.77 (Ian McDonald et al. eds., 6th ed. 2003).

of the points-based system, there were over seventy different ways to enter the UK, with approximately fifty of these being for the purposes of work or study.¹³

The UK Border Agency is responsible for implementing the points-based system, which aims to provide a simplified immigration system and attract migrants who will contribute to the UK. The system is structured so that greater emphasis is placed on employers who sponsor applicants to keep track of their employees and report any suspected abuses to the UK Border Agency.¹⁴ By tying these requirements to the employer, the UK aims to improve compliance with its immigration system and reduce abuse.¹⁵

There are five different tiers, which are further broken down into different categories with varying requirements that must be met before an applicant is provided with a visa for entry:

Tier 1: High-Value Migrants¹⁶

Tier 2: Skilled Workers¹⁷

Tier 3: Low-Skilled Workers

Tier 4: Students

Tier 5: Temporary Workers

Each of the tiers has different categories within it, which award points in different ways for different attributes of the applicant. Distribution of the points is designed in a way to ensure that applicants who will benefit the UK are provided entry, with points “being awarded to reflect the migrant’s ability, experience and age—and, when appropriate, the level of need in the migrant’s chosen industry.”¹⁸ With the exclusion of Tier 1, applicants must have a job offer from, and be sponsored by, an employer who is licensed by the UK Border Agency.¹⁹

In all categories for in-country applications, to be eligible the applicant must have entered the UK legally.²⁰

¹³ HOME OFFICE, A POINTS-BASED SYSTEM: MAKING MIGRATION WORK FOR BRITAIN, 2005–6, Cm. 6741, <http://www.official-documents.gov.uk/document/cm67/6741/6741.pdf>.

¹⁴ NATIONAL AUDIT OFFICE, REPORT BY THE COMPTROLLER AND AUDITOR GENERAL, H.C. 819, 2010–2011, ¶ 2, <http://www.official-documents.gov.uk/document/hc1011/hc08/0819/0819.pdf>.

¹⁵ *Id.* at 4.

¹⁶ *Immigration Rules*, *supra* note 7, ¶ 245B. *See also Skilled Workers*, UK BORDER AGENCY, <http://www.ukba.homeoffice.gov.uk/visas-immigration/working/tier2/> (last visited Feb. 25, 2013).

¹⁷ *High-Value Migrants*, UK BORDER AGENCY, <http://www.ukba.homeoffice.gov.uk/visas-immigration/working/tier1/> (last visited Feb. 25, 2013).

¹⁸ *Quick Guide to the Points-Based System*, UK BORDER AGENCY, <http://www.ukba.homeoffice.gov.uk/business-sponsors/points/quick-guide-pbs/> (last visited Feb. 25, 2013).

¹⁹ *Id.*

²⁰ *See, e.g., Immigration Rules*, *supra* note 7, ¶¶ 245CA & 245BF.

B. Tier 1: High-Value Migrants

This tier is designed to contribute to the UK’s growth and productivity.²¹ It aims to ensure that the most highly skilled individuals and investors with substantial funds can qualify for entry and leave to remain in the UK.

There are four categories within Tier 1:

- Exceptional Talent, “for exceptionally talented individuals in the fields of science, humanities, engineering and the arts, who wish to work in the UK. These individuals are those who are already internationally recognised at the highest level as world leaders in their particular field, or who have already demonstrated exceptional promise in the fields of science, humanities and engineering and are likely to become world leaders in their particular area.”²² Leave to remain is granted for up to three years.²³ The initial application must be endorsed by either the Royal Society, the Arts Council England, the British Academy, or the Royal Academy of Engineering.²⁴
- General, for “highly skilled migrants who wish to work, or become self-employed, to extend their stay in the UK.”²⁵ Leave to remain is granted for up to three years.²⁶
- Entrepreneur, for “for migrants who wish to establish, join or take over one or more businesses in the UK.”²⁷ Leave to remain is granted for up to three years and four months.²⁸
- Post-Study Worker, for “graduates who have been identified by Higher Education Institutions as having developed world class innovative ideas or entrepreneurial skills to extend their stay in the UK after graduation to establish one or more businesses in the UK.” Leave to remain is granted for one year;²⁹ and
- Investor, for “high net worth individuals making a substantial financial investment to the UK.”³⁰ Leave to remain is granted for up to three years.³¹

Tier 1 has recently had a cap added to it and is restricted to 1,000 exceptional individuals, investors, and entrepreneurs.³²

²¹ MACDONALD’S IMMIGRATION LAW AND PRACTICE, *supra* note 12, ¶ 10.2.

²² *Immigration Rules*, *supra* note 7, ¶ 245B.

²³ *Id.* ¶ 245BC.

²⁴ *Tier 1 (Exceptional Talent)*, UK BORDER AGENCY, <http://www.ukba.homeoffice.gov.uk/visas-immigration/working/tier1/exceptional-talent/> (last visited Feb. 26, 2013).

²⁵ *Immigration Rules*, *supra* note 7, ¶ 245C.

²⁶ *Id.* ¶ 245CB.

²⁷ *Id.* ¶ 245D.

²⁸ *Id.* ¶ 245DC.

²⁹ *Id.* ¶ 245F.

³⁰ *Id.* ¶ 245E.

³¹ *Id.* ¶ 245EE.

1. Permanent Residence

The law provides that highly skilled migrants may qualify for permanent residence in the UK (known as indefinite leave to remain). The requirements are that the applicant must:

- not be an illegal entrant;
- have spent a continuous period of five years lawfully resident in the UK and not been absent for more than 180 days in one year;
- have at least seventy-five points; must have sufficient knowledge of the English language and life in the UK unless aged under eighteen or over sixty-five; and
- not have breached immigration laws during his or her stay (overstays of twenty-eight days or less are disregarded for these purposes).³³

C. Tier 2: Skilled Workers

This tier encompasses skilled workers that have a job offer in an area where there is a labor shortage in the UK.³⁴ Areas of the labor market where there are shortages are determined by the Migration Advisory Committee.³⁵ Skilled workers require a job offer from an employer within the UK that has been licensed by the UK Border Agency as a sponsor.³⁶ Categories within this tier include:

- Intracompany Transfers, for “multinational employers to transfer their existing employees from outside the EEA to their UK branch for training purposes or to fill a specific vacancy that cannot be filled by a British or EEA worker.”³⁷ Within this category are four subcategories: short-term staff, long-term staff, graduate trainees, and skills transfers.³⁸ Leave to remain varies according to which subcategory the employee is present in the UK under, and may be granted for up to three years and one month.
- General Migrants; Minister of Religion; and Sportspeople. This category is provided to “enable UK employers to recruit workers from outside the EEA to fill a particular vacancy that cannot be filled by a British or EEA worker.”³⁹ Leave to remain may be granted for up to three years and one month.⁴⁰

³² NATIONAL AUDIT OFFICE, *supra* note 14, ¶ 1.16.

³³ *Immigration Rules*, *supra* note 7, ¶ 245BF.

³⁴ MACDONALD’S IMMIGRATION LAW AND PRACTICE, *supra* note 12, ¶ 10.6.

³⁵ NATIONAL AUDIT OFFICE, *supra* note 14, ¶ 2.

³⁶ *Id.* ¶ 1.

³⁷ *Immigration Rules*, *supra* note 7, ¶ 245G.

³⁸ *Id.* ¶ 245GC.

³⁹ *Id.* ¶ 245H.

⁴⁰ *Id.* ¶ 245HC.

The category was recently further restricted and is now limited to 20,700 people per year, who must have a job offer for a position that requires a college degree.⁴¹ This cap excludes individuals that earn £150,000 (approximately US\$240,000) per year and intracompany transfers.⁴²

Tier 2 workers are eligible for permanent residence on generally the same basis as those in Tier 1. There are a number of additional criteria that individuals who are in the UK as Tier 2 intracompany transfers, general migrants, ministers of religion, and sportspersons must meet when applying for permanent residence. One of the most notable additional criteria is a certificate in writing from the sponsoring employer that “(i) he still requires the applicant for the employment in question, and (ii) he is paid at or above the appropriate rate for the job as stated in the Codes of Practice in Appendix J.”⁴³

D. Tier 3: Low-Skilled Workers

Tier 3 was designed to fill temporary low-skilled labor shortages. However, this tier was never opened and is currently suspended.⁴⁴ The UK closed this tier after it determined that its low-skilled labor needs were being met by workers from within the European Union, who do not need to obtain a visa to enter and work in the UK.⁴⁵

E. Tier 5: Temporary Workers

Admission into the UK for temporary workers is provided for by Tier 5 of the points-based immigration system. There are six categories of Tier 5 temporary workers:

- Creative and Sporting,
- Charity Workers,
- Religious Workers,
- Government Authorized Exchange Programs,
- International Agreements, and
- Youth Mobility Scheme.⁴⁶

⁴¹ *Annual Tier 2 Limit Announcement*, UK BORDER AGENCY, Apr. 2012, <http://www.ukba.homeoffice.gov.uk/sitecontent/newsarticles/2012/april/18-Tier2-limit>.

