



ABA Section of  
International Law  
*Your Gateway to International Practice*

## Immigration & Nationality Law News

*Newsletter of the ABA's Section of International Law's Immigration and Naturalization Committee*

*Spring Issue 2018*

### **Editorial Note**

Dear Members,

Here is the Spring Issue 2018 of the Immigration and Nationality Law News, published by ABA's Immigration and Naturalization Committee. This issue focuses on nationalism and its effects on immigration practice and the change of immigration law across the world. This Spring Issue will highlight the recent developments in the field of immigration law in the U.S., Australia, Canada, the UK, India and Switzerland.

Specifically, this issue contains:

- *Chair's Note* by Audrey Lustgarten;
- *The U.S. Nationalist Movement's Impact on Business Immigration* - By Lauren K. Ross;
- *Australia Changes its Employer Sponsored Visa Programme* - By Rebecca Macmillan;
- *Changes to the Immigration Regime in India* - By Poorvi Chothani and Ashwina Pinto;
- *Integration in Canadian Immigration Law* - By Jacqueline Rose Bart and Clara Morrissey;
- *Nationalism in the UK: The Effect of the Nationalist Movement on UK Immigration Policy and Laws* - By Jennifer Stevens and Fay Robinson;
- *Switzerland - A Move Away from Globalization Towards an Economic Nationalism* - By Stefan Mueller and Laura Fontana;
- **Past Events** - *ABA Section of International Law 2018 Annual Conference, April 17-21, 2018.*

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

Regards,

**Stefan Mueller**  
*Editor*

### **Co-Chair's Note**

Dear Members,

We are very pleased to present the Spring Issue of our Immigration and Nationality Law News. This is our first ever themed issue, with the very timely theme of the impact of nationalism on immigration law and policy globally. We are fortunate to have received contributions from many global jurisdictions and are very grateful to our contributors.

We are also pleased to report that we had a very successful Annual Conference in New York in April. As detailed further below, we had an unprecedented number of committee members speaking on sponsored/co-sponsored panels. We also enjoyed a packed breakfast committee meeting (standing room only, we may need two tables next time!) and a lovely happy hour reception hosted by Jennifer Stevens of Laura Devine Solicitors. Thank you to all who attended and participated. And to those who could not attend, we sincerely hope to see you next time. In the interim, there are always ways to get more involved in the Committee, whether by writing an article, presenting a panel proposal, volunteering to assist with a project, or just attending our monthly calls held on the first Wednesday of each month at 11 a.m.

Best,

**Audrey Lustgarten**  
*Co-Chair*



**ABA Section of  
International Law**  
*Your Gateway to International Practice*

## Immigration & Nationality Law News

*Newsletter of the ABA's Section of International Law's Immigration and Naturalization Committee*

*Spring Issue 2018*

***Disclaimer:** The views expressed in this publication are solely the views of the authors and not necessarily of the ABA Section of International Law Immigration & Naturalization Committee. The contents of this publication are intended for informational purposes only and neither constitute legal advice nor act as a substitute for professional, legal advice from a qualified attorney.*

### **Committee Officers**

#### **Co-Chair**

Audrey Lustgarten  
Margaret Kuehne Taylor

#### **Vice Chairs**

Jacqueline Bart  
Qiang Bjornbak  
Poorvi Chothani  
Kevin Fandl  
Sergio Karas  
Tzu-Kai Lo  
Stefan Mueller  
Hardeep Sull  
Mohammad Syed

#### **Editors**

Stefan Mueller  
Sabrina Damast

### **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@wengerviel.ch](mailto:st.mueller@wengerviel.ch) and [sabrinadamast@gmail.com](mailto:sabrinadamast@gmail.com).

### **The U.S. Nationalist Movement's Impact on Business Immigration**

*By Lauren K. Ross*

American nationalism has had different and competing permutations historically, but the current administration, in sheer political terms, has successfully leveraged nationalism in its most ordinary form with immigration at the forefront as a unifying tool to gain support from a disillusioned base. Immigration in general is such a flash point in U.S. politics right now because it serves as the inflammatory domestic policy issue that most directly pits “us” against “them” thereby creating a unifying feeling among those who identify as “us” while isolating and alienating “them” irrespective of who “they” are and what “they” contribute to the U.S. economy. U.S. nationalists purport to believe that the key to effective U.S. immigration law and policy lies in what promotes the national interest and helps U.S. citizens who live here. However, a deeper dive into the current administration’s immigration policies demonstrate the conflict between the actual practical implications of current administrative immigration policy and how such policies promote the national interest. This conflict is most clear upon inspection of policies as they relate to employment based immigration and the impacts that current immigration policy are having on businesses and foreign national employees in the United States.

As a practical matter, there is overwhelming evidence of the economic value that immigrants



## Immigration & Nationality Law News

*Newsletter of the ABA's Section of International Law's Immigration and Naturalization Committee*

*Spring Issue 2018*

bring to the United States. For every 10,000 immigrants to the U.S., about 62 will start a business, which is more than double the rate of Americans. Moreover, immigrant business founders have become more important to the U.S. economy over time. Immigrants were involved in founding one-quarter of the companies that went public between 1990 and 2005. One-third of the companies that went public between 2006 and 2012 had at least one immigrant founder. Of the 87 privately held companies currently valued at over \$1 billion, 51 percent had immigrant founders.<sup>1</sup> There are also countless individual immigrant success stories that further drive this point home. Some of the most prominently successful immigrants include Elon Musk, Founder of Tesla and SpaceX; Jerry Yang, Co-Founder of Yahoo!, Sergey Brin, Co-Founder of Google and Pierre Omidyar, Founder of eBay.

