

# CHINESE IMMIGRATION LAW AND POLICY: A CASE OF 'CHANGE YOUR DIRECTION, OR END UP WHERE YOU ARE HEADING'?

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## Abstract

Laozi's famous call for reform in the title of this paper is a useful metaphor for the need to address the outdated settings that constitute much of China's policy toward resident aliens. This is because unless there is improvement in the laws, there will be more social and economic exclusions of migrant populations at a time when cohesion is politically paramount. Formalizing the position of resident aliens presents a unique economic opportunity for China to harness such people with an assimilation policy. In turn, this will increase the nation's revenue base and enlarge the polity's conception of what it is to be a Chinese. By translating from Chinese to English the views of a range of academics, policy makers, and local officials, this article makes available to a Western audience the Middle Kingdom's increasingly contentious discourse on immigration. By reviewing the *1985 Law of the People's Republic of China on the Control of Entry and Exit of Aliens* and the *2012 Law of the People's Republic of China on the Administration of Exit and Entry*, this article argues that the Chinese immigration law is at a crossroad. By making a special reference to African nationals immigrating to Guangzhou City, this article surveys the law to establish what is wrong with it and how it needs to be changed.

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## INTRODUCTION

Humans are a migratory species. It has been said that: "... migration is as old as humanity itself." Even though the populous migratory movements of people from one place to another are ubiquitous in this day and age, a general perception remains that the People's Republic of China ("PRC") is a source of emigration rather than a destination of immigration. Although the PRC was not a common destination for migrants until relatively recently,<sup>2</sup> a large number of immigrants from diverse origins have been pouring into China since the beginning of the new millennium.<sup>3</sup> Today, a large group of foreigners come to China to seek education, tourism, business, employment or settling down in China. Cities like Beijing, Shanghai, or Yiwu (in Zhejiang Province) are particularly popular to attract expatriates.

However, China's current immigration law does not meet the challenges that come with such a demographic change. Its methodology of regulating the life and work of foreigners in China is out of date. To illustrate this point, this article will delve into the challenges facing the African immigrants in Guangzhou City, who unlike other foreign nationals, intend to settle in China for a longer period. In fact, most African immigrants are actually seeking to permanently remain in China and acquire Chinese nationality in order to enjoy a full range of citizens' rights.<sup>4</sup> However, China's archaic immigration laws fail to categorize these new immigrants - it only recognizes groups such as asylum seekers, permanent residents, guest workers, and short-term business expatriates. Such a lack of proper legal characterization of the African immigrants had adversely impacted their legal personality and their ability to enjoy social and economic rights and to bear civic responsibilities.

By analyzing the effects of immigration laws on African nationals in Guangzhou City, this article will showcase the many challenges facing China's immigration law. Most notably, this article will discuss how such laws fail to fully take into account the recognition and promotion of foreign nationals' social and economic rights. Due to China's rapid economic growth, a burgeoning number of documented and undocumented migrants have made their way to China. Although an average ten-percent annual growth rate in the

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<sup>1</sup> Douglas S. Massey, *Worlds in Motion: Understanding International Migration at the End of the Millennium* 1 (1998).

<sup>2</sup> *Id.* at 1-3.

<sup>3</sup> Hu Zhanfen (胡展奋), *Laowai Jiangshu Hun Zai Zhongguo de Rizi: Yuelai Yue Nan Hun* (老外讲述混在中国的日子: 越来越难混) [*Days in China Told by Foreigners: More and More Difficult*], *Xinmin Zhoukan* (新民周刊) [*Xinmin Weekly*], Jun, 27, 2012, available at <http://news.sina.com.cn/c/sd/2012-06-27/131424666950.shtml>.

<sup>4</sup> Wang Daqi (王大骐), *Ai Yu Tong de Bianyuan: Feizhou Shangren Guangzhou Shenghuo Jishi* (爱与痛的边缘 非洲商人广州生活纪实) [*On the Edge of Love and Pain - A Real Record of Life of African Traders in Guangzhou*], *Nanfang Renwu Zhoukan* (南方人物周刊) [*Southern People Weekly*], Aug. 10, 2009, available at [www.infzm.com/content/32675](http://www.infzm.com/content/32675).

number of international visitor arrivals has been recorded since 2000,<sup>5</sup> the PRC's legal treatment of immigrants must reflect the country's increasing ability to assimilate and harness such populations for the prosperity of the nation. Hence, immigrants in China must have more formal and substantive equality in individual constitutional rights under the Chinese Constitution, and Chinese national laws should be better adapted to face the new realities of migration in the 21st century.

## I. LEGAL PROTECTION OF RESIDENT MIGRANTS IN CHINA

In theory, foreigners in China can enjoy fundamental civil rights and limited social rights. The labor law grants them the same degree of protection of their economic rights as long as they are legally employed.<sup>6</sup> What remains critical is the thin protection of their social rights. The Constitution provides that the rights and interests of foreigners are protected by law. However, this statement is too vague and abstract. The "Equality Clause" as prescribed in the Constitution<sup>7</sup> does not apply to foreigners in the PRC due to their legal status. Hence, foreigners cannot enjoy the same social and economic rights as Chinese citizens do.

Identification of the legal status of aliens is crucial for them to enjoy constitutional and legal rights and to perform legal duties. According to the 2012 *Law of the People's Republic of China on the Administration of Exit and Entry* (hereafter referred to as "the 2012 Law") that has repealed the 1985 *Law on the Control of Entry and Exit of Aliens* ("the 1985 Law") and shall take effect on July 1, 2013, "alien" refers to "persons without Chinese nationality."<sup>8</sup> As noted by Cai Dingjian, "alien" includes the stateless. Cai believes that "alien" under Article 32 of the Constitution should refer to "all persons that are temporarily or permanently residing in China but don't hold Chinese nationality, including natural persons holding foreign nationality and the

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<sup>5</sup> Ni Yuanjin et al. (倪元锦等), *Zhongguo Zhengfu Yuanhe Zhili Waiguoren "San fei?"* (中国政府缘何治理外国人“三非”?) [Why China will Promulgate New Laws on Illegal Aliens], May 15, 2012, available at [http://news.xinhuanet.com/world/2012-05/15/c\\_11958596.htm](http://news.xinhuanet.com/world/2012-05/15/c_11958596.htm).

