

# Recent Reform of the Chinese Employment-stream Migration Law Regime

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*The Chinese employment-stream migration law regime recently underwent fundamental reformation. The introduction of a unified work permit for foreign nationals issued by the local bureaus of the State Administration of Foreign Experts Affairs constitutes a significant institutional and procedural change that trims procedures and clarifies competences. Further, the new classification scheme divides foreign nationals into three categories according to their academic qualifications, professional experience, and income, and is supplemented by a points system. The main objective of the scheme is to establish a modern migration law and policy system that will attract highly skilled global talent. Applying a doctrinal approach, this study analyzes the most recent policies and legal reform measures pertaining to the employment-related migration system. It discusses changes to that system against the backdrop of other factors affecting the legal status of foreign nationals in China such as the resident permit system, naturalization, labor standards, social insurance, legal remedies, the legalization of illegal labor migration, and the legal framework for integrating foreign employees into society.*

**Keywords:** Chinese Migration Law, High-Skilled Migration, Rights of Foreigners, Integration of Foreign Employees

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## I. INTRODUCTION

Today, many foreign nationals arrive in the People's Republic of China ("PRC") for employment purposes. These international migrants can be divided into two groups: regular migrants who enter China legally for work purposes and irregular migrants who enter the country to work, albeit without the required legal approval. Falling between the two are permanent residents who are eligible to work in China. Foreign nationals who are legally permitted to work are provided services offered by the governmental bodies in charge of foreign experts, human resources and social security, culture, broadcasting, film and television, offshore resources, public security, and foreign affairs. As no single permit scheme covers the legal entry, stay, and work decisions concerning foreign nationals in China, employment-stream immigrants have to apply separately to different state authorities for visas, work permits, and residence permits.

For example, foreign experts are issued a work permit by their local bureau of the State Administration of Foreign Experts Affairs ("SAFEA"), whereas ordinary foreign employees receive their work permit from local bureaus of the Ministry of Human Resources and Social Security ("MHRSS") (although, as noted below, SAFEA began issuing a unified work permit to both groups from 2017). Embassies and consulates of the PRC are responsible for issuing employment (Z) visas, whereas the public security authorities are tasked with issuing residence permits to employed foreigners and punishing illegal employment.

The administrative mechanisms governing foreign nationals who come to China for employment purposes have undergone extensive reforms in recent years. In December 2015, the Office of the Leading Group of the State Council on the Reform of the Administrative Examination and Approval System delivered an Opinion on the Integration of Matters Concerning Foreigners Working in China [外国人来华工作许可], that introduced a unified work permit for all foreign employees thereby abolishing the distinction between work permits for ordinary foreign employees [外国人入境就业许可] and those for foreign experts [外国专家来华工作许可].<sup>1</sup>

Between October 2016 and March 2017, SAFEA piloted the reformed work permit system in ten municipalities/provinces, including Beijing, Tianjin, Hebei, Shanghai, Anhui, Shandong, Guangdong, Sichuan, and Ningxia. The

Implementation Plan for the Pilot Work License System for Foreigners in China stipulates as follows.

The aim of the pilot reforms for unified work permits is to unify the service system for foreigners' work permits, simplify the application materials, improve the application workflow, scientifically implement differentiated management, push information sharing, innovate supervision during and after the decision-making process, and improve supervision efficiency. [Another] aim is to hold on to the principle of “encouraging the high-end, controlling the regular, restricting the low [鼓励高端、控制一般、限制低端]” and to shape a [unified] system for the administration of foreigners' employment ... to increase the level of scientific rigor, regulation, information, and the internationalization of services and administration.<sup>2</sup>

Employment-stream immigrants are now divided into three categories: A, B, and C, which encompass highly skilled foreign experts, foreign specialist talent, and ordinary foreign workers, respectively. In November 2016, the Central Committee of the Chinese Communist Party (“CPC”) and the State Council issued an Opinion on Strengthening the Attraction of Foreign Talent under New Circumstances,<sup>3</sup> which emphasizes the “consolidation of resources for administrating and serving the attraction of foreign talent, the optimization of matching administrative competences with tasks, and the establishment of a unified, strong, and efficient administration system for foreign talent.”<sup>4</sup> As of the end of March 2017, the authorities in the ten aforementioned pilot zones had issued 9,638 unified work permits to foreign employees.<sup>5</sup> Following the pilot period, the unified work permit system for employment-stream immigrants was implemented nationally.<sup>6</sup> Between June 2016 and May 2017, SAFEA tested the Guiding Catalogue for Foreigners Working in China and the Plan for the Accumulation of Points, both of which categorize employment-stream immigrants via a points system to establish a system for attracting and evaluating international talent that caters to the needs of the labor market. In addition to obtaining a specified number of points, such immigrants need to possess a job offer. Today, however, there is no legal requirement for employers to prove that there is no Chinese national who can fill a given position before offering it to a non-national.<sup>7</sup>

The primary purpose of this study is to analyze legal and policy documents

on the substantive, procedural, and institutional aspects of recent migration law in China. We also investigate the classification scheme and points system according to which employment-stream immigrants to the country qualify for the new unified work permit. Our analysis examines recent changes in migration law against the backdrop of other factors affecting the legal status of foreign nationals in China such as the resident permit system, naturalization, labor standards, social insurance, legal remedies, the legalization of illegal labor migration, and the legal framework for the integration of foreign nationals into Chinese society.

