CYRUS D. MEHTA & PARTNERS PLLC
US IMMIGRATION & NATIONALITY LAW

JULY 2016 GLOBAL IMMIGRATION UPDATE

Posted on July 6, 2016 by Cyrus Mehta

1. **Feature Article**

REFUGEES AND RELATED BENEFITS: AN OVERVIEW – This article provides an overview of recent developments with respect to refugees and the benefits granted to them.

2. **Country Updates:**

BELGIUM – This article summarizes details on work permit exemptions, related to technical work, for foreign employees in Belgium.

CANADA – Several developments have been announced.

ITALY – Several developments have been announced.

RUSSIA – The Federal Migration Service of Russia has been reorganized.

TURKEY – The European Commission has proposed visa-free travel for Turkish nationals in the Schengen area.

UNITED KINGDOM – Several developments have been announced.

1. **Feature Article**

REFUGEES AND RELATED BENEFITS: AN OVERVIEW

This article provides an overview of recent developments with respect to refugees and the benefits granted to them.

Canada

In September 2015, a news photograph of a drowned Syrian child sparked a

heated debate over refugee rights and Canada's role to provide refuge. Ever since then, refugee rights have been a recurrent theme in Canada's media outlets and elsewhere. Below is a brief overview of the benefits granted to refugees (i.e., protected persons or persons who received this status following a favorable pre-removal risk assessment decision) and refugee claimants in Canada with regard to health care coverage and work permits.

Health care coverage. Before June 2012, refugee claimants, even those with pending or failed claims awaiting an appeal, were eligible to be covered under the Interim Federal Health Program, which provided similar health care coverage to what Canadian citizens and permanent residents on social assistance were entitled to (basic health care coverage, prescription drugs, vision care benefits, urgent dental care). Following cuts imposed in 2012 by the Conservative government, coverage became tiered and placed prior eligible persons into four categories. This had the effect of significantly reducing their benefits. On April 1, 2016, following Justice Mactavish's ruling in the Federal Court that these cuts had a "cruel and unusual" impact on refugee claimants, the Liberal government officially announced that the prior Interim Federal Health Program would be restored to what it was before the changes were introduced. Moreover, it was reported that as of April 2017, additional health care coverage would be available to refugees before their departure for Canada.

Refugees, refugee claimants (determined to be eligible for a hearing), and protected persons now have access to full health care coverage, which includes, for most beneficiaries, coverage for the cost of the Immigration Medical Exam (IME) required under the Immigration and Refugee Protection Act. The Interim Federal Health Program provides resettled refugees with basic coverage until they become eligible for provincial or territorial health insurance as well as supplemental and prescription drug coverage as long as they continue to be assisted by the government. Protected persons have access to basic, supplemental, and prescription drug coverage until they qualify for provincial or territorial health insurance. Refugee claimants have access to the coverage until they become eligible for provincial or territorial health insurance, until they depart from Canada if their claim has been rejected or immediately after their claim is either withdrawn or abandoned or they are re-determined to be ineligible and not able to apply for a pre-removal risk assessment.

Work permits. Most refugee claimants in Canada are eligible to apply for an

open work permit. They must prove that their personal information form (PIF) has been filed and referred to the Refugee Protection Division of the Immigration and Refugee Board (IRB), and they must demonstrate their inability to financially sustain themselves without resorting to welfare. If these conditions are met, refugee claimants must undergo a medical examination before a work permit can be issued. In certain cases, a person with a removal order that the Canada Border Services Agency is not able to immediately enforce may be able to obtain a work permit.

As noted above, not all refugees are eligible to apply for an open work permit. Those from "designated countries of origin" (such as the United States, Mexico, and most European countries) are prohibited from applying for a work permit unless their claim has been accepted or 180 days following the date their claim has been referred to the IRB.

Germany

The opportunities for refugees to be employed in Germany depend on their residence status.

Applicants with permission to reside (Aufenthaltsgestattung). Foreign third-country nationals having crossed the border who have sought or filed for asylum but are still in asylum proceedings may in principle be granted residence for the purpose of employment with the consent of the labor authorities once they have been in Germany for more than 3 months.

Before giving consent, the labor authorities carry out a job market test by examining the impact of the employment on the labor market, whether priority applicants are available, and the concrete working conditions. With regard to the latter, the applicant must benefit from the same working conditions (e.g., salary and working hours) as applicants from the local job market. However, such a test need not be passed if the application is filed under the EU Blue Card visa category for shortage occupations (e.g., natural scientists, mathematicians, engineers, doctors, or IT consultants earning at least €38,688). The same applies to applications filed under the vocational training visa category (Section 6 Employment Regulation) or the recognized occupation requiring formal training visa category (Section 8 Employment Regulation).

The foreigners' office can grant residence for the purpose of employment

without the consent of the labor authorities in the following cases:

- Employment as an introductory trainee
- Employment in in a state-recognized apprenticeable occupation
- Employment under the highly skilled visa category, the EU Blue Card visa category, or the academic person visa category for holders of a German degree (Section 2 para. 1 Employment Regulation)
- Employment under the executive visa category (Section 2 Employment Regulation)
- Employment of a spouse, life partner, relative, or first cousin living together with the applicant in a common household
- Any employment after four years of having been duly employed in Germany with a residence permit *(Aufenthaltserlaubnis)*, a permission to reside *(Duldung)*, or a temporary suspension of deportation status

Moreover, consent with regard to employees to be employed by temporary agencies may be given only if the applicant resides in Germany for at least 15 months with permission to reside *(Aufenthaltsgestattung).* In such cases, the priority review is limited to a check of the working conditions based on the specific job, the salary, and the working hours.

