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IMMIGRATION LAW SANCTIONS AND ENFORCEMENT IN SELECTED FOREIGN COUNTRIES

Brazil, Egypt, Japan, Mexico, Sweden, and Switzerland

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**IMMIGRATION LAW SANCTIONS AND ENFORCEMENT IN
SELECTED FOREIGN COUNTRIES**

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IMMIGRATION LAW SANCTIONS AND ENFORCEMENT IN SELECTED FOREIGN COUNTRIES

COMPARATIVE SUMMARY

Executive Summary

A survey of the immigration laws and practices of Brazil, Egypt, Japan, Mexico, Sweden, and Switzerland reveals that Japan and Switzerland are most effective in enforcing their immigration laws. Illegal immigration is viewed as harmful in these countries and enforcement mechanisms include the registration of aliens by the local authorities. Mexico also has a register of aliens that is maintained by the federal authorities. The fingerprinting of visa applicants is relied upon in Switzerland and Sweden, and Japan plans on introducing it. Most surveyed countries use border controls and labor inspections, albeit with varying intensity and results. Mexico and Switzerland concentrate on the avoidance and discovery of fraudulent marriages. Enforcement of immigration laws is lax in Brazil and Egypt.

All countries except for Brazil have criminal penalties for illegal entry and presence, and all countries have substantial criminal sanctions for various forms of fraud and forgery relating to immigration. In Japan, Mexico, Sweden, and Switzerland human trafficking is severely punished. The highest punishment frames for immigration offenses are found in Mexico, and these aim at coping with the problem of transient migration en route to the United States.

Illegal immigration is a worldwide problem that affects countries of differing legal background and at various stages of economic development. This report reviews the incidence of illegal immigration and its root causes as well as the sanctions of immigration law and the level of enforcement in Brazil, Egypt, Japan, Mexico, Sweden and Switzerland.

I. Incidence of Illegal Immigration

According to the rough estimates that are available, all the countries surveyed have a significant presence of illegal immigrants, though the size of the illegal alien population differs between the countries. At the high end of the spectrum are Egypt and Brazil. In the year 2000, Egypt had between two and five million refugees from Sudan, compared to a total population of close to seventy-two million.¹ In the state of Sao Paulo in Brazil, it is estimated that forty percent of the alien population is illegal. These migrants come from other South American countries, notably Bolivia, Paraguay, Peru and Chile.

At the low end of the spectrum are Switzerland and Japan, even though immigrants are drawn to these countries because of employment opportunities and high wage levels. According to a recent study, Switzerland harbors 90,000 illegal immigrants, as compared to a total population of 7.5 million. Japan's official estimate of the presence of 220,000 illegal immigrants in 2003 may be lower than the actual

¹ Population figures are taken from STATISTISCHES JAHRBUCH 2003 174 (Wiesbaden, 2003).

figure, yet it is remarkable that the official estimate for 1993 was 298,646 in 1993, thus showing a sizeable decrease in illegal immigration during that decade. In 2003, Japan had a total population of almost 128 million.

Mexico's situation is unique in that much of its immigrant population is transient and en route to the United States. Since the 1980s a chain of migration has expanded from the Central American countries across Mexico and into the United States. As part of this migration, close to one million Salvadorans and Guatemalans crossed into Mexico and then into the United States between 1981 and 1990. The illegal aliens who traverse Mexico flee from poverty and/or repressive conditions in their homelands.

II. Sanctions

All the surveyed countries have enacted criminal sanctions for various violations of immigration law. Generally, these distinguish between illegal entry and presence, various forms of fraudulent conduct, employment-related offenses, and human trafficking. The sanctions mostly take the form of penalties of imprisonment that can be applied instead of or in addition to fines. Moreover, the laws of all the surveyed countries call for the expulsion or deportation of illegal aliens, often instead of a penalty, and the denial of entry to those encountered at the borders.

All the countries except for Brazil provide criminal sanctions for illegal entry and presence. The penalties range from a maximum prison sentence of three months in Egypt to a maximum prison sentence of three years in Japan. However, Mexico has an even higher punishment frame for repeat offenders. These are subject to a maximum prison sentence of ten years, whereas first time offenders are punishable with up to two years imprisonment.² In Sweden, the punishment frame is up to one year of imprisonment, and in Switzerland it currently is up to six months of imprisonment. However, Switzerland has promulgated a new immigration law that would double the current punishment frame, if this law is accepted by a popular referendum in the fall of 2006.

All the surveyed countries provide higher punishment frames for fraudulent conduct that relates to illegal immigration and some differentiate between various form of fraud, forgery, and falsification of documents. Some of them also call for the subsidiary application of the general provisions of their Criminal Codes. The highest penalties are found in Mexico that has a wide range of offenses relating to immigration fraud. Among these is a punishment frame of two to six years for providing false information to the authorities, and up to five years imprisonment for claiming a false immigration status. A maximum penalty of five years also applies to marriage fraud. In Brazil the various provisions on fraud and forgery that apply to immigration-related conduct provide punishment frames that range from eight years imprisonment for the forgery of public papers. In Japan, the maximum penalty for immigration-related fraud is three years in prison; in Egypt and Sweden it is two years. In Switzerland, the maximum currently is a six months prison sentence, yet the proposed Act calls for a maximum prison sentence of three years that also would apply to marriage fraud.

Employers of illegal aliens are punished most severely in Japan, with a maximum prison penalty of three years. Sweden provides a punishment frame of up to one year, and Egypt one of up to three months while Brazil relies solely on fines. Although Mexico has a prohibition to hire illegal aliens it does not have a sanction specifically provided for that offense. However, a low sanction of general application, provided by the law, for administrative offenses could be applied. Switzerland's current punishment

² See the country report on Mexico for additional information on the very intricate system of criminal and administrative sanctions.

frame is topped at six months imprisonment; however, the proposed law doubles this penalty and also increases the maximum fine to 500,000 Swiss Francs (US\$3940), a level that actually might deter illegal employment.

Japan, Mexico, Sweden, and Switzerland have criminal provisions for human trafficking. Although the countries differ on what constitutes human trafficking, the general principle of these provisions is to apply severe penalties to the smuggling of aliens for a profit, on a commercial scale, or as a gang activity, while providing lower punishment frames for more random acts of aiding and abetting.

Japan's maximum penalty for bringing aliens into the country as stowaways or by landing without permits is up to five years in prisons; however, if done for profit such conduct carries a penalty of one to ten years in prison. Mexico punishes human trafficking with six to twelve year imprisonments, with harsher penalties under aggravated circumstances, but provides lower punishment frames for lesser forms of aiding and abetting. In Sweden, the punishment range for human trafficking for a profit is imprisonment of between six months and six years, with lower punishment frames provided for such conduct without a profit motive. Switzerland's current law punishes human trafficking for profit or as a gang activity with a maximum penalty of three years in prison, but the proposed law reform raises this level to five years. Aiding and abetting on a lesser scale is currently punishable with up to six month in prison, and the proposed law calls for a maximum of one year.

III. Enforcement

Statistics for enforcement have been obtained for Japan and Switzerland, and these show a substantial level of enforcement. In Japan, in 2004, a total of 55,351 deportation proceedings were carried out. Of these, 11,217 involved illegal entry and 41, 175 involved the overstaying of visas. During the same year, 42,074 written deportation orders were issued.

In Switzerland, the border police turned away 100,000 unqualified entrants per year during the last few years. Moreover, in 2003, the police apprehended 8,200 aliens who attempted a clandestine entry and 422 individuals who aided and abetted such conduct. In addition, the police confiscated 3,685 forged or falsified identification documents. During the same year, 9,000 aliens were convicted for offenses relating to the illegal status, 60 individuals were convicted for human trafficking, and 569 for aiding and abetting immigration law offenses on a lesser scale. Also in 2003, the authorities requested the annulment of 140 fraudulent marriages.

Japan and Switzerland are effective in enforcing immigration laws because illegal immigration is viewed as harmful. An enforcement device that works well in both countries is the registration of aliens at the local government level. Swiss law enforcement also benefits from an extensive database on aliens that ever came into contact with the Swiss authorities. Mexico also requires aliens to register and the register of aliens is maintained by the federal authorities.

The fingerprinting of visa entrants is practiced in Switzerland and Sweden, and Japan is planning to introduce this measure. Sweden is a member of the Schengen Agreement of ten European countries that calls for border controls at the outer border of the combined Schengen area. As a result, Sweden gets to use the data accumulated by the other Schengen countries and it prosecutes violations of immigration law that were committed throughout the Schengen area.

Illegal employment is controlled mostly by plant inspections in the surveyed countries. Enforcement of marriage fraud is highly developed in Mexico where civil registrars guard against this violation. Mexico also requires its civil registrars to watch out for illegal status when aliens petition for other entries into the civil register.

In the federated countries surveyed, that is, Brazil, Mexico, and Switzerland, there are differences in the level of federal and state involvement in the enforcement of immigration law. In Brazil, the Ministry of Justice, through the Federal Police, is the competent enforcement agency. In Mexico, the federal authorities are also responsible for the enforcement of immigration law, yet a high level of cooperation is required from the local authorities. In Switzerland, on the other hand, the federal authorities control the borders while the remainder of enforcement lies with the cantons.

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April 2006

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BRAZIL

IMMIGRATION LAW SANCTIONS AND ENFORCEMENT IN SELECTED FOREIGN COUNTRIES

Executive Summary

In Brazil, Law No. 6,815 of August 19, 1980 - Foreigner's Law (Estatuto do Estrangeiro), as modified by Law No. 6,964 of December 9, 1981 - defines the legal situation of the foreigner in Brazil, and Decree No. 86,715 of December 10, 1981 regulates this legislation. There is stated to be a large presence of illegal immigrants in Brazil, but there is reportedly little enforcement action undertaken by the government at the borders.

I. Introduction

The current Brazilian immigration law was developed during the military dictatorship period, which occurred in the late sixties and seventies, and it has a national security perspective. At present, there is a legislative project under analysis (*Novo Estatuto do Estrangeiro*) in the Ministry of Justice, tailored under a human rights perspective.

The philosophy underlying the new law disassociates immigration from national security, simplifies the entrance of citizens of MERCOSUR¹ country members and the Community of Countries of Portuguese Language in Brazil, and adopts other measures designed to facilitate the immigration-economic development equation.²

II. Illegal Entry, Illegal Presence, and Visa Overstay in Violation of Law

An alien who illegally enters or irregularly stays in Brazil and does not depart voluntarily is subject to deportation.³ At the request of the Minister of Justice, the alien may be imprisoned for sixty days while the deportation is not put into effect.⁴ The Federal Police is the competent agency that arrests⁵ and deports an alien.⁶

¹ MERCOUR or MERCOSUL is an economic bloc established as a Customs Union between Brazil, Argentina, Uruguay, and Paraguay with the purpose of promoting free trade and a more fluid movement of goods, people, and currency amongst these countries.

² *Estatuto do Estrangerio Vai para Consulta Pública*, Sept. 1, 2005, available at <http://www.mj.gov.br>. This hyperlink connects to the Web site of Brazil's Ministry of Justice.

³ Lei No. 6,815 de 19 de Agosto de 1980, arts. 57, 125.

⁴ *Id.* art. 61

⁵ Decreto No. 86,715 de 10 de Dezembro de 1981, art. 110, I.

⁶ *Id.* art. 98 § 1.