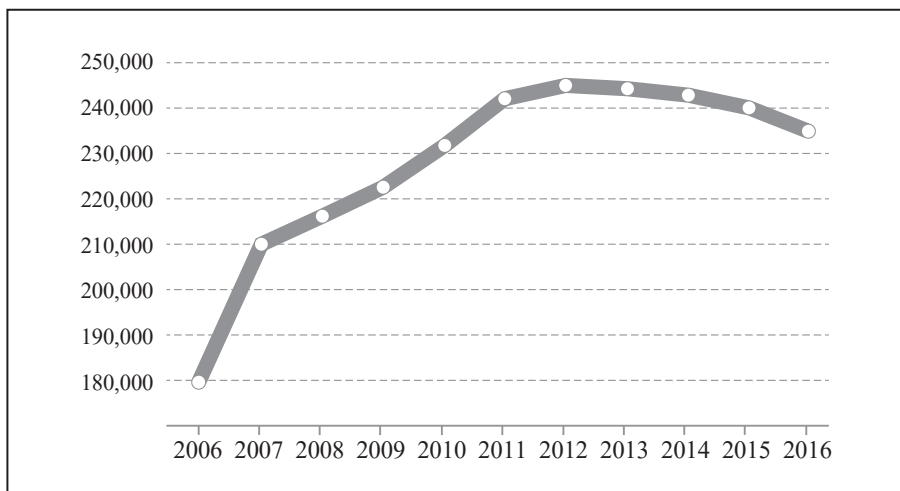
This paper is composed of six parts. Following an introduction to the development of employment-stream immigration to China, we analyze in detail the legal preconditions of the employment and residence of foreign nationals, as well as the procedural protections and social rights afforded them.

## II. BASIC FACTS OF EMPLOYMENT-STREAM IMMIGRATION TO CHINA

Approximately 240,000 foreign nationals enter China annually for employment purposes and hold a foreigners' work permit. Public Security Vice Minister Zhang Huanning reported to the Standing Committee of the National People's Congress ("NPC") in April 2012<sup>8</sup> that around 74,000 foreigners were employed in China in 2000.<sup>9</sup> Since 2007, the Ministry of Labor and Social Security (now MHRSS) and National Bureau of Statistics have regularly issued data on the holders of foreigners' work permits in their Statistical Report on the Development of Work and Social Security. It can be seen from Table 1 that the number of such holders increased 28.7 percent over the 2006-2010 period, rising from 180,000 to 231,700, and then holding fairly steady in the years since to reach 235,000 by the end of 2016. Most foreign employees in China work in foreign-invested companies, as teachers, or as the representatives of foreign enterprises, and around 60 percent reside in metropolitan areas such as Shanghai, Beijing, and Guangzhou. By the end of 2015, the number of employed foreigners in Shanghai had reached 86,536, accounting for 36 percent of the 240,000 foreign employees in all of China that year.<sup>10</sup>

**Table 1: Number of foreign employees in China holding a work permit in the 2006–2016 period<sup>11</sup>**

Year	Foreign employees	Year	Foreign employees
2006	180,000	2012	246,400
2007	210,000	2013	244,000
2008	217,000	2014	242,000
2009	223,000	2015	240,000
2010	231,700	2016	235,000
2011	241,900		



When the distinction between ordinary foreign employees and foreign experts was still in place, the number of the latter also increased over time. SAFEA's criteria for admitting individuals as foreign experts were set in accordance with China's developmental needs.<sup>12</sup> In 2001, SAFEA and the National Bureau of Statistics jointly conducted the first nation-wide survey of foreign experts (including those from Hong Kong, Macau, and Taiwan) working in the economic arena across Mainland China. A second survey in 2002 was extended to experts employed in the fields of culture and education. According to a study reporting the survey results, 220,000 foreign experts were working in China in 2000.<sup>13</sup> Over the period covered by the government's 12th five-year plan, their numbers grew by more

than 5 percent annually, rising from 529,000 in 2011 to 620,000 in 2015.<sup>14</sup> At the start of the period, 122,000, 85,000, and 72,000 of those experts were employed in Guangdong, Shanghai, and Beijing, respectively, together accounting for 52.7 percent of the total number employed across China in 2011.<sup>15</sup>

China also faces the challenges of illegal migration.<sup>16</sup> Foreign nationals working illegally constitute the country's largest group of irregular migrants. Illegal migration is officially characterized by the term *sanfei* [三废] (the so-called Three Illegalities), which stands for illegal entry, illegal work, and illegal stay in China.<sup>17</sup> Foreign nationals working illegally tend to be employed as foreign language teachers, housekeepers, or movie performers or be involved in labor-intensive production, most of whom initially entered China as exchange students or visitors. After 1995, when the public security authorities in charge of exit-entry administration handled 10,000 *sanfei* cases, their numbers rose steadily year-by-year, beginning to decline only in 2007. In 2011, the exit-entry authorities handled over 20,000 *sanfei* cases.<sup>18</sup> In 2016, the border inspection authorities dealt with 2,705 cases of illegal exit and entry and 63,700 cases of violations other than those of exit-entry regulations.<sup>19</sup> In that year, the public security authorities in Beijing, Guangdong, Hebei, Guizhou, Hunan, Guangxi, Sichuan, Fujian, Jilin, and Jiangxi launched intensive campaigns to crack down on *sanfei* foreign nationals. Between June and August of 2016, for example, the Jiangxi authorities rolled out campaigns to fight the employment, accommodation, hiding of such foreign nationals, and other violations of immigration-related laws.<sup>20</sup>