Such evidence notwithstanding, the current administration has relied heavily on nationalist rhetoric in an effort to convince Americans that immigrants are a drain on the U.S. economy, that they are stealing American jobs, and that it is in the national interest to significantly reduce legal immigration. In addition to generating widespread outrage with his crude disparagement of Haiti, El Salvador and African nations during a widely reported congressional meeting earlier this year, President Trump also couches anti-immigrant sentiment in terms that resonate with nationalists but are seemingly race-neutral such as security, culture, productivity and assimilation. In a speech at the U.N., Mr. Trump used the terms "sovereign" or "sovereignty" 21 times as he made the case that strong, independent nations, as opposed to international institutions, will result in a more prosperous and peaceful nation. Attorney General Jeff Sessions is also on record conflating the immigration issue with U.S. unemployment

rates. In an opinion piece, he states, "After years of mass immigration, falling wages, and surging joblessness, isn't it time we focused on the needs of the people living here today? Isn't it time we got our own people back to work?"<sup>2</sup> The U.S. immigration policies that have resulted from this position are slowing or stopping legal immigration without any Congressional review.

Over the past year, employers have faced unprecedented hurdles in hiring or retaining foreign workers. Last January, their employees from Iran, Syria, Libya, Somalia, Sudan and Yemen were abruptly and completely banned from entering the U.S. This travel ban was extremely disruptive to business travel. Employees from these countries with valid U.S. visas who happened to be traveling when the ban went into effect were unable to return to work in the U.S. Employees who were in the U.S. were unable to depart without getting stuck outside the country and, in some cases, employees were separated from their families. The already onerous and comprehensive visa screening procedures by the Department of State (DOS) at U.S. embassies and consulates abroad have become increasingly restrictive, resulting in foreign workers who live and work in the U.S. getting stuck overseas for months at a time waiting for a visa stamp while their employers need them in the U.S. Customs and Border Protection (CBP) has taken steps to collect social media information and has increased searches of electronic devices at ports of entry for both U.S. citizens and foreign nationals, which raises serious privacy and constitutional concerns.

In addition to the extreme vetting and travel ban initiatives outlined above, employers have had to contend with Executive Order 13788, Buy American and Hire American (BAHA). BAHA's purpose is heavily rooted in nationalist sentiment,

<sup>1</sup> Ivanova, I. (2017, Feb 10). Immigrants' impact on the U.S. economy in 7 charts.

<sup>2</sup> Sessions, J. (2014, Nov 2). Obama wants immigration amnesty; your vote can stop it.



## Immigration & Nationality Law News

*Newsletter of the ABA's Section of International Law's Immigration and Naturalization Committee*

*Spring Issue 2018*

as its stated purpose is to create higher wages and employment rates for U.S. workers and to protect their economic interests by rigorously enforcing and administering the laws governing the entry of foreign workers. Unfortunately, the stated purpose conflicts with the practical reality that there are serious labor shortages in the U.S. in certain fields and that employment based immigration helps the U.S. economy by creating more jobs for U.S. workers. The results of BAHA on the ground have been extremely taxing on U.S. employers. There has been a dramatic increase in burdensome Requests for Evidence and Denials by the United States Citizenship and Immigration Services (USCIS) for all employment based petition types, especially the most commonly used H-1B and L-1 visa types. New interview requirements were imposed on applicants for temporary visas overseas and employment based green cards domestically. Meanwhile, government processing times have increased across the board, leaving employers and their employees in limbo for countless months.

Foreign entrepreneurs, who are indisputably critical for creating jobs, have also faced diminishing options for establishing their businesses in the U.S. over the past year. The U.S. immigration laws have always been woefully inadequate in welcoming foreign entrepreneurs because the system lacks a dedicated visa for start-ups. In an effort to address this issue, the Department of Homeland Security (DHS) proposed a rule in 2016 that would grant work authorization to qualified international entrepreneurs who had received significant investor funding and showed promise for creating jobs for U.S. workers. The final rule was set to take effect on July 17, 2017, but DHS abruptly announced that it would delay implementation of the rule while considering whether to eliminate the program. The rule became the subject of litigation as a result, but the fate of the program

remains grim in light of the administration's stated intent to eliminate the program completely.

*Lauren K. Ross a business immigration attorney who helps companies apply for visas and green cards for their employees and founders. Her firm, Ross Law, has offices in San Francisco and New York and Lauren K. Ross can be reached at [lauren@rossimmigration.com](mailto:lauren@rossimmigration.com).*

### **Australia Changes its Employer Sponsored Visa Programme**

**By Rebecca Macmillan**

It has happened! On 18 March 2018, we said goodbye to the subclass 457 visa and hello to the Temporary Skill Shortage Visa (TSS).

Permanent employer sponsored visa legislation has also been amended.

#### **Temporary Skill Shortage (TSS) Visa**

The TSS visa is the subclass 457 visa with a new name. We have seen many changes to the 457 visa over the past 12 months and these continue into the TSS visa with some further revisions.

These include:

- Sponsorship applications
  - No longer required to satisfy training benchmarks for the grant of sponsorship;
  - Introduction of a simpler renewal process;
  - Sponsorship is granted for five years in all cases (no shorter validity sponsorships for new business);



## **Immigration & Nationality Law News**

*Newsletter of the ABA's Section of International Law's Immigration and Naturalization Committee*

*Spring Issue 2018*

- Expansion of the criteria for sponsorship accreditation.
- Nomination applications
  - There are now three occupation lists – the short-term list, the medium to long term list, and a regional Australia list;
  - Labour Market Testing is mandatory for all applications, except where there is an international trade obligation. The legislation now specifies how, when and where advertising must take place. For example, you must advertise in two national publications, the advertisement must be in English and must state the salary for the position, and you must have advertised within the last six months.
- Visa applications
  - Visa applicants must have a minimum of two years' work experience;
  - New visa conditions.