III. Fraud

Under the Brazilian Foreigner's Law, an alien who practices fraud in order to enter or stay in Brazil is subject to expulsion.⁷ Making of a false declaration during an immigration procedure or for the acquisition of a foreigner's passport, laissez-passer, or exit visa subjects a citizen to one to five years detention, and an alien to expulsion.⁸

In cases of expulsion, the Ministry of Justice may require, at any time, the imprisonment of an alien for ninety days, to assure the conclusion of a legal inquiry or to guarantee the fulfillment of the expulsion.⁹ An expelled alien who re-enters the Brazilian territory is subject to reclusion for a maximum of four years and a subsequent expulsion after serving his time.¹⁰

Under criminal law, an alien who uses a name other than his own to enter or stay in Brazil faces up to three years of detention.¹¹ An alien who claims a false attribute to promote his entrance in Brazilian territory can be punished with up to four years of reclusion.¹² Additionally, an alien who uses a passport or any other document that is not his own, as well as persons who facilitate or supply such documentation, are subject to detention for up to two years and a fine, if this action does not constitute an element of a more serious crime.¹³

Other sanctions foreseen in the Brazilian Penal Code that apply to Brazilian citizens as well as to aliens include the forgery of public papers, with a punishment of up to eight years of reclusion and a fine;¹⁴ the forgery of public documents, with a punishment of up to six years of reclusion and a fine;¹⁵ and the destruction, suppression, or concealment for the person's own benefit, for the benefit of a third party, or to the detriment of a third party, of a public or private document that should not be used, with a punishment of up to six years of reclusion and a fine.¹⁶

IV. Employment of Illegal Aliens While Aware of Their Illegal Status

The Brazilian Labor Law establishes that no company may admit into its service an alien worker that does not present a duly noted alien card.¹⁷ The employment of aliens with an irregular situation or unauthorized to work subjects the employer to a fine.¹⁸

⁷ Lei No. 6,815, art 65, a.

⁸ *Id.* art. 125, XIII.

⁹ *Id.* art. 69.

¹⁰ Código Penal, art. 338.

¹¹ Código Penal, art. 309.

¹² *Id.* art. 309, § 1.

¹³ *Id.* art. 308.

¹⁴ *Id.* art. 293.

¹⁵ *Id.* art. 297.

¹⁶ *Id.* art. 305.

¹⁷ Consolidação das Leis do Trabalho, art. 359.

¹⁸ Lei No. 6,815, art. 125, VII.

The Ministry of Labor is responsible for the enforcement of the labor legislation, which consists of inspections to verify compliance with laws and regulations, which are performed by competent authorities of the Ministry of Labor and inspectors of the National Institute of Social Security.¹⁹

V. Enforcement

Pursuant to article 129 of Law 6,815, the National Council of Immigration, which is subordinate to the Ministry of Labor, is responsible for the coordination and inspection of immigration activities in Brazil. The Ministry of Justice, through the Department of Federal Police, is the competent agency to enforce, *inter alia*, the legislation dealing with nationality, immigration, and foreigners.²⁰

In the realm of immigrants living in Brazil, it is estimated that forty percent of the hundreds of thousands of immigrants living in the state of São Paulo are illegal or irregular, mainly coming from Bolivia, Paraguay, Peru, and Chile.²¹ Another eight thousand illegal immigrants coming to Brazil through Guajará Mirim and Costa Marques, two cities that border Bolivia, are estimated to live in the state of Rondonia.²² According to a local newspaper, the non-existence of government control on the Brazilian border stimulates illegal entrance, and the presence of a high contingent of illegal immigrants in Brazilian territory does not trigger too many repressive actions on the part of the federal police.²³

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¹⁹ Consolidação das Leis do Trabalho, art. 626.

²⁰ Lei No. 10,683 de 28 de Maio de 2003, art. 27, XIV, g.

²¹ Rede Social de Justiça e Direitos Humanos, <http://www.social.org.br/relatorio2005/relatorio017.htm>.

²² *Imigrantes Ilegais: Em Porto Velho Eles Vêm Principalmente da Bolívia*, Imprensa Popular, Sept. 28, 2005, available at <http://www.imprensapopular.com/see.asp?codnews=1810&categoria=reportagem&claro=sim>.

²³ *Id.*

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EGYPT

IMMIGRATION LAW SANCTIONS AND ENFORCEMENT IN SELECTED FOREIGN COUNTRIES

Executive Summary

Even though Egypt does not have an immigration policy that allows foreigners to obtain permanent residency and Egyptian citizenship, the law relating to the entry and stay of foreigners provides criminal sanctions for violating its provisions. The enforcement of these provisions is not very effective as evidenced by the presence in 2000 of two to five million undocumented refugees from Sudan.

Egypt has an emigration law regulating the status of Egyptian citizens who leave Egypt to reside in foreign countries.¹ It does not have laws permitting foreigners to immigrate to Egypt as a matter of official policy similar to what persons are accustomed to in the United States. Any foreigner who enters the country is expected to eventually leave Egypt and go back to his country of origin. The entry and stay of foreigners in Egypt is regulated by law,² which provides the following sanctions for its violation:

1. Illegal Entry

Any foreigner who enters the country without a bona fide passport and visa or from a point other than those designated by the Ministry of Interior shall be punished by up to three-months imprisonment and a fine of fifty to two hundred Egyptian pounds.³

2. Illegal Presence

Any foreigner who does not comply with an order of removal is punished by no less than three months to two years imprisonment and a fine of fifty to two hundred Egyptian pounds.⁴

3. Visa Overstay

Every foreigner has the obligation to leave the country at the end of his stay permit; otherwise he is subject to imprisonment, not to exceed three-months, and a fine, not to exceed fifty Egyptian pounds.⁵

4. Fraudulent Entry or Overstay

¹ Law Number 111 of 1983, official gazette, issue23, 1983.

² The information in this report is based on Law Number 89 of 1960 regarding entry and stay of foreigners, official gazette, issue 71, 1960, and other laws as published in the Law Library of Congress collection of "mawsuat misr liltashriaa walkada," Abd al-Munim Husmi.

³ *Id.* art 41.

⁴ *Id.* art 38.

⁵ *Id.* art 42.

Anyone who knowingly makes untrue statements or presents untrue documents to facilitate his or someone else's entry or stay in Egypt shall be punished by up to two years imprisonment and a fine not to exceed two hundred Egyptian pounds.⁶ This punishment shall not prejudice any greater punishment provided by other laws such as the penal code.

5. Use of Fraudulent Numbers/Names by Illegal Aliens to Obtain Employment

No alien is allowed to work or obtain employment unless he holds a working permit.⁷ Anyone who violates this requirement, including giving fraudulent numbers or names, shall be punished by up to three months imprisonment, a fine between one and two hundred pounds, or either of these two measures.⁸

6. Use of Fraud by Illegal Aliens to Obtain Immigration, Health Care, or Other Benefits

The commission of fraud by anyone, including illegal aliens, to obtain benefits is subject to the provisions of the penal code. Depending on the particular facts of each case this action may constitute theft, embezzlement, or forgery.

7. Employment of Illegal Aliens While Aware of Their Illegal Status

Anyone employing an alien without a working permit is subject to the same punishments provided for in article 169 of the Labor Law.⁹ Furthermore, the employer who does not inform the government within twenty-four hours when the employment of the alien begins and when it ends shall be punished by up to three months imprisonment and a fine not to exceed fifty Egyptian pounds.¹⁰

The political system in Egypt is a centralized one. All regional and local authorities operate under the ultimate supervision of their relevant ministries. The enforcement of the provisions related to the entry and stay of foreigners in Egypt are the responsibility of the Ministry of Interior. However, the Ministry of Labor is the entity responsible for issuing work permits to foreigners.

8. Enforcement

The enforcement of these provisions, however, seems to be not very effective. According to the World Council of Churches as reported by the Egyptian Organization for Human Rights, the undocumented refugees from Sudan numbered between two to five millions in 2000 in Egypt.¹¹

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⁶ *Id.* art 40.

⁷ Article 27 of Labor Law Number 137 of 1981, official gazette, issue 33 (tabei), 1981.

⁸ *Id.* art 169.

⁹ *Id.*

¹⁰ Article 42 of Law Number 89 of 1960.

¹¹ The Egyptian Organization for Human Rights, <http://www.eohr.org/ref/>.

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JAPAN

IMMIGRATION LAW SANCTIONS AND ENFORCEMENT IN SELECTED FOREIGN COUNTRIES

Executive Summary

Japan has tightened its illegal alien regulations and enforcement measures. The Japanese believe public safety is disturbed by illegal aliens. The prosecution of illegal aliens recently has been enhanced. The government aims to reduce the number of illegal aliens by half over the next five years.

I. Introduction

Based on the statistics of the Immigration Control Department of the Ministry of Justice (MOJ), the number of illegal aliens in Japan peaked at 298,646 in 1993. The number was still more than 220,000 as of 2003. This figure does not include illegal aliens who entered Japan without going through examinations by immigration inspection officers.¹ It is assumed that more illegal aliens stay in Japan than these numbers suggest. It also is assumed that most illegal aliens are working without proper permission, as some commit crimes and form gang groups, threatening Japan's public safety.²

The government submitted a bill in 2006 to the Diet to amend the Immigration Control Act to implement the fingerprinting of foreign nationals on visa applications in 2006.³ The Advance Passenger Information System (APIS) was introduced in January 2005 for airlines to transmit information on crewmembers and passengers on flights bound for Japan before they arrive to allow automatic verification of this data against data maintained by immigration control, customs, and police authorities.⁴

In 1992, the National Police Agency (NPA), MOJ, and Ministry of Health, Labour and Welfare (MHLW) established the Relevant Directors' Meeting to Counter Illegally Working Foreigners and the Conference of Counter Measures of Illegally Working Foreigners. These organizations have exchanged information and cooperated to prosecute illegally working foreigners.⁵

Because of concern that Japanese public security is jeopardized by illegal aliens, prosecution of illegal aliens recently has been enhanced. The Ministerial Meeting against Crimes formulated an *Action Plan for the Realization of a Society Resistant to Crime* in December 2003.⁶ According to this action

¹ National Police Agency (NPA), SHŌTEN [FOCUS] 269, chap. 2, sec. 8, 46-7 (2004), available at http://www.npa.go.jp/kouhousi/biki2/pdf/sec02_08.pdf.

² *Id.*

³ Kakuhō [Cabinet sponsored bill] No. 56 of the 164th Diet session.

⁴ Ministry of Justice (MOJ), Dai 3 ji shutsunyōkoku kanri kihon keikaku [Third Basic Plan for Immigration Control], III, 2 (2005). The provisional translation by MOJ is available at <http://www.moj.go.jp/ENGLISH/information/bpic3rd-03.html#3-2>.

⁵ NPA, *supra* note 1, at 48-49.

⁶ Hanzai taisaku Kakuryō kaigi [Counter Crimes Ministers' Conference], Hanzai ni tsuyoi shakai no jitsugen no tame no kōdō keikaku [Action Plan in Order to Realize Society not susceptible to Crimes] (Dec. 2003), available at <http://www.kantei.go.jp/jp/singi/hanzai/kettei/031218keikaku.pdf>.

plan, the government aims at reducing the number of illegal foreign residents by half over the next five years. This Plan calls for promotion of measures to prevent aliens from pretending to be Japanese to obtain passports; increasing prosecutions; maintaining effective deportation; implementing a strict alien registration system; developing a system to check schools that accept foreigners; encouraging employers to confirm an alien's resident status when an alien is employed.⁷ Also, to prevent foreign terrorist attacks, tougher border measures are promoted, based on the Action Plan for Prevention of Terrorism as adopted at the Headquarters for Promotion of Measures Against Transnational Organized Crime and Other Relative Issues and International Terrorism in December 2004.⁸

II. Sanctions

The Immigration Control Law stipulates sanctions for its violations. The Criminal Code may apply to forgery and document fraud.