<sup>6</sup> *Laodong Fa* (劳动法) [Labour Law] (promulgated by Standing Comm. Nat'l People's Cong., Jul. 5, 1994, effective Jan. 1, 1995) art. 3, available at <http://english.mofcom.gov.cn/aarticle/policyrelease/internationalpolicy/200703/20070304475283.html>.

<sup>7</sup> *Xianfa* art. 33, § 2 (1982) (China).

<sup>8</sup> *Chujing Rujing Guanli Fa* (出境入境管理法) [Law on the Administration of Exit and Entry] (promulgated by Standing Comm. Nat'l People's Cong., Jun. 30, 2012, effective Jul. 1, 2013) art. 89, available at [http://www.gov.cn/jflfg/2012-06/30/content\\_2174944.htm](http://www.gov.cn/jflfg/2012-06/30/content_2174944.htm) [hereinafter *The 2012 Law*]. Unofficial English versions are available at West Law China Database and Peking University Law Database.

stateless.”<sup>9</sup> The scope of this definition obviously and purposefully excludes the large number of refugees in China.<sup>10</sup>

Furthermore, the current set of laws provides limited answers to what rights foreigners can actually enjoy and what duties they must perform. As a principle, the current Constitution only states that: “[t]he PRC protects the lawful rights and interests of aliens within Chinese territory, and while on Chinese territory aliens must abide by the law of the PRC.”<sup>11</sup> The next paragraph of Article 32 provides that the PRC may grant asylum to aliens who request it for political reasons. What is the extent of “the lawful rights and interests of aliens”? Scholars Xu Anbiao and Liu Songshan state that this body of rights and duties “refers to those recognized by Chinese law, globally accepted norms of international law, and international practice.”<sup>12</sup> Hence, this broad definition has domestic as well as international dimensions. On the other hand, the 2012 Law merely repeats the constitutional provisions in substance.<sup>13</sup>

Foreigners are also subject to domestic civil and criminal law. For instance, China’s criminal law states that “[t]he Law shall be applicable to anyone who commits a crime within the territory and territorial waters and space of the PRC, except as otherwise specifically provided by law,”<sup>14</sup> and Chinese civil law also defines that “[t]he Law of the PRC shall apply to civil activities within the PRC, except as otherwise stipulated by law. The stipulations of this Law in regard to citizens shall apply to foreigners and stateless persons within the PRC, except as otherwise stipulated by law.”<sup>15</sup> It is

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<sup>9</sup> Cai Dingjian (蔡定剑), *Xianfa Jingjie (宪法精解) [A Concise Understanding of the Constitution]* 232 (2006).

<sup>10</sup> Yu Cheng (喻尘), *Zai Zhongguo de 40 Duowan Nanmin (在中国的 40 万多国难民) [Over 400,000 International Refugees Staying in China]*, *Guancha (观察) [Observer]*, Feb. 2004, available at <http://www.kanzhongguo.com/node/60080>.

<sup>11</sup> *Xianfa art. 33, § 2 (1982) (China)*.

<sup>12</sup> Xu Anbiao & Liu Songshan (许安标 & 刘松山), *Zhonghua Renmin Gongheguo Xianfa Tongshi (中华人民共和国宪法通释) [General Understanding of the Constitution of the PRC]* 109 (2004).

<sup>13</sup> *Xianfa art. 4, § 2 (1982) (China)* states: “The Chinese Government shall protect the lawful rights and interests of aliens on Chinese territory. Freedom of the person of aliens is inviolable. No alien may be arrested except with the approval or by decision of a people’s procuratorate or by decision of a people’s court, and arrest must be made by a public security organ or state security organ.” Article 5: “Aliens in China must abide by Chinese laws and may not endanger the state security of China, harm public interests or disrupt public order.”

<sup>14</sup> *Xing Fa (刑法) [Criminal Law]* (promulgated by Nat’l People’s Cong., Mar. 14, 1997, effective Oct. 1, 1997) art. 6, 2011 Standing Comm. Nat’l People’s Cong. Gaz. 129, available at <http://www.cecc.gov/pages/newLaws/criminalLawENG.php>.

<sup>15</sup> *Minfa Tongze (民法通则) [General Principles of the Civil Law]* (promulgated by Nat’l People’s Cong., Apr. 12, 1986, effective Jan. 1, 1987) art. 8, available at <http://fr.expo2010.cn/download/putongfalv.pdf>.

also expected that civil and criminal cases involving foreigners will increase year after year due to the continued growth of the number of foreigners residing in China. For example, from January to November in 2010, the courts across the country tried 13,191 foreigner-related cases, representing an increase of 15 percent from 2009.<sup>16</sup>

## II. DETERMINATE AND INDETERMINATE CATEGORIES UNDER THE CHINESE IMMIGRATION LAW

Although the Chinese Constitution does not differentiate different types of aliens, in reality resident aliens experience very different immigration policies in China. On one hand, there are those groups who, like Western technical experts, enjoy determinate legal protection. On the other hand, there are others, such as Africans and Southeast Asians, who belong to an indeterminate category because they have fewer rights than a regular Westerner, Korean or Japanese, or may even have been staying China on an undocumented basis. This section discusses which existing “category” of immigrants Guangzhou’s African immigrants fall under.

