



ABA Section of  
International Law  
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## Immigration & Nationality Law News

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

*Fall Issue 2019*

### *Editorial Note*

Dear Members,

Here is the Fall Issue 2019 of the Immigration and Nationality Law News, published by ABA's Immigration and Naturalization Committee. This issue highlights developments and challenges in immigration law in different jurisdictions.

Specifically, this issue contains:

- *Chair's Note* by Jennifer Stevens;
- *Indian Citizenship and Permanent Residence Rights* – By Poorvi Chothani and Ashwina Pinto;
- *Expanding into the UK Market: Immigration Restrictions* – By Faydelys Robinson;
- *Transcontinental Railway and the Chinese Exclusion Act* – By Qiang Bjornbak Esq.

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

Regards,

**Stefan Mueller**  
*Editor*

### *Co-Chair's Note*

Dear Immigration Committee Colleagues,

As we enter our new committee year I am delighted to be taking on the role of Co-Chair of this committee. Thank you all again for your support and Peggy for setting such a high bar! Also to Mo who I thank for his great leadership, guidance and patience. I look forward to working with each and every member of the committee.

Mo and I are feeling positive and motivated as we look to the year ahead. As recognized by the ABA we are an outstanding committee! Thanks to all the leaders and volunteers from last year who made this award possible. In particular, the vice-chairs who remained active throughout the year and went above and beyond. Without such a committed team we would not have been able to make it happen. The list of praiseworthy leaders, volunteers and projects is too long to list so we just say a big thank you to all of you.

Anxiety about immigration is still grabbing headlines around the world so it is our role as immigration experts to ensure that we are also showing the positive side of immigration despite all its challenges. As a committee we continue to be collaborative and open with our communication and we have and will make a difference.

We wish to emphasize that this committee depends on each of you as its life blood. We exist to take your ideas and help you make them into successful projects or programs so help us in this process by continuing to communicate with us and letting us know what you would like to do and how we can help. Please continue to attend the committee monthly calls where we will share ideas and will again have a fantastic speaker series, all are welcome so please also encourage others to join. We are also preparing for the ABA SIL annual conference in April 2020 and have received some stellar program proposals from many within the committee and have been asked to co-sponsor programs from other committees. Preparation for The Year in Review has begun, so please provide



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your ideas and articles. There are future Section meetings planned in Costa Rica, Dublin, Los Angeles to name a few. There are many opportunities for us to get involved and make a difference. There is also an opportunity to get involved with influencing ABA policy surrounding international law related aspects of the treatment of refugees and asylum seekers by certain nations. We encourage you to get in touch with us with your ideas and suggestions.

We thank you committee members for your time and dedication, together let's make this another outstanding year.

**Jennifer Stevens**  
*Co-Chair*

### **Committee Officers**

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Stefan Mueller

### **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.



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### **Indian Citizenship and Permanent Residence Rights**

**By Poorvi Chothani and Ashwina Pinto**

Migration from India began in large numbers during the British rule as laborers moved to former British colonies such as Fiji, Kenya, the Caribbean and Malaysia creating a widespread diaspora of people, originally from India. During the post-independence period, Indians made their presence felt in countries such as the United States, Canada, the United Kingdom and Australia adding to the Indian diaspora.

The term "diaspora" is derived from the Greek word diasporá, which means "dispersion." Over time, the term evolved, and now loosely refers to any person(s) belonging to a country with a common origin or culture but residing outside of their homeland for various reasons. The Government of India attempted to define the term in 2004 as "a generic term to describe the people who migrated from territories that are currently within the borders of the Republic of India. It also refers to their descendants." The Indian Diaspora now, is commonly understood to include Non-Resident Indians (NRIs), foreign national of Indian descent including Persons of Indian Origin (PIOs) and Overseas Citizens of India (OCI), of which PIO and OCI card holders were merged under one category in the year 2015.

Today, while immigration rules the world over are getting tougher and overseas jobs difficult to find, there are many economic opportunities in India, luring the Indian diaspora and other foreign nationals. A large number of the Indian diaspora are also returning to connect with their roots in India.

