

IMMIGRATION PAPER SERIES

MODELS FOR IMMIGRATION MANAGEMENT SCHEMES

*Comparison and analysis of existing approaches
and a perspective for future reforms*

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1 INTRODUCTION

Over the past few decades, international migration has not only increased but is also flowing to and from an ever-larger number of countries. As the number of countries receiving economically motivated migration increases, they are developing a variety of strategies to deal with this challenge. Consideration of which legal instruments of migration management appear promising, in particular with regard to the recruitment of skilled migrants, is high on the political agenda. This paper gives an account of the present state of the debate on migration management schemes and the options available and strategic decisions to be made for the United States, Germany, and the European Union.

In particular, Section 2 of this paper demonstrates that a growing number of states are adopting selective immigration strategies that manifest themselves in a variety of policies. Some states opt for policies that rely more on state efforts to plan future migration, particularly through the use of point systems to select migrants. Other states opt for more of a market-based approach that is driven by private sector demand for migrant labor and enlists employers, rather than state officials, to select prospective immigrants. Section 3 explains how both approaches have their pluses and minuses and, in

the end, states often combine the approaches in the formulation and implementation of their selective immigration policies. In the realm of policy making, immigration is routinely categorized under family reunification, labor migration, and humanitarian admissions of refugees and asylum-seekers. This paper concerns itself only with recent state efforts to shape labor migration by increasing the numbers of high-skilled labor migrants. Section 4 examines the realities of immigration that defy policymakers' categorizations of people's purpose for migrating, as reflected in the visas they receive as well as the duration of the visa on which they enter, temporary or permanent. Section 5 places the immigration policies of European countries into the context of their membership in the European Union and the processes of integrating immigration, asylum, and border control policies. Furthermore, it raises questions over the international competition that has justified adoption of selective immigration policies as to whether European Union member states compete for high-skilled migrant labor as one unit at the global level or as individual states that compete with each other as well. The conclusion offers ten take-away points in the hopes of improving the understanding of contemporary immigration policies in both the United States and Europe.

2 SELECTIVE IMMIGRATION POLICIES: DIFFERENT APPROACHES

Ever since the development of the international system of states, states have, to varying degrees, attempted to shape the size and composition of migration across their borders.

2.1. Immigration and immigration policy

In accordance with the United Nations definition of migrants as those who have lived outside of their country of nationality for more than one year, the world's major countries of immigration are mostly in Europe and North America (see Table 1) but include several states that are not always thought of receiving large numbers of immigrants.

Although these countries are all now major immigration-receiving countries, they have come to

past four centuries, states primarily focused on controlling emigration, particularly the loss of those with skills and wealth. When the settler societies of United States, Canada, Argentina, Australia, and New Zealand gained their independence from European empires in the 19th and 20th centuries, they passed laws and adopted policies that encouraged continued immigration from Europe in order to populate their territories. These “classical immigration countries” initially prioritized admitting sheer numbers of migrants with little

Table 1: The ten countries with the highest number of international migrants (in millions)

Rank	1990		2005	
	1	United States of America	23.3	United States of America
2	Russian Federation	11.5	Russian Federation	12.1
3	India	7.4	Germany	10.1
4	Ukraine	7.1	Ukraine	6.8
5	Pakistan	6.6	France	6.5
6	Germany	5.9	Saudi Arabia	6.4
7	France	5.9	Canada	6.1
8	Saudi Arabia	4.7	India	5.7
9	Canada	4.3	United Kingdom	5.4
10	Australia	4.0	Spain	4.8

Source: Trends in Total Migrant Stock: The 2005 Revision, United Nations Department of Economic and Social Affairs, Population Division, POP/DB/MIG/Rev.2005/Doc, February 2006.

this point through different historical experiences of migration, which have, in turn, shaped their immigration policies.

Ever since the development of the international system of states, states have, to varying degrees, attempted to shape the size and composition of migration across their borders. For most of the

in the way of active state intervention to limit immigration. Only later did classical immigration countries pass laws and enforce regulations restricting migrants on the grounds of their health and country of origin, until World Wars I and II, essentially brought an end to large-scale relatively free flows of immigration. In the post-war period, immigration flows restarted as these

states resettled the refugees and displaced persons from Europe, accepted immigration of the family members of foreign born citizens and permanent residents, gradually loosened restrictions on labor migration or even, as in the case of Australia, actively recruited permanent migration of settlers immediately following World War II.

Migration policies of most European countries have been shaped more by a history of emigration than immigration. It is crucial to remember that net migration flowed out of Western Europe as a whole until the early 1970s, when it reversed direction. While classical immigration countries opened their doors to European immigrants during the 19th and early 20th centuries, most of Europe adopted nationality laws that enabled emigrants and their children to easily return. Since most European countries had relatively few immigrants in the post-World War II period, many of them did not enact immigration laws or develop bureaucracies to implement those laws—unlike the U.S., Canadian, and Australian governments, which had such laws and administrative agencies in place for decades. During the 1970s, 1980s, and 1990s, many European countries that had been net migration-sending countries became major immigration-receiving countries and only then passed immigration laws and adopted immigration policies, most notably Germany in 2004.

Legal immigration flows, regardless of the receiving country, can be roughly categorized by family reunification, labor migration, and humanitarian admissions of accepted asylum claimants and resettled refugees. Illegal migrants may be seeking work, joining family, or fleeing violence in their home country but are unable to gain asylum. Generally speaking, the largest legal migration flows to developed countries in Europe and North America are admitted under provisions for family reunification, and the immigration of labor has been constrained. Motivated by declining fertility

rates, increasing pensioner-to-working-age population ratios, and employer demand, many major immigration countries have been changing their policies to increase labor migration relative to family reunification and humanitarian flows.

Those major immigration-receiving countries who acknowledge that they are “immigration countries” are increasingly attempting to better manage immigration flows so as to realize national objectives instead of simply allowing migration to happen. As French President Nicolas Sarkozy, argued, “We no longer want immigration that is inflicted [on us].... We want selected immigration.”¹ Selective migration policies are proliferating among migrant destination countries of the developed world. The United States, Canada, Australia, New Zealand, Germany, the United Kingdom, France, the Netherlands, Ireland, and the Czech Republic have devised special visas and programs to attract scientists, highly-skilled engineers, medical professionals, computer programmers, and information technology professionals from abroad. Even relatively new immigration-receiving countries such as Russia are opting for selective migration policies. In 2005, then-President Vladimir Putin called for an immigration policy in which “people should be sent to where there is demand for them. We need specialists and workers with certain specialties in places where there is demand for them.”²

Selective migration policies may be explicit in the case of countries that have adopted point systems to select permanent migrants or they may be more implicit with the introduction of temporary high-skilled visas and/or the use of labor market criteria

¹ Quoted by Henry Samuel, “Sarkozy Unveils New Laws to Expel Foreign Workers,” *The Telegraph*, February 7, 2006.

² Quoted by Natalia Voronina, *Outlook on Migration Policy Reform in Russia*, in: IOM, *Migration Perspectives—Eastern Europe and Central Asia*, 2006, p. 78.

Selective migration policies are proliferating among migrant destination countries of the developed world.

Canada and Australia were pioneers of immigration policies based on point systems.

for certain skills in the determination of visa applications. Countries adopting explicit selective migration policies such as Canada, Australia, the United Kingdom, and France lean toward country planning of migration flows whereby government agencies select migrants using point systems guided by state determinations of labor market demand. Other countries have taken more market-oriented approaches driven by labor market demand as determined by employers who select the migrants by offering them jobs.

2.2. Planned immigration: Admission following economic forecasts

Canada and Australia were pioneers of immigration policies based on point systems, in which a prospective immigrant's skills, education, work experience, and age count toward attaining permanent resident status. **Canada's** 1976 Immigration Act established three categories of admission: family, humanitarian (refugees), and "independent" applicants selected by a point system that sorts applicants according to education, age, and skills. The Canadian point system allocates a maximum number of points in six categories: education (25); language ability in English and/or French (24); experience (21); age (10); arranged employment in Canada (10), and adaptability (10) for a total maximum of 100 points. Individuals who surpass 67 points are eligible to gain permanent residency under the independent admissions category. Immigrants selected through the point system constituted roughly 55-60 percent of the 200,000 to 250,000 immigrants that arrived in Canada each year over the past decade.³ **Australia** established a point system in 1973 to select individual applicants for permanent immigration. Out of 120,060 people Australia selected in its

³ CIC 2006, "Facts and Figures 2005 Immigration Overview: Permanent and Temporary Residents," Citizenship Immigration Canada. Retrieved at: <http://www.cic.gc.ca/english/pub/facts2005/index.html>.

