
THE CORPORATE IMMIGRATION REVIEW

EDITOR
CHRIS MAGRATH

LAW BUSINESS RESEARCH

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PREFACE

This book, the first edition of *The Corporate Immigration Review*, is the first major guide to global immigration issues of the 21st century.

The prevailing global economic uncertainty since the 2008 financial crisis has ignited significant debate across the world's media and political classes on the desirability of bringing foreign nationals into local jurisdictions to participate in local labour markets. Immigration remains at the forefront of political debate in Europe, the Americas and Asia. The impact of migration on the availability of work for resident workers, and the effect on social infrastructures of mass migration, are debated in all the jurisdictions in this Review.

Political campaigns in numerous countries have been dominated by immigration policy. In the UK it was a major topic in the 2010 election resulting in considerable discomfort for leading politicians during the campaign. Consequently, the new coalition government has introduced a quota system for economic migration for the first time. In France the National Front, with its protectionist and anti-immigration message, has enjoyed resurgence in the polls, with its new leader, Marine Le Pen, predicted to be a major force in the 2012 presidential election.

In the US, President Obama has brought the immigration debate to the top of his 2011 agenda. He has described the immigration system as 'broken' and reiterated a commitment to comprehensive immigration reform that strengthens security at the borders and restores accountability. Key concerns, shared by many jurisdictions around the world, include educating 'the best and brightest' but finding that the talent is shipped overseas, concerns over the ability of businesses to hire and retain a legal workforce, and the need to level the playing field for workers by ending underground labour markets. India, in particular, with its outstanding educational opportunities within new technologies has suffered from the departure of some of its most talented graduates.

The conflict between the perceived burdens of mass migration, and the need to develop free economies led by the world's best talent, is nothing new. All systems seek to attract businesses and highly skilled individuals into the economy while protecting the state from potentially costly immigration. Most policies aim to create an immigrant population that descends from multinational corporations, professionals and entrepreneurs. Hong Kong, for example, has resolved historical problems with immigration from countries such as China and Vietnam, and introduced myriad economic migration routes to enhance its economy. The focus in Hong Kong is to promote the economy and increase business competitiveness. It has, to a large part, been successful in this endeavour.

Alongside tougher regimes designed to limit the flow of migrant labour we see in a number of jurisdictions flexibilities introduced to encourage inward investment. For example, in the UK, the Tier I routes for entrepreneurs and investors have been amended to include an expedited route to settlement for those investing the largest sums. But the Tier I route for highly skilled migrants looking to enter the workforce has been abandoned entirely.

The purpose of each chapter is to introduce the immigration framework of a given jurisdiction, including an outline of government policy and the types of visas available. The introductory paragraphs set out the key mechanisms and authorities that administer immigration control in the host country with reference to primary legislation, relevant policy guidelines, published immigration rules, etc. This is followed by an outline of the main public authorities in administering immigration control.

The central focus of each chapter is on the procedure and rules that apply to economic migrants, such as sponsored workers, highly skilled individuals, entrepreneurs and investors. While it is beyond the realms of possibility for the text to provide a comprehensive and authoritative guide to all the immigration systems of the world, we believe that sufficient detail and guidance is given to create a highly useful reference tool for immigration practitioners advising in the global market.

Given that this is an annual publication, a section dedicated to a review of the key developments over the preceding 12 months is included. This includes reference to changes to primary legislation, processes, procedures, and key cases that have been determined by the relevant courts. Contributors make reference to the political developments and policies that have been witnessed over the relevant period and each chapter concludes with an outlook for the future.

Perhaps more than in any other legal discipline, immigration lawyers grapple with constant changes to regulatory, procedural and statutory frameworks. As our globalised economy continues to develop, immigration systems will vary and change, as will the nature of the professional legal advice needed to resolve the issues. This annual review will be invaluable to those who wish to keep abreast of the changing systems.

We wish to thank the many contributors to this book who have devoted considerable time and expertise in clearly setting out the essential elements of the immigration system of their countries, and for their support and cooperation in preparing this Review.

