



ABA Section of  
International Law  
*Your Gateway to International Practice*

# IMMIGRATION AND NATURALIZATION COMMITTEE NEWSLETTER

Summer 2013



## IN THIS ISSUE:

P 3 - FALL MEETING PROGRAM HIGHLIGHTS: IMMIGRATION REQUIREMENTS FOR ATTORNEYS ENGAGING IN FIFO TRAVEL

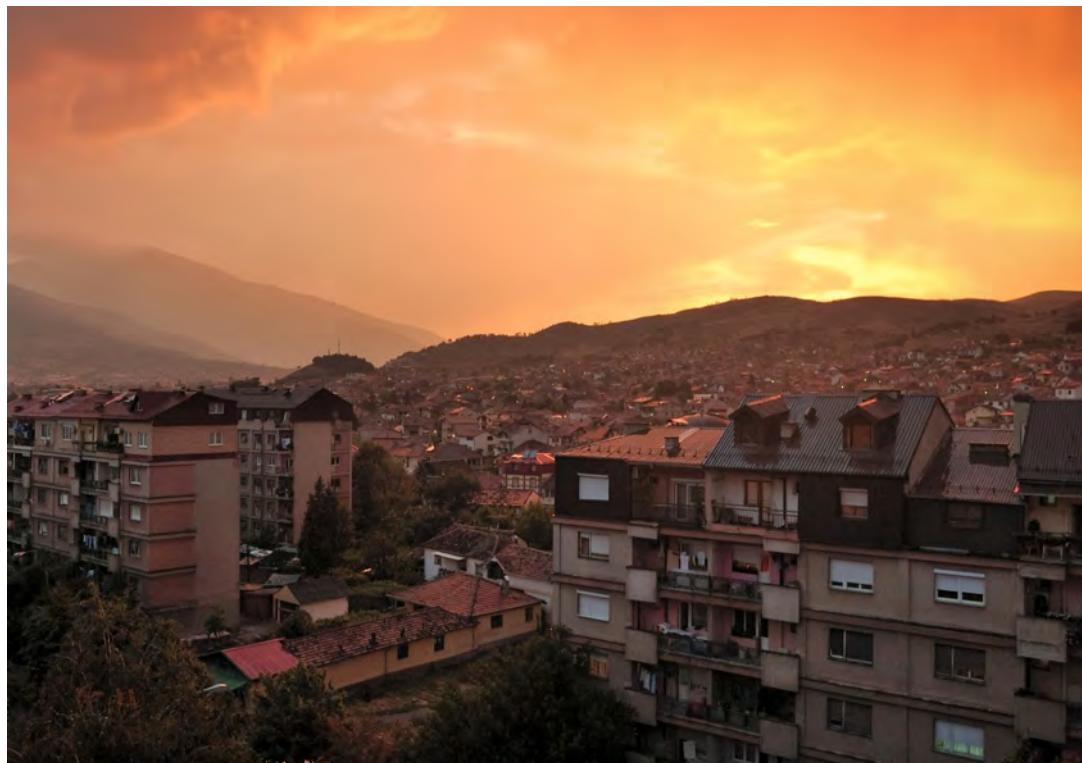
P 6 - CANADIAN IMMIGRATION LAW AMENDMENTS TARGET BACKLOGS, CHANGING LABOUR MARKETS, AND PROGRAM INTEGRITY

P 11 - SURROGACY IN INDIA

P 14 - RECENT CHANGES TO AUSTRALIAN MIGRATION LAW: EMPLOYER COMPLIANCE

P 17 - RECENT CHANGES IN MEXICAN IMMIGRATION LAW

P 23 - CONSULAR NON-REVIEWABILITY DOCTRINE

**Alfonso Venegas**

is an attorney and is admitted to practice law in Mexico, the State of New York and in Spain. He is the partner in charge of the immigration practice of Venegas Gutierrez y Asociados, S.C. in Mexico City. He is the manager of the Law Office of Alfonso Venegas, PLLC where he has an immigration and nationality law practice in the United States.

He also has an office in Valencia and has a presence in Madrid. Alfonso Venegas has represented clients in Mexico and Spain in obtaining non-lucrative visas, student visas, visas for self-employment and has represented various professionals in obtaining the recognition of foreign professional degrees in Mexico and Spain. He also has assisted clients on citizenship and nationality issues. He is the author of the Spanish chapter for the Global Business Immigration Practice Guide published by Lexis-Nexis.