### A. Foreign Resident Professionals

“Foreign resident professionals” (*waiguo zhuanye renyuan*) is not a term adopted in the current law, and it generally refers to foreigners who enter China with a valid visa due to non-diplomatic or official reasons including work and talent introduction,<sup>17</sup> and hold a foreigner resident permit for work.<sup>18</sup> Most of Guangzhou’s African immigrants do not fit in the category of foreign resident professionals simply because they don’t hold a working visa or a permit for work. According to the Ministry of Human Resources and Social Security, there were 220,000 foreign resident professionals in 2011; however this figure obviously omits the undocumented African immigrants. The majority of foreign resident professionals were employees of joint-ventures, teachers and representatives of foreign companies.<sup>19</sup> It is generally perceived in

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<sup>16</sup> Wang Doudou (王斗斗), *Zuigaofa Tiaozheng Shewai Minshangshi Anjian Jizhong Guanxia Geju* (最高法调整涉外民事案件集中管辖格局) [*The Supreme People’s Court Adjusts the Jurisdiction Over Foreign-related Civil and Commercial Cases*], *Fazhi Ribao* (法制日报) [*Legal Daily*], Jan. 10, 2011, available at [www.waizilawyer.com/ShowArticle.shtml?ID=2011117361484546.htm](http://www.waizilawyer.com/ShowArticle.shtml?ID=2011117361484546.htm).

<sup>17</sup> *The 2012 Law*, *supra* note 6, art. 16.

<sup>18</sup> *The 2012 Law*, *supra* note 6, art. 30.

<sup>19</sup> Xin Shiji Yilai Waiguoren Rujing Renshu Meinian Dizeng 10% (新世纪以来外国人入境人数每年递增10%) [*An Increase of the Number of Foreigners Entry into China by 10% has been Recorded since the New Millennium*], April 26, 2012, available at [http://www.npc.gov.cn/huiyi/cwh/1126/2012-04/26/content\\_1719377.htm](http://www.npc.gov.cn/huiyi/cwh/1126/2012-04/26/content_1719377.htm).

China that foreign resident professionals, often being called expatriates by people, enjoy a high level of socio-economic status within the community, and can usually be found in affluent areas such as Shanghai's Xin Tian Di, an icon of Metropolitan Shanghai.

In contrast with foreign resident professionals, a significant portion of Guangzhou's African immigrants are relatively poor. They usually live in cheap accommodations and seek blue-collar work.<sup>20</sup> Hence, the socio-economic status of Guangzhou's African immigrants and their typical occupational profile make them imperfect for the category of "foreign resident professionals."

### B. Southeast Asian Factory Workers

In contrast to the influx of skilled western professionals stands the recent arrival of a large number of Southeast Asian workers. Mainly of Vietnamese, Laotian and Cambodian origins, Southeast Asian workers usually partake in blue-collar work to alleviate the shortage of labor in China.<sup>21</sup> On the other hand, the African immigrants usually engage in small scale retail and wholesale commercial activities rather than the provision of factory labor. Hence, the arrival of Southeast Asian workers is a new phenomenon that needs to be differentiated from that of the African community.

However, Southeast Asian workers also highlight the need for a regulatory framework to recognize and convert undocumented workers into guest laborers who enjoy a settled range of rights and responsibilities under Chinese law. This is a similar model implemented by countries such as Germany and Australia where a short-term contract does not necessarily qualify a guest worker for permanent residency. The Chinese immigration regime is ill-prepared to accommodate this Southeast Asian influx, but the situation is hardly surprising considering that it has failed to develop general recognition of the conditions of life, legal rights and duties of foreign nationals in China *per se*.

To date, almost nothing has been ventured in academic circles about the current immigration law and administrative system, its flaws and the need to reform and modernize China's immigration settings so that they are compatible with international standards and practices. Before this article embarks on this discussion, it is necessary to take a closer look at the situation of the Africans in Guangzhou as their presence and living situations make them the most likely subjects of immigration reform in China. As the African

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<sup>20</sup> Wang, *supra* note 3.

<sup>21</sup> Zhongpingshe (中评社), Zhongguo Mingong Huang Shengji Dongnanya Laogong Jiasu Qianru (中国民工荒升级 东南亚劳工加速潜入) [Aggravated Situations of Shortage of Workers in China Lead to Speeded Smuggling of Southeast Asian Laborers], Zhongguo Pinglun (中国评论) [China Review], Feb 28, 2011, available at [www.chinareviewnews.com/crn-webapp/doc/docDetailCNML.jsp?coluid=7&kindid=0&docid=101613376](http://www.chinareviewnews.com/crn-webapp/doc/docDetailCNML.jsp?coluid=7&kindid=0&docid=101613376).

immigrants is a test case for international immigration in China, it is necessary to discover a little more about who they are and why they are there.

### C. Africans in Guangzhou City

It is hard to ignore the existence of African nationals in Guangzhou. An African national, whose nationality was not officially revealed but believed to be of Nigerian descent, was found dead in Guangzhou on July 15, 2009.<sup>22</sup> The video-recording of the protest that took place after the accident attracted international attention. People learned for the first time that there were a significant number of African “traders”<sup>23</sup> and their families living in southern China. In Guangzhou and its suburbs, several “ethnic enclaves,” or “transnational social spaces,”<sup>24</sup> house people from Sub-Saharan countries, including Nigeria, Congo, Ghana, Togo, Mali, Guinea, Senegal, and Sudan. It was reported that the first group of Africans entered into Guangzhou shortly after the Asian financial crisis significantly affected these African countries economically. They have made Guangzhou their ideal destination from which to import commodities such as jeans, mobile phones and household goods.<sup>25</sup>

There are reportedly over 20,000 registered African residents, plus another 200,000 “invisible” Africans living in Guangzhou.<sup>26</sup> Their primary purpose in moving to Guangzhou is economic. As described by many journalists, Guangzhou has become “the world’s factory” in the last decade and its products are attractive to traders in small or mid-sized businesses. As the staff reporter of South China Morning Post wrote, “if Guangdong is the ‘factory of the world’, then Guangzhou is the world’s department store.”<sup>27</sup> Due to the advancement of the bilateral relationship between China and African nations since 2003, the intensity of trading activities has grown year after year and has reached a new high. In turn, the surge of Africans into Guangzhou has accordingly followed this trend and has increased by 30 to 40 percent.<sup>28</sup>

Li Zhigang told the first author during an interview in the middle October 2009 that he believed that the above figure of “200,000” invisible Africans was

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<sup>22</sup> *Dozens of Africans Protest in Southern China*, CNN, Jul. 16, 2009, available at <http://edition.cnn.com/2009/WORLD/asiapcf/07/16/china.african.protest/index.html>.