### III. LEGAL FRAMEWORK FOR EMPLOYMENT-STREAM IMMIGRANTS

There is no unified law for admitting employment-stream immigrants to the national labor market. Instead, as discussed above, a variety of laws are governing foreign nationals who enter China for employment purposes and the work open to them. The overall aim of current legislation is to encourage highly skilled foreign nationals to work for China, to help 'legitimate' foreign nationals, and to restrict the entry of less skilled foreign nationals.

## **A. Legal Preconditions for the Employment and Residence of Foreign Nationals**

According to the 2012 Exit-Entry Administration Law of the Peoples Republic of China [中华人民共和国出境入境管理法] (hereinafter Exit-Entry Law), to legally work in China, foreign nationals are required to hold both a work permit and a residence permit for work purposes, and entities and individuals are prohibited from employing those who do not hold these documents.<sup>21</sup> The validity of a residence permit for work purposes ranges from 90 days to five years.<sup>22</sup>

Foreign nationals are required to obtain a work visa before they enter China. The 2013 Regulations on the Administration of the Entry and Exit of Foreign Nationals<sup>23</sup> (hereinafter 2013 Regulations) replaced the 1986 Rules for the Implementation of the Law Governing the Administration of Entry and Exit of Foreigners.<sup>24</sup> They stipulate that foreign nationals who intend to take up employment in China, as well as their relatives, must apply for a Z-visa (or an R-visa in the case of highly skilled experts). To obtain such a visa, the individual concerned has to submit a work permit notice<sup>25</sup> and his/her passport to the relevant Chinese embassy or consulate.<sup>26</sup> The local bureaus of SAFEA issue such notices to the person's prospective employer.<sup>27</sup>

Work permits issued to foreign nationals must be endorsed by the State Council, and both the foreign national him or herself and his/her employer are the objects of examination and approval. The 2016 Tentative Service Manual [on] Foreigners' Work Permit[s]<sup>28</sup> builds on the requirements with which foreign nationals must comply to work in China, which were first stipulated in 1996 in the Regulations on the Administration of Employment of Foreigners in China (hereinafter 1996 Regulations),<sup>29</sup> by adding the following wording: "The work should meet the needs of the socioeconomic development of China."

The 2016 Tentative Service Manual further outlines the basic requirements for applying for a work permit notice and a work permit, noting that foreign nationals are required to:

- (1) be at least 18 years old, of good health, without a criminal record [and to] have a designated legal employing entity in China and intend to engage in work [that] requires specialist skills or a certain degree of education;
- (2) be urgently needed as specialists in the country, and their labor should meet the needs of the socioeconomic development of China; and

- (3) follow other laws and legal provisions that regulate the employment of foreigners in China.<sup>30</sup>

The Exit-Entry Law states:

The Human Resources and Social Security Department and the Foreign Experts Department of the State Council shall, in conjunction with other relevant departments of the State Council, formulate and regularly adjust a guiding catalogue for foreign nationals working in China on the basis of the needs for economic and social development and the demand and supply status of human resources.<sup>31</sup>

As noted above, foreign nationals who settle in China to take up employment must also apply for a foreigners' residence permit for work purposes. According to the 2013 Regulations, those applying for such a permit must submit their passports and work permits to the relevant authorities. Foreign nationals employed as high-level experts or urgently needed specialists, or who are otherwise needed by the state, are also required to provide additional information proving their status.<sup>32</sup> Residence permit applications are handled by the Exit-Entry Administration Departments of the local public security authorities at the county level and above, and those departments are also responsible for collecting applicants' biometric data such as fingerprints.<sup>33</sup>

## **B. Highly-skilled (Category-A) Foreign Talent**

A major aim of the PRC government is to attract the world's elite to China, thereby actively encouraging highly skilled foreign talent to come to the country for employment purposes.<sup>34</sup> Before the work permit system for foreign nationals was unified at the national level in 2017, the attraction of such talent was conducted primarily through specific rules governing foreign experts, who were treated differently from ordinary employees. The 1983 Provisional Regulations on Attracting Foreign Talent to Work outlined the residence arrangements for foreign experts.<sup>35</sup> The 1996 Regulations and 2004 Provisions on the Handling of Foreign Expert Work Permits then further provided that they receive specific work permits without the need to apply for an employment license.<sup>36</sup>

