

# Points-Based Immigration Systems

Australia • Canada • United Kingdom

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# AUSTRALIA

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**SUMMARY** Australia operates a “hybrid” system for skilled migration, involving both employer sponsorship options and points-based visas. In recent years, there has been a shift in focus away from independent skilled migration, with greater emphasis being placed on demand-driven employer- and government-sponsored skilled migration.

In 2012, three new points-based visas were introduced to replace the existing visas and a new application process was put in place. This followed the introduction of a new points test in 2011 that recognizes a broader range of skills and attributes. People who wish to migrate to Australia under the points-based system must now submit an online expression of interest and must receive an invitation from the Department of Immigration and Citizenship in order to apply for a visa. To be eligible for a points-based visa, applicants must be younger than fifty years of age, nominate an occupation from the Skilled Occupations List, have their skills assessed by a relevant authority, have at least competent English, meet health and character requirements, and score at least sixty points on the points test.

Both the employer-sponsored and points-based skilled migration programs have resulted in high labor market participation rates of migrants, with rates of 99% and 96% respectively after one year of permanent settlement. Migrants also received relatively high median full-time earnings in Australia. In 2011-12, the top source countries for General Skilled Migration visas were India, the United Kingdom, China, Sri Lanka, and Malaysia.

In addition to programs for permanent migration of skilled workers, Australia offers various temporary visas for visitors, students, and workers. In 2012, a seasonal worker program was introduced following a four-year pilot.

Various mechanisms are used to encourage voluntary compliance with the immigration system, including a status resolution service, bridging visas, and an online visa verification system. In 2011-12, 99% of temporary visa holders complied with their visa requirements.

## I. General Overview of the Immigration System

Australia’s universal visa system requires all noncitizens to have a valid visa to enter and remain in Australia. Australia’s immigration program is primarily governed by the Migration Act 1958 (Cth) and the Migration Regulations 1994 (Cth).<sup>1</sup> The program is administered by the Department of Immigration and Citizenship (DIAC).

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<sup>1</sup> Migration Act 1958 (Cth), <http://www.comlaw.gov.au/Details/C2012C00855>; Migration Regulations 1994 (Cth), <http://www.comlaw.gov.au/Details/F2013C00062>. Multiple additional subsidiary instruments and governmental notices apply under the Migration Act, *see Legislative Instruments – All – by Title – MI*, COMLAW,

The permanent migration program has two main components: the Migration Program<sup>2</sup> and the Humanitarian Program.<sup>3</sup> Both programs are divided into streams, categories, and visa “subclasses.” The Migration Program consists of the Skilled Stream, Family Stream,<sup>4</sup> and Special Eligibility Stream.<sup>5</sup>

Australia operates a “hybrid” selection system for skilled migrants that includes both a points-based system and employer sponsorship options.<sup>6</sup> The Skilled Stream of the Migration Program is divided into four main categories:<sup>7</sup> points-based skilled migration (also known as General Skilled Migration), the Permanent Employer-Sponsored Program,<sup>8</sup> the Business Innovation and Investment Program,<sup>9</sup> and visas for people with “distinguished talent.”<sup>10</sup> Section III of this report provides information on the points-based skilled migration category.

Various temporary visas are available.<sup>11</sup> Some of these visas provide limited rights to work, such as those for students,<sup>12</sup> seasonal workers, and young people on working holidays. Information on the latter two programs is provided in Section IV of this report. The subclass 457 visa is the major temporary work visa for employer-sponsored foreign workers in skilled

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<http://www.comlaw.gov.au/Browse/Results/ByTitle/LegislativeInstruments/Current/Mi/0>; *Gazettal Notices*, DIAC, <http://www.immi.gov.au/legislation/gazettals/> (both last visited Feb. 28, 2013).

<sup>2</sup> See generally *Fact Sheet 1 – Immigration: The Background Part One*, DIAC, <http://www.immi.gov.au/media/fact-sheets/01backgd.htm> (last reviewed May 2012).

<sup>3</sup> See generally *Fact Sheet 1 – Immigration: The Background Part Two*, DIAC, [http://www.immi.gov.au/media/fact-sheets/01backgd\\_01.htm](http://www.immi.gov.au/media/fact-sheets/01backgd_01.htm) (last reviewed May 2012).

<sup>4</sup> See generally *Fact Sheet 29 – Overview of the Family Stream*, DIAC, [http://www.immi.gov.au/media/fact-sheets/29overview\\_family.htm](http://www.immi.gov.au/media/fact-sheets/29overview_family.htm) (last reviewed Sept. 2012).

<sup>5</sup> See generally *Fact Sheet 40 – Special Eligibility Stream*, DIAC, <http://www.immi.gov.au/media/fact-sheets/40special.htm> (last reviewed Apr. 27, 2011). This stream makes provision for former permanent residents who meet certain criteria to remain in or return to Australia as permanent residents.

<sup>6</sup> See DEMETRIOS G. PAPADEMETRIOU & MADELEINE SUMPTION, *RETHINKING POINTS SYSTEMS AND EMPLOYER-SELECTED IMMIGRATION 5* (Migration Policy Institute, June 2011), [http://www.migrationpolicy.org/pubs/rethinking\\_pointssystem.pdf](http://www.migrationpolicy.org/pubs/rethinking_pointssystem.pdf).

<sup>7</sup> *Fact Sheet 24 – Overview of Skilled Migration to Australia*, DIAC, [http://www.immi.gov.au/media/fact-sheets/24overview\\_skilled.htm](http://www.immi.gov.au/media/fact-sheets/24overview_skilled.htm) (last reviewed July 2012).

<sup>8</sup> See generally *Employer Sponsored Workers*, DIAC, <http://www.immi.gov.au/skilled/skilled-workers/permanent-employer-sponsored-visa-whats-new.htm> (last visited Feb. 27, 2013). See also DIAC, *PERMANENT EMPLOYER SPONSORED PROGRAM*, <http://www.immi.gov.au/skilled/skilled-workers/pdf/skilled-migration-diagrams.pdf> (providing an overview of the current visa streams under this program) (last visited Feb. 28, 2013).

<sup>9</sup> See generally *Fact Sheet 27 – Business Migration*, DIAC, <http://www.immi.gov.au/media/fact-sheets/27business.htm> (last reviewed July 2012).

<sup>10</sup> *Distinguished Talent Visa (Offshore) (Subclass 124): About this Visa*, DIAC, <http://www.immi.gov.au/skilled/specialist-entry/124/>; *Distinguished Talent Visa (Onshore) (Subclass 858): About this Visa*, DIAC, <http://www.immi.gov.au/skilled/specialist-entry/858/> (both last visited Feb. 27, 2013).

<sup>11</sup> See generally *Fact Sheet 46 – Temporary Entry: An Overview*, DIAC, [http://www.immi.gov.au/media/fact-sheets/46temporary\\_entry.htm](http://www.immi.gov.au/media/fact-sheets/46temporary_entry.htm) (last reviewed Nov. 2012).

<sup>12</sup> See *Student Visa Conditions for the Primary Visa Holder*, DIAC, <http://www.immi.gov.au/students/visa-conditions-students.htm> (last visited Feb. 21, 2013).

occupations and may be valid for up to four years.<sup>13</sup> People on this and some other temporary visas may be able to transition to a permanent residence visa while they are in Australia.<sup>14</sup>

New Zealand citizens are able to live, work, and study in Australia indefinitely on special “temporary” visas due to reciprocal arrangements between the two countries.<sup>15</sup> New Zealanders settling in Australia are included in total settler numbers but are not counted as part of Australia’s Migration Program unless they choose to apply for permanent residence as skilled or family migrants.<sup>16</sup>

In recent years, Australia has introduced various temporary and permanent visa initiatives targeted at enabling employers in different regions in Australia to address labor shortages by obtaining overseas workers to fill skilled and semiskilled positions.<sup>17</sup>

The specific eligibility criteria for the different subclasses are set out in Schedule 2 of the Migration Regulations 1994 (Cth). There are also some “general public interest criteria” set out in the Regulations that relate to health<sup>18</sup> and character<sup>19</sup> requirements that apply to all visas. In addition, applicants for some visas (including all permanent visas) are required to sign an Australian Values Statement.<sup>20</sup>

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<sup>13</sup> See generally *Fact Sheet 48b – Temporary Work (Skilled) (Subclass 457) Visa*, DIAC, <http://www.immi.gov.au/media/fact-sheets/48b-temporary-business-visa.htm> (last reviewed Nov. 2012).

<sup>14</sup> See, e.g., *Employer Nomination Scheme (Subclass 186)*, DIAC (SkillSelect), <http://www.immi.gov.au/skills/skill-select/index/visas/subclass-186/> (last updated Dec. 12, 2012); Mei Hoong, *Changes to the Permanent Employer Sponsored Program*, DIAC MIGRATION BLOG (May 7, 2012), <http://migrationblog.immi.gov.au/2012/05/07/changes-to-the-permanent-employer-sponsored-program/>.

<sup>15</sup> See *Fact Sheet 17 – New Zealanders in Australia*, DIAC, <http://www.immi.gov.au/media/fact-sheets/17nz.htm> (last reviewed Oct. 2012); *New Zealand Citizens Entering Australia*, DIAC, <http://www.immi.gov.au/allforms/travel-documents/new-zealand.htm> (last visited Feb. 25, 2013). New Zealanders automatically receive a Special Category visa (SCV) when they enter Australia. Migration Act 1958 (Cth), s 32; Migration Regulations 1994 (Cth), sch 2, subclass 444.

<sup>16</sup> See also DIAC, *TRENDS IN MIGRATION: AUSTRALIA 2010-2011* (Annual submission to the OECD’s Continuous Reporting System on Migration (SOPEMI)) 22, <http://www.immi.gov.au/media/publications/statistics/trends-in-migration/trends-in-migration-2010-11.pdf>.

<sup>17</sup> See, e.g., Press Release, Chris Bowen MP, *Skilled Migration Reform to Support Australia’s Growing Economy* (May 10, 2011), <http://www.minister.immi.gov.au/media/cb/2011/cb165287.htm>.

<sup>18</sup> See *Fact Sheet 22 – The Health Requirement*, DIAC, <http://www.immi.gov.au/media/fact-sheets/22health.htm> (last reviewed May 2010).

<sup>19</sup> See *Fact Sheet 79 – The Character Requirement*, DIAC, <http://www.immi.gov.au/media/fact-sheets/79character.htm> (last reviewed Jan. 2013); Migration Act 1958 (Cth), s 501; Migration Regulations 1994 (Cth), reg 1.03 & sch 4 pt 1 (Public Interest Criterion 4001).

<sup>20</sup> See *Australian Values*, DIAC, <http://www.immi.gov.au/living-in-australia/values/> (last visited Feb. 21, 2013); Migration Regulations 1994 (Cth), sch 4, pt 3.

## II. Number of Immigrants

As of February 25, 2013, Australia's population was estimated to be over 22.9 million people.<sup>21</sup> According to the Australian Bureau of Statistics (ABS), 27% of the estimated population on June 30, 2011, was born overseas (about 6 million people).<sup>22</sup> The largest group of overseas-born residents at that time was from the United Kingdom (5.3% of the population), followed by New Zealand (2.5%), China (1.8%), India (1.5%), and Vietnam and Italy (0.9% each).<sup>23</sup>

The ABS states that “[h]istorically, more people immigrate to, than emigrate from, Australia.”<sup>24</sup> Net overseas migration peaked at 315,700 in December 2008, but declined significantly to about 197,200 in March 2012. The DIAC has predicted a gradual rise in net overseas migration to about 249,000 by June 2016.<sup>25</sup>

### A. Migration Program

Under section 85 of the Migration Act 1958, the Minister for Immigration and Citizenship can place limits, or “caps,” on the number of visas that can be granted for a particular subclass each year.<sup>26</sup> In terms of the Migration Program, over the last decade there has been a shift to more people obtaining residence in Australia under the Skilled Stream than the Family Stream. In 1996-97,<sup>27</sup> more than 50% of migrants arrived under the Family Stream with about 47% of places being awarded under the Skilled Stream.<sup>28</sup> In comparison, in 2012-13, Australia's Migration Program is set at 190,000 places,<sup>29</sup> comprising

- 60 185 places for family migrants who are sponsored by family members already in Australia [31.7% of the program]

<sup>21</sup> *Population Clock*, AUSTRALIAN BUREAU OF STATISTICS, <http://www.abs.gov.au/ausstats/abs%40.nsf/94713ad445ff1425ca25682000192af2/1647509ef7e25faaca2568a900154b63?OpenDocument> (last visited Feb. 25, 2013).

<sup>22</sup> *Australia's Population by Country of Birth*, AUSTRALIAN BUREAU OF STATISTICS, <http://www.abs.gov.au/ausstats/abs@.nsf/Products/84074889D69E738CCA257A5A00120A69?opendocument> (last updated Dec. 17, 2012). See also *Fact Sheet 15 – Population Growth*, DEPARTMENT OF IMMIGRATION AND CITIZENSHIP (DIAC), <http://www.immi.gov.au/media/fact-sheets/15population.htm> (last reviewed June 2012).

<sup>23</sup> *Australia's Population by Country of Birth*, supra note 22.

<sup>24</sup> *Id.*

<sup>25</sup> DIAC, *THE OUTLOOK FOR NET OVERSEAS MIGRATION 3* (Sept. 2012), <http://www.immi.gov.au/media/publications/statistics/immigration-update/nom-sep12.pdf>.

<sup>26</sup> See *Fact Sheet 21 – Managing the Migration Program*, DIAC, <http://www.immi.gov.au/media/fact-sheets/21managing.htm> (last reviewed Sept. 2012).

<sup>27</sup> The Australian government's fiscal year runs from July 1 to June 30.

<sup>28</sup> JANET PHILLIPS & HARRIET SPINKS, *SKILLED MIGRATION: TEMPORARY AND PERMANENT FLOWS TO AUSTRALIA 3* (Australia Parliamentary Library, updated Dec. 6, 2012), [http://parlinfo.aph.gov.au/parlInfo/download/library/prspub/1601351/upload\\_binary/1601351.pdf;fileType=application%2Fpdf](http://parlinfo.aph.gov.au/parlInfo/download/library/prspub/1601351/upload_binary/1601351.pdf;fileType=application%2Fpdf).

<sup>29</sup> This is about 5,000 more than the 2011-2012 planning level. Of the additional places, 3,400 were allocated to the Skilled stream to “help meet demand for skilled migrants.” *Fact Sheet 2 – Key Facts About Immigration*, DIAC, <http://www.immi.gov.au/media/fact-sheets/02key.htm> (last reviewed June 2012).

- 129 250 places for skilled migrants who gain entry essentially because of their work or business experience, business qualifications, skills or sponsorship [68% of the program]
- 565 places for special eligibility migrants who are former permanent residents and have maintained close business, cultural or personal ties with Australia.<sup>30</sup>

## **B. Humanitarian Program**

In 2011-12, the Humanitarian Program resulted in 13,759 visas being granted against a planning figure of 13,750. This included 6,718 offshore visas and 7,041 onshore visas. Forty-four percent of the total number of visas were granted to refugees, 5% were Special Humanitarian Program visas, and 51% were Protection and other visas granted onshore.<sup>31</sup>

## **C. Source Countries**

The total number of settlers arriving in Australia during the 2010-11 year was 127,460, with people coming from more than two hundred countries. The majority came from four countries: New Zealand (20.2%), China (11.5%), the United Kingdom (8.6%), and India (8.3%).<sup>32</sup>

In terms of permanent migration of skilled workers, the top source countries for 2011-12 were as follows:<sup>33</sup>

- General Skilled Migration: (1) India, (2) United Kingdom, (3) China, (4) Sri Lanka, (5) Malaysia.
- Employer-sponsored Migration: (1) United Kingdom, (2) Philippines, (3) India, (4) South Africa, (5) China.
- Total Skill Stream: (1) India, (2) United Kingdom, (3) China, (4) Philippines, (5) South Africa.

