

## Attractive Immigration Policies: “A worldwide fight for the skilled workers”

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*“Remember, remember always, that all of us, and you and I especially, are descended from immigrants and revolutionists.”<sup>1</sup>*

### 1. Introduction

This famous quote by Franklin D. Roosevelt summarizes the idea that the US was born, built and became a world power thanks to the efforts and work of its immigrants and their descendents, many of them not greatly educated and without any special skills. Similarly, the prosperity and success of Australia and Canada are greatly due to the successive waves of immigration that they received over the last centuries.<sup>2</sup> Along the same lines, an important part of Germany’s amazing post-World War II economic and industrial recovery was due to the low-skilled work performed by immigrants that “left rural and mountainous areas of southern Italy, western Spain, northern Portugal, and northern Greece”<sup>3</sup> searching for a better life in Germany.

The US, Australia, Canada and Germany<sup>4</sup> are perfect examples of how, during the previous centuries, many developed countries have benefited from the immigration of low-skilled individuals. The necessity of this type of individuals was logical in young countries (such as the US, Australia and Canada) that needed to create a society and all the infrastructure that comes along with it from “scratch,” and also in countries that needed to be reconstructed after the terrible consequences of a war (i.e., Germany).

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<sup>1</sup> Franklin D. Roosevelt, thirty-second President of the US, *Before the Daughters of the American Revolution*, 1936.

<sup>2</sup> “In total from 1824 until 1924, 52 million people were shipped from European ports to North and South America, Australia, and New Zealand.” See Smith & Favell, *The Human Face of Global Mobility: International Highly Skilled Migration in Europe, North America and the Asia-Pacific*, 53 (2006).

<sup>3</sup> *Id.* at 54.

<sup>4</sup> The main four countries that together with the UK constitute the bulk of this study.

Nevertheless, during the last decades “immigration policies in the advanced economies have shown a recent tendency to shift toward a focus on attracting high-skilled workers.”<sup>5</sup> This recent “race for talent” among developed countries is easily understandable. In a society which is daily more specialized and industrially advanced, highly skilled individuals capable of performing highly qualified jobs are a coveted asset, even more so in those industries, such as the IT<sup>6,7</sup> sector, in which developed countries present a shortage of workers with the required formation or experience. “Add to this the fact that highly skilled workers generate substantial economic value and wealth”<sup>8</sup> by placing their host countries “on the cutting edge of the information age, creating new technologies, products and exports”<sup>9</sup> and we can easily understand the main reasons why so many developed nations are shaping and fine-tuning their immigration policies to attract those that are usually referred as “the best and the brightest.”<sup>10</sup>

For many decades the US, without needing to have a specific immigration policy in this regard, has been the most attractive destination for foreign talent. This is clearly evidenced by the fact that more than 33% of the US Nobel laureates are immigrants.<sup>11</sup> “But this trend has changed dramatically in recent years”<sup>12</sup> as the rest of the developed countries have realized the important implicit advantages of promoting this type of immigration and have decided, by enacting new immigration legislation, to become contestants in this ongoing race.

As a result, some countries have developed special immigration policies focused on attracting highly qualified employees to their countries. In principle, there are two basic immigration systems used. Each of the countries studied has adopted and adapted one of them to its own relevant characteristics. These two systems are:

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<sup>5</sup> Barry R. Chiswick, *High Skilled Immigration in the International Arena*, 3 (2005).

<sup>6</sup> Bernard von Hoffmann, *Towards a Common European Immigration Policy: Reports and Discussions of a Symposium held in Trier on October 24th and 25th, 2002*, 161 (2003).

<sup>7</sup> A 1997 study commissioned by the Information Technology association of America found that the IT industry was facing a shortage of 340,000 workers. See Research and Policy Committee of the Committee for Economic Development, *Reforming Immigration: Helping Meet America’s Need for a Skilled Workforce*, 6 (2001).

<sup>8</sup> Ayelet Shacar, *The Race for Talent: Highly Skilled Migrants and Competitive Immigration Regimes*, 81:148 N.Y.U.L. Rev., 148, 152 (2006).

<sup>9</sup> Research and Policy Committee of the Committee for Economic Development, *supra* note 7, at 12.

