**BLUE CARDS, GREEN CARDS – THE CONTEST TO ATTRACT HIGHLY SKILLED MIGRANTS**

Highly skilled immigrants are considered to be “sort after” individuals. They provide countries with skilled labour often, if they originate from developing or least developed countries, with significantly less wage demands than similarly skilled domestic workers. Furthermore they provide an attractive solution to skills’ shortages in the labour market of western States. Schemes to encourage this type of immigration have a long history, with the most well-known example supposedly being the US Green Card for labour migrants. Member States of the European Union have also operated similar schemes but it is only recently that the EU itself has entered this field with the adoption of Directive 2009/50/EC[[1]](#footnote-1), the “Blue Card” Directive. The UK however has opted out of this scheme and has introduced its own points based system[[2]](#footnote-2) for highly skilled migrants[[3]](#footnote-3).

In fact it is not the US Green Card that should be used as the instrument for a comparative analysis with the EU Blue Card but the H-1B visa[[4]](#footnote-4). This paper will conduct a comparative analysis of the US[[5]](#footnote-5), EU and UK schemes for attracting highly skilled migrants[[6]](#footnote-6). The three schemes will be examined, including the rationale for their implementation, before critically analysing their strengths, weaknesses and likely success in achieving their stated aims, including considering the effects on the migrant’s home State. The merits of each scheme will be assessed with the intention of making recommendations for amendments to ensure that their aims can be achieved.

The US and EU are without doubt the most attractive areas for these talented migrants with the lure of the world’s best universities, very well developed technological, IT and pharmaceutical industries and a need to augment the domestic skills base through immigration. With negotiations taking place between them on a free trade agreement, the treatment of highly skilled migrants could take on significant importance in order to establish a competition edge for future technological and economic advancement in the EU and US.

**AIMS AND OBJECTIVES**

HOST COUNTRY

Positive effects – increased R&D & economic activity due to availability of additional HSM, entrepreneurship in high growth areas, knowledge flows & collaboration with sending country, increased diversity & cultural creativity, export opportunities for technology, increased enrolment in graduate programmes & keeping smaller programmes alive, new blood to academia, wage moderation in high growth sectors with labour shortages, entrepreneurs foster firm & job creation, network hiring effects

Negative effects – possible decrease in incentive of natives to seek higher skills & less places at uni for natives, technology transfer to foreign competitors & possible security issues

HOME COUNTRY

Remittances

Knowledge flows

Brain drain

Brain circulation

HIGHLY SKILLED MIGRANT

Distinction between incentives for general migration & that for HSMs. So there can be better research opportunities, better work conditions and resources and greater access to a broader infrastructure (network of contacts). On top of that there is better pay, career advancement, higher quality research facilities, opportunities to work with prestigious colleagues & in prestigious institutions, greater opportunities for increased autonomy & often greater freedom in general, opportunities to report on research in prestigious academic journals. But also money sent home, can be a role model for others at home, & can gain necessary contacts, knowledge, credentials and industry kudos for career advancement at home.

US

US immigration system identifies 2 types of entrants to USA, immigrants & non-immigrants. Immigrants are those individuals seeking permanent residence & naturalisation – Green Card.

H1-B category of alien is a temporary resident, highly skilled & non-immigrant. First introduced in Immigration Act 1990. No aims & objectives set out in the legislation.

Criteria – employees can employ foreign workers in “speciality occupations” for 3 years, that can be extended to 6 (after 6 years the alien must leave the US & wait a year before reapplying). Speciality occupations – defined as requiring “theoretical & practical application of a body of highly specialised knowledge” & “attainment of a bachelor’s or higher degree in the specific speciality (or its equivalent) as a minimum” (somewhat confusingly the requirements of a speciality occupation are then restated in slightly different terms as “full state licensure to practice in the occupation, if such licensure is required to practice in the occupation” & “completion of the degree” previously described. Degree requirement can be set aside if applicant for a visa has “experience in the speciality equivalent to the completion of such a degree” & “recognition of expertise in the speciality through progressively responsible positions relating to the speciality”. No specific exclusions are detailed, merely the requirements to be satisfied to receive H-1B status.

3 stages in application. First employer submits a Labor Condition Application to Dept of Labor. Second, employer must submit an application for an alien visa petition to US Citizenship & Immigration Service for H-1B classification for the foreign worker. Third alien may then apply for an H-1B visa abroad at a consular office of Dept of State. Quota of 65, 000, though can also be 20, 000 for academic or a non-profit or governmental research organisation, or has earned a post-graduate degree from a US university.

Rights – can move to another job whilst retaining status but must come within quota again. If lose job there is no grace period to find another – employer must pay reasonable return costs. Spouse & minor children may accompany migrant (under an H-4 visa) & study but cannot work or obtain a social security number. Employment rights are same as that for a US worker. Can apply to become a immigrant permanent resident & receive a Green Card.