In April 2017, the 'foreign experts' category was replaced by the designation



“Category-A foreign nationals.” According to the 2016 Working Foreigners Classification Scheme (hereinafter 2016 Scheme), Category-A foreign nationals comprise such highly skilled talent as scientists, international entrepreneurs, and specialist experts who are urgently needed to further China’s socioeconomic development, and must meet one of the following requirements: (1) participated in a national talent introduction plan; (2) achieved internationally accepted professional standards; (3) adopted a market-oriented position; (4) have an innovative mind-set; (5) qualify as an outstanding young expert; or (6) achieved at least 85 points according to the designated points system.<sup>37</sup> Those who qualify as Category-A foreign nationals undergo a more convenient application procedure, being provided with a ‘green channel,’ and their spouses and children can apply directly for permanent residence status without being subjected to age- or work experience-related restrictions.<sup>38</sup>

Highly skilled overseas talent, who are included in China’s Thousand Talents Plan, constitute the most important group of Category-A foreign nationals. According to the Provisional Measures on the Introduction of Foreign Highly Skilled Talent, individuals in this group must have received a doctoral degree from an overseas university, be no older than 55, work in China for no less than six months per year, and meet one of the following requirements: (1) be a specialist academic who holds a post equivalent to professor at a well-known university or research institute; (2) have professional technical or administrative management talent and hold a senior position in an internationally renowned enterprise or financial institution; (3) be classified as an innovative expert who owns independent intellectual property or controls a core technology, has innovative overseas experience, and is familiar with related industries; or (4) be a highly skilled innovative or entrepreneurial expert who is urgently needed in China.<sup>39</sup> In December 2008, 13 party entities and state organs at the ministerial level, including the CPC Organization Department and National Development and Reform Commission, issued *Several Provisions on Requirements of the Work of Attracting Foreign Highly Skilled Talent*<sup>40</sup> and *Several Provisions on the Special Treatment of Attracted Foreign Highly Skilled Talent*<sup>41</sup> to create a favorable environment for highly talented experts of Chinese ethnicity who return to China from overseas for employment purposes.

Those provisions also provide for the aforementioned ‘green channel’ for

Category-A foreign nationals, who can make use of a self-certification system to prove that they do not have a criminal record, are not required to submit hardcopies of their certificates before entering China, and can submit their applications online. Highly skilled foreign nationals who have been accepted to participate in a national talent plan can further avail themselves of an online self-certification process to submit proof of their work experience, specialist skills, and academic certificates. The authorities have to examine their application and issue a decision within five working days of the approval of the work permit notice or work permit or the extension or cancellation thereof.<sup>42</sup>

The validity period of the residence permits issued to foreign nationals holding an R-visa is longer than that of the residence permits issued to Z-visa holders. According to the 2013 Regulations on the Issuance of Visa Documents by Public Security Organs, the maximum validity period for a residence permit issued to R1- and Z-visa holders is five years and two years, respectively. Other stipulations in those regulations include the following.

- (1) [T]he validity period of residence permits issued to highly skilled foreign experts and specialists [who are] urgently needed shall not exceed five years;
- (2) the validity period of residence permits issued to foreign investors who directly invest US\$2,000,000 or more and foreigners employed in [foreign-invested] enterprises shall not exceed two years;
- (3) the validity period of residence permits issued to high-level management personnel and important technical specialists who work at a Fortune Global 500 enterprise or in the regional headquarters of a transnational enterprise or who hold the post of vice-manager or higher in an enterprise filed with the exit-entry administration authorities or receive a comparable salary shall not exceed five years;
- (4) the validity period of residence permits [issued to] leading academic or research personnel employed by national or provincial scientific research institutions or universities, as well as personnel holding the post of associate professor or associate researcher or higher, or academic or research staff who receive a comparable salary and are employed at a relevant institution shall not exceed two years; and
- (5) the validity period of residence permits [issued to] other working foreigners shall not exceed one year.<sup>43</sup>

The 2016 Tentative Service Manual for Foreigners' Work Permits allows Category-A

foreign nationals to apply for a work permit even though they are already living in China and entered the country on another type of visa or hold a residence permit issued for purposes other than work. The same holds for the family members of such foreign nationals, as long as they hold valid visas and residence permits of another category.<sup>44</sup>

### **C. Regular (Category-B) Foreign Talent**

According to China's overarching migration policy, 'regular' foreign experts who come to China for employment purposes need to 'be controlled' and must serve the needs of the country's socioeconomic development.<sup>45</sup> Such experts are defined as Category-B foreign nationals in the 2016 Scheme. In addition to meeting the requirements of the Guiding Catalogue for Foreigners Working in China and being urgently needed to further China's socioeconomic development, Category-B foreign nationals need to meet at least one of the following requirements: (1) hold at least a bachelor's degree and have two or more years of relevant work experience in the position of manager or technical specialist; (2) hold a master's degree (with distinction) from a Chinese university; (3) hold a master's or higher-level degree from a top-100 overseas university; (4) be a qualified foreign language teacher; or (5) accrue 60 to 84 points under the points system.<sup>46</sup> Regular foreign experts must also be no older than 60. However, if an employer has an urgent need for a particular individual, the age-, degree-, and work experience-related restrictions may be waived. The number of such experts in the country at any given time is restricted by the needs of the market.<sup>47</sup>

