



ICLG

The International Comparative Legal Guide to:

Corporate Immigration 2014

1st Edition

A practical cross-border insight into corporate immigration law

Published by Global Legal Group, with contributions from:

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Email: info@glgroup.co.uk
URL: www.glgroup.co.uk

GLG Cover Design
F&F Studio Design

GLG Cover Image Source
iStockphoto

Printed by
Information Press Ltd
August 2014

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ISBN 978-1-910083-10-9
ISSN 2054-7579

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China

Laura Danielson



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Fredrikson & Byron P.A.

1 Introduction

1.1 What are the main sources of immigration law in China?

Chinese immigration consists of central immigration laws and regulations and local rules, procedures, and policies. The new Exit-Entry Administration Law of the People's Republic of China took effect on July 1, 2013. Its accompanying regulations, the Foreign Nationals' Entry-Exit Administrative Rules, took effect on September 1, 2013. The new law and administrative rules represent the first major immigration reform in China since 1986, and are now the centrepiece of China's regulation of foreign nationals' entry, stay, and exit. They spell out China's new direction for administrative entry visas, short-term stays and long-term residence, permanent residence, travel, border inspections, grounds for inadmissibility, and penalties for violations of these rules.

Besides the new Exit-Entry law and administrative rules, various regulations issued prior to the new system remain in effect. For instance, the Provisions on the Employment of Foreigners in China (2011 Amendment) were promulgated jointly by the Ministry of Labour, Ministry of Public Security, Ministry of Foreign Affairs, and Ministry of Foreign Trade and Economic Cooperation of China in 1996, and amended in 2011. The Provisions set forth the general requirements and procedures for those seeking employment in China.

Other relevant regulations are the Measures for the Administration of Examination and Approval of Foreigners' Permanent Residence in China issued in 2004 by the Ministry of Public Safety and the Ministry of Foreign Affairs. The Measures delegate to the Ministry of Public Security the authority and discretion to adjudicate permanent residence applications and set forth the principal eligibilities and requirements for permanent residence in China. The new Exit-Entry law provides that the Ministry of Public Security, the Ministry of Foreign Affairs, and other relevant departments of the State Council should formulate administrative measures for the examination and approval of permanent residence applications. Before any new measures are issued, however, the 2004 measures remain in effect.

1.2 What authorities administer the corporate immigration system in China?

The Ministry of Foreign Affairs and the Ministry of Public Security are the main administrative agencies of the Chinese immigration system. Chinese embassies and consulates under the Ministry of Foreign Affairs are authorised to administer, adjudicate and issue

entry visas for foreign nationals overseas. Under the Ministry of Public Security, the exit-entry border inspection authorities are responsible for implementing exit-entry border inspections. Public security authorities and their exit-entry administrative divisions on the local levels are designated to administer foreign nationals' temporary stays and long-term residence in China. The Ministry of Labour and the labour bureaus at provincial, municipal, and prefecture levels are responsible for the administration of most foreign nationals' employment in China. State Administrations of Foreign Experts Affairs of the P.R.C., on the other hand, are responsible for the administration of foreign experts' employment within China.

1.3 Is China part of a multilateral agreement between countries (EU/NAFTA/MERCOSUR) which facilitates the movement of people between countries for employment purposes?

China is a member of the Asian-Pacific Economic Cooperation ("APEC") scheme. APEC has created an APEC Business Travel Card ("ABTC") that allows approved business travellers pre-cleared, facilitated short-term entry to participating members. The ABTC serves as a multiple-entry visa and is valid for three years. Card holders who have received pre-clearance from China are allowed to stay in China for up to 60 days per entry, and benefit from fast-track entry and exit processing through special APEC lanes at major airports in participating countries and regions. Each participating member state promulgates its own eligibility requirements and administers the issuance of ABTC to its own citizens. Currently, there are 18 countries and regions fully participating in the ABTC system, including Australia, Brunei, Chile, China, Hong Kong (China), Indonesia, Japan, Korea, Malaysia, Mexico, New Zealand, Papua New Guinea, Peru, Philippines, Singapore, Taipei, Thailand, and Vietnam. The United States has passed legislation authorising the issuance of ABTCs and the U.S. Customs and Border Protection is in the process of commencing card issuance. Russia and Canada are also preparing for their implementation of the ABTC system.