2004–2005 migration program, 77,880 were selected on the basis of their skills as opposed to family ties or for humanitarian reasons.⁴

In October 2001, the British government announced the establishment of a Highly-Skilled Migrant Programme, which was designed to attract "highly mobile people with special talents that are required in a modern economy"⁵ with one year permits that can be renewed indefinitely. In March 2006, the Home Office outlined a point system for permanent immigration of highly-skilled migrants who apply as individuals or skilled workers with a job offer from employers.⁶ Launched in February 2008, the point system "combines more than 80 pre-existing work and study routes into the **United Kingdom** into five tiers; points are awarded on workers' skills to reflect aptitude, experience, age and also the demand for those skills in any given sector."⁷

In 2006, the government of **France** also unveiled legislation that would facilitate the migration of the highly skilled while making immigration more difficult for the unskilled. Then French Interior Minister and current President Nicolas Sarkozy argued, "The most qualified migrants, the most dynamic and competent ones head to the American continent, while immigrants with little or no skills come to Europe."⁸ The new law establishes a three-year "skills and talents"

⁴ Bob Birrell, Lesleyanne Hawthorne, and Sue Richardson. Evaluation of the General Skilled Migration Categories, Department of Immigration and Multicultural Affairs, March 2006

⁵ Cf. "U.K.: Immigration and Race Relations," *Migration News*, Vol. 9, No. 1 (January 2002).

⁶ Home Office, "A Points-Based System: Making Migration Work for Britain". Retrieved April 12, 2006 at: http://www.fco.gov.uk/Files/kfile/Command_Paper1.pdf.

⁷ Home Office, "The points-based system," Retrieved May 4, 2008 at: <http://www.bia.homeoffice.gov.uk/managingborders/managingmigration/apointsbasedsystem/>.

⁸ Quoted by Katrin Bennhold, "France to favor skilled immigration," *International Herald Tribune*, February 10, 2006.

residence permit aimed at attracting scientists, IT experts, and artists who, as Sarkozy put it, could “contribute to the economic dynamism of our country.”⁹ The July 2006 Immigration and Integration Act created three new types of three-year residence permits for highly-skilled workers, those who are sponsored by French employers and seasonal workers. Foreign students who graduate with a French master’s degree will have up to six months upon graduation to find a job, after which they will be given a work permit. Applicants for high-skill and student-resident permits will be selected through a point system that ranks them according to their field of work and study.

While all the above countries have adopted point systems, they may vary significantly in terms of which immigrant characteristics earn applicants points and the number of points these desired characteristics earn relative to other characteristics. Point systems may take fundamentally different approaches to migrant selection as the contrast between Canada and Australia amply demonstrates. Canada utilizes a “human capital model” whereby government officials assign points for education, language capability (English or French), and work experience with a view that “ ‘well-trained flexible individuals... who have experience in the labour force’ should be able to ‘adapt to rapidly changing labour market circumstances.’ ”¹⁰ In contrast, Australia abandoned a similar human capital model in 1996 due to high rates of unemployment among economic stream migrants and adopted a more skills-specific approach based on labor market assessments and more rigorous credential screening

⁹ Quoted by Samuel, 2006.

¹⁰ Daniel Hiebert, “Skilled Immigration in Canada: Context, Patterns and Outcomes”, Chapter A1, in Bob Birrell, Lesleyanne Hawthorne and Sue Richardson, eds., *Evaluation of the General Skilled Migration Categories*, Commonwealth of Australia, Canberra 2006, p. 185.

and English language testing before migration.¹¹ Australia has developed a highly calibrated approach whereby the Department of Immigration and Multicultural Affairs (DIMA) identifies desired occupations and skills in the Skilled Occupation List and Employer Nomination Scheme Occupation List and gives applicants between 40-60 points depending on the listing of their occupation and their credentials, which are assessed by an identified credential assessing authority. DIMA continually revises this list in consultation with employers and unions in order to target labor market needs sector by sector and skill-set by skill-set. Regional economic needs are also taken into account as Australian states and territories can in effect sponsor applicants who enter their data in a “Skill Matching Database.”

2.3. Demand-driven immigration: Admission following employers’ needs

Unlike Canada and Australia and now the United Kingdom and France, U.S. and German government officials do not set abstract criteria for levels of education and skills and select permanent immigrants based on a standardized assessment. In the United States, selection of skilled migrants is determined by employers who apply to the government for temporary visas for migrant workers from abroad and employers who sponsor their employees with temporary visas to adjust their status and get permanent residence. The United States essentially takes more of a market-based, employer-demand driven approach to the formulation and implementation of selection criteria. The systematic approach in Germany is more similar to that of the United States than widely assumed. Even though applications are filed by the potential immigrants rather than the

¹¹ Lesleyanne Hawthorne, *Labour Market Outcomes for Migrant Professionals: Canada and Australia Compared* (Ottawa: Statistics Canada 2006).

Point systems may take fundamentally different approaches to migrant selection.

The German concept of economic immigration is mostly demand-driven and hence employment-based.

potential employer, admission depends—besides other criteria—on a binding job offer.

Selection on the basis of general criteria frequently used in point systems (“human capital-model”) has been intensively discussed in Germany in the context of demographic developments and long-term immigration management. In principle, Germany, as well as most other European states, has opted against a concept of planned immigration as practiced in Canada. Instead, the German concept of economic immigration is mostly demand-driven and hence employment-based. A specific employment offer including an examination of comparable labor-wage conditions is required in Germany in order to apply for a residence permit for the purpose of taking up employment. Employment is considered a more reliable indicator of successful integration than a general assessment of the individual’s potential, following criteria like age, diploma, language skills, etc.

The U.S. Congress and successive administrations have responded to employer demand for high-skilled migration by enacting certain provisions of U.S. immigration law that permit both permanent and temporary high-skilled migration. The Immigration Act of 1990 nearly tripled permanent residence (“green cards”) for immigrants who are sponsored by employers up to an annual limit of 140,000. The then existing H1 visa program that enabled migrants of “distinguished merit or ability” to fill temporary jobs as long as they established intent to return home was also revised by the 1990 Act by establishment of the H1-B visa (capped at 65,000) that enabled employers to offer permanent jobs to migrants in “specialty occupations” on a three-year, one-time renewable, visa after which migrants could adjust their status to permanent resident. High-tech professionals and engineers acquired an increasing share of employer-sponsored green cards and H1-B visas following the tech boom of the 1990s.

Subsequent legislation enacted in 1998 and 2000 expanded the H1-B program (see Table 2) but then expired, returning the quota to 65,000. In 2005, the U.S. Congress created an “advanced degrees exemption” that allocates 20,000 additional H1-B visas for applicants with advanced degrees from U.S. universities. The H1-B program has enabled an increasing share of high-skilled workers within not only temporary migration flows but, as H1-B visa holders adjusted to permanent resident status, permanent immigration flows as well. Many of those leaving their H-1B status within the total six-year term did not necessarily leave the United States—rather between 20 percent and 50 percent of H-1B visa holders adjusted their status to permanent resident alien (received a “green card”) each year of the 1990s.¹² The net effect is that there has been a flow of high-skilled migrants who essentially immigrate to the United States first on a temporary visa and then after three or six years get a green card.

In the first five business days of April 2008, employers filed some 163,000 applications for the 65,000 H1-B visas to be issued for the 2009 fiscal year. The quota of the additional 20,000 H1-B visas for those with advanced U.S. degrees was also met. U.S. Citizenship and Immigration Services then randomly selects applications for processing to meet the quota. In response to the shortage, on April 10, 2008, U.S. Senator John Cornyn (R-TX) introduced the Global Competitiveness Act of 2008, which would increase the cap to 115,000 visas for fiscal years 2009 through 2011 and increase the number of visas for advanced degree holders to 30,000 (U.S. Senate 2008). It is unlikely that any action will be taken on increasing the number of visas in any immigration category until after the

¹² Lindsay B. Lowell, “H-1B Temporary Workers: Estimating the Population,” Working Paper No. 12, May 12-13, 2000, Center for Comparative Immigration Studies, University of California, San Diego, 2000.

