ABIL Global Immigration Update

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Updates on the following countries are included in this issue:

- **1. FRANCE**- A new circulaire designates the Migrations Office as the one-stop office that will coordinate work and residence permit processes, during a trial period in certain districts, for intra-company transferees and executive officers.
- **2. FRANCO-INDIAN TREATY ON SOCIAL SECURITY**- The much awaited ratification of the treaty between France and India on social security coverage occurred on March 22.
- **3. ITALY** - Seasonal "work quotas" are available.
- **4. NETHERLANDS** - The new Act on Tracing the Uninsured allows authorities to trace persons who have not yet obtained mandatory basic medical care insurance; an important European Court of Justice judgment was rendered in the *Vicoplus* case.
- **5. UNITED KINGDOM** - The government is proposing various measures to reduce immigration and save public funds.
- **6. UNITED STATES (OVERSEAS USCIS/CONSULAR UPDATES)**- A new U.S. Consulate is being constructed for Mumbai, scheduled to open later in 2011, and no new H and L appointments are being made at the current Mumbai Consulate; USCIS has permanently closed its Vietnam (Ho Chi Minh) office.
- **7. GLOBAL MOBILITY CONFERENCE**- Session topics include Compliance: The Key To Doing Business Globally, including immigration and tax compliance issues and criminal liability; Best Practices in Global Mobility, including a case study; and Global Mobility Trends and Hot Topics.

Details...

1. FRANCE

A new circulaire designates the Migrations Office (OFII) as the one-stop office that will coordinate work and residence permit processes with the various administrations, to simplify such processes and reduce the overall processing time, for intra-company transferees and executive officers. This designation is for a trial period of 6 months and concerns districts 75 (Paris), 92 (Nanterre), and 69 (Lyon).

In its circulaire of February 10, 2011, the Bureau of Professional Immigration has designated the Migrations Office (OFII) as having jurisdiction over the place of work as the one-stop office (*guichet unique*) that will receive work permit applications for qualifying intra-company transferees (*salarié en mission*). OFII will coordinate the work permit application process with the local labor office (DIRECCTE) that adjudicates work permits and e-mail work permit approvals to the visa-issuing consular authorities. The circulaire provides very specific target processing times.

Work Permit Processing Times

The OFII is asked to forward the application to the DIRECCTE within 5 days. This office must adjudicate the work permit and inform the OFII within 10 days. The OFII will then inform the consular authorities, which are to issue the visas to the applicant and his or her accompanying family members by e-mail within 48 hours. The overall processing time should take 4 to 6 weeks from the time OFII receives a complete application.

Residence Permit Processing Times

The residence permit should be issued within the validity period of the long-stay visa to avoid the need to issue an intermediary document (*récépissé*), and in any case, no later than 3 months from the date of entry.

OFII will also coordinate the issuance of the residence permit with the Prefecture having jurisdiction over the applicant's domicile so that the residence permit may be delivered when the assignee passes the medical exam. The assignee will be spared the additional appearance at the Prefecture to receive the residence permit.

Important: OFII is urged by the Bureau of Professional Immigration to schedule the medical examination before the expiry date of the long-stay visa. If the applicant does not appear on the date of convocation, he or she will be convoked a second time. If the applicant does not appear within 30 days of the first appointment, the residence permit will be returned to the Prefecture for delivery.

Accelerated Processing for Executive Officers

The circulaire recalls Articles 7 and 7bis of the decisions of the National Commission of Skills and Talents,[1] which allow qualifying executive officers to apply for the Skills and Talents permit, and avoid the more cumbersome process under the Business (*commerçant*) permit. To qualify under Article 7, the executive officer's nomination must be supported by a foreign company that was formed at least 2 years ago or that is already doing business in France. To qualify under 7bis, the applicant must be a *représentant légal* of an entity in France, meeting the following three criteria: (i) employment with or nomination as a non-resident executive officer (*mandataire social hors de France*) by an entity of the same group; (ii) a monthly salary of three times the legal minimum wage (*smic* is the acronym for minimum legal wage); and (iii) assignment in France for more than 6 months.

Trial Period

The designation of the OFII as the one-stop office is on a trial basis for 6 months and applies only to districts 75 (Paris), 92 (Nanterre), and 69 (Lyon). If the trial is successful, we should expect a new circular that will make the designation permanent and enlarge OFII's territory to include all other districts.