### **D. Low-skilled (Category-C) Foreign Employees**

Current Chinese migration policies emphasize the restriction of low-skilled foreign nationals to protect Chinese citizens' right to employment.<sup>48</sup> Such foreign nationals are classified as Category-C migrants,<sup>49</sup> and there are state-mandated quotas on their entry and stay. According to the 2016 Scheme, Category-C foreign nationals can be admitted, if the national labor market so demands, to engage in temporary, seasonal, non-technical, or service work pursuant to national regulations and policies if they fulfill one of the following criteria: (1) their employment has been authorized by the relevant department of the State Council or is based on a bilateral agreement between China and another country; (2) they came to China

to take up an internship on the grounds of a bilateral agreement; (3) they are employed to provide housekeeping services to a highly skilled foreign expert; (4) they work in a specialist field such as deep-sea fishing; (5) they are engaged in seasonal work; or (6) are working in any other position subject to a quota.<sup>50</sup>

The Ministry of Public Security issued measures to support the Shanghai Technology Innovation Center in July 2015, the innovative development of Beijing in March 2016, and the Fujian Free-Trade Zone in November 2016. According to those measures, highly skilled foreign nationals or residents of Hong Kong or Macau are allowed to employ foreign nationals for personal services if they have permanent residence status or hold a residence permit for work purposes, although they are required to submit a personal guarantee and employment contract. As of November 2016, Shanghai had issued 23 residence permits to foreign nationals who provide housekeeping services to highly skilled foreign nationals living and working in the city.<sup>51</sup>

Practical arrangements for Category-C foreign nationals have also been implemented in certain border regions in Yunnan to cater to the needs of local economic development. In January 2015, for example, the counties of Dehong and Honghe, city of Baoshan, and other counties and cities in Yunnan province adopted joint implementation measures of the national requirements for foreign employees to regulate the status of foreign border-area residents who cross into China to seek employment.<sup>52</sup>

These measures enlarge the scope of the entities permitted to help individual economic organizations and individuals legally employ foreign nationals. In general, ordinary workers who reside in the border area of Yunnan are allowed to work in China. Administrative processes and requirements have been adapted to local circumstances by introducing a “registration certificate for the employment of foreign border-area residents” and a “workers’ certificate for foreign border-area residents,” which replace the application form to employ foreigners, the foreigners’ work permit, and the foreigners’ employment license.<sup>53</sup> Such work permit requirements as a bachelor’s degree and two years of work experience have also been dropped, if applicants could prove that they have the necessary skills to perform the work in question. Further, instead of a work permit and residence permit, foreign nationals working in the border region of Yunnan require only an exit-entry pass, health certificate, temporary residence permit for border-area

residents, and registration certificate for the employment of foreign border-area residents.<sup>54</sup> As of March 2016, Dehong had issued 31,784 workers' certificates to foreign border-area residents and 218 registration certificates for the employment of such residents.<sup>55</sup>

### **E. Illegal Employment of Foreign Nationals**

The Exit-Entry Law defines 'illegal employment' as: (1) working in China without a work permit or work-type residence permit; (2) working in China beyond the scope specified in the work permit; or (3) working in China as a foreign student beyond the prescribed scope or period of employment in violation of the rules on work-study administration.<sup>56</sup> It further provides for administrative penalties for illegal employment, illegal hiring, and fraudulently obtaining a work permit for a foreigner. A fine of up to RMB 20,000 can be imposed on foreign nationals who are illegally employed. In serious circumstances, they can be imprisoned for up to 15 days. A fine of up to RMB 50,000 and RMB 100,000, respectively, can be levied on individuals and entities who broker illegal employment for foreigners, and income from illegal employment can also be confiscated. Those who illegally hire a foreign national face a fine of up to RMB 100,000.<sup>57</sup> A fine of up to RMB 5,000 can be imposed on foreign nationals who obtain a visa, residence permit, or other exit or entry credentials by falsification or other fraudulent means. In serious circumstances, the fine can reach as high as RMB 20,000 and be accompanied by up to 15 days' imprisonment. If such illegal acts are committed by an entity, a fine of up to RMB 50,000 can be imposed, and the responsible person in charge and other liable persons can be imprisoned for up to 15 days.<sup>58</sup>

As the Exit-Entry Law provides only for administrative penalties rather than criminal sanctions, it is comparatively lenient toward violations of migration regulations relative to other countries.<sup>59</sup> According to the law, foreign nationals who have a serious disease, are pregnant or breast-feeding, or are under the age of 16 or over the age of 70 cannot be detained while being investigated.<sup>60</sup> Furthermore, administrative reconsideration can be requested or litigation brought against fines, the confiscation of illegal gains, orders to exit China within a prescribed time limit, or other administrative penalties.<sup>61</sup> Final decisions on exceptions to the deportation of a foreign national rest with the Ministry of Public Security. Such a deportation order can be issued in the case of a serious violation

of the Exit-Entry Law.<sup>62</sup>

## **IV. LEGAL FRAMEWORK GOVERNING THE RIGHTS AND PROTECTIONS OF EMPLOYMENT-STREAM IMMIGRANTS**

In this section, we discuss the social and procedural rights of foreign nationals who enter and stay in China for employment purposes.<sup>63</sup>