2 Business Visitors

2.1 Can business visitors enter China under a relevant visa waiver programme?

China offers a visa waiver programme for a very limited number of countries: Singapore; Brunei; and Japan. Individuals holding a

regular passport from one of these countries can enter China for business visits through ports that are open to foreign nationals for up to 15 days.

2.2 What is the maximum period for which business visitors can enter China?

The maximum period of stay per entry varies based on the admission permission that visitors possess. Generally, business visitor visas (M visas) allow visa holders to stay in China for up to 30, 60, or 90 days per entry, depending on the terms of their visas.

2.3 What activities are business visitors able to undertake?

The new Exit-Entry law and regulations do not specify the activities that are allowable for business visitors. The old rules that applied to business visitor visas lend some light to the scope of permissible activities as including conference attendance, seminars, or training sessions; participating in business meetings and negotiations; and engaging in representative services such as exploring business opportunities on behalf of an overseas employer.

2.4 Are there any special visitor categories which will enable business visitors to undertake work or provide services for a temporary period?

There is only one business visitor visa type under the new Exit-Entry law and regulations. To accommodate the increasing demand for short-term work assignments by foreign businesses and individuals, the new immigration system provides that work permits can be issued for a minimum of 90 days (whereas previously it was 180 days). The law and regulations are not clear on whether or how to acquire work permission for those who work in China for fewer than 90 days.

2.5 Can business visitors receive short-term training?

Business visitors may receive short-term training without obtaining work permits. For training longer than 90 days, the employer would need to assess the details of the training programme to determine whether such training is in fact employment in China.

3 Immigration Compliance and Illegal Working

3.1 Do the national authorities in China operate a system of compliance inspections of employers who regularly employ foreign nationals?

Yes, compliance inspections are operated on the local level.

3.2 What are the rules on the prevention of illegal working?

Illegal employment is defined as working without a work permit or a residence permit as required by law; working beyond the scope specified by the foreign national's work authorisation; and foreign students working beyond the scope of work authorisation permitted under their work-study programme. Both the employers and foreign employees who engage in illegal employment are subject to monetary penalties. Foreign employees may also be held in detention.

3.3 What are the penalties for organisations found to be employing foreign nationals without permission to work?

Employers that employ a foreign worker illegally are subject to a fine of 10,000 RMB per unauthorised employee, up to a total of 100,000 RMB. Any illegal income earned by the company as a result of the employee's efforts will be confiscated.

Sponsoring entities that have issued a letter of invitation or any other application materials in violation of the Exit-Entry law are subject to a fine of between 10,000 RMB and 50,000 RMB. Any illegally earned income will be confiscated, and the entity must bear the foreign national's exit costs and expenses. In addition, responsible personnel are subject to a fine of between 5,000 RMB and 10,000 RMB.

Sponsoring entities that have obtained a visa, stay permit, resident permit, or other exit or entry documents for a foreign national by fraud are subject to a fine of between 10,000 RMB and 50,000 RMB. Responsible personnel are subject to a fine of 2,000 RMB to 5,000 RMB. Under serious circumstances, they may be subject to detention of from 10 to 15 days, and a fine of at most 20,000 RMB.

Entities and directly responsible personnel are subject to fines and confiscation of illegal income for assisting a foreign national with illegally entering or exiting China; accommodating or harbouring a foreign national who has entered or resided in China illegally; assisting a foreign national with illegally entering, illegally residing in China or evading inspection; and illegally providing exit or entry document to a foreign national who has illegally resided in China.

In addition, an entity that has provided a reference or referral for a foreign national so that he or she can gain illegal employment is subject to a fine, as well as confiscation of any illegal gain.