A. Illegal Entry

In case an alien has entered Japan without a legitimate passport or has landed in the country without obtaining landing permission from an immigration inspector, the alien, except for refugees,⁹ will be punished with penal servitude for no more than three years, or a fine of no more than three million *yen* (US\$25,000), or both of these punishments.¹⁰

B. Illegal Presence / Overstay

In cases where an alien enters Japan illegally and keeps staying, the same sanction is applied: penal servitude for no more than three years, a fine of not more than three million *yen* (US\$25,000), or both these punishments.¹¹ In cases where an alien stays in Japan beyond the authorized period of stay without obtaining an extension or change, the same sanction is applied.¹²

C. Document Fraud or Other Fraud to Facilitate Illegal Presence / Overstay by Self (the Illegal Alien) and by Others / Use of Fraud by Illegal Aliens to Obtain Immigration

There are brokers who draft documents for fake marriages and the fake status of a family member of a Japanese who was left in China at the end of World War II. There are factories to produce fake passports and fake alien registration cards. A related problem results from persons entering as students, although they do not have the intention to study and only want to earn money in Japan.¹³

When it is discovered that a foreigner obtained an endorsement stamp for permission to land or reside in Japan through a forged document, the MOJ may revoke the alien's status of residence.¹⁴ When

⁷ *Id.* at 22-24.

⁸ MOJ, *supra* note 4.

⁹ Shutsunyūkoku kanri hō [Immigration Control and Refugee Recognition Act (Immigration Control Act)], Order No. 319 of 1951, as amended, art. 70-2.

¹⁰ *Id.* art. 70, para. 1, items 1-2.

¹¹ *Id.* art. 70, para. 2.

¹² *Id.* art. 70, para. 1, items 5-8.

¹³ NPA, *supra* note 1, at 49.

¹⁴ Immigration Control Act, Order No. 319 of 1951, as amended, art. 22-4, para. 1, items 2-4.

an alien who has obtained a status of residence fails for more than three months to perform, without a legitimate reason, the activities required to maintain this status, his status of residence may be revoked.¹⁵ A person who has forged Japanese official documents, such as a Japanese passport, a visa, an alien registration card, may be punished with penal servitude for no more than three years or a fine of no more than 200,000 *yen* (US\$1,700).¹⁶

Under the Immigration Control Law, any person who has had groups of alien stowaways under his control enter into Japan or land in Japan, without legitimate permission from an immigration inspector for landing, faces imprisonment for no more than five years or a fine of three million *yen* or less.¹⁷ This sanction applies to cases where the aliens obtained permission for landing from immigration inspectors by making false statements or by other dishonest means. In cases where the person did these actions in the pursuit of profit, he is punished with imprisonment for one to ten years and a fine not exceeding 10 million *yen* (US\$84,000).

D. Use of Fraudulent ID Numbers / Names by Illegal Aliens to Obtain Employment / Use of Fraud by Illegal Aliens to Obtain Health Care or Other Government Benefits

All foreign nationals residing in Japan are required to register at the municipal government, which has jurisdiction over residence.¹⁸ An alien is required to carry his alien registration card. There is no other official ID number system or name search system for employers who want to hire aliens. Forgery of an alien registration card may be punished under the Criminal Code with penal servitude for no more than three years or a fine of no more than 200,000 *yen* (US\$1,700).¹⁹

Japan has a universal health insurance system for its residents.²⁰ A registered alien who lives in Japan more than one year must be enrolled in the National Health Insurance Program.²¹ If an alien who is ineligible to enroll in the National Health Insurance Program receives a health insurance benefit, he must have violated the Immigration Control Act, the Criminal Code, or the Alien Registration Law to obtain long-time resident status, an illegitimate alien registration card, or illegitimate insurance card. Sanctions for these violations are provided in their respective laws.

E. Employment of Illegal Aliens While Aware of That Illegal Status

Any person who does any of the following may be punished with imprisonment for no more than three years, a fine not exceeding three million *yen* (US\$25,000), or both of these punishments:

- Having an alien engage in work illegally in connection with business activities;

¹⁵ *Id.* art. 22-4, para. 1, item 5.

¹⁶ Criminal Code, Law No. 45 of 1907, as amended, art. 155, para. 3.

¹⁷ Immigration Control Act, Order No. 319 of 1951, as amended, art. 74.

¹⁸ Gaikokujin tōroku hō [Alien Registration Law], Law No. 125 of 1952, as amended, art. 3.

¹⁹ Criminal Code, Law No. 45 of 1907, as amended, art. 155, para. 3.

²⁰ Kokumin kenkō hoken hō [National Health Insurance Law], Law No. 192 of 1958, as amended, art. 5.

²¹ Kokumin kenkō hoken hō shikō kisoku no ichibu o kaiseisuru shōrei no shikō ni suite [Regarding enforcement of the ordinance that amended a part of National Health Insurance Law Enforcement Regulation], Ministry of Health and Welfare, Hoken-hatsu No. 84 (Nov. 25, 1981); Gaikokujin ni taisuru kokumin kenkō hoken no tekiyō ni suite [Regarding application of the National Health Insurance for foreigners], Ministry of Health and Welfare, Hoken-hatsu No. 41 (Mar. 31, 1992).

- Placing an alien under his control for the purpose of having the alien engage in work illegally; and
- Repeatedly mediating the procurement or custody of an alien to engage in work illegally.²²

III. Enforcement

The prefecture police and the regional immigration control office individually or jointly prosecute illegal aliens. The NPA, a central police organization, controls and supervises prefecture police organization on matters of national concern. Each prefecture police force has the authority to carry out duties to protect the life, person, and property of residents, as well as maintain public safety and order within its jurisdiction. Regional immigration control offices have immigration control officers. These persons fall under the MOJ's jurisdiction.²³ Immigration control officers have authority to investigate violations of the Immigration Control Act and enforce detention and deportation.²⁴ The police and the regional immigration control office collect information on illegal aliens in major entertainment centers and other districts that have concentrated numbers of illegal foreign residents.²⁵

In addition to the criminal prosecution system, there is a system to deport an illegal alien or order him to depart from Japan. An immigration control officer may conduct an investigation for deportation.²⁶ The deportation may be forced upon aliens who, among other things, have committed the following actions:²⁷

- illegal entry;
- document fraud;
- running a business or being employed without persimmon;
- overstay;
- violations of specific provisions of the Immigration Control Law;
- incarcerated based on violations of the Alien Registration Law; and
- violations of specified provisions of other laws.

An immigration control officer may make inquiries to public offices or to public or private organizations for information on matters necessarily connected with investigations of violations.²⁸ An officer may request the appearance of a suspect and question him. In such a case, the immigration control officer must produce the suspect's written statement.²⁹ An officer may request the appearance of a witness for questioning. In such cases, the immigration control officer also must produce the witness's written

²² *Id.* art. 73-2.

²³ Homushō secchi hō [MOJ Establishment Law], Law No. 93 of 1999, as amended, art. 15.

²⁴ Immigration Control Act, Order No. 319 of 1951, as amended, art. 61-3-2.

²⁵ MOJ, *supra* note 4.

²⁶ Immigration Control and Refugee Recognition Act, Order No. 319 of 1951, as amended, art. 27.

²⁷ *Id.* art. 24.

²⁸ *Id.* art. 28.

²⁹ *Id.* art. 29.

statement.³⁰ In order to detain the suspect, an immigration control officer must apply for a written detention order with a supervising immigration inspector in his office. The officer then may detain the suspect when he obtains a written detention order.³¹ When an immigration inspector finds that a suspect is subject to deportation, he must notify the suspect that he may request a hearing.³² If the suspect has no objection to the findings, the supervising immigration inspector issues a written deportation order.³³ If he has an objection to the findings and requests a special inquiry officer for a hearing, a hearing is held.³⁴ When a special inquiry officer finds no error in the hearing's deportation decision, the suspect may file an objection with the Minister of Justice.³⁵ After the deportation decision becomes final, the alien will be deported to the country of his citizenship or nationality.³⁶

An immigration inspector issues a departure order for an overstayed alien who has satisfied all of the following conditions:

- has made a voluntary appearance at an immigration office with the intention of departing from Japan promptly;
- has never committed a specified crime in Japan;
- has never been deported or received a departure order
- has proved the certainty of his prompt departure from Japan.³⁷

If the suspect is given a departure order while he is detained, the immigration inspector releases the suspect³⁸ and lets him depart from Japan within fifteen days.³⁹

Statistics on enforcement of immigration law are available in *Shutsunyūkoku kanri* [Immigration Control Report], the periodical report issued by the Immigration Bureau of MOJ. “In 2004, the number of foreign nationals for whom deportation procedures were carried out on account of violating the Immigration Control Act was 55,351.”⁴⁰ Among them, “the number of foreign nationals who illegally entered Japan without valid passports and so forth, was 11,217.”⁴¹ Also, among them, “the number of

³⁰ *Id.* art. 30.

³¹ *Id.* art. 39.

³² *Id.* art. 47, para. 4.

³³ *Id.* art. 47, para. 5.

³⁴ *Id.* art. 48.

³⁵ *Id.* art. 49.

³⁶ *Id.* art. 53.

³⁷ *Id.* art. 24-2.

³⁸ *Id.* art. 47, para. 2.

³⁹ *Id.* art. 55-3.

⁴⁰ MOJ, Immigration Control Report 2005 48 (2005), available at <http://www.moj.go.jp/NYUKAN/nyukan46-2.pdf>.

⁴¹ *Id.* at 49.

those who had stayed beyond the authorized period of stay was 41,175.”⁴² Moreover, many of these persons worked illegally. “The number of written deportation orders issued in 2004 was 42,074.”⁴³

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⁴² *Id.* at 53.

⁴³ *Id.* at 61.

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SWEDEN

IMMIGRATION LAW SANCTIONS AND ENFORCEMENT IN SELECTED FOREIGN COUNTRIES

Executive Summary

Immigration is regulated primarily in the Swedish Aliens Act. The Act regulates illegal entry and presence in Sweden as well as the sanctions for employing an immigrant who does not possess a required work permit. Document fraud is regulated in the Swedish Penal Code, but the Aliens Act contains provisions on the consequences for aliens who commit crimes in Sweden. Immigration controls are exercised at the outer borders of the countries included in the Schengen Agreement. Swedish police exercise internal controls, but the available data indicates that expulsion orders due to violations of the Aliens Act are used restrictively.

I. Introduction

Immigration to Sweden is regulated in the Swedish Aliens Act¹ and the Aliens Ordinance.² A foreigner who enters Sweden to stay for more than three months must obtain a residence permit.³ Generally a residence permit is issued prior to entering Sweden.⁴ The Nordic countries (Denmark, Finland, Iceland, Norway, and Sweden) signed a Protocol on the exemptions from passport and residence permit requirements in the 1950s.⁵ A foreigner employed in Sweden or abroad must have a work permit to work in Sweden, unless he has a residence permit or is a citizen of one of the Nordic countries.⁶

Swedish policy on work immigration is that need for labor shall be supplied by foreign workers only if a demand cannot be met within Sweden, the European Union, or the European Economic Area (EEA). In Sweden, like in most of the European Union, the population is aging. In the discussion on how to meet the demand for labor the question of economic migration has been raised. In the spring of 2003, the Swedish Parliament gave the Swedish government the task to assemble a parliamentary commission to propose new rules that would allow expanded economic migration from countries

¹ Utlänningslag (Svensk författningssamling [SFS] 1989:529) (Swed.).