<sup>10</sup> This term is widely used in all academic articles and books dealing with this issue. See for example Smith & Favell, *supra* note 2, at 81; see also Research and Policy Committee of the Committee for Economic Development, *supra* note 7, at 4.

<sup>11</sup> Gold & Rumbaut, *The New Americans: Recent Immigration and American Society*, 27.

<sup>12</sup> Shacar, *supra* note 8, at 148.

- (i) The points system: It was created by Canada and quickly copied by Australia. This system evaluates the candidate according to “*certain human capital characteristics*”<sup>13</sup> *deemed to advance the host country’s interests.*”<sup>14</sup> The candidate receives certain points in each category and will be admitted into the country if he/she reaches the minimum amount of points required by the host country independently of having or not a job offer; and
- (ii) The individual worker/job evaluation system: The US model generally “*based on matching a specific immigrant with a specific job offer in a case-by-case process.*”<sup>15</sup>

Section II of this paper will provide a more in depth study of the points system by revisiting the models implemented in Canada and Australia. From the points system we will move on to analyze the US model in Section III. Section IV will deal with the peculiarities of adapting these models to Europe. Finally, section V will provide a brief overview of other techniques used to “*gain brains*” by other developed countries all around the globe.

## 2. The points System

*“Australia and Canada, the two with established skills-based points systems, increased both the number of skilled immigrants and the share of skilled immigrants in total permanent immigration in the second half of the 1990s.”*<sup>16</sup>

### 2.1. Canada

In 1967 Canada became the first country to implement an immigration points system as a response to the need to adapt its recently adopted (1962) non-discriminatory admission policy to the important goal of receiving better qualified immigrants.<sup>17</sup> Some of the flexibilities of the Canadian model that might attract highly skilled candidates are that it is not necessary to score points in every category in order to

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<sup>13</sup> Such as age, knowledge of the host country’s language, education, experience, etc.

<sup>14</sup> Demetrios Papademetriou, *Balancing Interests: Rethinking U.S. Selection of Skilled Immigrants*, 125 (1996).

<sup>15</sup> *Id.* at 124.

<sup>16</sup> Devesh Kapur, *Give us your Best and Brightest the Global Hunt for Talent and its Impact on the Developing World*, 40-42 (2005).

<sup>17</sup> Beach, Green & Worswick, *The Impacts of the Point System and Immigrant Class on Skill. Characteristics of Immigrant Inflows: The Experience of Canada*, 8 (2005).

achieve the minimum score, and that it is possible to reach the minimum required without knowledge of English or French. Moreover, additional points are awarded for the qualifications of the spouse<sup>18</sup> or the common-law partner in an attempt to attract dual career families.

If the candidate reaches the minimum score required, he/she and his/her accompanying family members receive lawful permanent residency in Canada immediately upon their arrival. Moreover, this status places them on the track towards obtaining Canadian citizenship, which they can obtain in as little as four years.<sup>19</sup>

One disadvantage that candidates might face in Canada is the great amount of time that it usually takes to process the application.<sup>20</sup> But some very interesting proposals to alleviate this problem have already been discussed in the Parliament of Canada.<sup>21</sup>

## 2.2. Australia

Australia implemented a points system six years after Canada first introduced it. The four main categories in which the candidates are evaluated are skills, work experience, age and language. Under this system candidates must score at least one point in each category<sup>22</sup> (e.g., immigrants with an absolute lack of knowledge of English will not be accepted).

Candidates who obtain enough points are entitled to permanent residency status, which means that they are immediately embarked on the road towards naturalization. In fact, Australia has the most generous naturalization policy worldwide. Australian citizenship can be obtained after only two years of consecutive lawful residence in the country.

Australia also tries to seduce dual career families by awarding points for the education achievements or experience of the candidate's spouse. Moreover, both spouses can start

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<sup>18</sup> Kapur, *supra* note 16, at 46.

<sup>19</sup> Shacar, *supra* note 8, at 175-176.

<sup>20</sup> Kapur, *supra* note 16, at 48.

<sup>21</sup> Such as creating a specialized body of immigrant officials only entrusted with reviewing highly skilled immigrant applications in order to reduce these delays and create expertise in the subject; or give priority to those applicants with already arranged employment. *See* Report of the Standing Committee on Citizenship and Immigration, *Competing for Immigrants*, 5 (2002).