⁴² NATIONAL AUDIT OFFICE, *supra* note 14, ¶ 1.16.

⁴³ *Immigration Rules*, *supra* note 7, ¶ 245GF(e).

⁴⁴ MIGRATION ADVISORY COMMITTEE, LIMITS ON MIGRATION, 2010, ¶ 2.10, available at <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/aboutus/workingwithus/mac/mac-limits-t1-t2/report.pdf?view=Binary>.

⁴⁵ *Id.*

⁴⁶ *Temporary Workers*, HOME OFFICE UK BORDER AGENCY <http://www.ukba.homeoffice.gov.uk/visas-immigration/working/tier5/>.

To apply for a visa under almost all Tier 5 categories, the applicant must have a job offer from a sponsor licensed in the UK, have a valid Certificate of Sponsorship from this sponsor prior to applying for the visa, and score a certain number of points on an assessment. To qualify as a Tier 5 temporary worker in most categories the applicant must score thirty points (for a Certificate of Sponsorship) and ten points by demonstrating they have maintenance funds of at least £900 (approximately US\$1400) in a bank account.⁴⁷ Certain workers may be exempt from demonstrating the maintenance funds if an “A rated” sponsor certifies that they will not claim public funds during their stay as a temporary worker.⁴⁸

A sponsor is a UK-based organization that has registered as a licensed sponsor that meets the requirements for the particular category of Tier 5. Employers must assign prospective employees with a certificate of sponsorship, which is required before an application can be made, and provide assurance that the applicant is able and intends to work in a specific job.⁴⁹

Accruing the requisite number of points alone does not guarantee a successful application, and the UK Border Agency bases its decision on the complete application and evidence provided to support it.⁵⁰ Eligibility for entry as a Tier 5 temporary worker may be refused on “general grounds” even if the applicant is otherwise fully eligible. These general grounds are extensive, and include a criminal history or a previous breach of the immigration rules.⁵¹

1. *Visa Conditions*

Individuals entering as temporary workers may engage in work that is supplementary to work that they have been granted leave to enter the country for, provided the job is for less than twenty hours per week, does not interfere with the hours for which the Certificate of Sponsorship was originally granted, and is “on the shortage occupation list in Appendix K⁵² of the Immigration Rules or a job in the same sector and at the same level as the work for which the Certificate of Sponsorship was assigned.”⁵³

In almost all Tier 5 categories workers may change jobs while in the UK as a Tier 5 worker. The new job can be either with the same sponsor or a new one. If a new sponsor is used, the worker must be provided with a new certificate of sponsorship, and the applicant must provide new

⁴⁷ Home Office UK Border Agency, *Tier 5 (Temporary Worker) of the Points-Based System - Policy Guidance*, Dec. 2012, ¶ 135, <http://www.ukba.homeoffice.gov.uk/sitecontent/applicationforms/pbs/tier5temporaryworker/guidan1.pdf>.

⁴⁸ *Immigration Rules*, *supra* note 7, ¶ 105 & App. C, ¶ 8.

⁴⁹ Home Office UK Border Agency, *supra* note 47, ¶ 44.

⁵⁰ *Id.* ¶ 13.

⁵¹ *General Grounds for Refusal*, Dec. 2012, HOME OFFICE, UK BORDER AGENCY, <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/modernised/general-grounds-refusing/about.pdf?view=Binary>.

⁵² *Immigration Rules*, *supra* note 7, App. K. There are a wide range of jobs that are experiencing shortages and are listed in this appendix, including civil engineers, biological scientists, software professionals, medical practitioners, social workers, nurses, dancers, and artists.

⁵³ Home Office, *supra* note 47, ¶ 158.

evidence that he or she meets the maintenance requirement. The rules do not permit Tier 5 workers to switch into a different tier or category and they may only stay the maximum time permitted in the Tier 5 category they originally selected.⁵⁴

If a temporary workers employment ends before the time allotted in their visa, the UK Border Agency will reduce the duration of stay to a maximum of sixty days.⁵⁵ With the exception of workers in the international agreement category who have worked as private servants in a diplomatic household,⁵⁶ there is no method through which a person who is in the UK as a Tier 5 worker can apply for permanent residence or citizenship.⁵⁷

2. Tier 5 Categories

The following is a brief summary of some specific provisions that apply to each of the Tier 5 categories:

a. Creative Workers and Sportspersons

To enter the UK as a sportsperson in the Tier 5 category, the individuals must be internationally established at the highest level and/or their employment must make a significant contribution to the development and running of high-level sports. Additionally, the sponsor's endorsement must confirm that the post could not be filled by a suitable settled worker in the UK.⁵⁸ Sportspersons must be endorsed by a governing body of their sport that is recognized by the UK. Requirements for coaches are less onerous and simply require that the individuals be suitably qualified to perform the job.

Sponsors of creative workers must follow a code of practice in the Immigration Rules, which requires taking the needs of the resident labor market into account. If a job is not covered by a code of practice, the sponsor is required to show that a settled worker could not fill the post.⁵⁹

Sportspersons may be in the country for a maximum of twelve months. There are no ways to extend in the Tier 5 category past that time.⁶⁰ Creative workers may receive entry clearance for up to twelve months, extendable for a maximum of twenty-four months, provided they remain with the same sponsor.

⁵⁴ *Id.* ¶ 164-5.

⁵⁵ *Id.* ¶ 85.

⁵⁶ *Immigration Rules*, *supra* note 7, ¶ 245ZS.

⁵⁷ *Tier 5 (Temporary Worker—Government Authorised Exchange)*, HOME OFFICE: UK BORDER AGENCY, www.ukba.homeoffice.gov.uk/visas-immigration/working/tier5/government-authorised-exchange/settlement/.

⁵⁸ Home Office, *supra* note 47, ¶ 101.

⁵⁹ *Id.* ¶ 104.

⁶⁰ *Id.* ¶ 58–62.

b. Religious Workers

Religious workers may be admitted into the UK for a maximum stay of twenty-four months to preach and do both pastoral and nonpastoral work.⁶¹

c. Charity Workers

Charity workers may enter the UK for a maximum of twelve months to do unpaid voluntary work. They can not receive paid employment and must intend to carry out work “directly related to the purpose of the sponsoring organisation.”⁶²

d. Government Authorized Exchange Programs

The Government Authorized Exchange category is “for those coming to the United Kingdom through approved schemes that aim to share knowledge, experience and best practice through work placements, whilst experiencing the wider social and cultural setting of the United Kingdom. This category cannot be used to fill job vacancies or provide a way to bring unskilled labour to the United Kingdom.”⁶³ There are different programs provided for under this subcategory, including: work experience programs; research programs; and training programs.⁶⁴

Individuals in this category, with limited exceptions, may not be sponsored by individual employers or organizations as is required by most other Tier 5 categories. Instead, an overarching government body is responsible for assigning Certificates of Sponsorship.⁶⁵

Entry into the UK in this category is for a maximum period of twenty-four months.⁶⁶

e. International Agreements

This category is for individuals that enter the UK under an international agreement. This category includes private servants in diplomatic households and employees of overseas governments and international organizations.⁶⁷ Various conditions apply to ensure that the workers are of age, engage in domestic work only, and will leave the UK once their permission to stay ends.⁶⁸ Overseas governments and international organizations that act as sponsors must guarantee these conditions.⁶⁹ Entry into the UK is for a maximum period of twenty-four months,

⁶¹ *Id.* ¶ 88.

⁶² *Id.* ¶ 119.

⁶³ *Id.* ¶ 125.

⁶⁴ *Id.*

⁶⁵ *Id.* ¶ 127.

⁶⁶ *Id.* ¶ 88.

⁶⁷ *Id.* ¶ 130.

⁶⁸ *Id.* ¶ 132.