In terms of subclass 457 (temporary skilled) visas, the top source countries for 2011-12 were: (1) United Kingdom, (2) India, (3) Ireland, (4) Philippines, (5) United States of America.<sup>34</sup>

In the Humanitarian Program, the main groups resettled from within the three key source regions in 2011-12 were:

- Middle East/South West Asia—Iraqi minorities from a range of countries in the Middle East, Iranian Baha'is from Turkey, and Afghans from Iran and Pakistan

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<sup>30</sup> *Fact Sheet 20 – Migration Program Planning Levels*, DIAC, <http://www.immi.gov.au/media/fact-sheets/20planning.htm> (last reviewed May 2012).

<sup>31</sup> DIAC, ANNUAL REPORT 2011-12 at 111, <http://www.immi.gov.au/about/reports/annual/2011-12/pdf/report-on-performance.pdf>.

<sup>32</sup> Fact Sheet 2 – Key Facts About Immigration, *supra* note 29.

<sup>33</sup> DIAC, CURRENT COUNTRY RANKINGS, [http://www.immi.gov.au/media/statistics/country-profiles/\\_pdf/country-ranking.pdf](http://www.immi.gov.au/media/statistics/country-profiles/_pdf/country-ranking.pdf) (last visited Feb. 27, 2013).

<sup>34</sup> *Id.*

- Asia—Burmese refugees from Malaysia, Thailand and India and Bhutanese refugees from Nepal
- Africa—refugees from Ethiopia, the Democratic Republic of the Congo and Eritrea.<sup>35</sup>

### III. The Points-Based Skilled Migration System

#### A. Overview of the System

The purpose of the points test mechanism is to “help select skilled migrants who offer the best in terms of economic benefit to Australia.”<sup>36</sup> According to the DIAC, the test “creates a selection process that is transparent and objective, awarding points to the skills and attributes considered to be in need in Australia.”<sup>37</sup>

The visa subclasses that have been established under the points-based skilled migration category are available to independent (unsponsored) applicants, applicants nominated by a state or territory government agency, and applicants sponsored by an eligible relative.<sup>38</sup> People must be invited to apply for these visas.<sup>39</sup>

Section 93 of the Migration Act 1958 (Cth) provides the Minister with the power to prescribe points for a range of factors through regulations.<sup>40</sup> Points are currently awarded for the following factors:<sup>41</sup>

- Age;
- English language ability;
- Number of years of skilled employment in the past ten years within or outside Australia;
- Level of educational qualifications;
- Qualifications obtained from Australian educational institutions;

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<sup>35</sup> ANNUAL REPORT 2011-12, *supra* note 31, at 112.

<sup>36</sup> DIAC, 1 JULY 2011 – POINTS TEST FOR CERTAIN SKILLED MIGRATION VISAS (June 2011), <http://www.immi.gov.au/skilled/general-skilled-migration/pdf/points-test.pdf>.

<sup>37</sup> *Id.*

<sup>38</sup> Note that graduates of Australian institutions may be eligible for temporary visas that enable them to gain work experience or improve their English skills in Australia before applying for a permanent General Skilled Migration visa. *Skilled – Graduate (Temporary) Visa: About this Visa*, DIAC, <http://www.immi.gov.au/skilled/general-skilled-migration/485/>; *Skilled – Recognised Graduate (Temporary) Visa (Subclass 476)*, DIAC, <http://www.immi.gov.au/skilled/general-skilled-migration/476/> (both last visited Feb. 27, 2013).

<sup>39</sup> *See infra*, Section III(C). The various factors in the points test must be demonstrated at the time that a person is invited to apply for a visa.

<sup>40</sup> *See* Fact Sheet 21 – Managing the Migration Program, *supra* note 26.

<sup>41</sup> Migration Regulations 1994 (Cth), regs 2.26AC-2.27D & sch 6D. The full points test table is attached as an appendix to this report.

- Other factors, such as community language qualifications, study in regional Australia or a low-population-growth metropolitan area, partner skill qualifications, and Professional Year in Australia; and
- Nomination by a state or territory government or sponsorship by an eligible family member (relevant visas only).

Under the current system for points-based visas, an applicant must nominate a skilled occupation from the Australian government's Skilled Occupation List (SOL) and must have their skills assessed as suitable for that occupation by a recognized authority.<sup>42</sup> However, the occupation itself does not form part of the points test.

Section 96 of the Migration Act allows the Minister to set the "pass mark" for points-tested visas.<sup>43</sup> The current pass mark for the skilled migration points-based visas is sixty points.<sup>44</sup> "Pool marks" can also be set so that applicants with a score that is lower than the pass mark can be placed in a pool for a specified period of time. However, the current pool mark for all visas is the same as the pass mark, meaning that no applications are being placed in the pool at this time.<sup>45</sup>

Apart from passing the points test and nominating a skilled occupation from the SOL, there are basic eligibility requirements that must be met in order to obtain one of the visas: applicants must be under fifty years of age, have at least competent English, and meet the health and character requirements.<sup>46</sup>

Applicants for skilled migration visas can include family members in their application. Such family members must meet specified secondary applicant criteria. They must also demonstrate the family relationship with the applicant and satisfy health, character, Australian values, and any English language requirements.<sup>47</sup>

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<sup>42</sup> *Skills Assessment and Assessing Authorities*, DIAC, <http://www.immi.gov.au/skilled/general-skilled-migration/skilled-occupations/skills-assessed.htm> (last visited Feb. 27, 2013).

<sup>43</sup> See Fact Sheet 21 – Managing the Migration Program, *supra* note 26.

<sup>44</sup> Migration Act 1958 - Specification under subsections 96(1) and 96(2) - Pass Marks and Pool Marks in relation to applications for General Skilled Migrations Visas (Classes VE, VC, VF, VB, SI, SN and SP) - June 2012 (Cth), pt 3, <http://www.comlaw.gov.au/Details/F2012L01317>.

<sup>45</sup> *Id.* See also *What is the Points Test*, DIAC, <http://www.immi.gov.au/skilled/general-skilled-migration/points-test.htm> (last visited Feb. 27, 2013).

<sup>46</sup> DIAC, CHANGES TO POINTS TESTED SKILLED MIGRATION VISAS 2 (June 2012), <http://www.immi.gov.au/skilled/general-skilled-migration/pdf/points-tested-visas.pdf>. Competent English is defined as "an International English Language Test System (IELTS) score of at least six in each of the four components of the IELTS test; or at least B in the Occupational English Test (OET); or being a citizen and passport holder of the UK, Canada, New Zealand, Ireland or the USA." *Id.* at 3.

<sup>47</sup> *Id.* at 3.

## B. Changes to Skilled Migration 2008-2011

In 2008-09, in the wake of the global financial crisis, the Australian government conducted a review of permanent skilled migration.<sup>48</sup> The review identified “the need for a shift in focus away from ‘supply driven’ independent skilled migration towards ‘demand-driven’ outcomes, in the form of employer and government-sponsored skilled migration.”<sup>49</sup> As a result, changes were made to the system to apply priority processing arrangements for sponsored migrants rather than those opting for independent points-based skilled migration.<sup>50</sup>

Further changes were made in 2010 that were intended to “target the program and ensure that it is driven by the demands of Australian industry rather than the supply of independent skilled migrants.”<sup>51</sup> This included the phasing out of existing skills lists and their replacement with the Skilled Occupation List referred to above, which is developed by an independent body and updated annually to reflect occupations in demand.<sup>52</sup>

These changes were followed by a review of the points test in 2010,<sup>53</sup> with the resulting recommendations implemented from July 1, 2011.<sup>54</sup> The new test sought to address concerns that the previous test had “not always led to outcomes consistent with the objectives of the skilled migration program.”<sup>55</sup> For example, its emphasis on Australian qualifications and experience had meant that “an overseas student with a short term vocational qualification and one year’s work experience in Australia [was put] ahead of a Harvard educated environmental engineer with three years’ relevant work experience.”<sup>56</sup>

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<sup>48</sup> See Press Release, Chris Bowen MP, Migration Program Gives Priority to Those with Skills Most Needed (Dec. 17, 2008), <http://www.minister.immi.gov.au/media/media-releases/2008/ce08123.htm>.

<sup>49</sup> PHILLIPS & SPINKS, *supra* note 28, at 4. See also Mark Cully, *Skilled Migration Selection Policies: Recent Australian Reforms* (2012), [http://www.immi.gov.au/media/publications/research/\\_pdf/skilled-migration-policies.pdf](http://www.immi.gov.au/media/publications/research/_pdf/skilled-migration-policies.pdf).

<sup>50</sup> *Id.* See also *Fact Sheet 24a – Priority Processing for Skilled Migration Visas*, [http://www.immi.gov.au/media/fact-sheets/24apriority\\_skilled.htm](http://www.immi.gov.au/media/fact-sheets/24apriority_skilled.htm) (last reviewed July 2012).

<sup>51</sup> PHILLIPS & SPINKS, *supra* note 28, at 4.

<sup>52</sup> *Id.* at 5. See generally *Do You Have a Skilled Occupation?*, DIAC, <http://www.immi.gov.au/skilled/general-skilled-migration/skilled-occupations/skilled-occupations.htm> (last visited Feb. 27, 2013).

<sup>53</sup> Press Release, Chris Bowen MP, General Skilled Migration Points Test Review (Feb. 17, 2010), <http://www.minister.immi.gov.au/media/media-releases/2010/ce10012.htm>; DIAC, GENERAL SKILLED MIGRATION (GSM) POINTS TEST REVIEW, <http://www.immi.gov.au/skilled/general-skilled-migration/pdf/faq-points-test.pdf> (last visited Feb. 27, 2013).

<sup>54</sup> See Press Release, Chris Bowen MP, New Migration Points Test to Better Address Australia’s Skills Needs (Nov. 11, 2010), <http://www.minister.immi.gov.au/media/media-releases/2010/cb10078.htm>; DIAC, FREQUENTLY ASKED QUESTIONS – NEW POINTS TEST (Nov. 2010), <http://www.immi.gov.au/skilled/general-skilled-migration/pdf/points-testfaq.pdf>.

<sup>55</sup> Press Release, Chris Bowen MP, New Migration Points Test to Better Address Australia’s Skills Needs, *supra* note 54.

<sup>56</sup> *Id.*

According to the DIAC, the new test “does not give undue weight to any one factor and recognises a broader range of skills and attributes.”<sup>57</sup> The changes to the points test focused on “better English language skills, more extensive skilled work experience, higher level qualifications obtained in Australia and overseas and different age ranges.”<sup>58</sup> It was as part of these changes that it was determined that points would no longer be awarded on the basis of an applicant’s occupation, although all applicants would still be required to nominate an occupation on the Skilled Occupation List.<sup>59</sup> Another significant change was an increase in the age limit for skilled migration from forty-five to fifty years.<sup>60</sup>

### C. Skilled Migration Reforms 2012

In 2011, the Australian government announced significant reforms to the Skilled Migration Stream and other visa programs.<sup>61</sup> The changes included a new, two-stage application process for points-based visas and some business and investment visas. The process involves an electronic Skilled Migration Selection Model, known as “SkillSelect,”<sup>62</sup> through which persons submit Expressions of Interest (EOI) for specific skilled migration visas. A person can only apply for one of the visas if he or she is subsequently invited to do so by the DIAC.<sup>63</sup>

For independent skilled migrants, selection is based on the EOI, from which a points test score and occupation rankings are derived, with the highest ranked in each selection round invited to apply. For state- and territory-nominated migrants, state and territory governments “can select anyone from the expression of interest pool, so long as they meet the points test pass mark and other criteria as specified in their State Migration Plans.”<sup>64</sup> Employers can also gain access to the database and can “select migrants who have expressed an interest in being sponsored by an employer on a permanent or temporary basis.”<sup>65</sup>

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<sup>57</sup> DIAC, 1 JULY 2011 – POINTS TEST FOR CERTAIN SKILLED MIGRATION VISAS, *supra* note 36, at 1.

<sup>58</sup> DIAC, Frequently Asked Questions – New Points Test, *supra* note 54, at 1.

<sup>59</sup> *Id.*

<sup>60</sup> Annual Report 2011-12, *supra* note 31, at 43.

<sup>61</sup> See Press Release, Chris Bowen MP, Budget 2011-12: Skilled Migration Reform to Support Australia’s Growing Economy (May 10, 2011), <http://www.minister.immi.gov.au/media/cb/2011/cb165287.htm>; PHILLIPS & SPINKS, *supra* note 28, at 5-7.

<sup>62</sup> *SkillSelect*, DIAC, <http://www.immi.gov.au/skills/skillselect/> (last visited Feb. 27, 2013).

<sup>63</sup> See generally, *New Skilled Visa and Points Test Arrangements*, <http://www.immi.gov.au/skilled/general-skilled-migration/new-skilled.htm> (last visited Feb. 27, 2013); Robert, *Changes to Points-tested Skilled Migration Visas*, DIAC MIGRATION BLOG (Apr. 24, 2012), <http://migrationblog.immi.gov.au/2012/04/24/changes-to-points-tested-skilled-migration-visas/>.

<sup>64</sup> Trends in Migration: Australia 2010-2011, *supra* note 16, at 9-10.

<sup>65</sup> *Id.* at 10.

Under the reforms, which took effect on July 1, 2012, the six existing points-based visa subclasses were phased out<sup>66</sup> and replaced with three new points-based visas that are now available through the SkillSelect process:<sup>67</sup>

- Skilled Independent (subclass 189) visa, which allows skilled workers who are not sponsored by an employer, state or territory, or family member, to live and work permanently anywhere in Australia.<sup>68</sup>
- Skilled – Nominated (subclass 190) visa, which allows skilled workers who are nominated by a state or territory to live and work permanently in Australia. Holders of this visa must stay in the state or territory that nominated them for at least two years.<sup>69</sup>
- Skilled – Nominated or Sponsored (Provisional) (subclass 489) visa, which allows skilled workers who are nominated by a state or territory, or sponsored by an eligible relative living in a designated area of Australia, to live and work in a specified regional area for up to four years.<sup>70</sup> Holders of this visa can apply for permanent residence through the Skilled Regional (Residence) visa (subclass 887) after certain conditions have been met.<sup>71</sup>

The consolidation of the visa subclasses included the removal of distinctions relating to a person's location for the above visas, meaning that they can be inside or outside Australia at the time they apply for a visa and when the visa is decided.<sup>72</sup>

As indicated above, the pass mark for the three visas was set at sixty points. This is lower than the 65-point pass mark that previously applied to the General Skilled Migration subclasses following the 2010 review of the points test. According to the DIAC, the lower pass mark for the new visas was intended to “encourage a broader range of people with the skills and attributes needed in Australia to register their interest in migration.”<sup>73</sup>

The DIAC has stated that the new points test and SkillSelect “are designed to provide government with 21st century tools to choose skilled migrants who have the most to offer

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<sup>66</sup> The visa subclasses for which applications are now no longer being accepted are 175, 176, 475, 487, 885, and 886.

<sup>67</sup> See DIAC, POINTS BASED SKILLED MIGRATION (SUBCLASSES 189, 190 AND 489) VISA (Booklet 6, Nov. 2012), <http://www.immi.gov.au/allforms/booklets/1119.pdf> (providing detailed information on these visas).

<sup>68</sup> *SkillSelect: Skilled Independent (Subclass 189) Visa*, DIAC, <http://www.immi.gov.au/skills/skillselect/index/visas/subclass-189/> (last updated Aug. 7, 2012).

<sup>69</sup> *SkillSelect: Skilled – Nominated (Subclass 190) Visa*, DIAC, <http://www.immi.gov.au/skills/skillselect/index/visas/subclass-190/> (last updated Aug. 7, 2012).