Transitional arrangements are in place for labour market testing criteria in circumstances where a business has advertised the positions before 18 March 2018. These transitional arrangements won't be in place for long and we expect they will be removed by June 2018.

In addition to the legislative changes, there has also been some procedural changes. For example, you cannot apply to change a TSS visa holder's nominated occupation by lodging only a nomination application, you must also lodge a visa application.

Until the last of the 457 visas expires in 2022, employers will need to manage and understand the

differences between the two visas. The differences are subtle, but they are there. For example, using the scenario above, while an

employer cannot change a TSS visa holder's occupation by lodging only a nomination application, it is possible to change a 457 visa holder's occupation without lodging a new visa application.

Care must however be taken when doing this as changing an occupation may affect eligibility for permanent residence.

### **Permanent Employer Sponsored Visa**

For the Employer Nomination Scheme (186) visa the changes relate mostly to which occupations are eligible to apply for permanent residence.

For the Direct Entry Stream, only applicants whose occupation is on the medium and long-term occupation list are eligible apply. This is the same for Temporary Residence Transition Stream for any person who applied for a 457/TSS visa after April 18, 2017 – their occupation must have been on the medium and long-term occupation list.

It is the Regional Sponsored Migration Scheme (187) visa that has been most impacted by the changes. The regional concessions that applied to this program have been removed and the only difference between this visa and the Employer Nomination Scheme visa is the list of occupations, and currently skills assessments are not mandatory for non-trade occupations. This however will change further in July 2018 when we expect the regional occupation list to be greatly reduced and mandatory skills assessments will be introduced.

Age exemptions are still available and the time has been reduced from four years holding a 457/TSS visa down to three years with a salary above the Fair Work High Income Threshold.



## Immigration & Nationality Law News

*Newsletter of the ABA's Section of International Law's Immigration and Naturalization Committee*

*Spring Issue 2018*

Transitional arrangements are in place for 457 visa holders who applied for, or were granted, a 457 visa before April 18, 2017. This cohort can apply for permanent residence regardless of what list their occupation is on.

### **Training Benchmarks and Skilling Australia Fund**

The Skilling Australia Fund (SAF) is still before parliament and once approved, it will be applied to both the TSS and permanent employer sponsored visas. The SAF will impose a training levy on employers which must be paid at the time a nomination application is lodged.

In the meantime, a TSS visa can be obtained without satisfying training benchmarks and without paying the SAF fee.

While training benchmarks are no longer required for new TSS sponsorship, employers that are or have previously been approved as a Standard Business Sponsor, and/or have 457/TSS employees, must continue to satisfy their training obligations. This means, employers need to provide evidence with every permanent residence application, that it has satisfied its obligation to provide training to Australian workers.

### **Expansion of Adverse Information Definition**

Employers have always had to declare whether there is any adverse information known about the business or a person associated with the business.

On all sponsorship and nomination applications, an employer must declare whether there is any adverse information. In answering this question, the Department of Home Affairs is concerned with adverse information in relation to: immigration, discrimination, industrial relations, occupation health and safety, and taxation.

The adverse information provision now extends to family members and associates of directors and office holders of a business. For example, it is possible the Department of Home Affairs will want these same questions answered by the spouse or partner of a company director or office holder.

The changes to the employer sponsorship legislation will impact employers in different ways. We encourage all employers that sponsor overseas workers to obtain advice about how these changes will impact their business, and how to best manage their individual visa program.

*Rebecca Macmillan is a registered migration agent and is based in Holding Redlich's new Cairns office. Rebecca Macmillan has more than 10 years' experience specializing in Australian migration law. She can be reached at [rebecca.macmillan@holdingredlich.com](mailto:rebecca.macmillan@holdingredlich.com).*

### ***Changes to the Immigration Regime in India***

***By Poorvi Chothani, Esq.  
and  
Ashwina Pinto***

In a world that is characterized by globalization and a constant mobility of people across borders, countries are redefining policies and enhancing compliance initiatives. The Government of India through the Ministry of Home Affairs deals with all matters relating to visa, immigration, citizenship, overseas citizenship of India, acceptance of foreign contribution as well as hospitality.



## **Immigration & Nationality Law News**

*Newsletter of the ABA's Section of International Law's Immigration and Naturalization Committee*

*Spring Issue 2018*

Most foreign nationals require a visa to enter the country and/or work in India. All foreign nationals are required to enter India through authorized check posts or at an airport. The Immigration services at the major International Airports in India and the foreign nationals' registration offices are under the jurisdiction of the Bureau of Immigration (BOI), under the Ministry of Home Affairs (MHA).

The regulations regarding visa categories and in-country registration are issued and enforced by the MHA. While the policy as announced applies to all the consular posts abroad and the Foreigners Regional Registration Offices (FRROs) as well as Foreigners Registration Offices (FROs) the way these policies are implemented or enforced varies at the consular posts and at the FRROs/FROs. The consular officers and the officers at the FRROs and FROs wield wide discretionary powers and thus the experiences that foreign nationals have for a similar process may vary widely.

The Indian Government introduced the Intern Visa for foreign nationals who desire to pursue an internship with a company, Non-Governmental Organization (NGO) or an educational institution in India for a period of one year or the duration of the internship, whichever is lesser, and will be granted only pursuant to the completion of graduation or post-graduation. Thus, this visa is not granted for mid-career or intra-company internships.

With the intention to promote the ease in travel of foreign film makers and production houses to India, the Government recently introduced the 'Film Visa' category, which is granted for a maximum period of one year with multiple entries. This visa enables foreign national to shoot films, TV shows, commercials, etc. in India.