Table 2: H1-B visas									
Fiscal Year	1998	1999	2000	2001	2002	2003	2004	2005	2006
Visa Cap	65,000	115,000	115,000	195,000	195,000	195,000	65,000	65,000	65,000
Visa Holders	240,947	302,326	355,605	384,191	370,490	360,498	386,821	407,418	431,853

Source: 2006 Yearbook of Immigration Statistics, Department of Homeland Security, see Table 26.

new U.S. Congress and President-elect Barack Obama take office in January. Even then, passage of legislation that would only increase the H1-B visa cap is unlikely. The business groups that want the cap increased are an essential part of the coalition brought together to support the comprehensive immigration reform legislation co-sponsored by U.S. Senators Ted Kennedy (D-MA) and John McCain (R-AZ) and voted for by President-elect Obama. If business groups were to get the piece of comprehensive immigration reform that they want on its own, their support for the comprehensive immigration reform legislation as a whole would decrease and reduce the chances of its passage by the new U.S. Congress and the incoming U.S. administration.

Given that President-elect Obama supported the Comprehensive Immigration Reform Act of 2007 (U.S. Senate 2007) and the Democratic Party Platform calls for passage of comprehensive immigration reform in the first year of an Obama administration, an attempt to resurrect some version of the proposal by the new U.S. administration and Congress is likely. The bill had many provisions to increase skilled migration but died in the U.S. Senate on June 28, 2007. Had this legislation been enacted into law, it would have authorized more temporary high-skilled migration under the H-1B visa—exempt from the annual H-1B visa cap are those who have earned a master’s or higher degree from an accredited U.S.

university or have been awarded a medical specialty certification based on post-doctoral training and experience in the United States—making it easier for more foreign graduate students studying in the United States and other temporary migrants with advanced degrees to adjust their status to permanent resident alien. This would have increased the number of employment-based permanent immigrant visas (“green cards”) to 450,000 and, most importantly, introduced a point system to select more permanent immigrants on the basis of education and skills. Interestingly, the confidential March 28, 2007 White House Powerpoint presentation to key U.S. Congressional leaders that introduced the point-system provision into the reform package specifically referenced the Canadian and Australian immigration systems as models (White House, 2007). Passage of comprehensive immigration reform as initially developed in 2006-2007, however, is becoming less likely with the collapse of the real estate market, the financial market crisis, and now an economic recession that increasingly appears to be both deep and long-lasting.

Germany maintains a primarily demand-driven immigration scheme. Foreigners, as a rule, will only be granted a residence title for taking up employment if the Federal Employment Agency has granted approval or if a statutory provision stipulates that such employment may be taken up. In principle, foreigners from abroad applying for a

An attempt to resurrect some version of the proposal by the new U.S. administration and Congress is likely.

In 2000, the German government made a first attempt at recruiting a specified category of qualified foreigners.

residence permit in order to take up employment will receive a residence permit only for specified categories of skilled workers or employees with a vocational qualification. The granting of a residence permit requires that the employment does not result in adverse consequences for the labor market and that Germans and equally entitled EU citizens are not available for the type of employment concerned. A generalized assessment of these requirements is provided for in the legislation of certain branches of the economy, but has so far not been practiced.

While the general immigration policy was rather restrictive following the end of the recruitment policy of foreign “guest workers” in 1973, in the last several years some liberalization has taken place in order to facilitate the immigration of highly-skilled migrants. In 2000, the German government made a first attempt at recruiting a specified category of qualified foreigners on the basis of a special regulation providing a limited number of temporary work and residence permits for up to 20,000 IT specialists. The regulation stipulated that foreigners would be granted a temporary residence permit provided that they earn a minimum salary of 100,000 German marks (“green card initiative”). By the end of 2003, 15,658 residence permits were granted.¹³

The immigration legislation of 2004, replacing the Aliens Act of 1990, introduced another limited opening of the German labor market to highly qualified and skilled foreigners from non-EU countries, although the recruitment stop in principle was maintained. There was no need to include nationals of EU member states since they were enjoying free movement within the European Union (with some exceptions for nationals of the newly acceding EU member states for an interim

¹³ Steffen Angenendt, *Die Steuerung der Arbeitsmigration in Deutschland*, Friedrich-Ebert-Stiftung, Bonn 2008, p. 13.

period up to 2011, respectively 2014 in the case of Bulgaria and Romania). With the opening of the labor market and the granting of unlimited free movement being left to the discretion of the member states of the European Union, a substantial number of concerned skilled EU nationals from Central and Eastern Europe have moved to the United Kingdom, Ireland, and other EU member states, thereby opening up their labor markets for new EU citizens. Germany and Austria, however, being traditionally major immigration countries for nationals of Central and Eastern European countries, have maintained restrictions.

The Residence Act of 2004 provided for a settlement permit (equivalent to an immigrant status) for highly qualified persons, defined in particular as scientists with special technical knowledge, teaching or scientific personnel in prominent positions, and specialists and executives with special professional experience who earn a salary of at least 86,400 Euros per year.¹⁴ In addition, a special residence permit was introduced for self-employed persons with a promising business plan and a minimum investment of 1,000,000 Euros (reduced to 500,000 Euros in 2007).

A point system, as suggested by the Independent Commission for Immigration Reform in 2001, has not been taken up by the legislative bodies. The Commission had suggested to admit a limited number of immigrants primarily on the basis of a point system, in particular young well-educated people as immigrants for a permanent residence status with the prospect of naturalization. In addition, the Commission report recommended temporary residence permits for a period of up

¹⁴ The minimum annual salary corresponds to twice the earnings that are subject to mandatory health scheme contributions. As this threshold in the health insurance scheme is subject to annual amendments, the related threshold in the immigration provisions is not stare either but depends on the health insurance rules.

to five years on the basis of an employment offer that may be changed into permanent residence according to the criteria of the point system.¹⁵

Although such proposals have never managed to get a parliamentary majority, elements of a more long-term oriented immigration management policy have found their way into the reform legislation of 2004/2007. The Residence Act mentions the principle that any decision on granting a residence permit for the purpose of taking up employment must take into account potentially harmful effects on the labor market and particularly the aim to achieve a high degree of employment. This principle requires an examination procedure to determine future labor market demands rather than a mere reflection of the present situation. Germany as well as the European Union are only at the beginning stages of developing such procedures. It is fairly clear that the individual examination of whether a particular job can be filled by a German national or an equally privileged EU citizen (rule of preferential access) does not fulfill the expectations of the economic actors and of the society as a whole. Therefore, it is likely that forms of cooperation between the economic players and state agencies will be developed (see also 3.2.).

The new provisions of the Residence Act have not yet had a significant impact upon the desired immigration of qualified foreigners. Only 1,123 highly-qualified foreigners received a residence permit in the first two years following the enactment of the legislation, most of them going to individuals already residing in Germany.¹⁶ For self-employed business people, 3,973 residence permits were granted in the same period. Under the general rules of Section 18 of the Residence Act, governing

the demand-driven immigration of skilled as well as unskilled foreigners for certain occupations, 29,466 residence permits for taking up employment were granted in 2006 and 17,612 in 2005. Many of the newly admitted foreigners in 2006 came from Romania (3,828) and Bulgaria (1,147). However, by far the largest numbers of residence or work permits (for EU nationals no residence permit being required) have been granted to temporary or seasonal workers.

In 2007 and 2008, the German government reacted to increasing requests by the German business community for additional qualified engineers and technical workers by enacting a legislative program that included the following elements:¹⁷

1. Lowering of the income threshold for highly qualified persons under Section 19 of the Residence Act from 86,400 Euros to 63,600 Euros.
2. Possibility for all third country nationals with a university degree from a German university or equivalent qualifications to take up employment provided that the vacancy cannot be filled with persons entitled to a preferential status.
3. Privileged access (without examination of the priority) to the labor market for foreigners having successfully completed their education at a German school abroad.
4. Privileged access to the labor market for fully integrated children of “tolerated” foreigners who have successfully completed vocational training in Germany or have received a university degree, as well as for persons having worked in a qualified profession for two years in Germany.

The new provisions of the Residence Act have not yet had a significant impact upon the desired immigration of qualified foreigners.

¹⁵ Immigration Commission, Report Summary, p. 7.

