ABA Section of International Law
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Immigration & Nationality Law News

A quarterly newsletter of the ABA's Section of International Law's Immigration and Naturalization Committee

Winter Issue 2017/2018

Editorial Note

Dear Members,

Here is the Winter Issue 2017/2018 of the Immigration and Nationality Law News, published by ABA's Immigration and Naturalization Committee. This issue contains:

- *Co-Chair's Note* by Audrey Lustgarten;
- *Trade in Services: Legal Comparison of CETA to NAFTA* - By Jacqueline Rose Bart and Oliver Mao;
- *How Trump will reduce Immigration without changing the INA or even 8 CFR* – By Ira. J. Kurzban, Esq.;
- ***Upcoming Events*** - *ABA Section of International Law 2018 Annual Conference, April 17-21, 2018;*
- ***Past Events*** – *ABA Section of International Law 2017 Fall Conference Miami, October 24-28, 2017.*

Our sincere gratitude to the contributors - your time and effort are greatly appreciated.

Best,

Stefan Mueller
Sabrina Damast
Editors

Co-Chair's Note

Dear Members,

Happy New Year! We hope that everyone has enjoyed a restful holiday break and is ready to take on all of the immigration challenges that are sure to come our way this year. Our committee is off to a busy start in the new year, with speaker series sessions now scheduled for our February and May monthly calls, as well as three panels planned for the Section's Annual Conference in New York in April. We are also working on Diversity and Rule of Law initiatives that will be forthcoming shortly.

If your personal resolutions for the new year included getting more involved with the committee, we are happy to oblige. We are currently accepting nominations for Co-Chair, Vice Chair and Steering Committee roles for the next ABA year. To apply simply send an email with brief statement of interest to audrey@lustgartenglobal.com and m.kuehne.taylor@gmail.com. There are also many other opportunities for involvement – including writing an article for this wonderful newsletter, submitting a panel proposal for a seasonal meeting or even our speaker series session, or just volunteering your time to assist one of the Vice Chairs in organizing an event or initiative. We are always happy to answer questions and discuss opportunities for involvement, so please do not hesitate to reach out to us at any time.

Best,

Audrey Lustgarten
Co-Chair

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Call for Submissions

Members can submit articles, practice pointers, professional news and other items that they might think would interest our member base. If any member has just received an award, has been nominated for an award, moved firms, changed roles in the firm, or is speaking at an event, publishing an article, engaging in a volunteer project, or anything else noteworthy please let us know. Please note that all contributions on substantive law and practice pointers should focus on immigration law and practice.

Up until the leadership announces new roles in the committee, please continue to send your contributions to st.mueller@wengervieli.ch and sabrinadamast@gmail.com.

Trade in Services: Legal Comparison of CETA to NAFTA

By Jacqueline Rose Bart
and
Oliver Mao

The North American Free Trade Agreement (NAFTA) greatly improved mobility between enterprises in Canada, the US, and Mexico. Familiarity with the NAFTA business visitor, intra-company transfer, trader/investor, and professional categories is now an essential part of any immigration practitioner's legal arsenal. With the coming into force of the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union (EU), similar mobility has also been made available to EU and Canadian citizens. The increased mobility is poised to create new opportunities for Canadian enterprises with a presence in the EU and vice versa, especially in light of growing uncertainty as to NAFTA's future. An understanding of the trade in services provisions of both CETA and NAFTA, including how they differ from each other and from existing Canadian regulations, is accordingly necessary to take full advantage of opportunities in the EU market.

The commitments that Canada has made to enable EU citizens to enter the country for business purposes are contained in Chapter 10 of CETA. The four basic categories of such business travellers are:

- Business visitors;
- Intra-corporate transferees;
- Investors; and
- Professionals.

Business Visitors

Short-Term Business Visitors

A CETA short-term business visitor may engage in a wider rage of work activities without a work

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permit than those of a general business visitor.[1] In addition to attending meetings, purchasing or taking orders for goods or services, receiving or giving training, or performing after-sales service, CETA short-term business visitors may:

- Conduct technical, scientific, statistical, or marketing research;
- Conduct commercial transactions, in the case of management and supervisory personnel and financial services personnel (e.g. insurers, bankers, investment brokers);
- Accompany a tour that began in an EU member state (e.g. travel agents, tour operators, tour guides);
- Provide translation and interpretation services.