He is a member of the American Bar Association, the New York Bar Association, American Immigration Lawyers Association (one of the founders of the Mexico Chapter), Global Immigration Section of AILA, Illustrious Bar Association of Mexico, Houston Maritime Arbitration Association, among others.

<sup>1</sup> See Official Gazette dated Friday, September 28, 2012. (Diario Oficial de la Federación, Viernes 28 de Septiembre de 2012)

## Recent Changes in Mexican Immigration Law

By: Alfonso Venegas

Mexico enacted the Immigration Law (the "Law") on May 25, 2011. New immigration regulations (the "Regulations") were published on September 28, 2012, to become effective thirty calendar days after the date of publication. The Regulations regulate the Law and provide an explanation of the concepts contained in the Law. The Regulations took more than a year to be approved by the Mexican Congress and were one of the last to be issued by the government of President Felipe Calderon.<sup>1</sup> This law modifies and in some instances supersedes concepts contained in the previous General Population Law "Ley General de Población," which was formerly considered the immigration law in Mexico.

The Law and the Regulations have been a project long-expected by the legal community in Mexico. The Law covers most of the aspects related to the immigration field that previously were contained in various laws and regulations. The proliferation of laws and regulations did not contribute to the unification of criteria in the field. This law and these regulations intend to embrace all the concepts that were disseminated in other laws, and it is a good step forward towards the

harmonization of the immigration legal system in Mexico.

The Regulations clarify and explain concepts contained in the Law and explain in more detail the requirements needed to obtain the new set of visas included in the Law.<sup>2</sup> The concept of FM-2 and FM-3 are no longer contained in the Law. However, petitions pending resolution will be resolved based on the laws applicable at the time of filing.<sup>3</sup> The Law contains a new category of visas.

## VISAS

The Law provides for a new classification of visas. These visas can be ordinary or non-ordinary.

The ordinary visas are listed in Article 40 of the Law.<sup>4</sup> The new classifications are as follows:

- \* A Visitor with No Employment Authorization, is authorized to be in Mexico no longer than 180 days<sup>5</sup>;
- \* A Visitor with an Employment Authorization, is allowed to enter Mexico and be employed for no longer than 180 days;
- \* A Visitor to adopt, allows the individual to enter and stay in Mexico until adoption proceedings are final and the child is able to obtain proper documentation to migrate to another country. This visa only covers nationals or residents of countries that have entered into agreements with Mexico regarding adoption matters<sup>6</sup>;
- \* Temporary Residency, allows an individual to enter and stay in Mexico for no longer than four years, if the person intends to stay in Mexico for more than 180 days<sup>7</sup>;

- \* Student Temporary Residency, allows the individual to stay in Mexico to study in any institution that is part of the National Educational System. It also allows the individual to work in a field related to the course of study completed in Mexico. This visa also allows the individual to travel and for the reunification of family members;
- \* Permanent Residency, allows the individual to enter Mexico and stay indefinitely.

In addition, the Law provides for two other important visas, the Regional Visitor Visa and the Border Worker Visa.

The Regional Visitor Visa authorizes the foreign national or resident of a bordering country to enter Mexico for three days. This visa does not confer employment authorization.

The Border Worker Visa allows the national of a country bordering Mexico to stay in Mexico for one year in a State designated by the Ministry of the Interior, based on an offer of employment. The person can exit and enter Mexico as many times as necessary.

Non-ordinary visas are not that common and are designed for special circumstances. A visa petition can be filed at the Consulate abroad or at the National Institute of Migration.

## National Institute of Migration

The National Institute of Migration (the

2. Under the old law the FM-3 was given to non-immigrants and the FM-2 was given to immigrants.  
3. Article 4 of the Transition Section of the Regulations. Artículo 4 Transitorio del Reglamento.  
4. Article 40 of the Immigration Law.