A decision of the Administrative Court of Appeal of Paris confirms that a foreign employee cannot be seconded to a position in France when such position is permanent in nature.

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[1] Decisions of December 11, 2007 and April 16, 2008, resulting in Articles 7 and 7bis of its Orientations.

The facts in this case[2] are quite simple and frequently encountered by mobility managers of multinational corporations. Turkish Airlines transferred one of its Turkish employees to serve as the accountant for their operations based in France, under a secondment (*détachement*) work permit. As such, the Turkish employee remained under a Turkish employment contract, on the Turkish payroll and under the Turkish social security scheme. The secondment work permit had been renewed annually over three consecutive years, before a new renewal application was denied by the labor authorities in Paris.

The denial of the work permit was overruled in the first instance by the Administrative Court and then upheld by the Administrative Court of Appeal. The court reasoned that the position of accountant in France was a permanent position, by its very nature. It could therefore not be filled by a Turkish employee on a secondment assignment, regardless of the facts that the position required knowledge of the Turkish language and Turkish accounting principles. A secondment, as defined by the labor code (Article L. 1261-3) must be temporary in nature. Consequently, Turkish Airlines should have applied for a permanent work permit under a French employment contract giving rise to French social security charges.

The secondment in this case occurred before the French government created the "*salarié en mission*" category in 2006 to allow multinational companies to transfer foreign personnel to French affiliates. The "*salarié en mission*" work permit, under the present regulations, is intended for a temporary assignment, as was the secondment work permit obtained by Turkish Airlines. Arguably, it could be concluded that the new "*salarié en mission*" work permit would not have allowed Turkish Airlines to temporarily transfer its Turkish employee to become the accountant of its French operations.

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2. FRANCO-INDIAN TREATY ON SOCIAL SECURITY

The much-awaited ratification of the treaty between France and India on social security coverage occurred on March 22, 2011. This treaty is now in effect and will allow Indian assignees to avoid contributing to retirement funds under the French social security system while on secondment assignment in France. Such assignees will nevertheless be required to make contributions to French social security for health coverage.

What does the treaty change?

Ever since the globalization of the economy, India has progressively become the world's provider of highly technical services, primarily in the information technology (IT) area. One of the biggest difficulties experienced by Indian service providers when sending their Indian personnel to execute international service agreements has been the high cost of social security compliance in France. Because there was no bilateral treaty between France and India on social security matters, Indian service providers had to make all the French social security contributions, the biggest component of which is state health insurance.

During the negotiation of the bilateral treaty, Indian service providers had hoped that this treaty would allow them to keep the Indian assignees on the Indian regime, and escape the high cost

[2] CAA Paris, October 18, 2010, Min. du travail c/ Société Turkish Airlines, *available at* http://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000023162129&fastReqId=929852083&fastPos=1.

of French social security contributions for health insurance, as is the case with assignees from many other countries with which France has a bilateral treaty.

Unfortunately this will not be the case here. The Indian service provider will have to subscribe to French state health insurance. It will, however, be able to maintain the Indian assignee on the Indian retirement plan and avoid French retirement contributions. The present state of social security regulations (after *décret 2009-34* of January 9, 2009) would have allowed the Indian employer to opt out of the French basic retirement contributions anyway. This long awaited bilateral treaty does not appear to bring a significant change in the social security considerations of assignments of Indian personnel to France, except to enlarge the avoidance to include the complementary retirement (the AGIRC/ARRCO contributions).

Purpose of the treaty

The stated purpose of the treaty is to facilitate professional mobility between France and India, to improve the attractiveness of France for Indian investors, to respond to the demand of French companies doing business in India and of Indian companies doing business in France, by facilitating the movement of workers.

Secondment under this bilateral social security treaty would allow the maintenance of retirement regimes in home countries, and make temporary assignments abroad more attractive to French employees. Having said this, with retirement contributions being only a fraction of the social security contributions, the increase in the attractiveness for Indian and French investors and workers, which is the focus of an impact study discussed by the parliament, is all quite relative.