Those with permission to reside who must live in a reception facility *(Aufnahmeeinrichtung)* for six weeks up to six months cannot engage in any employment . The same applies to individuals from countries declared safe countries of origin (e.g., Albania, Bosnia and Herzegovina, Ghana, Kosovo, Macedonia, Montenegro, Senegal, and Serbia) who filed their application for asylum after August 31, 2015, and must live in a reception facility for the duration of their asylum proceedings or, if their applications are turned down, for the duration until they leave the country.

Applicants with a residence permit *(Aufenthaltserlaubnis).* Applicants who have received a positive decision as a result of asylum proceedings, regardless of the type of protection (e.g., right of asylum, refugee protection, subsidiary protection) in principle have the right to work, whether on a dependent or self-employed basis. However, in case of a prohibition of deportation, the local foreigners' office decides whether residence for the purpose of employment is granted. It is noted on the residence title as well as on any additional paperwork that has been issued whether such permission has been granted.

Consent concerning those employed by temporary agencies is only given if the applicant resides in Germany for at least 15 months with a residence permit *(Aufenthaltserlaubnis).* In such cases, the priority review is limited to a check of the working conditions based on the specific job, the salary, and the working hours.

The foreigners' office may grant residence for the purpose of employment to applicants from the Balkan states declared safe countries of origin (e.g., Albania, Bosnia and Herzegovina, Kosovo, Macedonia, Montenegro, Serbia) concerning any kind of employment if the applicant—before entering Germany—has duly filed an application with the German immigration authorities abroad in the country of origin. However, that privilege is limited in time (from 2016 until 2020) and does not apply to applicants who have received benefits under the Seekers' Benefits Act *(Asylbewerberleistungsgesetz)* within the last 24 months. The latter does not apply to applicants who filed for asylum between January 1, 2015, and October 24, 2015; resided in Germany on October 24, 2015, with temporary suspension of deportation status *(Duldung)*; and immediately left the country. The aforementioned stipulation is an incentive for those refugees who were in Germany at the time to leave and come back by following the proper process so that the authorities can review the application while the applicant stays abroad.

Applicants with temporary suspension of deportation status (*Duldung*). Applicants who are not, or are no longer, in asylum proceedings, or whose applications have been turned down but whose deportation has been suspended, are granted a "certificate of suspension of deportation" (*Duldung*) by the immigration authorities. Such individuals may in principle be granted residence to work with the consent of the labor authorities once they have been in Germany for more than 3 months.

Before giving consent, the labor authorities carry out a job market test by examining the following criteria: the impact of the employment on the labor market, whether priority applicants are available, and the concrete working conditions. With regard to the latter, the applicant must benefit from the same working conditions (e.g., salary and working hours) as applicants from the local job market. However, such a test need not be passed if the application is filed under the EU Blue Card visa category for shortage occupations (e.g., natural scientists, mathematicians, engineers, doctors, or IT consultants earning at least €38,688). The same applies to applications filed under the *vocational*

training visa category (Section 6 Employment Regulation) or the *recognized occupation requiring formal training* visa category (Section 8 Employment Regulation).

The foreigners' office can grant residence for the purpose of employment without the consent of the labor authorities in the following cases:

- Employment as an introductory trainee
- Employment in a state-recognized apprentice occupation
- Employment under the highly skilled visa category, the EU Blue Card visa category, or the academic person visa category for holders of a German degree (Section 2 para. 1 Employment Regulation)
- Employment under the executive visa category (Section 2 Employment Regulation)
- Employment of a spouse, life partner, relative, or first cousin living together with the applicant in a common household
- Any employment after four years of working in Germany with a residence permit *(Aufenthaltserlaubnis)*, a permission to reside *(Duldung)*, or a temporary suspension of deportation status

Moreover, consent with regard to employees to be employed by temporary agencies may be given only if the applicant resides in Germany for at least 15 months with a temporary suspension of deportation *(Duldung).* In such cases, the priority review is limited to a check of the working conditions based on the specific job, the salary, and the working hours.

Those with temporary suspension of deportation status who must live in a reception facility for six weeks up to six months cannot engage in any employment at all. The same applies to individuals having such a status if they entered the country to obtain benefits under the Asylum-Seekers' Benefits Act; if they prevented residence-terminating measures by, for example, providing misleading information about their identity or nationality; or if they come from a country declared a safe country of origin (e.g., Albania, Bosnia and Herzegovina, Ghana, Kosovo, Macedonia, Montenegro, Senegal, and Serbia) and their asylum application was filed after August 31, 2015, and was turned down.

Draft Integration Act (*Integrationsgesetz*). The governing coalition has just presented a draft of the Integration Act intended to facilitate the integration of

asylum seekers by making integration measures available at an early stage, but also providing for sanctions if the integration measures are refused or not regularly attended. Furthermore, the principle according to which the grant of residence for the purpose of employment is only possible once the labor authorities have consented after having carried out a job market test will be lifted for three years since, based on the experience of the authorities, the decision was positive in most of the cases anyway. However, this only applies to regions with a low unemployment rate. In any case, the authorities will check whether the conditions of employment, particularly with regard to salary and working hours, are comparable to those that would be offered to an applicant from the local job market.