¹⁶ From 1.1.2005 until 1.1.2007, cf. Migrationsbericht 2006, p. 82.

¹⁷ Action Program of the German government on July 16, 2008, BT-Drs. (Parliamentary Document) 16/10288.

The opinions on the potential effect of these new measures to meet the demand for highly qualified foreigners in the German economy are split within the major political parties.

Table 3: Newly Arriving Immigrants in Germany, Sorted by Purpose of Residence (2006)

Employment (general), § 18 AufenthG	Highly qualified, § 19 AufenthG	Self employed, § 21 AufenthG	Seasonal Workers,* §§ 18, 19 BeschV	Contract Workers,* § 39 BeschV	Asylum applications, § 60 AufenthG
19,466	80	642	303,492	20,001	21,029
Family Reunification, §§ 27-36 AufenthG	Students, § 16 AufenthG	Other Education Purposes, §§ 16, 17 AufenthG	Spätaussiedler, § 4 BVFG	Jewish Immigration, § 23 AufenthG	
50,300	53,554	9,080	7,747	1,079	

Source: Migrationsbericht 2006

* No residence permit under § 18 AufenthG required if EU National.

5. Facilitated recognition of professional qualifications and university degrees and the admission of spouses (no German language knowledge required).

The opinions on the potential effect of these new measures to meet the demand for highly qualified foreigners in the German economy are split within the major political parties. The Liberal Party (FDP) as well as parts of the Christian Democratic Union (CDU) criticized the proposals as too restrictive with regard to recruitment of skilled immigrants,

whereas the more union-related and conservative branches of the CDU and the Social Democratic Party (SPD) have warned of potentially adverse effects for the employment situation in Germany, particularly considering the prospect of an economic recession with increasing unemployment figures. They emphasize that nationals of the new EU member states, some of them facing serious economic problems, will soon enjoy unlimited free movement by 2011 or 2014 (in the case of Bulgaria and Romania) and thus increase the migration pressure on the domestic labor market.

3 COMPARING APPROACHES TO SELECTIVE IMMIGRATION POLICIES

3.1. Advantages and drawbacks of planned and demand-driven approaches

The planned approach of using a point system has the distinct advantage of giving the country a transparent and relatively simple means of selecting (and discriminating against) migrants by skills and other characteristics such as age. This approach not only allows the country to actively recruit those migrants deemed most desirable, but it also enables potential skilled migrants to ascertain if they stand a good chance of receiving a residence and work permit if they do in fact apply. For example, all prospective “independent” immigrants selected by Canada’s point system can go to a Canadian government website and conduct a self-test by entering their qualifications and attributes to see if they have a sufficient number of points to receive a permanent residence permit. This allows highly skilled and motivated people from around the world to envision themselves migrating to Canada, whereas, envisioning immigration to a country with a more complicated and opaque immigration process is much more difficult and may dissuade the very highly-skilled migrants that a selective migration policy is intended to attract from even thinking about immigration to that country.

Despite destination countries’ best efforts, skilled migrants may not necessarily respond to the selective migration strategies of the receiving country. For example, the results of the German green card program were decidedly mixed. The wave of IT workers that many German policymakers had anticipated did not materialize, particularly the migration of the Indian computer programmers who primarily opted to go to the United States instead (the H1-B cap had just been lifted at the time) where they had greater options to adjust to permanent residency status and open their

own businesses.¹⁸ The lopsided flows of highly-skilled migrants to the United States, in comparison to flows to EU member states and even Australia and Canada, demonstrate that explicit selective migration policies of countries with highly regulated labor markets might not be as effective in generating the expected flows of the highly-skilled as less-explicit selective migration strategies embodied in piecemeal temporary visa programs within countries that have more liberal labor markets and liberal immigration policies in general.

A demand-driven approach to high-skilled labor migration in which employers select immigrants has the distinct advantage of ensuring that each new immigrant has a job upon arrival. Moreover, state immigration authorities can usually expect that the migrant will remain employed upon arrival as employers will normally not go through the trouble of recruiting a migrant worker if that employer does not envision employing the migrant worker for a period of time sufficient to re-coop initial recruitment and training costs. Given these costs, it is in the employer’s best interests to ensure that the highly-skilled migrant that they are recruiting has the requisite education, professional certifications, etc. to take and retain the intended position.

In contrast, selective migration strategies using point systems may not necessarily achieve their intended economic objectives if the highly skilled who have migrated are not able to put their skills to work in appropriate jobs. In many cases, migrants who have been selected by point system-based selective migration policies fail to find or maintain employment in their profession or, if so, at a level

¹⁸ Heinz Werner, “The Current ‘Green Card’ Initiative for Foreign IT Specialists in Germany,” *International Mobility of the Highly Skilled* (Paris: OECD 2001), p. 323.

Despite destination countries’ best efforts, skilled migrants may not necessarily respond to the selective migration strategies of the receiving country.

Demand is also a function of price.

that takes full advantage of their skills.¹⁹ In some cases, those with high levels of engineering or technical skills do not have sufficient language skills in order to work effectively in the receiving country. In other cases, highly-skilled migrants find it very difficult to acquire the professional credentials necessary to practice their profession. These factors give rise to the proverbial taxi driver with a Ph.D. phenomenon that highlights the broader challenge of adequate placement that, in turn, undermines the intended economic impact of selective migration policies.

As much as the highly skilled may dash expectations of policymakers by not migrating like they are supposed to, the highly skilled (perhaps of a lower caliber) may in fact migrate but use the receiving country as a stepping stone to another country's labor market that may be easier to enter with additional experience, proximity and even new citizenship. For example, many high-skilled immigrants to New Zealand end up moving to Australia's larger economy and better paid jobs, often after acquiring New Zealand citizenship.²⁰ Similarly, many highly-skilled permanent immigrants selected by the Canadian point system subsequently take jobs in the better paying U.S. market.

The demand-driven approach based on employer selection also has several potential pitfalls. First, it assumes that employers are always better in determining demand than the government; that is, employers know how many and which migrants are needed in a given receiving country. This assumption can lead to unanticipated and undesirable outcomes. For example, after U.S. businesses lobbied to lift the H1-B cap to 195,000 due to the tremendous demand for highly-skilled

workers, particularly computer programmers, employers did not hire enough workers to meet the 195,000 cap for two out of the three years that the cap was at the level they wanted. In 2000, what looked like a "new economy" with a "new paradigm" of non-inflationary growth for as far as the eye can see, is now referred to as the peak of the internet stock bubble.

Demand is also a function of price. While there may be great demand for highly-skilled migrant labor at a price that is lower than the price of similarly skilled workers already in the country, the demand for highly-skilled migrant workers may be lower if labor market tests and other government requirements keep the price of highly-skilled migrant workers at or above that of workers from among a country's citizenry. Much depends on minimum salary thresholds set by governments and the steps an employer is required to take to recruit domestic workers before being permitted by a government to offer a particular job to a migrant worker. Moreover, some countries such as Germany require that employers provide health care benefits to the migrant workers that they recruit, whereas, employers who hire a worker on an H1-B visa are not required to provide health care benefits to that worker.

The legal system and actual enforcement of labor law plays an essential role in the option for migration management schemes. In Germany, in spite of some efforts to deregulate the labor market, the principle of equal labor conditions discourages that low wages and less protection for skilled workers become a major incentive for employers to sponsor skilled immigration. In addition, control of immigration is also considered absolutely essential to maintain the stability of existing labor relations. Therefore, any attempt to facilitate skilled migration on a larger scale must comply with the condition that it will not significantly affect the existing labor relations.

¹⁹ Bob Birrell, Lesleyanne Hawthorne and Sue Richardson, Evaluation of the General Skilled Migration Categories, Department of Immigration and Multicultural Affairs, March 2006.

²⁰ Rey Koslowski's interview with New Zealand Department of Labor Officials, December 2006.

It is important to understand that the internet has transformed the market for highly-skilled labor—particularly information technology workers. Employers no longer simply advertise jobs in local or even national newspapers. Firms and job seekers post openings and resumes on general job boards such as monster.com or information technology specific boards such as computerjobs.com or dice.com, which are accessible from any internet café in any developing country. Therefore, labor markets are potentially global with prices that, if there were no government barriers to international labor mobility, would reflect global competition for any given position.

