

## LEGAL FRAMEWORK FOR HIGH-TECH WORKERS IN GERMANY

Rolf Wank†

The German green-card law to facilitate the hiring of foreign Information and Telecommunication (IT)-specialists has created some attention in Germany as well as abroad. To better understand the impact of this law, it must be seen in connection with the employment of foreign employees in Germany in general. The law for foreigners in Germany,<sup>1</sup> as well as in the United States,<sup>2</sup> is based on the prevailing idea that every sovereign country has the right to regulate immigration and residence of foreigners as well as nationality and the control of immigration.

### I. THE DEVELOPMENT OF THE EMPLOYMENT OF FOREIGNERS IN GERMANY

The policy of employment of foreigners in Germany has taken a changing course since World War II. At the end of the war at the country first had to be rebuilt. Foreigners had no interest in working in Germany, so there was no need for a law concerning their employment. Only after the change of currency in 1949, in the times of the so-called *Wirtschaftswunder* in the fifties, did the German economy make such progress that the need for foreign workers arose. At first, only single employees, especially from Italy and Spain, arrived. Later on employees were recruited mostly from Turkey.<sup>3</sup> They were employed for jobs that required no special qualifications. With respect to the fatal experiences in Germany concerning foreigners, the government's official policy was obliging; the employees were called *Gastarbeiter* (guest workers). When permanent unemployment first arose among Germans, foreign

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† Professor Dr., Ruhr University, Bochum, Germany.

1. Otto Depenheuer, *Einwanderung und Integration als verfassungsrechtliches Problem*, in ANTON RAUSCHER, IMMIGRATION UND INTEGRATION 73 (2003) [hereinafter RAUSCHER].

2. See *Fong Yue Ting v. U.S.*, 149 U.S. 698 (1893).

3. STEFAN LUFT, MECHANISMEN, MANIPULATION, MISSBRAUCH, AUSLÄNDERPOLITIK UND AUSLÄNDERINTEGRATION IN DEUTSCHLAND 14 (2002).

employees were regarded as competitors, and in 1973 there was a halt to the acquisition of foreigners.<sup>4</sup> However, there was still a need to recruit foreigners for special jobs, which led to exemptions.<sup>5</sup> The resulting green-card law is similar to laws created before.

When foreign workers were invited into Germany, it was commonly assumed that after some years of stay they would return to their native countries.<sup>6</sup> In fact, most of these *Gastarbeiter* have stayed in Germany. They have married here and their children have remained, so that in Germany today the special problems of integration accompanying immigration of a great number—especially with the Turks, who constitute 28.7% of Germany's foreign population<sup>7</sup>—become clear.

Because working conditions are significantly worse in Turkey and guest workers have become alienated from living in Turkey, few employees are interested in returning "home." Unlike foreign workers from other European countries, who are predominately Christian, the Turks are mostly Moslem, and come from a different cultural background. The Turks tend to be segregate and in every bigger German town there are districts in which a large number of Turks live.<sup>8</sup> At home they often speak Turkish and watch Turkish television. This style of living leads to cultural differences; even with third generation Turks, there are still remarkable deficits in proficient use of the German language.<sup>9</sup>

A characteristic for the lacking integration is that many of these young Turks maintain only Turkish nationality, although a change in German law some years ago makes it possible for them to adopt the German nationality in addition to the Turkish, or change the nationality, without problems.

Today the percentage of foreigners in Germany is about 9%, much higher than the EC average (4.86%).<sup>10</sup> The latter number,

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4. Verfügung des Bundesministers für Arbeit und Sozialordnung, v. 23.11.1973 (Bulletin der Bundesregierung, v. 27.11.1973, 1506); Wilhelm Moll & Michael E. Reichel, "Green Card"—*Verfahren, Voraussetzungen und arbeitsrechtliche Fragen*, 54 RECHT DER ARBEIT 308 (2001).

5. Especially in the Arbeitsaufenthaltsverordnung (AAV), v. 18.12.1990 (BGBl. 2994); Anwerbestopp-Ausnahmereverordnung (ASAV), v. 17.9.1998 (BGBl. 2893).

6. ANDREAS HEINZ, HELMUT SCHUHMAN & ANDREAS BUSEMANN, AUSLÄNDISCHE ARBEITNEHMER ¶ 2 (2d ed. 2002); LUFT, *supra* note 3, at 15.

7. See Fulltime-Employed Foreigners in Germany, available at <http://www.integrationsbeauftragte.de/download/datenab24.pdf>.

8. LUFT, *supra* note 3, at 77.

9. *Id.* at 101.

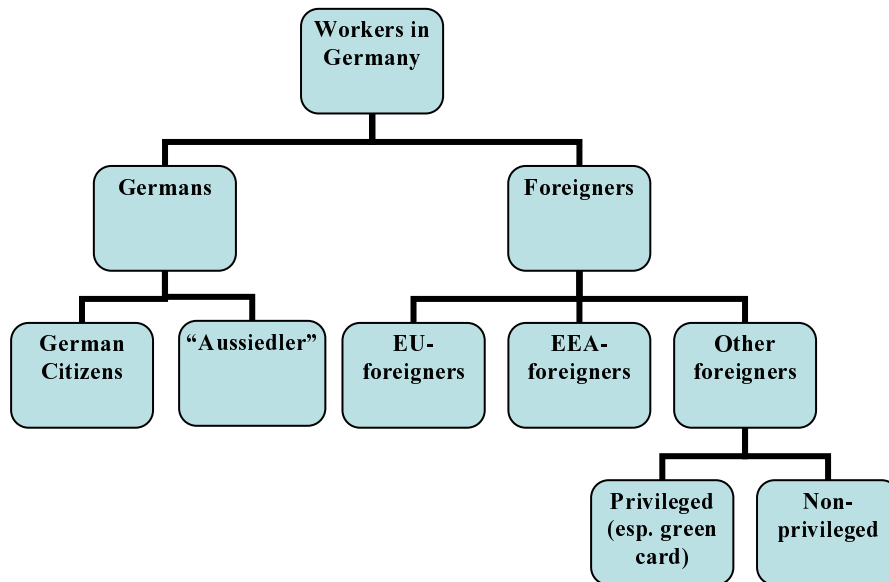
10. *Id.* at 13; J. Schwarz, *Die globale Herausforderung der Migration (General Trends and Processes of International Migration)*, in RAUSCHER, *supra* note 1, at 30; RAUSCHER, *supra* note 1, at 53; HERBERT BRÜCKER ET AL., MIGRATION: POTENTIAL UND EFFEKTE FÜR DEN DEUTSCHEN ARBEITSMARKT 12 (2003).

however, does not include people who emigrated from the former colonies to Great Britain, France, or the Netherlands, since according to the respective national laws they sometimes were not regarded as foreigners. In the time after the end of the Warsaw Pact, immigration to Germany has increased. In the first half of the 1990s the Federal Republic of Germany accepted more immigrants than Canada and Australia together.<sup>11</sup> With this background in mind, two questions arise: With which instrument can this growing number of people be controlled? and How can immigration be regulated in the future?