The BOI has announced the launch of 'E-Services' for all foreign residing within the jurisdictions of the following Foreigners Regional Registration Offices (FRROs):

- Mumbai FRRO;
- Delhi FRRO;
- Bengaluru FRRO;
- Chennai FRRO.

This means that various visa services including in-country registration and visa extensions must now be completed via an online procedure, eliminating the need for foreign nationals to visit the FRRO in person.

The Ministry of Home Affairs (MHA) in March 2018 made several amendments to the immigration regime in India, some of which are provided below.

### **Modified Visa Cancellation Policy**

If a foreign national wishes to avail of a short duration visa (conference visa, transit visa, electronic visas (e-visas)) to India while in possession of a pre-existing, long term/consular issued Indian visa, the long term visa will not stand cancelled. Instead, the long-term visa will be kept on hold for the period of the short duration visa.

### **Introduction of New Sub-categories of Business and Student Visas**

The Business visa has introduced several new sub-categories such as:

- Crew of non-scheduled airlines who operate chartered flights and special flights (B-5);
- Foreign academicians/experts covered under GIAN (B-6);



## Immigration & Nationality Law News

*Newsletter of the ABA's Section of International Law's Immigration and Naturalization Committee*

*Spring Issue 2018*

- Foreign nationals who are partners in the business and/or functioning as Directors of a company (B-7);
- Other miscellaneous categories who are eligible for a business visa and are not covered under any of the sub-categories listed under a business visa (B-8); and;
- Foreign nationals who are engaged in commercial sports events in India on contract and receiving a remuneration (including coaches) (B-Sports).

The student visa now includes a new subcategory for students coming to India for theological studies and missionary students.

### **Change in Permitted Activities**

Foreign nationals must strictly adhere to and comply with the purpose of their visit declared at the time of submitting the visa application. However, with the recent amendment, all foreign nationals other than Pakistani nationals coming to India will now be entitled to also avail of the activities permitted under a Tourist visa irrespective of the visa type.

### **Visa Categories**

Generally, as part of the visa application procedure, an applicant must choose the appropriate visa sub category from the drop-down list mentioned in the application form. However, if the applicant's proposed activities are not covered in the sub-categories or is unsure of the appropriate sub-category, the applicant must apply under the broad category of visa. The visa officer will then determine the appropriate and exact sub-category.

### **Visa Conversions**

Earlier e-visas could not be converted within India. However, Persons of Indian Origin who are

on any short (e-visa) or long term issued Indian visa and who are otherwise entitled to an Entry visa, may be eligible for an Entry visa.

To conclude, it is thus evident that the Indian Government has been taking affirmative action to harmonize its policies and practices with global standards. With the introduction of new visas as well as the varied sub-categories of visas, the arrival of foreigners will substantially increase thus contributing to the growth of the Indian economy.

*Poorvi Chothani, Esq. is the founder and managing partner of LawQuest, an immigration and employment law firm headquartered in Mumbai, India. She is an alumna of Penn Law School, is admitted to practice law in New York and India and is a registered and practicing Solicitor in England and Wales. She can be reached at [poorvi@lawquestinternational.com](mailto:poorvi@lawquestinternational.com). Ashwina Pinto is an Associate at LawQuest and may be contacted at [ashwina@lawquestinternational.com](mailto:ashwina@lawquestinternational.com).*

### **Integration in Canadian Immigration Law**

**By Jacqueline Rose Bart  
and  
Clara Morrissey**

In a 2015 interview with the New York Times, Prime Minister Justin Trudeau remarked that "There is no core identity, no mainstream in Canada", and described Canada as a "post-national state".<sup>3</sup> The Prime Minister's statements reflect a particular vision of Canadian national identity which conceives of Canada as a multicultural nation united by a set of

<sup>3</sup> Guy Lawson, Trudeau's Canada, Again: New York Times Magazine, online, December 8, 2015.



## Immigration & Nationality Law News

*Newsletter of the ABA's Section of International Law's Immigration and Naturalization Committee*

*Spring Issue 2018*

shared ideals or values rather than by a shared ethnic, cultural or religious background.

This conception of Canadian national identity reflects the reality of Canada's economic reliance on high levels of immigration. It may also be facilitated by an increasing targeting of high skilled workers on the basis of their high potential for economic integration, which results in the selection of immigrants more likely to also successfully integrate socially and culturally into Canadian society.

### **Canada's Reliance on Immigration to Support Population Growth**

Historically, Canadian immigration policy has been focused on population growth and economic development. One of the first major pieces of Canadian immigration legislation, the *Dominion Lands Act* of 1872, was intended to promote agricultural growth and natural resource development in Canada's western provinces. The act granted free land to any immigrant over the age of 21, provided they lived on and cultivated the land for three years.<sup>4</sup>

Today, while the requirements for immigration to Canada have certainly become more restrictive, the need for immigration to sustain economic and population growth remains. The 2016 Canadian census figures reflect an average fertility rate in Canada of 1.6 children.<sup>5</sup> Statistics Canada projects that without immigration, Canada's population growth could be close to zero in 20 years.<sup>6</sup>

The 2016 Census data also found that approximately 21.9% of the current Canadian population are first-generation immigrants.<sup>7</sup> Immigration remains essential to Canada's growth and prosperity.