These additional activities, while broader than those of a general business visitor, are still more restrictive than those permitted under NAFTA. For example, NAFTA would also permit an agricultural harvesting supervisor or a vehicle operator transporting goods to Canada to work in Canada as a business visitor.[2]

Like a general business visitor, a CETA short-term business visitor may not sell goods and services to the general public. However, while a general business visitor must simply show that his or her *primary* source of remuneration and the *predominate* location of accrual of profits is outside Canada, CETA prohibits the receipt of any remuneration from a source in Canada. Additionally, if an applicant is required to perform any of the above-noted activities unique to CETA business visitors, the maximum length of stay will be restricted to 90 days in any six-month period. Employers must stay mindful of these differences, both major and subtle, between CETA short-term business visitors and general business visitors when planning employee business travel.

[1] *IRPR,* s. 187.

[2] *IRCC Publications and Manuals*, International Mobility Program: North American Free Trade Agreement, s. 2.7.

Business Visitors for Investment Purposes

Under this new category, an EU citizen in a managerial or specialist position may enter Canada without a work permit to set up an enterprise, as long as he or she does not engage in direct transactions with the general public and does not receive remuneration from a source in Canada. The maximum length of stay for a business visitor for investment purposes is 90 days in any six-month period. This new provision will allow EU citizens to expeditiously invest in new Canadian enterprises without the need for cumbersome work permits.

Intra-Corporate Transferees

Senior Personnel and Specialists

A work permit may be issued under the CETA Intra-Corporate Transferee (ICT) Senior Personnel and Specialist categories under conditions similar to those under the International Mobility Program[3] and NAFTA. The transferee must have been employed by, or a partner in, an enterprise of an EU member state for at least one year as a "Senior Personnel" or a "Specialist" (mirroring the NAFTA definitions of "executive capacity" and "specialized knowledge," respectively). He or she must be transferring to a Canadian subsidiary, branch, or head company of the EU enterprise. No Labour Market Impact Assessment is required for any CETA ICT.

Graduate Trainees

An EU citizen that has been employed by, or a partner in, an enterprise of an EU member state for at least one year may also be temporarily transferred to a Canadian subsidiary, branch, or head company of the EU enterprise as a Graduate Trainee. A qualifying employee must possess a university degree and must be transferring for

[3] *IRPR,* s. 204(a), 205(a).

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career development purposes or to be trained in business techniques or methods.

Distinctions between CETA and existing ICTs

Several important differences exist between these CETA categories and existing ICT categories. Unlike for an International Mobility Program or NAFTA ICT, there is no requirement that a CETA transferee's one year of previous employment have been continuous or obtained within the last three years. A CETA Specialist is only required to have either uncommon knowledge of the enterprise's products and services *or* an advanced level of expertise in the enterprise's processes (rather than both). However, the transferee cannot be transferring to an affiliate company of the EU enterprise. The maximum length of stay under the former two categories above is three years plus up to an additional 18 months at an officer's discretion, rather than seven or five years under the International Mobility Program, and the maximum length of stay as a Graduate Trainee is only one year. Because of these restrictions, practitioners should exercise caution when considering a CETA ICT.

Investors

The section of the IRCC manual regarding CETA Investor applications explicitly states that "CETA investors should be assessed using investor guidelines found in section six of NAFTA." [4] Accordingly, this category will likely be assessed using largely the same criteria as for NAFTA Investors.[5] A CETA Investor may obtain a work permit if he or she is an EU citizen that irrevocably invests a substantial amount of capital to establish a controlling interest in an enterprise majority-owned by EU nationals. Whether the investment meets the threshold for substantiality will depend on whether it is "significantly proportional to the total investment." [6]

Distinctions between CETA Investors and NAFTA Traders/Investors

The definition of a CETA Investor only extends to those who "establish, develop, or administer the operation of an investment in a capacity that is supervisory or executive." Thus, while individuals with "essential skills" might qualify as a NAFTA Investor,[7] they may not qualify as a CETA Investor. CETA also does not contain any provisions like those for NAFTA Traders, involving a substantial trade of goods or services principally between Canada and the trader's country of citizenship.