<sup>70</sup> *SkillSelect: Skilled – Nominated or Sponsored (Provisional) (Subclass 489) Visa*, DIAC, <http://www.immi.gov.au/skills/skillselect/index/visas/subclass-489/> (last updated Aug. 7, 2012).

<sup>71</sup> *Id.*; *Skilled – Regional (Residence) Visa (Subclass 887): About this Visa*, DIAC, <http://www.immi.gov.au/skilled/general-skilled-migration/887/> (last visited Feb. 27, 2013).

<sup>72</sup> DIAC, Changes to Points Tested Skilled Migration Visas, *supra* note 46, at 1.

<sup>73</sup> Press Release, DIAC, Change to the Skilled Migration Pass Mark (June 15, 2012), <http://www.newsroom.immi.gov.au/channels/Visas/releases/Change-to-the-skilled-migration-pass-mark>.

Australia as well as promote effective administration of the Migration Program.”<sup>74</sup> The new system means that “invitations to apply can be issued in line with the number of visa places available” and legal entitlements to a visa decision are limited to the second stage of the process, thus avoiding a “pipeline of queued applicants” and allowing for better control over the level of net overseas migration.<sup>75</sup>

#### D. Labor Market Outcomes of “Points System” Migrants

In 2009, DIAC commenced a program called the “Continuous Survey of Australia’s Migrants” (CSAM), which aims to “provide timely information on the labour market outcomes of recent migrants.”<sup>76</sup> A summary of the key findings of the first round of CSAM surveys, covering 2009-2011, was published in February 2013.<sup>77</sup> Findings from the surveys included the following:

- Overall, skilled migrants had a “particularly high” labor force participation rate of 96%, substantially higher than the national rate of 67% and “much higher than the rate for our Australia-born and overseas-born populations—of 69 per cent and 62 per cent respectively.”<sup>78</sup>
- After six months of permanent residence, “[a]t \$74 600 per year, Offshore Independent migrants had the highest median full-time earnings of any group—well above the \$44 400 per annum of Onshore migrants, and higher even than the \$71 300 per annum for migrants with employer sponsorship.”<sup>79</sup> The summary report suggests two key reasons for this situation: “Firstly, unlike Employer Sponsored migrants, they have had to meet the requirements of a strict points test in order to be granted their visa. Secondly, because of the way the test is structured, most will also have acquired considerable work experience, meaning that provided they are able to find work they are likely to be further advanced in terms of career and pay.”<sup>80</sup>
- After a year of permanent residence, “Offshore Independent migrants showed strong improvements in labour outcomes, with significant falls in unemployment (down 7 percentage points) and significant increases in full-time work (up 9 percentage points).” This group also had “a relatively large increase in skilled employment, with the proportion employed in a skilled job increasing by 8 percentage points.”<sup>81</sup>
- After a year of permanent residence, “Employer Sponsored migrants had almost no unemployment (only 0.5 per cent), the highest rate of workforce participation of all Skilled

<sup>74</sup> Trends in Migration: Australia 2010-2011, *supra* note 16, at 10.

<sup>75</sup> *Id.*

<sup>76</sup> DIAC, FACT SHEET: THE CONTINUOUS SURVEY OF AUSTRALIA’S MIGRANTS, <http://www.immi.gov.au/media/publications/research/pdf/csam-info.pdf> (last visited Feb. 27, 2013). *See generally*, *Continuous Survey of Australia’s Migrants*, DIAC, <http://www.immi.gov.au/media/research/surveys/csam/> (last visited Feb. 27, 2013).

<sup>77</sup> DIAC, THE CONTINUOUS SURVEY OF AUSTRALIA’S MIGRANTS: COHORTS 1 TO 5 REPORT 2009-11, <http://www.immi.gov.au/media/publications/research/pdf/continuous-survey-aus-migrants.pdf>.

<sup>78</sup> *Id.* at 3.

<sup>79</sup> *Id.* at 12.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 14.

migrant categories (99 per cent) and the second highest median full-time earnings of \$75 000. They also had the greatest likelihood of being in skilled work (91 per cent).”<sup>82</sup> The summary report states that “[i]n terms of immediate economic return from skilled migration, the CSAM validates the government’s policies that promote skilled migration and in particular Employer Sponsored migration.”<sup>83</sup>

- The results for Offshore Independent skilled migrants after a year included 83% in skilled employment, 85% working full-time, 96% participation rate, and median full-time earnings of AU\$79,000.<sup>84</sup> For Employer Sponsored migrants, the figures were 91% in skilled employment, 93% working full-time, 99% participation rate, and median full-time earnings of AU\$75,000.<sup>85</sup>

The DIAC has worked with an independent economic consultancy to develop the Migrants’ Fiscal Impact Model, which “provides a detailed profile of the effect of new migrants on the Australian Government Budget, taking into account their impact on revenues and expenditure.”<sup>86</sup> This model showed that the cumulative fiscal benefit of all Migration and Humanitarian Program (i.e. permanent) visas granted in 2010-11 over the first ten years of settlement in Australia is over AU\$10.2 billion, with skilled migrants making the greatest fiscal contribution.<sup>87</sup> The net fiscal impact on the Budget from different skilled visa categories that existed in that year was estimated as follows:<sup>88</sup>

- Skilled Independent: AU\$384.2 million after ten years of permanent settlement; AU\$439.5 million after twenty years
- State/Territory Sponsored: AU\$104.7 million after ten years; AU\$138.1 million after twenty years
- Employer Sponsored: AU\$493 million after ten years; AU\$530.8 million after twenty years

#### IV. Low-Skilled Migrants

Low-skilled temporary workers may enter and work in Australia under two program areas: the Seasonal Worker Program and the working holiday programs. Semi-skilled workers may also

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<sup>82</sup> *Id.* at 4.

<sup>83</sup> *Id.* at 12.

<sup>84</sup> *Id.* at 13. See also DIAC, Table 1: Employment Outcomes for Recent Migrants, Compared with Australian Population, Additional Results from the Continuous Survey of Australia’s Migrants, <http://www.immi.gov.au/media/publications/research/pdf/csam-additional-results.pdf> (last visited Feb. 27, 2013) (providing a breakdown of figures by visa types after six months); and TRENDS IN MIGRATION: AUSTRALIA 2010-2011, *supra* note 16, at 98 (setting forth 2010 results).

<sup>85</sup> The Continuous Survey of Australia’s Migrants: Cohorts 1 to 5 Report 2009-11, *supra* note 77, at 13.

<sup>86</sup> TRENDS IN MIGRATION: AUSTRALIA 2010-2011, *supra* note 16, at 108. The Model considers fiscal impacts over a twenty-year period, examines the first generation of migrants, and is not a “life cycle” model.

<sup>87</sup> *Id.* at 109.

<sup>88</sup> *Id.* at 110.

obtain temporary subclass 457 visas under the Labour Agreement program<sup>89</sup> or two related programs: Enterprise Migration Agreements<sup>90</sup> and Regional Migration Agreements.<sup>91</sup> These programs are designed to address labor shortages in the context of large resource projects and in remote areas of the country that cannot be resolved via normal sponsorship.

Apart from these programs, low-skilled positions may in some cases be filled by New Zealand citizens who can live and work indefinitely in Australia without meeting any of the skilled migrant requirements.

### A. Seasonal Worker Program

Between September 2008 and June 2012, Australia piloted a guest worker program that enabled people from certain Pacific Island countries to come to Australia for seasonal horticultural work.<sup>92</sup> Following the pilot, the Seasonal Worker Program (SWP) came into effect in July 2012.<sup>93</sup>

The SWP involves agreements with several countries<sup>94</sup> where people aged twenty-one to forty-five can apply for special visas<sup>95</sup> to work for approved employers for set periods. The new program is scheduled to run until 2016 and is administered by the Department of Education, Employment and Workplace Relations (DEEWR). It applies to the following industries: horticulture (all locations), tourism (accommodation; limited locations), sugarcane (limited locations), cotton (limited locations), aquaculture (limited locations).<sup>96</sup>

Participants in the program can work for a specified approved employer for between fourteen weeks and six months, cannot bring family members, and are restricted from applying for further

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<sup>89</sup> *Labour Agreements*, DIAC, <http://www.immi.gov.au/skilled/skilled-workers/la/> (last visited Feb. 25, 2013).

<sup>90</sup> *Enterprise Migration Agreements*, DIAC, <http://www.immi.gov.au/skilled/enterprise-migration-agreements.htm> (last visited Feb. 25, 2013); *Fact Sheet 48a – Enterprise Migration Agreements*, DIAC, <http://www.immi.gov.au/media/fact-sheets/48a-enterprise.htm> (last reviewed June 2012).

<sup>91</sup> *Regional Migration Agreements*, DIAC, <http://www.immi.gov.au/skilled/regional-migration-agreements.htm> (last visited Feb. 25, 2013); *Fact Sheet 48c – Regional Migration Agreement*, DIAC, <http://www.immi.gov.au/media/fact-sheets/48c-rma.htm> (last reviewed Sept. 2012).

<sup>92</sup> See Press Release, Chris Bowen MP, Visa for Pacific Island Seasonal Worker Scheme (Sept. 23, 2008), <http://www.minister.immi.gov.au/media/media-releases/2008/ce08090.htm>; *Pacific Seasonal Worker Pilot Scheme*, DEPARTMENT OF EDUCATION, EMPLOYMENT AND WORKPLACE RELATIONS (DEEWR), <http://deewr.gov.au/pacific-seasonal-worker-pilot-scheme> (last visited Feb. 25, 2013).

<sup>93</sup> See *Seasonal Worker Program*, DIAC, <http://www.immi.gov.au/skilled/seasonal-worker/>; *Seasonal Worker Program*, DEEWR, <http://deewr.gov.au/seasonal-worker-program> (both last visited Feb. 25, 2013).

<sup>94</sup> The program is currently only available for citizens of East Timor, Kiribati, Nauru, Papua New Guinea, Samoa, Solomon Islands, Tonga, Tuvalu, and Vanuatu who have been sponsored by an employer.

<sup>95</sup> *Seasonal Worker Program – Eligibility*, DIAC, <http://www.immi.gov.au/skilled/seasonal-worker/eligibility.htm> (last visited Feb. 11, 2013); Migration Regulations 1994 (Cth), sch 2, subclass 416.

<sup>96</sup> *Seasonal Worker Program: How This Program Works*, DIAC, <http://www.immi.gov.au/skilled/seasonal-worker/how-program-works.htm> (last visited Feb. 25, 2013).

visas while in Australia. Seasonal workers can return to Australia to work in future years if they comply with visa conditions.<sup>97</sup>

## B. Working Holiday Programs

Australia also operates two working holiday programs for young people (aged eighteen to thirty years) of certain countries who are able to engage in any type of work for limited periods during their one-year visit to Australia: “Working Holiday” visas (subclass 417) and “Work and Holiday” visas (subclass 462).<sup>98</sup> According to the DIAC, many working holiday program participants are employed in the hospitality and seasonal horticultural industries.<sup>99</sup>

## V. Illegal Immigration

### A. Compliance Mechanisms

Any noncitizen in Australia without a valid visa is considered an “unlawful non-citizen.”<sup>100</sup> It is possible to become an unlawful noncitizen by arriving without a valid visa, by overstaying a visa, or as a result of a visa being cancelled due to noncompliance with a visa condition.<sup>101</sup> If there is no legal entitlement for a person to remain in Australia, they are expected to depart.<sup>102</sup> Unlawful noncitizens may be placed in immigration detention and removed from the country.<sup>103</sup>

The DIAC, Centrelink (the agency that disburses social security payments), and the Australian Taxation Office share information in order to locate noncitizens who are illegally employed or who claim welfare payments to which they are not entitled.<sup>104</sup> The DIAC also works with the Australian Federal Police and state police authorities to locate illegal workers, and has a range of initiatives aimed at addressing noncompliance in the agriculture sector.<sup>105</sup>

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<sup>97</sup> *Seasonal Worker Program – About This Program*, DIAC, <http://www.immi.gov.au/skilled/seasonal-worker/swp.htm>; *How This Program Works*, DIAC, <http://www.immi.gov.au/skilled/seasonal-worker/how-program-works.htm> (both last visited Feb. 25, 2013).

<sup>98</sup> *See Work and Holiday Visa (Subclass 462)*, DIAC, <http://www.immi.gov.au/visitors/working-holiday/462/>; *Working Holiday Visa (Subclass 417)*, DIAC, <http://www.immi.gov.au/visitors/working-holiday/417/> (both last visited Feb. 25, 2013).

<sup>99</sup> Trends in Migration: Australia 2010-2011, *supra* note 16, at 11.

<sup>100</sup> Migration Act 1958 (Cth), s 14.

<sup>101</sup> ANNUAL REPORT 2011-12, *supra* note 31, at 163.

<sup>102</sup> *Expired Visas*, DIAC, <http://www.immi.gov.au/managing-australias-borders/compliance/staying-legally/expired.htm> (last visited Feb. 27, 2013); *see generally Compliance*, DIAC, <http://www.immi.gov.au/managing-australias-borders/compliance/> (last visited Feb. 25, 2013).

<sup>103</sup> *Fact Sheet 82 – Immigration Detention*, DIAC, <http://www.immi.gov.au/media/fact-sheets/82detention.htm> (last reviewed May 2012).

<sup>104</sup> *Fact Sheet 86 – Overstayers and Other Unlawful Non-citizens*, DIAC, <http://www.immi.gov.au/media/fact-sheets/86overstayers-and-other-unlawful-non-citizens.htm> (last revised Mar. 2012).

<sup>105</sup> *Fact Sheet 87 – Initiatives to Combat Illegal Work in Australia*, DIAC, <http://www.immi.gov.au/media/fact-sheets/87illegal.htm> (last reviewed Sept. 2010).

The Australian government instituted a range of reforms in 2007-08 that sought to encourage noncomplying visa holders to voluntarily approach the DIAC.<sup>106</sup>

People who have overstayed their visa can contact the DIAC's Community Status Resolution Service in order to seek to resolve their status.<sup>107</sup> The CSRS can grant bridging visas, which allow people to remain in the country (or to leave and return) after their substantive visa expires and while their application for a new substantive visa is being processed.<sup>108</sup>

The DIAC operates a system called "Visa Entitlement Verification Online," which employers can use to check a person's work rights.<sup>109</sup> Individual visa holders can also check their visa status online using the system.<sup>110</sup> Organizations and individuals must register and be approved to access this system. The DIAC also runs an "immigration dob-in service," which enables members of the public to provide information on persons who they think are in the country illegally.<sup>111</sup>

Employers face sanctions under the Migration Act 1958 for recruiting illegal workers.<sup>112</sup> Proposed amendments to the law introduced in the federal Parliament in 2012 include new, no-fault civil penalty provisions and would allow the Department to issue infringement notices and penalties.<sup>113</sup>

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<sup>106</sup> ANNUAL REPORT 2011-12, *supra* note 31, at 179.

<sup>107</sup> *Community Status Resolution Service*, DIAC, <http://www.immi.gov.au/managing-australias-borders/compliance/community-status-resolution/> (last visited Feb. 25, 2013).

<sup>108</sup> *Bridging Visas*, DIAC, <http://www.immi.gov.au/visas/bridging/> (last visited Feb. 25, 2013); Migration Act 1958 (Cth), s 37 & pt 2, div 3, subdiv AF; Migration Regulations 1994 (Cth) pt 2, div 2.5 & sch 2, subclasses 010, 020, 030; *see also* sch 3 (additional criteria applicable to unlawful noncitizens and certain bridging visa holders).

<sup>109</sup> *Visa Entitlement Verification Online (VEVO)*, DIAC, <http://www.immi.gov.au/e-visa/vevo.htm> (last visited Feb. 11, 2013).