⁶⁹ *Id.* ¶ 131.

with limited exceptions that include private servants in diplomatic households and employees of overseas governments.⁷⁰

f. Youth Mobility Scheme

The youth mobility scheme is open to young people aged eighteen to thirty-one on the date of application. Once in the country, individuals in this category may extend their stay for up to two years, but may not transfer into another Tier or category.⁷¹ Applicants under this category must give evidence that they have sufficient maintenance by showing a bank balance of at least £1800 (approximately US\$3500) to support themselves during their stay.

This program applies to residents of only certain countries, and there are restrictions on the number of places allotted to each country participating under the program. For 2013, the limits are:

- Australia—35,000 places
- Canada—5,500 places
- Japan—1,000 places
- Monaco—1,000 places
- New Zealand—10,000 places
- Republic of Korea—1,000 places
- Taiwan—1,000 places.⁷²

Individuals entering under this category may not bring dependents, and applicants must not have any children under the age of eighteen living with them, or for whom they are financially responsible.⁷³

F. Sponsor Responsibilities

As noted above, to help tie in sponsoring employers to immigration enforcement, the sponsors have a number of duties. They are responsible for keeping records of the applicant's passport, immigration documents, and contact details. They are obliged to report any person they sponsor to the UK Border Agency if

- the worker does not show for work on his or her first day,
- the worker is absent from work for more than ten working days without permission,

⁷⁰ *Id.* ¶ 88.

⁷¹ *Id.* ¶ 35.

⁷² *Youth Mobility Scheme*, HOME OFFICE, UK BORDER AGENCY, <http://www.ukba.homeoffice.gov.uk/visas-immigration/working/tier5/youthmobilityscheme/>.

⁷³ Home Office, *supra* note 47, ¶ 35.

- the job has ended for any reason,
- the sponsorship stops for any reason, and
- the worker has any change in circumstances, such as a change of job.⁷⁴

Notification requirements also arise if the sponsor believes a worker is breaching the conditions of his or her immigration status or if the sponsor believes the employee is engaging in criminal or terrorist activity.⁷⁵

G. Resident Labor Market Test

As the purpose of the majority of the points-based worker categories is to fill positions that cannot be filled by a UK resident, there is a resident labor market test that must be performed. This is designed to ensure that there are no UK residents that are able to perform the job for which the employer sponsors a migrant worker. This test requires employers to advertise positions through the Jobcentre Plus and nationally for four weeks before they are able to sponsor a migrant. The UK Border Agency checks that employers have met this requirement.⁷⁶

III. Statistics of Applications Under the Points-Based System

The following table provides points-based system data for 2010–11, as reported by the UK National Audit Office:

Tier	Visa Application	Apply Within UK (%)	Apply Outside UK (%)	Total	Total % of Applications
Tier 1	General	55,018 (63%)	31,901 (37%)	86,919	48%
	Post-Study	82,455 (89%)	10,379 (11%)	92,834	51%
	Investor	337 (45%)	407 (55%)	744	0.4%
	Entrepreneur	244 (42%)	336 (58%)	580	0.3%
	Total	138,054 (76%)	43,023 (24%)	181,077	50%
Tier 2	General	26,734 (59%)	18,499 (41%)	18,499	40%
	Intracompany Transfer (ICT)	12,732 (20%)	51,358 (80%)	64,090	57%
	Minister of Religion	1,132 (61%)	739 (39%)	1,871	2%
	Sportsperson	181 (27%)	494 (73%)	675	1%
	Total Tier 2	40,779 (36%)	71,090 (64%)	111,869	31%
Tier 5	Total Tier 5	454 (1%)	67,469 (99%)	67,923	19%
Total		179,287 (50%)	181,582 (50%)	360,869	

Source: UK NATIONAL AUDIT OFFICE, REPORT BY THE COMPTROLLER AND AUDITOR GENERAL, IMMIGRATION: THE POINTS-BASED SYSTEM—WORK ROUTES, 2010–11, H.C. 819, at 13, <http://www.official-documents.gov.uk/document/hc1011/hc08/0819/0819.pdf>.

⁷⁴ *Id.* ¶ 60.

⁷⁵ *Id.*

⁷⁶ NATIONAL AUDIT OFFICE, *supra* note 14, ¶ 3.18.

IV. Number of Immigrants

The estimate for the population of the UK as of 2011 reported that there are 63.2 million people resident in the UK.⁷⁷ In 2011, estimates show that 566,000 immigrated to the UK with 351,000 emigrating from the UK.⁷⁸ Twelve percent of the population is foreign born.⁷⁹ The five most common countries that foreign-born UK residents come from are India, Poland, Pakistan, the Republic of Ireland, and Germany.⁸⁰

V. Visa Countries

Pre-entry clearance is required for individuals classed as “visa nationals.” This clearance can be obtained from the British Embassy, Consulate, or Commission in the individual’s country of residence. The Immigration Rules specify that nationals or citizens from a long list of developing countries and countries of a lesser economic status must obtain a visa to enter the UK.⁸¹

VI. Non-visa Countries and the European Economic Area

Citizens of countries that are not listed above, British Nationals, British Subjects, and British Protected Persons are considered to be non-visa nationals. Citizens of these countries are required to obtain leave to enter the UK (a visa); however, a non-visa national may obtain this visa at the port of entry if his or her visit is for less than six months and the purpose of the visit not for employment or study on a course that requires a work placement.⁸²

Nationals of Member States of the European Economic Area do not require a visa to enter the UK. Current Member States are all twenty-seven member countries of the European Union plus Iceland, Liechtenstein, and Norway.

⁷⁷ *UK Population Estimate Revealed*, OFFICE FOR NATIONAL STATISTICS, Dec. 2012, www.ons.gov.uk/ons/rel/mro/news-release/uk-population-estimate-revealed/uk-population-estimate-revealed-.html.

⁷⁸ *Long-Term International Migration, 2011*, OFFICE FOR NATIONAL STATISTICS, Nov. 2012, <http://www.ons.gov.uk/ons/rel/migration1/long-term-international-migration/2011/index.html>.

⁷⁹ *Population by Country of Birth and Nationality Report*, OFFICE FOR NATIONAL STATISTICS, Aug 2012, www.ons.gov.uk/ons/rel/migration1/migration-statistics-quarterly-report/august-2012/population-by-country-of-birth-and-nationality.html#tab-1--What-are-the-latest-figures-.

⁸⁰ *Ch. 3, Population by Country of Birth and Nationality Report*, OFFICE FOR NATIONAL STATISTICS (Aug. 2012), www.ons.gov.uk/ons/rel/migration1/migration-statistics-quarterly-report/august-2012/population-by-country-of-birth-and-nationality.html#tab-3--Which-countries-are-non-UK-born-residents-and-non-British-nationals-from-.

⁸¹ *Immigration Rules*, *supra* note 7, App. 1, ¶ 1.

⁸² *Information for Non-Visa Nationals*, HOME OFFICE, UK BORDER AGENCY, <http://www.ukba.homeoffice.gov.uk/visas-immigration/general-info/non-visa-nationals/> (last visited Mar. 5, 2013).

VII. Citizenship Pathways

Legislation regarding citizenship in the United Kingdom is highly complex and is contained primarily in the British Nationality Act 1981, as amended.⁸³ Individuals born in the United Kingdom, or in a former colony of the United Kingdom, on or after January 1, 1983, and whose parents are either British citizens or settled in the United Kingdom, are entitled to British citizenship (double *jus soli*). Individuals can also obtain British citizenship through adoption by British citizens or persons settled in the United Kingdom, descent, or naturalization and registration.⁸⁴ Citizenship is not granted automatically to individuals who have legally resided in the United Kingdom for any period of time, nor is it granted automatically to individuals who marry British citizens or babies born in the UK. Such individuals must meet specific criteria and apply for citizenship.

A. Birth and Descent

Citizenship is not automatically granted to babies born in the UK. British citizenship is only granted to babies if their birth father or mother is a British citizen or settled in the UK. A person whose parents are not British citizens may register as a British citizen if, during the period her or she is a minor, either parent become a British citizen or an application is made to register the minor as a British citizen.⁸⁵ Individuals born outside the UK are considered to be British citizens if, at the time of birth, either their mother or father is a British citizen otherwise than by descent.⁸⁶

B. Naturalization and Residence

Citizenship through naturalization is not an entitlement or right. Certain legal requirements must be met and the Home Secretary must “see fit” to grant citizenship.⁸⁷ Specifically, the law requires that applicants for citizenship must

- be over the age of eighteen years;
- be able to communicate effectively in either English, or Welsh or Scottish Gaelic;
- have sufficient knowledge of life in the UK,⁸⁸

⁸³ British Nationality Act 1981, c. 61, <http://www.legislation.gov.uk/ukpga/1981/61>. In this report, the term “citizenship” is used to include nationality. For definitions of “nationality” and “citizenship,” which are commonly used interchangeably, see FRANSMAN, *supra* note 1.