Professionals

CETA Professionals differ significantly from NAFTA Professionals in several ways. Most noticeably, NAFTA and CETA contain very different lists of occupations qualifying for their respective Professional categories. CETA Professionals are separated into two subcategories – Contractual Service Suppliers and Independent Professionals – both of which permit an EU citizen to obtain a work permit to fulfill a *bone fide* contract to supply a service. Unlike a NAFTA Professional, a CETA Professional may not work as an ordinary full-time employee of a Canadian enterprise; he or she may only supply a service pursuant a service contract.

One of the most attractive aspects of a NAFTA Professional work permit is that it may be initially issued for up to a three-year duration and may be extended indefinitely provided that the applicant continues to comply with the requirements of the category. This flexibility has been greatly reduced for CETA Professionals. The initial duration of a CETA Professional work permit is limited to 12 months in a 24-month period and extensions are

[4] *IRCC Publications and Manuals,* Canada-European Union (EU) Comprehensive Economic and Trade Agreement (CETA) – Investors R204(a) (work permit required/LMIA exemption code T46).

[5] *IRCC Publications and Manuals*, International Mobility Program: North American Free Trade Agreement, s. 6.1.

[6] *Ibid* s. 6.3.

[7] *Ibid* s. 6.4.

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only available at the discretion of the adjudicating officer. CETA Professionals must also possess more than merely a university degree and must meet stringent requirements, as set out below.

Contractual Service Suppliers

A Contractual Service Supplier is an EU citizen entering Canada to supply a service pursuant a contract between his or her EU employer and a Canadian customer. The EU employer must have no establishment in Canada. The applicant must have at least three years of professional experience in the occupation that is the subject of the contract and must have been working in that occupation for the EU employer for at least the immediately preceding year. The applicant must also possess a university degree and the necessary professional qualifications to work in that occupation in Canada. He or she cannot be remunerated directly by a Canadian source.

Independent Professionals

An Independent Professional is a self-employed EU citizen entering Canada to supply a service pursuant a contract between him or her and a Canadian customer. The applicant must have no establishment in Canada. The applicant must have at least six years of professional experience in the occupation that is the subject of the contract. The applicant must also possess a university degree and the necessary professional qualifications to work in that occupation in Canada.

Conclusion

Just as NAFTA facilitated business travel between Canada, the US, and Mexico, CETA will do the same for Canada and EU member nations. CETA is stronger than NAFTA in certain cases such as the Graduate Trainee ICT and business visitor for investment purposes categories. However, in other cases CETA is the more restrictive agreement. While it effectively enhances business mobility for EU enterprises, CETA is not as generous as NAFTA in enabling entry of professions to Canada. CETA has been in force in Canada for over three months. However, member states in Europe are in the process of implementing CETA into their domestic legislation and most anticipate doing so in 2018. Once CETA is proven by Europe to be as beneficial as it has been in Canada, it is hoped that CETA will be expanded to include more professions in a similar manner to the current NAFTA provisions.

Jacqueline Rose Bart *is the Principal and Founder of BartLAW Canadian Immigration Group, Barristers and Solicitors.* ***Oliver Mao*** *is an Associate Lawyer at BartLAW. They can be reached at info@bartlaw.ca or 4166011346.*

How Trump will reduce Immigration without Changing the INA or even 8 CFR

By Ira J. Kurzban, Esq.

The current administration has made immigration a focal point of its alleged war against the *status quo*. Trump talks about "bad hombres." His Attorney General Sessions appeared in Miami in August, 2017, to speak again about a random "illegal" Hispanic who raped a white woman and the need therefore to go after all "criminal aliens." After he tried to undo Obamacare and paid allegiance to the Koch Brothers in his first two Executive Orders, Trump began issuing his famous Executive Orders on immigration, including the Travel Ban.