Chris Magrath and Ben Sheldrick
Magrath LLP
London
July 2011

Chapter 4

CHINA

*Edward E Lehman**

I INTRODUCTION TO THE IMMIGRATION FRAMEWORK

The history of contemporary immigration law in China is a relatively short one. From the revolution that brought the Communist Party to power in 1949 to the 1970s, foreign travel to China was almost non-existent. In 1968, the Prime Minister of Canada began negotiations with China that resulted in the establishment of mutual diplomatic missions in 1971. US President Nixon's visit to China in 1972 secured an agreement for both nations to establish diplomatic offices, although this did not come to fruition until 1979. Since the 1980s, however, foreigners have become more and more common in China. Diplomats were followed by scholars, businessmen and tourists, who were interested in the nation of over a billion people for its history, its beauty and its opportunities. In the mid 1980s, China formally codified regulations regarding the entry and exit of foreigners into the country. Since then, the central requirements of this law have remained largely unchanged.

In the recent past, a visa to China was difficult to obtain and in-country regulations were strict, preventing foreigners from visiting or staying in certain areas, which were considered to be 'non-secure' sites. While China is now far more liberal in its approach to granting work visas for foreign expatriate assignments, there are still vestiges of the old political system, often resulting in a confusing and contradictory regime for foreign workers. One obvious point of distinction is the inability for foreigners to become naturalised as Chinese citizens, no matter how long they have lived in China, as there is no 'Immigration Law'. However, China recently introduced a 'green card' system, which allows for permanent residency by foreigners; however, its availability is restricted to all but the most affluent investors and influential scholars or individuals.

A Chinese visa is a permit issued to a foreigner by the Chinese visa authorities for entry into, exit from or transit through the Chinese territory. The Chinese visa authorities

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may issue a diplomatic, courtesy, service or ordinary visa to a foreigner according to his identity, purpose of visit to China and passport type. An introduction to the ordinary visa is outlined *infra*.

The ordinary visas consist of eight sub-categories, which are marked with Chinese phonetic letters (D, Z, X, F, L, G, C, J-1 and J-2, respectively).

- a* *Visa D*: Issued to aliens who are to reside permanently in China. A permanent residence confirmation form shall be required for the application of Visa D. The applicant shall apply to obtain this for his or herself or through his or her designated relatives in China from the exit-and-entry department of the public security bureau in the city or county where he or she applies to reside.
- b* *Visa Z*: Issued to aliens who are to take up posts or employment in China, and to their accompanying family members. To apply for a Visa Z, an employment licence of the People's Republic of China for foreigners and a visa notification letter or telegram issued by an authorised organisation or company are required.
- c* *Visa X*: Issued to aliens who come to China for study, advanced studies or job training for a period of six months or more. To apply for a Visa X, certificates from the receiving unit and the competent authority concerned are required.
- d* *Visa F*: Issued to an applicant who is invited to China on a visit for a period of no more than six months, on a study or lecture, business tour, for scientific-technological and cultural exchanges, for short-term refresher courses or for job-training. To apply for a Visa F, the invitation letter from the inviting unit or the visa notification letter or telegram from the authorised unit is required.
- e* *Visa L*: Issued to aliens who come to China for sightseeing, visiting relatives or other private purposes. For a tourist applicant, in principle he or she shall evidence his or her financial capability of covering the travelling expenses in China, and when necessary, provide the air, train or ship tickets to the country or region of destination after leaving China. For the applicants who come to China to visit relatives, some are required to provide invitation letters from their relatives in China.
- f* *Visa G*: Issued to aliens who transit through China. The applicants are required to show valid visas and on-going tickets to the countries or regions to which they are heading.
- g* *Visa C*: Issued to train attendants, air crewmembers and seamen operating international services, and to their accompanying family members. To apply for a Visa C, relevant documents are required to be provided in accordance with bilateral agreements or regulations of the Chinese side.
- h* *Visa J-1*: Issued to foreign resident correspondents in China.
- i* *Visa J-2*: Issued to foreign correspondents that make short trips to China on reporting tasks. The applicants for J-1 and J-2 visas are required to provide a certificate issued by the competent Chinese authorities.

i Legislation and policy

Although there is no statute law in the area of immigration in China, China still has related legislations such as (1) the Nationality Law of the People's Republic of China, (2) the Law of the People's Republic of China on Control of the Entry and Exit of Aliens, (3)

Measures for the Administration of Examination and Approval of Foreigners' Permanent Residence in China, (4) Rules for the Administration of Employment of Foreigners in China, and (5) Rules governing implementation on Temporary Residence Registration of Aliens including people from Hong Kong, Macao and Taiwan.