This article addresses the residence and citizenship options available to live and/or work in India.

### **Indian Citizenship**

To begin with, the Constitution of India provided that an individual must fulfil the conditions set out in the Constitution and be domiciled in the territory of India at the time of commencement of the Constitution. Subsequently, the Citizenship Act was enacted by the Indian Parliament in 1955, (the Citizenship Act) under the powers vested in it under the Constitution which governs the acquisition and determination of citizenship in India.

The modern sense of citizenship is usually based on one or more of these factors:

- Parents are citizens: If a person has one or both parents who are citizens of a given nation, then the person is generally presumed to be a citizen as well. This is referred to by the Latin legal term *jus sanguinis* meaning "right of blood". A person could be born outside of the physical territory of a nation, but if his or her parents are citizens, then the child is presumed to be a citizen as well.
- Born within the nation: If a person is born within the geographical territory of a nation, then they are presumed to be citizens of the said nation. The Latin term for this is *jus soli* meaning "right of soil." Many countries have a hybrid birth right requirement of local nativity and citizenship of at least one parent. These first two factors are usually clubbed together under the term birth right citizenship. The applicable options under this category are provided below.
- Marriage to a citizen: Citizenship in some countries can also be obtained by marrying a citizen, which is termed *jure matrimonii*. However, India does not automatically grant citizenship but allows a spouse of an India national to live in India on a long-term dependent visa. The spouse will



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also be eligible to make an application for an Overseas Citizen of India (OCI) card after a period of two years since the marriage has been registered. The spouse could subsequently qualify for citizenship.

- **Naturalization**: Citizenship can be obtained by immigrating to a nation, and fulfilling its requirements for citizenship, such as passing a test, establishing long term residence or domicile status. This form of citizenship is termed as "naturalization."

Indian citizenship can be acquired through birth, descent, registration and naturalization. The provisions are listed under sections 3,4,5(1),5(4) and 6 of The Citizenship Act, 1955. Marriage to an Indian national does not grant automatic citizenship or permanent residence rights.

### ***Citizenship by birth***

As per the Citizenship Act, since the year 2003, a child acquires citizenship by birth if he/she has been born in India and provided at least one parent is an Indian national with none of the parents enjoying or having enjoyed any diplomatic privileges at the time of birth. Children born prior to 2003 qualify for citizenship based on specific criteria applicable at the time of birth. For instance, almost all children born in India irrespective of the nationality of parents, between July 1987 and commencement of the Citizenship (Amendment) Act, 2003, are entitled to Indian citizenship provided none of the child's parents enjoyed diplomatic privileges at the time of birth. It is important to note that a child born in India to a surrogate mother who is an Indian national and to a biological father who is a foreign national is entitled to citizenship by birth in India.

### ***Citizenship by descent***

Certain children born outside India to a qualifying parent may be eligible for Indian citizenship provided the birth of the child is registered with an Indian consulate within one year of the birth. At the time of

registering the birth the parents have to categorically affirm that the child has not acquired any other nationality. This is impossible in countries like the U.S. where nationality automatically attaches at the time of birth and can be terminated by the government in certain circumstances or renounced by the child at age 18 or soon after.

### ***Citizenship by registration***

The following foreign nationals may be eligible to register as a citizen of India, generally after having continuously resided in India for the 12 months (in legal status) immediately preceding the date on which the application is duly filed with the appropriate government office (the 12-month continuous stay requirement).

- A person of Indian origin and have resided in India for at least six years of the eight years preceding the 12-month continuous stay requirement;
- A foreign national who is married to a citizen of India and is ordinarily resident in India for seven years before making an application for registration;
- A minor child of persons who are citizens of India;
- a person of full age and capacity who, or either of his parents, was earlier citizen of independent India;
- a person of full age and capacity whose parents are registered as citizens of India;
- a person of full age and capacity who has been registered as an OCI for five years;
- a person of full age and capacity who, or either of his parents, was earlier citizen of independent India.