## II. DIFFERENT LEGAL FRAMEWORK FOR THE OCCUPATION OF FOREIGNERS IN GERMAN LAW

When considering the employment of foreigners, one needs to make the distinction between *Aussiedlern*, exiles from former German territories lost after World War II, and foreigners—from EC countries, from the EEA (European Economic Area), and other groups of privileged foreigners, including green-card foreigners.

**Figure 1: German and Foreign Workers in Germany**



11. J. Althammer, *Ökonomische Determinanten der Migration*, in RAUSCHER, *supra* note 1, at 95.

### A. Aussiedler (*Exiles*)

There is a privileged status for so-called *Spätaussiedler* (i.e., ethnic German immigrants) according to article 116, section 1 of the German Constitution. These are persons who have lived outside of the Federal Republic of Germany, especially in the former Soviet Union, and who belong according to their origin to the German people. In a legal sense they are foreigners. But as soon as they have received an *Aufnahmebescheid* (certificate for exception) according to section 26 et seq. of the *Bundesvertriebenengesetz*<sup>12</sup> by the German embassy in their native country, they may leave their country, immigrate into Germany, and receive the legal status of Germans. As they are often alienated from German culture and speak little or no German, there are problems with the integration similar to those described above among foreigners of the second or third generation of immigrants.

### B. Foreigners

Foreigners who are working in the Federal Republic of Germany generally must fulfill three conditions: they must have a valid passport, a residence permit, and a work permit.

#### 1. Foreigners from EC Countries

Among foreigners working in Germany, citizens of a Member State of the EC are privileged. The EC currently has twenty-five Members since spring 2004. For citizens from these countries there exists freedom of movement according to EC law.<sup>13</sup> In Germany this freedom is transformed by the "statute on immigration and stay of members of the member states of the European Economic Community" (*AufenthG/EWG*)<sup>14</sup> effective January 31, 1980. According to this statute, foreigners who are citizens of a Member State of the EC are granted freedom of movement if they want to be engaged as an employee or if they want to work as an independent entrepreneur. This also applies to their family members. The original philosophy behind these freedoms was that, from an economic

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12. Gesetz über die Angelegenheiten der Vertriebenen und Flüchtlinge i.d.F. der Bekanntmachung, v. 2.6.1993 (BGBl. 829).

13. Cf. Peter Hanau, *Freizügigkeit der Arbeitnehmer*, in PETER HANAU, HEINZ-DIETRICH STEINMEYER & ROLF WANK, HANDBUCH DES EUROPÄISCHEN ARBEITS- UND SOZIALRECHTS § 15 (2002) [hereinafter HANDBUCH].

14. Aufenthaltsgesetz/EWG i.d.F. der Bekanntmachung, v. 31.1.1980 (BGBl. 116).

standpoint, the liberal market idea of supply and demand would also create prosperity in the labor market.<sup>15</sup>

Regarding all three conditions named above (passport, residence permit, and work permit), EC employees are privileged in several ways:

- According to section 10, sentence 1 AufenthG/EWG, EC foreigners do not need a passport. A national identity card is sufficient.
- According to section 3 AufenthG/EWG employees who already have an employment contract are given a residence permit EC for at least five years. This permit is only declaratory,<sup>16</sup> as EC employees already are granted the right of free movement according to article 39 of the EC treaty. It is not a material requirement but only a formality which shall enable authorities to control if the conditions for residents are given. Contrary to other foreigners, foreigners from EC countries and from EEA countries<sup>17</sup> can apply for the residence permit even after they have come to Germany (sec. 9, para. 1 DV AuslG<sup>18</sup>). There is no need to have a visa when coming to Germany. But failure to apply for a residence permit may be sanctioned with a fine (sec. 13 AufenthG/EWG).

The same is valid for entrepreneurs with a residence permit EC who want to settle down in the Federal Republic of Germany. An unlimited permit is possible according to section 7 AufenthG/EWG if the foreigner has been a resident in the Federal Republic of Germany for at least five years, can basically communicate in German, has sufficient living space, and lives in secure economic conditions.

- Members of an EC Member State need no work permit.<sup>19</sup>

As a result these regulations mean that a foreigner from an EC country must be granted the same chance to start and to continue his or her work as a German employee. The only relevant difference concerning the beginning of work between a German and an EC foreigner is that the latter must apply for a residence permit EC. But there is a right to receive this permit and there is no fee (sec. 13

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15. Althammer, *supra* note 11, at 104.

16. GÜNTER RENNER, AUSLÄNDERRECHT, KOMMENTAR, § 15 AuslG, ¶ 3 (7th ed. 1999).

17. Cf. Rolf Wank, *Die geschichtliche Entwicklung*, in HANDBUCH, *supra* note 13, § 11, ¶ 72.

18. Durchführungsverordnung zum Ausländergesetz, v. 18.12.1990 (BGBl. 2983).

19. Drittes Buch Sozialgesetzbuch (SGB III), v. 24.3.1997 (BGBl. 594), § 284, ¶ 1, sentence 2, no. 1.

AufenthG/EWG). Furthermore even after their employment has finished, these foreigners have a right to stay in the Federal Republic of Germany.<sup>20</sup>

## 2. Foreigners from EEA Countries

Similar privileges exist for citizens of the European Economic Area (EEA).<sup>21</sup>

## 3. Foreigners in General

For employees who come from neither EC countries nor from EEA countries, the general law for foreigners is applicable. If foreigners do not come for a short visit but rather to take on employment in Germany, they must conform to heavy restrictions, which are to be found in the Gesetz über die Einreise und den Aufenthalt von Ausländern im Bundesgebiet (Ausländergesetz—AuslG)<sup>22</sup> from 1990. It came into force on January 1, 1991, and it pursues three aims:

- to integrate foreigners legally immigrated with their family members who want to live permanently in the area of the Federal Republic;
- to promote international relations; and,
- to control the further immigration of foreigners from non-EC countries.

In accordance with the general rules of international law, foreigners have no legal claim to immigrate and to stay in the area of the Federal Republic. Generally they need a permit. The law for foreigners is based on the idea that Germany is not dependent on immigration.<sup>23</sup>

Foreigners who do not fall under the AufenthG/EWG are generally obliged to have a passport (sec. 4, para. 1 Ausländergesetz), or a valid substitute for a passport.<sup>24</sup> The possession of a passport is the objective condition for legal immigration and legal residence. Exceptions to this passport requirement apply with regard to

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20. WINFRIED KISSROW, AUSLÄNDERRECHT, VORSCHRIFTENSAMMLUNG, Einführung III (13th ed. 1995).