### **Policies Targeting Immigrants with High Potential for Integration**

The government of Canada aims to admit 310,000 new permanent residents in the 2018 year. Of this number, the majority will be admitted as economic immigrants. They are selected based on a number of factors including their education, work experience, language ability, and the potential economic benefit they will bring to Canada. The government plans to bring in 177,500 new economic immigrants in 2018. The other two major categories, the family class (sponsorship of family members), and the refugee and humanitarian class will together accept 132,000 new immigrants.<sup>8</sup>

In recent years, we have seen the factors on which applicants under the Economic Programs are evaluated and selected reflect an increasing emphasis on the applicant's ability to establish themselves in Canadian society. This has been the case particularly since the introduction of the Express Entry system in 2015, an online system under which candidates are assigned a score based on their skills and background.

Prior to 2015, any applicant who met the baseline requirements for the Federal High Skilled immigration programs could submit an application directly to the government. Since the

---

<sup>4</sup> An Act Respecting the Public Lands of the Dominion S.C. 1872, available online via Library and Archives Canada.

<sup>5</sup> Statistics Canada, *Births and Total Fertility Rate, by Province and Territory (fertility rate)*, online, October 19, 2017.

<sup>6</sup> Statistics Canada, *Population Growth: Migratory Increase Overtakes Natural Increase*, online, March 3, 2017.

---

<sup>7</sup> Statistics Canada, *Immigration and Ethnocultural Diversity Highlight Tables*, online, November 1, 2017.

<sup>8</sup> Immigration, Refugees and Citizenship Canada, *Notice – Supplementary Information 2018-2020 Immigration Levels Plan*, online, November 1, 2017.



## Immigration & Nationality Law News

*Newsletter of the ABA's Section of International Law's Immigration and Naturalization Committee*

*Spring Issue 2018*

introduction of the Express Entry system, applicants cannot apply for these programs unless the Canadian government invites them to do so. While an applicant may meet the baseline eligibility requirements for their program, they cannot apply unless their score is high enough to be selected. This creates a system in which potential applicants compete for selection, as only the highest scoring applicants are invited to apply for permanent residence.

Increasingly, we have seen the factors on which applications are ranked and selected under Express Entry focus on the applicant's potential for integration into Canadian society. These factors include the following:

- A strong emphasis on English and/or French language proficiency. Applicants without high language test scores are unlikely to be selected, and bilingual applicants have an increased chance of being selected;
- Targeting of younger applicants. Applicants between the ages of 20-29 are considered to be the most desirable. Applicants 45 years or older are allocated no points for age, and it is difficult for them to be selected;
- Skilled work experience in Canada increases an applicant's chances of being selected;
- Post-secondary education in Canada increases an applicant's chances of being selected;
- Applicants with an offer of employment from a Canadian company are prioritized under the federal Express Entry system. The offer of employment must meet very specific requirements;
- Applicants receive additional points for having a sibling who is a Canadian citizen

or permanent resident, and is currently living in Canada;

- A married applicant under the Express Entry system receives fewer points than a single applicant. However, married applicants can receive additional points for their spouse's language abilities, education and Canadian work experience. This creates a system wherein married applicants are at a disadvantage unless their spouse also demonstrates a high potential for economic establishment in Canada;
- Foreign work experience is a factor taken into consideration, but only to a limited extent. An applicant only needs to demonstrate three years of foreign work experience in order to achieve to the maximum score for this factor. This creates a system in which a younger applicant just starting out in their career may be prioritized over an older applicant with a decade or more of experience in their field.

Additionally, the Canadian provinces also have their own Provincial immigration programs. Many of these programs require the applicant to have a job offer in the applicable province, or other ties to the province such as previous work or post-secondary education, or close family.

We have also seen an increasing trend in provinces targeting applicants with experience in occupations deemed in-demand in the region. For example, the province of British Columbia currently has a pilot program targeting the tech sector, with the aim of removing barriers for B.C. tech companies to bring skilled workers to the province on a permanent basis. These in-demand occupation programs aim to ensure that the skills and experience immigrants are bringing matches up with the skills currently in demand in the Canadian labour market.



## Immigration & Nationality Law News

*Newsletter of the ABA's Section of International Law's Immigration and Naturalization Committee*

*Spring Issue 2018*

The factors outlined above result in a system under which applicants are increasingly selected for their perceived ability to integrate into Canadian society based on factors such as age, ties to Canada, and language ability. These factors facilitate not only economic integration, but also cultural and social integration.

### **Conclusion**

Prime Minister Trudeau's vision of Canada as a multicultural post-national state relies on the notion of "shared values" rather than a shared ethnic, cultural or religious background. This conception of Canadian identity is facilitated by an emphasis under Canadian immigration law and policy on selecting high skilled economic immigrants who are more likely to integrate successfully into Canadian society, and as a result share these values.

*Jacqueline Rose Bart is the Principal and Founder of BartLAW Canadian Immigration Group, Barristers and Solicitors. Clara Morrissey is an Associate Lawyer at BartLAW. They can be reached at [info@bartlaw.ca](mailto:info@bartlaw.ca) or 416-601-1346.*

### ***Nationalism in the UK: The Effect of the Nationalist Movement on UK Immigration Policy and Laws***

***By Jennifer Stevens  
and  
Fay Robinson***

It is undeniable that the concept of nationalism has impacted the political landscape in the UK (and worldwide) exponentially over recent years, perhaps most notably as a defining feature of the 2016 Brexit campaign. However, while the nationalist movement has had a clear impact on

the UK's immigration regime and its foreign policy, from a practical perspective it remains to be seen what the long-term impact will be on the UK's immigration trends.

The meaning attributed to 'nationalism' varies depending on who you ask, however the term is defined by the Oxford English Dictionary as the 'identification with one's own nation and support for its interests, especially to the exclusion or detriment of the interests of other nations'. This idea of nationalism is not a new concept. However, in recent years it has grown in its importance and impact in most countries across the globe.