5. See Article 105 of the Regulations.  
6. See Article 106 of the Regulations.  
7. See Article 107 of the Regulations.

"Institute") is an administrative body of the Ministry of the Interior. Its objective is to execute, control and supervise the acts carried out by immigration authorities within Mexico.<sup>8</sup>

The Law also contains a new section devoted to personnel employed by the Institute. It establishes the process and the qualifications necessary to be part of the Institute and also sets the guidelines for the certification of its personnel. In order to enter, continue to work and to be promoted, the individual must be certified. In order to be certified, the individual must pass the various tests administered by the Evaluation Center.

In order to join the Institute, the federal employee must be certified by the Evaluation Center and attend to and pass the formation, training and professionalization programs, as well as legal training pertaining to immigration and human rights legal framework.<sup>9</sup>

The supervision of personnel working at the Institute is another effort to reduce impunity and to control the actions of individuals that are employed to protect the well-being of migrants. Mexican society demands the professionalization of the personnel guarding Mexico's borders and the protection of migrants and their recognition as human beings.

Another important aspect that the Law and its Regulations intends to contemplate is that of the most complicated aspect of Mexican foreign policy – undocumented immigration.

The fact that thousands of people, foreign and national, leave Mexico in order to go to

the United States has become a matter of most importance for the Mexican government.

The proliferation of mafias that abuse migrants and Mexican nationals and expose them to all types of dangers has prompted great concern within Mexican society. In order to attack the consequences of human trafficking across Mexico, important sections are incorporated into the Law. One in particular is a section regarding the determination of the "superior interest" of non-accompanied children and adolescent migrants. Another section encompasses procedures for detecting, identifying and assisting foreign nationals that are victims of crimes. Other sections worth mentioning are the recognition of vulnerable individuals and organizations for the protection of migrants.

### **Determination of the Superior Interest of Non-Accompanied Children and Adolescent Migrants**

Based on Article 4 of the Mexican Constitution, the superior interest of children and adolescent foreign migrants should prevail in all decisions pertaining to their treatment by Mexican immigration authorities, especially in connection with the family reunification procedure, regularization of stay, refugee procedure and assisted return.<sup>10</sup> The Law provides that children will be interviewed by specialized personnel of the Institute to look after their superior interests.<sup>11</sup>

In evaluating the superior interest of the child, the following aspects should be considered:

8. See Article 19 of the Law.

9. See Article 25 of the Law.

10. See Section 169 of the Regulations.

11. The personnel are trained on the law and on analyzing the psychological well being of the child.

- \* information about the parents and their locations and the reason why the child is not with them;
- \* identifying possible violations of human rights either in the child's home country, country of residency, or in Mexico;
- \* identifying if the child is a witness to or victim of a crime in the child's home country, country of last residency, or in Mexico;
- \* determine the need for international protection of the child;
- \* alternative housing for the child in public or private institutions where proper care can be obtained;
- \* take into consideration the opinion of the child at all stages of the proceedings; if applicable; and
- \* consider the opinion of other relatives or individuals close to or associated with the child.<sup>12</sup>

During the interview process to consider the child's superior interest, the Law provides that the child may be assisted by a representative of the National Commission of Human Rights, and by the child's legal representative or by a person elected by the child. If personnel determine that international protection is required, a notice shall be sent to the Mexican General Coordination Assistance to Refugees, in order to proceed according to that regulatory framework. Based on the interview, the proper Consulate will be notified in order to represent the minor in the proceeding.

The Law provides that the child may be placed under the care of the Family Integral Development National System ("DIF"). DIF could place the child in any of its facilities or in any public or private institution if it is not

possible to place the minor at a DIF facility.<sup>13</sup> The Institute has the prerogative to impose measures to protect the physical and psychological well being of the child. The Institute may also determine the situation of the child by consulting other government entities as well as the Consulate of the child's nationality.

### **Procedure for the Detection, Identification and Assistance to Foreign National Victim of Crimes**

In the event of indications that an individual is the victim of an offense, immigration authorities will perform an interview to determine the level of vulnerability of the foreign national. The Institute will provide the foreign national with a questionnaire elaborated by the Institute in order to determine the identity of the individual victim of a crime.<sup>14</sup>

If the individual is in Mexico with proper immigration documentation, then the immigration authorities would inform the individual of the right to file charges before the District's Attorney Office in order to proceed with the investigation and prosecution of the offense.<sup>15</sup> The individual would also be able to request another type of visa that would allow him to remain in Mexico for a longer period of time in order to collaborate with Mexican authorities in the prosecution of the offense.