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### ***Citizenship by naturalization***

Eligible foreign nationals who have no other linkages to India may apply for citizenship by naturalization after having continuously lived for 11 years in a period of 14 years subject to the 12-month continuous stay requirement described above. This means that the foreign national must have resided in India for total of 12 years before he or she qualifies for Indian citizenship. In addition, the government has the discretionary power to waive other, applicable legal stipulations and grant citizenship to foreign nationals who have rendered distinguished service to the cause of science, philosophy, art, literature, world peace or human progress generally.

### ***Dual Citizenship***

Neither the Constitution of India nor the Citizenship Act, 1955 (as amended from time to time) grants dual citizenship. On acquiring foreign nationality, an Indian citizen automatically loses Indian nationality. Additionally, any foreign national who wishes to acquire Indian citizenship must renounce his or her foreign nationality. The application process to acquire citizenship usually generally involves three stages. In the first stage an application is filed with the local authority at the place of residence. The application is then forwarded to the Ministry of Home Affairs (MHA) after multiple government and police verifications. Once the MHA approves the application, they issue a letter indicating provisional approval subject to submitting proof of renunciation of current nationality. Such proof needs to be submitted within the period mentioned in the letter. In the second stage the foreign national must complete renunciation procedures as prescribed by the country of nationality. Proof of renunciation must then be submitted to the MHA after which the MHA, if all is found to be in order, will grant the naturalization certificate, thus concluding stage three. It is thus apparent that it is impossible to acquire Indian citizenship without renouncing any and all foreign citizenships.

### ***Registration as an Overseas Citizen of India - Permanent Residence Option***

The OCI program is not a replacement for dual citizenship but does afford some extra rights to eligible individuals with Indian heritage who are now citizens of different countries. However, individuals from Pakistan or Bangladesh or individuals descended from such individuals do not qualify as OCI.

Individuals whose parents, grandparents or great grandparents were from India could qualify as an OCI. In some cases, the spouse of an OCI card holder can also register and receive benefits.

Registering as an OCI does not offer all the benefits other citizens of India have. However, an OCI card does allow lifelong visa free entry to India and exemption from having to register and report your stay and movements to police when you're in the country. This registration requirement applies to foreign nationals residing in India in some visa categories such as a dependent, student or employment visa.

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### ***Expanding into the UK Market: Immigration Restrictions***

***By Faydelys Robinson***

#### **Attracting the brightest and best**

"We want Britain to be the most prosperous economy in Europe with an immigration system that attracts the brightest and best global talent." These words were recently spoken by the British Home Secretary, Priti Patel, in reference to the UK's future (post-Brexit) immigration regime. This rhetoric is not new, however. Over recent years, the UK Government has often stated that it wishes to attract the best talent and encourage investment into the UK market. Yet, the UK's immigration regime has become increasingly difficult to navigate. Below, we explore some of the main UK immigration options available to the 'brightest and best' businesses planning to expand into the UK market.

#### **Closure of Tier 1 (Entrepreneur) route**

Until recently, the immigration category most often relevant to a businessperson wishing to open a business in the UK has been the Tier 1 (Entrepreneur) category. This immigration route was open to genuine entrepreneurs who were able to show access to £200,000 and their plans to set up, join or take over the running of one or more businesses in the UK. Once the individual had entered the UK, they were required to invest the full £200,000 and create at least two new full-time jobs for settled persons in the UK.

Earlier this year, on 29 March 2019, the UK Government permanently closed the Tier 1 (Entrepreneur) route to new applicants. This was done with very little notice, with the closure having been officially announced just weeks beforehand on 7 March 2019. The Government simultaneously launched a new immigration category, Start-Up and Innovator, which was intended to act as a

replacement for Tier 1 (Entrepreneur) and the related Tier 1 (Graduate Entrepreneur) category. Unfortunately, in the months since this change took place it has become clear that significantly fewer applicants will qualify under the Start-Up and Innovator category than would have qualified under the Tier 1 (Entrepreneur) route – existing overseas businesses hoping to expand into the UK are particularly adversely affected.