### **A. Procedural Protections with regard to Applications for Work and Residence Permits**

Compared with the laws in other jurisdictions, Chinese law prescribes very short time limits for administrative decisions on work and residence permits for foreign nationals. To receive a visa for work purposes, the applicant's employer has to apply for a work permit notice before the applicant enters China. The 2016 Tentative Service Manual on Foreigners' Work Permit states that a competent administrative body has to conduct a preliminary assessment of the application materials submitted online. If they are complete and the application meets the legal requirements, the work permit notice application is processed immediately. If incomplete, a notice to supplement or correct the application is issued immediately. A decision must be made within ten working days, with the permit notice issued online in the case of a positive decision. Then, within ten days of that decision, the relevant administrative organ issues the applicant a foreigners' work permit.<sup>64</sup>

With respect to residence permits, the exit-entry administration division of the public security authority is subject to a 15-day time limit that applies to examining the permit application, taking a decision, and issuing the permit.<sup>65</sup>

### **B. Labor Contract, Minimum Wage, and Working Hours**

The employers of foreign nationals are obliged to enter into a written labor contract with them. At a minimum, the contract must include the place of employment, information on the scope of work, compensation, working hours, and a description of the employee's position. The term of the labor contract cannot exceed five years.<sup>66</sup> Foreign teaching experts are required to sign a standardized

employment contract that is formulated, printed, and numbered in accordance with SAFEA requirements even if they were seconded to China on the basis of an international agreement.<sup>67</sup>

The wages paid to foreign employees cannot be lower than those mandated by the local minimum wage standard. Such employees and their employers can agree autonomously on the terms of the employment contract regarding the employment period, position, remuneration, conditions for termination of the employment relationship, and the two parties' responsibilities in case of breach of contract.<sup>68</sup> The provisions of the 1994 Labor Law and 2007 Labor Contract Law (revised in 2012) do not apply directly to foreign nationals. However, the 1996 Regulations refer to state law, including the relevant labor law provisions, with respect to working hours, rest and vacation, work safety and hygiene, and social security for foreign employees.<sup>69</sup>

### **C. Social Insurance**

When it comes to social security, foreign employees are treated the same as Chinese citizens.<sup>70</sup> Both foreign employees and their employers are required to pay the relevant social insurance fees. The mention in the social insurance requirement of "all foreigners who are engaged in legal employment in China" refers not only to those employed directly by organizations within China, such as enterprises, public institutions, social organizations, and law or accounting firms, but also those seconded to China to work in the branch office of an overseas employer.<sup>71</sup>

Article 5 of the 2011 Provisional Measures on the Participation of Foreigners Employed in China in Social Insurance provides that foreign nationals are not only permitted to work temporarily and make social insurance contributions in China, but also to accrue social insurance claims in various jurisdictions. If foreign nationals leave the country before reaching retirement age, their personal insurance accounts are retained, and they can resume contributions should they return to China.<sup>72</sup> Moreover, foreign nationals who leave China retain their pension entitlements in some circumstances,<sup>73</sup> although they will not receive the contributions paid by their employers.<sup>74</sup> The pension entitlements of foreigners are also inheritable. If foreigners employed in China are nationals of a country that has signed a bilateral or multilateral social insurance agreement with the PRC, their social insurance entitlement will then be handled in accordance with the relevant

provisions of that agreement.<sup>75</sup>

#### **D. Individual Income Tax**

The State Administration of Taxation offers a number of tax privileges to foreigners employed in China pursuant to the 1997 Issues concerning the Clarification of Foreigners' Individual Income Tax. For example, subsidies/allowances for housing, relocation, and business trips, fees for family visits, and language training and children's education are exempt from individual income tax<sup>76</sup> as long as they are paid as reimbursement or in non-cash form.<sup>77</sup> Although not explicitly expressed in law, expenses related to an employer-provided car are also considered a form of tax-free reimbursement. Although no prior approval of such expenses is needed from the authorities, reimbursement claims must be backed up by evidence, and cannot exceed a reasonable limit, which is undefined but, in practice, taken to be no more than 30 percent of the employee's remuneration.<sup>78</sup>

Further, Chinese citizens and foreign nationals are subject to different taxable income thresholds. For foreigners who are employed by enterprises, public institutions, social organizations, or state organs, the threshold is RMB 4,800 per month, whereas it is RMB 3,500 per month for Chinese nationals regardless of their employer.<sup>79</sup> All individuals with a place of residence in China are taxed according to their worldwide income, with their place of residence determined by their household registration.<sup>80</sup>

#### **E. Freedom of Movement**

Not all areas of China are open to foreigners for work and settlement. As of November 2005, 2,650 districts and cities were open to travel or settlement by foreign nationals, leaving just 8 percent of the country inaccessible to them.<sup>81</sup> Access to certain areas can be restricted only on the grounds of public or state security requirements. The public security and state security authorities are in charge of deciding whether to restrict access to a given area, and can order the relocation of foreign nationals. However, foreign nationals may be able to enter restricted areas if they obtain special approval.<sup>82</sup>