The Law of the People's Republic of China on Control of the Entry and Exit of Aliens was adopted at the 13th Meeting of the Standing Committee of the Sixth National People's Congress, was promulgated by Order No. 31 of the President of the People's Republic of China on 22 November 1985, and became effective as of 1 February, 1986. The Law is formulated with a view to safeguarding the sovereignty of the People's Republic of China, maintaining its security and public order and facilitating international exchange. This Law is applicable to aliens entering, leaving and travelling through the territory of the People's Republic of China and to those residing and travelling in China. According to the Law said aliens must obtain the permission of the competent authorities of the Chinese government in order to enter, travel or reside in China.

The Measures for the Administration of Examination and Approval of Foreigners' Permanent Residence in China were approved by the State Council on 13 December 2003, and promulgated by Order No. 74 of the Ministry of Public Security and the Ministry of Foreign Affairs on 15 August, 2004. These Measures are formulated in accordance with the relevant provisions of the Law of the People's Republic of China on Control of Entry and Exit of Foreigners and the detailed rules for its implementation for the purpose of standardising the examination and approval of foreigners' permanent residence in China.

The Rules for the Administration of Employment of Foreigners in China were promulgated jointly by the Ministry of Labour, Ministry of Public Security, Ministry of Foreign Affairs and the Ministry of Foreign Trade and Economic Cooperation of the People's Republic of China on 22 January 1996. These rules are formulated in accordance with the provisions of the relevant laws and decrees for the purpose of strengthening the administration of employment of foreigners in China.

The Rules governing implementation on Temporary Residence Registration of Aliens including people from Hong Kong, Macao and Taiwan relate to aliens lodging at guest houses, hotels, inns, hostels, schools or other enterprises and institutions or at government authorities or other Chinese organisations. Aliens shall, within 24 hours of their arrival, report to the local public security organ. If any aliens fail to register at local public security authorities with 24 hours after they enter China, they may be given a warning letter or fine of 500 renminbi per day up to 5,000 renminbi.

ii The immigration authorities

China's diplomatic missions, consular offices and other resident agencies abroad authorised by the Ministry of Foreign Affairs of China shall be the Chinese government's agencies abroad to handle aliens' applications for entry and transit.

The Ministry of Public Security's authorised local public security authorities shall be the Chinese government's agencies in China to handle aliens' applications for entry, transit, residence and travel. Likewise, the authorities shall have the power to refuse to issue visas and certificates or to cancel visas and certificates already issued or declare them invalid. While performing their duties, foreign affairs police of the public security

authorities at or above the county level shall have the power to examine the passports and other certificates of aliens or to detain an alien who enters or resides in China illegally.

The Ministry of Foreign Affairs' authorised local foreign affairs departments shall be the Chinese government's agencies in China to handle aliens' applications for entry, transit, residence and travel as well.

The Ministry of Labour and Social Security, the labour administrative authorities of the people's government of the provinces, autonomous regions and municipalities directly under the central government and those at the prefecture and city level with their authorisation are responsible for the administration of employment of foreigners in China.

The local police station shall investigate aliens' temporary residence registration, and exam aliens' visa status.

The Ministry of Commerce's authorised local commerce bureau shall issue an official invitation letter to aliens.

iii Exemptions and favoured industries

Exemptions exist in the practice of immigration. For example, there is a list of Agreements on Visa Exemption Signed between the People's Republic of China and Foreign Countries, including 58 countries, which allows residents from these countries to come to China without a visa for different reasons, such as diplomatic, service passport and passports for public affairs. In addition, under Article 18 of the Regulations of the People's Republic of China Concerning Consular Privileges and Immunities, Consular officers and members of the administrative of technical staff of the consular post shall be exempt from all obligations under the laws and regulations of China with regard to the registration of aliens and residence permits.