#### **New Start-Up and Innovator route**

Applicants under both the Start-Up and Innovator provisions must now apply to a 'endorsing body' to have their business plans assessed; only once they have been endorsed can the applicant then apply for a visa. The Government has compiled a list of UK higher education institutions (for Start-Up applicants only) and UK business organisations with a history of supporting entrepreneurs which are approved as endorsing bodies. While the Government has published general criteria for assessing applicants, each endorsing body is free to publish its own detailed guidance.

Generally speaking, Start-Up applicants must show that their business venture is innovative, viable and scalable. They must also show that they plan to spend the majority of their time in the UK developing business ventures. One major positive of the Start-Up category includes the removal of the requirement to show any funding – this was often a major barrier for applicants. While the Start-Up category is theoretically open to overseas applicants, the endorsing bodies are largely UK universities which tend to focus on previous/current students.

Innovator applicants must pass a credibility assessment and show access to £50,000 in investment funds. Crucially, applications will be assessed under the so-called 'new business' criteria unless the individual has previously held a visa as a Start-Up or an Innovator (or as a Tier 1 (Graduate Entrepreneur)). These criteria are quite similar to the 'innovative, viable and scalable' requirements placed on Start Ups, and include providing a business plan



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that meets new or existing market needs and/or creates a competitive advantage; evidencing skills, knowledge, experience and market awareness; and showing scalability with potential for job creation and growth into national and international markets. While the reduction in the level of investment funds required is a major positive for businesses wishing to expand into the UK market, the 'new business' criteria are extremely restrictive and effectively exclude applications from many existing overseas businesses.

### **Case Study: US law firm opening a UK office**

Take the example of a successful litigation practice with offices across the US, now hoping to open its first office in the UK, based in London. The firm wishes to send a senior equity partner to establish and grow the business and, as the firm considers itself as one of the brightest and best, it is confident that the UK immigration regime will provide for a suitable visa for their London-bound partner. Yet, the reality is that they will have a long (and perhaps not very fruitful) road ahead if they plan to apply under the Start-Up and/or Innovator provisions. First, they will need to find a suitable endorsing body – this is very difficult for companies which do not have existing relationships with UK universities (for Start-Up applications) and/or seed funding or other entrepreneurial-minded companies which are approved as endorsing bodies. Even if a suitable endorsing body is found, providing an 'innovative' business plan which shows how the firm will meet new or existing market 'needs' and/or create a competitive advantage is likely to be a challenge, particularly as the UK market is already awash with successful litigation law firms.

### **Other options**

It has become clear that many businesspersons who would have previously qualified under Tier 1 (Entrepreneur) are now not able to apply under the Start-Up and Innovator category. As such, it is necessary to take a creative approach to the other immigration categories to find a suitable solution. These may include Tier 1 (Exceptional Talent), Tier 1

(Investor) and the 'representative of an overseas business' category (often referred to as the 'sole representative' category). There is also the main 'work visa' category, Tier 2, however this requires an existing UK-based employee to be workable.

Under Tier 1 (Exceptional Talent), applicants must show that they are world leaders in their field. Currently, the main 'fields' include science, technology, arts/culture, humanities and engineering. The requirements in this category are very strict, with only 2,000 places available each year. That said, the UK is strongly encouraging applications under this category, particularly from the tech sector.

Under Tier 1 (Investor), an applicant must invest at least £2 million into a UK company or companies. The limitations placed on this category are immediately obvious – many individuals and companies do not have access to £2 million.

The sole representative category is relevant where a business is sending a senior employee to the UK to establish the company's first UK presence. This can be an extremely useful category, however it does come with limitations – perhaps most crucially, the applicant cannot be a majority shareholder in the company and must be employed (so in our example above, an equity partner without an employment relationship with the firm would not qualify).