If the individual is in Mexico without proper immigration documentation, then the individual will be transferred to the custody of the Institute. Immigration authorities will clearly explain the individual's rights in the proceeding.

12. See Section 173 of the Regulations.

13. Section 176 of the Regulations.

14. Section 178 of the Regulations.

15. Section 179 of the Regulations.

The individual has the following rights:

- \* to request refugee status where there is reasonable fear of persecution in the home country;
- \* to obtain Consular protection in an expedited manner, except in the case of requesting refugee status;
- \* to present charges before proper authorities in order to investigate and prosecute the offense;
- \* to request regularization of the individual's immigration situation up to the conclusion of the criminal proceeding so that the individual is able to fully collaborate with Mexican authorities in order to prosecute the offenders;
- \* to request assisted return to his or her home country; and to request the protection of the individual's identity and personal information.<sup>16</sup>

Immigration authorities should send the individual to the proper institutions in order to obtain medical and psychological services. If the individual requests refugee status, a notice will be sent to the General Coordination Commission for Human Rights. In the case of children or adolescents, the individual will be assisted by the Institute's personnel, specially trained in the protection of children and their rights and will be transferred immediately to the DIF housing premises until the immigration status is resolved. Children will always be placed in a different facility separate from the adult population. Where the child has been a victim of sex trade, the child will not be placed in immigration facilities, but in social centers or specialized institutions where proper care may be rendered to the child.<sup>17</sup>

In the event that as a result of the interview performed by the Institute, it is determined that the individual is the victim of a serious offense committed in Mexico and the individual has expressed the intention to file a complaint,<sup>18</sup> the Institute will issue a document<sup>19</sup> indicating that the individual is the victim of a crime. Once the document has been issued by the Institute and the individual has filed criminal charges, immigration authorities will issue a decision granting the individual a period of time to request proper immigration status in Mexico in order for the individual to have proper access to justice.

Under no circumstances will the individual be forced to file charges or prosecute the commission of an offense, if the individual is not willing to do so.<sup>20</sup>

### **Vulnerable Individuals and Organizations to Protect Migrants.**

There is also a new section contained in the Law regarding the protection of the most vulnerable individuals. This group includes non-accompanied children, migrant women, individuals that are victims of crime, disabled individuals, the elderly, and any individual that may need special assistance. Immigration proceedings would include the completion of appropriate questionnaires in order to determine the situation of the individual and ascertain if special measures should be taken by immigration authorities.<sup>21</sup>

In order for Mexico to fulfill its obligations contained in international treaties and conventions, the Ministry of the Interior may

16. Section 180 of the Regulations

17. Section 180 of the Regulations

18. Section 182 of the Regulations

19. Recognition document or statement made by the Institute.

20. Section 181 of the Regulations

21. Section 185 of the Regulations

enter into coordination agreements with the various States in Mexico, municipalities, and other non-governmental organizations in order to implement measures to improve the situation of individuals in situations of vulnerability.

The Law contemplates the recognition of organizations whose purpose is to protect migrants in Mexico. Recognition of these groups is a step forward against impunity and it is also a deterrent against human trafficking. The Secretary of the Interior in coordination with the Institute shall coordinate these groups in order to provide services to immigrants located in Mexico. The services include first aid, humanitarian and immigration assistance and information about immigration rights.<sup>22</sup> The Ministry of the Interior through the Institute will periodically supervise and evaluate these groups in order to improve their operation. It shall define the location of the new groups and shall modify existing ones.<sup>23</sup>

The Institute shall provide continued training to the personnel of these groups. Depending on the specific operational needs of each group, training shall include: attention to children and adolescents, refugee status requests, assistance to migrant women, human rights, due process in immigration proceedings, crisis intervention, rescue, first aid and survivorship.

After reviewing some of the aspects covered by the Law and its Regulations, it is clear that the Mexican government is sending a strong humanitarian and social message that intends to improve the condition of migrants in Mexico. We can only hope that the government is able to implement the content of this important legislation in Mexico.

22. Section 188 of the Regulations  
23. Section 189 of the Regulations

\*General Note from the author: In this article we are covering some of the sections that we consider most important. The limited space does not allow us to mention all of the sections .