Foreigners may be exempted from the requirement to hold an employment licence and employment permit when they fall into any of the following categories:

- a* foreign professional technical and managerial personnel employed directly by the Chinese government or those with senior technical titles or credentials of special skills recognised by their home or international technical authorities or professional associations to be employed by Chinese government authorities and institutions and foreigners holding a foreign expert certificate issued by China's Bureau of Foreign Expert Affairs;
- b* foreign workers with special skills who work in offshore petroleum operations without the need to go ashore for employment and hold a 'work permit for foreign personnel engaged in the offshore petroleum operations in the People's Republic of China'; and
- c* foreigners who entertain commercially with the approval of the Ministry of Culture and hold a 'permit for temporary commercialised performance'.

Foreigners may be exempted from the employment licence and may apply directly for the employment permit by presenting their employment visas and relevant papers after their entry when they meet any of the following conditions:

- a* foreigners employed in China under agreements or accords entered into by the Chinese government with foreign governments or international organisations for the implementation of Sino-foreign projects of cooperation and exchange; and
- b* chief representatives and representatives of the permanent offices of foreign enterprises in China.

There are certain favoured industries that have been regulated in the Examination and Approval Administration Measures of Permanent Residence for Aliens in China. Besides aliens conforming to the requirements, any investor who invests an actual sum of registered capital in China amounting to \$2 million or more, may apply for the permanent residence certificate for investors; the investor may also have a residence certificate for favoured industries as well (such as an investor who invests in China's western areas and key poor counties supported by the state in development with an actual sum of registered capital amounting to \$500,000 or more).

II INTERNATIONAL TREATY OBLIGATIONS

A number of international treaties have been signed regarding travel and immigration between China and other countries. For example, on 9 October 2007, China and the United Kingdom signed the Implementation Rules on the Memorandum of Understanding on the Facilitation of Legitimate Travel and Co-operation to Combat Illegal Immigration in Beijing. With the deepening of the China–UK all-round strategic partnership, personnel exchanges between the two countries have increased considerably in recent years. According to the Implementation Rules, China and the UK will grant visa-free treatment to the holders of the other's diplomatic and service passports as well as multiple-visa treatment to service and business visits and overseas students of the two countries; they will also work together to fight against international stowaway crimes and accelerate the settlement of illegal immigration matters. Such efforts will hopefully promote exchanges and advance the cooperation in various fields between the two countries. The Vienna Convention on Consular Relations and Optional Protocols provides that:

- a* members of the consular post shall, with respect to services rendered for the sending state, be exempt from any obligations in regard to work permits imposed by the laws and regulations of the receiving state concerning the employment of foreign labour; and
- b* members of the private staff of consular officers and of consular employees shall, if they do not carry on any other gainful occupation in the receiving state, be exempt from the obligations referred to in paragraph 1 of this Article.¹

1 Article 47 Exemption from Work Permits

III EMPLOYER SPONSORSHIP

i Work permits

The Chinese government welcomes foreign investors, high-level administrators and technical staff to work in China. For those aliens that hold posts as high-level administrators or technical staff in China, employers shall apply for permission to employ aliens and posts filled by any foreigner recruited by the employer shall be post of special need, a post that cannot be filled by any domestic candidates for the time being but violates no government regulations.

Any foreigners shall meet the normal requirements of employment in law, such as:

- a* being aged between 18 and 60 for males and 18 and 55 for females;
- b* being in good health;
- c* having professional skills and job experience required for the work of intended employment;
- d* having no criminal record;
- e* having a definitive employer; and
- f* having a valid passport or other international travel documents in lieu of a passport.