### **Changes on the horizon?**

The UK Government maintains its commitment to attracting the brightest and best talent and has promised a new immigration scheme which facilitates applications based on skill rather than nationality. The details of this new regime remain to be seen, however in the meantime companies expanding into the UK market must take a creative and strategic approach when navigating the immigration options currently available.

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*immigration and nationality applications at Laura Devine Attorneys in New York.*

### **Transcontinental Railway and the Chinese Exclusion Act**

**By Qiang Bjornbak Esq.**

The construction of transcontinental railway started in 1863, right after the U.S. had experienced a painful civil war. President Lincoln decided to unite this country with a railway. The railway was built by three private companies, the Western Pacific Railroad Company (from Oakland/Alameda to Sacramento, California), the Central Pacific Railroad Company (from Sacramento to Promontory Summit, Utah), the Union Pacific (from Omaha, Nebraska westward to Promontory Summit).

Building from the East, the Union Pacific hired many Irish immigrants to lay track across the Great Plains. Building from the West, the Central Pacific Railroad hired more than 12,000 Chinese workers. Just as Irish Ambassador Daniel Mulhall stated, "that mix of peoples working together in harmony in pursuit of a shared objective was characteristic of this land of opportunity that was 19th Century America."

Chinese immigrant workers blasted and chiseled their way through the rugged Sierra Nevada mountains. they dug 15 tunnels through hard granite by using manual hammer drills, pickaxes and explosives. When snow fell, they had to build roofs over 37 miles of track so supply trains could make it through. About two thousand Chinese workers died from coldness, hungry, disease, dangerous operations during the construction. Thirty-nine boxes of bones (of Chinese workers) which weigh about 20,000 pounds were shipped back to China in 19<sup>th</sup> century.

The construction of the railway is an industrial engineering feat and it was completed seven years ahead of time. It shortened the six-month wagon travel into one week comfortable train travel. The transcontinental railway has united the U.S. from sea to shining sea and has promoted the interstate economy.

### **The Chinese Exclusion Act**

Gold rush and construction of transcontinental railway brought more and more healthy and young Chinese laborers to California and other states. At one point, Chinese men represented nearly a quarter of all wage-earning workers in California. Industrious and cheap Chinese laborers were resented by white laborers at economic downturn. Most people and unions strongly supported the Chinese Exclusion Act, because they believe that Chinese workers did not participate in labor strikes and were used as a wedge to keep white laborers' wages low.

One of the painful chapters in the history is the Chinese Exclusion Act, signed by President Chester A. Arthur on May 6<sup>th</sup>, 1882. The 1882 Act prohibited all immigration of Chinese Laborers for ten years. The Chinese Exclusion Act was the first law that prevented all members of a specific ethnic or national group from immigrating. The 1882 Act was renewed in 1892 as a result of the Geary Act and made permanent in 1902.

After the Chinese Exclusion Act was passed, violence against Chinese laborers broke out in several cities. On September 2, 1885, Twenty-eight Chinese laborers were murdered, seventeen Chinese were injured, about seventy-nine Chinese laborers' houses were burnt down in Rock Spring, Wyoming. Some of the Chinese laborers were burnt to death. No criminals were brought to trials. 559 Chinese laborers signed at the bottom of the investigation report prepared by a Chinese



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investigation group. Chinese Ambassador Zheng, Tsao Ju wrote to Mr. Bayard, the Secretary of the State " Sir, I have the honor to state that it become my painful duty to bring formally to the notice of your excellency a subject of the gravest importance, heretofore referred to in other notes, and to ask for it the careful and considerate attention which distinguishes your conduct towards this legation and my Government. It appears that several hundreds of his Imperial Majesty the Emperor of China, having entered the territory of the United States in accordance with treaty stipulation, had located themselves at Rock Springs, in the Federal Territory of Wyoming; has there erected houses, and for a number of years past had been engaged in the lawful pursuits of peaceful industry. On the 2<sup>nd</sup> of the September last these subjects, while quietly engaged in their usual avocations, were suddenly attacked, without any provocation on their part, by a lawless hand of armed men."