<sup>22</sup> Beach, Green & Worswick, *supra* note 17, at 10-11.

working immediately upon arrival, which provides Australia with a great advantage to attract talent as compared to other countries (see the US impediments in Section III.4. below).<sup>23</sup>

### 2.3. Main Advantages of the Points System

It is widely recognized that the principal advantages of this system consist of its objectivity and impartiality,<sup>24</sup> both of which qualities are perceived by the candidate, who knows beforehand the degree of skills and education needed to be accepted in the host country, and also by the nationals of the host country that recognize that only immigrants with certain skills and abilities that the country needs at that moment in time will be accepted. It seems obvious that skilled foreigners will be more inclined to apply for residency in a country where they can evaluate their possibility of being admitted with a great degree of certainty before applying. Moreover, complaints by both candidates and nationals are greatly reduced thanks to a model that can be viewed as a level playing field.

### 3. US<sup>25</sup>

As worldwide reputed professor Oscar Handlin, Professor *Emeritus* of American History at Harvard University, once masterfully explained it in his famous quote: "*Once I thought to write a history of the immigrants in America. Then I discovered that the immigrants were America,*"<sup>26</sup> the US is in the entire spectrum of its population, from the low skilled workers to the most qualified individuals, a country built by and consisting of immigrants.

However, as explained above, "*the United States is no longer sole -nor the most sophisticated- national player engaged in the global race for talent.*"<sup>27</sup>

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<sup>23</sup> Shacar, *supra* note 8, at 185.

<sup>24</sup> Papademetriou, *supra* note 14, at 125.

<sup>25</sup> The author wishes to thank Marko Maglich (Immigration Lawyer, White & Case, New York) for his review and helpful comments on this section.

<sup>26</sup> Oscar Handlin, *The Uprooted*, 1.

<sup>27</sup> Shacar, *supra* note 8, at 150.

### 3.1. Permanent Employment-based Admissions: EB-1, EB-2 and EB-3<sup>28</sup>

The Immigration and Nationality Act of 1952<sup>29</sup> through the EB-1, EB-2 and EB-3 categories enables the permanent admission of the so-called “*priority workers*”<sup>30</sup> (EB-1), “*aliens who are members of the professions holding advanced degrees or aliens of exceptional ability*” (EB-2) and “*skilled workers, professionals and other workers*”<sup>31</sup> (EB-3).

### 3.2. Temporary Employment-based Admissions: H1-B<sup>34</sup>

Due to the strict quotas, burdensome and time-consuming procedures<sup>35</sup> and requirements and the enhanced requests for documentation of the permanent employment-based admission categories, the temporary employment-based system is used almost in every occasion as the starting necessary point for those who wish to obtain permanent residence in the US down the road.

The H-1B is a temporary three-year employment visa that can be extended for another three years during which the worker may try to obtain “*green card*” status.<sup>36</sup> The H-1B worker must hold at least the equivalent of a bachelor’s degree and must have an employment offer for a job that requires such a degree and the use of highly specialized knowledge (e.g., law, engineering, medicine, etc.).<sup>37</sup> H1-B visas, however, are also subject to a very restrictive cap<sup>38</sup> that has in these last years turned the H-1B program

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<sup>28</sup> There are other US permanent employment-based admission categories but they are out of the scope of this paper.

<sup>29</sup> See 8 U.S.C. 1101 et seq.

<sup>30</sup> Priority workers are: (i) aliens with an extraordinary ability in the sciences, arts, education, business or athletics whose entry into the US to continue working in the area of their extraordinary ability will prospectively substantially benefit the US; (ii) outstanding professors and researchers; or (iii) certain multinational executives and managers. See 8 U.S.C. 1153.

<sup>31</sup> Qualified immigrants who are capable of performing skilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the US. See 8 U.S.C. 1153.

<sup>32</sup> Qualified immigrants who hold bachelor degrees. See 8 U.S.C. 1153.

<sup>33</sup> Qualified immigrants who are capable of performing unskilled labor, not of a temporary seasonal nature, for which qualified workers are not available in the US. See 8 U.S.C. 1153.

<sup>34</sup> There are other US temporary employment-based admission categories but they are out of the scope of this paper.

<sup>35</sup> The application process for temporary permits only takes a few weeks or months; whereas it may take years for permanent admission petitions. See Research and Policy Committee of the Committee for Economic Development, *supra* note 7, at 20.