<sup>110</sup> *Id.*; *see also About Your Visa*, DIAC, <http://www.immi.gov.au/visas/about-your-visa.htm> (last visited Feb. 25, 2013).

<sup>111</sup> *Immigration Dob-In Service*, DIAC, <http://www.immi.gov.au/contacts/dob-in/> (last visited Feb. 25, 2013).

<sup>112</sup> Migration Act 1958 (Cth), pt 2, div 12, subdiv C. *See About the Employer Sanction Legislation*, DIAC <http://www.immi.gov.au/managing-australias-borders/compliance/employer-obligations/about.htm>; *see also 2010 Howells Review of Employer Sanctions*, DIAC, <http://www.immi.gov.au/media/publications/compliance/review-employer-sanctions/> (last visited Feb. 11, 2013).

<sup>113</sup> *See Migration Amendment (Reform of Employer Sanctions) Bill 2012*, PARLIAMENT OF AUSTRALIA, [http://aph.gov.au/Parliamentary\\_Business/Bills\\_Legislation/Bills\\_Search\\_Results/Result?bId=r4889](http://aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r4889). *See also* Press Release, Chris Bowen MP, New Legal Sanctions Against Noncompliant Employers (Sept. 18, 2012), <http://www.minister.immi.gov.au/media/cb/2012/cb189943.htm>.

## B. Compliance Numbers

According to the DIAC, overall compliance with Australia's immigration system is high, with more than 99% of the more than 4.8 million temporary visa holders complying with their visa requirements in 2011-12.<sup>114</sup>

As of June 30, 2011, Australia's "overstayer" population was estimated at 58,400.<sup>115</sup> This was an 8.3% increase from June 30, 2010, and "largely reflects increases in temporary migration from previous years."<sup>116</sup> Most of these people "only overstay their visa for a short period and then depart voluntarily."<sup>117</sup>

In 2011-12, the DIAC

- received about 18,900 "dob-ins" or pieces of fraud-related information, compared to 15,600 in 2010-11;<sup>118</sup>
- located 15,477 unlawful noncitizens, an increase compared to 13,831 in 2010-11 (About 82% of the overall number were voluntary, with 18% of people located through field operations or referred by the police. Many people were granted bridging visas in order to make their own arrangements to depart Australia, with a small number detained for removal);<sup>119</sup>
- located 1,928 people who were working illegally, compared to 1,788 in 2010-11;<sup>120</sup>
- "assisted or managed" the departure of 10,785 unlawful noncitizens, including voluntary departures as well as the removal of people from immigration detention;<sup>121</sup>
- resolved the immigration status of 12,588 unlawful noncitizens, an increase of 13% from 11,137 in 2010-11;<sup>122</sup> and
- took 12,967 people into immigration detention, including 8,371 "irregular maritime arrivals" (IMAs), 2,014 unauthorized air arrivals, 2,455 people who had breached their visa conditions, 68 foreign fishers, and 59 others.<sup>123</sup>

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<sup>114</sup> ANNUAL REPORT 2011-12, *supra* note 31, at 163.

<sup>115</sup> DIAC, POPULATION FLOWS: IMMIGRATION ASPECTS 2010-11 EDITION 71, <http://www.immi.gov.au/media/publications/statistics/popflows2010-11/pop-flows-chapter3.pdf>; TRENDS IN MIGRATION: AUSTRALIA 2010-2011, *supra* note 16, at 178.

<sup>116</sup> Population Flows: Immigration Aspects 2010-11 Edition, *supra* note 115, at 71.

<sup>117</sup> *Id.*

<sup>118</sup> ANNUAL REPORT 2011-12, *supra* note 31, at 178.

<sup>119</sup> *Id.* at 179.

<sup>120</sup> *Id.* at 174.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 197.

**Appendix: Current Points Test for Subclass 189, 190, and 489 Visas**

<b>Factor</b>	<b>Description</b>	<b>Points</b>
<b>Age</b> at time of invitation	18–24 years (inclusive)	25
	25–32 years (inclusive)	30
	33–39 years (inclusive)	25
	40–44 years (inclusive)	15
	45–49 years (inclusive)	0
<b>English language ability</b> at time of invitation	Competent English – IELTS 6 / OET B	0
	Proficient English – IELTS 7 / OET B	10
	Superior English – IELTS 8 / OET A	20
<b>Skilled employment</b> at time of invitation  Only 20 points can be awarded for any combination of overseas and Australian skilled employment  Overseas employment in nominated skilled occupation or a closely related skilled occupation  Australian employment in nominated skilled occupation or a closely related skilled occupation	<b>Skilled employment outside Australia</b>	
	At least three but less than five years (of past 10 years)	5
	At least five but less than eight years (of past 10 years)	10
	At least eight and up to 10 years (of past 10 years)	15
	<b>Skilled employment in Australia</b>	
	At least one but less than three years (of past 10 years)	5
	At least three but less than five years (of past 10 years)	10
	At least five but less than eight years (of past 10 years)	15
At least eight and up to 10 years (of past 10 years)	20	
<b>Educational qualifications</b> at time of invitation	Doctorate from an Australian educational institution or other Doctorate of a recognised standard	20
	At least a Bachelor degree, including a Bachelor degree with Honours or Masters, from an Australian educational institution or other degree of a recognised standard	15
	Diploma or trade qualification completed in Australia, or qualification or award of recognised standard	10
<b>Australian study requirements</b> at time of invitation	One or more degrees, diplomas or trade qualifications awarded by an Australian educational institution and meet the Australian Study Requirement	5

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<b>Other factors</b> at time of invitation	Credentialed community language qualifications	5
	Study in regional Australia or a low population growth metropolitan area (excluding distance education)	5
	Partner skill qualifications	5
	Professional Year in Australia for at least 12 months in the four years before the day you were invited	5
<b>Nomination/sponsorship</b> at time of invitation	Nomination by state or territory government (visa subclass 190 only)	5
	Nomination by state or territory government or sponsorship by an eligible family member, to reside and work in a specified/designated area (visa subclass 489 only)	5

**Source:** Contents copied from *Skilled Independent (Subclass 189) Visa*, DIAC (SkillSelect), <http://www.immi.gov.au/skills/skillselect/index/visas/subclass-189/> (click on “Points”).

# CANADA

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**SUMMARY** Immigration to Canada is predominantly regulated by the Immigration and Refugee Protection Act and its regulations, which categorize immigrants as economic class immigrants, family class immigrants, and refugees or others needing special protection. Among the programs within the economic class immigration category is the Federal Skilled Workers Program, which utilizes selection criteria based on a points system. Applicants must obtain at least sixty-seven points out of a total of one hundred possible points on the selection grid. Areas that are evaluated include education, languages, experience, age, employment arrangements, and adaptability.

Immigration is administered by the Canada Border Services Agency and Citizenship and Immigration Canada. Since 2008 Canada has been tightening its immigration policies and laws and focusing predominantly on economic class immigration and short-term labor market needs. Canada welcomes more than 250,000 permanent residents a year, the majority of whom are economic class immigrants.

## I. Immigration Overview

Immigration to Canada is predominantly regulated by the Immigration and Refugee Protection Act, 2001 (IRPA).<sup>1</sup> Canada had been known to have a fairly broad and generous immigration policy, but since 2006, the government has pursued reforms to “focus Canada’s immigration system on fuelling economic prosperity” and to place “a high priority on finding people who have the skills and experience required to meet Canada’s economic needs.”<sup>2</sup> Since 2008, Canada has been tightening its immigration policies and focusing on economic class immigrants (i.e., immigrants who have the skills and abilities to contribute to Canada’s economy) and short-term labor market needs.<sup>3</sup> According to 2012 Citizenship and Immigration Canada (CIC) figures, economic immigrants receive about 60% of permanent resident visas, the majority of which are awarded under the Federal Skills Workers Program and the Provincial Nominee Program.<sup>4</sup> Canada welcomes about 250,000 permanent residents from all categories each year.<sup>5</sup>

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<sup>1</sup> Immigration and Refugee Protection Act, S.C. 2001, c. 27, <http://laws-lois.justice.gc.ca/eng/acts/I-2.5/FullText.html>.

<sup>2</sup> Notice, CIC, Transforming the Immigration System (May 25, 2012), <http://www.cic.gc.ca/english/department/media/notices/notice-transform.asp>.

<sup>3</sup> NAOMI ALBOIM & KAREN COHL, SHAPING THE FUTURE: CANADA’S RAPIDLY CHANGING IMMIGRATION POLICIES at iv (Oct. 2012), <http://maytree.com/wp-content/uploads/2012/10/shaping-the-future.pdf>.

<sup>4</sup> *Canada – Permanent Residents by Category, 2008–2012*, CIC, <http://www.cic.gc.ca/english/resources/statistics/facts2011/permanent/02.asp> (last modified Feb. 27, 2012).

<sup>5</sup> *Id.*

Immigration to Canada is administered by Citizenship and Immigration Canada and the Canada Border Services Agency, which is responsible for border enforcement, immigration enforcement, and customs services.

## A. Categories of Immigrants

### 1. Permanent Residence

Canada accepts several categories of immigrants for permanent residence. In addition to economic class immigrants (skilled or business immigrants, including provincial nominees), it admits specified family members and adopted children under the family class category, refugees, and others not falling into these specific categories who qualify for entry on humanitarian or compassionate grounds or for public policy reasons.

#### a. Economic Class

Canada admits three types of business immigrants as part of its Business Immigration Program: investors, entrepreneurs, and self-employed persons.<sup>6</sup> However, CIC has temporarily stopped accepting new applications for its investors and entrepreneurs program. Business immigrants are not assessed on the points system. Canada's provinces have their own Nomination Programs for business immigration programs.

Apart from the Federal Skilled Workers Program, which is based on a points system (see below for more details), Canada also grants permanent residency to skilled workers under its Federal Skilled Trades Program and the Canadian Experience Class (CEC). The Federal Skilled Trades Program is for persons “who want to become permanent residents based on being qualified in a skilled trade.”<sup>7</sup> This relatively new program started on January 2, 2013, to deal with labor shortages of skilled traders in some regions of the country.<sup>8</sup> Under the CEC program any skilled workers who have twelve months of skilled work experience in Canada in the three years before they apply and the requisite language skills can transition from temporary to permanent residence (additional requirements apply).<sup>9</sup>

The Canadian government has signed agreements with a number of Canada's provinces that allow the provinces to sponsor immigrants<sup>10</sup> under their respective Provincial Nominee Program

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<sup>6</sup> *Investors, Entrepreneurs and Self-Employed Persons*, CIC, <http://www.cic.gc.ca/english/immigrate/business/index.asp> (last updated Dec. 1, 2010).

<sup>7</sup> *Determine Your Eligibility—Skilled Trades*, CIC, <http://www.cic.gc.ca/english/immigrate/trades/apply-who.asp> (last updated Feb. 6, 2013).

<sup>8</sup> *News Release—New Federal Skilled Trades Program Accepts Applications Starting Today*, CIC, <http://www.cic.gc.ca/english/department/media/releases/2013/2013-01-02.asp> (last updated Jan. 2, 2013).

<sup>9</sup> *Determine Your Eligibility—Canadian Experience Class*, CIC, <http://www.cic.gc.ca/english/immigrate/cec/apply-who.asp> (last updated Jan. 25, 2013).

<sup>10</sup> *Provincial Nominees*, CIC, <http://www.cic.gc.ca/english/immigrate/provincial/index.asp> (last updated Oct. 22, 2012).

(PNP) “who will meet specific local labour market needs.”<sup>11</sup> They receive priority processing time from CIC. The criteria for admitting immigrants vary by province and territory. According to the CIC, “In the last ten years, the PNP has become the second largest source of economic immigration to Canada. In 2011, more than 38,000 provincial nominees (including their spouses and dependants) were admitted to Canada, an almost six fold increase since 2004.”<sup>12</sup>

All the provinces and territories except Quebec and Nunavut have signed nominee agreements with the federal government. Quebec has a separate arrangement under the Canada-Quebec Accord. The Province of Quebec administers its own immigration program, which “establishes its own immigration requirements and selects immigrants who will adapt to living in Quebec.”<sup>13</sup> Quebec uses a points system that is similar to the federal government’s points system to assess its applicants, but it awards a higher number of points for fluency in the French language. Applications accepted by Quebec are submitted to the federal government for medical examinations and background checks.

#### b. Family Class

Family class immigrants are not assessed on a points system, but preference is given to certain applicants based upon their relationship to their sponsor. According to CIC, “If you are a Canadian citizen or a permanent resident of Canada, you can sponsor your spouse, conjugal or common-law partner, dependent child (including adopted child) or other eligible relative to become a permanent resident.”<sup>14</sup> It further states that “[t]here are two different processes for sponsoring your family under the FC. One process is used for sponsoring your spouse, conjugal or common-law partner and/or dependent children. Another process is used to sponsor other eligible relatives.”<sup>15</sup>

#### c. Refugees

In the last few years Canadian refugee policy has been generally seen as relatively generous, to such an extent that many critics contend it invites fraud and abuse. However, in the past year, in an effort to thwart “bogus” refugee claims, Canada’s Parliament passed Bill C-31, also known as Protecting Canada’s Immigration System Act.<sup>16</sup>

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<sup>11</sup> *Fact Sheet—Provincial Nominee Program*, CIC, <http://www.cic.gc.ca/english/resources/publications/employers/provincial-nominee-program.asp> (last updated Mar. 28, 2012).

<sup>12</sup> *Id.*

<sup>13</sup> *Quebec-Selected Skilled Workers*, CIC, <http://www.cic.gc.ca/english/immigrate/quebec/index.asp> (last updated Nov. 9, 2009).

<sup>14</sup> *Family Sponsorship*, CIC, <http://www.cic.gc.ca/english/immigrate/sponsor/index.asp> (last updated Oct. 26, 2012).

<sup>15</sup> *Id.*

<sup>16</sup> Protecting Canada’s Immigration System Act, S.C. 2012, c. 17, [http://laws-lois.justice.gc.ca/eng/AnnualStatutes/2012\\_17/page-1.html](http://laws-lois.justice.gc.ca/eng/AnnualStatutes/2012_17/page-1.html).

## 2. *Temporary or Guest Workers (Low-Skilled) and Permanent Residency*

Temporary workers are issued work visas for prescribed periods of time. The federal government of Canada administers the Temporary Foreign Worker Program,<sup>17</sup> which authorizes eligible foreign workers to work in Canada for an approved period of time if “employers can demonstrate that they are unable to find suitable Canadians/permanent residents to fill the jobs and that the entry of these workers will not have a negative impact on the Canadian labour market.”<sup>18</sup> According to the Citizenship and Immigration Canada (CIC) website, “[e]mployers from all types of businesses can recruit foreign workers with a wide range of skills to meet temporary labour shortages.”<sup>19</sup>

Programs for the hiring of foreign low-skilled workers include:

- The Low Skilled Worker Pilot (C & D) project, instituted in 2002, which allows employers to hire temporary foreign workers (TFWs) with “lower levels of formal training.”<sup>20</sup> The pilot project also has an agricultural stream.<sup>21</sup>
- The Live-in Caregiver Program, which “allows families to hire a foreign live-in caregiver, often called a nanny, when Canadian citizens and permanent residents are not available.”<sup>22</sup>
- The Seasonal Agricultural Worker Program, which “matches workers from Mexico and the Caribbean countries with Canadian farmers who need temporary support during planting and harvesting seasons, when qualified Canadians or permanent residents are not available.”<sup>23</sup>

The provinces and territories also have their own Provincial Nominee Programs that may be available to lower-skilled workers.

Most low-skilled workers are not eligible to become permanent residents in Canada. However, workers under the Live-in Caregivers Program can apply to become permanent residents as long

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<sup>17</sup> *Temporary Foreign Worker Program*, HUMAN RESOURCES AND SKILLS DEVELOPMENT CANADA (HRSDC), [http://www.hrsdc.gc.ca/eng/workplaceskills/foreign\\_workers/index.shtml](http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/index.shtml) (last updated Feb. 4, 2013).