In late May 1887, a gang of seven white horse gang members robbed, murdered, and mutilated between 10 and 34 Chinese employees from the Sam Yup Company and looted the gold ranging from \$4,000 to \$50,000.

On December 17, 1943, Mughuson Act repealed the Geary Act and allowed 105 Chinese to enter the U.S. per year. Immigration and Nationality Act of 1965 abolished national origins Formula. More Chinese immigrated to California, New York, Oregon, Washington, Massachusetts, etc.

After continuing efforts from CACA, APAPA, NCCA, etc., Congresswoman Judy Chu introduced H.Res. 683. On June 18<sup>th</sup>, 2012, the United States House of Representatives passed the resolution, that formally expresses the regret for the Chinese Exclusion Act. In October, 2011, similar Resolution, S. Res. 201 passed the U.S. Senate. In 2014, the California Legislature call upon Congress to

formally apologize for the 1882 adoption of the Chinese Exclusion Act.

The darkest history has passed. Now, concepts of diversity and inclusion have been brought to work sites. On March 16<sup>th</sup>, 2015, California Supreme Court granted a bar license to Hong Yen Chang, posthumously to correct a "grievous wrong" in the history. Hong Yen Chang was denied a bar license solely because his race 125 years ago.

### **Golden Spike 150 Anniversary**

On May 10<sup>th</sup>, 2019, more than 10,000 people gathered at Promontory Summit. Quite a few dignitaries showed up at Golden Spike 150 anniversary. They are Secretary of Transportation Elaine Chao, Utah Governor Gary Herbert, U.S. Secretary of the Interior David Bernhardt, Utah Lieutenant Governor Spencer J. Cox, U.S. Senator Mitt Romney (R-Utah), U.S. Senator Mike Lee (R-Utah), Former U.S. Senator Orrin Hatch (R-Utah), U.S. Congressman Rob Bishop; Rios Pacheco of the Northwestern Band of the Shoshone, Union Pacific president/CEO Lance Fritz, Russell M. Nelson, president of The Church of Jesus Christ of Latter-day Saints.

Secretary Elaine Chao stated, "the transcontinental railroad was a tremendous feat of engineering, innovation and manpower that was key to the economic development of the United States, and today, we pay special tribute to the diverse workforce — especially 12,000 or more Chinese laborers — that built this seminal infrastructure project that transformed America"

Chinese ambassador Tiankai Cui stated "This is a project of a wonder of the world that linked America together from sea to shining sea and laid the foundation for the American economic boom. This is also a telling example of how the Chinese and American people can come together to get things done and make the impossible possible. This



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is particularly true today. A strong bond between China and the United States can deliver real benefits to our two countries.”

Historian Connie Young Yu, a descendant of Chinese railway worker, said that at the Golden Spike’s centennial in 1969, only one descendent — her mother — was present at the ceremony at Promontory. That oversight was corrected this time, as hundreds of Chinese Americans were in the crowd, and Chinese culture was well-represented on stage. On the same day, Promontory Summit was designated as a national history park.

In May, 2019, Utah State Capitol put on the exhibits relating to this railway construction. Comparing the pictures taken in 1969 and the pictures taken from 2014 to now. What a change! The society is more inclusive now. I flew to Salt Lake city to celebrate golden spike 150, to honor my ancestors, to witness the great event watching two trains coming together, and to encourage the society to recognize the contribution from Chinese Americans. I also visited Rock Springs on July 7<sup>th</sup>, 2019. The memorial rock at Rock Springs recorded the dark history on September 2, 1885. In the front of the rock, there is a Chinese character “Peace”. May peace and harmony stay among people in this country.

150 Golden Spike Anniversary marked a new chapter in the U.S. history. People from different ethnic backgrounds are encouraged to work together to better the society in the U.S.

***Qiang Bjornbak** is admitted to the Bar of the People's Republic of China and to the State Bar of California, and has extensive knowledge on U.S. immigration law, business and civil law as well as China law. She can be reached at [qbjornba@gmail.com](mailto:qbjornba@gmail.com).*

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