India

While India has accepted millions of refugees in recent times—mainly Bangladeshis but also Tibetans, Tamil Sri Lankans, Myanmarese, and Afghans—it does not have a separate law on refugees. Moreover, India is not a signatory to the 1951 United Nations Convention relating to the Status of Refugees and its 1967 Protocol. The Foreigners Act, with its limited definition of "foreigner," is inadequate to deal with the notions of asylum, non-refoulement, and refugees. On the other hand, India is a signatory to various international and regional treaties and conventions relating to universal human rights and refugees, such as the United Nations Declaration on Territorial Asylum (1967), the Universal Declaration of Human Rights, and the International Convention on Civil and Political Rights. India's Supreme Court has also extended the application of Article 14 (Right to Equality) and Article 21 (Right to Life and Dignity) to everyone, including migrants and refugees residing within the territory of India. Basic human rights as defined by the United Nations also have been conferred upon refugees in India.

The Ministry of Home Affairs (MHA) intends to amend the Citizenship Act, 1955 to grant citizenship to undocumented migrants who fled religious persecution in Pakistan and Bangladesh. The migrants would include Hindus, Buddhists, Christians, Zoroastrians, Sikhs, and Jains. The MHA seems to have specifically left out Muslims from the list of migrants, or could have allowed any migrant escaping religious persecution. If the criteria for granting citizenship is religious persecution, Muslims should also have been included in this list. The Citizenship Act, 1955 will have to be amended to reflect their exemption from the status of illegal migrant. Accordingly, a bill is being prepared to bring about

these changes to the Citizenship Act, 1955 as well as to the Foreigners Act, 1946; the Passport (Entry into India) Act, 1920; and the Passport (Entry into India) Rules 1950.

This benefit will extend to allowing people from "minority" communities in Pakistan who are in India on a long-term visa to buy property, open bank accounts, and obtain permanent account numbers (PANs). Previously, New Delhi announced that Pakistanis and Bangladeshis belonging to minority communities who had entered India legally before December 31, 2014, could stay in the country, even if their statuses had lapsed.

Given the fact that Articles 14 and 15 of the Constitution of India emphasize "equality before law" and "prohibition of discrimination on the basis of religion, caste, sex, race, place of birth," it will be interesting to see how these amendments to the Citizenship Act or the Foreigners Act will be worded. If such amendments are based on religious discrimination, they may be challenged as violating the fundamental principles laid down by the Constitution of India. The Ministry of External Affairs has also cautioned the Home Ministry that this move could affect relations with India's neighboring countries. Such a move could also have far-reaching political implications.

Although the Foreigners Act gives unfettered discretion to the government to expel a foreign national, he or she may still invoke the fundamental right to life and liberty as provided for in Article 21 of the Indian Constitution. However, this does not include the right to reside and settle in the country, as provided in Article 19(1)(e), which applies only to citizens of India. In *NHRC v. State of Arunachal Pradesh*, AIR 1996 SC 1234, the Supreme Court emphasized that it was the duty of a state to protect the life and liberty of Chakma refugees from threats by other groups who are opposed to them, and that the state "must act impartially and carry out its legal obligations to safeguard the life, health and well-being of Chakmas residing in the State without being inhibited by local politics." Moreover, in *Ktaer Abbas Al Qutaifi v. Union of India*, 1999 CriLJ 919, the Gujrat High Court recognized the principle of non-refoulement in the Refugee Convention so long as the person is not a threat to national security, even though India is not a party to the Convention, as this principle is encompassed in Article 21 of the Indian Constitution.

Italy

Italy's refugee policies are set forth in Decree 251/2007 (implementing the

European Commission (EC)'s directive 2004/83), which establishes a minimum standard for the attribution of the status of refugee, as well as the services they can enjoy (e.g., schooling, employment, healthcare), and Decree 25/2008 (implementing EC directive 2005/85). The decrees identify the basic procedures to assign and end refugee status. Withdrawal can occur when the refugee re-acquires protection from his or her own country, the fear of persecution ends, or he or she acquires a new nationality in a state that can grant his or her protection.

Asylum and protection seekers must present their requests to either the border police at their time of arrival, or the Police Department if they are already on Italian soil. They must remain within a specific area, as determined by the chief officer. The Territorial Commission reviews the application within 30 days and decides whether to interview the applicant. If there is no interview, this may be because there are sufficient reasons to grant refugee status or because the applicant does not have the prerequisites to be granted refugee status. After the interview, the applicant can be granted either refugee status, subsidiary protection, or a stay permit for humanitarian reasons. Refugee status can be refused based on the rejection of the application or for lack of grounds (especially if the individual is found to be applying for protection to delay his or her expulsion from Italy.

United States

In enacting the Refugee Act of 1980, the United States incorporated into domestic law the principles underlying the 1951 United Nations Convention relating to the Status of Refugees and its 1967 Protocol. The President, in consultation with the U.S. Congress, determines the number of refugees the United States accepts for resettlement each year. This year the United States is accepting 85,000 refugees, including 10,000 refugees from Syria. One year after resettling in the United States, refugees are eligible to apply for permanent resident status.

The United States thoroughly screens all refugee applicants before resettling them in the United States. Successful refugees are investigated at least four times by U.S. and international agencies before they enter the United States. The vetting process can take up to two years.