² Utlänningsförordning (Svensk författningssamling [SFS] 1989:547) (Swed.).

³ 1:4 Utlänningslag (Svensk författningssamling [SFS] 1989:529) (Swed.).

⁴ 2:5 Utlänningslag (Svensk författningssamling [SFS] 1989:529) (Swed.).

⁵ 1:4 Utlänningslag (Svensk författningssamling [SFS] 1989:529) (Swed.).

⁶ 1:5 Utlänningslag (Svensk författningssamling [SFS] 1989:529) (Swed.).

outside the EU/EEA.⁷ The government formed the commission in February 2004 and its conclusions are due to be presented in October 2006.⁸

II. Illegal Entry

According to the Swedish Aliens Act, an alien who intentionally, and in a forbidden manner, crosses an outer border according to the Schengen-Agreement⁹ can be sentenced to fines or prison for up to one year.¹⁰

If someone intentionally aids an alien to unlawfully enter or pass through Sweden, a member state of the European Union, Norway, or Iceland, he or she can be charged with human trafficking and can be sentenced to prison for up to two years. If the crime is aggravated, the court can sentence the guilty party to prison for at least six months and, at most, six years for aggravated human trafficking. The crime is aggravated if the trafficking was conducted for compensation, was part of an enterprise that concerned a large number of people, was carried out in a way that could put the alien in mortal danger, or it otherwise was carried out in a ruthless manner. If the crime is considered minor the sanctions are fines or imprisonment of up to six months.¹¹ A person who, with the intent to make a profit, plans or organizes activities to promote aliens to travel to Sweden without passports or the required permits needed to enter the country, , can be sentenced to prison for up to two years for the organization of human trafficking.¹² If the crime is aggravated, the minimum sentence is six months to at the most six years in prison. If the crime is considered minor the guilty party can be sentence to a fine or imprisonment for up to six months.¹³

III. Illegal Presence and Visa Overstay

According to the Aliens Act an alien who, by neglect or intentionally, stays in Sweden without a required permit (such as a residence permit) and without applying for such a permit can be subjected to fines.¹⁴

The Swedish Migration Board can make a decision to expel an alien if he remains after his residence permit has expired or it has been revoked.¹⁵

⁷ Frågor och svar: Migrations- och asylpolitik samt visuminformation, Regeringen [Swedish Government], available at <http://www.regeringen.se/sb/d/5216>.

⁸ Kommittédirektiv Dir. 2006:13 Tilläggsdirektiv till Kommittén för arbetskraftsinvandring (N 2004:09) (Swed.).

⁹ Austria, Belgium, Denmark, Finland, France, Germany, Greece, Iceland, Italy, Luxemburg, Norway, Portugal, Spain, Sweden, and The Netherlands.

¹⁰ 10:1b Utlänningslag (Svensk författningssamling [SFS] 1989:529) (Swed.).

¹¹ 10:2a Utlänningslag (Svensk författningssamling [SFS] 1989:529) (Swed.).

¹² Author's own translation of Swedish term *organiserande av människosmuggling*.

¹³ 10:5 Utlänningslag (Svensk författningssamling [SFS] 1989:529) (Swed.).

¹⁴ 10:1 Utlänningslag (Svensk författningssamling [SFS] 1989:529) (Swed.).

¹⁵ 4:3 Utlänningslag (Svensk författningssamling [SFS] 1989:529) (Swed.).

IV. Document Fraud

Falsification of documents is a crime according to the Swedish Penal Code.¹⁶ According to chapter 14 section 1 of the Penal Code:

A person who, by writing the name of another person, real or fictitious, or by deceit obtains another's signature or in other ways produces a false document or deceitfully alters or adds to a genuine document, shall if the act jeopardizes proof, be sentenced for *falsification of a document* to imprisonment for at the most two years.¹⁷

Chapter 14 section 9 of the Penal Code states:

A person who invokes a false document, offers or hold for sale a work with a false signature, passes a counterfeit banknote or coin, uses a false mark indicating value or a false control stamp, invokes a fixed mark or otherwise makes use of anything that has been falsified in a manner described above, shall, if the act jeopardises proof, be sentenced for the use of that which was falsified as if he himself had made the falsification.¹⁸

According to chapter 15 section 12 of the Penal Code:

A person who misuses a passport, certificate or similar document issued in the name of a given individual or imparts the document to be thus misused, or if he imparts a false document, which has come into being as a carbon copy or photographic reproduction or otherwise, as being a correct copy of a certain document, shall if the act jeopardizes proof, be sentenced for *misuse of document* to fine or imprisonment for at most six months or, if the crime is gross, to imprisonment for at most two years.¹⁹

An alien is eligible for expulsion from Sweden if he is convicted of a crime punishable by imprisonment, or if a court revokes a conditional sentence or probation that he has incurred. The alien may, however, only be expelled if he is sentenced to a punishment that is more severe than fines and

1. because of the nature of the crime and other circumstances it can be assumed that he will continue his criminal activity in Sweden; and
2. the crime, with regards to the damage it has caused, generated danger or violations against private individuals or public interests that are so serious the alien should not be allowed to remain in the country.²⁰

V. Employment of Illegal Aliens While Aware of Their Illegal Status

An alien who, intentionally or by neglect, is employed or is running a business without having a work permit, when such a permit is required, can be sentenced to a fine.²¹

¹⁶ Brottsbalk [BrB] [Penal Code] (Svensk författningssamling [SFS]1962:700) (Swed.).

¹⁷ Departements serie [Ds] 1999:36, The Swedish Penal Code, [Ministry series] (Swed.). The crime may also be judged as slight or aggravated. If the crime is an aggravated offense the guilty party may be sentenced to prison for at least six months and at the most six years.

¹⁸ Departements serie [Ds] 1999:36, The Swedish Penal Code, [Ministry series] (Swed.).

¹⁹ *Id.*

²⁰ 4:7 Utlänningslag (Svensk författningssamling [SFS] 1989:529) (Swed.).

A person who employs an alien who does not have a required work permit can be fined or can be sentenced to prison for up to one year if the circumstances are aggravated. It does not matter whether the employer was acting intentionally or by neglect.²² Furthermore, a legal entity or private person who has employed an alien without a required work permit, must pay a fine according to the Aliens Act, irrespective of whether they are held responsible under the law.²³

VI. Enforcement

Overall responsibility for Swedish border control lies with the Swedish police. The purpose of border control is, amongst other things, to counteract illegal immigration and cross-border crime.²⁴ One exception to the police's control over border control is the passport control conducted at sea by the Swedish Coast Guard.²⁵ As a result of the Schengen Agreement passport controls at the inner-borders of the member countries have ceased to exist, making travel within the Schengen area akin to traveling domestically. Nevertheless, careful controls at the outer borders of the Schengen area still are carried out.²⁶ The number of court decisions containing expulsion orders due to violations of the Aliens Act has increased since Sweden joined the Schengen Agreement. In the years 1999-2000, six people were expelled from Sweden due to violations against the Aliens Act and in the years 2001-2002, the number rose to thirteen people.²⁷

The Swedish police also conduct internal controls. According to the Aliens Act, if the police request, an alien must present a passport or other documents proving that he is staying in Sweden legally. An alien also must present himself to the Swedish Migration Board or a police authority if he is summoned to do so. If the alien does not abide by the summons he may be collected by the police. If it can be assumed that the alien will not comply with a summons because of personal circumstances or other reasons, the police may collect the alien without first issuing a summons.²⁸ These controls can only be carried out if there is reason to believe that a person does not have the right to stay in Sweden.²⁹

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²¹ 10:1a Utlänningslag (Svensk författningssamling[SFS] 1989:529) (Swed.).

²² *Id.*

²³ 10:7 Utlänningslag (Svensk författningssamling[SFS] 1989:529) (Swed.).

²⁴ Gränskontroll – Schengen, Polisen, available at <http://www.polisen.se/inter/nodeid=6346&pageversion=1.html>.

²⁵ *Id.*

²⁶ *Id.*

²⁷ Statens Offentliga Utredningar [SOU] 2004:110 Gränskontrolllag - effektivare gränskontroll [government report] 296 (Swed.).

²⁸ 5:6 Utlänningslag (Svensk författningssamling[SFS] 1989:529) (Swed.).

²⁹ *Id.*

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MEXICO

IMMIGRATION LAW SANCTIONS AND ENFORCEMENT IN SELECTED FOREIGN COUNTRIES

Executive Summary

Mexico enforces its immigration policy nation-wide through a large administrative apparatus and by using mechanisms that include inspections, prison term, fines and deportation. This immigration policy is enforced by the Secretariat of Interior under the General Population Act and its Regulation. The National Institute of Migration (INAMI) is the enforcement arm of the Secretariat of Interior. INAMI has branches throughout the country and the authorities in federal, state, or municipal public enforcement agencies, must collaborate with immigration officials to enforce immigration law.

I. Introduction

Mexico, the southernmost country of the North American continent, located between the United States of America to the north, the Central American Isthmus-nations to the south, the Pacific to the east and the Caribbean to the west, has a two thousand-mile common border with the United States. It has a 956-km common border with Guatemala at its southeast frontier and a 193-km common border with Belize on the Caribbean side.¹

Mexico has not been a center of high immigration. The foreign born population, beginning in 1990, was approximately 350,000 persons and increased over the next ten years only by slightly more than 150,000, resulting in approximately a half million foreign born persons in the year 2000.² In the last thirty years, the percent of foreign born has been maintained at around 0.5 percent.³ The total population of Mexico is 107,449,525 (July 2006 est.). The net migration rate is -4.32 migrant(s)/1,000 population (20006 est.). This latest figure from The World Factbook shows that more people are moving out of than into Mexico.⁴

However, México has had during the last sixty-seven years episodic flows of immigrants, such as the entrance of twenty thousand Spaniards who fled the Civil War of Spain at the end of the 1930s; five hundred Guatemalans who immigrated in June 1954 after the coup d'état that removed the government of Jacobo Arbens Guzman from power; and the immigration of a massive number of Chileans who were suffering from political persecution after the removal from power and death of

¹ Europa Regional Survey of the World: South America, Central America and the Caribbean [Mexico] 589 (14th ed., 2006).

² Francisco Alba, *México: A Crucial Crossroads* 4 (2002), available at Migration Policy Institute, <http://www.migrationinformation.org/Profiles/display.cfm?ID=211>.

³ Manuel Angel Castillo, *México: Caught Between the United States and Central America* 2 (2006), available at Migration Policy Institute, <http://www.migrationinformation.org/Feature/display.cfm?id=389>.