<sup>18</sup> *How to Hire a Temporary Foreign Worker (TFW)—A Guidebook for Employers*, CIC, <http://www.cic.gc.ca/english/resources/publications/tfw-guide.asp> (last updated Jan. 18, 2013).

<sup>19</sup> *Id.*

<sup>20</sup> *Foreign Workers*, HRSDC, [http://www.hrsdc.gc.ca/eng/workplaceskills/foreign\\_workers/ei\\_tfw/orllft\\_tfw.shtml](http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/ei_tfw/orllft_tfw.shtml) (last updated Aug. 26, 2011).

<sup>21</sup> *Agricultural Stream*, HRSDC, [http://www.hrsdc.gc.ca/eng/workplaceskills/foreign\\_workers/agriculture/description.shtml](http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/agriculture/description.shtml) (last modified Nov. 21, 2012).

<sup>22</sup> *Live-in Caregiver Program: Program Description*, HRSDC, [http://www.hrsdc.gc.ca/eng/workplaceskills/foreign\\_workers/caregiver/description.shtml](http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/caregiver/description.shtml) (last updated July 25, 2012); see also *Determine Your Eligibility—Hiring a Live-in Caregiver*, CIC, <http://www.cic.gc.ca/english/work/apply-who-caregiver.asp> (last updated Oct. 19, 2012).

<sup>23</sup> *Seasonal Agricultural Worker Program*, HRSDC, [http://www.hrsdc.gc.ca/eng/workplaceskills/foreign\\_workers/ei\\_tfw/sawp\\_tfw.shtml](http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/ei_tfw/sawp_tfw.shtml) (last updated June 10, 2009). For additional, more detailed information, see *Seasonal Agricultural Worker Program: Requirements*, HRSDC, [http://www.hrsdc.gc.ca/eng/workplaceskills/foreign\\_workers/sawp/requirements.shtml](http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/sawp/requirements.shtml) (last updated Feb. 15, 2013).

as they meet certain requirements.<sup>24</sup> Low-skilled workers may also be eligible to gain permanent residency through Provincial Nominee Programs.<sup>25</sup>

Three departments jointly administer the temporary labor migration programs: CIC, Human Resources and Skills Development Canada/Service Canada, and the Canada Border Services Agency.<sup>26</sup>

## II. Number of Immigrants and Country of Origin

According to Statistics Canada, as of July 2012, the Canadian population was estimated to be 34,880,500.<sup>27</sup> According to CIC's statistics, approximately 257,515 persons were admitted to Canada for permanent residence in 2012.<sup>28</sup> Of those, approximately 160,617 were admitted as economic class immigrants and their dependents, 64,901 as family class immigrants, 23,056 as refugees, and 8,936 in other immigrant categories.<sup>29</sup> According to a CIC press release, "[f]or the seventh consecutive year, Canada continued the highest sustained level of immigration in Canadian history, according to preliminary 2012 data . . . ."<sup>30</sup>

CIC's annual report to Parliament on immigration in 2012 compared 2011 immigration figures with those of the previous year and found that,

[w]hile 2011 had lower overall admissions than that of 2010, which reached 280,691 admissions, it is important to note that a combination of unique factors created a high watermark year for admissions in 2010. In the context of the last five years, the overall 2011 admissions were closer to the average of 250,000 admissions per year. The proportions among the economic, family and protected persons categories [are] comparable to previous years, with a slightly higher proportion in the economic category. In 2011, 62.8 percent of admissions were economic immigrants (along with their spouse/partner and dependants), 22.7 percent were in the family reunification category, and 14.5 percent were protected persons and other immigrants.<sup>31</sup>

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<sup>24</sup> *Become a Permanent Resident—Live-in Caregivers*, CIC, [http://www.cic.gc.ca/english/work/caregiver/permanent\\_resident.asp](http://www.cic.gc.ca/english/work/caregiver/permanent_resident.asp) (last modified Oct. 19, 2012).

<sup>25</sup> *Can Lower-Skilled Workers Apply for Permanent Residence Under the Canadian Experience Class?*, CIC, <http://www.cic.gc.ca/english/helpcentre/answer.asp?q=385&t=6> (last modified Nov. 7, 2012).

<sup>26</sup> *How to Hire a Temporary Foreign Worker (TFW): A Guidebook for Employers*, *supra* note 18.

<sup>27</sup> *Canada's Population Estimates: Age and Sex, July 1, 2012*, STATISTICS CANADA, <http://www.statcan.gc.ca/daily-quotidien/120927/dq120927b-eng.htm> (last modified Sept. 27, 2012).

<sup>28</sup> *Canada – Permanent Residents by Category, 2008-2012*, *supra* note 4.

<sup>29</sup> *Id.*

<sup>30</sup> *News Release — Canada Continued to Welcome Highest Sustained Level of Immigration in Canadian History in 2012*, CIC (Feb. 27, 2013), <http://www.cic.gc.ca/english/department/media/releases/2013/2013-02-27.asp>.

<sup>31</sup> CIC, ANNUAL REPORT TO PARLIAMENT ON IMMIGRATION 2012—SECTION 2: MANAGING PERMANENT IMMIGRATION AND TEMPORARY MIGRATION (Oct. 31, 2012), <http://www.cic.gc.ca/english/resources/publications/annual-report-2012/section2.asp>.

The top ten source countries for immigrants to Canada in 2011 were the Philippines (34,991), China (28,696), India (24,965), the United States (8,829), Iran (6,840), the United Kingdom (6,550), Haiti (6,208), Pakistan (6,073), France (5,867), and the United Arab Emirates (5,223).<sup>32</sup> In 2012, China (32,990), the Philippines (32,704), and India (28,889) were the highest source countries of immigration.<sup>33</sup>

### III. Points System Under the Federal Skilled Workers Program

According to CIC, “[s]killed workers are people who are selected as permanent residents based on their ability to become economically established in Canada.”<sup>34</sup> Canada’s process for selecting skilled workers is fairly complex.

Prior to 2002, applicants were assessed on a points system that generally required applicants to have a job offer for a position that no Canadian citizen was willing and able to fill. In enacting the IRPA, Parliament adopted a slightly different philosophy. The law seeks to identify the types of persons who are most likely to integrate into the Canadian workforce based upon their background. This change of philosophy is based upon findings that persons with certain education and work backgrounds generally become well integrated into Canadian society regardless of whether or not they have a specific position waiting for them.

#### A. Basic Eligibility and Work Experience Requirements

For an application to be eligible for processing, the applicant must either have an offer of full-time permanent employment from a Canadian employer or “be an international student enrolled in a PhD program in Canada (or have graduated from a Canadian PhD program within the past 12 months) and meet certain criteria”<sup>35</sup> Alternatively, the applicant must have one year continuous full-time work experience, or the equivalent in part-time work experience, of a “skill type 0 (managerial occupations) or skill level A (professional occupations) or B (technical occupations and skilled trades)” under the Canadian National Occupational Classification (NOC).<sup>36</sup> However, pursuant to the Immigration Minister’s instructions, the list of qualifying

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<sup>32</sup> *Facts and Figures 2011—Immigration Overview: Permanent and Temporary Residents: Permanent Residents by Source Country*, CIC, <http://www.cic.gc.ca/english/resources/statistics/facts2011/permanent/10.asp> (last modified Oct. 16, 2012).

<sup>33</sup> *News Release — Canada Welcomes Record Number of Immigrants, Visitors and Students from China in 2012*, CIC (Mar. 4, 2013), <http://www.cic.gc.ca/english/department/media/releases/2013/2013-03-04c.asp>; *News Release — Canada Welcomes Record Number of Immigrants, Visitors and Students from the Philippines in 2012*, CIC (Mar. 4, 2013), <http://www.cic.gc.ca/english/department/media/releases/2013/2013-03-04a.asp>; *News Release — Canada Welcomes Record Number of Immigrants, Visitors and Students from India in 2012*, CIC (Mar. 4, 2013), <http://www.cic.gc.ca/english/department/media/releases/2013/2013-03-04b.asp>.

<sup>34</sup> *Determine Your Eligibility—Skilled Workers and Professionals*, CIC, <http://www.cic.gc.ca/english/immigrate/skilled/apply-who.asp> (last modified Nov. 7, 2012).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

skilled occupations has been narrowed down to twenty-nine specific, high-demand occupations.<sup>37</sup>

If an application meets minimum requirements, it will then “be processed according to the six selection factors in the skilled worker points grid.”<sup>38</sup>

## B. Selection Criteria

Applicants must obtain at least sixty-seven points out of a total of one hundred possible points on the selection grid. According to CIC, “If your score is the same or higher than the pass mark, then you may qualify to immigrate to Canada as a skilled worker. If your score is lower than the pass mark, you are not likely to qualify to immigrate to Canada as a skilled worker.”<sup>39</sup>

The six selection criteria and the maximum number of points available for each are as follows:

- Education: A maximum of twenty-five points can be earned by a person who has a Master’s Degree or a Ph.D. and at least seventeen years of full-time or full-time equivalent study. The lowest number of points available is five for completion of high school.<sup>40</sup>
- Languages: A maximum of twenty-four points can be awarded to persons who are highly proficient in both official languages of Canada. An applicant can be awarded up to twenty-four points for basic, moderate, or high proficiency in English and French. Written and oral tests are administered to ascertain a person’s abilities in different language areas, including listening, speaking, reading, and writing.<sup>41</sup>
- Experience: A maximum of twenty-one points can be awarded for experience in approved occupations. The IRPA allows CIC to designate certain professions as being restricted to guard against labor surpluses. However, at the present time, it appears that there are no professions that are designated as such. The maximum of twenty-one points can be earned with four or more years experience in an approved occupation. For each year less than four, two points are deducted. The minimum number of fifteen points can be earned through one year of qualifying experience.<sup>42</sup>

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<sup>37</sup> Ministerial Instructions: Ministerial Instructions (MI3): Federal Skilled Workers, Immigrant Investor Program, Entrepreneurs, CIC, <http://www.cic.gc.ca/english/department/mi/index.asp> (last modified Jan. 1, 2013).

<sup>38</sup> *Determine Your Eligibility—Skilled Workers and Professionals*, supra note 34.

<sup>39</sup> *Other Selection Factors—Skilled Workers and Professionals*, CIC, <http://www.cic.gc.ca/english/immigrate/skilled/apply-factors.asp> (last modified June 26, 2010).

<sup>40</sup> *Points for Education—Skilled Workers and Professionals*, CIC, <http://www.cic.gc.ca/english/immigrate/skilled/factor-education.asp> (last modified Mar. 31, 2007).

<sup>41</sup> *Points for Proficiency in English or French—Skilled Workers and Professionals*, CIC, <http://www.cic.gc.ca/english/immigrate/skilled/factor-language.asp> (last modified Nov. 9, 2011).

<sup>42</sup> *Points for Work Experience—Skilled Workers and Professionals*, CIC, <http://www.cic.gc.ca/english/immigrate/skilled/factor-experience.asp> (last modified June 26, 2010).

- Age: A maximum of ten points is awarded to persons who are between twenty-one and forty-nine years of age. Persons outside this range lose two points for each year that they are under twenty-one or over forty-nine.<sup>43</sup>
- Arranged employment: A person may be awarded ten points for having a permanent job offer that has been confirmed by Human Resources and Skills Development Canada.<sup>44</sup>
- Adaptability: A person may be awarded ten additional points for a spouse's education, previous work in Canada, and family relations in Canada.<sup>45</sup>

CIC has temporarily stopped accepting new applications under the Skilled Worker program as of July 1, 2012, in order to reduce a backlog of applications. (This temporary suspension does not affect applications under the job offer and PhD stream.) CIC will start accepting applications again when revised selection criteria take effect on May 4, 2013. (See discussion of proposed changes, below.)

Moreover, CIC currently has an annual cap of 10,000 new Federal Skilled Worker applications and a cap of 500 for each of the twenty-nine occupations. However, applicants with “qualifying job offers are not affected by the cap.”<sup>46</sup>

#### IV. Pros and Cons of the Points System

Canada's points system is designed to attract immigrants who show promise of being able to join in and contribute to their new communities. According to CIC, it has by and large succeeded in meeting the “immediate and longer-term need for highly skilled professionals, and addresses Canada's broader immigration objectives.”<sup>47</sup>

One of the major advantages of the system is that it is largely transparent. Potential applicants can review the selection criteria to determine whether they may be able to attain sufficient points to reach the pass mark of sixty-seven points. Another advantage of the system is that it gives persons who are unable to travel to Canada to arrange employment a better chance of being accepted than was previously the case.

One disadvantage of the points system is that transparency can lead to complaints of unfair treatment. Persons who fall short of the pass mark often believe they should have been awarded

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<sup>43</sup> *Points for Age—Skilled Workers and Professionals*, CIC, <http://www.cic.gc.ca/english/immigrate/skilled/factor-age.asp> (last modified Mar. 31, 2007).

<sup>44</sup> *Points for Arranged Employment—Skilled Workers and Professionals*, CIC, <http://www.cic.gc.ca/english/immigrate/skilled/factor-employment.asp> (last modified Aug. 9, 2007).

<sup>45</sup> *Points for Adaptability—Skilled Workers and Professionals*, CIC, <http://www.cic.gc.ca/english/immigrate/skilled/factor-adaptability.asp> (last modified Mar. 31, 2007).

<sup>46</sup> Ministerial Instructions: Ministerial Instructions (MI3): Federal Skilled Workers, Immigrant Investor Program, Entrepreneurs, *supra* note 35.

<sup>47</sup> CIC, EVALUATION OF THE FEDERAL SKILLED WORKER PROGRAM: EXECUTIVE SUMMARY (Aug. 2010), <http://www.cic.gc.ca/english/resources/evaluation/fswp/section1.asp>.

more points in one or more categories. This is particularly true of the more subjective categories, such as adaptability.

A 2010 evaluation of the Federal Skilled Workers Program found that, although the program has “moved towards a more objective, transparent and efficient process of selecting skilled workers, the processing times remained long and the backlog increased.”<sup>48</sup>

Professionals who have been unable to find employment in their chosen field or have their foreign credentials recognized by professional licensing bodies have been another source of complaints under the current system. Most professions, such as those in medicine and law, are licensed by provincial governing bodies. For example, each province has its own law society. Professional licensing bodies have discretion in determining what types of additional training or examination foreign-trained professionals must undergo before they can practice in that province. In response, with recent changes to the selection criteria, a new rule will require that “applicants wanting to immigrate as Federal Skilled Workers would have their foreign education credentials assessed and verified by designated organizations before they arrive in Canada.”<sup>49</sup> According to CIC, the pre-arrival assessment

would let applicants know how their education credentials compare to Canadian credentials and . . . give immigrants a sense of how Canadian employers are likely to value their education. This will also screen out people without proper education levels and is an important step in helping to address the problem of immigrants arriving and not being able to work in their field.<sup>50</sup>

## V. Recent or Proposed Changes to the System

Recent changes made to the selection criteria that reportedly will go into effect on May 4, 2013, will provide more points for younger applicants and persons with greater language proficiency. CIC in a recent press release has outlined the changes, which will include the following:

- Minimum official language thresholds and increased points for official language proficiency, making language the most important factor in the selection process;
- Increased emphasis on younger immigrants, who are more likely to acquire valuable Canadian experience, are better positioned to adapt to changing labour market conditions, and who will spend a greater number of years contributing to Canada’s economy;
- Introduction of the Educational Credential Assessment (ECA), so that education points awarded reflect the foreign credential’s true value in Canada;
- Changes to the arranged employment process, allowing employers to hire applicants quickly, if there is a demonstrated need in the Canadian labour market; and

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<sup>48</sup> *Id.*

<sup>49</sup> News Release, CIC, Minister Kenney Proposes to Assess Foreign Education Credentials Before Skilled Workers Arrive (Mar. 28, 2012), <http://www.cic.gc.ca/English/department/media/releases/2012/2012-03-28.asp>.