The local public security authorities and border inspection authorities are authorised to enforce these penalties under the new Exit-Entry law.

4 Corporate Immigration - General

4.1 Is there a system for registration of employers who wish to hire foreign nationals?

Some, but not all local labour authorities have established registration systems for employers.

4.2 Do employers who hire foreign nationals have ongoing duties to ensure immigration compliance?

Yes. Employers of foreign nationals have various reporting duties for immigration compliance purpose. Work permits are region- and employer-specific. A permit holder generally may work only for the authorised employer in the authorised region. Sponsoring employers must promptly report a foreign employee's termination of employment, return the employee's work permit and resident permit, and process the employee's exit formalities at the public security agency. Employers must also promptly report to their local public security authorities a foreign employee's change of employment location and any violations of the Exit-Entry law and regulations.

4.3 Do the immigration authorities undertake routine inspections of employers who sponsor foreign nationals, to verify immigration compliance?

The labour administrative authorities conduct annual inspections of employment permits, during which employer must report and

follow the annual inspection procedures at the Certificate Office of the labour administrative authorities within thirty days before the end of each year of employment. Failure to report for the annual inspection will result in invalidation of the foreign worker's work permit.

4.4 Do the immigration authorities maintain a list of skilled occupations which may be filled by foreign nationals?

The relevant laws, regulations, and policies do not prescribe an exclusive list of skilled occupations that may be filled by foreign nationals.

4.5 Is there a recognition that some occupations may be in short supply and do special exemptions apply to certain sectors and occupations?

Yes. The new immigration law and regulations created the R visa category for "high-level-foreign talents" and urgently needed professionals. While the new system does not eliminate qualifying foreign nationals' need to obtain work authorisation, the goal is to provide convenience to such individuals. For instance, once approved as a "high-level talent", an individual may apply for a change of status from a short-term visa to a long-term resident permit without departing from China.

4.6 Are there annual quotas for different types of employment-related work permits or visas?

No, there are no annual quotas.

4.7 Are employees who are sponsored to work in China required to demonstrate language proficiency?

No, they are not required to demonstrate proficiency in language.

4.8 Are employees who are sponsored to work in China required to undergo medical examinations before being admitted?

Medical examinations are required for obtaining work authorisation. However, the procedures depend on local rules and policies. Some cities require a medical examination to be conducted before foreign nationals may apply for a work visa, while others only require a medical examination after foreign nationals have entered China on a work visa and before they apply for work permits and resident permits.

4.9 Does the work permit system allow employees who hold work permits to be seconded to a client site?

Work permits are both region- and employer-specific. Whether a secondment is permissible depends on the local labour bureau's and exit-entry bureau's policies. If the client site is located within the same city as the employer, and the employer and employee maintain a genuine employment relationship, a secondment is generally permissible. If the client site is located in a different jurisdiction to the employer's location, on the other hand, employers should check with both locations' labour and exit-entry bureaus regarding their policies.

5 Highly Skilled Visas

5.1 Is there an immigration category which covers highly skilled individuals?

Highly skilled individuals may qualify as "foreign experts". There are two general categories of foreign experts: (i) culture and education experts; and (ii) economy and technology experts. The former applies to those individuals who are employed in China in skilled professional or managerial positions in education, scientific research, journalism, publications, culture, arts, health, or sports. This category also includes language teachers. The latter category is divided into four types: (i) foreign skilled professionals and managerial personnel who are employed according to international treaties or agreements or under an international trade contract; (ii) foreign professionals who are employed in the fields of technology, engineering, economics, management, trade, accounting, tax, or finance; (iii) foreign skilled professionals and managerial personnel who are employed by foreign-invested enterprises; and (iv) representatives of a foreign expert organisation or representative office of a foreign expert agency that has been approved by the State Administration of Foreign Experts Affairs. The employers of foreign experts must apply for a Foreign Expert Employment Confirmation.

In addition, in an effort to introduce and attract foreign talent to work in China, the authorities created the R visa category for "high-level talents" or urgently needed professionals.