The reality of high-skilled migration to the United States is not one of firms sifting through applications from anyone in the world who has access to their website, but rather they often outsource the recruitment process to consulting agencies, often referred to as “job shops” or “body shops.” Consulting agencies post position descriptions on job boards without identifying the employer, screen applicants and forward the resumes of promising candidates to the employer. If an employer opts to hire a programmer, the consulting agency may contract an hourly rate with the firm for the programmer’s labor that may be twice as much as that paid to the programmer (this is a normal situation of U.S. citizens and permanent residents in the information technology consulting business). Since H-1B workers have depended on their employers for their legal status in the United States, critics charge that they are often paid much less for comparable work.²¹ Some consulting firms who have hired H1-B workers for placement on projects elsewhere pay reduced salaries or do not pay workers at all between placements while they are “on the bench.” Some firms have threatened to sue workers for breach of contract if they quit. One firm admitted in court to paying an H1-B worker

²¹ Norman Matloff, “High-Tech Cheap Labor,” *The Washington Post*, September 12, 2000.

\$26/hour for worked billed to a client at \$110/hour, and they sued the worker because he quit.²² Hence, demand-driven approaches to selective migration depend on employers to effectively determine future demand and set prices for labor at rates equivalent to that of domestic labor. Otherwise, highly-skilled migrant workers may be used by employers to drive down labor costs. If in addition to paying below domestic market wage rates, employers do not provide health care benefits, they may reap the benefits of employing relatively inexpensive highly-skilled migrant workers without paying additional costs of those migrants’ stay that may have to be paid by others, namely taxpayers.

3.2. Planning demand: Most models combine elements of both approaches

Point-system models and employer selection approaches can also be combined. For example, Australia increasingly added employer selection features into its point system after 1996 by adding the Employer Nomination Scheme Occupation List and giving additional points to migrants who have Australian employment experience or employer sponsors. Moreover, both Canada and Australia have received growing numbers of skilled temporary migrants who are selected by employers to take specific jobs then apply through the point system for permanent visas; much like H1-B visa holders adjust their status to permanent residency. Even though Canada and Australia maintain very explicit selective migration policies based on point systems they are increasingly practicing the “two-step” approach of the United States whereby temporary migrants are selected by employers and then a percentage of these temporary migrants adjust their status to permanent.

²² Gary Cohn and Walter F. Roche Jr., “Indentured Servants for High-Tech Trade,” *The Baltimore Sun*, February 21, 2000.

Therefore, labor markets are potentially global with prices that, if there were no government barriers to international labor mobility, would reflect global competition for any given position.

Germany is between the ideal types of the United States and Canada but very close to the United States.

Recently, the German government has put forward a proposal on labor market monitoring in order to identify better short-, mid-, and long-term labor market demands. It is envisaged to establish an advisory committee consisting of representatives of trade unions, scientists, and representatives of the respective ministries of the federal government and the states (Länder). The purpose is to identify the expectations and needs of enterprises relating to a future labor demand by an index. The monitoring will be carried out by the federal government by way of external projections on the mid- and long-term labor demand taking into account the recommendations of the advisory committee. As a rule, there is no direct involvement of employers in the process. Some very careful steps in such a direction have, however, been taken within the application scope of the researcher directive of the European Union. Research institutions, such as universities or private companies, are involved in the administrative procedure. These research institutions need to undergo a certification procedure before they will be entitled to conclude contracts with researchers. Moreover, the institution covers the risk if the sponsored researcher overstays his residence title. Researcher applicants must fulfill certain basic requirements like sufficient health insurance and adequate resources. However, no further examination of whether the vacancy could also be filled by a EU citizen is necessary.

In many ways, it may be useful to think of Canada as an ideal type of selective migration policy based on state planning in which state agencies select migrants, and the United States can be thought of as the opposing ideal type based on market principles in which employers decide on which migrants gain entry. Similarly, in Canada the selection is of greater consequence as it entitles the migrant to become a permanent resident and, after three years, a citizen whereas in the United States most employment based immigrants enter on temporary visas and then only after having proved themselves in their jobs, do employers sponsor them to become permanent residents, after which they can naturalize in five years. Given that Australia incorporates more employer selection and initial temporary visas into its approach, it is between Canada and the United States but closer to Canada than the United States. Given that Germany relies on employers to select immigrants and offers very little permanent labor migration but also incorporates labor market assessments by the state, it is also between the ideal types of the United States and Canada but very close to the United States. The United Kingdom and France fall in between Australia and Germany.

4 CROSSCURRENTS IN DIFFERENT IMMIGRATION STREAMS

The governments of immigration-receiving countries typically divide immigration into three categories of admission: family, humanitarian (refugees), and economic (labor) as discussed above. Immigration, however, has always been a conglomerate of political, humanitarian, and economic considerations. Therefore, immigration management schemes include differentiated rules to better encompass migrants admitted for different reasons. In the past decades, political and humanitarian considerations have had a larger influence on the labor market than economic considerations in major European immigration countries. In Germany, after the recruitment stop in 1973, family reunification constituted the largest part of legal immigration. In addition, humanitarian admission became a prominent feature of migration policy in the 1990s. In 1992, immigration in Germany peaked with 438,000 asylum seekers and more than 400,000 immigrants of German descent and their relatives from the former Soviet Union. However, a clear distinction between different immigration streams is not always possible and it may well be asked if it is always necessary or desirable.

New concepts of migration management try to combine the economic incentives of migration to industrialized countries with concepts from other policy fields such as development and security. The idea to set up a system of circular migration between selected countries of origin and EU member states is a frequently discussed example of this trend.

Moreover, immigration schemes based on well defined categories of immigration do not always take into account that individuals may have multiple purposes for migration or that the original reason for which they migrated changes over the years. If an immigrant decides to give his or her residence in the host country another purpose, this will often require an adjustment of status. However, not all immigration schemes provide for

such a possibility. While policymakers may wish to categorize immigration into separate family, labor, and humanitarian streams and into temporary and permanent migration, in reality, there are many cross-currents in these streams; temporary migrants may become permanent and immigrants who receive permanent residence may leave their host country. Hence, circular migration of labor may sound good in theory, but it is not clear that states always have the will or capabilities to ensure that temporary labor migrants do not shift to the family or humanitarian category or that they return after the end of their authorized stay.

4.1. Economic elements in family reunification and humanitarian immigration

Highly-skilled migrants are primarily admitted within the employment immigration stream but it would be a mistake to think that highly-skilled migrants gain entry only in the employment category and that, therefore, selective migration policies that focus on this category are the only way to increase numbers of highly-skilled immigrants.

Immigrants admitted under the category of family reunification are often spouses and children who do not join the labor force; however, many are also highly-qualified individuals who, after acquiring permanent residence, fill jobs requiring extensive education and a high level of skills.

Refugees are often very well educated and highly skilled. Whether they are resettled from countries of first asylum or successfully apply for asylum after arriving in a host country, they are often unable to return to their home countries, and many eventually adjust status, become permanent residents, and assume positions that require advanced training and skills.

Although admission criteria are different with regard to humanitarian admission and family reunion, outside Europe, migration management

A clear distinction between different immigration streams is not always possible and it may well be asked if it is always necessary or desirable.

What was thought to be temporary migration eventually became permanent migration.

practices combine elements of skilled immigrant management schemes with other forms of immigration management. As far as host countries are obliged under public international law or—in the case of the European Union—by community law to grant a humanitarian residence permit for refugees or foreigners enjoying subsidiary protection, admission is obligatory under the predefined selection criteria. While the overwhelming majority of refugees in the European Union successfully claimed asylum after arriving, classical immigration countries, in particular the United States and Canada admit large numbers of their refugees as countries of second asylum. In 2007, “a total of 75,300 refugees were admitted by 14 resettlement countries, including the United States (48,300), Canada (11,200), Australia (9,600), Sweden (1,800), Norway (1,100), and New Zealand (740).”²³ In contrast to many European countries, where asylum seekers are not permitted to work, in the United States, asylum seekers may receive work authorization in cases where applications have been pending more than 150 days or have been recommended for approval—that in addition to applications that have received final approval. Refugees that are resettled in the United States are not only permitted to work but they are encouraged to work and prospects for economic adaptation are taken into account in refugee resettlement. Although those European countries that do resettle refugees, such as Sweden and Norway, accept relatively small numbers, they are known for taking the severely ill and disabled. In contrast, the United States resettles the most refugees but it is known for resettling groups of refugees with above average educational attainment and high skills.