⁸⁴ British Nationality Act 1981, c. 61, §§ 3–5, <http://www.legislation.gov.uk/ukpga/1981/61>.

⁸⁵ *Id.* c. 61, § 1.

⁸⁶ *Id.* § 2.

⁸⁷ *Standard Requirements for Naturalisation*, HOME OFFICE, UK BORDER AGENCY, www.ukba.homeoffice.gov.uk/britishcitizenship/eligibility/naturalisation/standardrequirements/ (last visited Mar. 12, 2013).

⁸⁸ *Id.*

- be of sound mind;
- intend to continue to reside in the UK “or to continue in Crown service, the service of an international organisation of which the UK is a member, or the service of a company or association established in the UK”;⁸⁹
- be of good character, demonstrated by observing the laws of the UK and fulfilling the duties and obligations of being a resident in the UK, such as by paying taxes;⁹⁰
- be legally resident in the United Kingdom for a period of five years;
- be free of immigration time restrictions during the last twelve months of the five-year period; and
- not have been absent from the UK for a total period of more than 450 days, with no more than ninety of these days occurring in the twelve months preceding the application.⁹¹

If the individual is applying on the basis of marriage to a British citizen, the period of residency is three years and the applicant must not have been absent from the UK for more than 270 days in these three years.⁹²

If all these requirements are met, the applicant must then take a formal oath and pledge of allegiance before citizenship will be granted.⁹³ This was in response to concerns that the common sense of “Britishness” was diminishing and that a clearer idea of the rights and responsibilities of British citizenship could be established through a formal statement of allegiance.⁹⁴

C. Language Requirements

Citizenship applicants must be able to communicate effectively in either English, or Welsh or Scottish Gaelic. Applicants can demonstrate this in one of two ways. The first is simply showing that they meet the English for Speakers of Other Languages (ESOL) Entry 3 standard of English.⁹⁵ There is no need to submit a form to the Home Office demonstrating this capability, as the citizenship test that applicants for naturalization are required to pass is designed to require the ability to use English language at the ESOL Entry 3 standard and thus “applicants who pass

⁸⁹ *Id.*

⁹⁰ *Good Character Requirement*, HOME OFFICE, UK BORDER AGENCY <http://www.ukba.homeoffice.gov.uk/britishcitizenship/eligibility/goodcharacter/> (last visited Mar. 11, 2013).

⁹¹ British Nationality Act 1981, c. 61, sch. 1, <http://www.legislation.gov.uk/ukpga/1981/61>.

⁹² *Id.*

⁹³ *Id.* The oath and pledge of allegiance are contained in schedule 5 of the British Nationality Act 1981, c. 61.

⁹⁴ HOME OFFICE, COMMUNITY COHESION: A REPORT OF THE INDEPENDENT REVIEW TEAM, 2002, ¶ 5.1.16.

⁹⁵ *Knowledge of Language and Life in the UK*, HOME OFFICE, UK BORDER AGENCY, <http://www.ukba.homeoffice.gov.uk/visas-immigration/settlement/knowledge-language-life/> (last visited Mar. 6, 2013).

the test will automatically have shown that they have the required level of ability in English.”⁹⁶ In the first year from the introduction of citizenship tests, applications for citizenship dropped by 8%.⁹⁷

D. Family Reunification

Individuals who obtain permanent leave to remain or citizenship are entitled to bring their immediate family, classed as their spouse and children under the age of eighteen.⁹⁸ Parents and grandparents of settled persons or citizens are permitted to join their children or grandchildren in the United Kingdom but only if they are over the age of sixty-five and have no other relatives to support them in their home country.⁹⁹ Other close relatives, such as aunts, uncles, brothers, and sisters may be eligible “if living alone outside the United Kingdom in the most exceptional compassionate circumstance.”¹⁰⁰

VIII. Border Security

Border controls are achieved through technical measures, such as those used to detect illegal immigrants in freight trucks passing through the channel tunnel,¹⁰¹ intelligence-led (risk-based) checks at ports of entry,¹⁰² passport inspections, and the requirement that all visitors obtain leave to enter for any period of stay in the UK. The UK Border Agency has a large number of officers based out of Calais and Belgium and has attributed to this staffing the prevention of over 100,000 individuals from illegally entering the UK since 2004.¹⁰³ All visa applicants are fingerprinted and their information checked against databases to help prevent those with a known criminal background from entering the UK. These procedures also help identify fraudulent visa applications.¹⁰⁴

Legislation governing border controls provides for wide-ranging measures and is contained in a number of acts that address asylum and immigration. Leave to enter can be refused¹⁰⁵ on certain grounds, including when the person seeking entry is subject to a deportation order; the Secretary

⁹⁶ *Id.*

⁹⁷ *UK Citizenship Applications Fall*, BBC NEWS (May 17 2005), http://news.bbc.co.uk/2/hi/uk_news/4555663.stm.

⁹⁸ *Immigration Rules*, *supra* note 7, pt. 8.

⁹⁹ *Id.*

¹⁰⁰ *Id.* ¶ 317(i)(f).

¹⁰¹ HOME OFFICE, UK BORDER AGENCY, PROTECTING OUR BORDER, PROTECTING THE PUBLIC 9 (Feb. 2010), available at <http://webarchive.nationalarchives.gov.uk/20100303205641/http://www.ukba.homeoffice.gov.uk/sitecontent/documents/managingourborders/crime-strategy/protecting-border.pdf?view=Binary>.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ The legislative basis for refusing leave to enter is contained in section 3(1)(a) of the Immigration Act 1971, c. 77, <http://www.legislation.gov.uk/ukpga/1971/77/contents>.

of State has personally directed that the exclusion of a person is conducive to the public good;¹⁰⁶ a previous leave to enter or remain was obtained by deception; the person has been convicted of an offense that would be punishable in the UK by twelve months or more imprisonment; or the Immigration Officer has information available to him that the person's exclusion from the UK is conducive to the public good, "for example in the light of the character, conduct or associations of the person seeking leave to enter it is undesirable to give him leave to enter."¹⁰⁷

IX. Illegal Immigration

Illegal immigration is a continuing problem in the UK, and is exacerbated by the lack of exit controls that make verifying whether individuals have overstayed their permitted time extremely difficult. The government has declined to disclose the top three countries for which illegal immigrants originate from, but has stated that the majority come to the UK through Turkey and then into Greece.¹⁰⁸

The Immigration Act provides for a number of criminal offenses that apply to illegal immigrants. They are extensive and include the offenses of illegally entering the country; entering the country by deception; overstaying visas; and violating the terms of a visa, such as by working if this is not authorized.¹⁰⁹ Assisting unlawful entry into the UK is also an offense.¹¹⁰ The UK has two methods of dealing with illegal immigrants: they face administrative action by the UK Border Agency, or criminal proceedings and deportation.¹¹¹ Such individuals are barred from entering the UK again.¹¹²

The National Audit Office notes that under the points-based system the UK Border Agency has not sufficiently followed up with workers to ensure that they leave the UK once their leave to remain expires. There are estimates that up to 181,000 migrants of all visa types are still in the

¹⁰⁶ R (Farrakhan) v. Secretary of State for the Home Department, [2002] 2 WLR 481, *available at* http://www.lcor.com/1315/?form_1155.replyids=496. With regard to the Secretary of State's discretion in making such an order the courts have found that the Secretary of State, rather than the courts, is more suited to make such a determination as he is "better placed to reach an informed decision about the likely consequences of admitting" a person into the UK; is democratically accountable for his decision; and the decision typically involves a wide range of consultation that the Secretary of State has at his disposal. In 2000, the Secretary of State directed that a citizen from the United States of America be excluded from the UK on the grounds that it would not be conducive to the public good, as the presence of the person, a spiritual leader of Islam, might give rise to public disorder. In this instance, the courts upheld the Secretary of State's order as being proportionate interference with the freedom of individual expression.

¹⁰⁷ *Immigration Rules*, *supra* note 7, pt. 9.

¹⁰⁸ 7 Mar. 2011, HANSARD, H.C. (6th ser.) 627, <http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm110307/debtext/110307-0001.htm>.

¹⁰⁹ Immigration Act 1971, c. 77, pt. III, § 24(1)(i), (ii), <http://www.legislation.gov.uk/ukpga/1971/77/contents>.