The growth of this movement in the UK manifested itself in the result of the 'Brexit' referendum, where the UK voted to leave the EU by a margin of 51.9% and the campaign was largely governed by the public's view of the free movement of EEA nationals to the UK. Phase one of the Brexit negotiations was focused on the rights of EU nationals and there has been some agreement, most recently that EU citizens arriving in the UK during the transition period (which will be from 29 March 2019 until 31 December 2020) will enjoy "the same rights and guarantees" as those present before Brexit. However, it is still unknown how EU migrants will qualify to enter the UK after Brexit and the level of restrictions that will be imposed on their ability to live and work in the UK.

The Brexit result is just one (very important) example in many years of anti-immigration rhetoric. In the years prior to the Brexit result, the UK's immigration laws were tightened repeatedly to make hiring non-British (and non-EEA) workers more difficult for employers in the UK. Over the past few years, the Home Office has closed a number of immigration routes (for example, the 'Post Study Work' category and Tier 1 (General)) and has made the requirements for



## Immigration & Nationality Law News

*Newsletter of the ABA's Section of International Law's Immigration and Naturalization Committee*

*Spring Issue 2018*

the remaining immigration categories more stringent and difficult to satisfy.

The UK government has also made it more expensive to hire non-British/EEA workers, most recently introducing the Immigration Skills Charge, a levy on sponsoring skilled migrants, of £1,000 per year of sponsorship (or £364 for small sponsors). It is intended that this will be used to upskill British workers. Perhaps more surprisingly is the cost of immigration categories which are unrelated to work – for example, a spouse application can cost over £2,000.

One of the key reasons behind the UK's crackdown on immigration across the board has been the rise in the nationalist movement, particularly the voting public's desire for British citizens to have better access to British jobs. To some extent, the policy changes have been working – the UK's latest net migration statistics show that in the year ending September 2017, net migration to the UK fell by 29,000 to 244,000. However, this figure is somewhat misleading – while net EU migration fell by 75,000 to 90,000, its lowest level for five years (likely as a direct result of Brexit), net migration from outside Europe rose to 205,000 during the same period.

Upon further analysis of these statistics, it appears that record numbers of skilled EU workers have left the UK following the Brexit vote which has increased demand within the UK for skilled workers. This demand has not solely been met within the local workforce however, as skilled migration from outside the EU appears to be increasing. Indeed, two major immigration categories for investors/business persons entering the UK – Tier 1 (Entrepreneur) and Tier 1 (investor) – increased by 17% and 59% respectively in 2017 compared to 2016. Also, the Tier 2 (General) category which has a monthly cap continues to meet that cap each month.

So, while it is clear that nationalism has been on the rise in the UK, the long-term impact of resulting policy changes remains to be seen. Net migration, at 244,000, is still above the 100,000 goal set by the UK government and while EEA migration to the UK is decreasing (and emigration from the UK is increasing), non-EEA skilled migration continues to increase

*Jennifer Stevens is a Partner at Laura Devine Attorneys in New York. Jennifer Stevens is a UK qualified solicitor and a registered Foreign Legal Consultant with extensive experience advising on a range of UK immigration applications. Jennifer Stevens can be reached at [jennifer.stevens@lauradevine.com](mailto:jennifer.stevens@lauradevine.com). Fay Robinson is an experienced Paralegal at Laura Devine Attorneys in New York assisting with UK immigration and nationality applications.*

### **Switzerland – A Move Away from Globalization Towards an Economic Nationalism?**

**By Stefan Mueller, Esq.  
and  
Laura Fontana**

Generally, Switzerland could be described as a conglomerate of different languages, different cultures and different political systems. Switzerland does neither have one language that unifies the nation – instead it has four national languages – nor is it united by ethnicity or religion. To the contrary, Switzerland is more a nation of will than a nation of unity. The Swiss Constitution even proclaims “the will [of the Swiss people] to live in unity by respecting each other and the diversity of the nation.”



## Immigration & Nationality Law News

*Newsletter of the ABA's Section of International Law's Immigration and Naturalization Committee*

*Spring Issue 2018*

Due to its central location in Europe, its economic and political stability as well as its wealth, Switzerland has always been subject to significant immigration of foreign nationals, both for economic and humanitarian reasons. For example, starting around 1945, many Italians relocated to Switzerland in the hopes of evading the post-World War II depression in Italy. At that time, Switzerland had facilitated the immigration of so-called immigrant workers and by 1970, Switzerland recorded a total of one million immigrants of which 54 percent were Italian nationals. Furthermore, with the collapse of the Yugoslavian state in 1991 and the following crisis and the Yugoslav Wars, Switzerland has become the home to a significant number of Yugoslavian immigrants.

While each group of immigrants had faced considerable political pressure for forced integration and assimilation, these immigrants were able to integrate into the Swiss culture and many of their descendants are now Swiss nationals. While there have always been tensions in connection with immigration, Switzerland has generally benefited from such immigration, which has significantly contributed to its economic growth and diversity.

According to the Swiss Federal Statistical Office, Switzerland had a foreign population exceeding 2,000,000 people in 2016, thus amounting to approximately 25 percent of the total population of Switzerland. Of this foreign population, approximately 1,400,000 people have been from EU/EFTA countries<sup>9</sup>, while Italian

and German nationals each formed the biggest groups among these EU/EFTA countries with approximately 350,000 people each. Interestingly, according to the statistics in 2016, there have only been 260,000 African and Asian people residing in Switzerland; nevertheless, the African population has grown the most since 2012. 59.5 percent of the foreign population are permanent residents of Switzerland while only 3.1 percent in Switzerland for humanitarian reasons applying for asylum.