⁴ CIA- THE WORLD FACTBOOK – MEXICO, available at <http://www.cia.gov/publications/factbook/geos/mx.html>

Chilean President Salvador Allende in 1973. These last three groups were granted political asylum.⁵ During the 1980s, the chain of migration running through the Central American countries expanded across Mexico and into the United States. Hundreds of thousands of Central Americans fled warfare, persecution, and poverty.⁶ It has been estimated that some 340,000 Central Americans were living underground in Mexico City and other urban areas in refugee-like circumstances at that time.⁷ More than 200,000 people fled to Mexico from Guatemala in the wake of the general violence experienced by that country between 1980 and 1985.⁸ Mexico also has been used as a transit area by Central American migrants. A number of Central Americans looking for low paying jobs in Mexico in the 1980s, moved to the United States after facing a limited Mexican labor market and inadequate earnings.⁹ There are estimations that nearly one million Salvadorans and Guatemalans fleeing repression in their respective countries crossed Mexico and entered into the United States between 1981 and 1990. The number of undocumented persons that Mexico has deported has increased each year since the 1990s. These persons have been mainly from Guatemala, followed by Honduran, Salvadorans and Nicaraguan nationals. Groups of undocumented persons from South America and Asia also have been deported from the Mexican territory.¹⁰

II. The Law

Mexico is a republic with a federal form of government. The Nation is composed of thirty-one states plus the Federal District (Mexico City).¹¹ As in the United States, the legislative powers delegated to the federal congress are enumerated in the Constitution,¹² and the powers not so delegated remain with the states.¹³ Matters regarding immigration, emigration, legal status of foreigners, naturalization, and nationality, are federally preempted subject matter.¹⁴

A. The Constitution

The general legal standard concerning foreigners in Mexico is basically governed by Article 33 of the Federal Constitution, which provides that:

Foreigners are those who do not possess the qualifications set forth in Article 30. They are entitled to the [individual] guarantees granted by Chapter I, Title I of the

⁵ Centro de Investigaciones y Estudios Superiores en Antropología Social, *Los Refugiados Guatemaltecos y los Derechos Humanos* 27 (Gobierno de Chiapas 1991).

⁶ B. Frelick, *Running the Gauntlet: The Central American Journey through Mexico*, 3 *International Journal of Refugee Law* 210 (No. 2, 1991).

⁷ B. Frelick, *Refugees in Mexico: New Law, Old Practices*, *World Refugee Survey* 93 (1992).

⁸ Frelick, *supra* note 6, at 215-216.

⁹ Manuel Angel Castillo, *supra* note 3, at 3.

¹⁰ *Id.*

¹¹ Constitución Política de los Estados Unidos Mexicanos, as amended, arts. 40 and 43, (Editorial Porrúa, México, D.F., 2004), originally published officially in *Diario Oficial (D.O.)* February 5, 1917. Relevant to this report were the amendments published in the D.O. December 31, 1994. The Constitution and its amendments are available at <http://www.ordenjuridico.gob.mx>.

¹² *Id.* arts. 73, 74, 76.

¹³ *Id.* art. 124.

¹⁴ *Id.* art. 73, § XVI.

present Constitution; but the Executive of the Union shall have the exclusive power to expel any foreigner whose presence is judged undesirable, from the national territory immediately and without the necessity of prior legal action.¹⁵

B. Immigration Law

The immigration law of Mexico is contained within the General Population Act of January 7, 1994¹⁶ (the Act). The *Secretaría de Gobernación* (Secretariat of Interior) is the governmental agency exclusively in charge of implementing the provisions regarding immigration contained in the Act¹⁷ and its implementing Regulation, the Regulation of the General Population Act (the Regulation).¹⁸

C. Sanctions

Article 6 of the Federal Penal Code¹⁹ identifies crimes (*delitos*) not found in the Code itself, but in special statutes. A Mexican professor of law of the Autonomous University of San Luis, Potosí, Juan Manuel Ramírez Delgado in his treatise on federal crimes, and in reference to Article 6 of the Federal Criminal Code, discusses many federal statutes, including administrative ones, that contain a chapter on crimes, misdemeanors and sanctions, such as the General Population Act.²⁰ Indeed, Chapter VIII of the Act²¹ provides sanctions for crimes (*delitos*) and for misdemeanors. The sanctions for crimes can be as high as eighteen years imprisonment²² and fines, which can be as high as ten thousand pesos²³ (US\$910.53)²⁴ and fifteen thousand times the general minimum daily wage in effect in the Federal District at the time the violation is committed.²⁵ The sanctions for misdemeanors contained in Chapter VIII can be as high as thirty-six hours of detention or fines.²⁶ Article 140 of the Act also states that any administrative infringement of its provisions or the provisions of its Regulation on immigration matters, with respect to cases not foreseen in Chapter VIII's sanctions, are subject to fine up to one

¹⁵ *Id.* art. 33.

¹⁶ Ley General de Población (D.O., Jan. 7, 1974), as amended.

¹⁷ *Id.* arts. 2, 7, 9 & 10.

¹⁸ Reglamento de la Ley General de Población (D.O., Apr. 14, 2000).

¹⁹ Carranca y Trujillo, Carranca y Rivas, Código Penal Anotado art. 6 (24th ed., Editorial Porrúa, México, D.F. 2003).

²⁰ Juan Manuel Ramírez Delgado, *El Llamado Derecho Penal Especial o Delitos Especiales en el Ambito Federal*, at XVII-XVIII, (3d ed., Editorial Porrúa, México, D.F. 2003).

There are additional treatises authored by Mexican law professors and scholars on crimes not found in the criminal code, but in special statutes, including administrative statutes. Among these are:

- Miguel Acosta Romero and Eduardo López Betancourt's *Delitos Especiales*, (4th ed., Editorial Porrúa, México, D.F. 1998).
- Cesar Augusto Osorio y Nieto, *Delitos Federales*, (3d ed., Editorial Porrúa, México, D.F. 1998).

²¹ Ley General de Población ch. VIII (D.O., Jan. 7, 1974), as amended.

²² *Id.* art. 138, ¶¶ 1, 4.

²³ *Id.* art. 121.

²⁴ The currency conversion rate as of April 18, 2006 was 1 Mexican Peso = U.S. \$ 0.09106. This figure was obtained from the Yahoo Currency Converter available at <http://finance.yahoo.com/currency/convert>.

²⁵ Ley General de Población as amended, art. 138, ¶¶ 1,4. (D.O., Jan. 7, 1974).

²⁶ *Id.* ch. VIII.

thousand times the general minimum daily wage in effect in the Federal District at the time the violation is committed, based on the Secretariat of the Interior's opinion of the seriousness of the violations committed, or they are subject to detention for up to thirty-six hours if the imposed fine is not paid.²⁷ The sanctions imposed by the Act on administrative violations are consistent with the sanction ceiling mandated by Article 21 of the Federal Constitution for misdemeanors.²⁸

D. Illegal entry

Illegal entry is a federal crime (*delito*) penalized with imprisonment for up to two years, a fine from three hundred to five thousand Mexican Pesos (US\$27.32 to US\$455.47), and deportation.²⁹ Illegal entry is a continuous offense,³⁰ that is, that the offense continues after the initial illegal entry has been consummated. Therefore, the illegal presence of an alien that enters the country without documentation is a continuation of the initial crime of illegal entry (other penalized circumstances involving illegal presence are described below). According to a 1986 decision of the Mexican Supreme Court, when an illegal entry occurs on board a private airplane, the felony is consummated at the moment the alien in the airplane enters into national airspace without migratory documentation, even though the airplane has not landed.³¹

E. Repeated Illegal Entry

The General Population Act provides imprisonment for up to ten years, a fine of up to five thousand pesos (US\$455.47), and deportation against an alien who, after being deported, enters the Mexican territory again without having obtained readmission authorization. The same sanction applies to a foreigner who does not disclose or hides his deportee status in order to obtain a new entry authorization.³² This crime (*delito*) has two stages: the first is the initial crime (*delito*) of illegal entry, which continues during the time the alien remains in the country illegally and the second is the criminal omission of hiding the alien's deportee status. A readmission under the above circumstances requires an express authorization of either, the Secretary, the Sub-Secretary, or the Chief of Staff (*Oficial Mayor*) of the Secretariat of Interior (*Secretaría de Gobernación*).³³

F. Illegal Presence and Visa Overstay

The Act does not refer to visa overstay, but to illegal presence. Different penalties for illegal presence in the country under different circumstances are provided by the Act. Thus, a prison term of up to six years, fines of up to five thousand pesos (US\$455.47), and deportation must be imposed upon a foreigner who after [initially] obtaining legal authorization to enter the country, is [now] illegally in

²⁷ *Id.* art. 140

²⁸ Constitución Política de los Estados Unidos Mexicanos, as amended, arts. 21, (Editorial Porrúa, México, D.F., 2004), originally published officially in Diario Oficial (D.O.) Feb. 5, 1917.

²⁹ Ley General de Población, as amended, arts. 123, 125 (D.O., Jan. 7, 1974).

³⁰ Juan Manuel Ramírez Delgado, *supra* note 20, at 148.

³¹ *Internación Ilegal al País, Momento en que se Consuma, si el Medio Utilizado es una Aeronave*, 1a. Sala, Suprema Corte de Justicia, Semanario Judicial de la Federación, Séptima Época, Tomo II, Sept. 7, 1987, Tesis No. 39, página 26, available at <http://www.scjn.gob.mx>.

³² Ley General de Población, as amended, arts. 118, 125 (D.O., Jan. 7, 1974).

³³ Juan Manuel Ramírez Delgado, *supra* note 20, at 143-144.

the country due to non-compliance with, or in violation of, the administrative or legal provisions upon which his stay was conditioned.³⁴

Other circumstances of illegal presence occur when a foreigner performs activities for which he is not authorized under the Act or the entry permit he was granted by the Secretariat of Interior.³⁵ The Act penalizes this conduct with imprisonment for up to eighteen months, a fine of up to three thousand pesos (US\$274.18), and deportation.

An alien violating the terms governing his stay in the country, by performing unlawful or dishonest acts, will be penalized with up to two years imprisonment, a fine of up to ten thousand pesos (US\$910.53), and deportation.³⁶

The Act penalizes yet, another conduct of illegal presence. A fine of up to five thousand pesos (US\$455.47) and deportation is imposed on any alien whose immigration status has been revoked and who has not complied with orders from the Department of the Interior to leave the country within the time period set for the purpose he stated at entry.³⁷

No provision granting a grace period for overstaying a visa has been identified.

G. Threats to the National Security

In those cases involving threats to the sovereignty or the national security, deportation is certain and final. In all other cases, the Secretariat of Interior must determine the time period during which the deported foreigner must not be allowed to reenter the country. During such period, the deported person may only be readmitted upon authorization expressly issued by the Secretariat of the Interior or the respective assistant secretary.³⁸

H. Fraud

Under the General Population Act, an alien who provides false information to immigration officials in order to enter or after having entered the country, has his immigration status revoked and faces deportation, without prejudice to the penalties provided by the Penal Code.³⁹ In addition, the Federal Penal Code imposes prison terms from two to six years upon a person who provides false information while being interrogated by an authority other than a judicial authority.⁴⁰

Prison terms of up to five years and a fine of up to five thousand pesos must be imposed upon any Mexican national who contracts a marriage with an alien for the sole purpose of allowing the alien

³⁴ Ley General de Población arts. 125, 119 (D.O., Jan. 7, 1974), as amended (D.O., July 22, 1992).

³⁵ *Id.* arts. 120, 125.

³⁶ *Id.* arts. 121, 125.

³⁷ *Id.* art. 117, 125.

³⁸ *Id.* art. 126, 125.

³⁹ *Id.* arts. 124, 125.