Shortly after the terrorist attacks in Paris, the U.S. Department of State on November 17, 2015, announced additional screening for Syrian refugee

applicants seeking to enter the United States. This process requires Syrian applicants to have their files reviewed at State Department headquarters and then undergo in-person interviews abroad by U.S. Citizenship and Immigration Services (USCIS) officers who have received specialized training. The USCIS Fraud Detection and National Security Unit also separately reviews Syrian refugee applicants with national security concerns. If a Syrian refugee satisfactorily passes these enhanced procedures, he or she must then complete a cultural orientation before entering the United States.

Several U.S. states have expressed concerns about resettling refugees from Syria and other Middle Eastern countries. The federal government and resettlement agencies have sued to prevent state governments from barring Middle Eastern refugees. The federal government argues that U.S. states lack power to refuse refugees based on their country of origin. In general, U.S. courts have ruled that the federal government has supremacy over state governments concerning immigration policy.

Once admitted to the United States, refugees are eligible to work. Employers may find that refugees can fill shortages at a time when other categories of foreign workers are less available than in previous years. A common nonimmigrant employment-based visa category, the H-1B specialty occupation, includes a statutory cap of 65,000 visas under the general-category cap and an additional 20,000 cap under the advanced degree exemption per fiscal year. USCIS received 172,500 H-1B petitions for fiscal year 2015, leaving an unfilled demand for over 107,000 skilled positions. In 2016, potential employers again invested a significant amount of time and effort in the H-1B petition process, only to again have the results decided by a lottery due to the significant number of petitions in excess of the cap. Many refugees are college-educated professionals who may immediately work in specialty occupations for which employers would regularly petition for foreign workers under the H-1B category.

As with all new hires, a Form I-9 (Employment Eligibility Verification) must be completed once a refugee has been offered and has accepted a job with the employer. The refugee should mark "Alien authorized to work" in Section 1 and record "N/A" for the date work authorization expires. Upon admission into the United States, a refugee will be issued a Form I-94/Form I-94A (Arrival/Departure) with an unexpired refugee admission stamp while an employment authorization card is being processed. In completing the I-9, the

employer must accept this document as a receipt establishing employment authorization and identity for 90 days. At the end of this 90-day period, the refugee must then present the employer either an original Form I-766 (Employment Authorization Document) or a document from List B, such as a state-issued driver's license, with a document from List C, such as an unrestricted Social Security card. As with all new hires, a refugee may choose to present any acceptable document from List A or combination of acceptable documents from List B and List C.

Employers are prohibited from discriminating on the basis of race, color, national origin, religion, sex, age, disability, and genetic information. Examples of discrimination include improperly requesting employees to produce more documents than required, improperly requesting that employees present a particular document, improperly rejecting documents that reasonably appear to be genuine and to relate to the employee presenting them, and requiring employees who look or sound "foreign" to present a particular document the employer does not require other employees to present. The Department of Justice's Office of Special Counsel for Immigration-Related Unfair Employment Practices investigates immigration-related discrimination claims and sues employers on behalf of immigrant workers complaining of discrimination.

Syrian refugees are only the latest group to become the focus of anxiety and discrimination. Employers should remind those who may avoid, insult, harass, or slight their new co-workers based on their nationality that such discrimination is un-American and can subject the company to lawsuits. Setting aside the legal issues, and reflecting practically on the disturbing world we live in today, it is a sad fact that we may need to worry more about our unscreened, U.S.-born applicants and co-workers than we do about extensively vetted refugees.

A Department of State fact sheet with frequently asked questions on the Syrian refugee admissions program is at http://www.state.gov/j/prm/releases/factsheets/2016/254651.htm. An overview of the U.S. refugee resettlement program is at http://www.acf.hhs.gov/programs/orr/resource/the-us-refugee-resettlement-program-an-overview.

Back to Top

2. **Country Updates**

Belgium

Below is a summary of details on work permit exemptions, related to technical work, for foreign employees in Belgium.

In principle, any employment in Belgium of a foreign employee requires a work permit, unless an exemption applies.

Several activities are considered business visitors' activities, which do not trigger a work permit requirement, such as technical activities like initial assembly or first installation of a product. Such a service is defined as: (i) an essential part of a sales/supply agreement; (ii) necessary for the use of the product; and (iii) provided by qualified and/or specialized employees of the supplier. Work in the construction/building industry is excluded.

Official comments from the authorities refer to the following example:

An American company sells a highly technological printing press to a Belgian printing company. The company sends two technicians. They have to install the printing press, adjust it, and provide the Belgian client's personnel with a training course. All of this takes 5 days. This American company and its employees are exempt.

The work permit exemption only applies to employees who are posted/assigned to Belgium, and the work cannot take longer than 8 days. There is no salary requirement.

Another business visitor activity is urgent maintenance of and repair work on a product. The scope of this work by specialized technical workers is the performing of urgent maintenance of and repair work on goods supplied by the foreign employer to a Belgian customer. The regulations explicitly confirm that IT work falls under the scope of this work permit exemption.

Official comments from the authorities refer to the following example:

The air-conditioning in a Belgian company is defective. The company contacts the supplier in..., who sends out a technician. After half a day the technical problem is solved. The ... employer/supplier is exempt from the declaration.