¹¹⁰ *Id.* pt. III.

¹¹¹ *Id.* pt. III, § 24(1)(i)–(ii).

¹¹² News Release, Home Office, UK Border Agency, Illegal Immigrants Removed from Lincolnshire, (Aug. 12, 2012), <http://www.ukba.homeoffice.gov.uk/sitecontent/newsarticles/2012/august/15-illegal-lincolnshire>.

UK after the expiration of their leave to remain.¹¹³ This has been attributed in part to the lack of exit checks, making it almost impossible to identify individuals who overstay, and to IT systems that are unable to identify individuals who need to renew their visas.¹¹⁴

The government has established an E-borders program, which requires carriers to provide certain information regarding the passengers and crew they carry. Carriers are under a mandatory duty to provide travel document information for crew and passengers, as well as the name of the carrier and its departure and arrival points when requested. The information must only be given when requested, and at the point when no other embarkation for other passengers or crew is allowed.¹¹⁵ Carriers are also required to provide additional data, such as passenger information that includes the name, address, telephone numbers, ticketing information, and travel itinerary of the passengers.¹¹⁶ A Code of Practice provides that data collected by the UK Border Agency may be shared with other law enforcement agencies in the UK.¹¹⁷ One of the controversial issues of this system is extending it to ports and railway stations within the EU as a number of Member States view sharing passenger and crew information as violating the European Union's free movement laws.¹¹⁸

In addition to preventing individuals from illegally entering the country, all UK employers are under a legal obligation to verify that their employees are not subject to immigration controls that prevent them from working in the UK. It is an offense, punishable by a fine of up to £10,000 (approximately US\$16,000) per illegal worker, to violate these provisions.¹¹⁹ This law is actively enforced and in "2010–11, the UK Border Agency (UKBA) collected £6.91 million [approximately US\$11 million] in illegal working civil penalties from those employers who were found to be employing illegal workers."¹²⁰ In the period July to September 2012 alone, 305 penalties were issued to UK employers for hiring people who were not authorized to work, amounting to fines of £2.7 million (approximately US\$4.2 million), and 481 illegal workers were discovered.¹²¹

¹¹³ NATIONAL AUDIT OFFICE, *supra* note 14, ¶ 17.

¹¹⁴ *Id.* ¶ 3.9.

¹¹⁵ UK Border Agency, *E-Borders Overview of Legislation*, at 3, <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/travel-customs/ebordersoverview>. See also The Immigration and Police (Passenger, Crew and Service Information) Order 2008, SI 2008/5, http://www.opsi.gov.uk/si/si2008/uksi_20080005_en_1.

¹¹⁶ *Id.*

¹¹⁷ The Immigration, Asylum and Nationality Act 2006 (Data Sharing of Practice) Order 2008, SI 2008/8, http://www.opsi.gov.uk/si/si2008/uksi_20080008_en_1.

¹¹⁸ Brian Wheeler, *The Truth Behind UK Migration Figures*, BBC NEWS (Oct. 12, 2012), www.bbc.co.uk/news/uk-politics-19646459.

¹¹⁹ *Penalties for Employing Illegal Workers*, GOV.UK, <https://www.gov.uk/penalties-for-employing-illegal-workers> (last visited Mar. 11, 2013).

¹²⁰ 20 Feb. 2012, HANSARD, H.C. (6th ser.) 512W, <http://www.parliamentonline.co.uk/hansard/hocw/120220w0002.htm>.

¹²¹ *Illegal Working Civil Penalties – 1 July to 30 September 2012*, HOME OFFICE, UK BORDER AGENCY, <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/employersandsponsors/listemployerspenalties/illegal-working-civil-pen?view=Binary> (last visited Mar. 12, 2013).

The issue of compliance with immigration rules has been further compounded by the faltering economy. The UK has recently cut 20 percent of the UK Border Agency's budget, and there have been over 5,200 job losses from this Agency. Despite this big drop in funding and staffing, the government claims that the work of the UK Border Agency has not been undermined and that the use of better technology and intelligence are resulting in higher numbers of illegal immigrants being caught at the border.¹²²

¹²² 7 Mar. 2011, HANSARD, H.C. (6th ser.) 627, <http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm110307/debtext/110307-0001.htm>.

EU Schengen Area

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SUMMARY The Schengen area, which originated in the mid-1980s as part of intergovernmental cooperation between five European Union countries, has emerged as an area composed of twenty-six European countries, with no internal borders and a common external border. Current members include all EU Members with the exception of the United Kingdom and Ireland and four non-EU Members. Participating states are required to implement the Schengen rules and any new member of the EU must fully comply with Schengen rules to join the Union.

Since 1999, the Schengen acquis (body of law) has been incorporated into the legal framework of the European Union. Core provisions of the Schengen Borders Code, established by Regulation No. 562/2006, are the lifting of the internal borders between Schengen countries and the parallel strengthening of the external borders of the Schengen area. Lifting of the internal borders guarantees the free movement of EU citizens and qualified third-country nationals. Third-country nationals are subject to thorough checks when entering and exiting the Schengen area, while EU citizens and others who enjoy the right to free movement are subject to minimum checks for identity purposes. A key feature of the Schengen area is the Schengen Information System (SIS), a large database used by competent national authorities to maintain public safety and security within the Schengen area and provide effective management of the external border. Participating countries are mainly responsible for managing their external borders, while they are allowed to enter into bilateral agreements with neighboring states for implementing a local border regime. Moreover, Schengen countries retain the right to reimpose internal controls for six months in exceptional cases.

Visa issuance for third-country nationals in the Schengen area is harmonized throughout the area based on EU regulations. Third-country nationals must also meet additional criteria for entry into the Schengen area.

In February 2013, in an effort to facilitate and reinforce border control procedures, the European Commission proposed two new border protection measures: (1) an entry/exit system (EES), consisting of a centralized system for the registration of entry and exit data of third-country nationals crossing the external borders of the EU Member States, and (2) a Registered Traveler Program (RTP), which would allow frequent travelers to follow simplified border checks. The EES system is designed to combat illegal immigration by identifying those who overstay their visas and those who no longer meet the criteria for staying legally in the Schengen area.

I. Introduction

The Schengen area, which is considered as the greatest achievement of European integration, is an area composed of twenty-six European countries with no internal borders; free movement of

EU citizens, their families, and qualified third-country nationals; and a common external border.¹ It is the product of intergovernmental cooperation of the original signatories to the Schengen Agreement, which was signed on June 14, 1985, by the three Benelux countries—Belgium, the Netherlands, and Luxembourg—as well as France and West Germany.² As envisioned, the key objective of the Schengen Agreement was to gradually eliminate the border controls between them and at the same time establish more secure external borders. A Convention implementing the Schengen Agreement was signed on June 19, 1990.³ It established detailed rules on the abolition of internal border controls, equivalent measures to strengthen the external borders, and procedures for issuing uniform visas. A key feature of the Schengen area is the Schengen Information System (SIS), used by national customs, police, judicial authorities, and border guards to retrieve and exchange information on missing or wanted persons, stolen vehicles, or documents.⁴

The Schengen Convention and Agreement were further incorporated into the framework of the European Union and have been part of the EU body of law since 1999 pursuant to a protocol attached to the Amsterdam Treaty.⁵ Since then, the function of the Schengen area has been subject to a number of changes. The Council of the EU has replaced the Executive Committee established by the Schengen Agreement and also incorporated the Schengen Secretariat into the General Secretariat of the Council⁶ The Council has also spelled out the contents of the Schengen *acquis* in conformity with the relevant provisions of EU treaties.⁷

¹*The Schengen Area and Cooperation*, EUROPA, http://europa.eu/legislation_summaries/justice_freedom_security/free_movement_of_persons_asylum_immigration/133020_en.htm (last visited Mar. 6, 2013). See also *Schengen, Borders & Visas*, EUROPEAN COMMISSION, http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/index_en.htm (last updated Nov. 29, 2012).

² EUROPA, *supra* note 1.

³ The Schengen Acquis – Convention Implementing the Schengen Agreement of 14 June 1985 Between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the Gradual Abolition of Checks at Their Common Borders, 2000 OFFICIAL JOURNAL OF THE EUROPEAN UNION (O.J.) (L 239) 19, [http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:42000A0922\(02\):EN:HTML](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:42000A0922(02):EN:HTML).

⁴ *Schengen Information System (SIS)*, EUROPEAN COMMISSION, HOME AFFAIRS, http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/schengen-information-system/index_en.htm (last updated Aug. 31, 2012).