⁴⁰ Carranca y Trujillo, Carranca y Rivas, Código Penal Anotado art. 247 (24th ed., Editorial Porrúa, México, D.F. 2003).

to reside in the country and to enjoy the benefits that the law establishes in such cases. The same penalty, plus deportation, is applied to the alien involved in such a marriage.⁴¹

A prison term of up to five years, a fine up to five thousand pesos, and deportation are applicable to any foreigner who maliciously makes use of or claims to hold a migratory status different than the one granted to him by the Secretariat of Interior.⁴²

The submission or signing of any document or petition with a signature that is false or different from the one normally used is penalized with a fine up to two hundred times the general minimum daily wage in effect in the Federal District at the time the violation is committed, or by detention for thirty-six hours if such fine is not paid. These sanctions are without prejudice to any penalty that may be incurred when such violations constitute a criminal offense.⁴³ Stiffer penalties for the commission of this offense are found in the Federal Criminal Code. The Code penalizes this kind of offense with imprisonment from four to eight years when the document is a public document⁴⁴ (e.g. those documents issued by government authorities when exercising their functions)⁴⁵, and imprisonment from six months to five years, plus fines, when the document involved is a private document.⁴⁶ These provisions of the Code include various kinds of document fraud, such as providing false dates, names, data, or circumstances, among others.⁴⁷

I. Aiding and Abetting

The Federal Penal Code assigns criminal responsibility to persons who, in different ways, aid and abet the commission of any crime and establishes rules to determine the sanction to be imposed.⁴⁸ The Act provides fines, detention for thirty-six hours if the imposed fine is not paid, and deportation upon a person who aids, abets, or advises any individual to violate the provisions of the Act and its Regulation “in a manner that does not constitute criminal offense.”⁴⁹ The Act does not specify how an individual conducts himself “in a manner” that is unauthorized, but not criminal. Additional conduct involving aiding and abetting occurs with the trafficking of illegal persons as described below.

J. Trafficking Illegal Persons In or Out of the Country

The highest penalties are provided for the commission of this crime. Imprisonment between six and twelve years and a fine between one hundred and ten thousand times the general minimum daily

⁴¹ Ley General de Población art. 127 (D.O., Jan. 7, 1974); *see also* Ley General de Población art. 125 (D.O., Jan. 7, 1974).

⁴² *Id.* arts. 122, 125.

⁴³ *Id.* art. 116.

⁴⁴ Carranca y Trujillo, Carranca y Rivas, Código Penal Anotado, arts. 243, 244 (24th ed., Editorial Porrúa, México, D.F. 2003).

⁴⁵ Código Federal de Procedimientos Civiles[C.F.P.C.][Federal Civil Procedure Code], as amended,art. 129 Diario Oficial de la Federation [D.O], 24 de Febrero (Mex.) de 1943, *available at* <http://www.ordenjuridico.gob.mx>.

⁴⁶ Carranca y Trujillo, Carranca y Rivas, Código Penal Anotado arts. 243, 244 (24th ed., Editorial Porrúa, México, D.F. 2003).

⁴⁷ *Id.*

⁴⁸ *Id.* arts. 13, 64-*bis*.

⁴⁹ Ley General de Población arts. 115, 125 (D.O., Jan. 7, 1974).

wage in effect in the Federal District at the time the violation is committed, plus deportation when an alien is involved, is imposed upon any person who, for purposes of trafficking, either directly or through an intermediary, transports or attempts to transport Mexican citizens or foreigners into another country without corresponding documentation.⁵⁰

The same penalty is imposed upon any person who either directly or through others brings one or more foreigners into Mexican territory without corresponding documentation issued by an appropriate authority, or who, for purposes of trafficking, shelters or transports foreigners within the national territory to hide such persons and avoid immigration inspections.⁵¹

Prison terms from one to five years and a fine of up to five thousand times the general minimum daily wage in effect in the Federal District at the time the violation is committed, and deportation if the offender is an alien, is imposed on any person who knowingly provides the means to, offers to, or helps to carry out acts considered trafficking illegal persons.⁵²

The penalties discussed in this subsection are increased by up to fifty percent in the event they involve underage persons, occur under conditions or by means that endanger the life, health, integrity or the life of the undocumented persons, or in the event the author of the crime is a public servant.⁵³

K. Employment of Illegal Aliens

The Act mandates that no one may be able to employ aliens who have not first demonstrated their legal stay in the country and obtained the specific authorization required to render the service in question.⁵⁴ The same prohibition is found in the Regulation, which also mandates that in case of doubt, immigration authorities must be consulted.⁵⁵ Despite these prohibitions, no specific sanctions for violating this prohibition have been identified, neither in the Act nor in the Regulation. Nevertheless, the sanction imposed under Article 140 of the Act, which is of general application, could, in the author's opinion, be applied to violator employers. Article 140, grants authority to the Secretariat of Interior to impose fines or detention for up to thirty-six hours, upon any one who commits an administrative violation of the Act or its Regulation that is not included in statute's sanctions listed in Chapter VIII.⁵⁶ It appears that the imposition of any sanctions upon employers who hire illegal aliens is implemented in a discretionary way.⁵⁷

⁵⁰ *Id.* arts. 138, 125.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* art. 74.

⁵⁵ Reglamento de la Ley General de Población art. 141 (D.O., Apr. 14, 2000).

⁵⁶ Ley General de Población art. 140 (D.O., Jan. 7, 1974).

⁵⁷ In a April 21, 2006, telephone inquiry by the author of this report to Mr. Antonio Avila, an attorney, officer of the Mexican National Institute of Migration (the implementing agency of the Secretariat of Interior), he confirmed that there is no specific sanction for employers who hire aliens while they are aware of their illegal status, adding that any sanction applied to them is discretionary.

L. Health care and Other Government Benefits

Under the Act on the National System of Social Assistance, social assistance is considered the totality of services established in the General Act on Health that are intended to modify and improve the social circumstances that impede the development of an individual or are intended to afford physical, mental, and social protection to those in a state of need or those who find themselves disadvantaged until they achieve a full and productive life. The Social Assistance Act specifically identifies twelve categories of individuals in need. Among these persons are indigents; persons who by extreme ignorance require assistance services; marginal rural or urban residents who lack elements of subsistence; and persons affected by disasters.⁵⁸ In addition, the National System of Integral Family Development offers special assistance to the uninsured urban infant-maternal population, providing health care, nutrition, and other services.⁵⁹

Foreigners who enter Mexico with the predominant purpose of using the health services will make full payment of any medical services received, except in cases of emergency.⁶⁰ No law or regulation making any kind of distinction for class, social condition, nationality, race, or political or religious affiliation of the person requesting medical or any kind of social benefits was found during the research conducted for this report. However, available literature reveals that during the 1980s undocumented Central Americans other than the Guatemalans settled in Chiapas, Campeche and Quintana Roo, received assistance only from non-profit organizations.⁶¹

III. Enforcement Of Immigration Laws

Mexico has extensive measures to enforce its immigration laws and it is the Mexican policy to do so. The Secretariat of Interior enforces the immigration laws through its enforcing arm, the National Institute of Migration - INAMI (*Instituto Nacional de Migración*). INAMI is a technical institution, with a large structure that includes branches in each state of the Mexican Union, and enjoys a certain amount of autonomy, although it is subordinate to the Secretariat.⁶² The Act establishes that the Secretariat may deny the entry of aliens or make changes in their migratory status for several reasons, as follows:

- a lack of international reciprocity;
- when the national population equilibrium demands it;
- when the quotas referred to in article 32 of the Act do not allow such entry or status change;

⁵⁸ Ley sobre el Sistema Nacional de Asistencia Social, arts. 3, 4 (D.O., Jan. 9, 1986).

⁵⁹ C. Mesa-Lago, *Health Care for the Poor in Latin America and the Caribbean* 106 (Pan American Health Organization and Inter-American Foundation, Scientific Publication No. 539, 1992).

⁶⁰ Ley General de Salud, as amended, arts. 35-36 (D.O., Feb. 7, 1984), available at <http://www.ordenjuridico.gob.mx>. A search of the Library's collection did not render any informative literature indicating that resident non-citizens in Mexico are denied social welfare benefits.

⁶¹ B. Frelick, *supra* note 6, at 226.

⁶² Reglamento Interior de la Secretaría de Gobernación, arts. 35, 36, 55, 56, 57, 59, & 61 and § V (D.O., July 30, 2002), available at <http://www.inami.gob.mx>.

- when it is considered detrimental to the economic interest of nationals;
- when the alien in question has violated domestic laws or has negative references from abroad;
- when the alien in question has violated this Act or its Regulation thereto, or any applicable administrative provisions, or does not comply with the requisites set forth in the same;
- when the alien in question is not physically or mentally fit in the judgment of the public health authorities; or
- in accordance with other statutory provisions;⁶³

Furthermore, the Act grants the Ministry of Interior authority to deny or suspend the admission of an alien even in cases when all the legal requirements are met, if it is in the national interest.⁶⁴ This discretion exists because it is the Secretary himself who determines what is considered in the national interest.

A. Enforcing Units

The INAMI performs its functions of enforcing the immigration laws with the assistance of several supporting units such as the Unit of Migratory Control and Verification, the Unit of Regulatory Migration, the Unit of International and Inter-institutional Relations, the Legal Unit, the Unit of Planning and Investigation, the Administrative Unit, the Unit of Delegations, and the Regional Delegations.⁶⁵

B. Verification, Oversight Procedures, and Levels of Enforcement

Besides fixed inspection locations established according to provisions of the law, immigration authorities, through their immigration services personnel,⁶⁶ and the Federal Preventive Police Force, may carry out the following actions: 1) performing verification visits; 2) causing a foreigner to appear before immigration authorities; 3) receiving and presenting complaints and testimony; 4) requesting reports; 5) performing migration inspection operations on routes or at temporary points different from established inspection locations; and 6) obtaining such other elements of proof as may be necessary for the application of the Act, its Regulation, and additional administrative provisions.⁶⁷

⁶³ Ley General de Población art. 37 (D.O., Jan. 7, 1974).

⁶⁴ *Id.* art. 38.

⁶⁵ Reglamento Interior de la Secretaría de Gobernación arts. 58 (D.O., July 30, 2002), *available at* <http://www.inami.gob.mx>.

⁶⁶ According to a phone conversation with Mr. Antonio Avila from INAMI, these officers are known as *agentes de migración*. See telephone inquiry, *supra* note 57.

⁶⁷ Ley General de Población art. 151 (D.O., Jan. 7, 1974).

Those officials who by law are responsible for federal, state, or municipal public enforcement agencies, must collaborate with immigration officials upon a request from these entities, for purposes of enforcing immigration law.⁶⁸

Personnel responsible for migration services and the Federal Preventive Police Force have priority, except in health-related cases, to inspect the entry and exit of persons, regardless their form of transit, at all the country's coastlines, ports, border crossing, or airports.⁶⁹ With the exception of health-related cases, within the national territory, the Federal Preventive Force is responsible for all effects related to the inspection of personnel in international transit, be it by air, sea, or land.⁷⁰

Whenever required by immigration authorities, aliens must verify that they have legally entered and stay in the country, and must comply with such other requirements set forth by the Act and its Regulation.⁷¹

C. Other Enforcement Mechanisms

The authorities of the country, whether federal, local, or municipal, and the notaries public and commercial brokers are required to request that the foreigners whom they deal with prove their legal presence in the country.⁷²

Civil Registry judges or officers of the Civil Registry must not perform any act involving the participation of an alien until the person first has demonstrated that his stay in the country is legal, except in cases of births (within the prescribed time limit) and death under the terms set forth in the Regulation. In cases involving the marriage of a foreigner with a Mexican citizen, they also must request authorization from the Secretariat of the Interior.⁷³

Judicial and administrative authorities must not process any divorce or marriage annulment involving aliens unless their request is accompanied by a certification from the Secretariat of the Interior accrediting their legal residence in the country and that their immigration status and category permits that such an action be performed.⁷⁴

D. Detention of Deportable Foreigners

Two types of detentions can be found in Mexican law. The first one is to carry out a Presidential order expelling from the national territory a foreigner whose presence is judged undesirable. As stated above, Article 33 of the Constitution grants the President this power without the need of a prior legal action of any kind.⁷⁵ Moreover, the President does not need to explain to the

⁶⁸ *Id.* art. 73.