This exemption only applies to employees who are posted/assigned to Belgium, and the employee cannot work more than 5 days per month. The remuneration

of the employee must be at least equal to the Belgian minimum wage.

The employer who invokes a work permit exemption must be able to prove that the conditions for the exemption are met (such as in the event of audit by social inspection services). There are specific rules regarding the minimum initial documentation required:

- For initial assembly and/or first installation of a product: a sworn statement by the employer, and a copy of the supply contract;
- For urgent maintenance of and repair work on a product: a sworn statement by the employer, and a statement by the client regarding the urgency of the work.

In the event of an audit, the social inspection services can "overrule" the employer's sworn statement: they can opine on the basis of the facts that the work permit exemption does not apply. This could result in civil or criminal proceedings.

As a general requirement, to be able to invoke a work permit exemption, the employees must be legally residing in Belgium. Unless the employees reside in a hotel, they must make a declaration of arrival with the municipal authorities of the town where they will reside within three working days of arrival.

Legal residence in Belgium for visa waiver citizens implies that the employees have not yet resided in the Schengen area more than 90 days in any 180-day period. Furthermore, these employees must hold a travel document that (i) is valid "at least 3 months after the intended date of departure from the territory of the Member States" (this requirement may be waived in "a justified case of emergency"), and (ii) has "been issued within the previous 10 years."

Back to Top

CANADA

Several developments have been announced.

Many are being caught unprepared by new primary inspection tools. Beginning in November 2015, the Canada Border Services Agency (CBSA) updated its frontline systems so that CBSA officers working the Primary Inspection Line (PIL) at border crossings now have immediate access to the Canadian Police Information Centre (CPIC) database. Previously, these frontline officers only had access to an immigration-related database, and an individual seeking to

enter Canada would need to be referred to secondary inspection for an Officer to run his or her information through CPIC.

The introduction of this change has affected the information available to PIL CBSA officers, and has the potential to affect any foreign national who has ever been arrested, charged, or convicted of a crime inside or outside of Canada. In the first month of operation, this procedural change flagged 1,800 cases where travelers were identified as having outstanding warrants against them.

All foreign nationals seeking to enter Canada who have been subject to an arrest, charge, or conviction in or outside of Canada need to proactively consider if they are inadmissible to Canada and be prepared to address any issues, including disclosing their past history. Of importance is the fact that the CPIC information is not always up-to-date, so even if the matter was resolved without a conviction (i.e., dismissed or finding of not guilty), the onus is on the foreign national to satisfy the CBSA officer that he or she is admissible. Depending on the nature of the charge or conviction, these foreign nationals might find that prior incidents render them inadmissible to Canada. Failure to disclose the information on entry can result in a finding of misrepresentation, and could lead to a five-year ban on entering Canada, or refusals of future immigration applications. Even without the CPIC system, it is imperative that a foreign national disclose any past infractions, from driving while impaired to issues of criminality.

There are ways to overcome inadmissibility based on a past criminal activity. These include a discretionary application known as a Temporary Resident Permit or a finding of "deemed rehabilitation," which can be executed directly at the port of entry, or a more involved application for rehabilitation that typically needs to be filed at a Canadian embassy or consular office outside Canada before entry.

Administrative monetary penalties are introduced for employers failing to comply with rules for foreign workers. Canada has introduced a new system of financial penalties and other consequences for employers found to be non-compliant with the conditions of the Temporary Foreign Worker Program (TFWP) and the International Mobility Program (IMP). New regulations introducing fines known as Administrative Monetary Penalties (AMPs), and bans on hiring foreign workers for whom work permits are required, came into force on December 1, 2015.

The new system takes various factors into consideration, including the nature and severity of the violation, the employer's compliance history, and the size of the employer. A points system is used to determine the amount of any applicable fines and the length of any applicable bans. In the spirit of encouraging compliance with program conditions, employers are encouraged to voluntarily disclose non-compliance and may receive reduced consequences for doing so, depending on the circumstances.

Therefore, it is particularly important that employers ensure their employees' working conditions (such as name of employer, work location, occupation, and wage) remain the same as those outlined in the Labour Market Impact Assessment (LMIA) approval letter or, in the case of an LMIA-exempt position, that the name of the employer, work location, and occupation match those outlined in the offer of employment provided to Immigration, Refugees and Citizenship Canada (IRCC), formerly Citizenship and Immigration Canada. Note, however, that IRCC may see a significant change in wages as an indication that the occupation has changed, and additional information establishing that this is not the case could be required.

The potential consequences for employers are significant: up to $1,000,000 in fines and a permanent ban on hiring foreign workers for whom work permits are required. Consequences may be reduced if employers voluntarily disclose non-compliance and provide justification, especially if employers are able to demonstrate that they were proactive in reporting or addressing the discrepancy or violation. Employers are encouraged to take the following steps:

1. Identify all foreign workers in the organization with Canadian work permits.
2. For each foreign worker with an LMIA-based work permit, compare his or her current occupation (job title and duties), wages (including benefits and other compensation), and work location with what was indicated on the LMIA approval letter. Identify any discrepancies and consult with immigration counsel on whether to report these discrepancies to Service Canada as not substantially the same terms as those initially approved.
3. Review each other Canadian employer-specific work permit to determine if the employer, occupation (job title and duties), and work location are consistent with what is listed on the work permit and with what was submitted to IRCC at the time the work permit application was made.