⁵ Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Oct. 2, 1997, 1997 O.J. (C 340) 1, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:1997:340:0001:0144:EN:PDF>.

⁶ Council Decision 1999/307/EC of May 1, 1999, Laying Down the Detailed Arrangements for the Integration of the Schengen Secretariat into the General Secretariat of the Council, 1999 O.J. (L 119) 49, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1999:119:0049:0052:EN:PDF>.

⁷ Council Decision 1999/435/EC of 20 May 1999, Concerning the Definition of the Schengen Acquis for the Purpose of Determining, in Conformity with the Relevant Provisions of the Treaty Establishing the European Community and the Treaty on European Union, the Legal Basis for each of the Provisions or Decisions which Constitute the Acquis, 1999 O.J. (L 176) 1, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1999:176:0001:0016:EN:PDF>.

Finally, under the 2009 Lisbon Treaty, which amended the Treaty on European Union and the Treaty on the Functioning of the European Union (TFEU), the Schengen *acquis* was incorporated into the EU system on the basis of Protocol No. 19.⁸

II. Schengen Participating Countries

The Schengen area has expanded from the original five members in 1985 to twenty-six countries today. The latest major enlargement occurred in 2007 with the abolition of the control of land and sea borders with the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, and Slovenia.⁹ Four countries of the Schengen area are not EU Members—Iceland, Norway, Switzerland (which joined the Schengen area in 2008), and Liechtenstein (which joined in 2011). Two EU Members, Ireland and the United Kingdom, have opted out. The UK is not part of the Schengen area and does not participate in the free internal border area nor does it participate in the external border and visa policy. It does, however, participate in judicial and police cooperation.¹⁰ Ireland and the UK have the right at any time to participate in certain or all of the Schengen *acquis* provisions, based on a unanimous vote of the Council.¹¹ Denmark's status is more complex. Although Denmark has signed the Schengen Agreement, it can choose whether or not to apply any new measures taken under Title IV of the EC Treaty within the EU framework (current title V, area of freedom, security and justice of the TFEU), even those that constitute a development of the Schengen *acquis*. Denmark has the option to decide, within a period of six months after the Council has decided on a proposal or initiative to further develop the Schengen *acquis*, whether it will implement this measure in its national law. If it decides to do so, the measure will create an obligation under international law between Denmark and the other Member States bound by the measure.¹² Three small European States—Monaco, San Marino, and Vatican City—are also part of the Schengen area and maintain open or semi-open borders with other Schengen countries.

The success of the Schengen system depends on continuous, effective cooperation between participating States in securing their external borders by applying strict controls at land, sea, and airport borders; issuing a uniform set of visas; and ensuring collaboration among law enforcement authorities.¹³ New EU Members must also fully accept the Schengen *acquis* and any measure taken pursuant thereto.¹⁴

⁸ Protocol (No. 19) on the Schengen Acquis Integrated into the Framework of the European Union, 2012 O.J. (C 326) 290, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2012:326:FULL:EN:PDF>.

⁹ *Schengen Area*, EUROPEAN COMMISSION, HOME AFFAIRS, http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/schengen/index_en.htm (last updated Dec. 19, 2012).

¹⁰ *Id.*

¹¹ Protocol No. 19, *supra* note 8, art. 4.

¹² Protocol (No. 22) on the Position of Denmark art. 4, 2012 O.J. (C 326) 299, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2012:326:0201:0330:EN:PDF>.

¹³ EUROPA, *supra* note 1.

¹⁴ Protocol No. 19, *supra* note 8, art. 7.

III. The Schengen Borders Code

Schengen rules were integrated within the legal framework of the EU through article 2 of the Treaty of Amsterdam, which inserted Title IV on “Visas, asylum, immigration and other policies related to free movement of persons.” Title IV was substantially amended, became Title V, and was renamed “Area of Freedom, Security and Justice” by the Treaty of Lisbon of 2009, which amended the Treaty on European Union and the TFEU. Article 77 of Title V of the Lisbon Treaty authorizes the EU to develop an EU policy on visas and immigration to

- a) ensure the absence of any controls irrespective of nationality when crossing the internal borders,
- b) conduct checks and monitor the crossing of the external border, and
- c) gradually introduce an integrated management system for external borders.¹⁵

In implementation of the above mandate, the EU adopted Regulation No. 562/2006 establishing a Community Code on the Rules Governing the Movement of Persons Across Borders, the Schengen Borders Code (SBC).¹⁶ The SBC repealed the relevant provisions of the Schengen Convention, three Schengen Executive Committee decisions on borders, the Common Manual as amended by EU measures, and other EU legislation.¹⁷

The SBC establishes detailed rules governing two specific instances: (1) the absence of border controls for persons crossing the internal borders between the EU Member States; and (2) border controls for persons crossing the external borders of the EU Member States.

Ireland and the United Kingdom do not participate in the SBC. Bulgaria, Cyprus, and Romania do not fully apply the SBC’s provisions on the internal borders and do not use the SIS system. Denmark participates because it has aligned its national legislation. Iceland, Norway, and Switzerland apply the Code.¹⁸

A. Internal Borders

The SBC defines the internal and external borders of the Schengen area. Thus, internal borders are the common land borders, including lake and river borders, and airports and ports for internal flights and boat connections. External borders are all other borders that do not come within the definition of internal borders.¹⁹ Rules on borders do not affect the demarcation of the

¹⁵ Consolidated Version of the Treaty on the Functioning of the European Union (TFEU) art. 77, 2012 O.J. (C 326) 47, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2012:326:FULL:EN:PDF>.

¹⁶ Regulation (EC) No. 562/2006 of the European Parliament and of the Council of 15 March 2006 Establishing a Community Code on the Rules Governing the Movement of Persons Across Borders (Schengen Borders Code [SBC]), 2006 O.J. (L 105) 1, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:105:0001:0032:EN:PDF>.

¹⁷ *Id.* art. 39.

¹⁸ *Id.* Recital 25.

¹⁹ *Id.* art. 2, para. 1.

geographic borders of the EU Members, who retain their prerogative on this issue pursuant to international law.²⁰

EU citizens enjoy the right to free movement, which also entitles them to move and work in any EU Member State. The SBC does not affect the right to free movement within the Schengen border-free area. Thus, the right of free movement is accorded to the following groups of persons:

- EU citizens and third-country nationals who are family members of an EU citizen and who fall within the scope of Directive 2004/38/EC on the right of free movement²¹
- Third-country nationals and their family members, irrespective of nationality, who because of agreements concluded between the EU and its Members and their countries of origin have a right of free movement equivalent to that enjoyed by EU citizens²²

1. Local Border Traffic Regime

Under Regulation (EC) 1931/2006, Schengen countries have the option of concluding bilateral agreements with neighboring third countries that derogate from border controls for people living in their border areas in order to promote social and cultural interchange and strengthen regional cooperation.²³ Residents of border areas may cross the external borders of a neighboring country, provided that they have a local border traffic permit and a travel document if required by relevant agreements and do not pose a threat to the security, public safety, and health of the Schengen countries.²⁴ The territorial validity of a border permit is limited to the border area of the issuing country.²⁵ The maximum stay, as provided for in the agreements, may be up to three months.²⁶

²⁰ TFEU, *supra* note 15, art. 77, para. 4.

²¹ Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the Right of Citizens of the Union and Their Family Members to Move and Reside Freely Within the Territory of the Member States Amending Regulation (EEC) No. 1612/68 and Repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, 2004 O.J. (L 158) 77, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:158:0077:0123:EN:PDF>.

²² *Id.* art. 2, para. 5(a), (b). Free movement of persons is extended to citizens from the European Economic Area (EEA) based on an agreement with Norway, Iceland, and Lichtenstein, and to citizens of Switzerland.

²³ Regulation (EC) No. 1931/2006 of the European Parliament and of the Council of 20 December 2006 Laying Down Rules on Local Border Traffic at the External Land Borders of the Member States and Amending the Provisions of the Schengen Convention, 2006 O.J. (L 405) 1, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:405:0001:0022:EN:PDF>.

²⁴ *Id.* art. 4.

²⁵ *Id.* art. 7, para. 2.

²⁶ *Id.* art. 5.