Behind the rhetoric of the statements and Executive Orders is a calculated group of hardened anti-immigration activists lead by Stephen Miller and others placed in the Departments of Homeland Security, Justice, and State, whose goal is to virtually eliminate immigration in all its aspects. They want to end family immigration, end most of business immigration, dramatically reduce the numbers of refugees, asylees, and others fleeing persecution, and

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completely end immigration by Mexicans whom they see as a threat to their white America and Republican hegemony.

Trump invited the sponsors of the RAISE Act to the White House to kick off a legislative campaign to cut immigration by one-half and to develop a point system that would allow in to the U.S. only a small group of certain types of highly educated people. The chances of the RAISE Act's passage are quite small, just as Trump's threats to shut down the government unless our government pays for the "Wall" that he promised Mexico would pay for.

But all the public fanfare, like virtually everything else in the Trump era, is simply designed to mesmerize and distract the public while the true business of dismantling the federal government and ending immigration continues at a quickened pace. After all, you do not need the RAISE Act or the "Wall" to stop immigration—the former will not pass and the latter is hyperbole with no discernable practical enforcement effect—to achieve zero net immigration to the U.S. There are many other ways to accomplish that goal without any legislation or change in immigration regulations.

Just ask President Herbert Hoover. On September 9, 1930, during the Depression, Hoover held a press conference stating that "the only important provision of our law as to immigration is that one requiring the exclusion of those who are liable to become public charges." [8] He noted that the State Department had called a conference of consular officers to tighten up immigration and to extend those efforts beyond Mexico to Canada and Europe. Indeed, during this time period immigration was reduced by 60 percent simply through administrative fiat.

The same is happening right now. Here is how they are doing it:

1. Slowing down all immigration simply by taking longer periods to adjudicate applications. Officers are being instructed to scrutinize every piece of paper an applicant and petitioner ever filed before immigration or a consular officer. Gathering former DOS applications for non-immigrant visas, former petitions, and former declarations will often take months. But so what? If it takes twice as long to adjudicate a case, immigration has been reduced by one-half without any legislation or regulation.[9]

2. Issue lengthy detailed requests for evidence contesting every issue and requiring unreasonable quantities of proof in regard to any application for an immigrant or non-immigrant visa or adjustment of status. The back-and-forth of responding to requests for evidence alone significantly reduces immigration.

3. Cutting off parole and other forms of permissions to remain in the U.S. In August, USCIS ended a parole program for children fleeing violence in Central America[10] and the announced the end of the Cuban parole program.

4. Stopping programs that were required to go into effect that would have permitted entrepreneurs to enter the U.S. to the benefit of the U.S. economy. In July, USCIS issued a notice stating that the Entrepreneurial Parole Program would not go into

[8] The President's News Conference of September 9, 1930.

[9] *See generally USCIS Processing Time Information*, U.S. Citizenship and Immigration Services, https://egov.uscis.gov/cris/processTimesDisplayInit.do; *Summary of Presidential Memorandum on Implementing Immediate Heightened Screening and Vetting of Applications for Visas and Other Immigration Benefits*, American Immigration Lawyers Association, AILA Doc. No. 17031307 (Mar. 13, 2017).

[10] Termination of the Central American Minors Parole Program, 82 Fed. Reg. 38,926 (August 16, 2017); *see also* Mica Rosenberg, *U.S. Ends Program for Central American Minors Fleeing Violence*, Reuters (Aug. 16, 2017), www.reuters.com/article/us-usa-immigration-minors-idUSKCN1AW2OZ .

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effect and is being put off for a year while it can be studied.[11]

5. Delaying the issuances of visas abroad to persons who are otherwise eligible for such visas by doing greater "security" checks. The number of visa issuances is likely to significantly decrease over the next six months. Stripping the Department of State of sufficient personnel through budgetary cuts in the consular section ensures that the numbers of visas are decreased dramatically.[12]

6. Selectively refusing to issue visas to certain countries as in the current ban on non-immigrant visas to Russia, the end of visa issuance in Havana, the current visa "war" with Turkey, and the ban on Muslims entering the U.S. through the Travel Ban.[13]

7. Ending programs of humanitarian deferral of deportation by refusing to extend supervised release and stays of removal to family members of USC children or to alien families where one or more members, including children, have serious illness and need treatment in the U.S.