<sup>23</sup> Xuan Feng et al. (炫风等), *Guangzhou Heike Daqianxi* (广州黑客大迁徙) [*Migration of Black Africans in Guangzhou City*], *Nandou Zhoukan* (南都周刊) [*Southern Metropolis Weekly*], Aug. 14, 2009, at 25, available at [http://past.nbweekly.com/Print/Article/8449\\_0.shtml](http://past.nbweekly.com/Print/Article/8449_0.shtml).

<sup>24</sup> *Id.* at 24.

<sup>25</sup> *Id.* at 29.

<sup>26</sup> *Id.* at 28.

<sup>27</sup> Staff Reporter, *Guangzhou’s African Bind*, *South China Morning Post*, Nov. 29, 2009, at 12, available at <http://www.scmp.com/article/699752/guangzhous-african-bind>.

<sup>28</sup> Xuan, *supra* note 22, at 28.



“exaggerated.” No official figures can be found or obtained and the Guangzhou City Public Security Bureau told a reporter that “the figures are confidential”<sup>29</sup>. A recent figure released by a newspaper confirmed that the number of foreigners living in Guangdong province is 57,793; of this number, 37,100 come from 181 countries and are working and registered with the relevant authorities and subject to labor administration.<sup>30</sup> There may never be accurate official figures available to the public, as the PRC simply lacks an efficient central data system and there exists a large number of irregular cases, including persons without travel documents, illegal workers and over-stayers, and economic migrants pretending to be refugees.

Huang Shiding, Director of the Research Institute of City Management of Guangzhou City Academy of Social Sciences, divided the Africans in Guangzhou into three categories, as follows: (i) traders, who arrived in China earlier, having acquired the right to stay and who know the local situation well; (ii) white collar workers, serving Black Africans and Middle East employers and working in offices; (iii) small number of blue collar workers, who arrived in Guangzhou recently, and earn their living by selling their physical labor.<sup>31</sup> Ma Qiang, a researcher from Northwestern Ethnic Research Centre of Shanxi Normal University, added that Africans in Guangzhou can be further divided into different groups if applying language and religion criteria.<sup>32</sup> Huang and Ma also each emphasize that the occupational and ethnic diversity of the Africans in Guangzhou deserves greater recognition in the immigration settings. Those traders and white collar workers actively participating in the local economy and seeking to settle down should be celebrated by the national authorities and encouraged through a purposeful development of appropriate immigration settings.

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<sup>29</sup> Liu Gang (刘刚), Guangzhou Qiujie Waiguoren Guanli (广州求解外国人管理) [*Understanding How Foreigners' Presence is Managed in Guangzhou City*], Zhongguo Xinwen Zhoukan (中国新闻周刊) [China News Weekly], Aug. 12, 2009, at 30.

<sup>30</sup> Tian Jiagang (田加刚), Jingwai Feifa Laogong Yongru Zhusanjiao Juliu Gaomenkan Jiaju Luanxiang (境外非法劳工涌入珠三角 居留高门槛加剧乱象) [*Illegal Laborers from Overseas are Flooding into Pearl River Delta and the High Criterion for Residency Aggravates the Chaos*], Minzhu yu Fazhi Shibao (民主与法制时报) [Democracy and Law], Aug. 9, 2010, available at <http://news.sina.com.cn/c/sd/2010-08-09/142520857997.shtml>.

<sup>31</sup> Zhen Jinghui (甄静慧), Feizhou Heiren Zai Guangzhou (非洲黑人在广州) [*Black Africans in Guangzhou*] Nanfengchuang (南风窗) [Southern Wind Window], Sept. 11, 2009, available at [www.nfcmag.com/articles/1648/page/2](http://www.nfcmag.com/articles/1648/page/2).

<sup>32</sup> *Id.*

### III. CURRENT OPERATION OF CHINA'S INTERNATIONAL IMMIGRATION SYSTEM

In Guangzhou City, neither the local residents nor the local authorities were fully prepared for the sizeable wave of African immigration. Although in theory the Chinese government treats Africans the same way as it treats any other foreign residents, most communities of local Chinese residents do not know how to interact and communicate with the increasing number of African immigrants. In fact, some feelings of detachment have unfortunately fomented into a discriminatory attitude among locals against African immigrants.<sup>33</sup> The rapid growth of the African population in Guangzhou has brought numerous challenges to the City and its residents, and invites the municipal and provincial governments to review relevant laws and policies. For the first time, the political leaders and public media have turned their attention to the living environment of the African immigrants in southern China. They have started to think of how to construct a more coordinated and robust policy of administration and control that not only addresses local concerns about anti-social and criminal activities among Africans but also provides a pathway to assimilation and formal residency for those making a positive contribution to the community.<sup>34</sup>

The current laws and regulations dealing with aliens are outdated and mechanical, the management style is archaic, the enforcement is hap-hazard, and the governments, at both the central and local levels, are not prepared to face the new constitutional challenges arising out of international immigration to China.<sup>35</sup> Before conducting an in-depth examination of the current legal system and commenting on its flaws and insufficiency, the following sections will first examine the current situation and the representative views as expressed by the local authorities and academics in order to comprehend the problems and difficulties the current migration regime is facing.