21. See also Wank, *supra* note 17, ¶ 72.

22. Ausländergesetz, v. 9.7.1990 (BGBl. 1354).

23. MICHAEL KITTNER, ARBEITS- UND SOZIALORDNUNG 306 (28th ed. 2003).

24. Referring to the difference between the duty to have a passport, to carry a passport, and to the duty to carry an identity card, see KISSROW, *supra* note 20, at II.4.

international treaties and persons who are exempt from the need for a residence permit, e.g. aircraft staff.<sup>25</sup>

Foreigners need an *Aufenthaltsgenehmigung*, a residence permit (sec. 3 *Ausländergesetz*). The *Aufenthaltsgenehmigung* is the generic term for four residence titles,

- the *Aufenthaltserlaubnis* (secs. 15, 17);
- the *Aufenthaltsberechtigung* (sec. 27);
- the *Aufenthaltsbewilligung* (secs. 28, 29); and,
- the *Aufenthaltsbefugnis* (sec. 30).

The German law for foreigners differs depending on the duration for which a residence permit is given and the aims of the residence in Germany. A residence permit cannot be granted if the foreigner is unable to live from his or her own employment, property, or other means or on alimonies, grants, etc. (sec. 7, para. 2, no. 2 *Ausländergesetz*).

- The *Aufenthaltserlaubnis* is the general title for a residence permit. It can be given for a certain time but can also be prolonged indefinitely. It is not bound to a special aim for residence. A residence permit to start an employment relationship (sec. 10 *Ausländergesetz*) is generally given as an *Aufenthaltserlaubnis*.<sup>26</sup>
- An *Aufenthaltserlaubnis* is also given for foreign family members of a German or of a foreigner who has the *Aufenthaltserlaubnis* or the *Aufenthaltsberechtigung* to guarantee the family community (sec. 17 et seq. *Ausländergesetz*).
- The *Aufenthaltsberechtigung* grants a residence permit that is unrestricted and unlimited in time and offers a far-reaching protection against eviction as is also granted for people who have a right of asylum. In general, it is only given after a longer legal stay.
- The *Aufenthaltsbewilligung* is a residence title limited in time and granted only for a certain date. No further permanent stay is possible afterwards. It is created for those foreigners who come into the Federal Republic of Germany only for a time-limited purpose. Therefore a residence permit to start work can be given as an *Aufenthaltsbewilligung* if only a short time of employment is planned.

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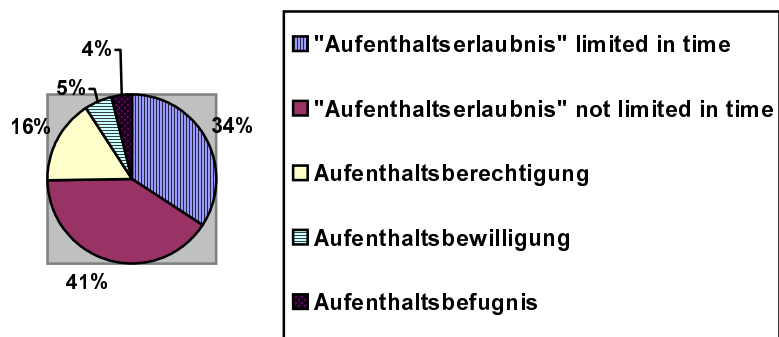
25. HEINZ ET AL., *supra* note 6, ¶ 5.

26. *Id.*

- The Aufenthaltserlaubnis is given for reasons of international law or on humanitarian or political grounds. It cannot be denied by reasons set down in section 7, paragraph 2 Ausländergesetz; thus it can even be given if the foreigner cannot take care of his or her own living expenses (sec. 30, para. 1 Ausländergesetz).

A residence permit unlimited in time can be given with two variations as *unbefristete* Aufenthaltserlaubnis (sec. 24 et seq. Ausländergesetz) and as Aufenthaltsberechtigung (sec. 27 Ausländergesetz). As the following survey referring to the status of foreigners on December 31, 2001 (not including EU foreigners) shows, the Aufenthaltserlaubnis is in reality the most common permit. This is also in accordance with the legal concept.<sup>27</sup>

**Figure 2: Different Kinds of Residence Permits**



In the context of the Ausländergesetz, immigrations and stay are regarded as one, i.e., the same conditions apply to both.<sup>28</sup> The residence permit in the shape of a visa in Germany is, unlike in other legal systems, not only a right to come into the country, but also the right to reside.<sup>29</sup> In general, the visa must be applied for at the relevant diplomatic mission before a person enters the Federal Republic. There are exemptions for members of certain countries like the United States.<sup>30</sup>

If foreigners want to stay longer than three months in the Federal Republic of Germany in an employment relationship, they need the

27. See [http://www.integrationsbeauftragte.de/download/datentab\\_11.pdf](http://www.integrationsbeauftragte.de/download/datentab_11.pdf).

28. KISSROW, *supra* note 20, at Einführung II.2.

29. RENNER, *supra* note 16, § 5 AuslG, ¶ 5.

30. HEINZ ET AL., *supra* note 6, ¶ 15.

Arbeitserlaubnis. The law of residency has priority to the law of work permit<sup>31</sup> (sec. 284, para. 5 SGB III); the employment must not be excluded by a residence-law restriction. The details of a residence permit for work purposes are regulated in the ArbeitsaufenthaltsVO (AAV)<sup>32</sup> (ordinance on residence for employment purposes) of 1990. The basis for a work permit for foreigners is set forth in section 285, paragraph 3 SGB III. Details on questions of work permits are set down in the ArbeitsgenehmigungsVO<sup>33</sup> (ordinance governing work authorization).

Although there had been a general stop for the acquisition of foreign workers in 1973, as cited above, the AAV enables especially qualified persons to start work in Germany. Conditions to receive the AAV are, according to section 285, paragraph 1, sentence 1 SGB III, that:

- no German or EC foreigner can or wants to accept this workplace;
- the employment of foreigners has no negative effect on the German labor market; and,
- the foreigner is not occupied at less favorable working conditions than comparable German employees.

The potential employer has a number of duties of information and proof, which make the acquisition of qualified IT experts on the basis of the AAV very difficult. An easier way of acquiring foreign workers is given by the Anwerbestoppausnahmereverordnung (ASAV)<sup>34</sup> (ordinance on exceptions to the ban of recruitment for foreign labor) from 1998. But the procedure to get the concession is also very difficult, takes time, and is not focused on IT specialists. Therefore even this ordinance did not come up to the demands of the IT area, which was in rapid development.

#### 4. Green-card Foreigners

##### a) *Development*

The regulations of the law for foreigners as shown above are, in general, valid for every profession in the same way. Disregarding special rules as mentioned above, there is no general exemption for a job for which there is a big demand. With regard to this background,

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31. *Id.* ¶ 93.

32. Arbeitsaufenthaltsverordnung, v. 18.12.1990 (BGBl. 2994).

33. Arbeitsgenehmigungsverordnung, v. 12.9.1980 (BGBl. 1245).

34. Anwerbestoppausnahmereverordnung, v. 21.12.1990 (BGBl. 3012).

then, the question arises: Why has a special law been created for high-tech workers?