8. Refusing to agree to reopen administrative removal proceedings thereby thwarting the ability of persons who are eligible to become residents of the U.S. to file those applications.[14]

9. Refusing to agree to administratively close removal proceedings, thereby thwarting the opportunity of some to obtain residency or simply to not face removal due to extraordinary hardship or close relationships to U.S. citizens and lawful permanent residents.

10. Creating an atmosphere of terror by pursuing any removal case of any person not in status9 and by expanding expedited removal to include anyone within 100 miles of the border who cannot prove they have been in the U.S. continuously for the past two years.[15] The idea of creating a "reign of terror" is extended to blatantly unconstitutional conduct such as inspecting everyone on a *domestic* airline flight.[16]

11. Savaging the H-1B program by challenging level 1 wages for H-1Bs and utilizing other tactics to slow all H-1B processing, including temporarily ending premium processing.[17]

12. Pressuring Persons Granted Withholding to Leave the US.

13. Ending Deferred Action for Childhood Arrivals (DACA) and not continuing to fight challenges to Deferred Action for Parental Arrivals (DAPA).

14. Requiring interviews in business and other adjustment of status applications but refusing to hire more adjudicators, thereby cutting the numbers of people who may be adjusted yearly by 30 per cent or more.

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[11] International Entrepreneur Rule: Delay of Effective Date, 82 Fed. Reg. 131, 31,887 (July 11, 2017).

[12] Presidential Memorandum, 82 FR 16279 (Mar. 6, 2017); *See also* Jennifer Rubin, *What Is Going on at the State Department?*, Washington Post (August 16, 2017), www.washingtonpost.com/blogs/right-turn/wp/2017/08/16/what-is-going-on-at-the-state-department/?utm_term=.0cbee69d79cd.

[13] Exec. Order No. 13,780, 82 Fed. Reg. 13209 (Mar. 6, 2017); Proclamation No. 9645 (Sept. 24, 2017) [banning in whole or in part entry from Chad, Iran, Libya, N. Korea, Somalia, Syria, Venezuela and Yemen].

[14] AILA, Practice Pointer: *ICE Update on Prosecutorial Discretion Under the New Administration* (June 212, 2017), AILA Doc. No. 17062031.

[15] Executive Order 13767 (Jan. 25, 2017), 82 FR 8793.

[16] This undifferentiated "show me your papers" tactic has been challenged in federal court as a violation of the Fourth Amendment as well as the Administrative Procedures Act. *See* Amadei v. Duke, Case No. 17-Civ-5967 (EDNY Oct. 12, 2017).

[17] C. Mehta, *Stopping H-1B Carnage,* blog.cyrusmehta.com/2017/10/stopping-h-1b-carnage.html.

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15. Ending TPS for Sudan (which will terminate in Nov. 2018) and threatening to end Haitian and other TPS programs.[18]

16. Considering the removal of programs from the Exchange J-1 Visas—e.g. SWT Program, camp counselor program, au pair program, internships, trainees.

17. Cutting Refugee Levels to the lowest amount in decades to 45,000.[19]

18. Using Immigration Judges to undermine UAC's claims for asylum by giving IJs authority to determine whether children are UAC.[20]

19. Setting "completion" quotas for immigration judges as a means of increasing and expediting removal from the U.S. and threatening judicial independence.[21]

20. Visa restrictions on countries that allegedly do not cooperate in taking back their own citizens (naming Cambodia, Eritrea, Guinea and Sierra Leone).[22]

21. Imposing financial penalties on cities, counties and states that are considered sanctuaries for aliens.

22. No longer granting deference based upon any prior decision in the same case, thereby prolonging adjudications by treating extensions of stay and extension of petition requests *ab initio* in all cases.[23]

Ira J. Kurzban *is a Fellow of the American Bar Association, a Partner and Chair of the Immigration Department of Kurzban, Kurzban, Weinger, Tetzeli and Pratt, P.A., of Miami, Florida, a former National President and General Counsel of the American Immigration Lawyers Association and the author of Kurzban's Immigration Law Sourcebook (15th Edition).*

[18] Jacqueline Charles, *DHS Chief Tells Haiti's President: Start Thinking About Bringing Haitians on TPS Home*, Miami Herald (June 1, 2017), www.miamiherald.com/news/nation-world/world/americas/haiti/article153907329.html.