2. Temporary Reintroduction of Control at Internal Borders

EU Members have the right in exceptional cases and when there is a serious threat to their public policy or internal security to reintroduce border controls at their internal borders.²⁷ Members must notify the Commission when they do so. For example, during the period of May 1 to October 31, 2012, control at the internal borders was reintroduced twice. First, on April 20, 2012, Spain notified the Commission that because of the meeting of the European Central Bank in Barcelona on May 2–4, 2012, it intended to reintroduce control at the internal land border with France as well as at the Barcelona and Girona airports from April 28 to May 4, 2012. During that week, Spain performed border checks on 669,385 persons, and sixty-eight persons were refused entry.²⁸ Secondly, on May 4, 2012, Poland informed the Commission that due to the EURO 2012 football championships from June 8 to July 1, 2012, it had decided to reintroduce control at its internal borders between June 4 and July 1. Poland reported that during that period, the guards checked 28,980 persons, of whom twenty-two were refused entry and fifteen apprehended.²⁹

The power to reintroduce border controls has been the subject of contention between the Commission, which seeks to exert more control on the external border, and the EU Members who want to retain their prerogative to introduce controls, as they see fit.³⁰ As a result, the entire system of assessing the implementation of the Schengen rules has been called into question. Under the previous system, Schengen countries conducted peer review of implementation of Schengen rules and the Commission's role was limited to being an observer.³¹

In September 2011, the Commission proposed to amend the SBC and called for more “EU-based governance” to assess the implementation of Schengen rules. The Commission suggested that Commission experts should make announced or unannounced visits at border-crossing points to evaluate the implementation of Schengen rules. Consequently, the reintroduction of border controls would be decided at the EU level, rather than at the level of the Member States.³² On June 7, 2012, the Home Affairs Ministers reached an agreement that gave national governments the right to reintroduce controls at internal borders in unforeseen emergencies without the consent of the Commission or the Parliament.³³

²⁷ SBC, *supra* note 16, art. 23.

²⁸ *Report from the Commission to the European Parliament and the Council, Second Biannual Report on the Functioning of the Schengen Area, 1 May 2012 – 31 October 2012*, at 3, COM (2012) 686 final 11/23/1012 http://ec.europa.eu/dgs/home-affairs/what-is-new/news/pdf/2_en_act_part1_v7_schengen.pdf.

²⁹ *Id.* at 4.

³⁰ Anna Sonny, Comment, *Schengen Disputes Continues*, CIVITAS (Institute for the Study of Civil Society) (Feb. 8, 2013), <http://civitas.org.uk/newblog/2013/02/schengen-dispute-continues/>.

³¹ Press Release, European Commission, Schengen: EU Commission Proposes a European Approach to Better Protect Citizens' Free Movement (Sept. 16, 2011), http://europa.eu/rapid/press-release_IP-11-1036_en.htm.

³² *Id.*

³³ Toby Vogel, *Disputed Borders*, EUROPEAN VOICE.COM (June 14, 2012), <http://www.europeanvoice.com/article/imported/disputed-borders/74600.aspx>.

B. External Border Controls

The external borders of the Schengen area cover 8,826 kilometers (about 5,484 miles) of land borders and close to 42,672 km (26,515 miles) of external sea borders.³⁴ In 2005, the EU established a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex).³⁵ While EU Members retain primary responsibility for the security and surveillance of their borders, Frontex is also responsible for the effective application of EU rules related to external border management. Among Frontex's duties is the carrying out of risk analyses, coordinating operational cooperation between Members, and deploying Rapid Border Intervention Teams to Member States when faced with a big influx of third-country nationals attempting to enter their territories illegally.³⁶

Individuals who wish to enter the EU may cross the borders at border-crossing points. Each EU Member has designated its border-crossing points for the Commission.³⁷ Persons who enjoy the right of free movement are subject to minimum checks to ensure their identity.³⁸ Third-country nationals, however, are subject to thorough checks, which include inter alia checks on required documents and residence permits, scrutiny of travel documents, and checks of entry or exit stamps.³⁹

Third-country nationals may enter for stays not exceeding three months in a six-month period provided that they do not pose a threat to public policy, security, or public health, and no alert has been issued in the Schengen Information System (discussed below) to refuse entry.⁴⁰ In addition, they must meet the following requirements:

- have a valid travel document
- have a visa if they come from a country whose nationals must be in possession of a visa, pursuant to Regulation No. 539/2001⁴¹

³⁴ I VISAS AND BORDER CONTROLS: EU IMMIGRATION AND ASYLUM LAW 119 (Steve Peers et al. eds., 2012).

³⁵ The name "Frontex" is derived from the French *frontieres exterieures* (external borders). *Id.* at 119 n.2. Regulation (EC) No. 2007/2004 Establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, 2004 O.J. (L 349) 1, http://eur-lex.europa.eu/LexUriServ/site/en/oj/2004/l_349/l_34920041125en00010011.pdf.

³⁶ Regulation (EC) No. 863/2007 of the European Parliament and of the Council of 11 July 2007 Establishing a Mechanism for the Creation of Rapid Border Intervention Teams and Amending Council Regulation (EC) No. 2007/2004 as Regards That Mechanism and Regulating the Tasks and Powers of Guest Officers art. 12(3), 2007 O.J. (L 199) 30, http://www.frontex.europa.eu/assets/Legal_basis/rabit_regulation-863-2007.pdf.

³⁷ SBC, *supra* note 16, art. 4, para. 1.

³⁸ *Id.* art. 7, para. 2.

³⁹ *Id.* art. 7, para. 3, (i)–(iii).

⁴⁰ *Id.* art. 5, para. 1(d)–(e).

⁴¹ Council Regulation (EC) No. 539/2001 of 15 March 2001 Listing the Third Countries Whose Nationals Must Be in Possession of Visas When Crossing the External Borders and Those Whose Nationals Are Exempt from That Requirement, 2001 O.J. (L 81) 1, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:081:0001:0007:EN:PDF>.

- have reasons for stay and sufficient financial means to support themselves during the stay and for the return trip⁴²

The SBC establishes a number of procedural rights for persons who are refused entry. Entry may be denied on the basis of a substantiated decision that states the “precise reasons for the refusal.”⁴³ Such a decision must be made by a competent authority and be given to the individual concerned, who subsequently must acknowledge receipt. Such individuals have the right to appeal, according to the national law of the EU Member involved.⁴⁴

IV. Schengen Information System

The Schengen Information System (SIS) is a database that was initially established by the Schengen Convention in 1985 and is used by the competent authorities of the EU Members to exchange information on wanted or missing persons or stolen vehicles, and to ensure that individuals contained in the SIS database are precluded from entering the Schengen area. In 2001, the Council decided to update the SIS with a more technologically advanced system, “SIS II,” to ensure the participation of more countries and to increase the storage of data.⁴⁵ Consequently, Regulation No. 1987/2006 on the Establishment, Operation and Use of the Second Generation Schengen Information System was adopted.⁴⁶ This Regulation establishes the requirements and procedures for the entry and processing in SIS II of alerts with respect to third-country nationals, and the exchange of supplementary information and data for the purpose of refusing entry into, or preventing further stay in, a Member State. The SIS II has a central system containing the SIS II database, a national system in each Member State (the “N.SIS II”) that communicates with the central database, and a communications infrastructure between the central and national systems that provides an encrypted virtual network⁴⁷

Articles 20–30 of Regulation 1987/2006 deal with immigration issues. These articles establish rules concerning the grounds for issuing immigration alerts, types of data kept, access to alerts by competent national authorities, and data retention. They also provide rules for the use of photographs and fingerprints.⁴⁸ The Regulation allows the use of biometrics to identify persons when the technology so permits.⁴⁹

⁴² SBC, *supra* note 16, art. 5, para. 1(a)–(c). Annex I of the Code provides a nonexhaustive list of documents needed to prove the purposes of entry and stay.

⁴³ *Id.* art. 13(2).

⁴⁴ *Id.* art. 13(3).

⁴⁵ Council Decision 2001/886/JHA of 6 December 2001 on the Development of the Second Generation Schengen Information System (SIS II), 2001 O.J. (L 328) 1, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:328:0001:0003:EN:PDF>.

⁴⁶ Regulation (EC) No. 1987/2006 of the European Parliament and of the Council of 20 December 2006 on the Establishment, Operation and Use of the Second Generation Schengen Information System (SIS II), 2006 O.J. (L 381) 4, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:381:0004:0023:EN:PDF>.

⁴⁷ *Id.* art. 4.

⁴⁸ *Id.* art. 22(a).

⁴⁹ *Id.* art. 22(c).