In more recent history, Switzerland adopted a more restrictive policy with regard to economic immigration only allowing specialists to enter Switzerland thus excluding common employees. Furthermore, Switzerland has imposed annual quotas for immigration of non-EU/EFTA nationals in order to control immigration to Switzerland. Hence, slowly but continuously, Switzerland has moved to a more nationalist country, with "Switzerland first" being a repeatedly used slogan. This resulted in the decrease of annual quotas and the rise of the Swiss People's Party to the largest political party in Switzerland. One of the cornerstones of the Swiss People's Party is its focus on issues such as euroskepticism and opposition to mass immigration. In its immigration policy the party has always committed itself to make asylum laws stricter and to significantly reduce immigration into Switzerland. Furthermore, it has criticized the high proportion of foreign nationals among the public insurance benefit recipients and other social welfare programs. As a result of its immigration policy, the party has successfully introduced two federal popular initiatives "For the expulsion of Criminal Foreigners" (approved by the Swiss public by a margin of 52.3 percent) and "Against Mass Immigration (approved by the

---

Principality of Liechtenstein, and Switzerland. Some immigration restrictions apply to Bulgaria, Croatia and Romania even though they are EU member states.

---

<sup>9</sup> EU countries include Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Great Britain, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, and Sweden. EFTA countries include Iceland, Norway, the



## Immigration & Nationality Law News

*Newsletter of the ABA's Section of International Law's Immigration and Naturalization Committee*

*Spring Issue 2018*

Swiss public by a margin of 50.3 percent) in 2010 and 2014, respectively.

Specifically, the popular initiative “Against Mass Immigration” aimed to significantly limit immigration into Switzerland through the imposition of annual quotas for EU/EFTA nationals, as it was the case before the bilateral agreements with the European Union. By voting for the initiative “Against Mass Immigration”, the Swiss public theoretically voted against the freedom of movement of persons agreed upon between Switzerland and the European Union in accordance with the Agreement on the Free Movement of Persons (AFMP). While the conclusion of the AFMP enabled Switzerland to benefit of a high degree of integration in the European Union and access to the European Single Market, the public vote did risk Switzerland’s position in Europe and its relations to the European Union. Swiss-EU bilateral treaties on European Single Market participation are all co-dependent; if one of the treaties is terminated, then all other treaties are terminated as well. Consequently, should Switzerland have unilaterally chosen to cancel the AFMP, and then all other Swiss-EU treaties would have lapsed at the same time.

The implementation of the initiative “Against mass Immigration” has been subject of endless political debates and discussions within the Swiss government and between the Swiss government and the EU. Finally, on 22 December 2016, Switzerland and the EU have concluded an agreement that a new Swiss law (in response to the initiative) may require Swiss employers to give priority to Swiss-based applicants (Swiss nationals and foreign national who are registered in Swiss job agencies) but otherwise will not limit the free movement of EU/EFTA nationals into Switzerland thus upholding the principles of the AFMP and, consequently, not jeopardizing all other Swiss-EU treaties.

The new Swiss law is to be implemented as of 1 July 2018 and will require Swiss employers to report certain job vacancies to the Swiss public employment agencies before they can advertise these jobs themselves. The job reporting requirement will initially only apply to types of occupation in which the unemployment rate for the whole of Switzerland reaches or exceeds the threshold of 8 percent. As of 1 January 2020, a new threshold value of 5 percent will apply. Since the job reporting obligation relates to the type of occupation, all employers looking for employees of this type of occupation are affected. Employers must report job vacancies in the professions with unemployment above the threshold to the relevant public employment agency. During five working days, only employees of the public employment agencies and persons registered with public employment agencies as applicants have access to the job vacancies reported; the employer may not advertise the job vacancy elsewhere until the deadline has expired. However, employers are not required to hire certain type of applicant and remain free in hiring someone registered with a public employment agency or someone who has applied after the expiration of the deadline with the employer directly; the employer has to simply notify the public employment agency whether an applicant through the public employment agency was hired.

There are several exceptions to the requirement to report job vacancies. The most important exception is that the new Swiss law allows for the filling of job vacancies within a group of companies in the event of internal promotions, reorganizations or staff relocations. In order to prevent a possible circumvention of the job-reporting obligation by hiring employees at short notice and subsequently transferring them, the employees to be transferred must have been employed within the same group of companies for at least six months. This exception



**ABA Section of  
International Law**  
*Your Gateway to International Practice*

## **Immigration & Nationality Law News**

*Newsletter of the ABA's Section of International Law's Immigration and Naturalization Committee*

*Spring Issue 2018*

allows for the free movement of employees within a group of companies, be it under national legislation or under the rules of the General Agreement on Trade in Services (GATS).

In summary, the new Swiss law was originally intended to restrict immigration into Switzerland, however, due to extended negotiations with the EU and under consideration of the need for specialized workforce on the Swiss market, has been amended into a law that imposes a job-reporting obligation on Swiss employers without restricting the immigration. Therefore, the new Swiss law does not have any effect on Switzerland's current immigration policy, especially with regard to the immigration of non-EU/EFTA nationals. Furthermore, the Swiss Federal Council has increased the annual quotas for 2018 due to significant pressure from the Swiss economic leaders and while such increase of annual quotas does not facilitate the immigration per se, it may be argued that it serves as an indicator that Switzerland moves towards its old habit – embracing its diversity and conclusively being open to immigration as the basis for its economic growth and economic advantage.