Identify any discrepancies and consult with immigration counsel on whether an application to vary and change the work permit should be made.
4. Set up a flag in employment records for all employees holding employer-specific Canadian work permits as a reminder to the human resources team that any changes in wage, occupation, or work location should be reviewed with immigration counsel.
5. Educate human resources personnel and employees with Canadian work permits on the potential implications of changing wages, location of work, or job duties.
6. Consider implementing a workplace harassment policy, harassment awareness training, and a mechanism for employees to report concerns.
7. Take steps to review and ensure compliance with provincial and federal legislation regulating employment and the recruitment of employees.
8. Develop an immigration strategy to transition foreign workers to Canadian permanent residence.
9. Take steps to ensure that payroll and recruiting records for workers holding Canadian work permits are maintained for 6 years.

As of October 26, 2015, employers offering employment to LMIA-exempt foreign nationals must submit compliance information through the new IRCC Employer Portal. The IMM 5802 form (Offer of Employment to a Foreign National Exempt from a Labour Market Impact Assessment (LMIA)) that was in place since February 21, 2015, is no longer accepted. For a foreign worker employed by a non-Canadian company, it is unclear whether the Canadian company receiving the benefit of the work or the foreign worker's non-Canadian employer is responsible for filing the compliance form and ultimately liable if there is a finding of non-compliance. Recently, IRCC stated that the Canadian company receiving the benefit of the work performed by the foreign worker is responsible for filing the compliance form. Accordingly, the Canadian company will be held liable if there is a finding of non-compliance.

Many Canadian companies are reluctant to assume responsibility for filing the compliance form for their foreign vendors or foreign vendors' employees. Those that are prepared to file may seek an indemnification from the foreign vendor to mitigate against the foreign vendor's not keeping payroll records or failing to pay the foreign worker the wage offered at the time the work permit was issued. In other instances, the foreign vendor may be unwilling to provide

the Canadian company with details of wages paid to their employees, which are necessary for the Canadian company to file the compliance form. Vendors typically want to avoid the Canadian company's knowing the foreign vendor's profit margins. Consequently, this new compliance scheme is likely to have a chilling effect on trade relationships between Canadian and foreign vendors providing services. The foreign national cannot proceed with a work permit application at a port of entry or through a visa office without this compliance requirement first having been completed online.

Given the potential severity of these new penalties and consequences, it is imperative that employers provide accurate and complete information on all LMIA and LMIA-exempt applications.

Back to Top

ITALY

Several developments have been announced.

Tax on residence permits declared void. The TAR, Lazio's Regional Administrative Court, has declared void part of the Ministerial decree of October 6, 2011, introducing a residence permit tax and abolishing the fee on applications. This comes after the European Court of Justice had judged the Italian residence permit application tax a breach of European Union (EU) regulations, being disproportionate and a limit on the rights of foreign citizens. The decree had set the renewal fee at a variable rate of 80 to 200 euros, replacing the previous lower fee. Although the tax should no longer be applied, other expenses remain, such as €16 for stamps, €30.46 for the electronic card, and €30 for post office services.

It is likely that the Italian government will lower the tax to an amount considered acceptable by the EU. Further developments and instructions are expected soon.

Increased filing fees for electronic residence permit card. Under a ministerial decree of March 10, 2016, issued by the Ministry of Economy and Finance, the Italian government has increased filing fees for the electronic residence permit (*permesso di soggiorno*) in credit-card format (format pursuant to Council Regulations No. 1030/2002 and No. 380/2008). The new fee amounts are:

- Residence permit card—fee waiver: €30.46 (previously €27.50)

- Residence permit card valid from three months to one year: €110,46 (previously €107,50)
- Residence permit card valid from one to two years: €130.46 (previously €127.50)
- EC residence permit card for long-term residents and intracompany residence permit cards for managers and highly skilled workers (application pursuant to Art. 27a of Italian immigration law): €230.46 (previously €227.50)

Counsel no longer allowed to accompany clients submitting applications at Milan Police Office. The Police Office in Milan no longer allows local counsel to accompany clients while they are submitting applications. Counsel can stay with their clients in the waiting room, but when clerks summon applicants to submit the applications, they cannot be accompanied by a third party. In addition, serious delays have been reported in appointments for fingerprinting. Individuals who have filed applications in May have been summoned for September appointments, for example.

Revocation of EC residence permit for long-term residents—right to maintain an ordinary permit of stay if the individual meets the conditions set forth by law. The Administrative Appeal Council (*Consiglio di Stato*, April 5, 2016, no. 1327) overturned a decision of the Administrative Court and declared that if an EC permit for a long-term resident is revoked, an expulsion order cannot be issued without taking into account whether the individual has the right to obtain an ordinary permit of stay and therefore is still entitled to remain in Italy on different grounds. An exception exists if the individual is a danger to national security.

Civil union law for same-sex couples passes. A same-sex civil union law was published in the official gazette on May 21, 2016, and took effect June 5, 2016. Implementing decrees will follow to harmonize all other regulations—included immigration regulations—with the new law.For the full text of the law (Italian only), see: http://www.gazzettaufficiale.it/eli/id/2016/05/21/16G00082/sg

Back to Top

RUSSIA

The Federal Migration Service of Russia has been reorganized.

On April 5, 2016, Russian President Vladimir Putin signed a Presidential Order

reorganizing the Federal Migration Service of Russia. Specifically, it no longer exists as an independent government service. It is one of the departments of the Internal Affairs Ministry.