This is due to a political agenda that also generated effective publicity.<sup>35</sup> From the viewpoint of an employer, there is in Germany a vast demand for foreign workers in certain jobs that is not satisfied. But these are jobs without special qualifications, for example, in the areas of gastronomy or geriatric care. However, no similar political emphasis has been put on these jobs. In the IT area, however, employers have effective organizations. Besides, the special law for high-tech jobs was based on expectations of extreme growth of the "new economy." Employers demanding to allow additional foreigners in the high-tech area had the advantage that in public opinion and in politics the promotion of the high-tech industry had a high priority in Germany. They are regarded as jobs for the future, and we know that a country like Germany, which is dependant on orders from abroad, must fulfill high standards of technique. The technology in the information area is regarded as a key area, basic for the future of the German economy. Therefore the call for an exemption for this area was readily accepted in the political realm.

The green-card regulation goes back to an initiative of Federal Chancellor Schröder to increase the number of workers in the area of technology for information and telecommunication (IT) on the CeBit fair in early 2000.<sup>36</sup> The CeBit in Hannover is the world's largest fair for computer technology. In 2003 it had 700,000 visitors.<sup>37</sup> Because such an event is accompanied by international media interest it was a favorable time to announce such a procedure.

#### *b) Legal Framework*

The green-card regulation is based on the *Verordnung über Aufenthaltserlaubnisse für hoch qualifizierte ausländische Fachkräfte der Informations- und Kommunikationstechnologie (IT-AV)*<sup>38</sup> from 2000. It deals with the residence law. In addition, the *Verordnung über die Arbeitsgenehmigung für hoch qualifizierte ausländische Fachkräfte der Informations- und Kommunikationstechnologie (IT-ArGV)*<sup>39</sup> from 2000 regulates under which conditions a work permit

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35. For more detail, see LUFT, *supra* note 3, at 162.

36. See <http://www.bundestkanzler.de/Buergergesellschaft> (Bundeskanzler = chancellor of the federal republic of Germany, Bürgergesellschaft = civil society).

37. CeBit's Web site is available at <http://www.cebit.de/29222>.

38. IT-AV, v. 25.7.2000 (BGBl. 1176).

39. IT-ArGV, v. 11.7.2000 (BGBl. 1146).

according to section 285, paragraph 1 SGB III can be granted. IT-AV and IT-ArGV have priority over the AAV.

The *Arbeiterlaubnis* (work permit) is given if certain personal and other conditions are fulfilled. Addressees are foreigners with residence abroad and graduates from German universities and advanced technical colleges. These persons must have had instruction in their university or institute in the technology of information and communication as the main area of study or they must have proved their qualification by an employment contract with a salary of at least € 51,000 (sec. 2 IT-ArGV). In addition, there must be an actual temporary demand for highly qualified experts in the technology of information and communication. The maximum figure of *Arbeiterlaubnisse* (green cards) was initially, according to section 5, limited to 10,000 and was, when further demand arose, extended to a maximum of 20,000.

The relevant decree came into force on August 1, 2000. This decree is valid for a limited time (so-called sunset legislation). Originally, the last *Arbeiterlaubnis* based on the IT-ArGV should have been given on July 31, 2003 (sec. 6, para. 1 IT-ArGV). The duration of the permit can be limited to a maximum of five years, so validity of the last green card would have ended on July 31, 2008. But by a decision of the federal government this decree was extended from July 9, 2003, to the end of 2004, in the expectation that meanwhile the *Zuwanderungsgesetz* (immigration act, see below) would come into force; an expectation that has been realized.

As soon as a work permit is promised or given, an *Aufenthaltserlaubnis* (residence permit) can be granted according to section 1 IT-AV. For the *Aufenthaltserlaubnis* the same conditions apply as in section 1, paragraph 1. The *Aufenthaltserlaubnis* is given or extended for the duration of the employment for a maximum of five years (sec. 1, para. 2 IT-AV). This decree will come out of force at the same time as the decree named before.

### *c) Practical Effects*

Following the IT-program, IT-experts from non-EC countries may apply for a working place. The program aims to address experts in information and communication technology, e.g., in the areas of software, multimedia-development, and programming, the development of semiconductors and IT systems, of IT consulting, as well as specialists for systems, Internet, and network.

One condition for the granting of a work permit is the proof of a qualification at a university or an advanced technical college as Bachelor, Master, or with a diploma in IT studies (e.g., informatics, informatics in economics, and communication engineering). As an alternative it is sufficient to prove the qualification by a salary agreement according to which the employer in Germany will pay a year's gross salary of at least 100,000 Deutsche Mark (€ 51,000). The employer has to prove this when applying for the work permit. The chance to prove the qualification by a high salary is based on the idea that the potential employer will only be willing to pay this salary if the employee has demonstrated the appropriate qualifications. It must be emphasized that the salary agreement with a gross income of € 51,000 has to be certain. It is not sufficient if this sum may only be expected according to a salary model referring to success.<sup>40</sup>

If a lower salary is agreed upon, a comparable exam certificate in German or English must be submitted. The salary agreed upon should, in general, not be lower than the Beitragsbemessungsgrenze in the federal health insurance (West Germany € 39,600, East Germany € 32,700), if no lower but appropriate salary can be derived from a collective bargaining agreement valid for this enterprise.<sup>41</sup>

In general the applicant has to prove:

- a salary of at least € 51,000 or
- a salary of at least € 39,600/€ 32,700 and a corresponding examination certificate from a university.

In reality, the second case will apply more frequently. In the area of the Landesarbeitsamt (employment authority) of the German state of Saxon, for example, as of May 2003, a salary of over € 51,000 could only be gained by 59 out of 465 applicants.<sup>42</sup> There are different ways how applicants and enterprises can be brought together. Starting in June 2000 the Bundesagentur für Arbeit (Federal Authority for Employment Politics meanwhile called Bundesagentur für Arbeit, Federal Agency) has maintained a placement agency on the World Wide Web where applicants may introduce themselves and employers can show their offers. It is also possible for foreign experts to apply directly at a business in Germany (e.g., following an offer in a newspaper or on the Internet).

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40. Björn Gaul & Stefan Lunk, *Greencard: Chancen und Probleme bei der Beschäftigung ausländischer Arbeitnehmer im IT-Bereich*, 53 DER BETRIEB 1281 (2000).

41. Runderlaß der Bundesanstalt für Arbeit 37/2000, v. 26.7.2000: 37/2000.

42. This data is available at [http://www.arbeitsamt.de/laa\\_s/statistik/s\\_auswert/green1.pdf](http://www.arbeitsamt.de/laa_s/statistik/s_auswert/green1.pdf) [hereinafter Arbeitsamt].