***Stefan Mueller, Esq.** is a Senior Associate at Wenger & Vieli Ltd. Attorneys at Law, with its headquarters in Zurich and Zug, Switzerland. Stefan Mueller is a Swiss and New York qualified attorney focusing on immigration and employment law issues and advising clients on a range of Swiss immigration applications. He can be reached at [st.mueller@wengervieli.ch](mailto:st.mueller@wengervieli.ch). **Laura Fontana** is an experienced Associate at Wenger & Vieli Ltd. Attorneys at Law, focusing her practice on corporate and employment law. She can be reached at [l.fontana@wengervieli.ch](mailto:l.fontana@wengervieli.ch).*

## *Past Events*

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

*By Stefan Mueller*

The ABA Section of International Law 2018 Annual Conference has taken place from April 17 – 21, 2018 at the Grand Hyatt in New York. It was a splendid opportunity for the Immigration and Naturalization Committee's members to gather, socialize and attend interesting panels which the Committee has sponsored or co-sponsored that included:

- *How to Advise Clients on Global Mobility Matters: Employment, Immigration, Tax, and Family Law, Oh My!* held on Tuesday, April 17, 2018, 2:25 PM to 3:15 PM with Audrey Lustgarten and Michelle Jacobson;
- *Managing an International Workforce During and Amidst the Turmoil of Nationalism and Globalization – Separating Immigration Fact from Fiction* held on Wednesday, April 18, 2018, 4:30 PM to 6:00 PM with David Grunblatt, Qiang Bjornbak, Noah Klug, Stefan Mueller, Betina Schlossberg and Jennifer Stevens;
- *Goals and Glitz: Immigration Options in Sports and Entertainment* held on Friday, April 20, 2018, 4:30 PM to 6:00 PM with Sergio R. Karas, Graeme Kirk, and Greg Siskind;
- *Where Did All the People Go? Labor Issues in the New Global Political Environment* held on Thursday, April 19, 2018, 9:00 AM to 10:30 AM with Audrey Lustgarten; and
- *A Discussion of the Current Refugee Crisis: How Legally Innovative Strategies and Best Practices Can Improve Humanitarian Outcomes* held on Thursday, April 19, 2018, 11:00 AM to 12:30 PM;
- *Cross Border Babies: Insemination, Surrogacy, Adoption, and Nationality* held on Thursday, April 19, 2018, 2:30 PM to 4:00 PM with Jennifer Stevens.

*How to Advise Clients on Global Mobility Matters: Employment, Immigration, Tax, and Family Law, Oh My!*

*By Michelle Jacobson*

On the *How To Advise Clients On Global Mobility Matters: Employment, Immigration, Tax, and Family Law, Oh My!*, Committee Senior Advisor Michelle Jacobson of Fragomen presented an overview of global mobility topics to consider from an immigration law perspective. She was joined on the panel by Richard Tonge of Grant Thornton providing a tax perspective and Michelle Gyves of Proskauer providing an employment law perspective. The panel discussed a hypothetical relocation to China which illustrated the variety of issues that can arise in the pre-planning, relocation and residency stages.

*Managing an International Workforce During and Amidst the Turmoil of Nationalism and Globalization – Separating Immigration Fact from Fiction*

*By Betina Schlossberg*

Six members of the Committee participated in the panel. David Grunblatt introduced the topic with an overview. Jennifer Stevens explained the UK's Points Based System for business or family sponsorship of foreign nationals. She also explained the timeline for Brexit and how foreign nationals in the UK should start getting ready for the country's departure from the European Union. Next, Stefan Mueller gave a synopsis of the Schengen Treaty that affects the movement of people within 26 countries in Europe (not all EU countries), as well as a summary of recent developments in Swiss business immigration law.

A discussion of U.S. Immigration issues followed with Noah Klug discussing the current administration's position on H-1B visas, Betina Schlossberg speaking on the challenges Small Businesses and Start-ups are facing when trying to transfer personnel or hire foreign workers, and Qiang Bjornbak focusing on Investor's visas -immigrant and non-immigrant- and how these are suffering.



## *Goals and Glitz: Immigration Options in Sports and Entertainment*

*By Sergio R. Karas*

The Immigration and Naturalization Committee sponsored the program *Goals and Glitz: Immigration Options in Sport and Entertainment* at the Section of International Law Annual Conference in New York. The program was chaired and moderated by Sergio R. Karas from Karas Immigration Law Professional Corporation in Toronto, Canada, with the participation of speakers Gregory Siskind, from Siskind Susser, Memphis, TN; Graeme D. Kirk, Gross & Co, Solicitors, London, UK; and Natalia Natashkin, United Talent Agency, New York, NY. The panel canvassed the various regulatory regimes that govern the entry of sports figures, entertainers, and performing artists in different jurisdictions.



## *Where Did All the People Go? Labor Issues in the New Global Political Environment*

*By Audrey Lustgarten*

On the *Where Did All the People Go? Labor Issues in the New Global Political Environment* panel, Committee Co-Chair Audrey Lustgarten presented on immigration trends in the new global political environment. She was joined on the panel by moderator Ernesto Velarde Danache (Mexico), Carolyn Knox (USA), Amanda Hunter (Canada), and Debjani Aich (India). The panel included a lively discussion of the impact of politics, media, trade deals, and labor and employment laws on the movement of employees worldwide.



## *Cross Border Babies: Insemination, Surrogacy, Adoption, and Nationality*

*By Jennifer Stevens*

The Immigration and Naturalization Committee co-sponsored the program *Cross Border Babies: Insemination, Surrogacy, Adoption, and Nationality* at the Section of International Law Annual Conference in New York. During the panel, the panelists discussed the family and immigration/nationality law complexities of medically assisted procreation, surrogacy and the adoption of children, particularly where there are cross border arrangements.

**Disclaimer:** *The views expressed in this publication are solely the views of the authors and not necessarily of the ABA Section of International Law Immigration & Naturalization Committee. The contents of this publication are intended for informational purposes only and neither constitute legal advice nor act as a substitute for professional, legal advice from a qualified attorney.*