Previously, the Federal Migration Service had been a part of the Internal Affairs Ministry. It was detached from the Internal Affairs Ministry and established as a separate government service in 2004.

Over the last few years, Federal Migration Service officials complained that the Service did not belong to the so-called "enforcement agencies" and was therefore not able to conduct investigations, arrest people, and overall engage in operational-search activity. The Service constantly required Internal Affairs assistance in such matters. The "merger" is expected to solve this problem.

President Putin also announced that a third of the Federal Migration Service employees will be dismissed. It remains to be seen whether this will affect the efficiency of the Service.

The change is only organizational and no related legislative changes in the immigration sphere have yet been made.

Kirillova Olga Evgenievna has been appointed as the chief of the Federal Migration Service, replacing Romodanovskiy Konstantin Olegovich.

Back to Top

TURKEY

The European Commission has proposed visa-free travel for Turkish nationals in the Schengen area.

Under a European Commission proposal for visa-free travel for Turkish citizens in the Schengen area, Turks would have visa-free access to the 26 countries of the Schengen zone. This is reportedly in return for Turkey accepting back an outflow of migrants traveling via the Aegean Sea to Greece.

The proposed change would lift visa requirements by the end of June for Turks traveling for short-stay (three-month) tourism or business trips, but will not include granting Turks the right to get a job in Europe. The change could take effect from July, but first it requires approval by the European Parliament and member states. It will not apply to the United Kingdom or Ireland, which are not part of the Schengen area, so the visa requirement will still apply to Turks traveling to those areas.

Back to Top

UNITED KINGDOM

Several developments have been announced.

Immigration Act 2016 Enacted

The Immigration Bill has completed its passage through Parliament. The bill received Royal Assent on May 12, 2016, and was published on May 17, 2016, as the Immigration Act 2016. The bill creates a number of new criminal offenses of which both individuals and businesses need to be aware and for which they should plan to ensure that they do not fall afoul of the new law. A summary of some of the key proposed offenses is outlined below.

Illegal Working

There is a new offense for an employee who works illegally. This offense applies where a person works when he or she has not been granted leave to enter or remain in the United Kingdom (UK), or the person's leave to enter or remain in the UK is invalid or has ceased to have effect, or the person is subject to a condition preventing him or her from doing the work. The proposed offense is punishable by imprisonment for up to a maximum of 51 weeks (currently 6 months), or by a fine, or both. A person convicted of the offense may also have his or her earnings seized. "Working" is given a broad statutory definition that purports to cover an array of working arrangements.

Crucially for businesses, the bill includes an offense of employing an illegal worker. This offense covers a situation where a person employs an employee who is disqualified from employment by reason of the employee's immigration status and the hirer has reasonable cause to believe that the employee is disqualified from employment by reason of the employee's immigration status.

This offense has a broader application than its predecessor under § 21 of the Immigration, Asylum and Nationality Act 2006. This offense now can be tried on indictment and a maximum penalty of five years of imprisonment can be imposed. This offense is in addition to the civil penalties under § 15 of the Immigration, Asylum and Nationality Act 2006, under which a company can be fined for employing an illegal worker.

This new offense means that businesses in particular need to be much more diligent about ensuring the correct checks are made when hiring new

employees to avoid criminal liability.

Residential Tenancies

The bill creates an offense where a landlord knows or has reasonable grounds to believe that an adult is disqualified from renting as a result of his or her immigration status, yet allows the adult to occupy residential premises. There is also a separate offense where a tenant's leave to remain in the UK expires during the term of the tenancy, the tenant continues to occupy the property, and the landlord is aware of this or has reasonable cause to believe this has happened but fails to notify the Secretary of State as soon as reasonably practicable.

Similar offenses apply to letting (leasing) agents when they carry out "right to rent" checks on behalf of a landlord and know, or have reasonable cause to believe, that a landlord will be entering into a tenancy agreement with a person disqualified as a result of his or her immigration status and fail to inform the landlord despite having sufficient opportunity to do so.

Driving

There are further powers relating to the provision of driving licenses. These include a power to search premises for a driving license belonging to someone unlawfully in the UK that has been revoked. There is also a criminal offense for failing to surrender a driving license that has been revoked on the grounds of immigration status without reasonable excuse. Finally, there is a new offense of unlawfully driving while in the UK. This offense criminalizes someone who is caught driving while unlawfully in the UK as a result of his or her immigration status.

This package of criminal offenses (which are designed to work alongside additional civil powers) makes it very difficult for people unlawfully in the UK to live a normal life. In addition, the new offenses now place onerous burdens on (often small) businesses to undertake checks on employees and tenants. The best way for businesses and landlords to ensure that they do not fall afoul of the criminal law is to ensure that the correct checks are undertaken, and that records of the checks are retained.

Changes to Tier 2

Following the publication of the Migration Advisory Committee (MAC)'s report

on its review of the Tier 2 visa category in January 2016, the Home Office has announced details of the changes it will introduce for the Tier 2 visa route. Despite fears that the restrictive measures recommended by the MAC would be followed in their entirety, the government has adopted a more cautious approach in some areas and decided not to introduce some of the changes that would have been most damaging to businesses.