[19] Presidential memorandum for Secretary of State, Presidential Determination on Refugee Admissions for FY2018, No. 2017-13 (Sept. 29, 2017).

[20] Legal Opinion, King, GC, EOIR, *EOIR's Authority to Interpret the Term Unaccompanied Alien Child for Purposes of Applying Certain Provisions of TVPRA* (Sept. 19, 2017), AILA Doc. No. 17100201 [opining that IJs are not bound by DHS's determination regarding whether a respondent is a UAC and claiming that IJs may resolve any dispute about UAC status during the course of removal proceedings when it bears on the UACs eligibility for relief including the initial jurisdiction over asylum].

[21] Statement, National Association of Immigration Judges, *Threat to Due Process and Judicial Independence Caused by Performance Quotas on Immigration Judges* (Oct 1, 2017), AILA Doc. No. 17102061; DOJ, *Attorney General Jeff Sessions Delivers Remarks to the Executive Office for Immigration Review* (Oct. 12, 2017), AILA Doc. No. 17101231.

[22] Ron Nixon, *Trump Administration Punishes Countries that Refuse to Take Back Deported Citizens,* NY Times (Sept. 13, 2017).

[23] Policy Memorandum, PM-602-0151, *Rescission of Guidance Regarding Deference to Prior Determinations of Eligibility in the Adjudication of Petitions for Extension of Nonimmigrant Status* (Oct. 23, 2017), AILA Doc. No. 17102461.

Upcoming Events

ABA Section of International Law 2018 Annual Conference
April 17-21, 2018

By Stefan Mueller

The Immigration and Naturalization Committee is either sponsoring or co-sponsoring several programs at the ABA Section of International Law 2018 Annual Conference in New York, held from April 17-21, 2018. These programs include **Goals and Glitz – Immigration Options in Sports and Entertainment** and **Managing an International Workforce Amidst in the Turmoil of Nationalism and Globalization – Separating Fact from Fiction**.

Additionally, the Immigration and Naturalization Committee is co-sponsoring a version of an adoption and surrogacy program and is also taking part in the "How to"-track organized by the leadership of the ABA Section of International Law on the topic titled **How to Advise Clients on Global Mobility Matters: Employment, Immigration, and Tax Law, Oh My!** to be held on Tuesday, April 17, 2018.

As it was the case at the ABA Section of International Law 2017 Fall Meeting in Miami, there are once again many interesting panels to attend for those members interested in the practice of immigration and naturalization law.

All are invited to attend these fantastic programs.

Past Events

ABA Section of International Law 2017 Fall Conference Miami, October 24-28, 2017

By Stefan Mueller

The ABA Section of International Law's 2017 Fall Meeting in Miami was a great opportunity for the Immigration and Naturalization Committee to gather, socialize and attend interesting panels which the Immigration and Naturalization Committee has either sponsored or co-sponsored. These panels included **Beyond The Wall: The New Administrations' Impact on Immigration Policy**, chaired by Hedwin Salmen-Navarro, Gabrielle Buckley and Mohammed Syed with Ira Kurzban, Cyrus Mehta and Amy Nice as speakers as well as **Populism, Protectionism, Nationalism and other "Isms:" Is This the End of Free Trade?** chaired by Sergio Karas and speakers that included Anna Birtwistle, Marcy Stras, Diego Munoz Tamayo, and Juan Carlos Velazquez de Leon.

While the panel Populism, Protectionism, Nationalism and other "Isms:" Is This the End of Free Trade? discussed the effect of the recent US election, Brexit, EU referenda, the rise of populist and nationalist parties among other significant changes, the panel Beyond The Wall: The New Administrations' Impact on Immigration Policy highlighted recent changes that have been implemented by the new administration and their effects on the practice of immigration law in the United States.

Finally, many members of the Immigration and Naturalization Committee enjoyed breakfast with Ira Kurzban, Cyrus Mehta and Amy Nice prior to their panel Beyond the Wall: The New Administrations' Impact on Immigration Policy.