Beneficiaries of the treaty and risks covered

The scope of the treaty covers salaried and non-salaried workers, including civil servants. The treaty allows the maintenance of social security in the sending state only with respect to retirement benefits, invalidity, and survivor rights, for a maximum period of 5 years. On the other hand, it does not cover health issues, accidents at work, or work-related illness. For these risks, French employees seconded in India and Indian employees seconded in France will have to continue to be covered under the social security insurance of the country where work is performed. In other words Indian workers being seconded to France will be exempted from contributions to the retirement funds, but shall continue to be registered and make contributions to the relevant health insurance fund (URSSAF of Bas-Rhin).

Article 10 of the treaty nevertheless allows the signing States to agree to increase the scope of theexemptions.

Retroactive application of the treaty

The treaty does not provide for retroactive application for persons who had been already sent to one of the contracting states before the effective date of the treaty. They may, however, benefit under the terms of the treaty and be seconded from its effective date.

Liaison authority

The CLEISS (*Centre de liaisons européennes et internationales de sécurité sociale*) is the authority in France that will liaise with the social security authorities of India.

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3. ITALY

Seasonal "work quotas" are available.

Those wishing to work in the farm, hotel, or tourism industries may apply for one of the 60,000 "work quotas" by filing online with the Ministry of the Interior starting March 22, 2011. The number of quotas is sufficiently high to virtually guarantee the entrance of all those who apply. Considering that it takes at least one month for the quota to be issued, those needing workers in Italy immediately should file the application quickly. Availability is limited to the following nationalities: Serbia, Montenegro, Bosnia-Herzegovina, Macedonia, Philippines, Kosovo, Croatia, India, Ghana, Pakistan, Bangladesh, Sri Lanka, Ukraine, Gambia, Nigeria, Tunisia, Albania, Morocco, Moldavia, and Egypt. The request may be for multiple years so that in following years the employer may have the employee return without the need for a new quota.

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4. NETHERLANDS

The new Act on Tracing the Uninsured allows authorities to trace persons who have not yet obtained mandatory basic medical care insurance. Also, an important European Court of Justice judgment was rendered in the Vicoplus case.

The Act on Tracing the Uninsured (Wet Opsporing Onverzekerden) went into effect on March 15, 2011. This act allows Dutch authorities to link various governmental databases and actively trace any person residing in the Netherlands who has not obtained Dutch basic medical care insurance (*zorgverzekering*). International basic care insurance will not suffice.

A foreigner must register for Dutch basic care insurance after receiving his or her first residence permit. This obligation exists also if the foreigner has international basic care insurance. If no basic care insurance is arranged for, under the Act a warning will be issued first. If still not arranged within 3 months, a fine of EUR 343,74 may be imposed, and another fine will be imposed after an additional 3 months if no action has been taken. Finally, if no basic care insurance is taken out after this period, compulsory insurance will be issued. Payment will be imposed by compulsory withholding on the foreigner's wages from the employer.

Non-compliance may also result in problems with extending the residence permit.

In other news, on February 10, 2011, the European Court of Justice rendered an important judgment on the freedom to provide services and the posting of workers (C-307/09, C-308/09 and C-309/09, the *Vicoplus* case). The Dutch High Administrative Court (Raad van State) requested that the court issue this preliminary ruling. The European Court ruled that articles 56 and 57 of the Treaty on the Functioning of the European Union (TFEU) do not preclude a Member State during the transitional period (the period after the accession of new Member States to the EU) from subjecting the hiring-out of workers with the nationality of those new Member States on its territory to a work permit requirement. The transitional period is still relevant for Bulgarian and Romanian nationals.

The court also set the criteria for determining whether a service constitutes a hiring-out of workers: (i) the worker remains in the employ of the company providing the service, (ii) the

movement of workers to another Member State constitutes the purpose of a transnational provision of services, and (iii) a worker who is hired out works under the control and direction of the sending company.

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5. UNITED KINGDOM

Less, less, less migration: The UK government is proposing various measures to reduce immigration and save public funds.

On February 16, 2011, the UK Border Agency (UKBA) released a Statement of Intent (SOI) detailing proposals to change the eligibility criteria for the Points-Based System (PBS) Tier 2 migrants and the operation of permanent limits on certain Tier 2 applications. Additionally, proposals to change the criteria for indefinite leave to remain (ILR) for Tiers 1 and 2 and work permit holders were made. These changes will come into force on April 6, 2011, including the final closure of the Tier 1 (General) category. Increases in application fees have also been proposed due to the need to cut public spending.