Companies also have ways to obtain IT experts from abroad. As stated above, the Bundesagentur für Arbeit has installed a placement agency for employers. Employers may address their local employment authority or may search on their own (e.g., via the Internet). Finally an employer may recruit experts directly in other countries (e.g., by advertisements, employees of the enterprise, or third parties). For these actions, however, the employer is obliged to ask for the consent of the Bundesagentur für Arbeit. If the enterprise involves the service of private agencies, these agencies need permission for a placement from abroad, which is given by the respective employment authority of the German state (Bundesland).

Before the permission is granted, the documents must be submitted to the labor authority. The authority checks, first, to see if the position can be filled by a German expert or by an expert from the EC; it then checks to see if there is sufficient qualification and makes sure the employer does not offer the applicant working conditions less favorable than for comparable high-qualified German experts. This control, however, is executed liberally. In the state of Saxon, for instance, less than 1% of the applications were refused.<sup>43</sup>

The experts coming to Germany are insured by the German state social insurance system, which provides health insurance, retirement insurance, unemployment insurance, and work accident insurance. If the Federal Republic of Germany has concluded a treaty of social insurance with the country from which the applicant comes, this treaty will also contain regulations about how the German system may be integrated into the native system of social security. If the applicant comes from a country with which Germany has not concluded a treaty on social security, the applicant may be refunded half of the payment to retirement insurance on a separate application, as soon as he or she ceases to be a subject of the German social security system and after a waiting period of two years. Employees may not only apply from abroad but also when having finished their studies in the area of IT at a German university or a comparable institution; this is also possible if they stay in Germany for purposes of university careers (doctoral thesis or habilitation).

The IT expert may also start his or her own enterprise, rather than working for an existing business. The residence permit for IT experts, however, does not permit experts to work on their own account. On application, however, this restriction can be abolished by the authority. This cannot happen on the basis of IT-ArGV/IT-AV,

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43. *Id.*

but only on the basis of the less adequate regulations of the law for foreigners in general.<sup>44</sup> If the employees want to change their employers, they must apply for a new work permit for the new employment relationship.<sup>45</sup>

Applicants granted work permits are entitled to bring their spouse and underage children at once; but only under the condition that the family has adequate living space in Germany. Otherwise, the family may follow as soon as this living space has been found. The spouse may obtain a work permit one year after having come to Germany. After two years of marital community in Germany, the spouse has an autonomous claim for a work permit.

In practice, it is of a great advantage that the authority must answer within one week of the application for a green card, assuming all necessary documents have been submitted (sec. 7, para. 1 IT-ArGV).<sup>46</sup> In reality, the applicant receives his permission often within one day. So the procedure has been enormously accelerated compared with the former practice to AAV or ASAV.

The applicant may get the immigration permit in the form of a visa at the German embassy in his or her native country, if he or she can prove the offer of a work permit and of sufficient living space for him or herself and his or her family. The applicant also needs a valid passport. After arriving in Germany, the foreigner must notify his arrival to the relevant local authority<sup>47</sup> and apply at the local authority for foreigners to receive the residence permit.<sup>48</sup>

#### *d) Further Legal Aspects*

In general, according to German international private law, the parties of a contract have a free choice with regard to the legal system applicable to their contract (art. 27, para. 1 EGBGB).<sup>49</sup> However, there is no exemption from the compulsory regulations for the protection of employers in German law, even for employment contracts ruled by the green-card treaty (art. 30, para. 1 and para. 2, no. 1 EGBGB).<sup>50</sup> Among these compulsory regulations are the law on

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44. Gaul & Lunk, *supra* note 40, at 1282.

45. *Id.*

46. Moll & Reichel, *supra* note 4, at 310.

47. *Id.*

48. Checkliste für Bewerberinnen und Bewerber des Bundesministeriums für Arbeit (this can be ordered at Bundesministerium für Wirtschaft und Arbeit, Referat Publikationen, Postfach 500, 53105 Bonn, Germany).

49. Wank, *supra* note 17, § 31, ¶ 28.

50. Gaul & Lunk, *supra* note 40, at 1283; HEINZ ET AL., *supra* note 6, ¶ 101.

health and safety, the law on public holidays, the law on working time, the principle of nondiscrimination, the regulations on inventions by employees, and the protection of the employment contracts in cases of transfers of undertaking.<sup>51</sup>

The law on dismissal is also compulsory. This means that an employer can dismiss an employee who has come according to the green-card regulation only if there are reasons for the dismissal. As long as the work permission is valid, the foreign employee is protected to the same extent as his or her German colleague.

The lack of a work permit does not necessarily lead to the invalidity of the working contract because of an offense against a prohibition law, following section 134 BGB (German Civil Code).<sup>52</sup> A dismissal because of reasons in the person of the employee is possible, however, for example, if the employee has no work permit because it was not extended, and the employee therefore cannot fulfill his or her contractual duties.<sup>53</sup> The dismissal is possible if the refusal of the work permit has become legally binding. If it is not certain yet whether a new work permit will be granted or an existing one will be prolonged, the dismissal is only valid if in a reasonable amount of time a permit cannot be expected.<sup>54</sup> This will be the case when the five-year limit of the green card has expired, because there is no extension of the law. An extraordinary dismissal merely because of the lack of a work permit is invalid.<sup>55</sup> However, the employee who cannot fulfill his or her duties because of the lack of the work permit has no claim for salary (secs. 297 and 615, sentence 1 BGB).<sup>56</sup>

The employer may combine the working contract with a time limit of up to two years without reasonable ground (sec. 14, para. 2, sentence 1 *Teilzeit- und Befristungsgesetz*).<sup>57</sup> There is controversy about whether the time limit of the residence permit according to IT-AV gives reasonable ground for a longer time limit of a working contract. The *Bundesarbeitsgericht* (Federal Labor Court)<sup>58</sup> requires a prognosis for residence permits with a time limit that, with reasonable certainty, must come to the conclusion that there will be no extension of the residence permit. This prognosis must be based

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51. Moll & Reichel, *supra* note 4, at 313.

52. HEINZ ET AL., *supra* note 6, ¶ 90; Moll & Reichel, *supra* note 4, at 318.

53. BAG, v. 7.2.1990—2 AZR 359/89—AP Nr. 14 zu § 1 KSchG Personenbedingte Kündigung.

54. HEINZ ET AL., *supra* note 6, ¶ 212.

55. Gaul & Lunk, *supra* note 40, at 1283.

56. *Id.*; Moll & Reichel, *supra* note 4, at 318.

57. *Teilzeit- und Befristungsgesetz*, v. 21.12.2000 (BGBl. 1966).

