CYRUS D. MEHTA & PARTNERS PLLC
US IMMIGRATION & NATIONALITY LAW

HOW VIABLE IS THE POINTS SYSTEM?

Posted on January 22, 2013 by Cyrus Mehta

By Felicia Zeidman

Editor's Note: *While we will soon be deliberating about the merits of various proposals to comprehensively reform the US immigration system, the Canadian-based points system may be proposed as it was part of earlier comprehensive immigration reform proposals, especially the 2007 compromise Senate bill. Under existing US immigration law, an employer generally sponsors a foreign national based on a need and is required to test the US labor market through labor certification. This week, guest blogger Felicia Zeidman will examine Canada's points assessment and explore whether it can fit into a US immigration reform proposal. One of the criticisms of the points system is that it fails to match the prospective immigrant to an employer, and there are cases of many Ph.Ds ending up driving taxis. The question, however, is whether employability should be the sole determining factor or whether it should assess the immigrant's overall ability to successfully adapt in the new country? Ms. Zeidman is a U.S. and Canadian-licensed lawyer practicing from New York and New Jersey, and can be reached at 646 789 2224 or in Canada at 416 459 8958, email* Felicia_Zeidman@visaserve.com

Canada maintains immigration legislation with an objective to pursue the social, cultural and economic benefits of immigration. The method of achieving this goal is consistently being tweaked by policy-makers and legislators and subject to collected data that will shape the type of immigration Canada will seek in any particular period. While Canadians might argue about the assessment of data and what conclusions should be drawn from it for the creation of current policy, the background ethos of the nation includes a strong gratitude to the waves of immigration that arrived and successfully built sectors of industry while influencing all manner of next-generation development. These background factors in policy-making will not strike Americans as particularly unique and are grounded in common 19th and 20th century experiences in the

U.S. and Canada. This article will discuss the 'points test' of the Canadian immigration procedure, the likes of which is not utilized in U.S. immigration practice and provides an illustration of how procedure, if not policy, between the two heavily industrialized nation-neighbours is in fact different.

Canada has utilized a points system for the partial assessment of certain classes of applicants in its recent immigration programs. A points system breaks down what are perceived to be the most important of the applicant's abilities so that the his/her overall likelihood of success – both for his/her own integration and the meeting Canada's needs – can be determined. The more points an applicant gets, the stronger his/her application. The system awards point for age, with more points awarded for youthful workers; it awards points for education; it awards points for language ability; work experience; a job offer; and similar experiences of a spouse. Most recently the points system was an integrated part of the federal skilled worker program, building on the requirement that a worker be in one of 29 particular occupations, with a year of experience in the profession. The federal skilled worker program awarded permanent residency before the individual even landed on Canadian soil, a significant benefit which will be referenced later in this article.

In addition to the professional experience requirements of the federal skilled worker program, the applicant had to score 67 points on the test out of a possible 100, without any one element of the test absolutely requiring achievement, and officer discretion was available should an applicant score under 67 points. The 67-point rule made some difficult-to-accomplish test elements (getting a job offer, for instance, which garnered 10 points) possible to abrogate by achieving high points in another part (perhaps taking all 24 points available for language ability in English and French). Some parts of the test were in practice nearly impossible to abrogate, as points for education and age, for example, were such a large percentage of the overall test.

It should be noted the points system is likely being revamped as is Canada's federal skilled worker program which encourages the immigration of certain professionals. Over the last decade, the program has gone from relying entirely on a points assessment to requirements that the applicant also be experienced in a certain profession. The federal skilled worker program has been altered several times over the last few years, and this year is no different as the program has been 'closed for renovation' since July 2012 with an opening date of May 2013. Announcements from the government have clarified that the

revamped federal skilled worker program which opens in May will include, amongst others, a renewed emphasis on youthful workers, language ability of the applicant and spouse, and in-Canada experience. It is unknown whether the points test will continue to be a central assessment tool but the concept of stressing certain factors does appear to remain.

A U.S. Immigration lawyer would label the Canadian system outlined above as 'self-sponsorship'. This is because the U.S. System does not have a program that includes a points and professions test in order to find an individual immigration-worthy; an individual seeking to immigrate to the U.S. without relying on family sponsorship is most likely to rely upon very high-level expertise or in-country, ongoing work experience. (The overall procedural distinctions are for another article). It can be argued that the Canadian system, where it relies on points, assesses a more raw potential in applicants: age; education; language; experience. How do we ferret out elements of the U.S. System that might include assessments similar to a points test? We look at the elements of the points test as they are embedded in an individual's capacity for and achievement of ongoing employment. In other words, insofar as professional experience and education (awarding many points on the Canadian test) has made a potential immigrant employable, he/she can proceed down the employment and perhaps the permanent residency paths of the United States.

The Canadian assessment is larger-scale. In the Canadian assessment, being employable is a significant element of the points test; one needs to consider only that it is part of the federal skilled worker program assessment. However, the federal skilled worker is awarded permanent residency before the individual lands on Canadian soil, so it makes sense to integrate raw potential for overall success in and contributions likely to Canada. For example, the spouse's adaptability factor may not impact job success, but it is part of the points test because it impacts overall family adaptability. An age assessment of under 50 will not be important for many potential jobs, but it is a significant part of the points test because it will impact on Canada's future work force and the test is meant to bring in younger workers.

This is the interesting part about the integration of a points test. It doesn't have to be strictly related to any one class of immigration and can be part of a much larger policy. Although many would argue that employment and employability are the most critical factor in an immigrant, and there are dozens of Canadian

immigration programs which are indeed employment-driven, the points test takes into elements outside of success at any one job and seeks to bring an immigrant with overall likelihood of success and contribution capacity. The question for policy-makers is whether or not this larger assessment fits in with the country's immigration practice.