<sup>50</sup> *Id.*

- Additional adaptability points for spousal language ability and Canadian work experience.<sup>51</sup>

Consideration was given to the need to address the issue of unemployment and underemployment when making these changes. According to CIC, these changes were instituted because Canadian and international research had “consistently shown that language proficiency is the single most important factor in gaining better rates of employment, appropriate employment and higher earnings”<sup>52</sup> As a result, “[l]anguage ability is now the most important factor on the grid, representing a total of up to 28 points in recognition of its critical importance in ensuring successful outcomes.”<sup>53</sup> CIC also notes that recent studies indicate that “younger immigrants integrate more rapidly into the labour market and spend a greater number of years contributing to Canada’s economy.” The revised selection grid awards younger immigrants with a maximum of 12 points up to age 35, “with diminishing points awarded from 35 to age 46.”<sup>54</sup> There will be no points awarded after age 46. However, “workers aged 47 or older will continue to be eligible for the Program.”<sup>55</sup>

Because Canada has received a large number of applications for permanent residence in recent years, consideration has been given to raising the pass mark from the current sixty-seven points to a higher number. The previous pass mark of seventy-five points was lowered after backlogs had been reduced. However, with the recent change to the selection criteria, the pass mark remains at sixty-seven.

## VI. Employment Outcomes

The philosophy behind the current Canadian immigration law is that most promising immigrants are able to become well-established in Canada. The government appears to believe that the current system is generally working well, although it has acknowledged that despite the high level of education of immigrants,<sup>56</sup> the problem of unemployment and underemployment has grown in recent years. A Country Profile by the Migration Policy Institute, which looked at immigrants in the workplace, states the following:

In their first years after arrival, immigrants tend to have lower rates of labor market participation than the Canadian-born population. This is because a number of migrants spend time upgrading either professional, trade, or language skills, or are unable to find work that matches their skill and education levels.

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<sup>51</sup> *New Federal Skilled Worker Program to Accept Applications Beginning May 4, 2013*, CIC, <http://www.cic.gc.ca/english/department/media/releases/2012/2012-12-19.asp> (last modified Dec. 19, 2012).

<sup>52</sup> *Backgrounder—Overview of the New Federal Skilled Worker Program*, CIC, <http://www.cic.gc.ca/english/department/media/backgrounders/2012/2012-12-19.asp> (last modified Dec. 19, 2012).

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> DIANE GALARNEAU & RENÉ MORISSETTE, IMMIGRANTS’ EDUCATION AND REQUIRED JOB SKILLS (Statistics Canada, Dec. 2008), <http://www.statcan.gc.ca/pub/75-001-x/2008112/pdf/10766-eng.pdf>.

In the first quarter of 2011, the unemployment rate for native-born Canadians was 6.3 percent, compared to 9.1 percent for all immigrants and 14.2 percent for recent immigrants. Eventually, the labor force participation rates of the foreign born converge with those of the Canadian-born population. For instance, 91 percent of male immigrants aged 25 to 44 who arrived in Canada between 1981 and 1991 participate in the labor force, while 92.5 percent of Canadian-born men in the same age bracket are in the labor force.

Yet many immigrants—particularly new arrivals—have difficulty fully participating, and are often underemployed or overly represented in low paying jobs. There is considerable concern about the ability of immigrants to quickly and easily convert their often high human capital and willingness to work into strong employment, earnings, and socioeconomic mobility.

A number of recent studies have found significant and sustained income differences between newcomers and the Canadian-born population. Among immigrants who arrived in the later part of the 1980s and throughout the 1990s, the gap in initial earnings relative to the Canadian-born population has steadily increased over time, and this gap does not appear to close quickly with length of time in the country. Statistics Canada found that 16.5 percent of immigrants were classified as “low income” for at least seven of their first ten years in the country, and all immigrants are more likely than native-born Canadians to be low income. Furthermore, even those immigrants who have lived in the country for ten years or more do not match the national average for earnings.<sup>57</sup>

More recent data found that in 2011, the employment rate of core-aged immigrants was 75.6%, compared with 82.9% for their Canadian-born counterparts.<sup>58</sup> Moreover, “[e]mployment rates were progressively higher the longer immigrants had been in the country. In 2011, these rates ranged from 63.5% among those in the country for five years or less (very recent immigrants) to 79.8% among those here for more than a decade.”<sup>59</sup>

In addition, the recent changes to the selection criteria, as outlined above, were implemented in order to address some of these issues. In a December 2012 press release, Citizenship, Immigration, and Multiculturalism Minister Jason Kenney stated that “[f]or too long, too many immigrants to Canada have experienced underemployment and unemployment, and this has been detrimental to these newcomers and to the Canadian economy.”<sup>60</sup>

## VII. Services for Immigrants

Persons accepted for permanent residence in Canada generally have immediate access to all social services and enjoy the same constitutional rights and protections as Canadian citizens.

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<sup>57</sup> A.E. Challinor, *Canada's Immigration Policy: A Focus on Human Capital*, MIGRATION INFORMATION SOURCE (Migration Policy Institute, Sept. 2011), <http://www.migrationinformation.org/feature/display.cfm?ID=853>.

<sup>58</sup> *Study: Canada's Immigrant Labour Market, 2008 to 2011*, STATISTICS CANADA, <http://www.statcan.gc.ca/daily-quotidien/121214/dq121214b-eng.htm> (last updated Dec. 14, 2012). For more analysis on recent Canadian immigrant labour market trends, see *Analysis of the Canadian Immigrant Labour Market, 2008 to 2011*, STATISTICS CANADA, <http://www.statcan.gc.ca/pub/71-606-x/2012006/part-partie1-eng.htm> (last updated Dec. 20, 2012).

<sup>59</sup> *Id.*

<sup>60</sup> New Federal Skilled Worker Program to Accept Applications Beginning May 4, 2013, *supra* note 49.

Immigrants can enroll in the health insurance programs run by the provinces, receive free language training, get assistance in finding employment and housing, enroll in elementary and secondary schools, and pay in-province college tuition.

In order to assist immigrants in learning for which benefits they may be eligible, Services Canada has created a benefits homepage.<sup>61</sup>

## VIII. Illegal Immigration

### A. Statistics on Illegal Immigrants

Although there are no official statistics on the number of illegal immigrants in Canada, some estimate that there may be between 20,000 and 200,000 undocumented workers living in the country.<sup>62</sup> In 2008, the *Toronto Star* reported that Canada's border agency had lost track of 41,000 illegal immigrants.<sup>63</sup>

### B. Sanctions for Unlawful Entry and Overstaying

The IRPA does not specifically criminalize unlawfully entering the country or unlawfully overstaying a visa. Both of these types of actions, however, fall under the general prohibition against contravening the law without exercising due diligence to prevent doing so. Crown prosecutors have discretion to try general IRPA offenses either by way of an indictment or in summary proceedings. The distinction between indictable and summary offenses is similar to the distinction between felonies and misdemeanors in the United States, and a crime that can be tried either by way of an indictment or in summary proceedings is considered to be a “hybrid” offense. The maximum penalty for a person who commits such a general offense as entering the country unlawfully or unlawfully overstaying a visa is a fine of Can\$50,000 and imprisonment for two years, if prosecuted by way of an indictment, and a fine of Can\$10,000 and imprisonment for six months, if prosecuted in summary proceedings.<sup>64</sup> Crown prosecutors usually base their decisions as to whether a defendant should be tried by way of an indictment or in summary proceedings upon such factors as the seriousness of the violation, the defendant's intentions, and the defendant's prior record.

While the IRPA does provide for the prosecution of persons who enter the country illegally or illegally overstay a visa, trials for these offenses are rare. Most persons caught violating the general provisions of the immigration laws are deported or ordered to leave Canada.<sup>65</sup>

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<sup>61</sup> *I Am a Newcomer to Canada*, CANADABENEFITS.GC.CA, <http://www.canadabenefits.gc.ca/f.1.2cl.3st@.jsp?lang=eng&catid=27&geo=99> (last modified Mar. 1, 2013).

<sup>62</sup> Lilian Magalhaes et al., *Undocumented Migrants in Canada: A Scope Literature Review on Health, Access to Services, and Working Conditions*, 12(1) J. IMMIGR. & MINORITY HEALTH 132, 151 (2010), <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3084189/>.

<sup>63</sup> Richard Brennan, *41,000 Illegal Immigrants Gone Missing*, TORONTO STAR (May 6, 2008), [http://www.thestar.com/news/canada/2008/05/07/41000\\_illegal\\_immigrants\\_gone\\_missing.html](http://www.thestar.com/news/canada/2008/05/07/41000_illegal_immigrants_gone_missing.html).

<sup>64</sup> Immigration and Refugee Protection Act, S.C. 2001 c. 27, § 124(1)(a).

<sup>65</sup> Information obtained from the Immigration Office at the Canadian Embassy in Washington, DC, in 2006.

### C. Sanctions for Hiring Undocumented Workers

Another general offense under the IRPA is hiring undocumented workers. Section 124(1)(c) states that anyone “who employs a foreign national in a capacity in which the foreign national is not authorized under this Act to be employed” is guilty of an offense. The maximum penalties for this offense are the same as those for entering the country illegally or overstaying a visa illegally. A person is not guilty of the offense of illegally hiring an undocumented worker if he or she exercised “due diligence.”<sup>66</sup> The Act and its regulations do not specify what the accused must show in order to prove that he or she did in fact exercise due diligence.

The IRPA also makes both counseling misrepresentation and general misrepresentation criminal offenses. Misrepresentation can be committed by withholding material facts, giving misleading information, and refusing to answer questions in legal proceedings.<sup>67</sup> These offenses are punishable with a maximum fine of Can\$100,000 and imprisonment for five years, if prosecuted by way of an indictment, and a maximum fine of Can\$50,000 and two years of imprisonment, if prosecuted in summary proceedings.

In addition to criminalizing misrepresentation, the IRPA has special provisions for using, exporting, and dealing in forged documents that purport to establish a person’s identity. Using a forged document is punishable with up to five years of imprisonment, and exporting or dealing in forged documents is punishable with up to fourteen years of imprisonment. Canada has had numerous problems with forged passports. In several reported cases, international incidents have arisen out of discoveries that foreign intelligence agencies were using forged Canadian passports. Forged Canadian passports are reportedly popular with criminals because immigration officials in other countries are less likely to regard them with suspicion, due to the fact that Canada has a relatively large and diverse immigrant population.

Along with the penalties for hiring illegal immigrants, Canada also has strict laws against human smuggling and trafficking. A person who smuggles fewer than ten persons into the country is liable on a first offense to a fine of up to Can\$500,000 and imprisonment for up to ten years. For a subsequent offense, the maximum fine is doubled and the maximum period of imprisonment is raised to fourteen years. Those who smuggle more than ten persons into the country are liable to a fine of up to Can\$1,000,000 and imprisonment for life. Disembarking persons at sea is a separate offense that is also punishable with a fine of up to Can\$1,000,000 and imprisonment for life. This section was created in response to several instances in which owners of foreign boats filled them with illegal aliens and abandoned ship just before they washed up on Canadian shores. In determining the appropriate sentence for persons who engage in human trafficking, judges must consider such aggravating factors as whether the aliens suffered any bodily harm or degrading treatment.

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<sup>66</sup> Immigration and Refugee Protection Act, S.C. 2001, c. 27, § 124.

<sup>67</sup> *Id.* § 127.

## D. Border Security

Border security and management is primarily the responsibility of the Canada Border Services Agency (CBSA). Its mandate is to ensure “the security and prosperity of Canada by managing the access of people and goods to and from Canada.”<sup>68</sup> The Agency’s legislative, regulatory and partnership responsibilities include

- **administering** legislation that governs the admissibility of people and goods, plants and animals into and out of Canada;
- **detaining** those people who may pose a threat to Canada;
- **removing** people who are inadmissible to Canada, including those involved in terrorism, organized crime, war crimes or crimes against humanity;
- **interdicting** illegal goods entering or leaving the country;
- **protecting** food safety, plant and animal health, and Canada's resource base;
- **promoting** Canadian business and economic benefits by administering trade legislation and trade agreements to meet Canada's international obligations;
- **enforcing** trade remedies that help protect Canadian industry from the injurious effects of dumped and subsidized imported goods;
- **administering** a fair and impartial redress mechanism;
- **promoting** Canadian interests in various international forums and with international organizations; and
- **collecting** applicable duties and taxes on imported goods.<sup>69</sup>

On February 4, 2011, Canadian Prime Minister Stephen Harper and US President Barack Obama announced the Beyond the Border Declaration, which “outlines joint priorities to strengthen shared security and improve the legitimate flow of people, goods and services across our borders.”<sup>70</sup> This action plan “sets out joint priorities for achieving that vision within the four areas of cooperation identified in the Beyond the Border Declaration: addressing threats early; trade facilitation, economic growth and jobs; cross-border law enforcement; and critical infrastructure and cyber-security.”<sup>71</sup>

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<sup>68</sup> *About the CBSA*, CANADA BORDER SERVICES AGENCY (CBSA), <http://www.cbsa-asfc.gc.ca/agency-agence/menu-eng.html> (last modified June 7, 2011).

<sup>69</sup> *Id.*

<sup>70</sup> *Perimeter Security and Economic Competitiveness*, CANADA’S ECONOMIC ACTION PLAN, GOVERNMENT OF CANADA, <http://actionplan.gc.ca/en/content/perimeter-security-and-economic-competitiveness> (last visited Mar. 1, 2013).

<sup>71</sup> *Perimeter Security and Economic Competitiveness*, Beyond the Border: A Shared Vision for Perimeter Security and Economic Competitiveness (2011), [http://actionplan.gc.ca/grfx/psec-scep/pdfs/bap\\_report-paf\\_rapport-eng-dec2011.pdf](http://actionplan.gc.ca/grfx/psec-scep/pdfs/bap_report-paf_rapport-eng-dec2011.pdf).

# UNITED KINGDOM

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**SUMMARY** The United Kingdom (UK) introduced a points-based program in 2003 to simplify its immigration system. The law provides for five different tiers, with additional categories and points awarded for different attributes within those tiers. The most popular tier used is Tier 1, for high-value migrants. Most of the tiers require that the applicant have a job offer and be sponsored by an employer licensed by the UK Border Agency. This sponsorship aims to make the employer responsible for the migrant worker and includes notification requirements if the employee stops working. Illegal immigration does remain a problem in the UK, and the difficulty in determining an exact number of illegal immigrants present is exacerbated by the lack of exit controls.

## I. Introduction

Since 1891 it has been established at common law that “no alien has any right to enter (what is now the United Kingdom) except by leave of the Crown.”<sup>1</sup> The Aliens Restriction Act 1914,<sup>2</sup> the Aliens Restriction (Amending) Act 1919,<sup>3</sup> and Rules and Orders made under these Acts<sup>4</sup> gave the common law a statutory basis and formed the restrictions on immigration for much of the twentieth century. The statutory regime governing immigration in the United Kingdom (UK) is now contained in the Immigration Act 1971<sup>5</sup> and the Immigration Rules<sup>6</sup> made under it. The law requires that individuals who are not British or Commonwealth citizens with the right of abode in the UK, nor members of the European Economic Area,<sup>7</sup> obtain leave to enter the UK from an immigration officer upon their arrival.<sup>8</sup>

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<sup>1</sup> *Musgrove v. Chun Teeong Toy* [1891] A.C. 272, followed in *Schmidt v. Home Office* [1969] 2 Ch. 149.

<sup>2</sup> Aliens Restriction Act, 1914, 4 & 5 Geo. 5, c. 12.