<sup>36</sup> Kapur, *supra* note 16, at 55.

<sup>37</sup> Papademetriou, *supra* note 14, at 82.

<sup>38</sup> The currently effective annual H1-B visas cap is 58,200. An additional 20,000 visas are available for holders of U.S. advanced degrees and there are also some statutory exemptions from the cap for certain individuals (e.g., nationals of Chile and Singapore, prospective employees of a nonprofit or governmental research organization, etc.).

into a sort of lottery in which prompt filing of the required documentation has become more important than the worker's credentials.<sup>39</sup>

### 3.3. Students

Traditionally, the US has been the most powerful magnet for attracting bright students thanks in great part to its internationally recognized universities. The US has taken advantage of the enrollment of these talented foreigners in its superb educational institutions by obtaining highly qualified workers that are already adapted to the US way of life by the time they finish their studies. To this effect, foreigners who have been full-time students for at least one academic year in the US may engage in either curricular practical training ("C.P.T.") or optional practical training ("O.P.T.") for a period of up to 12 months,<sup>40</sup> providing US employers with a vast pool of talent to choose from.

This system, however, presents an important disadvantage in the event the graduating student wishes to remain working in the US after those initial 12 months. Under the law, these 12 months must be completed within 14 months of graduation. Graduation in most US universities occurs either in May or early June. Therefore, the non-renewable O.P.T.s and C.P.T.s expire on July or early August of the following year at the latest. Nevertheless, H1-B visas are not granted until October, leaving the employee, in the best of the scenarios,<sup>41</sup> with a very-unattractive-for-employers gap of a few months in which he/she cannot legally work in the US and needs to leave the country.<sup>42</sup> Furthermore, this problem cannot be avoided by applying directly for an H1-B during the academic year, as the application is due in April and the degrees (necessary to obtain the H1-B) are not awarded until graduation (in May or early June).

This circular problem is causing many talented students to reconsider pursuing their advanced studies in other parts of the world. In fact, the inflow of foreign students to

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<sup>39</sup> The statistics clearly illustrate this point. In each of the last three years the cap was met dramatically quicker than in the prior year, i.e., by August 2005 for fiscal year 2006, by May 2006 for fiscal year 2007, and on the very first day of filing of 2007 for fiscal year 2008. In fact, the quota was more than filled on the first day of filing for fiscal 2008, resulting in two thirds of those filings being rejected without any consideration. This early exhaustion also means that this visa is only available for employers already identified and qualified for hired 6 to 18 months before the actual start of employment.

<sup>40</sup> See 8 C.F.R. §214.2(f)(10).

<sup>41</sup> In which the employee is granted an H1-B visa after his/her first application.

<sup>42</sup> The author has some personal acquaintances that suffered this very same problem during 2007.

top European and Australian universities has constantly increased during the last years; whereas it has declined steeply in the US.<sup>43</sup>

### 3.4. Disadvantages of the US System

As mentioned, the most important procedural drawbacks of the US system consist of the strict quotas and the cumbersome and unwelcoming application procedures. Apart from the specific problems explained throughout this section, some other examples of unwelcoming features of the US system, in comparison with the ones used in other countries also considered as poles for the attraction of foreign talent, are the fact that H1-B visas do not automatically allow the spouse of the visa holder to work in the US,<sup>44</sup> as well as its limited portability from one employer to other.<sup>45</sup>

Moreover, whereas most of the developed countries are introducing changes to achieve more immigrant-friendly policies, since 9/11 the US has implemented stricter entry regulations and “cumbersome security-motivated tracking systems”,<sup>46</sup> including FBI background checks, that discourage many highly qualified individuals, specially from the Middle East region, from applying for residency.

All these reasons are making the US loose its privileged position as the main “IQ magnet”. Legislative reform appears to be the only solution for the US to regain its former ruling hegemony in attracting skilled immigrants.<sup>47</sup>

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<sup>43</sup> Shacar, *supra* note 8, at 152.

<sup>44</sup> Shacar, *supra* note 8, at 185.

<sup>45</sup> Research and Policy Committee of the Committee for Economic Development, *supra* note 7, at 36.

<sup>46</sup> Shacar, *supra* note 8, at 169.