The Coalition Government's overarching aim for UK immigration is to reduce net migration by "selecting the best and brightest." To help achieve this, UKBA proposes to raise the qualifying thresholds for the Tier 2 category and cap the number of Tier 2 (General) migrants to an annual limit. Moreover, restrictions will extend to the requirements for settlement in the UK to implement the government's "less automatic settlement" agenda.

UKBA is expected to publish the new Rules and formal guidance shortly.

Proposals for Tier 1 (Highly Skilled)

The final closure of Tier 1 (General) on April 6, 2011, will deal a huge blow to both employers and individuals alike. After the dubious operational assessment of the category in October 2010, which purported to find that 29% of Tier 1 migrants were in unskilled jobs (the report was based on solely Tier 1 dependents who had been in the UK for six months), UKBA believed it had justification to delete the entire highly skilled migrant category. At least there will be transitional provisions in place for those who will be submitting eleventh-hour Tier 1 (General) applications by post, so that their applications will be assessed in accordance with the Rules in place on the date of application (the date the application is posted).

Under the transitional arrangements, migrants who are not already in Tier 1 (General) or its predecessor category under the highly skilled migrant program will not be permitted to switch into this category beginning on April 6, 2011. The Tier 1 (General) route will remain open to allow those with existing leave to enter or remain under Tier 1 (General) or its predecessor to extend their leave. However, the points threshold for extensions will be raised to 100 points for those who required 100 points when first granted leave.

It is feared by immigration practitioners that the Tier 1 (post study work) category may survive the changes only to be phased out after the new rules are implemented. Generous transitional provisions are anticipated, if this were to be the case.

On a positive note, there are proposals for those recognized as possessing "exceptional talent" from different sectors to be certified as "exceptionally talented." It will be decided that a migrant

meets the "exceptionally talented" criteria by entities who have been delegated the power to certify migrants. The UKBA has yet to set definitive criteria on what will amount to "exceptional talent." Unsurprisingly, a Nobel prize winner will be viewed as such. The proposals need to be built upon and it is still unclear how the capped allocation of 1,000 migrants for each sector will be managed, let alone how UKBA will deal with an undoubted "oversubscription" to the category.

Proposals for reform of the Tier 1 Entrepreneur and Investor categories have not yet been published but future (skilled) changes are expected to be nominal.

Proposals for Tier 2

As the main category for sponsored skilled workers, Tier 2 requires a Certificate of Sponsorship (COS) from the migrant's licensed sponsor. These will be divided into "Restricted" and "Unrestricted" COS.

From April 6 on, the Restricted COS will be capped at an annual limit of 20,700 - 4,200 of which will be available for the first month and 1,500 available thereafter. It is proposed that if a monthly limit is undersubscribed, the balance will be added to the allocation for the following month. If the monthly limit is oversubscribed, applications will be prioritized based on a new points table. Much like the old work permit scheme, which ironically the PBS was supposed to displace, sponsors will need to apply to the monthly panel for a Restricted COS each time they wish to sponsor a migrant under Tier 2 (General).

This points system will prioritize occupations on the new shortage occupation list followed by occupations at the Ph.D. level and then occupations meeting the resident labour market test (RLMT). Points will also be awarded for salaries ranging from £20,000-£20,999 with further points for salaries of £100,000 to £149,000. Persons in occupations with salaries of less than £20,000 will be unable to meet the minimum points required.

Unrestricted COS are only available for the Tier 2 categories unaffected by the limit. These fortunate few include intracompany transfers, Tier 2 migrants extending with their original employer or switching to a new employer, migrants switching into Tier 2 (General) from a permitted category, applications under transitional arrangements for existing Tier 2 and work permit holders, positions with a salary over £150,000, and Tier 2 sports people or ministers of religion.

Sponsors will be given an initial annual allocation of Unrestricted COS based on UKBA's consideration of their allocation requests. These surprisingly generous provisions should enable sponsors to continue employing migrants who are extending their leave with their original employer; switching into Tier 2 (General); or are intracompany transfer migrants, without the need for a salary assessment (as there is for Restricted COS). The consequence will no doubt be a rush of annual allocation requests from sponsors who had been stripped of COS under the previous interim limits. Immigration practitioners are concerned that UKBA may not have provided for this or at least included any mechanism to prioritize urgent requests.