6 Investment or Establishment Work Permits

6.1 Is there an immigration category which permits employees to be authorised to work based on investment into your jurisdiction?

There is not a special category for foreign investors. In order to obtain work authorisation, foreign investors need to be sponsored by a legal entity registered in China. Certain investors may benefit from the special Provisions on Providing Entry and Residence Conveniences to Foreign High-Level Talented People and Investors. These provisions were issued in 2002 in an effort to attract foreign high-level talent and investors by providing preferential treatment in terms of visas and resident permits. These provisions remain in effect. To qualify, the investor must either invest US\$1 million or more in a county in the western or central regions of China that has been designated by the state as a 'key poverty reduction and development county', or invest US\$3 million or more in other regions.

7 Temporary Work Permits

7.1 Is there an immigration category permitting the hiring of temporary workers for exchanges, career development, internships or other non-economic purposes?

Under the new immigration system, the F visa is designated for short-term exchanges, visits, study tours and other non-economic activities.

The new law and regulations are not clear as to what visa category is appropriate for temporary internships. For internships under three months, a work permit should not be required. An F visa or an M visa would be appropriate depending on the specific terms of

the internship, including whether the student will be paid, and whether the placement is part of a school programme. For internships longer than three months, the employer would need to determine whether a work permit is required. If the internship is paid in China, a work permit is likely required.

7.2 Are there sector-specific temporary work permit categories which enable foreign workers to perform temporary work?

No, there are none.

8 Group or Intra-Company Transfer Work Permits

8.1 Does a specific immigration category exist for inter-company transfers within international groups of companies?

No, such a category does not exist.

8.2 What conditions must an employing company or organisation fulfil in order to qualify as part of a group of companies?

This is not applicable in China.

8.3 What conditions must the employer fulfil in order to obtain a work permit for an intra-company group employee?

This is not applicable in China.

8.4 What is the process for obtaining a work permit for an intra-company group employee?

This is not applicable in China.

8.5 What is the process for the employee to obtain a visa under the intra-company group transfer category?

This is not applicable in China.

8.6 How long does the process of obtaining the work permit and initial visa take?

This is not applicable in China.

8.7 How long are visas under the "initial" category valid for, and can they be extended?

This is not applicable in China.

8.8 Can employees coming under the intra-company transfer route apply for permanent residence?

This is not applicable in China.

9 New Hire Work Permits

9.1 What is the main immigration category used for employers who wish to obtain work permits for new hires?

The Z visa category is the main visa category for new foreign hires. Within the Z visa category, there are two types of work authorisation documents – work permits for ordinary employees, and foreign expert permits for high-level talent. The ordinary work permit is the main work authorisation category for new hires.

9.2 Is there a requirement for labour market testing, to demonstrate that there are no suitable resident workers, before a work permit can be issued to new hires?

To obtain work authorisation for foreign hires, the employer needs to prove that the job requires special qualifications that the domestic labour market cannot find suitable candidates for. The specific requirements vary by locality. For instance, cities such as Shanghai, Beijing, and Shenzhen do not require a formal labour market test, while the Yunnan Province does.

9.3 Are there any exemptions to carrying out a resident labour market test?

This depends on the policies and rules of the specific authority involved.

9.4 What is the process for obtaining a work permit for a new hire?

In general, there are four major steps: 1) the employer in China must apply for an Alien Employment Licence from the local labour authority and a Z visa invitation letter from the local exit-entry authority; 2) the foreign employee then needs to apply for a Z visa to enter China; 3) once the foreign employee enters China with a Z visa, he or she must apply to a local authority for a work permit or an expert certificate within 15 days after arrival; and 4) the employee must apply for a resident permit within 30 days of arrival. Each city has its own procedures and document requirements, so it is essential to check the local rules before proceeding.

9.5 What is the process for the employee to obtain a visa under the intra-company group transfer category for a new hire?

The same application process described above applies to intra-company transfer employees.