#### **F. Protection of Property Rights**

The acquisition of real estate by foreign nationals is restricted in China, which is



in line with the practice of other jurisdictions. According to International Monetary Fund statistics, 137 of the 187 IMF member states restrict non-resident investments in the real property market.<sup>83</sup> However, foreign nationals working or studying in China for more than one year are allowed to buy one apartment for private purposes, and the Property Law and other relevant laws protect the movable property of foreigners.<sup>84</sup> The rules regulating the purchase of an apartment actually place foreign nationals in a privileged position *vis-à-vis* Chinese citizens. In several Chinese cities, including Beijing and Shanghai, Chinese nationals who lack a local household registration are permitted to buy real estate only if they have paid into the welfare fund for at least five years.<sup>85</sup>

### G. Legal Remedies

The Chinese legal system affords foreign nationals a number of legal remedies with respect to work permits and exit-entry and stay procedures. If the competent bureau of SAFEA refuses to issue a work permit, it has to explain its grounds for refusal in a written decision.<sup>86</sup> Further, the applicant or employer so denied must be informed of his/her/its right to apply for administrative reconsideration or initiate administrative litigation in court.<sup>87</sup> If foreign nationals do not accept such measures as continued questioning, investigation under detention, activity restriction, or repatriation, they can apply for administrative reconsideration in accordance with the Administrative Reconsideration Law.<sup>88</sup> However, the administrative reconsideration decision is final and cannot be litigated against in court.<sup>89</sup> The restriction of legal remedies to redress an administrative reconsideration is based on official legislative documents that are in line with international law and practice in other jurisdictions.<sup>90</sup> Chinese procedural laws state that foreign nationals enjoy the same status in legal proceedings as Chinese citizens. For instance, the Administrative Litigation Law applies to administrative litigation by foreign nationals, stateless persons, and foreign organizations in the PRC, except as otherwise provided for by any other law.<sup>91</sup> Similar provisions can be found in the Criminal Procedure Law and Civil Procedure Law.<sup>92</sup>

## V. LEGAL FRAMEWORK FOR THE INTEGRATION OF FOREIGN EMPLOYEES

To attract international ‘super talent’ to promote innovation and economic development in China, the Chinese government has implemented a number of laws and policies aimed at the integration of foreign nationals and improvement of their overall living and working conditions.<sup>93</sup>

### A. Improving the Environment for Highly Skilled Foreign Experts

Prime Minister Li Keqiang recently stated that strengthening the construction of a ‘soft environment’ for common goods and services will establish “windows of internationalization,” which in turn will attract more foreign experts to promote innovation and entrepreneurship.<sup>94</sup> The 2008 Provisional Measures on the Attraction of Foreign Highly Skilled Experts require the issuing of special policies concerning stay, exit and entry, settlement, subsidies, remuneration, medical treatment, insurance, housing, taxation, spouse settlement, and schooling for this elite group.<sup>95</sup>

The aim of such policies is to address the difficulties that foreign experts experience when living and working in China. The MHRSS has been asked to establish service desks and issue dedicated policies addressing the aforementioned questions.<sup>96</sup> The 2008 Rules on the Preferential Treatment of Highly Skilled Overseas Experts provide for the special treatment of such experts with regard to entry, stay and exit, settlement, subsidies, medical treatment, insurance, housing, taxation, spouse settlement, and remuneration.<sup>97</sup> The 2011 Reference Guidelines for the Remuneration of Foreign Experts in the Area of Culture and Education further stipulate that associate professors and professors or experts with titles and skills of a corresponding level receive a monthly salary of RMB 6,700 to RMB 15,000.<sup>98</sup>

Foreign technical engineers are provided with housing and free transportation to and from their work place.<sup>99</sup> If they are married their employers must provide their spouses with airline tickets to China. Foreign experts who remain in China after retiring also receive annual airline tickets home and a subsidy for their room and board in China. Their former employers must also reimburse their medical expenses if incurred in China, as well as those of their family members.<sup>100</sup>

## B. Permanent Residence System

In 2004, the Ministry of Public Security and Ministry of Foreign Affairs jointly issued Measures for the Administration of Foreigners' Permanent Residence.<sup>101</sup> Foreign nationals who meet the requirements of those measures are eligible to receive a permanent residence card affording them indefinite leave to remain in China. Foreigners holding a permanent residence card enjoy the same rights and obligations as Chinese citizens, with the exception of political rights and certain rights and obligations expressly stated in law.<sup>102</sup> In 2016, the General Office of the CPC Central Committee and the General Office of the State Council issued an Opinion on Strengthening Service Administration of the Permanent Residency of Foreigners,<sup>103</sup> which is designed to streamline the administrative system and policies and regulations governing foreign permanent residents; reduce the number of application requirements; simplify work flows; implement differentiated treatment; strengthen daily administration; and shape a more scientific, reasonable, open, and pragmatic structure for the service and administrative work pertaining to such residents.<sup>104</sup> As of October 2016, the Ministry of Public Security had approved the permanent residence applications of 10,269 foreign nationals.<sup>105</sup>