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<sup>33</sup> Zhongpingshe, *supra* note 20. For the geographical distribution of African aliens in Guangzhou and their living situations, see generally Li Zhigang et al. (李志刚等), *Quanqiuhua Xia "Kuaguo Yimin Shehui Kongjian" de Difang Xiangying - Yi Guangzhou Xiaobei Heirenqu Weili* (全球化下“跨国移民社会空间”的地方响应——以广州小北黑人区为例) [*The Local Response of Transnational Social Space under Globalization in Urban China: A Case Study of African Enclaves in Guangzhou*], *Dili Yanjiu* (地理研究) [Geographical Research], no. 4, 2009 at 920-25.

<sup>34</sup> Guangzhou Committee of Chinese People's Political Consultative Conference, *The Report of Investigation and Research on the Management of Foreigners Living in Rented Houses/Apartments of Guangzhou City* (released on Oct. 31, 2007). A revised version of the Report, Feb. 20, 2008, available at <http://www.gzzx.gov.cn/lunzheng/content.aspx?id=633391252806005078442>.

<sup>35</sup> Liu Guofu (刘国福), *Yimin Fa: Lilun yu Shijian* (移民法: 理论与实践) [Migration Law: Theory And Practice] 96-104, 191-205 (2009).

### A. "San.Fei" - the Major Problems Nationwide

Officials and scholars conclude that the central problem with the daily administration of foreign nationals in Guangzhou is the so-called phenomenon of the "three situations of illegality" (*san fei*), which refers to "illegal entry, illegal stay and illegal employment."<sup>36</sup> This situation of "*san fei*" is actually not an individual phenomenon in Guangzhou but takes place across the country.

From 1995 to 2005, China repatriated 63,000 illegal immigrants.<sup>37</sup> In 2006 alone, there were 36,000 cases of illegal immigration and out of which, 9,560 were repatriated.<sup>38</sup> These illegal situations continue and the number continues to rise steeply.<sup>39</sup> Local statistics concerning Guangdong Province showed that there were 2,442 cases of illegality in 2001, 4,405 cases in 2002, 4,687 cases in 2003, 5,435 cases in 2004, 6,362 cases in 2005, and over 7,000 cases in 2007. Among the 6,362 cases in 2005, 5,548 cases resulted from unintentional overstay, equivalent to 87.2 percent of the totality, while 814 belonged to the category of intentional and grievous illegal over-stay, equivalent to 12.8 percent.<sup>40</sup>

Scholars generally agree that the emergence of "*san fei*" stems from a number of causes. First, the light punishment imposed on illegal behavior fails to deter people from engaging in illegal conduct. For example, illegal employment is just penalized by a fine of less than 1,000 RMB.<sup>41</sup> Second, outdated and insufficient laws and regulations currently effective can no longer cope with the burgeoning demand for low-end foreign labor supplied by illegal immigrants.<sup>42</sup> Finally, the other reasons for *san fei* relate to administrative shortcomings caused by the segmentation of governmental offices. The lack of a concerted effort by responsible departments, and the reluctance of frontline policemen to deal with foreigner-related cases as a

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<sup>36</sup> Zhuang Huining (庄会宁), "San fei" Waiguoren Jiuqing Youduoshao? ("三非"外国人究竟有多少?) [How Many Foreigners are in "Three Kinds of Illegal Situations" Exactly?], Renmin Gong'an (人民公安) [People's Public Security], no.5, 2007 at 24.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> Ke Xuedong & Du Anna (柯学东、杜安娜), Guangzhou Heiren "Buluo" Quan Jilu (广州黑人"部落"全记录) [A Full Record of Black "Tribes" in Guangzhou], Guangzhou Ribao (广州日报) [Guangzhou Daily], Dec. 13, 2007, available at [http://www.ce.cn/life/zclc/bysc/200712/13/t20071213\\_13900631.shtml](http://www.ce.cn/life/zclc/bysc/200712/13/t20071213_13900631.shtml).

<sup>40</sup> Liu, *supra* note 29, at 30.

<sup>41</sup> Zhuang Huining (庄会宁), "San fei" Waiguoren Guanli Kaoyan Zhengfu Nengli ("三非"外国人管理考验政府能力) [The Management of "Three Situations of Illegality" Tests the Ability of Government], Renmin Gong'an (人民公安) [People's Public Security], no.5, 2007 at 29.

<sup>42</sup> *Id.*

result of their poor language skills, low level of experience, and cumbersome procedures and rules exacerbate this problem.<sup>43</sup>

As to the solution to this general problem, Huang Jisheng's view represents the consensus. Huang, the Chairman of the Commission of Hong Kong, Macau, Taiwan and Overseas Chinese and Foreign Affairs of Guangzhou Committee of Chinese People's Political Consultative Conference, declared that "we must assist the foreigners who are in regular situations in integrating into the local community, and we must repatriate or detain those who are in illegal situations."<sup>44</sup> However, supporting measures are needed to implement this policy. In this respect, Guangzhou's municipal authorities have taken noticeable steps to cope with this completely new phenomenon and to improve the current administrative system and methods. In 2006, Yuexiu Branch Bureau of Public Security set up Guangzhou's first Center of Foreigners' Management, regrouping police officers from different sections of the Bureau to centrally handle all foreigner-related administrative services. In January 2008, Guangzhou's first Community Service Center for Foreigners was opened in Lijian Garden (Panyu), a residential quarter.<sup>45</sup> At the institutional level, Guangzhou convenes an inter-departmental meeting every year to discuss the pressing issues and to consider policy agenda. Apart from constituting a promising development in immigration policy application, the recent police reorganization is also due to the public perception that the African population is engaged in a disproportionately high level of crimes.<sup>46</sup> This is countered by advocates of the African presence in the city who argue that their indeterminate immigration status drives them underground and that they only engage in criminal activities in order to stay alive.<sup>47</sup>

With the adoption of the 2012 Law that repeals the 1985 Law, it is foreseeable that the new measures in the form of "implementing rules" will be soon put into place by the authorities to deal with the above-mentioned problems and insufficiencies. It is observed that out of the four highlights of the new Law, two directly concern the administration of foreigners in China.