<sup>3</sup> Aliens Restriction (Amendment) Act, 1919, c. 92, <http://www.legislation.gov.uk/ukpga/Geo5/9-10/92/contents>.

<sup>4</sup> Aliens Order, (1920) Stat R. & O. 448 (as amended).

<sup>5</sup> Immigration Act 1971, c. 77, <http://www.legislation.gov.uk/ukpga/1971/77/contents>.

<sup>6</sup> Immigration Rules (as amended), <http://www.ukba.homeoffice.gov.uk/policyandlaw/immigrationlaw/immigrationrules/>; *R v. Chief Immigration Officer, Heathrow Airport, ex. p. Salamat Bibi* [1976] 3 All ER 843 (CA) per Roskill, LJ: “these rules are [not administrative practice and are] just as much delegated legislation as any other form of rule making activity ... [and] to my mind, are just as much a part of the law of England as the 1971 Act itself.”

<sup>7</sup> The European Economic Area consists of the Members of the European Union, plus Norway, Iceland, and Liechtenstein.

<sup>8</sup> Immigration Act 1971, c. 77 § 3, <http://www.legislation.gov.uk/ukpga/1971/77/section/3>.

## II. Number of Immigrants

The estimate for the population of the UK as of 2011 reported that there are 63.2 million people resident in the UK.<sup>9</sup> In 2011, estimates show that 566,000 immigrated to the UK with 351,000 emigrating from the UK.<sup>10</sup> Twelve percent of the population is foreign born.<sup>11</sup> The five most common countries that foreign-born UK residents come from are India, Poland, Pakistan, the Republic of Ireland, and Germany.<sup>12</sup>

## III. Current System Overview

The law governing and policy surrounding immigration in the UK is highly complex and attempts to balance the needs of genuine visitors and the contributions they make to the economy of the UK with concerns about those that wish to enter for undesirable purposes. This report details the points-based system for worker migration into the UK.

### A. Points-Based Migration

The points-based migration system was introduced a decade ago in 2003 and is modeled on the Australian system.<sup>13</sup> The UK Border Agency is responsible for implementing the points-based system, which aims to provide a simplified immigration system and attract migrants who will contribute to the UK. The system is structured so that greater emphasis is placed on employers who sponsor applicants to keep track of their employees and report any suspected abuses to the UK Border Agency.<sup>14</sup> By tying these requirements to the employer, the UK aims to improve compliance with its immigration system and reduce abuse.<sup>15</sup>

There are five different tiers, which are further broken down into different categories with varying requirements that must be met before an applicant is provided with a visa for entry:

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<sup>9</sup> *UK Population Estimate Revealed*, OFFICE FOR NATIONAL STATISTICS, Dec. 2012, <http://www.ons.gov.uk/ons/rel/mro/news-release/uk-population-estimate-revealed/uk-population-estimate-revealed-.html>.

<sup>10</sup> *Long-Term International Migration, 2011*, OFFICE FOR NATIONAL STATISTICS, Nov. 2012, <http://www.ons.gov.uk/ons/rel/migration1/long-term-international-migration/2011/index.html>.

<sup>11</sup> *Population by Country of Birth and Nationality Report*, OFFICE FOR NATIONAL STATISTICS, Aug 2012, <http://www.ons.gov.uk/ons/rel/migration1/migration-statistics-quarterly-report/august-2012/population-by-country-of-birth-and-nationality.html#tab-1--What-are-the-latest-figures->.

<sup>12</sup> *Ch. 3, Population by Country of Birth and Nationality Report*, OFFICE FOR NATIONAL STATISTICS, Aug. 2012, <http://www.ons.gov.uk/ons/rel/migration1/migration-statistics-quarterly-report/august-2012/population-by-country-of-birth-and-nationality.html#tab-3--Which-countries-are-non-UK-born-residents-and-non-British-nationals-from->.

<sup>13</sup> IAN MACDONALD, QC & RONAN TOAL, *MACDONALD'S IMMIGRATION LAW & PRACTICE* (7th ed. 2008), ¶ 10.4.

<sup>14</sup> NATIONAL AUDIT OFFICE, *REPORT BY THE COMPTROLLER AND AUDITOR GENERAL*, H.C. 819, 2010–2011, ¶ 2, <http://www.official-documents.gov.uk/document/hc1011/hc08/0819/0819.pdf>.

<sup>15</sup> *Id.* at 4.

Tier 1: High-Value Migrants<sup>16</sup>

Tier 2: Skilled Workers<sup>17</sup>

Tier 3: Low-Skilled Workers

Tier 4: Students

Tier 5: Temporary Workers

Each of the tiers has different categories within it, which award points in different ways for different attributes of the applicant. Distribution of the points is designed in a way to ensure that applicants who will benefit the UK are provided entry, with points “being awarded to reflect the migrant’s ability, experience and age—and, when appropriate, the level of need in the migrant’s chosen industry.”<sup>18</sup> With the exclusion of Tier 1, applicants must have a job offer from, and be sponsored by, an employer who is licensed by the UK Border Agency.<sup>19</sup>

In all categories for in-country applications, to be eligible the applicant must have entered the UK legally.<sup>20</sup>

## **B. Tier 1: High-Value Migrants**

This tier is designed to contribute to the UK’s growth and productivity.<sup>21</sup> It aims to ensure that the most highly skilled individuals and investors with substantial funds can qualify for entry and leave to remain in the UK. There are four categories within Tier 1:

- Exceptional Talent, “for exceptionally talented individuals in the fields of science, humanities, engineering and the arts, who wish to work in the UK. These individuals are those who are already internationally recognised at the highest level as world leaders in their particular field, or who have already demonstrated exceptional promise in the fields of science, humanities and engineering and are likely to become world leaders in their particular area.”<sup>22</sup> Leave to remain is granted for up to three years.<sup>23</sup> The initial application must be

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<sup>16</sup> Immigration Rules, *supra* note 6, ¶ 245B. *See also* Skilled Workers, UK BORDER AGENCY, <http://www.ukba.homeoffice.gov.uk/visas-immigration/working/tier2/> (last visited Feb. 25, 2013).

<sup>17</sup> High-Value Migrants, UK BORDER AGENCY, <http://www.ukba.homeoffice.gov.uk/visas-immigration/working/tier1/> (last visited Feb. 25, 2013).

<sup>18</sup> Quick Guide to the Points-Based System, UK BORDER AGENCY, <http://www.ukba.homeoffice.gov.uk/business-sponsors/points/quick-guide-pbs/> (last visited Feb. 25, 2013).

<sup>19</sup> *Id.*

<sup>20</sup> *See, e.g.*, Immigration Rules, *supra* note 6, ¶¶ 245CA & 245BF.

<sup>21</sup> IAN MACDONALD, QC & RONAN TOAL, *supra* note 13, ¶ 10.2.

<sup>22</sup> Immigration Rules, *supra* note 6, ¶ 245B.

<sup>23</sup> *Id.* ¶ 245BC.

endorsed by either the Royal Society, the Arts Council England, the British Academy, or the Royal Academy of Engineering.<sup>24</sup>

- General, for “highly skilled migrants who wish to work, or become self-employed, to extend their stay in the UK.”<sup>25</sup> Leave to remain is granted for up to three years.<sup>26</sup>
- Entrepreneur, for “for migrants who wish to establish, join or take over one or more businesses in the UK.”<sup>27</sup> Leave to remain is granted for up to three years and four months.<sup>28</sup>
- Post-Study Worker, for “graduates who have been identified by Higher Education Institutions as having developed world class innovative ideas or entrepreneurial skills to extend their stay in the UK after graduation to establish one or more businesses in the UK.” Leave to remain is granted for one year;<sup>29</sup> and
- Investor, for “high net worth individuals making a substantial financial investment to the UK.”<sup>30</sup> Leave to remain is granted for up to three years.<sup>31</sup>

Tier 1 has recently had a cap added to it and is restricted to 1,000 exceptional individuals, investors, and entrepreneurs.<sup>32</sup>

### *Permanent Residence*

The law provides that highly skilled migrants may qualify for permanent residence in the UK (known as indefinite leave to remain). The requirements are that the applicant must

- not be an illegal entrant;
- have spent a continuous period of five years lawfully resident in the UK and not been absent for more than 180 days in one year;
- have at least seventy-five points; must have sufficient knowledge of the English language and life in the UK unless aged under eighteen or over sixty-five; and
- not have breached immigration laws during his or her stay (overstays of twenty-eight days or less are disregarded for these purposes).<sup>33</sup>

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<sup>24</sup> *Tier 1 (Exceptional Talent)*, UK BORDER AGENCY, <http://www.ukba.homeoffice.gov.uk/visas-immigration/working/tier1/exceptional-talent/> (last visited Feb. 26, 2013).

<sup>25</sup> Immigration Rules, *supra* note 6, ¶ 245C.

<sup>26</sup> *Id.* ¶ 245CB.

<sup>27</sup> *Id.* ¶ 245D.

<sup>28</sup> *Id.* ¶ 245DC.

<sup>29</sup> *Id.* 245F.

<sup>30</sup> *Id.* ¶ 245E.

<sup>31</sup> *Id.* ¶ 245EE.

<sup>32</sup> NATIONAL AUDIT OFFICE, *supra* note 14, ¶ 1.16.

<sup>33</sup> Immigration Rules, *supra* note 6, ¶ 245BF.

### C. Tier 2: Skilled Workers

This tier encompasses skilled workers that have a job offer in an area where there is a labor shortage in the UK.<sup>34</sup> Areas of the labor market where there are shortages are determined by the Migration Advisory Committee.<sup>35</sup> Skilled workers require a job offer from an employer within the UK that has been licensed by the UK Border Agency as a sponsor.<sup>36</sup> Categories within this tier include:

- Intracompany Transfers, for “multinational employers to transfer their existing employees from outside the EEA to their UK branch for training purposes or to fill a specific vacancy that cannot be filled by a British or EEA worker.”<sup>37</sup> Within this category are four subcategories: short-term staff, long-term staff, graduate trainees, and skills transfers.<sup>38</sup> Leave to remain varies according to which subcategory the employee is present in the UK under, and may be granted for up to three years and one month.
- General Migrants; Minister of Religion; and Sportspeople. This category is provided to “enable UK employers to recruit workers from outside the EEA to fill a particular vacancy that cannot be filled by a British or EEA worker.”<sup>39</sup> Leave to remain may be granted for up to three years and one month.<sup>40</sup>

The category was recently further restricted and is now limited to 20,700 people per year, who must have a job offer for a position that requires a college degree.<sup>41</sup> This cap excludes individuals that earn £150,000 (approximately US\$240,000) per year and intracompany transfers.<sup>42</sup>

#### *Permanent Residence*

Tier 2 workers are eligible for permanent residence on generally the same basis as those in Tier 1. There are a number of additional criteria that individuals who are in the UK as Tier 2 intracompany transfers, general migrants, ministers of religion, and sportspeople must meet when applying for permanent residence. One of the most notable additional criteria is a certificate in writing from the sponsoring employer that “(i) he still requires the applicant for the

<sup>34</sup> IAN MACDONALD, QC & RONAN TOAL, *supra* note 13, ¶ 10.6.

<sup>35</sup> National Audit Office, *supra* note 14, ¶ 2.

<sup>36</sup> *Id.* ¶ 1.

<sup>37</sup> Immigration Rules, *supra* note 6, ¶ 245G.

<sup>38</sup> *Id.* ¶ 245GC.

<sup>39</sup> *Id.* ¶ 245H.

<sup>40</sup> *Id.* ¶ 245HC.

<sup>41</sup> *Annual Tier 2 Limit Announcement*, UK BORDER AGENCY, Apr. 2012, <http://www.ukba.homeoffice.gov.uk/sitecontent/newsarticles/2012/april/18-Tier2-limit>.

<sup>42</sup> NATIONAL AUDIT OFFICE, *supra* note 14, ¶ 1.16.

employment in question, and (ii) he is paid at or above the appropriate rate for the job as stated in the Codes of Practice in Appendix J.”<sup>43</sup>

#### **D. Tier 3: Low-Skilled Workers**

Tier 3 was designed to fill temporary low-skilled labor shortages. However, this tier was never opened and is currently suspended.<sup>44</sup> The UK closed this tier after it determined that its low-skilled labor needs were being met by workers from within the European Union, who do not need to obtain a visa to enter and work in the UK.<sup>45</sup>

#### **E. Tier 5: Temporary Workers**

Admission into the UK for temporary workers is provided for by Tier 5 of the points-based immigration system. There are six categories of Tier 5 temporary workers:

- Creative and Sporting,
- Charity Workers,
- Religious Workers,
- Government Authorized Exchange Programs,
- International Agreements, and
- Youth Mobility Scheme.<sup>46</sup>

To apply for a visa under almost all Tier 5 categories, the applicant must have a job offer from a sponsor licensed in the UK, have a valid Certificate of Sponsorship from this sponsor prior to applying for the visa, and score a certain number of points on an assessment. To qualify as a Tier 5 temporary worker in most categories the applicant must score thirty points (for a Certificate of Sponsorship) and ten points by demonstrating they have maintenance funds of at least £900 (approximately US\$1400) in a bank account.<sup>47</sup> Certain workers may be exempt from demonstrating the maintenance funds if an “A rated” sponsor certifies that they will not claim public funds during their stay as a temporary worker.<sup>48</sup>

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<sup>43</sup> Immigration Rules, *supra* note 6, 245GF(e).

<sup>44</sup> MIGRATION ADVISORY COMMITTEE, LIMITS ON MIGRATION, 2010, ¶ 2.10, available at <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/aboutus/workingwithus/mac/mac-limits-t1-t2/report.pdf?view=Binary>.

<sup>45</sup> *Id.*

<sup>46</sup> *Temporary Workers*, HOME OFFICE UK BORDER AGENCY <http://www.ukba.homeoffice.gov.uk/visas-immigration/working/tier5/>.

<sup>47</sup> Home Office UK Border Agency, *Tier 5 (Temporary Worker) of the Points-Based System—Policy Guidance*, Dec. 2012, ¶ 135, <http://www.ukba.homeoffice.gov.uk/sitecontent/applicationforms/pbs/tier5temporaryworker/guidan1.pdf>.

<sup>48</sup> Immigration Rules, *supra* note 6, ¶ 105 & App. C, ¶ 8.

A sponsor is a UK-based organization that has registered as a licensed sponsor that meets the requirements for the particular category of Tier 5. Employers must assign prospective employees with a certificate of sponsorship, which is required before an application can be made, and provide assurance that the applicant is able and intends to work in a specific job.<sup>49</sup>

Accruing the requisite number of points alone does not guarantee a successful application, and the UK Border Agency bases its decision on the complete application and evidence provided to support it.<sup>50</sup> Eligibility for entry as a Tier 5 temporary worker may be refused on “general grounds” even if the applicant is otherwise fully eligible. These general grounds are extensive, and include a criminal history or a previous breach of the immigration rules.<sup>51</sup>

### 1. *Visa Conditions*

Individuals entering as temporary workers may engage in work that is supplementary to work that they have been granted leave to enter the country for, provided the job is for less than twenty hours per week, does not interfere with the hours for which the Certificate of Sponsorship was originally granted, and is “on the shortage occupation list in Appendix K<sup>52</sup> of the Immigration Rules or a job in the same sector and at the same level as the work for which the Certificate of Sponsorship was assigned.”<sup>53</sup>

In almost all Tier 5 categories workers may change jobs while in the UK as a Tier 5 worker. The new job can be either with the same sponsor or a new one. If a new sponsor is used, the worker must be provided with a new certificate of sponsorship, and the applicant must provide new evidence that he or she meets the maintenance requirement. The rules do not permit Tier 5 workers to switch into a different tier or category and they may only stay the maximum time permitted in the Tier 5 category they originally selected.<sup>54</sup>

If a temporary workers employment ends before the time allotted in their visa, the UK Border Agency will reduce the duration of stay to a maximum of sixty days.<sup>55</sup> With the exception of workers in the international agreement category who have worked as private servants in a

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<sup>49</sup> Home Office UK Border Agency, *supra* note 47, ¶ 44.