The changes will be introduced in two stages. The first tranche is expected to take effect in autumn 2016 (most likely with the October Rules changes). The second tranche will be implemented with the April 2017 Rules changes. They are as follows:

Autumn 2016 changes:

- There will be an increase in the Tier 2 (General) minimum salary threshold to £25,000 for experienced workers, maintaining the minimum threshold of £20,800 for new entrants.
- There will be exemptions from the increased Tier 2 (General) experienced worker salary threshold for nurses, medical radiographers, paramedics, and secondary school teachers in mathematics, physics, chemistry, computer science, and Mandarin. The exemption will end in July 2019.
- The salary threshold for the Tier 2 (ICT) Short-Term route will be raised to £30,000.
- The minimum salary requirement for the Tier 2 ICT (Graduate Trainee) category will be reduced from £24,800 to £23,000, and the number of places available to companies will rise from 5 to 20 per year.
- The Tier 2 (ICT) Skills Transfer category will be closed to new applications.
- Extra weighting will be given to overseas graduates in the Tier 2 (General) monthly quota allocation, to make it easier for employers to score the necessary points to secure a restricted Certificate of Sponsorship.
- Employers will continue to be able to sponsor non-European Economic Area (EEA) graduates of UK universities without first testing the resident labor market and without being subject to the annual limit on Tier 2 (General) places. Graduates will also be able to switch roles once they secure permanent jobs at the end of their training programs, without the sponsors having to undertake resident labor market tests.
- The Immigration Health Surcharge will be introduced for the Tier 2 (ICT) category.

- Nurses will remain on the shortage occupation list but employers will need to carry out a resident labor market test before recruiting a non-EEA nurse.

April 2017 changes:

- The Tier 2 (General) minimum salary threshold will be raised to £30,000 for experienced workers.
- The Tier 2 (ICT) Short-Term category will be closed to new applications.
- The Immigration Skills Charge (ISC) will be introduced for employers of Tier 2 migrants. This will be £1,000 per migrant per annum (£364 for small businesses and those in the charitable sector). An exemption to the charge will apply to PhD-level jobs and international students switching from Tier 4 to Tier 2 (General).
- The high-earners' salary for Long-Term ICTs will be reduced from £155,300 to £120,000.
- The one-year experience requirement in the Long-Term ICT category will be removed where the applicant is earning over £73,900.
- There will be a waiver of the resident labor market test and prioritization for Tier 2 (General) places where the visa grant(s) are in support of the relocation of a high-value business to the UK or, potentially, an inward investment project.
- The MAC's recommendation of a 24-month period of employment to qualify for Tier 2 (ICT) will not be introduced.
- Following a review of allowances under the Tier 2 (ICT) categories, there may be some changes to the type and amount of any allowance that can be amalgamated with the base salary, to meet the minimum salary threshold.

These measures will be a relief to those employers running graduate recruitment programs, since the government has decided not to introduce any restrictions that would jeopardize these programs. Furthermore, the reduction in the high-earner threshold to £120,000 will remove more migrants from the annual limit on Tier 2 (General) places, leaving more available for those earning lower salaries. In addition, with regard to those Tier 2 (ICT) migrants earning more than £73,900, removing the requirement for 12 months of employment overseas will make it easier for sponsors to transfer these highly skilled migrants from their overseas offices to take up work in the UK at short notice.

It is unclear how the 12-month cooling-off period will apply to those Tier 2 (ICT) migrants transferring to the UK for a short period, once the Tier 2 (ICT) Short-Term route is closed in April 2017. Currently, Tier 2 (ICT) Short-Term migrants can return to the UK under the Tier 2 (ICT) Long-Term route without first having to spend 12 months overseas (known as the 12-month cooling-off period). Will migrants needing to come to the UK for short periods continue to be exempt from the cooling-off period if they are coming to the UK for three months or less and will this minimum period be increased if the cooling-off period will continue to apply?

Also, the finer details of how the ISC will apply to sponsors who are also paying an Apprenticeship Levy have yet to be clarified. It is hoped that sponsors will not be subjected to a double charge.

Tier 2 Migrants Taking a Sabbatical

The latest version of the Tiers 2 and 5 sponsor guidance took effect on April 6, 2016. The guidance includes changes to the reporting requirements for Tier 2 migrants who wish to take a period of unpaid leave or sabbatical. The prior position was that if a Tier 2 migrant took a sabbatical of 30 days or more over a single period, or over more than one period during any calendar year (January 1 to December 31), the employer could no longer sponsor the migrant and had to report this to the Home Office via the Sponsor Management System within 10 days. The new guidance stipulates that sponsorship of the migrant must now cease if the period of unpaid leave or sabbatical is *four weeks or more*. The four weeks is calculated according to the migrant's normal working pattern. For example, if the migrant works three days per week, the four weeks would be 12 working days. In effect, this means that Tier 2 migrants must ensure that any unpaid leave or sabbatical taken is *under* four weeks.

The only exception is if the absence is due to maternity, paternity, shared parental, adoption, or long-term sick leave. In those cases, sponsorship of the Tier 2 migrant may continue throughout the period of the absence.

Delays in Production of Biometric Residence Permits

Some migrant employees have experienced delays in receiving their Biometric Residence Permits (BRPs). This is reportedly due to technical issues affecting BRP production that have led to a backlog. The Home Office expects that the backlog should be cleared shortly. The normal timescale for receiving a BRP is

10 working days from the date of decision.

Back to Top