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<sup>43</sup> Xu Min (许敏), "San fei Wenti" de Zhengfu Duice Fenxi ("三非问题"的政府对策分析) [*An Analysis of Governmental Policy regarding "Three Kinds of Illegal Situations"*], Jinri Nanguo (今日南国) [The South of China Today], no. 3, 2008, at 9; Wu Guangzhen et al. (武广震), "San fei" Waiguoren Weifa Fanzui Wenti ("三非"外国人违法犯罪问题) [*Illegal and Criminal Situations of Foreigners in "Three Kinds of Illegal Situations"*], Zhongguo Xingshi Jingcha (中国刑事警察) [China Criminal Police], no. 5, 2008, at 16-17.

<sup>44</sup> Liu, *supra* note 29, at 30.

<sup>45</sup> Xiao Wenfeng (肖文峰), Guangzhou Shoujia Waiguoren Guanli Fuwuzhan Guapai (广州首家外国人管理服务站挂牌) [*Guangzhou's first Community Service Centre for Foreigners Opened*], Jan. 1, 2008, available at [http://www.gov.cn/banshi/2008-01/17/content\\_860930.htm](http://www.gov.cn/banshi/2008-01/17/content_860930.htm).

<sup>46</sup> Tania Branigan, *China Cracks Down on African Immigrants and Traders*, The Guardian, Oct. 6, 2010, available at <http://www.guardian.co.uk/world/2010/oct/06/china-crackdown-african-immigration>.

<sup>47</sup> *Id.*

They are the reinforcement of the sanctions against “*san fei*,” in other words against foreigners of illegal status in China, and the establishment of an exit-entry administration information platform.<sup>48</sup> Under the 2012 Law, the treatment of “*san fei*” will be strengthened by way of more rigorous visa issuance to control the source of the problem, stricter management of foreigner residency, stricter enforcement of regulations regarding foreigners’ employment, and better clarification of measures and responsibilities regarding the investigation and repatriation of illegal stayers.<sup>49</sup> The outcome of the application of the Law deserves our further attention.

## B. The Status Quo in the Eyes of Scholars and Local Authorities

Comparative experiences show that international migration creates concerns for the national administrative authorities, ranging from the reception of migrants to their integration and assimilation. Their civil rights remain a minor concern, even though the right to family reunion, the right of their children to attend school, and the right of ongoing residency are vital to the everyday life of foreigners.<sup>50</sup> Some other government officials even believe that the presence of Africans in Guangzhou has brought about serious social and legal challenges to the society and the government. As Bao Shengyong, Head of Department of Sociology of Central University of Finance and Economics observed, “it is not only a matter of city and social management, but also an issue with international and diplomatic dimension; it could provoke problems of political order.”<sup>51</sup> He identified five “big problems” of public policy and social order associated with international immigration:

“(i) Obstacles of identification of original inhabitants and cultural shock are present; and the reception of foreign

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<sup>48</sup> Mao Lei & Bai Long (毛磊、白龙), *Churujing Guanlifa Sida Liangdian Jiedu* (出入境管理法四大亮点解读) [Understanding of the Four Highlights of the Law on Exit-Entry Administration], *Renmin Ribao Haiwaiban* (人民日报海外版) [People’s Daily Overseas Edition], July 2, 2012, available at <http://legal.people.com.cn/n/2012/0702/c42510-18419620.html>.

<sup>49</sup> *Id.* Xin Chunying (信春鹰), a drafter of the 2012 Law and vice-chairwoman of the Law Commission under the National People’s Congress, expressed the similar concern and expectation in her book, *Zhonghua Renmin Guoheguo Churujing Rujing Guanli Fa Jiedu* (中华人民共和国出境入境管理法解读) [Understanding of the Law on Exit-Entry Administration of the PRC] 1-2 (2012).

<sup>50</sup> The Council of Europe has published a series of pertinent research reports on migration under the auspices of European Committee on Migration, [www.coe.int/t/dg3/migration/default\\_en.asp](http://www.coe.int/t/dg3/migration/default_en.asp).

<sup>51</sup> Bao Shengyong (包胜勇), *Heiren Yongdong, Guoxie Wuda Wenti* (黑人涌动, 裹挟五大问题) [Five Problems Appear along with the Movement of Black Africans], *Nandou Zhoukan* (南都周刊) [Southern Metropolis Weekly], Aug. 14, 2009, at 38-40, available at [http://past.nbweekly.com/Print/Article/8454\\_0.shtml](http://past.nbweekly.com/Print/Article/8454_0.shtml).

immigrants in their monogenetic and monochromic society would take time; (ii) Potential problems based on the difference of races and cultures that different people represent; (iii) Enclaves created by illegal immigrants would create segregation and encourage more illegal immigrants to join; (iv) New pressure on the city's resource distribution (Indeed social services and facilities are underprovided in some places in Guangzhou); and (v) The need to take care of group rights and reasonable demands to be considered. For example, some Africans demand permanent resident treatment and naturalization; some others request better social treatment."<sup>52</sup>

The negative observations are predicted by Bao to take place in other cities hosting immigrants in the near future. His observations reflect a less than sanguine approach to Africans in Guangzhou. It is an approach that emphasizes the burden that the migrant population places on the City and quickly assumes that Africans choose to remain unassimilated as resident outsiders or that there is no economic "upside" associated with their presence.