As the new graduate occupation and shortage occupation lists are compiled, some occupations are expected to be dropped from the "skilled" threshold. Positions previously on the shortage occupation list may be removed if they do not meet the new graduate-level criteria. Nevertheless, provided the minimum salary levels are defined clearly and the lists compiled in accordance with Migration Advisory Committee (MAC) recommendations, some positions may

be elevated to the new skilled level by virtue of the migrants' previous experience being equivalent to graduate-level. This will apply to all migrants across the board for both Restricted and Unrestricted COS.

Another change proposed for the Tier 2 category is the increased English-language requirement to intermediate English at level B1 on the Common European Framework of Reference for languages. Furthermore, Tier 2 entry clearance applicants will no longer be able to claim points for qualifications.

Settlement

Migrants submitting applications for ILR in the UK on or after April 6, 2011, will be affected by the changes to settlement requirements to be introduced on April 6, 2011. The changes will introduce a new income requirement for Tier 1 (General), Tier 2 (General) and work permit holders applying for settlement; will amend the Knowledge of Language and Life in the UK requirement for Tier 1 (General), Tier 2 (General) and work permit holders; and will clarify the criminality test applied to all applicants for settlement. UKBA's proposals to tighten settlement requirements bear, on closer inspection, a likeness to the outgoing government's ideas (published in the "Path to Citizenship" green paper on February 20, 2008) for selecting migrants with "the right values and commitments" who could integrate well into British society. There is one key difference however, as there appears to be no inclination to mimic the "earned citizenship" proposal.

Unfortunately, as changes are proposed for the Tier 1 and Tier 2 categories, UKBA has failed to align its proposals with settlement rules and nationality law. For instance, the lure of "accelerated settlement" for Tier 1 (Entrepreneur) and Tier 1 (Investor) migrants who invest more money into the UK does not factor in the requirement of continuous residence in the UK under the settlement rules, which most entrepreneurs and investors will not be able to meet. UKBA have remained silent on this matter, but it is evident that primary legislation may need to be amended accordingly.

Conclusion

UKBA's aim to create a "flexible system designed to meet business needs" as well as to reduce net economic migration may seem almost impracticable but may be indeed achieved in part. Though it is a difficult balancing act, it cannot be denied that many potential applicants will now fall short of the higher thresholds, resulting in a net reduction in migration. It remains to be seen whether the new rules will constrict businesses from employing as many non-EEA migrants as required or whether businesses will remain unscathed.

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6. UNITED STATES (OVERSEAS USCIS/CONSULAR UPDATES)

New Mumbai U.S. Consulate To Open Later in 2011; H and L Interviews Limited in Meantime

A new U.S. Consulate is being constructed for Mumbai, scheduled to open later in 2011. No new H and L appointments are being made at the current Mumbai Consulate, which has limited interview capabilities due to aging infrastructure. New H and L interviews may be scheduled at other U.S. Consulates in India or at the U.S. Embassy in New Delhi.

For more information, see http://www.vfs-usa.co.in/USIndia/news.html.

USCIS Permanently Closed Vietnam Office on March 31

U.S. Citizenship and Immigration Services (USCIS) has announced that it has permanently closed its field office in Ho Chi Minh City, Vietnam, as of March 31, 2011. As of March 25, applications and petitions previously accepted by the USCIS Ho Chi Minh City Field Office may be filed with the U.S. Department of State Consular Section there. Where authorized, the Consular Section will assume responsibility for processing certain cases.

For details, including contact information for queries, see http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=48f1b3e38c19e210VgnVCM100000082ca60aRCRD&vgnextchannel=68439c7755cb9010VgnVCM10000045f3d6a1RCRD."

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7. GLOBAL MOBILITY CONFERENCE

The Alliance of Business Immigration Lawyers' Global Immigration Network will present the Global Mobility Conference in London, England, on Thursday, May 5, 2011, from 2 to 5 p.m. This half-day conference will help guide professionals involved in global mobility to be better equipped when conducting business transactions in another country. The conference will look at the following areas:

- Compliance related to immigration and tax, as well as criminal liability.
- Best practices in global mobility through a case study.
- Global mobility trends and hot topics from multiple countries.

The conference is presented at no charge by ABIL and co-sponsored by Baker Tilly International, a network of accountancy and business advisory firms. For more information, e-mail Lauren Anderson at lauren@abil.com.

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