⁶⁹ *Id.* art. 16.

⁷⁰ *Id.* art. 17.

⁷¹ *Id.* art. 64.

⁷² *Id.* art. 67.

⁷³ *Id.* art. 68.

⁷⁴ *Id.* art. 69.

⁷⁵ Constitución Política de los Estados Unidos Mexicanos, as amended, art. 33 (Editorial Porrúa, México, D.F., 2004), originally published officially in *Diario Oficial (D.O.)* Feb. 5, 1917.

foreigner the reasons for his decision. However, Article 33 does not grant the President an arbitrary power, but a discretionary power. The motivation and legal basis of the Presidential decision is subject to judicial review. Foreigners have the right to file an extraordinary constitutional appeal known as *Amparo* and in this proceeding the President must explain to the Court the reasons and legal basis of his deportation order. Although the deportation order is not suspended during the *Amparo* proceedings, the foreigner may return to the country if the Court decides in his favor.⁷⁶

The second type of deportation detention is based on Article 125 of the Act. Article 125 refers to a list of other articles concerning immigration related offenses, one being the illegal entrance into the country. The Act imposes imprisonment as well as deportation for the commission of these acts.⁷⁷ Immigration authorities may make visits of verification and oversight to foreigners. When as a result of such a visit, or due to the information received, the immigration authority learns that the alien has been involved in any of the illegal acts referred to by Article 125, the authority must detain the alien and place him at the disposal of the Secretariat of Interior (*Secretaría de Gobernación*).⁷⁸ The places assigned by law for securing aliens are immigration stations.⁷⁹ Once the alien has been detained there, the following procedure must be observed:

- The alien must be submitted to a medical physical examination.
- The alien must be allowed to communicate via telephone or by other means with whomever he desires.
- The consul of the alien's country of origin must be notified about his detention.
- An inventory will be taken of the articles in his possession and they will be stored in a place assigned to this purpose. These possessions are returned to the alien after the alien's departure from the immigration station has been authorized.
- The alien must be informed about the offenses with which he is charged and about his right to offer evidence and present witnesses.
- The authorities will proceed to hear his/her declaration through an administrative act and in the presence of two witnesses. He is provided with a translator if needed. He is also informed about the right to appoint a representative and to have access to the records of his/her case.
- He has the right to be visited by his/her family and his representative.

⁷⁶ Constitución Política de los Estados Unidos Mexicanos, commented, Vol. II, cmt. Art. 33, at 30-31 (15th ed., UNAM-Porrúa, México, D.F., 2000).

⁷⁷ Ley General de Población arts. 125, 117-127 & 138 (D.O., Jan. 7, 1974).

⁷⁸ Ley General de Población arts. 152, 153 (D.O., Jan. 7, 1974); Reglamento de la Ley General de Población arts. 198, 199 (D.O., Apr. 14, 2000).

⁷⁹ Ley General de Población art. 71 (D.O., Jan. 7, 1974); Reglamento de la Ley General de Población arts. 207, 208 (D.O., Apr. 14, 2000).

- If the securing of the alien's family is needed, they will be placed in the same location and allowed to live together.⁸⁰

After all the above steps have been performed, the Secretariat of Interior must decide the alien's fate within fifteen working days and notify the alien, personally or through his representative, of the decision.⁸¹ If the alien's deportation is decreed and it cannot be carried out for reasons outside the control of the immigration authorities, it may, in special cases, place the alien in the provisional custody of a person or an institution of good reputation, if so requested, until the deportation is carried out.⁸²

E. Enforcement through Registration

Foreigners residing in Mexico must be registered in the Registry of Foreigners Residing in Mexico, which is maintained by the Secretariat of Interior.⁸³

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⁸⁰ Reglamento de la Ley General de Población art. 209, ¶ VIII (D.O., Apr. 14, 2000).

⁸¹ *Id.* art. 210.

⁸² Ley General de Población art.153 (D.O., Apr. 7, 1974). A fine is imposed upon this referred person or institution when taking temporary custody of an alien as per the request of the immigration authority, allows said alien to escape immigration controls. The fine may be up to one thousand times the general minimum daily wage in effect in the Federal District at the time the violation is committed. This penalty is without prejudice to such penalties as may be incurred when such action constitute a criminal offense. *Id.* art. 139-*bis*.

⁸³ *Id.* art. 87.

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SWITZERLAND

IMMIGRATION LAW SANCTIONS AND ENFORCEMENT IN SELECTED FOREIGN COUNTRIES

Executive Summary

Switzerland enforces its immigration laws with some diligence at all levels of government and this process results in a fair number of expulsions, deportations, and criminal convictions. Yet, Switzerland expects to improve enforcement through the enactment of tougher immigration and asylum laws that will be submitted to a popular referendum in the fall of 2006.

I. Introduction

Switzerland is a small landlocked country of 7.4 million inhabitants and 21.8 percent of its population, some 1.5 million inhabitants, is alien.¹ The estimated number of illegal aliens is ninety thousand.² Although Switzerland has less illegal aliens than its neighbors Germany and Austria,³ the Swiss are apprehensive about the presence of illegal aliens and the Swiss governments at the federal and cantonal level have tried to cope with the problem through periodic studies of its scope and causes and through numerous attempts at law reform and improved cooperation among agencies.⁴

The latest comprehensive governmental study on illegal aliens and the status of immigration law enforcement was published in June 2004 (Illegal Migration Report).⁵ It informs that illegal aliens come to Switzerland in search of work, to join their families or partners, or to seek refuge. They come to Switzerland by crossing the border in uncontrolled locations or they are smuggled into the country by human trafficking organizations. In addition, they make spurious asylum claims, overstay visas, or commit fraud, forgery or enter fraudulent marriages in order to enter Switzerland or remain there. Illegal aliens cause problems by harboring a higher percentage of criminals than the population at large, by easily being drawn into criminal prostitution or drug trafficking, or by endangering domestic security and foreign relations through terrorist or extremist activities. In addition, illegal aliens are employed on the black market, with the payment of income taxes and social security contributions.

¹ STATISTISCHES JAHRBUCH DER SCHWEIZ 2006 24 – 25 (Bern 2006). The number of aliens is high because it is difficult for aliens to become permanent residents and even more difficult for them to become citizens. Of the aliens residing in Switzerland, two thirds are permanent residents and one fifth are second or third generation aliens [*Id.*].

² A governmentally commissioned study made this estimate in February 2005 [Schlussbericht im Auftrag des Bundesamtes für Migration, Sans Papiers in der Schweiz 58 (Bern 2005), available at <http://www.soziotrends.ch/pub/sans-papiers.pdf> (last visited Apr.20, 2006). Estimates of other studies range from 50,000 to 300,000 [*see Bericht, infra* note 3, at I].

³ Bericht zur illegalen Migration (IMES, BFF, fedpol, and Grenzwachtkorps) 10 (June 23, 2004), available at <http://bfm.mit.ch> (last visited Apr. 20, 2006). The report was compiled by the federal agencies involved in various aspects of immigration and by their cantonal counterparts.

⁴ Botschaft zum Bundesgesetz über die Ausländerinnen und Ausländer, Mzy 21, 2002, BUNDEBLATT [BBl] 3709 (2002).

⁵ Bericht, *supra* note 3. The report was compiled by the federal agencies involved in various aspects of immigration and by their cantonal counterparts.

A. Immigration Law in General

In December 2005, efforts to improve law enforcement against illegality that had been in the drafting process for the past two decades,⁶ culminated in the enactment of a new Act on Aliens (proposed Act)⁷ that, however, has been challenged by a petition to hold a referendum on the law,⁸ which will take place no earlier than September 2006.⁹ If the voters approve the Act, it will replace the Act on the Temporary or Permanent Residence of Aliens of 1931 the (current Act),¹⁰ that also was driven by the intent to keep out illegal aliens.¹¹

Both the proposed and the current Act provide a comprehensive system for the entry and residence of aliens; yet, the proposed Act imposes stiffer sanctions for illegal immigration and it closes loopholes by carefully defining unlawful conduct. In addition, the new Act makes it clear that Switzerland is interested only in admitting highly qualified workers in occupations that are in short supply, and only if the need for labor cannot be met by workers from Switzerland or the European Union's countries. Switzerland entered into a Freedom of Movement Agreement with the European Union that became effective in June 2002 and that is being gradually expanded to include the ten European countries that acceded to the European Union on May 1, 2004.¹²

The basic elements of immigration law remain unchanged in the proposed Act. Thus, both the current and the proposed Act provide that aliens require a passport and a visa to enter Switzerland, except that the visa is not required for countries with which Switzerland has executed a visa waiver agreement. In addition, aliens must live up to certain requirements to be granted entry into Switzerland – namely, the absence of circumstances that indicate that the alien may endanger law and order or international relations, the absence of an administrative or judicial deportation order or ban, assurances that the alien will leave Switzerland on time, and sufficient means to defray the cost of living.¹³ Aliens must enter Switzerland through an official checkpoint. The crossing of the border in field and forest is an illegal entry.¹⁴

Both Acts require aliens to report to the authorities before their visa has expired, or in the case of visa waiver entries, before the three months period of their permitted presence has expired.¹⁵ Both Acts disallow the employment of aliens on the basis of a tourist visa; instead, they require a visa for the

⁶ Botschaft, *supra* note 4, at 3709.

⁷ Bundesgesetz über die Ausländerinnen und Ausländer [AuG], Dec. 16, 2005, AMNTLICHE SAMMLUNG DES BUNDESRECHTS [AS] 7365 (2005).

⁸ According to article 141 of the Swiss Constitution [Bundesverfassung der Schweizerischen Eidgenossenschaft, Apr. 18, 1999, as amended, SYSTEMATISCHE SAMMLUNG DES BUNDESRECHTS [SR] 10, Swiss laws must be submitted to the voters for a referendum if fifty thousand voters or eight cantons request this.

⁹ M. Rosenberg, *Das Volk hat das letzte Wort*, NEUE ZÜRCHER ZEITUNG 13 (Apr. 7, 2006).

¹⁰ Bundesgesetz über Aufenthalt und Niederlassung der Ausländer [ANAG] Mar. 26, 1931, as amended, SR 142.20.

¹¹ M. SPESCHA & P. STRÄULI, AUSLÄNDERRECHT 33 (Zürich, 2001).

¹² EU-Erweiterung: Ausdehnen des Freizügigkeitsabkommens und Revision der flankierenden Massnahmen, (Bern, Sept. 2005), available at <http://www.bfm.admin.ch> (last visited April 20, 2005).

¹³ Under the current Act: Verordnung über Einreise und Anmeldung von Ausländern und Ausländerinnen, Jan. 14, 1998, as amended, SR 142.211; under the proposed Act: AuG art. 5.

¹⁴ Under the current Act, this is implied [Spescha *supra* note 11 at 102]; in the proposed Act it is expressed [AuG art 15 (d)].