EU

Aims & objectives of Blue Card scheme – identified in Impact Assessment. 2 global objectives – to improve EU’s ability to attract & retain TCN HSWs & effectively & swiftly respond to labour demands for highly qualified labour & offset skill shortages, by encouraging TCN HSW immigration & circulation within EU. Specific aims – to develop a coherent approach & common immigration policy on TCN HSWs, to increase numbers of TCN HSWs immigrating to EU on a needs-based approach, to simplify & harmonise admission procedures for TCN HSWs, to promote TCN HSWs’ social & economic integration & to foster intra-EU mobility, remove unnecessary barriers & allow a more efficient allocation of TCN HSWs through EU.

The scope of the Directive would appear to be clear from Article 3(1) – it is apply to TCNs who apply to be admitted to the territory of a MS for the purpose of highly qualified employment. However, there are 10 exempted classes of individuals that are wide & raise concern. Criteria for admission are set out in Article 5. Para 1 – documentary evidence, para 3 outlines a wage threshold where migrant’s gross annual salary must be at least 1.5 times the average gross annual salary as determined & published by that MS. This salary threshold can be reduced through the derogation in para 5 to 1.2 for employment in professions in particular need of TCN workers & which belong to the major groups consisting of legislators, senior officials & manages, & professionals (a suggestion in the original proposal for a derogation for graduate TCNs less than 30 years of age was completely removed). MSs retain the right to control the volume of admission of TCN HSWs entering their territory (Art 6).

Procedural matters dealing with issuing the Blue Card, grounds for refusal, withdrawal/non-renewal & safeguards (very limited) are set out in chapter III.

Rights are in chapter IV. Right to employment is set out in Art 12. 1st 2 years is restrictive – Art 5 conditions must be met & changes in employment only allowed with prior authorisation in writing of MS authorities. After 2 years, MS has discretion to grant equal treatment with nationals but if does not TCN concerned must communicate changes that affect Art 5 conditions to host MS’s authorities IAW domestic procedures. MSs retain discretion to apply some specific restrictions. Loss of employment cannot lead to loss of Blue Card unless happens more than once or lasts for more than 3 months. Right of equal treatment in Art 14 but with exceptions at the MS’s discretion. Right to move within the host MS territory but a limited right to intra-EU movement in chapter V – after 18 months of legal employment in 1st MS can move to 2nd State to take up another job. Full application must be made to 2nd MS’s authorities within a month of moving, & 2nd MS can reject application, even on basis of volume of admission IAW Art 6. If so 1st MS has to take worker back. No EU right to naturalisation. If Blue Card worker has 5 years continuous legal residence in EU territory & 2 years in host MS then can apply for LTR status under LTR TCN Directive.

UK

UK first introduced a Highly Skilled Migrants Programme in 2002, outside the confines of the Immigration Rules. The aim of the HSMP was to “encourage individuals with the skills and experience required to enable the United Kingdom to compete in the global economy to come to the United Kingdom without any prior offer of employment”. This was extensively revised in 2006 introducing a categorisation list for all non-EU migrants ranging from Tier 1 to Tier 5 and a points based system to determine the quality of the applicant, which has seen limitations increasingly appeared ever since. Tier 1 was split into a number of sub-categories (general, entrepreneur, investor and post-study work) where an offer of work was not required before migrating. In 2012 the general and post-study work categories were abolished and exceptional talent and graduate entrepreneur were added instead. Tier 2 comprises intra-company transfer migrants, general, minister of religion and sportsperson and requires a sponsor to offer an employment contract before the applicant applies for a visa or moves. There are complex lists of criteria for each category but in general there is an English language requirement and a quota of 20, 700 for Tier 1 and 2 entrants, though with the exceptions and after the abolition of Tier 1 (general) this quota will only really apply to HSM with a sponsor who apply under Tier 2 (general) and earning less than £150, 000. There is also a quota limit of 1000 for Tier 1 (exceptional talent).

Rights – same employment rights as UK citizens. If obtain another job then must also obtain another sponsor and apply again for entry into the appropriate scheme.

After 5 years of continuous legal residence can be granted Indefinite Leave to Remain (ILR).

STRENGTHS AND WEAKNESSES

POWER RELATIONSHIPS – WHO HAS IT?

Market citizenship but actually market denizenship with HSMs capable of choosing the best location and regime for them and their family. The market then is a competitive locale with States competing to attract HSMs.

1. Council Directive 2009/50/EC on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, OJ 2009 L155/17 [↑](#footnote-ref-1)
2. Immigration Rules, Part 6A [↑](#footnote-ref-2)
3. Immigration Rules, Rule 135 [↑](#footnote-ref-3)
4. 8 USC Chapter 12 §1101 (a)(15)(H)(i)(b) [↑](#footnote-ref-4)
5. Including proposed changes to US immigration under the Border, Security, Economic Opportunity, and Immigration Modernization Bill [↑](#footnote-ref-5)
6. A Schachar, ‘The Race for Talent: Highly Skilled Migrants and Competitive Immigration Regimes’ (2006) 81 New York University Law Review 148 conducted a comparative analysis but this was before the introduction of the EU’s Blue Card Directive and the UK’s points based system [↑](#footnote-ref-6)