Foreigners who work without an employment permit or employers that hire foreigners without an employment licence shall be handled by the public security authorities. For foreigners and employers who forge, falsely use, transfer, buy and sell employment permits and employment licences, the labour administrative authorities shall confiscate the employment permits and the employment licences in question, confiscate any illegal proceeds and impose a fine between 1,000 and 100,000 renminbi. In serious cases that constitute crimes, the criminal responsibility of the perpetrators shall be investigated by the judicial authorities.

ii Labour market regulation

The government of People's Republic of China introduces legislations and policies to protect the local labour market. There are the Rules for the Administration of Employment of Foreigners in China, promulgated jointly by the Ministry of Labour, Ministry of Public Security, Ministry of Foreign Affairs and the Ministry of Foreign Trade and Economic Cooperation of the People's Republic of China LBF, and the Proposals of the Labour Bureau of Shanghai on Implementing the Rules for the Administration of Employment of Foreigners in China.

According to Article 6 of Rules for the Administration of Employment of Foreigners in China, the post to be filled by the foreigner recruited by the employer shall be the post of special need, a post that cannot be filled by any domestic candidates for the time being but violates no government regulations. No employer shall employ foreigners to engage in commercialised entertaining performance, and Article 34 individual economic organisations and private citizens are prohibited from employing foreigners.

iii Rights and duties of sponsored employees

According to Article 31 of the Constitution of the People's Republic of China, China protects the lawful rights and interests of foreigners within Chinese territory, and foreigners on Chinese territory must abide by Chinese law; however there are a number of reasons not to do so:

- a Tax penalties:* China has a number of tax treaties with various nations, including Canada and the United States, which allows tax authorities to correspond with their counterparts in the various treaty countries. According to the Regulations of the State Administration of Taxation, if a foreigner is suspected of evading taxes while in China, he or she may be suspended and prevented from leaving the country until an investigation is completed. Upon conclusion of the investigation, if the individual is found to have avoided paying taxes on income subject to Chinese tax laws, he or she may be liable for interest on unpaid amounts plus a fine ranging from three to five times the unpaid amount.
- b Illegality:* Obviously, avoiding taxes that are subject to Chinese tax law is illegal and working in China without appropriate permits is against the law.
- c Lack of protection for legal rights:* Individuals who are not under contract with Chinese entities will be unable to sue their employers for breach of obligations without employment agreements (according to Labour Law, employment contracts must be in written form).

The specific obligations and rights placed on employees with sponsored status have been regulated in Rules for the Administration of Employment of Foreigners in China. In accordance with Articles 18, 22, 23, 25, 27 of the Rules for the Administration of Employment of Foreigners in China, employees' rights and obligations are as follows:

- a* employers and their foreign employees should, in accordance with law, conclude labour contracts;
- b* the wages paid to foreign employees by employers shall not be lower than the minimum wage in the locality;
- c* the working hours, rest and vacation, work safety and hygiene as well as the social security of the foreign employees in China shall follow the relevant provisions of the state;
- d* for foreigners whose residence status are revoked by public security authorities due to violations of Chinese law, labour contracts should be terminated by the employer and the employment permits withdrawn by the labour administrative authorities; and
- e* the labour administrative authorities shall conduct annual inspections of employment permits within the 30 days prior to the end of every year of employment of foreigners.

IV INVESTORS, SKILLED MIGRANTS AND ENTREPRENEURS

China allows any foreigner to apply for a permanent residence certificate as an investor who must (1) abide by Chinese laws, (2) be in good health and without any criminal record, and (3) fall into at least one of the following requirements:

- a* an investor who invests an actual sum of registered capital in China amounting to \$2 million or more, and this investment must be sustained for three consecutive years);
- b* an investor who invests an actual sum of registered capital in central areas of China amounting to \$1 million or more, and this investment must be sustained for three consecutive years;
- c* an investor who invests in western areas of China or any key poor counties supported by the state in development with an actual sum of registered capital amounting to \$500,000 or above, and this investment must be sustained for three consecutive years; and
- d* an investor who invests at least \$500,000 in any industry encouraged by the state under the Catalogue for the Guidance of Foreign Investment Industries.