<sup>50</sup> *Id.* ¶ 13.

<sup>51</sup> Home Office, UK Border Agency, *General Grounds for Refusal*, Dec. 2012, <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/modernised/general-grounds-refusing/about.pdf?view=Binary>.

<sup>52</sup> Immigration Rules, *supra* note 6, App. K. There are a wide range of jobs that are experiencing shortages and are listed in this appendix, including civil engineers, biological scientists, software professionals, medical practitioners, social workers, nurses, dancers, and artists.

<sup>53</sup> Home Office, *supra* note 47, ¶ 158.

<sup>54</sup> *Id.* ¶ 164-5.

<sup>55</sup> *Id.* ¶ 85.

diplomatic household,<sup>56</sup> there is no method through which a person who is in the UK as a Tier 5 worker can apply for permanent residence or citizenship.<sup>57</sup>

## 2. Tier 5 Categories

The following is a brief summary of some specific provisions that apply to each of the Tier 5 categories:

### a. Creative Workers and Sportspersons

To enter the UK as a sportsperson in the Tier 5 category, the individuals must be internationally established at the highest level and/or their employment must make a significant contribution to the development and running of high-level sports. Additionally, the sponsor's endorsement must confirm that the post could not be filled by a suitable settled worker in the UK.<sup>58</sup> Sportspersons must be endorsed by a governing body of their sport that is recognized by the UK. Requirements for coaches are less onerous and simply require that the individuals be suitably qualified to perform the job.

Sponsors of creative workers must follow a code of practice in the Immigration Rules, which requires taking the needs of the resident labor market into account. If a job is not covered by a code of practice, the sponsor is required to show that a settled worker could not fill the post.<sup>59</sup>

Sportspersons may be in the country for a maximum of twelve months. There are no ways to extend in the Tier 5 category past that time.<sup>60</sup> Creative workers may receive entry clearance for up to twelve months, extendable for a maximum of twenty-four months, provided they remain with the same sponsor.

### b. Religious Workers

Religious workers may be admitted into the UK for a maximum stay of twenty-four months to preach and do both pastoral and nonpastoral work.<sup>61</sup>

### c. Charity Workers

Charity workers may enter the UK for a maximum of twelve months to do unpaid voluntary work. They can not receive paid employment and must intend to carry out work "directly related to the purpose of the sponsoring organisation."<sup>62</sup>

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<sup>56</sup> Immigration Rules, *supra* note 6, 245ZS.

<sup>57</sup> *Tier 5 (Temporary Worker—Government Authorised Exchange)*, HOME OFFICE: UK BORDER AGENCY, <http://www.ukba.homeoffice.gov.uk/visas-immigration/working/tier5/government-authorised-exchange/settlement/>.

<sup>58</sup> Home Office, *supra* note 47, ¶ 101.

<sup>59</sup> *Id.* ¶ 104.

<sup>60</sup> *Id.* ¶ 58–62.

<sup>61</sup> *Id.* ¶ 88.

d. Government Authorized Exchange Programs

The Government Authorized Exchange category is “for those coming to the United Kingdom through approved schemes that aim to share knowledge, experience and best practice through work placements, whilst experiencing the wider social and cultural setting of the United Kingdom. This category cannot be used to fill job vacancies or provide a way to bring unskilled labour to the United Kingdom.”<sup>63</sup> There are different programs provided for under this subcategory, including: work experience programs; research programs; and training programs.<sup>64</sup>

Individuals in this category, with limited exceptions, may not be sponsored by individual employers or organizations as is required by most other Tier 5 categories. Instead, an overarching government body is responsible for assigning Certificates of Sponsorship.<sup>65</sup>

Entry into the UK in this category is for a maximum period of twenty-four months.<sup>66</sup>

e. International Agreements

This category is for individuals that enter the UK under an international agreement. This category includes private servants in diplomatic households and employees of overseas governments and international organizations.<sup>67</sup> For private servants of diplomatic households the sponsor must guarantee that the applicant is at least eighteen years old; a named member of staff of a diplomatic or consular mission with all the privileges and immunities as provided by the Vienna Convention on Diplomatic Relations; or a named official employed by an international organization. The sponsors must also guarantee that the applicant intends to do domestic work on a full-time basis for them and will not perform other work, and will leave the UK once his or her permission to stay ends.<sup>68</sup> Overseas governments and international organizations that act as sponsors must guarantee that the applicant is under a contract of employment with them, will only work in the job specified in the application, and will not change into a different category of worker within the international agreements category upon entry into the UK.<sup>69</sup>

Entry into the UK is for a maximum period of twenty-four months, with limited exceptions that include private servants in diplomatic households and employees of overseas governments.<sup>70</sup>

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<sup>62</sup> *Id.* ¶ 119.

<sup>63</sup> *Id.* ¶ 125.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* ¶ 127.

<sup>66</sup> *Id.* ¶ 88.

<sup>67</sup> *Id.* ¶ 130.

<sup>68</sup> *Id.* ¶ 132.

<sup>69</sup> *Id.* ¶ 131.

<sup>70</sup> *Id.* ¶ 88.

f. Youth Mobility Scheme

The youth mobility scheme is open to young people aged eighteen to thirty-one on the date of application. Once in the country, individuals in this category may extend their stay for up to two years, but may not transfer into another Tier or category.<sup>71</sup> Applicants under this category must give evidence that they have sufficient maintenance by showing a bank balance of at least £1800 (approximately US\$3500) to support themselves during their stay.

This program applies to residents of only certain countries, and there are restrictions on the number of places allotted to each country participating under the program. For 2013, the limits are:

- Australia—35,000 places
- Canada—5,500 places
- Japan—1,000 places
- Monaco—1,000 places
- New Zealand—10,000 places
- Republic of Korea—1,000 places
- Taiwan—1,000 places.<sup>72</sup>

Individuals entering under this category may not bring dependents, and applicants must not have any children under the age of eighteen living with them, or for whom they are financially responsible.<sup>73</sup>

#### IV. Sponsor Responsibilities

As noted above, to help tie in sponsoring employers to immigration enforcement, the sponsors have a number of duties. They are responsible for keeping records of the applicant's passport, immigration documents, and contact details. They are obliged to report any person they sponsor to the UK Border Agency if

- the worker does not show for work on his or her first day,
- the worker is absent from work for more than ten working days without permission,
- the job has ended for any reason,
- the sponsorship stops for any reason, and
- the worker has any change in circumstances, such as a change of job.<sup>74</sup>

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<sup>71</sup> *Id.* ¶ 35.

<sup>72</sup> *Youth Mobility Scheme*, HOME OFFICE, UK BORDER AGENCY, <http://www.ukba.homeoffice.gov.uk/visas-immigration/working/tier5/youthmobilityscheme/>.

<sup>73</sup> Home Office, *supra* note 47, ¶ 35.

Notification requirements also arise if the sponsor believes a worker is breaching the conditions of his or her immigration status or if the sponsor believes the employee is engaging in criminal or terrorist activity.<sup>75</sup>

## V. Resident Labor Market Test

As the purpose of the majority of the points-based worker categories is to fill positions that cannot be filled by a UK resident, there is a resident labor market test that must be performed. This is designed to ensure that there are no UK residents that are able to perform the job for which the employer sponsors a migrant worker. This test requires employers to advertize positions through the Jobcentre Plus and nationally for four weeks before they are able to sponsor a migrant. The UK Border Agency checks that employers have met this requirement.<sup>76</sup>

## VI. Statistics of Applications Under the Points-Based System

The following table provides points-based system data for 2010-11, as reported by the UK National Audit Office:

Tier	Visa Application	Apply Within UK (%)	Apply Outside UK (%)	Total	Total % of Applications
<b>Tier 1</b>	General	55,018 (63%)	31,901 (37%)	86,919	48%
	Post-Study	82,455 (89%)	10,379 (11%)	92,834	51%
	Investor	337 (45%)	407 (55%)	744	0.4%
	Entrepreneur	244 (42%)	336 (58%)	580	0.3%
	<b>Total</b>	<b>138,054 (76%)</b>	<b>43,023 (24%)</b>	<b>181,077</b>	<b>50%</b>
<b>Tier 2</b>	General	26,734 (59%)	18,499 (41%)	18,499	40%
	Intracompany Transfer (ICT)	12,732 (20%)	51,358 (80%)	64,090	57%
	Minister of Religion	1,132 (61%)	739 (39%)	1,871	2%
	Sportsperson	181 (27%)	494 (73%)	675	1%
	<b>Total Tier 2</b>	<b>40,779 (36%)</b>	<b>71,090 (64%)</b>	<b>111,869</b>	<b>31%</b>
<b>Tier 5</b>	<b>Total Tier 5</b>	<b>454 (1%)</b>	<b>67,469 (99%)</b>	<b>67,923</b>	<b>19%</b>
<b>Total</b>		<b>179,287 (50%)</b>	<b>181,582 (50%)</b>	<b>360,869</b>	

*Source:* UK NATIONAL AUDIT OFFICE, REPORT BY THE COMPTROLLER AND AUDITOR GENERAL, IMMIGRATION: THE POINTS-BASED SYSTEM—WORK ROUTES, 2010–11, H.C. 819, at 13, <http://www.official-documents.gov.uk/document/hc1011/hc08/0819/0819.pdf>.

<sup>74</sup> *Id.* ¶ 60.

<sup>75</sup> *Id.* ¶ 60.

<sup>76</sup> NATIONAL AUDIT OFFICE, *supra* note 14, ¶ 3.18.

## VII. National Audit Office Review of the System

In 2011, the National Audit Office (NAO) undertook a substantive review of the points-based migration system. It found a number of areas in which the system was operating effectively, and other areas in which it was not meeting its aims.<sup>77</sup>

The NAO noted that Tier 1 partially achieved its objective, and around 60% of workers who stayed in the UK after studying worked in skilled or highly skilled professions.<sup>78</sup> However, in the Tier 1 post-study work route, the NAO found that it was “unlikely to have met its original objective of selecting only the most able international students to work in the UK.”<sup>79</sup>

The review found that Tier 2 migrants “largely met employers’ needs for skilled workers although a third of employers . . . wanted to recruit more skilled foreign workers than they were able to.”<sup>80</sup> The NAO noted that most migrants did not end up working in positions that were acute or high-priority shortages.

The IT systems through which the points-based system operates were criticized for not being able to extrapolate data to enable the UK Border agency to assess and manage compliance with the immigration controls.<sup>81</sup>

While the focus of the system is on employers to monitor their migrant employees’ compliance with immigration rules, the NAO has found that the UK Border Agency is not adequately managing the risk of noncompliance of sponsors with their monitoring and reporting role. Specifically, it notes that the UK Border Agency does not “yet have an adequate grip on how well sponsors are fulfilling their duties.”<sup>82</sup> It has only visited 15% of the employers that it has licensed as sponsors, down from a goal of 40%.<sup>83</sup> There is further disorganization regarding how many should be visited, and there have been no statistics on the proportion of visits that have identified issues of compliance.<sup>84</sup> Despite these issues, the UK Border Agency has reported that 96% of its sponsor employers are compliant with the immigration rules.<sup>85</sup>

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<sup>77</sup> *Id.* ¶ 14.

<sup>78</sup> *Id.* ¶ 7.

<sup>79</sup> *Id.* ¶ 5.

<sup>80</sup> *Id.* ¶ 8.

<sup>81</sup> *Id.* ¶ 14.

<sup>82</sup> *Id.* ¶ 16.

<sup>83</sup> *Id.* ¶ 3.15.

<sup>84</sup> *Id.* ¶ 16.

<sup>85</sup> *Id.* ¶ 16.

### VIII. Illegal Immigration

Illegal immigration is a continuing problem in the UK and as the NAO has noted, it is exacerbated by the lack of exit controls that make verifying whether individuals have overstayed their permitted time extremely difficult. The government has declined to disclose the top three countries for which illegal immigrants originate from, but has stated that the majority come to the UK through Turkey and then into Greece.<sup>86</sup>

The NAO notes that under the points-based system the UK Border Agency has not sufficiently followed up with workers to ensure that they leave the UK once their leave to remain expires. There are estimates that up to 181,000 migrants of all visa types are still in the UK after the expiration of their leave to remain.<sup>87</sup> This has been attributed in part to the lack of exit checks, making it almost impossible to identify individuals who overstay, and to IT systems that are unable to identify individuals who need to renew their visas.<sup>88</sup>

The government has established an E-borders program, which requires carriers to provide certain information regarding the passengers and crew they carry. Carriers are under a mandatory duty to provide travel document information for crew and passengers, as well as the name of the carrier and its departure and arrival points when requested. The information must only be given when requested, and at the point when no other embarkation for other passengers or crew is allowed.<sup>89</sup> Carriers are also required to provide additional data, such as passenger information that includes the name, address, telephone numbers, ticketing information, and travel itinerary of the passengers.<sup>90</sup> A Code of Practice provides that data collected by the UK Border Agency may be shared with other law enforcement agencies in the UK.<sup>91</sup> One of the controversial issues of this system is extending it to ports and railway stations within the EU as a number of member states view sharing passenger and crew information as violating the European Union's free movement laws.<sup>92</sup>

In addition to preventing individuals from illegally entering the country, the UK also has a law that requires employers to verify that all employees they hire are able to lawfully work in the UK. Employers that fail to do so and employ people in the UK without authority to work can be fined. This law is actively enforced and in "2010–11, the UK Border Agency (UKBA) collected

<sup>86</sup> 7 Mar. 2011, HANSARD, H.C. (6th ser.) 627, <http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm110307/debtext/110307-0001.htm>.

<sup>87</sup> NATIONAL AUDIT OFFICE, *supra* note 14, ¶ 17.

<sup>88</sup> *Id.* ¶ 3.9.

<sup>89</sup> UK Border Agency, *E-Borders Overview of Legislation*, at 3, <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/travel-customs/ebordersoverview>, contained in The Immigration and Police (Passenger, Crew and Service Information) Order 2008, SI 2008/5, [http://www.opsi.gov.uk/si/si2008/uksi\\_20080005\\_en\\_1](http://www.opsi.gov.uk/si/si2008/uksi_20080005_en_1).

<sup>90</sup> *Id.*

<sup>91</sup> The Immigration, Asylum and Nationality Act 2006 (Data Sharing of Practice) Order 2008, SI 2008/8, [http://www.opsi.gov.uk/si/si2008/uksi\\_20080008\\_en\\_1](http://www.opsi.gov.uk/si/si2008/uksi_20080008_en_1).

<sup>92</sup> Brian Wheeler, *The Truth Behind UK Migration Figures*, BBC NEWS (Oct. 12, 2012), <http://www.bbc.co.uk/news/uk-politics-19646459>.

£6.91 million [approximately US\$11 million] in illegal working civil penalties from those employers who were found to be employing illegal workers.”<sup>93</sup>

The issue of compliance with immigration rules has been further compounded by the faltering economy. The UK has recently cut 20% of the UK Border Agency’s budget, and there have been over 5,200 job losses from this Agency. Despite this big drop in funding and staffing, the government claims that the work of the UK Border Agency has not been undermined and that the use of better technology and intelligence are resulting in higher numbers of illegal immigrants being caught at the border.<sup>94</sup>

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<sup>93</sup> 20 Feb. 2012, HANSARD, H.C. (6th ser.) 512W, <http://www.parliamentonline.co.uk/hansard/hocw/120220w0002.htm>.

<sup>94</sup> 7 Mar. 2011, HANSARD, H.C. (6th ser.) 627, <http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm110307/debtext/110307-0001.htm>.