Parallel to Bao, the local authorities of Guangzhou City also undertook some initial studies aiming at better evaluating the situation and drawing up some practical administration measures for the African community. In this context, the Office of Advisers of the Municipal Government published a report on the African presence in the city in 2007.<sup>53</sup> In October of the same year, Guangzhou Committee of Chinese People's Political Consultative Conference released a working report summarizing the existing problems. This official document, entitled "The Report of Investigation and Research on the Administration of Foreigners Living in Rented Houses/Apartments of Guangzhou City," ("The Report") provided an account of the disorder of administration and the lack of a unified legal approach to the status of the Africans. Some of the problems the report highlighted are: the failure of aliens to register with police stations, the failure of many foreign-owned companies to get licenses, the disregard of visa expiry dates, and landlords' frustration by the inspection of the Administration.<sup>54</sup>

Alarming, the report also detailed a basic lack of administrative coordination among relevant government departments. In fact, the information network of most communities and police stations did not cover the information of aliens. This is compounded by the fact that there is a lack of competent and sufficiently trained officers in charge of foreigners' administration. The two departments responsible for the foreigners-related business, such as the Division of Exit and Entry of City Public Security Bureau

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<sup>52</sup> *Id.*

<sup>53</sup> Liu, *supra* note 29.

<sup>54</sup> Guangzhou Committee of Chinese People's Political Consultative Conference, *supra* note 34.

and the City Bureau of Foreign Affairs, were reported to be overloaded with other responsibilities.<sup>55</sup> This situation of ill-administration of information is supposed to be improved due to the enactment of the 2012 Law to be effective on July 1, 2013, which stipulates that “The State shall establish a uniform exit-entry administration information platform to accomplish information sharing among relevant administrative departments.”<sup>56</sup>

Although the Report concluded that the above insufficiencies and problems did not cause harm to immediate social and economic development, their potential negative impact on Guangzhou should not be underestimated. It further stressed that the presence of a large number of illegal immigrants places pressure on community management and the social and security order of Guangzhou.<sup>57</sup> In its “Views and Suggestions,” the Report proposed ten suggestions including, most importantly, setting up a unitary and efficient administrative department in charge of all related matters, reinforcing the coordination among relevant functional departments and forming a standard work flow for officers, improving local regulations, and learning from foreign experiences.<sup>58</sup> These are all sensible suggestions even if they do not legally categorize African nationals in Guangzhou nor give them a legal personality or a path to permanent residency.

#### IV. CHINESE IMMIGRATION LAW: CRITICAL OBSERVATIONS

According to David Jackson’s *Immigration: Law and Practice*, effective immigration policies require the governance of: immigration control in general, entry control, post-entry control, immigration and criminal law, and review of initial decision to admit.<sup>59</sup> In sharp contrast, the 1985 Law was obviously outdated and imbalanced in light of China’s rapid social progress and the changes in international immigration trends. The Law purported to “administer” and “control” foreign nationals in China with a view of “safeguarding the sovereignty of the PRC, maintaining its security and public order.”<sup>60</sup> After over twenty-six years of application, a new Law on the Administration of Exit and Entry was enacted in 2012 “with a view to standardizing exit-entry administration, safeguarding the sovereign, security and social order of the People’s Republic of China, and promoting foreign

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<sup>55</sup> *Id.*

<sup>56</sup> *The 2012 Law*, *supra* note 8, art. 5.

<sup>57</sup> Guangzhou Committee of Chinese People’s Political Consultative Conference, *supra* note 34.

<sup>58</sup> *Id.*

<sup>59</sup> David Jackson, *Immigration: Law and Practice* (1999).

<sup>60</sup> Waiguoren Rujing Chujing Guanli Fa (外国人入境出境管理法) [Law on the Control of Entry and Exit of Aliens] (promulgated by Standing Comm. Nat’l People’s Cong., Nov. 22, 1985, effective Feb. 1, 1986) art. 31, available at [http://english.gov.cn/2005-08/21/content\\_25035.htm](http://english.gov.cn/2005-08/21/content_25035.htm) [hereinafter *The 1985 Law*].

exchanges and opening-up.” Compared with the 1985 Law, the 2012 Law seeks to standardize exit-entry administration, and to promote foreign exchanges and opening-up. It is worth noting that the new Law applies to both foreigners and Chinese citizens. Based on a comparative study of the 1985 Law and 2012 Law, China’s immigration laws are still unable to cope with all the new aspects of foreign immigration.

### A. General Assessment

Chinese immigration law suffers from several shortcomings. First, legitimate topics of immigration law, such as settlement, integration, refugee and asylum, and cross-border crime, have not been addressed. One of the many reasons that partly justifies the delayed legislation is that “China does not encourage foreigners to immigrate and settle in China” because China suffers from a population problem.<sup>61</sup> As we note later, this conservative approach is the major reason why there are only around 4752 permanent resident card (“green card”) holders in China by the end of 2011,<sup>62</sup> despite the administrative intention to attract “high end” talents urgently needed in China’s commerce and industry.<sup>63</sup> Second, the Chinese legislature is reluctant to make a separate law dealing with special immigration issues such as refugees and asylum seekers. In fact, even though China hosts over 400,000 refugees, “refugees in China are subject to almost no law.”<sup>64</sup> For instance, although relevant provisions in China’s Constitution<sup>65</sup> and the 2012 Law<sup>66</sup> lay out principles for the regulation of refugees,” no specific law or policy has been adopted to implement the constitutional clause and relevant laws. Hence, this is indicative that law and practice are not working parallels.

Third, and most importantly, the Chinese legislature and executive branch have not taken any action to meet the international standards to protect the rights and interests of foreigners. It is worth noting that domestic laws have yet to incorporate important elements such as access to minimal social rights and protection, rights to education, and rights to social security for foreigners and their family members. This situation breaches the constitutional provision that requires that “the PRC protects the lawful rights and interests of

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<sup>61</sup> Liu Guofu (刘国福), *Yimin Fa* (移民法) [Migration Law] 21 (2010).

<sup>62</sup> Xin Shiji Yilai Waiguoren Rujing Renshu Meinian Dizeng 10% , *supra* note 19.