## C. Naturalization

Although China has not traditionally been a country of immigration and naturalization is not a widespread practice, the Nationality Law of 1980 contains certain provisions on naturalization. If foreigners are close relatives of Chinese citizens living in China and are willing to abide by the Chinese Constitution and the country's laws, they may apply for naturalization as Chinese citizens.<sup>106</sup> According to the 2008 Provisions on the Special Treatment of Highly Skilled Foreign Experts, the public security authorities can consider naturalization applications from highly skilled overseas experts who wish to give up their former nationality or who wish to restore their Chinese citizenship, with priority accorded to the relevant articles of the Nationality Law.<sup>107</sup> However, the possibility of naturalization is likely to be attractive only to returning overseas Chinese who want to settle permanently in China and register in the national household registration scheme. The single-nationality rule codified in the Nationality Law is seen as a hurdle by both Chinese citizens reluctant to abandon the nationality they acquired because of the requirements of their new home countries, and foreign

nationals who want to retain their nationality. The latter are particularly likely to abstain from being naturalized as Chinese citizens.<sup>108</sup>

#### **D. Experiments with Legalization of Irregular Foreign Nationals**

In September 2010, the Public Security Bureau and Civil Affairs Bureau of Dehong in Yunnan province jointly issued Regulations on the Registration of Cross-Border Marriage Certificates for Residents of the Border Area, which establish a registration system for cross-border marriages.<sup>109</sup> The regulations legalize so-called *sanfei* foreign nationals by acknowledging the transnational marriages of border area residents and granting them the right to reside and work in China.<sup>110</sup> Accordingly, if a Burmese national is married to a Chinese national residing in Dehong county and holds a valid marriage certificate, then s/he may reside, engage in commercial activities, work, and travel within the administrative area of Dehong district. The public security and civil affairs authorities of Dehong investigated and registered Burmese nationals married to Chinese residents of the county several years ago, finding that, up until August 2014, the Civil Affairs Bureau of Longchuang, which is a county in Dehong, had issued 2,540 cross-border marriage certificates. The Dehong experience is a good example of a practical approach to resolving illegal residence and employment in specific border areas.<sup>111</sup>

## **VI. CONCLUSION**

In the past, employment-stream immigration to China was administered by a number of different governmental bodies. It was also often difficult to distinguish ordinary foreign employees from foreign experts, as the concept of the latter dates back to the birth of the PRC. As the number of foreign employees in China has steadily increased since the country's accession to the World Trade Organization. As around 240,000 foreign nationals are now entering China for employment purposes each year, there is an urgent need for reformation of the administrative processes governing foreign employees. In response to that need, the Chinese government recently streamlined the application procedures for work permits and unified the permits for foreign experts and ordinary foreign employees,

who previously required separate permits. Today, the local bureaus of SAFEA have sole responsibility for issuing the unified work permit, which constitutes a considerable improvement on the previous practice of local MHRSS bureaus being in charge of issuing ordinary work permits, while local SAFEA bureaus were responsible for the work permits of foreign experts. Another important reform to the administrative process is the digitalization of permit applications, which are now handled through an online platform. Together with the time limits imposed on application decisions, such digitization has considerably reduced the application handling time.

In addition to these institutional and procedural reforms, the new selection scheme and points system are other striking innovations. The new system for selecting employment-stream immigrants is based on a classification scheme that divides foreign nationals into Category-A, -B, and -C migrants based on their academic qualifications, professional experience, and income. The points system that supplements the classification scheme is modeled after the human capital accumulation principle underlying the immigration schemes of such traditionally immigration-friendly nations as Canada. However, China's system can still be considered employer-driven, as a specific job offer remains a prerequisite for obtaining a work permit. The new points system appears to be balanced, taking into account a variety of factors, including the potential migrant's proposed earnings, education, work experience, duration of stay in China, native language, region of settlement, age, and characteristics determined at the provincial level. Both the points system and classification scheme clarify the preconditions for issuing work permits to foreign nationals. They thus help to position China as an international player in the hunt for global talent. The points system also enables the immigration administration to fine-tune the criteria for selection and respond swiftly to changes in the national labor market.

In comparison with the comprehensive reform of the work permit system, the reform of the residence permit system has been more piecemeal in nature and has proceeded at a slower pace. The unattractive permanent resident scheme, for instance, has been only partially reformed. Greater congruence between the work permit and residence permit schemes with respect to different categories of foreign employees would improve the consistency of the overall employment-stream immigration system. At present, China's immigration law regime provides

no clear path to the acquisition of Chinese citizenship on the basis of long-term employment and/or residence in the country. The integration of the diverse policies governing foreign employees would provide foreign nationals in China with a more attractive living and working environment.

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- the State-owned Assets Supervision and Administration Commission, the General Administration of Customs, the State Administration of Taxation, the State Administration for Industry and Commerce, the National Tourism Administration, the Overseas Chinese Affairs Office, the Banking Regulatory Commission, the Securities Regulatory Commission, the Insurance Regulatory Commission, the State Administration of Foreign Experts Affairs, the Civil Aviation Administration and the State Administration of Foreign Exchange [中共中央组织部、人力资源和社会保障部、公安部、外交部、发展改革委、教育部、科技部、财政部、住房城乡建设部、铁道部、商务部、人口计生委、人民银行、国资委、海关总署、税务总局、工商总局、旅游局、侨办、银监会、证监会、保监会、外专局、民航局、外汇局] on September 25, 2012.
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