The European trend is going a somewhat different direction. A substantial amount of non-economic

²³ United Nations High Commissioner for Refugees, 2007 Global Trends: Refugees, Asylum-seekers, Returnees, Internally Displaced and Stateless Persons, Geneva: 2008, p.11.

immigration, in particular family reunion and refugee protection, that includes “subsidiary protection” for victims of indiscriminate violence in war or civil war situations is strictly regulated by obligatory EU-directives. Thus, discretion of EU member states (with some exceptions for the United Kingdom, Ireland, and Denmark under a special regime of the European Commission Treaty) is limited. For immigrants and their families, access to the labor market is implied. The efforts to regulate family reunification by including some skills-related elements, for example basic language knowledge requirements in Germany, the Netherlands, and France, meet heavy resistance by other EU member states and human rights groups. Some consideration has also been devoted to establishing more selective procedures for humanitarian admission of *de facto* refugees. It is clear, however, that this can apply only in addition to the EU-regulated refugee groups who enjoy a right of admission.

4.2. Circular migration

Germany as well as some other EU member states and Switzerland have somewhat unsuccessfully pursued a policy of circular migration (“rotation”) in the past. It was expected that migrant workers (so-called guest-workers) recruited in the 1950s and 1960s would return to their home countries, and other migrant workers would take their place in a rotation system. Instead, partly because of the economic self-interest of employers who would use the acquired skills of their workers and partly because of the social and economic interests of the migrant workers, what was thought to be temporary migration eventually became permanent migration. Additionally, migrant workers moved their families to Germany. Family reunification thus resulted in a substantial increase of the foreign population in Germany in spite of the recruitment stop. The most important effect of the recruitment stop was a dropping share of

employed persons among the foreign population rather than a reduction in total numbers. This European experience inspired the aphorism that nothing is more permanent than temporary migrant workers.

The reasons for the failure of these earlier circular migration programs do not, however, exclude a reflection about the conditions of successfully using the idea of circular migration in immigrant management schemes. In a globalized economic environment circular migration—particularly circular migration of skilled workers—may better serve the interests of all concerned parties, the migrant, the state of origin, and the host state than permanent migration. Under certain circumstances, circular migration programs have proved successful in several countries. Positive reviews have been given to seasonal worker programs between Korea and Mexico as well as to circular migration of Philippine workers moving on fixed term contracts to other states.²⁴

The idea of circular migration has been taken up by the immigration ministers of France and Germany, leading to the European Pact on Immigration and Asylum.²⁵ Circular migration, provided that an efficient management of return in cooperation with the country of origin is ensured, may have significant advantages. With the knowledge and skills acquired by a migrant worker, the development of the country of origin can be improved. At the same time, it may on the whole even serve the interests of migrant workers

better. Through a circular migration program access to the labor market of the host countries may be provided for a larger number of persons and under a limited integration perspective. The assumption that migrant workers will always prefer to move permanently to a country of immigration may well be wrong, provided that certain economic and political prospects exist in the country of origin.²⁶ A contractual arrangement with the country of origin as well as a careful selection of countries willing and able to enter into development and migration management are, however, essential preconditions for successful implementation of any circular migration program. Circular migration may be successfully managed only if there is a reasonable prospect of acceptable living conditions for the migrants in the sending countries. Not only will host countries not be able to implement a policy of forced return in large scale, but such a policy is also highly undesirable.²⁷ Therefore, a promising circular workers program will require, in addition to the contractual agreement mentioned, an analysis of the country of origin's economic and social circumstances. An additional incentive to return might be created by granting a special residential status including an option to return to the host country (or—with regard to the EU—to another member state) after a certain time of professional experience.²⁸ One of the lessons to be learned from successful seasonal migrant worker programs is that the danger of not receiving another residence permit for the next year in case of overstaying and/or risking illegal residence constitutes a sufficient

The assumption that migrant workers will always prefer to move permanently to a country of immigration may well be wrong.

²⁴ Global Commission on International Migration, *Migration in an interconnected world: New directions for action*, 2005, p. 17 f.; see also Dovelyn Rannveig Agunias/Kathleen Newland, "Circular Migration and Development: Trends, Policy Routes and Ways Forward," Migration Policy Institute, April 2007, p. 3.

²⁵ July 2008, p. 5 (Available under http://www.ue2008.fr/PFUE/lang/en/accueil/PFUE-10_2008/PFUE-15.10.2008/Conseil_europeen); see also Conclusions of the European Council, December 14, 2007.

²⁶ Ali M. Mansoor and Bryce Quillin indicate in their study on migrants from Eastern European and former Soviet Union states that many migrants prefer temporary over permanent migration, cf. *Migration and Remittances. Eastern Europe and Former Soviet Union*, World Bank 2007, p. 110.

²⁷ Cf. Dietrich Thränhardt, *Entwicklung durch Migration: Globalisierung auch für Menschen*, http://www.migration-boell.de/web/integration/47_1037.asp.

²⁸ See also Mansoor/Quillin, p. 107.

U.S. policymakers primarily viewed temporary migration as an alternative to illegal migration.

incentive to return after a working season. If these preconditions are met, circular migration agreements may well be used as an instrument to promote economic development in the countries of origin and to manage migration flows by reducing incentives for illegal migration at least for some groups of migrants.

For scientists and researchers, circular migration may be particularly useful in a global academic environment for universities as well as for private research institutions. Frequently, it will be in the interest of qualified scientists to pursue research for a limited time abroad. The EU Research Directive 2005/71²⁹ has made a step in this direction, although in a somewhat modest way. The idea is to give researchers, who have been admitted by an EU member state in cooperation with a recognized research institution, a right to move freely within the whole European Union to pursue a research project. Shortcomings concern the restrictions of the residence title to a specific research project and the somewhat tight conditions which research institutions have to fulfill in order to participate in the program. Changes may have to be made to adjust to the typical profile of research in private research institutions and with regard to the inclusion of persons doing research in the framework of a doctoral thesis.

Although rarely discussed in terms of “circular migration,” U.S. immigration policy shifted from predominantly permanent immigration toward expanding temporary migrant worker programs, such as the H1-B in the 1990s. More recently, U.S. policymakers have looked favorably on expanding temporary migration as the U.S. Congress considered proposals for expanding temporary migrant worker visas for skilled and unskilled alike during debates on immigration reform in

²⁹ Council Directive 2005/71 of 12 October 2005, Official Journal of the EU L 289/15, November 3, 2005.

2006-2007. While European policymakers discuss circular migration as a means to enable migrants to work in the European Union and then return home to contribute to economic development of origin countries, U.S. policymakers primarily viewed temporary migration as an alternative to illegal migration. In fact, the Bush administration initially advocated allowing illegal migrants in the United States to apply for a new temporary worker visa thereby using this temporary worker visas as vehicles of a *de facto* regularization.

While new temporary migration programs are increasingly popular among policymakers it is not clear that many states have the capability to ensure that temporary migrants do not in fact stay permanently. Proposals for new temporary migrant worker programs drew scepticism in the United States. Critics pointed out that since the U.S. Department of Homeland Security (DHS) has yet to fully implement the U.S.-VISIT biometric entry-exit system (the system collects entry data but not much in the way of exit data), the government would not know if temporary workers did in fact leave after the expiration of their visa or if they simply overstayed their visa to join the approximately 40 percent of the 12 million illegal migrants in the United States who had also overstayed their visas. Again, it was not clear that the temporary and permanent immigration streams would not flow together rather than remaining separate. From another angle, it is important to point out that migrants may defy policymaker expectations in the other direction. That is many immigrants who arrive as, or adjust their status to, permanent residents return to their country of origin (or another country). Policymakers often argue in favor of temporary migration programs over permanent immigration because they think that it is more politically acceptable to their constituencies. In contrast, a new public opinion survey indicates that 62 percent of those surveyed in the United States and 64 percent

of those surveyed in six EU member states (France, Germany, Italy, Netherlands, Poland, and the United Kingdom) expressed a preference for permanent immigration over temporary migration, saying that “legal immigrants should be given the opportunity to stay permanently instead of being admitted only temporarily.” Only 26 percent of those surveyed in Europe and 27 percent of those surveyed in the United States “thought that legal immigrants should be admitted temporarily and then be required to return to their country of origin.”³⁰

4.3. Adjustment of status

To a certain degree, the saying that nothing is as permanent as a temporary migrant worker is borne out by the fact that many of those who enter on temporary visas eventually adjust their status to

permanent residence. The United States expanded the number of temporary worker programs and the number of temporary visas issued in the 1990s, but given that many of these temporary migrants, particularly H1-B visa holders, adjusted status indicates the extent to which high-skilled labor migration to the United States yields a large number of permanent migrants. Given that many employers of H1-B visa holders sponsor those applications for permanent residence submitted by those H1-B workers shortly after their arrival, one may argue that these are migrants who do not intend to return and if they could apply for permanent immigrant status from abroad would have done so. Although the United States is not alone in its two-step immigration process for highly-skilled workers as Table 4 indicates, the percentage of temporary migrant workers that changed status to permanent is much higher for the United States than for Canada and Australia.