The accompanying spouse and children under 18 years of age and unmarried may, at the same time, apply for the same permanent residence certificate for aliens.

V OUTLOOK AND CONCLUSIONS

The number of foreign workers in China has been growing in recent years. Foreign workers are primarily attracted to China's big cities including Beijing, Shanghai and Guangzhou. In 2010, China recruited about 480,000 talented people from foreign countries, Hong Kong, Macao and Taiwan, according to the State Administration of Foreign Experts Affairs. Most foreign workers are hired directly by Chinese companies or dispatched to China by their domestic headquarters to expand business, and work in the fields of higher management, marketing, production, finance, catering and education. They come from more than 90 countries and regions, including Japan, the United States, South Korea, Germany and Singapore.

Due to China's effort to adjust its economic growth pattern, it has become more important for it to tap others' 'brains'; top-notch talent are crucial for improving the core competitiveness of a country, a region and a company. Recently China's central authorities have set down a more open policy to attract top-notch foreign talent to help promote the economic and social development and global competitiveness of the nation. According to the newly unveiled National Medium and Long-term Talent Development Plan (2010-2020), the government will work out favourable policies in terms of taxation, insurance, housing, children and spouse settlement, career development, research projects and government awards for high-calibre overseas talent who are willing to work in China. The Chinese government will improve its system for giving permanent residence rights to foreigners, explore the potential of a skilled migration programme, and work out measures to ensure a talent supply, discovery and appraisal system. The national plan, a blueprint for creating a highly skilled national workforce over the next decade, aims to transform the country from being 'labour-rich' to 'talent-intensive'.

As China's employment system is undergoing transformation in multiple directions, the number of foreign employees in catering, hotel management, culture and entertainment, and IT constitutes both a boost and a challenge to China's economic development. Foreign employees also help in communications with the rest of the world and can tell of the changes that have taken place in China. Following China's entry into the WTO, effectively regulating the entry of foreign employees and rapidly enhancing the competitive potential of domestic talents is a number one priority.

This chapter is a review of the corporation immigration law in China and transformation of China employment system. While the process may seem complex, the key to navigating it is engaging local counsel who will assist you through each step (including those that may appear to be simple, given the language difficulties often faced by foreign employees) and ensure smooth transition into the new workplace and country.

Appendix 1

ABOUT THE AUTHORS

EDWARD E LEHMAN

Lehman, Lee & Xu

Edward Lehman is the managing director of Lehman, Lee & Xu in China where he specialises in the legal aspects of doing business in China.

He has advised international clients in all major economic sectors on investment, trade and dispute resolution matters in China since 1987. He is the longest serving foreign lawyer with a Chinese legal firm (since 1989). Mr Lehman is one of the best known 'China-hands'; after 16 years in Beijing and Shanghai, in association with major international and Chinese firms, he along with Chinese nationals established Lehman, Lee & Xu, one of China's leading full-service professional service firms with six offices throughout greater China. He has been selected by his peers as one of the best advisers in China for banking, intellectual property, finance, foreign direct investment and infrastructure, and corporate and commercial counselling. He has experience in direct investments: joint ventures and wholly foreign-owned enterprises technology transfers, licensing and intellectual property, telecommunications, real estate, banking and finance, taxation and regulatory matters.

Mr Lehman has contributed to the *Fordham University Law Review* and was CCH author on *China Taxation*, *Kinsella Guide* author for Macau Intellectual Property and China IP.

Mr Lehman was admitted to the bar in the United States in Illinois (1986). He is a graduate of DePauw University BS 1982; University of Notre Dame College of Law, and Concannon Programme of International Law, London, England, International Law Certificate, (1985); and Loyola University of Chicago, Juris Doctor (1986). He won a number of Asialaw Leading Lawyer Awards in 2008 and was named Who's Who of Franchise Lawyers, 2008. He was recommended as an expert in IP practice in *PLC Cross-border Corporate Intellectual Property Handbook*, 2005. He is listed in Top 500 Lawyers, *Asia Pacific Legal*. Mr Lehman is currently an associate professor of Law at

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