Mandatory alerts are issued by the EU Members to refuse entry or stay when a third-country national poses a threat to public security, safety, or national security.⁵⁰ Such a situation arises, in particular, where the third-country national has been convicted with imprisonment of at least a year, or in the case of individuals for whom there are serious reasons to believe they have committed a serious crime or justified indications that they intend to commit such a crime.⁵¹

V. Visas

Rules on visas have been harmonized throughout the Schengen area to ensure that individuals who enter the Schengen area meet visa requirements. The following regulations, which are directly applicable within the legal systems of the Schengen countries, govern the matter:

- Regulation (EC) No. 810/2009 Establishing a Community Code on Visas lays down the procedures and conditions for issuing short stay visas and airport transit visas⁵²
- Regulation (EC) No. 539/2001 on List of Third Countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from the requirement⁵³
- Council Regulation (EC) No. 1683/95 Laying Down a Uniform Format for Visas⁵⁴
- Regulation (EC) No. 767/2008 on the Visa Information System (VIS),⁵⁵ which facilitates the exchange of data between Schengen countries pertaining to applications and issuance of short-stay visas, composed of a central IT system that communicates and is accessible by national systems⁵⁶

⁵⁰ *Id.* art. 24, para. 2.

⁵¹ *Id.*

⁵² Regulation (EC) No. 810/2009 of the European Parliament and of the Council of 13 July 2009 Establishing a Community Code on Visas (Visa Code), 2009 O.J. (L 243) 1, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:243:0001:0058:EN:PDF>.

⁵³ Regulation (EC) No. 539/2001 Listing the Third Countries Whose Nationals Must Be in Possession of Visas When Crossing the External Borders and Those Whose Nationals are Exempt from that Requirement, 2001 O.J. (L 81) 1, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:081:0001:0007:EN:PDF>.

⁵⁴ Council Regulation (EC) No. 1683/95 of 29 of May 1995, Laying Down a Uniform Format for Visas, 1995 O.J. (L 164) 1, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31995R1683:EN:HTML>.

⁵⁵ Regulation (EC) No. 767/2008 of the European Parliament and of the Council of 9 July 2008 Concerning the Visa Information System (VIS) and the Exchange of Data Between Member States on Short-stay Visas (VIS Regulation), 2008 O.J. (L 218) 60, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:218:0060:0081:EN:PDF>.

⁵⁶ *Visa Information System (VIS)*, EUROPEAN COMMISSION, HOME AFFAIRS, http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/visa-information-system/index_en.htm (last updated Oct. 11, 2012).

VI. New European Agency for IT Management

As of December 2012, a new European Agency for Large-scale IT Systems has taken over the operational management of the VIS and a biometric database known as Eurodac,⁵⁷ and as of spring 2013, will assume the management of SIS II. The main task of the Agency is to ensure that the systems under its responsibility are functioning effectively and are available on a twenty-four-hour basis in order to allow the exchange of data between national competent authorities.⁵⁸

Because Schengen regulations intersect with EU legislation and national laws on privacy and personal data protection, the new Agency is assigned the task of ensuring that data protection requirements are guaranteed, as provided for in the relevant EU legislation. The latter includes Directive No. 95/46/EC, which has been implemented by the EU Members and governs the processing of personal data by those Members, and Regulation (EC) No. 45/2001, which applies to the activities of EU institutions or actions by EU bodies.⁵⁹

VII. New Proposals on “Smart Borders”

On February 28, 2013, the European Commission, as a follow-up to its 2011 Communication on “Smart Borders—Options and the Way Ahead,”⁶⁰ proposed two new border protection measures: (1) a centralized Entry/Exit System (EES) for the registration of entry and exit data of third-country nationals crossing the external borders of the EU Members for a short stay;⁶¹ and (2) a Registered Traveler Program (RTP). The stated reason for the proposed EES is to combat illegal immigration and to strengthen the management and protection of the external borders of the Schengen area. The RTP is intended to facilitate border crossing for those frequent travelers from third-countries who have already been screened.

⁵⁷ Eurodac is a biometric database that contains fingerprints of third-country nationals seeking asylum and illegal immigrants caught at the border. See Council Regulation (EC) No. 2725/2000 of 11 December 2000 Concerning the Establishment of ‘Eurodac’ for the Comparison of Fingerprints for the Effective Application of the Dublin Convention, 2000 O.J. (L 316) 1, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2000:316:0001:0010:EN:PDF>.

⁵⁸ *EU Agency for Large-Scale IT Systems*, EUROPEAN COMMISSION, HOME AFFAIRS, http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/agency/index_en.htm (last updated Mar. 5, 2013).

⁵⁹ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, 1995 O.J. (L 281) 31, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1995:281:0031:0050:EN:PDF>; Regulation (EC) No. 45/2001 of 18 December 2000 of the European Parliament and the Council on the Protection of Individuals with Regard to the Processing of Personal Data by the Community Institutions and Bodies and on the Free Movement of Such Data, 2001 O.J. (L 8) 1, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:008:0001:0022:EN:PDF>.

⁶⁰ *Communication from the Commission to the European Parliament and Council, Smart Borders – Options and the Way Ahead*, COM (2011) 680 final (Oct. 25, 2011), <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0680:FIN:EN:PDF>.

⁶¹ *Proposal for a Regulation of the European Parliament and of the Council Establishing an Entry-Exit System (EES) to Register Entry and Exit Data of Third-country Nationals Crossing the External Borders of the Member States of the European Union*, COM (2013) 95 final (Feb. 28, 2013), http://ec.europa.eu/dgs/home-affairs/doc_centre/borders/docs/1_en_act_part1_v12.pdf.

A. Entry/Exit System

1. Current Situation

Currently, at the EU level, there is no method for calculating the number of irregular immigrants, the majority of whom have overstayed their visas. Current estimates indicate that there are between 1.9–3.8 million irregular immigrants in the EU. In 2010, the Commission reported that only 505,220 irregular immigrants were caught.⁶² The Schengen Borders Code does not require the registration of a third-country national's cross-border movements. Currently, travel documents of such individuals are stamped by border guards at the entry and exit points of the Schengen area. This is the only tool that can be used by border guards and immigration officials to calculate the duration of stay of a third-country national. The existing SIS and VIS databases, described above, have not been designed to register cross-border movement.

Consequently, as the Commission identified in its Explanatory Memorandum to the EES proposal, there are no electronic means to find out where and when a third-country national has entered or left the Schengen area. Thirteen Members—Bulgaria, Estonia, Spain, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Portugal, Romania, Slovakia, and Finland—have developed their own entry/exit systems and collect alphanumeric data (that is, data represented by letters, digits, or punctuation marks) on the people entering their territories.⁶³ However, as the Commission pointed out, these systems can detect an overstay only in cases of third-country nationals who exit the same Member State that they entered.

2. The Proposal

The proposed EES is designed to improve the management and control of the external borders, combat irregular immigration, facilitate the cooperation between border and immigration national authorities, and provide access to data pertaining to the entry and exit of third-country nationals.⁶⁴ Consequently, the EES is anticipated to facilitate decisions by national competent authorities pertaining to the

- calculation of the duration of the authorized stay of third-country nationals,
- identification of any person who may no longer meet the criteria for entry or stay within the territories of the Member States,
- identification of those who overstay their visas, and
- collection of statistics on the entries and exits of third-country nationals.⁶⁵

Initially, the EES will process alphanumeric data and at a later stage will also use fingerprints as the most reliable method of identifying those without travel documents.⁶⁶

⁶² *Id.*

⁶³ *Id.* at 2.

⁶⁴ *Id.* art. 4

⁶⁵ *Id.*

The EES will consist mainly of a central system comprised of a central unit and a back-up unit to be used in the event of failure of the central system, and a National System that will operate on the basis of a uniform interface with each Member State.⁶⁷ An important feature of the EES is that it will be equipped with an automated calculator, which will indicate the maximum authorized duration of stay. Thus, it will be possible to inform the competent authorities of the authorized stay on border entry and will also identify third-country nationals upon exit who have overstayed their visas.⁶⁸

B. Registered Traveler Program

Pursuant to the proposal, the RTP would consist of a “token-Central Repository” system for the storage of data on registered travelers, which would operate through the use of tokens kept by the individual travelers, and the Central Repository, which would be a centrally located physical storage of the RTP data.⁶⁹ Third-country nationals who wished to participate in the RTP would need to be at least twelve years old and provide reasons or a need for travelling often for business, family, or other purposes. Third-country nationals who held a multiple-entry visa, a residence permit, or a visa valid for at least one year would qualify for the program and be accepted, if they wished to participate.

⁶⁶ *Id.* Recital 8.

⁶⁷ *Id.* art. 5.

⁶⁸ *Id.* art. 9.

⁶⁹ *Id.* art. 2, para. 1.