Adjusted status indicates the extent to which high-skilled labor migration to the United States yields large number of permanent migrants.

³⁰ *Transatlantic Trends: Immigration 2008*, p.13. (retrieved on November 17, 2008 at: <http://www.transatlantictrends.org/trends/index.cfm?id=183>)

**Table 4: Changes in status from temporary to permanent 2005
percent of immigrants in group having changed status**

	Family	Employment
Australia	25	33
Canada	23	11
United Kingdom	n.a.	20
United States of America	52	89

Source: *International Migration Outlook: SOPEMI 2007 Edition* (Paris: Organisation for Economic Co-operation and Development, 2007).

Germany as well as other European countries uphold a strict separation between a residence title granted for a specific purpose and a residence title for taking up employment.

The second development relates to the shifting of status and increasing possibilities to improve a residential and social status for foreigners who have been granted a residence title for a limited purpose. Germany and other European countries uphold a strict separation between a residence title granted for a specific purpose and a residence title for taking up employment. In principle, individuals admitted for a specific limited purpose cannot adjust their status to a residence permit for other purposes or to a permanent residence permit. Therefore, foreign students having successfully completed their studies or a professional formation in Germany until 2005 had to leave the country in order to apply for a residence permit for taking employment from abroad. Their residence permits granted for the purpose of a study could not be prolonged in order to apply for a job on the labor market. The concept has been given up for economic as well as social reasons. Foreigners who acquired a professional qualification in Germany were usually not very inclined to return due to adverse economic conditions of their home countries. It was also considered economically unreasonable to look for qualified foreigners abroad while forcing foreign students having acquired a German university degree to return to their home countries. Therefore, an adjustment of status was permitted for this group of foreigners

if they managed to find a job appropriate to their educational level within a period of one year.

Nevertheless, as a rule, foreigners in possession of a residence permit for taking up employment will be entitled under certain conditions to a prolongation of their residence permit. However, changing the purpose of their residence may lead to considerable difficulties. An unlimited residence permit (so-called settlement permit) upon entry is granted only exceptionally under the conditions of Section 19 of the Residence Act (highly qualified foreigners). A settlement permit requires generally a previous residence permit for five years and the fulfillment of other conditions like adequate knowledge of the German language and successful completion of an integration course. Only a settlement permit contains a residence title not subject to any time limits or geographic restrictions or any other limitations with regard to the purpose of the residence. Immigration schemes offering secure residential status and privileged access to the labor market will inevitably have an impact upon immigrants who have been admitted for other purposes, provided that they fulfill the same requirements with regard to skill, professional experience, etc. It may well be argued that different categories of immigrants cannot be considered as distinct in their legal status.

5 INTERNATIONAL CONTEXT OF IMMIGRATION MANAGEMENT POLICYMAKING

Immigration policy is traditionally considered a *domaine réservé* of sovereign national states. However, over the last decades the supranational legislative framework of the European Union has started to influence the member states' legislation even in this policy field. In order to understand immigration policy making in Germany or any other EU member state it is necessary to understand the opportunities opened and constraints imposed by EU membership. Within the context of integration of immigration, asylum and border control policies at the European level, immigration for the purposes of employment has remained a holdout of member state prerogatives but even here EU member states have been considering European Commission proposals that would shape their policies on labor migration.

5.1. Immigration policy at the European Union level

Regulation of legal migration to EU member states is probably the most controversial aspect of European migration policy. The question of who is entitled to enter a member state's territory on a long-term basis is one of the last policy areas largely governed by national legislation. Although there is some European legislation on certain issues of legal immigration, such as the Family Reunification Directive³¹ or the Directive on Third Country Nationals who live in another EU member state on a long-term basis,³² the member states still decide more or less autonomously when a third-country national asks for admission to the labor market.³³

The European Commission, which is responsible for drafting and initiating legal acts, is in general rather open to increased economic immigration

into the member states. It emphasizes possible economic advantages of such immigration. The European Council, which is the actual legislator and needs to decide on the Commission's proposals, represents the positions of the member states, which are often far more restrictive. As the Council is staffed with the ministers of the interior, security concerns and the wish to retain control over immigration matters prevail.

Despite these difficulties the Commission pursues the intention to achieve, at least for some sectors, a harmonization of immigration rules. In its Policy Plan on Legal Migration of 2005,³⁴ the Commission acknowledged that a former proposal for one universal directive on labor migration had eventually failed.³⁵ Therefore, it announced a more specific approach for the years to come.³⁶

The proposal for a so-called framework directive, presented in October 2007, thus contains only some procedural rules and a limited set of rights for third-country nationals. According to the proposal, a third-country national will need to apply for a single document only, which shall include the residence permit as well as admission to the labor market. This one-stop shop procedure leaves the criteria for admission untouched but may require a simplification of the administrative procedure in some EU member states. The above-mentioned rights are granted to already admitted third-country nationals only, among them rights concerning working conditions, freedom of association, and the recognition of diplomas.

Regulation of legal migration to EU member states is probably the most controversial aspect of European migration policy.

³¹ Directive 2003/86/EC, O.J. 2003 L 251/12.

³² Directive 2003/109/EC, O.J. 2003 L 16/44.

³³ For more information on existing legislation governing legal migration, cf. Steve Peers, *EU JHA Law*, Oxford 2006, pp. 213-231.

³⁴ COM (2005) 669 final.

³⁵ This initiative had been brought forward in 2001, cf. COM (2001) 386 final. An analysis of the proposal is provided by Marcus ter Steeg, *Das Einwanderungskonzept der EU*, Baden-Baden 2006, pp. 333-343.

³⁶ For a critical evaluation of the Commission proposals, cf. Eberhard Eichenhofer, *Bewertung der Kommissionsvorschläge zur Arbeitsmigration*, *Zeitschrift für Ausländerrecht und Ausländerpolitik (ZAR)* 2008, pp. 81-86.

The initial decision whether and to what extent there is a need for workers from third countries will remain with the member states.

The limited regulative scope of the proposed framework directive means that the member states remain in principle free in their decision of whether they follow an immigration policy which sets abstract criteria for immigration, whether they prefer to rely on the employer's choice, or whether they choose a combination of both approaches. It is therefore doubtful whether the framework directive will be able to contribute largely to a common European immigration policy.

Resistance by EU member states against the proposal is nevertheless strong. Many of them invoke the principle of subsidiarity, which they consider as violated, as they do not share the Commission's view that the European Union is responsible for a non-discriminatory legal situation of third-country nationals in the member states. Keeping in mind that the adoption of directives requires unanimity in the Council, it is to assume that the proposal will undergo fundamental amendments before a possible adoption. On the other hand, the French presidency exercises some pressure on member states to settle an agreement on the disputed issues. Thus, it is to be expected that the directive will be adopted within short notice.

Besides the framework directive, the Commission prepares four special directives on the admission of highly-skilled workers, seasonal workers, remunerated trainees, and intra-corporate transferees.³⁷ Most interestingly, the first mentioned directive on highly-skilled workers, which was submitted in October 2007, quotes the U.S. green card by providing for an "EU blue card." This is more than just a label. It reflects the Commission's intention to attract highly-qualified migrants who

³⁷ The proposals for the framework directive and the directive on the admission of highly-skilled workers were submitted by the Commission in October 2007; the proposal on seasonal workers is expected for later this year. The remaining two proposals will presumably be presented in 2009. Cf. Commission Roadmap for proposed measures on legal migration, COM (2005) 669, p. 14 ff.

would otherwise head for another immigration country, in most cases for the United States.³⁸ With regard to the holder's legal position, there are, however, more divergences than convergences between the two concepts.