58. BAG, v. 12.1.2000—7 AZR 863/98—DER BETRIEB 978 (2000).

on certain facts.<sup>59</sup> Some commentators deny the possibility of a time limit because of the time limit of the residence permit according to the IT-AV.<sup>60</sup> It may be admitted, indeed, that a prolongation of the residence permit following the regulations of the law for foreigners in general is not impossible. But the green-card decrees expressly aim at filling a short-time gap with respect to IT-experts. At least following these regulations, prolongation about more than five years is certainly impossible. In this case, a prolongation following the law for foreigners in general has a purely hypothetical character. Therefore the argument is convincing that green-card foreigners may be given an employment contract limited to a duration of five years.<sup>61</sup>

*e) Comment*

The green-card regulation has not come up to the expectations that were put forth at its introduction. In March 2003, there was news that during the past one and a half years foreigners had only applied for 3,500 green cards. All in all, until January 2003, 13,566 green-card work permits had been granted. Following the news from the Zentralstelle für Arbeitsvermittlung (central authority for placement) this number, as of June 2003, has only risen to about 14,400. The first green cards were granted in August 2000. The experiment started very promisingly. During the first fifteen months, more than 10,000 green cards were granted, and at the end of 2001 the federal government estimated that the contingent of 20,000 work permits would be reached far before the originally planned date of July 31, 2003.<sup>62</sup>

The following statistics of the Bundesanstalt für Arbeit show the development of the number of granted work permits for foreign IT experts up until the end of 2002:

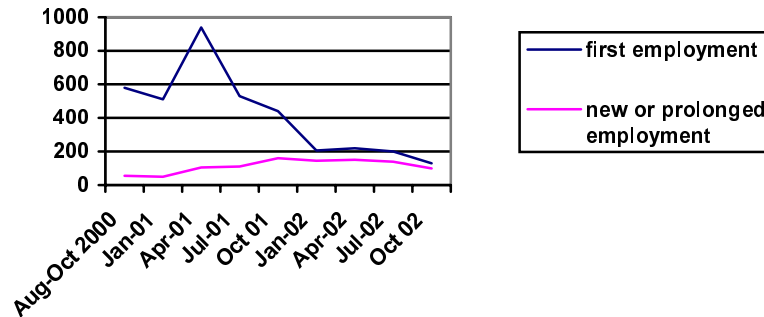
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59. HEINZ ET AL., *supra* note 6, ¶ 163.

60. Gaul & Lunk, *supra* note 40, at 1284.

61. Moll & Reichel, *supra* note 4, at 318.

62. Information der Bundesregierung, v. 31.10.2001, available at <http://www.bundeskanzler.de/Buergergesellschaft.7730.35196/a.htm>.

**Figure 3: Number of Green Cards**

As the economic situation in Germany at the moment is not promising, only few foreign IT specialists are employed. Jürgen Peters, vice head of the trade union IG Metall (steel union), estimated that at the moment 50,000 IT specialists are without work.<sup>63</sup> Even among holders of green cards, meanwhile, there is significant unemployment. For example, in the district of the authority for employment in Munich in spring 2003, 7% of these employees were counted as unemployed. This corresponds to the trend in the industrial sector, where the number of unemployed German IT specialists has doubled between September 2001 and September 2002.<sup>64</sup>

There is no further data on why the green-card regulation was less successful than expected. However, reasons can be found on the side of enterprises and on the side of foreigners.

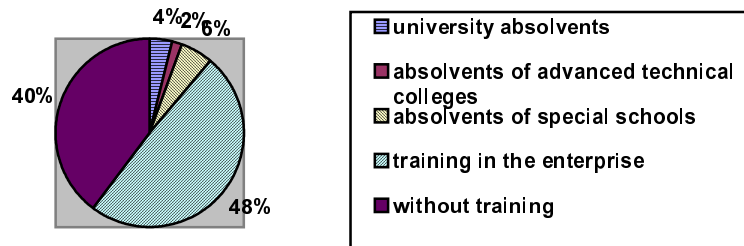
It is characteristic for the IT industrial sector to experience extreme fluctuations in the demand for employees. Some years ago it made remarkable progress. Especially among highly qualified persons the unemployment rate was very low. This is demonstrated by the results of a survey showing the number of unemployed Germans referring to their qualification in the year 2000.<sup>65</sup>

63. KÖLNER STADT-ANZEIGER, formerly available at <http://www.ksta.de/servlet> (no longer online) (on file with author).

64. IAB Kurzbericht 7/2003, available at <http://www.iab.de>.

65. Chart available at [http://www.integrationsbeauftragte.de\(download\)/daten/tab30.pdf](http://www.integrationsbeauftragte.de(download)/daten/tab30.pdf).

**Figure 4: Number of Unemployed According to Their Qualifications**



Meanwhile the figures have changed and many companies of the “new market” have closed. Therefore, the demand on the side of employers has continually diminished since August 2000.

In the case of foreigners, the green card seems not to have been as attractive as originally expected. Some potential green-card applicants have come to the conclusion that, as experts applying for an employment abroad, they would fare better going to the United States first because they expect better chances there and fewer language problems.

In addition, there may be a social factor. Whereas Turks coming to Germany will find Turkish districts in every bigger town, people coming from India (with 47.3% in the state of Saxon constituting the biggest ethnic group among holders of a green card<sup>66</sup>), Russia, or Bulgaria will find only a small number of compatriots even in bigger cities. This may lead to a life in isolation, which makes an application for the green-card offer less attractive.

Finally, the fact that green cards are only granted for five years and are bound to the existence of an employment relationship may have been a deterrent. Foreign employees are strained by the insecurity because they cannot rely on the creation of social relations or the purchase of a house to be worthwhile. This is not a groundless fear—in some cases, holders of green cards have been asked to leave Germany within 72 hours of becoming unemployed. However, the Bundesinnenministerium (Federal Department of Interior Affairs) has given orders that longer times for residence should be granted.<sup>67</sup>

66. See Arbeitsamt, *supra* note 42.

67. IAB Kurzbericht, *supra* note 64.

There is a positive result by the Initiative D 21—a union of more than 300 businesses in connection with politics and administration with the aim of accelerating the change to an information society. With the federal government this initiative has promoted with great energy the idea of easier acquisition of foreign IT experts and has participated to a great extent in the development of the green-card decrees. The member enterprises praise the quick and informal procedure when hiring according to the green-card regulations.

The initiative points out that it is of great importance for the success of foreigners that they have adequate knowledge of German. Most workplaces require contact with customers and therefore the applicants need to know German. This is untrue only in workplaces where software and hardware are developed. From the personal integration standpoint, the knowledge of German is also necessary. Therefore applicants from Eastern Europe have an advantage because some of them have learned German at school.

The Initiative D 21 also demands that the employment procedure should become simpler—there should be more positions at the employment authorities. It is regarded to be deterrent that spouses can only work in Germany after one year of residence.

The green-card regulation, according to the initiative, has led to progress in the German labor market. The figure of 8,500 green cards corresponds to the number of graduates of one year in the area of informatics at all German universities and advanced technical colleges. In addition, the green-card regulations have had a positive effect in promoting the studies in informatics.<sup>68</sup>

According to the Industrie- und Handelskammer Osnabrück (commercial chamber Osnabrück) the green-card regulations show that qualified immigrants can help to avoid lacks in demand and can create more working places. In competition for qualified workers Germany only has a chance if the foreign specialists and their families have a permanent perspective, which the green-card regulation currently lacks.<sup>69</sup>

The Initiative Faircard criticizes that this regulation has negative effects on the economy of the third world. The costs for the training

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68. See <http://www.initiative21.de>.