¹⁵ AuG art. 12.

purpose of working that must be renewed annually for several years before permanent status can be obtained. Both Acts have a system of sanctions for violations of immigration law and a system of coercive measures that range from turning away an entrant to prolonged detention under certain circumstances. The coercive measures were introduced in 1995, to deal with the influx of drug trafficking and organized crime.¹⁶

To complement the enforcement provisions of the proposed Act on Aliens, a major reform of the Asylum Act¹⁷ was promulgated in December 2005 and it will be subject to the same referendum as the proposed Act on Aliens.¹⁸ The proposed Asylum Reform Act aims at reducing the illegal entry of asylum petitioners and makes it less attractive for aliens to seek asylum in Switzerland for economic reasons.¹⁹ Another important measure in the fight against illegal immigration was accomplished in June 2005, with the enactment of an Act to Combat Black Market Labor²⁰ that applies to lawful residents and illegal aliens alike who do not pay income taxes and for whom employers do not pay social security contributions. The Act provides federal parameters for tighter controls, to be carried out primarily by the cantons, and the Act also increases penalties.²¹

B. Sanctions

1. Illegal Entry, Illegal presence, and Overstaying of Visas

Under the current Act, the sanction for most violations of immigration law is up to six months imprisonment or a fine up to 10,000 Swiss Francs (US\$7,686). This penalty applies to anyone who illegally enters the country or remains there. However, instead of prosecuting an alien offender, the Swiss authorities may immediately deport him. Moreover, no penalty attaches to anyone who seeks refuge in Switzerland, under justifiable circumstances, and to those who are induced to help such an individual by honorary motives.²²

The current law also penalizes the aiding and abetting of illegal entry or presence in the same manner as the offense itself, irrespective of whether these acts are committed in Switzerland or abroad. In addition, the current law imposes more severe sanctions on those who facilitate illegal immigration on a commercial scale or as a member of a criminal organization that engages in human trafficking. Such individuals are punished with up to three years' imprisonment, or a fine of up to 100,000 Swiss Francs (US\$76,860), or both of these penalties.²³

Under the proposed Act on Aliens, the penalty for illegal entry and presence has been increased to a maximum of one year imprisonment or a fine of up to 20,000 Swiss Francs (US\$15,372) for intentionally committed offenses, and a fine for negligent conduct.²⁴ The new penal provision also is

¹⁶ BG über Zwangsmaßnahmen im Ausländerrecht, Mar. 18, 1994, AS 1995 at 146.

¹⁷ Asylgesetz Änderung, Dec. 16, 2005, AS 7425 (2006), amending Asylgesetz, Jun. 26, 1998, SR 142.31.

¹⁸ Rosenberg *supra* note 9.

¹⁹ Botschaft *supra* note 4, at 3729.

²⁰ Bundesgesetz über Massnahmen zur Bekämpfung der Schwarzarbeit [BGSA], Jun. 17, 2005, AS 4193 (2005).

²¹ Botschaft, Jan. 16, 2002, BBl 3605 (2002).

²² ANAG art. 23 ¶¶ 1, 3.

²³ ANAG art 23 ¶ 2, in conjunction with Schweizerisches Strafgesetzbuch, [StGB, Criminal Code], Dec. 21, 1937, as amended, SR 311.0, art. 36.

²⁴ AuG art. 115.

more specific on what constitutes illegal entry and presence. According to the new article 115 of the Act on Aliens, the criminal offense of illegal entry or presence is committed by anyone who enters the country from a place other than a border-crossing checkpoint, by anyone who enters the country without required travel documents or visas, or by anyone who does not have sufficient means for his or her sojourn, or by anyone who constitutes a danger to national security or foreign relations.²⁵ Moreover, the same penalty applies to an alien who makes preparations to enter another foreign country illegally after leaving Switzerland or the transit area of a Swiss airport.

As under previous law, a criminal prosecution can be waived if the alien is removed promptly from Switzerland. However, it is possible that the proposed Act will disallow asylum seekers to enter the country illegally.²⁶ The proposed Asylum Reform Act works under the assumption that asylum seekers will enter the country at airports.²⁷

The proposed Act also provides more severe penalties for anyone whom engages in human trafficking, either individually or in a group. Such offenses are punishable with up to five years imprisonment or a fine of up to 500,000 Swiss Francs (US\$394,300).²⁸

2. Fraud and Forgery

Under the current Act, the sanction of up to six months' imprisonment or a fine of up to 10,000 Swiss Francs (US\$7,686) applies to anyone who creates forged documents, falsifies valid documents, uses or procures such documents, uses valid documents that do not belong to him, or allows others to use valid documents unlawfully. These offenses are interpreted in accordance with article 252 of the Criminal Code,²⁹ a more general provision on the forgery of official documents. If forgery or fraud is committed on a commercial scale or as part of a human trafficking scheme, then the higher sanctions of three years imprisonment or a fine of up to 100,000 Swiss Francs applies.

The proposed Act increases the penalty for fraudulent conduct to up to three years' imprisonment or a fine of up to 20,000 Swiss Francs [US\$15,372]. This penalty applies to anyone who, with the intent of obtaining a permit or avoiding the loss of a permit for himself or another, misleads the authorities through false statements or through the concealment of facts.³⁰ Commercial and gang activity would fall under the higher sanctions for human trafficking.

In addition, the proposed Act applies the penalty for immigration fraud to sham marriages.³¹ These arrangements are being perceived as a big problem in Switzerland – one that is difficult to resolve.³² The new criminal provision against marriage fraud is flanked by an amendment of the Civil Code that declares marriages as null and void when the spouses do not live together but merely aim to evade immigration law. In addition, civil registrars must refuse marriage applications that aim at

²⁵ *Id.* (referring to AuG art 5).

²⁶ AuG article. 115 does not mention the exculpatory circumstance of seeking asylum that is contained in ANAG article 23 ¶ 3.

²⁷ Botschaft, Sept. 4, 2002, BBl 6845 (6852).

²⁸ AuG art. 115.

²⁹ Schweizerisches Strafgesetzbuch, Dec. 21, 1937, as amended, SR 311.0

³⁰ AuG art 118.

³¹ *Id.*

³² Botschaft *supra* note 4 at 3836.

committing marriage fraud, and to ascertain this fact, the couple must be questioned, and if necessary, investigations must be undertaken.³³

3. Illegal Employment

Under the current Act, employers of illegal aliens are subject to a fine of up to 5,000 Swiss Francs (US\$3,843) per intentionally employed illegal alien, in addition to a possible conviction for aiding and abetting illegal immigration. A fine of up to 3,000 Swiss Francs (US\$2,592) is applicable for negligent conduct. However, the courts have discretion to lower or raise these fines for employers in accordance with the circumstances.³⁴ Under the proposed Act, employers who employ aliens who do not have the visa that entitles them to work are punished with up to one year imprisonment (three years imprisonment in aggravated cases) and a fine of up to 500,000 Swiss Francs.³⁵

In addition to violating immigration laws, employers who employ illegal aliens as well as the illegal aliens who work for them are likely to commit criminal violations of social security law by not reporting employments and by not submitting contributions.³⁶ Moreover, since enactment of the Act Against Black Market Labor, repeat offenders among employers may be barred from governmental procurement contracts for five years and any subsidies that they receive also may be forfeited. To provide additional discomfort, the cantons that impose these measures must publish lists of sanctioned employers.³⁷

B. Enforcement

The cantons play the predominant role in the enforcement of Swiss immigration law. They examine petitions from abroad, carry out deportations, and use coercive measures, as needed. They also investigate illegal residency and illegal labor. To carry out these functions, the cantons employ their police forces, immigration authorities, and labor authorities and these bodies interact with each other, with the agencies of the other cantons, and with the Federal authorities. Among the latter, the border police (*Grenzpolizei*) control the entry of persons and the border corps of the customs office (*Grenzwachkorps*) controls the entry of goods. In addition, cooperation is provided by the Federal Migration Office (BFM, *Bundesamt für Migration*), the Federal Police (fedpol), and the Swiss consular representations in foreign countries.³⁸

Among the features that enhance enforcement are various reporting requirements, most of which are enforceable by administrative sanctions. Among these is the requirement of reporting the identity of lodgers. Innkeepers and others who provide lodging for compensation must report alien lodgers immediately, while those who provide shelter to an alien without compensation must report within a month. The alien must report to the authorities before his visa expires, and aliens who are permitted to work in Switzerland must notify the authorities of their arrival within a week. The cantons are at liberty to impose more stringent reporting requirements.³⁹ In addition, aliens who have a residence permit must

³³ AuG Appendix 4.

³⁴ ANAG, art. 23 ¶ 4.

³⁵ AuG art 117.

³⁶ Bundesgesetz über die Alters- und Hinterlassenenversicherung, Dec. 20, 1949, as amended, SR 831.10.art. 87

³⁷ BGSA art. 13.

³⁸ Bericht, *supra* note 3, at 3-4.

³⁹ Verordnung, Jan. 14 1998, SR 142.211.

request permission to move to another canton.⁴⁰ The pertinent data about legal and illegal aliens are kept in a federal database that allows the authorities at all levels to obtain prompt information.⁴¹

Another improvement of enforcement is the increased use of fingerprint identifications at border controls. Since 2002, the border checkpoints have become part of an automated fingerprint identification system. In 2003, the border police took fingerprints from 15,000 individuals and stored 6,500 of them; this led to the discovery of 5,000 cases of illegality. The fingerprint identification system is particularly useful for returning asylum claimants to the country of safe refuge from where they came. However, the border controls are only sporadic at street and railroad crossings because extensive controls would disrupt traffic too much. Full investigations are carried out only at airports.

Despite the Swiss' efforts to enforce immigration law, many Swiss find that the current level of enforcement is insufficient. Enforcement is not evenhanded; it is more likely to be thorough in rural areas, where the population takes an active interest in enforcement, and cursory in big cities. Illegal employment is likely to occur in domestic employment, in construction work, agriculture, and in the hotel and restaurant trade. A special problem exists with prostitutes and nightclub workers. These persons are subjected to special restrictions and the practice on expelling illegal prostitutes varies among the cantons.⁴²

Entry controls at borders checkpoints have in recent years, lead to the annual rejection of some 100,000 aliens who do not meet the entry qualifications. In addition, a smaller number of aliens are discovered in clandestine entry attempts, such as hiding in vehicles or by crossing the borders in areas other than checkpoints. In 2003, some 8,200 individuals were apprehended during such activities.

In 2003, 9,000 offenders were convicted for violations of immigration laws, and some 4,500 aliens were banned from reentering Switzerland. In 2002, some 60 individuals were convicted of smuggling aliens into Switzerland for gain, and some 569 individuals were convicted for facilitating illegal entry without having a profit motive. In 2003, the Federal Border Corps apprehended 422 individuals who were aiding and abetting illegal entrants. Also in 2003, 3,685 persons falsified or forged identification documents that were confiscated by the Swiss border controls, and the authorities requested 140 annulments of fraudulent marriages, leading to 41 denials of naturalization.⁴³

These figures have to be viewed against the backdrop of larger incidences of illegal immigration that include activities such as facilitating the illegal entry and sojourn of relatives, remaining in Switzerland after the conditions for a legal residence no longer exist (such as remaining after a divorce or the breakup of a partnership) the overstaying of visas, and the avoidance of border checkpoints at entry. In addition, the abuse of the asylum process is a big problem. In recent years, only 20 percent of asylum petitioners have been granted asylum, and many of the rejected asylum petitioners remain in Switzerland illegally.⁴⁴

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⁴⁰ ANAG art. 8.

⁴¹ Zemis-Verordnung, available at <http://www.Bfm.admin.ch>. If enacted, this regulation will replace Verordnung über das zentrale Ausländerregister, Nov. 23, 1994, as amended, SR 142.215.

⁴² Bericht, *supra* note 3, at note 21 and accompanying text.

⁴³ *Id.* notes 28–30 and accompanying text.

⁴⁴ *Id.* at 22.