Contrary to the proposed framework directive, the proposal for a directive on highly-skilled workers defines criteria for the admission of immigrants to an EU member state. The same will be true for the other three proposals to come. However, the initial decision whether and to what extent there is a need for workers from third countries will remain with the member states. The criteria for admission as defined in the proposed directives therefore become relevant only if a member state has determined a certain volume of immigration to be admitted.

As regards the admission of highly qualified migrants, the proposal combines elements of the planned immigration approach with demand criteria. By requiring a certain level of academic education or professional experience the envisaged rules shall ensure that the immigrant matches the personal profile of the desired highly qualified immigrant who will be able to integrate into the labor market of EU member states for mutual gain. However, unlike in member states that rely on a strict point system, the individual qualifications are not enough in themselves but must meet the demand of an employer. Therefore, admission is only granted if the applicant presents a work contract or a binding job offer of at least one year. Existing demand in the individual case is thus *conditio sine qua non* for immigration. Moreover, the contract must foresee a salary that exceeds a minimum level set by the member states. To define a uniform minimum income threshold on the European Union level seemed to be of little use as the wage level differs considerably among

³⁸ Cf. COM (2007) 637 final, p. 3.

the member states. However, according to the proposal, an EU member state must not introduce a threshold which is lower than three times the minimum gross monthly wage set by the member state concerned. By introducing such a minimum threshold the directive tries to avoid immigrant workers eventually ending up in jobs they are overqualified for.

Despite the fact that the proposed directive on highly-qualified workers is far more detailed than the above-mentioned framework directive, the criticism by the member states is less fundamental. The necessity to attract this group of migrants is widely recognized and has just been reaffirmed by the Council in the European Pact on Immigration and Asylum.³⁹ However, some details of the Commission's proposal are still a matter of controversial discussion. In particular, the minimum income threshold is criticized as being too low with the result that another formula based on the average gross wage in the concerned member state will be used. Even though the negotiations are not terminated yet, it seems that the threshold will likely be fixed at 1.5 times above the average. With regard to the priority the French presidency has attributed to the migration issue, a compromise on the still disputed issues might be expected before the presidency expires at the end of 2008.

Some EU member states fear that they will lose control over economic immigration with the introduction of an intra-EU freedom of residence for third-country nationals. In the past, similar objections by member states have led to considerable alterations of the Directive on Long-Term Residents (2003/109/EC), which have been criticized as a watering down of the initial concept.⁴⁰ The proposed Blue Card-Directive seems

³⁹ Cf. Pacte européen sur l'immigration et l'asile, p. 5. Available under http://www.ue2008.fr/PFUE/lang/en/accueil/PFUE-10_2008/PFUE-15.10.2008/Conseil_europeen.

⁴⁰ Cf. Sonja Boelaert-Suominen, CML Rev. 2005, 1011.

to follow the path of Directive 2003/109 by granting a right to intra-community migration only after two years of holding a blue card in one member state.⁴¹ Furthermore, residence in a second member state is subject to the same admission mechanism as the initial entry to the first member state but under the criteria set by the second member state. Thus, it must be said that the differences between the EU blue card and the U.S. green card amount to far more than just a difference in color.

5.2. Competition for high-skilled immigration: U.S.-EU and intra-EU

Although it is a widely recognized fact that there is worldwide competition among nation-states for highly qualified immigrants, the consequences to be drawn from this finding are still highly disputed. It is often repeated that 50 percent of all skilled migrants from Maghreb states go to the United States or Canada, whereas only 5.5 percent of them choose an EU member state.⁴² Irrespective of whether these figures are reliable and may be generalized, they illustrate a certain self-assessment of being a rather unsuccessful competitor for talents on a global market.⁴³

However, far less attention is paid to the fact that by now it is not primarily the European Union that is in competition with the United States and other classical immigration states but rather the single member states. Given that there is no common immigration policy yet, the concept of the European Union being a real competitor is mere fiction.

⁴¹ Discussions indicate that this period might be reduced to 18 months in the directive to be adopted.

⁴² E.g. Ewa Klamt, MEP, in her statement to the recommendations of the EP on the proposed Directive on Highly skilled immigrants of 5 November 2008.

⁴³ Cf. Jakob von Weizsäcker, Welcome to Europe, Bruegel Policy Brief, Issue 2006/3.

It must be said that the differences between the EU blue card and the U.S. green card amount to far more than just a difference in color.

There is not only a worldwide competition for talent but also an intra-EU competition.

Moreover, it is not only the member states of the European Union being that are competition with third states. There is also a considerable degree of competition among the different EU member states themselves.⁴⁴ It has already been shown that some member states such as France, Germany, and the United Kingdom recently adopted new rules on skilled immigration in order to increase the numbers of highly-skilled immigrants to these states. It is quite obvious that these rules are aimed to attract any potential highly-skilled immigrant and not just the ones who otherwise would head to a non-EU state. Hence, there is not only a worldwide competition for talent but also an intra-EU competition. It remains to be seen how successful the different member states eventually are in attracting highly-skilled migrants under their newly introduced immigration schemes. Numbers from Germany suggest that the success is rather modest.

However, with the European Union forming a single economic area and under the assumption that high-skilled immigration contributes to the economic development of the host state, it is in the EU's common interest to convince a high number of migrants to head to a member state rather than to the United States or another classical immigration state. The crucial question in this context is whether it appears more promising on the whole if the member states compete individually on the global market or if they act collectively on the basis of a common immigration policy.

Member states used to claim that the decision on admission and the criteria for this decision must remain a matter of national determination because labor markets are national as well and show

⁴⁴ Cf. Sara Borella, *Migrationspolitik in Deutschland und der Europäischen Union*, Tübingen 2008, p. 130.

considerable differences throughout the European Union. National rules were therefore better suited to meet the demands of these national labor markets and might better take into consideration the peculiarities of the different member states.

However, with regard to highly-skilled individuals it is quite questionable whether the initial assumption that labor markets are national is still true. It may well be argued that not only this category of migrants, often equipped with an international education and experience, is highly mobile and flexible but that the same applies to persons with an equivalent qualification already living in the member states.

If one is willing to follow this assumption, there are good reasons to draw two conclusions:

First, to grant admission not only to an individual member state but to create intra-EU mobility for this group of migrants.⁴⁵ Opting for general intra-EU mobility does not, however, preclude certain transition periods to avoid misuse of the general rules. The second is strongly interlinked with the first. Rules of admission for highly-qualified migrants are bound to be harmonized once the intra-EU mobility has been established as national rules are easy to circumvent. However, this should not primarily be seen as a loss of national sovereignty but may be grasped as a chance to comprehend the European Union as a collective player on a global market for talent with common criteria for admission of highly-qualified migrants to the European labor market. Harmonized immigration rules would henceforth reduce the intra-EU competition for the sake of a higher competitiveness on the global level.

⁴⁵ Cf. Thomas Straubhaar, *HWWA Discussion Paper No. 95*, 2000, p. 18.

6 CONCLUSIONS

- A trend toward adopting selective immigration policies has emerged among most large immigration countries.
- There are two general types of selective immigration: state selection with a point system vs. demand-driven employer selection.
- Canada offers an ideal type of selective migration using a point system for general skill selection; the United States serves as an ideal type for demand-driven, employer selection of migrants.
- The two approaches have different advantages and disadvantages and are therefore often used in combination. Demand-driven, job specific selection criteria are often used in the framework of point systems.
- In Europe, the United Kingdom and France have opted for incorporating planned migration using a point system mechanism; Germany has opted for the demand-driven approach.
- In past comparisons of immigration policies, Germany and the United States were often depicted at opposite poles; now they are taking a more similar approach to selective migration.
- The concept of circular migration has become popular among policymakers, however, circular migration schemes have been difficult to implement due to insufficient administrative capacities and lack of incentives for voluntary return.
- The distinction between temporary and permanent migration policies is not always borne out in practice. Temporary becomes permanent; those on permanent resident permits often leave.
- There are strong reasons for increasing possibilities for granting free movement rights to highly-skilled third country nationals within the EU labor market in order to compete at the global level.
- EU member states will have to face a difficult choice of whether to compete on the global labor market as individual nation-states or collectively.

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