69. Industrie- und Handelskammer Osnabrück, *available at* <http://www.osnabrueck.ihk24.de> (Achim Dercks, *Wirtschaft Osnabrück-Emsland* Nr. 1/2002, Best.-Nr. H 4803) [hereinafter IHK Osnabrück].

of engineers in informatics, which should be paid by Germany, they argue, must be paid by countries of the third world.<sup>70</sup>

Even when accepting all criticism about green-card decrees it should not be forgotten that the crisis in the IT industry is only partially the result of a correction to the disproportioned prosperity of recent years, and that soon there will be a normalization. The decrease in applications in 2002 and 2003 is to a great extent due to the economic situation. In the beginning, when the economic situation was better, the offer of green-card decrees has readily been accepted. The original limit of 10,000 work permits was soon exceeded. In a short time there again will be an increase in demand on the labor market for IT experts. The union of this industry district, BITCOM, estimates a growth in this industry segment of 3% in 2004.<sup>71</sup> Accordingly, the demand for IT specialists will increase again. Contrary to what is feared by some people, there is no proof of a negative effect of increased immigration on salaries and employment.<sup>72</sup> The opinion of industrial associations is that qualified immigrants may add to the development of more working places in other industrial areas.<sup>73</sup> Therefore, the federal government intends to look for foreign experts even after the expiration of the IT-ArGV and the IT-AV.

### III. LEGAL CHANGES IN 2004

#### A. *The Zuwanderungsgesetz—the Way of Legislation*

Recently, the law of immigration has been changed by the *Zuwanderungsgesetz* (Gesetz zur Steuerung und Begrenzung der Zuwanderung und zur Regelung des Aufenthalts und der Integration von Unionsbürgern und Ausländern (immigration act)).<sup>74</sup> For this Act, the consent of the Bundesrat (Federal Second Chamber) was necessary. The first draft has been rejected by the Bundesrat in the session of March 22, 2002. The Bundestag passed a resolution of this Act without making changes, but the Bundesrat refused it again on June 21, 2003. After very long and intensive negotiations between the federal government and the opposition parties, it was finally possible

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70. Institut für soziale Dreigliederung, Berlin, available at <http://www.dreigliederung.de/fairprise/cardcontraproductiv.html>; see also LUFT, *supra* note 3, at 168, 171.

71. KÖLNER STADTANZEIGER, Mar. 17, 2003, at <http://www.ksta.de/servlet/ContentServer?> (on file with author).

72. BRÜCKER ET AL., *supra* note 10, at 18.

73. IHK Osnabrück, *supra* note 69.

74. *Zuwanderungsgesetz*, v. 30.7.2004 (BGBl. 1950).

to reach a compromise between all parties in Bundestag und Bundesrat. The new Act will come into force on January 1, 2005.

The aim of the Act follows from section 1, paragraph 1 of the new Aufenthaltsgesetz (Gesetz über den Aufenthalt, die Erwerbstätigkeit und die Integration von Ausländern im Bundesgebiet, Aufenthaltsgesetz, AufenthG) as article 1, a part of the Zuwanderungsgesetz:

This statute shall serve the control and the limitation of the immigration of foreigners into the Federal Republic of Germany. It enables and shapes the immigration with regard to the ability for admission and integration and the economical and labor market interests of the Federal Republic of Germany. This statute also serves the fulfillment of humanitarian obligations of the Federal Republic of Germany. With regard to this it regulates the immigration, the stay, the employment and the promotion of the integration of foreigners. (sec. 1, para. 1 AufenthG).

The aim is that, in the area of migration for work, there should be a turn from the so-far confusing system of a stop of recruitment, which is undermined by a lot of exceptions. Instead, the Zuwanderungsgesetz shall answer to the fact that in Germany a certain amount of immigration takes place and should take place in the future.<sup>75</sup> The Act wants to control this immigration with a reasonable and lucid instrument.

### *B. Contents of Zuwanderungsgesetz*

The three elements of the valid law (passport, residence permit, and work permit) also appear in the Zuwanderungsgesetz.

#### 1. Immigration and Residence

Foreigners need to have a passport according to section 3 AufenthG. Section 4, paragraph 1 AufenthG requires that a foreigner immigrating into the area of the Federal Republic and staying there receive a residence permit. This can be a visa according to the agreement of Schengen (sec. 6, paras. 1–3 AufenthG), a residence permit (sec. 7 AufenthG), eventually in the kind of a national visa (cf. sec. 6, para. 4 AufenthG), or a permission for self-employed applicants (sec. 9 AufenthG). The Schengen visa allows short visits up to three months without employment.

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75. Althammer, *supra* note 11, at 95, 116.

One condition for a residence permit (sec. 5 AufenthG) is that financial support is guaranteed. This means according to section 2, paragraph 3 AufenthG that the foreigner can take care of his or her living expenses including social security for health without state subsidies. The residence permit is a title limited in time granted only for the aims named in the AufenthG (sec. 7 AufenthG). Those aims are:

- training (sec. 16 et seq. AufenthG);
- employment (sec. 18 et seq. AufenthG);
- reasons from international law, humanitarian or political reasons, (sec. 22 et seq. AufenthG); and,
- family grounds (sec. 27 et seq. AufenthG).

The permit for self-employed is terminated after three years (sec. 21, para. 4 AufenthG). After this period, a permit can be given, if the foreigner has been successful in his job and if his financial support is guaranteed.

The Zuwanderungsgesetz will replace the four kinds of residence permits of the valid law (sec. 5 AuslG) by only two kinds of national residence permits, the Aufenthaltserlaubnis (residence permit, sec. 7 AufenthG) and the Niederlassungserlaubnis (establishment permit, sec. 9 AufenthG).

## 2. Employment

For the purpose of this article, residence for the aim of employment, sections 4 and 18 et seq. AufenthG, are of interest.

### *a) Residence Permit*

If the foreigner, as is usually the case, only has a residence permit, he or she currently needs and will need in future an additional agreement by the labor authority (sec. 18, para. 2 AufenthG). However, the new regulation no longer requires a separate work permit. Instead, the foreigner shall be able to apply for a residence permit at the foreigner's authority which includes the work permit (so-called residence permit for the aim of employment). The agreement of the labor authorities is granted internally by the foreigner's authorities. By this procedure the applicant needs to involve a smaller number of authorities (one-stop government).<sup>76</sup>

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<sup>76</sup> Bundesvereinigung der Deutschen Arbeitgeberverbände, Mitgliederinformation, v. 9.11.2001 (on file with author).