<sup>47</sup> US tycoons have already understood this necessity and are lobbying to obtain a comprehensive immigration reform. Bill Gates recently (02/25/2007) wrote an opposite editorial in the Washington Post affirming: “*Last year, reform on this issue stalled as Congress struggled to address border security and undocumented immigration. As lawmakers grapple with those important issues once again, I urge them to support changes to the H-1B visa program that allow American businesses to hire foreign-born scientists and engineers when they can't find the homegrown talent they need. This program has strong wage protections for U.S. workers: Like other companies, Microsoft pays H-1B and U.S. employees the same high levels -- levels that exceed the government's prevailing wage.*

*Reforming the green card program to make it easier to retain highly skilled professionals is also necessary. These employees are vital to U.S. competitiveness, and we should welcome their contribution to U.S. economic growth. We should also encourage foreign students to stay here after they graduate. Half of this country's doctoral candidates in computer science come from abroad. It's not in our national interest to educate them here but send them home when they've completed their studies.” See [http://www.washingtonpost.com/wp-dyn/content/article/2007/02/23/AR2007022301697\\_pf.html](http://www.washingtonpost.com/wp-dyn/content/article/2007/02/23/AR2007022301697_pf.html)*



#### 4. Europe. A mixture of systems

Europe, although later than the rest of the developed continents, also understood the importance of attracting highly skilled immigrants for the vitality and growth of its economy and, consequently, decided to enter the race for talent by introducing some fast-track admission systems for this category of workers. It is important to highlight that Europe offers any potential immigrant the tempting promise of achieving free movement and the right to work not only in the host country but throughout the European Union (EU) by attaining permanent residency and citizenship in only one EU country.<sup>48</sup>

Furthermore, the EU has already passed a legislative proposal to issue an EU-wide work permit allowing employment of third country nationals in any of the 27 member states without even having to obtain citizenship in one of the EU countries. This proposal is the pan-European answer to the fact that only 1.72% of EU member states residents are third country highly qualified workers.<sup>49</sup> As José Manuel Durão Barroso, President of the European Commission, affirmed in the press conference following the approval of this proposal: *“Immigration is one facet of globalization which demands a European rather than a national response to be effective.”*<sup>50</sup>

At a national level, the European countries are also acting in this area with the enactment of specific legislation (for the time being the EU’s initiative is only an approved legislative proposal). As we will see in the examples provided below, the fact that Europe has been one of the last continents to enter the competition has allowed its countries to study the different systems used in other continents in order to choose the one that best adapts to their own peculiarities.

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<sup>48</sup> Shacar, *supra* note 8, at 151.

<sup>49</sup> These figures show how the EU lags behind all the other important immigration attracting poles, such as Australia (9.9%), Canada (7.3%) and Switzerland (5.3%). For more information see the EU Commission MEMO/07/423 dated 23 October 2007 at <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/07/423&format=HTML&aged=0&language=EN&guiLanguage=en>

<sup>50</sup> See José Manuel Durão Barroso, President of the European Commission, *“Opening remarks of President Barroso – Legal Immigration”*, Press conference, Strasbourg, 23 October 2007, SPEECH/07/650, at <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/07/650&format=HTML&aged=0&language=EN&guiLanguage=en>

#### 4.1. EU Blue Card

On October 23, 2007, the EU Commission adopted a legislative proposal of a draft Framework Directive on the admission of highly qualified workers to the EU. This proposed permit, already known as the EU “blue card,” would create a fast-track admission procedure based on common criteria for all member states, facilitating and harmonizing the admission of this category of workers and promoting their efficient allocation in the EU labor market. It would also permit qualified workers<sup>51</sup> to move from one member state to another after an initial period of two years, provided the worker has an employment offer in the member state where he/she wishes to relocate, and would provide them with favorable conditions for family reunification. This program, if finally enforced, will not, however, create a right of admission and will be demand driven. Member states will maintain control of the type and number of highly qualified workers that will be allowed to enter their economies.