9.6 How long does the process of obtaining the work permit and initial visa for a new hire take?

The processing timeline varies from city to city. Generally, it takes two to three months before the foreign hire obtains a Z visa, and five to six weeks after the foreign hire's entry with a Z visa to complete the work and resident permit applications.

9.7 How long are initial visas for new hires granted for and can they be extended?

Z visas are valid for three months for a single entry. Foreign hires must enter China within three months and complete the work and

resident permit application process. In general, the initial work and resident permits are issued for one year, renewable on a yearly basis.

9.8 Is labour market testing required when the employee extends their residence?

This depends on the policies and rules of the local authority involved.

9.9 Can employees coming as new hires apply for permanent residence?

New employment in and of itself does not qualify a foreign national for permanent residence. The foreign hire needs to meet one of the criteria discussed in question 12.1.

10 Conditions of Stay for Work Permit Holders

10.1 What are the conditions of stay of those who obtain work permits and are resident on this basis?

Once the foreign employees' employment contract expires, their work permit automatically expires. In order to start working for a different employer, the foreign hire's prior employer must cancel the existing work permit, and the new employer must sponsor the foreign national for a work permit transfer application.

10.2 Are work permit holders required to register with municipal authorities or the police after their arrival?

Yes, foreign nationals are required to complete temporary residence registrations at the local police station having jurisdiction over the location of their residential address within 24 hours after arrival.

11 Dependants

11.1 Who qualifies as a dependant of a person coming to work on a sponsored basis?

For foreign nationals who have legal residency in China based on employment, their spouse, parents, children under the age of 18 and spouse's parents qualify as dependants.

11.2 Do civil/unmarried or same-sex partners qualify as family members?

The Chinese government does not recognise civil partnerships, same-sex marriages, cohabiting partners or unmarried partners.

11.3 Do spouses and partners have access to the labour market when they are admitted as dependants?

No, they do not have access.

11.4 Do children have access to the labour market?

No, children do not have access to the labour market.

12 Permanent Residence

12.1 What are the conditions for obtaining permanent residence?

Foreign nationals who have made outstanding contributions to China's economic and social development or otherwise 'meet the conditions for permanent residence in China' may obtain permanent residence.

Under the Measures for the Administration of Examination and Approval of Foreigners' Permanent Residence in China, a foreign national must: (1) have made a qualifying direct investment in China, and the investment has been stable for three consecutive years with good records of tax payment; (2) hold the position of (or equivalent to) assistant general manager, assistant factory director, assistant professional or researcher or above for four years, and have resided in China for at least an aggregated three years with good records of tax payment; or (3) have made major and outstanding contributions to China that are needed by the State.

12.2 Is it possible to switch from a temporary work visa to a work visa which leads to permanent residence?

This is not applicable in China.

13 Bars to Admission

13.1 What are the main bars to admission for work?

To qualify for work authorisation in China, the applicant must be 18 years or older, in good health, and with no criminal record. The applicant must have professional skills and required job experience. Lacking a university degree or experiences may render a foreign national ineligible for work authorisation. Another requirement that often catches foreign nationals off guard is the mandatory age of retirement for all workers in China – 60 for men and 55 for women. Foreign nationals qualifying for work authorisation as foreign experts may be allowed to work until age 65.

13.2 Are criminal convictions a bar to obtaining work permission or a visa?

Work and permanent residence applicants must have no criminal convictions. Some localities require applicants to provide police clearance certificates issued by their local police departments, while others do not.

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Fredrikson

& BYRON, P.A.

The lawyers in Fredrikson & Byron's China Practice Immigration Group work from their Minneapolis and Shanghai offices. There is always a team on the ground in each location available to assist with Chinese in-bound immigration matters. The lawyers in the group speak frequently at national and international conferences and have co-authored a number of publications on Chinese immigration laws. Working with support personnel on the ground in the various local provinces and cities, Fredrikson & Byron is able to provide immigration services in any Chinese jurisdiction. The immigration team shares a common philosophy of seeking to provide the best, most personal representation available. Members of the group are fluent in written and spoken English, Mandarin, Shanghainese, and Cantonese.

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