### (1) Self-employed

A foreigner can be granted a residence permit as a self-employed person according to section 21 AufenthG,

if a prevailing economic interest or a special regional interest exists which gives hope that the activity will have positive effects on the economy and if the financing of the project is insured by own resources or by a promise for a credit. In general a prevailing economical interest is assumed if the investment is worth at least one million Euro and if at least ten working places are created.

### (2) Employees

For employees, the conditions for a residence permit are stated in section 18 AufenthG. A general condition is either that the Bundesagentur für Arbeit has agreed according to section 39 AufenthG (see above) or that the agreement is unnecessary according to a decree following section 42 AufenthG. The consent of the Bundesagentur für Arbeit according to section 18 AufenthG can only be granted if the conditions according to section 39, paragraph 2 are fulfilled.

In detail these conditions are:

- that the employment of foreigners does not have negative effects on the employment market,
- for the employment German employees and foreigners which have rights equivalent to those of Germans or other foreigners who according to the law of the European Union have a prevailing right of access to the labor market are not at disposition or
- the Bundesagentur für Arbeit has proved for groups of persons or for industrial areas that to give working places to foreigners is acceptable under labor market aspects and in accordance with the politics of integration.

Additionally it must be ensured that the foreigner is not employed under working conditions less favorable than those of a comparable German employee. To summarize, there is a general priority for Germans and EC foreigners. The provisions ensure that foreigners do not expel Germans from the labor market by giving these foreigners low salaries.

#### *b) Establishment Permit*

According to section 9 AufenthG, the permit for self-employed people automatically allows employment. Employment here means

self-employed as well as dependent employment (sec. 2, para. 2 AufenthG).

The conditions for a Niederlassungserlaubnis for foreigners are stated in general in section 9, paragraph 2 AufenthG:

- residence permit for five years
- guaranteed coverage of living expenses
- sixty months of contributions for state old-age pension system
- no conviction for criminal offenses on purpose
- in case of a dependent employment, the permit for this employment
- other necessary permits
- the knowledge necessary for the job
- the knowledge of the German language
- the knowledge of life in Germany
- sufficient living space

Furthermore, under special circumstances a Niederlassungserlaubnis can be granted immediately, that is, without five years' waiting time. In this case, the special conditions in section 19 AufenthG apply.

#### (1) Niederlassungserlaubnis for Highly Qualified Workers

Highly qualified workers shall be especially privileged. According to section 19, paragraph 2 AufenthG these include especially well qualified:

- scholars
- teachers
- specialists and senior staff

These people may get a Niederlassungserlaubnis unlimited in time immediately after their immigration if their activities in Germany guarantee the costs for their living expenses. It is assumed that some highly qualified scholars might decide against working in Germany if they could get here only a residence title limited in time whereas other nations might grant them a residence permit unlimited in time from the beginning. Besides, this regulation is ruled by the idea that these qualified persons generally can be integrated and that therefore a limitation in time is not necessary.

(2) Niederlassungserlaubnis in the Auswahlverfahren (Selection Procedure)

In the draft of the Zuwanderungsgesetz, a special selection procedure was ruled by section 20, paragraph 2 AufenthG “in the economic and scientific interest of the Federal Republic of Germany which serves the immigration of qualified people for the labor market by whom a support to the economic development and the integration into the life of the Federal Republic of Germany can be expected.” A system of points in the law of immigration should be introduced. A certain number of Niederlassungserlaubnisse should be granted to persons for whose immigration there was supposed to be a national interest by the Federal Republic of Germany. This would have led to integrating IT law into the general law of foreigners. However, the proposed section 20 has not been taken up in the final Zuwanderungsgesetz, so there is no more special regulation for IT law.

(3) Citizens of the Union and Foreigners from EC Countries

There are special regulations for future members of other Member States of the European Union (“citizens of the Union”) and their family members following the Gesetz über die allgemeine Freizügigkeit von Unionsbürgern (Freizügigkeitsgesetz/EU-FreizügG/EU), article 2 of the Zuwanderungsgesetz. This statute shall replace the valid AufenthG/EWG.

Section 2, paragraph 2 of the Freizügigkeitsgesetz privileges citizens of the Union:

- who want to stay in Germany as employees;
- who want to execute self-employed activities; and,
- who want to make contracts of service according to article 50 EGV, if they have a right for those contracts.

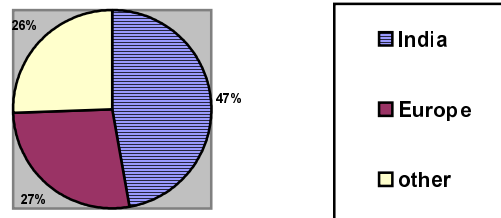
According to section 8 of the Freizügigkeitsgesetz, citizens of the Union and their family members who come into the Federal Republic will need a passport or an alternative. They are granted a certificate according to section 5 Freizügigkeitsgesetz without application. The same will be valid for foreigners from EAA countries (section 12 Freizügigkeitsgesetz).

#### IV. OUTLOOK

Now that the EC is enlarged by ten new countries from middle and eastern Europe, a great number of additional persons will gain

access to the German labor market. Especially in the area of low salaries there is a big gap between these candidates and the current members of the EC. This may lead to the conclusion that there will be a great number of immigrants from these countries.<sup>77</sup> It is unlikely that this would hold true for highly qualified IT specialists making an acquisition of experts from countries that in the future will also not belong to the EC, because the majority of green-card holders on the grounds of IT-AV and IT-ArGV have come from non-EC countries, as is shown by the following graphic taking the state of Saxon as an example.<sup>78</sup>

**Figure 5: Origin of Green-card Holders**



A study by the Deutsches Institut für Wirtschaftsforschung (DIW) estimates an increase in the foreign population in Germany of 700,000 people during the next thirty years.<sup>79</sup> But the estimation about future migration is very uncertain.

#### V. RESULT CONCERNING GREEN CARDS

The German green-card regulation deals only with a small sector of employed foreigners in Germany. It has not entirely fulfilled the expectations. This is due in part to the economic situation and in part to unfavorable conditions like the limitation in time of permits. The green-card regulation is only an episode. The Zuwanderungsgesetz contains a complete regulation concerning foreign workers in Germany.

The Bundesminister für Wirtschaft und Arbeit plans, in addition to sec. 39 Zuwanderungsgesetz, an

77. BRÜCKER ET AL., *supra* note 10, at 13.

78. See Arbeitsamt, *supra* note 42.

79. BRÜCKER ET AL., *supra* note 10, at 16.

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Ausländerbeschäftigungsverordnung (AuslBeschV) which shall come into force on January 1, 2005. Sections 25 and 27 AuslBeschV are meant to replace the IT-ArGV. According to secs. 25 and 27, a permit can be given if the job requires a qualified training and if the foreigner gets a salary comparable to that of a German employee. Besides, there must be a public interest in the employment of the foreigner (see the actual ASAV which will also be replaced by the AuslBeschV).