Mindful of the “*brain drain*” problem (i.e., the emigration of a vast majority of the talented and highly qualified individuals from third world or developing countries to developed countries, limiting and delaying the former’s development), the EU proposal advocates ethical recruitment standards to limit enrollment from countries suffering from brain drain and contains measures to promote “*circular migration*” (i.e., longer-term back and forward movements between home and host countries).<sup>52</sup>

The EU message is clear: “*With the EU Blue Card we send a clear signal: Highly skilled people from all over the world are welcome in the European Union.*”<sup>53</sup>

#### 4.2. Germany. Following the US Model.

Germany first entered the competition for highly qualified workers in 2000 by enacting a new regulation based on the US “*green card*” system, under which foreign IT specialists would receive a residence permit for a maximum of five years in a shorter period of time and through a less burdensome procedure than regular immigrants.<sup>54</sup>

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<sup>51</sup> Workers with a work contract, professional qualifications and a minimum salary level at least three times the minimum wages at national level.

<sup>52</sup> EU Commission, *supra* note 49.

<sup>53</sup> Durão Barroso, *supra* note 50.

<sup>54</sup> von Hoffmann, *supra* note 6, at 162.

This procedure, however, was not successful and in 2004 the government decided to pass a new Immigration Act not limited only to IT specialists. This act is specially conceived to attract highly skilled workers as it includes provisions granting immediate settlement permits to scientists, senior academic researchers, and top-level managers in business and industry. Moreover, it greatly simplifies the application procedure, and it allows spouses and same-sex partners to work in Germany.<sup>55</sup>

In addition, and with a structure similar to the US curricular or optional training system, it allows foreign students to stay for up to one year after completion of their studies in Germany.<sup>56</sup>

#### **4.3. Great Britain. Applying the Points System.**

In 2002 the UK introduced a points system named the “Highly Skilled Migrant Programme” (“HSMP”), evidently focused on attracting highly qualified workers. As opposed to standard working immigrants, these highly skilled workers do not need a job offer to be admitted to the UK. Applicants receive points based on the following criteria: qualifications, past earnings, age and experience. They must also prove their knowledge of the English language. This permission initially allows immigrants to stay for two years and it constitutes a first step to applying for permanent settlement.

The UK has also targeted talented students as an important asset for its economy by enacting new provisions in 2004 enabling graduates of the top 50 business schools to work in the UK for 12 months after completion of their Masters in Business Administration (MBA) program. The main difference with other models focused on attracting brilliant students is that it only applies to MBA graduates, and that the foreigner is not forced to pursue his/her studies in the UK. In fact, only 10 of the 50 business schools listed are located in the UK.<sup>57</sup>

#### **4.4. Other European Countries**

At least another seven European countries have also enacted legislation or have provided incentives to attract highly qualified immigrants. Sweden, for example, offers

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<sup>55</sup> *Residence Act 2004.*

<sup>56</sup> *Residence Act 2004* section 16.4.

<sup>57</sup> For more information see [www.workingintheuk.gov.uk](http://www.workingintheuk.gov.uk)

automatic permanent residency for the skilled immigrant that fulfils the required parameters and his/her accompanying family. In the Netherlands the *“high-skilled immigrants will not need to experience the long and tedious bureaucratic procedures of applying for a work permit.”*<sup>58</sup> One great incentive, not studied before in this paper, which is used by the Netherlands to lure highly qualified immigrants are the tax advantages for which they may qualify if admitted to work in the country. In fact, *“many will qualify to receive 35% of their income tax free.”*<sup>59</sup>

## 5. The rest of the World

It seems that no developed country wants to be separated from the leading positions of this never-ending competition. As a result, we can find policies specifically designed to *“gain brains”* all over the planet. New Zealand is offering a revolutionary *“talent visa”* by means of which employers that obtain a specific status by applying to the government are allowed to directly offer a visa to the applicants that they wish to hire.<sup>60</sup> Similarly, the new powerful Asian economies do not wish to be left behind. Countries such as Singapore, Taiwan and South Korea are also encouraging the arrival of highly skilled professionals by offering them diverse incentives such as permanent residence status, almost unlimited stay, heavy investments in public research, dual citizenship, tax incentives, etc.<sup>61</sup>

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<sup>58</sup> See [www.libertysecurity.org/article1190.html](http://www.libertysecurity.org/article1190.html)

<sup>59</sup> von Hoffmann, *supra* note 6, at 162.

<sup>60</sup> Shacar, *supra* note 8, at 180.

<sup>61</sup> Gold & Rumbaut, *supra* note 11, at 28. See also Shacar, *supra* note 8, at 160.