<sup>63</sup> Huang Qi (黄祺), *Zhuanjia Cheng Zhongguo Weilai Chengwei Xinyimin Guojia Kenengxing Da* (专家称中国未来成为新移民国家可能性大) [*Experts Believe that China Will Likely to Become a Destination of Immigration in the Future*], *Xinmin Zhoukan* (新民周刊) [Xinmin Weekly], Jun. 30, 2010, available at <http://news.sina.com.cn/c/sd/2010-06-30/115120579697.shtml>.

<sup>64</sup> Liu, *supra* note 61, at 15–16.

<sup>65</sup> Xianfa art. 32, § 2 (1982) (China).

<sup>66</sup> *The 2012 Law*, *supra* note 8, art. 46.



foreigners within Chinese territory,”<sup>67</sup> and in our view, it is certainly not in line with international practices to provide minimal social rights to foreigners residing in the country. We believe that this is mainly due to the fact that China is not yet a party to *Convention Concerning Aliens Status* (1928). That being said, it is particularly worth noting that on September 25, 2012, a circular entitled *Circular on Printing and Distributing the Measures for Entitlements of Foreigners with Permanent Residency in China* was jointly published by twenty-five authorities from the Party and the government including the Organization Department of the Central Committee of CPC, the Ministry of Human Resources and Social Security and the Ministry of Public Security (“the 2012 Circular”). It stipulates that: “In principle, foreigners may enjoy the same rights and bear the same obligations as Chinese citizens except for political rights and the rights and obligations as otherwise specified by laws and regulations.”<sup>68</sup> However, “foreigners” in this article refer to those who hold the Foreigner Permanent Resident Permit, i.e., the “green card.” Hence, even though the Chinese government publishes the 2012 Circular “as an important measure for attracting overseas talents to China” and asks that all levels of organizations and government agencies to make active effort “to effectively ensure the lawful rights and interests and the entitlements of foreigners with permanent residency in China,”<sup>69</sup> the majority of the foreigners staying in China are not covered by it and cannot “enjoy the same rights and bear the same obligations as the Chinese citizens.”<sup>70</sup>

Finally, current national laws prescribe ineffective measures to penalize immigrants’ breach of law. As a matter of law, the penalty imposed for illegal stay and illegal employment is “too light to create a warning effect.”<sup>71</sup> In fact, scholars have noted that “light punishment is not favorable for public security organs and other organs to deal with and to resolve the problem of illegality.”<sup>72</sup> Thus, it is evident that Chinese immigration laws are ineffective in deterring such illegal behaviors. The 2012 Law deals with this issue of “light punishment”

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<sup>67</sup> Xianfa art. 32, § 1 (1982) (China).

<sup>68</sup> Zhonggong Zhongyang Zuzhi Bu, Renli Ziyuan Shehui Baozhang Bu, Gong’an Bu deng 25 Bumen Guanyu Yinfa “Waiguoren zai Zhongguo Yongjiu Juliu Xiangyou Xiangguang Daiyu de Banfa” de Tongzhi (中共中央组织部、人力资源社会保障部、公安部等 25 部门关于印发《外国人在中国永久居留享有相关待遇的办法》的通知) [Circular of 25 Authorities Including the Organization Department of the Central Committee of Communist Party of China, the Ministry of Human Resources and Social Security and the Ministry of Public Security on Printing and Distributing the Measures for Entitlements of Foreigners with Permanent Residency in China] (promulgation and effective on September 25, 2012) art. 1, English version available at LexisNexis and Chinese version available at [http://www.gov.cn/zwgk/2012-12/12/content\\_2288640.htm](http://www.gov.cn/zwgk/2012-12/12/content_2288640.htm) [hereinafter *The 2012 Circular*].

<sup>69</sup> *Id.*, “Preamble”.

<sup>70</sup> *Id.*

<sup>71</sup> Wu et al., *supra* note 43, at 16–17.

<sup>72</sup> *Id.*

by adding two chapters in it, which are Chapter Six “Investigation and Repatriation” (art. 58 to art. 69) and Chapter Seven “Legal Liabilities” (art. 70 to art. 88). Comparing this Law with the previous one, it is notable that a range of measures of punishment have been established in details, varying from giving warnings, imposing fines, detention, confiscation of illegal earnings, to repatriation, order of exiting China with time limits, deportation, and criminal liabilities where violations of this Law constitute crimes. Since the 2012 Law is not effective yet, the efficiency of its enforcement awaits observation and evaluation. Since joining the WTO in December 2001, China has loosened its restrictions on visa applications and approvals and recorded an increasing number of foreign visitors of all kinds.<sup>73</sup> For example, a yearly increase of 40 percent of Africans visiting Guangzhou was recorded since 2003.<sup>74</sup> China’s policy change did bring in lots of immigrants for various reasons. However, as we can observe, the competent authorities did not evaluate and review the current domestic policy and law in time. Nor did they come up with a compatible package of legal and administrative measures which, one may assume, would be capable of assisting immigrants in their stay, settling and integration. The failure to manage the African immigration wave is indicated by the absence of a concerted system of national laws and regulations on the legal protection of foreigners’ basic rights and interests and the non-recognition of minimal social rights of immigrants in China. The current national and local legislatures and governments have been primarily concerned with the exit and entry of foreigners. The 2012 Law also mainly deals with visa application, entry and exit, stay and residency, and legal liabilities. But it has in nowhere properly defined foreigners’ social, economic and cultural rights. This makes the upcoming law still incapable of coping with foreigners’ inland activities systematically.

#### **B. National Immigration Law and Regulations: A Minimalist System Focusing Mainly on Control and Employment?**

The law-making system in China operates on three layers: national laws by central legislature, administrative laws by the State Council, and administrative regulations and rules by functional departments of the State Council. This system also applies to the law-making with respect to immigration. Before the enactment of the 2012 Law, the only directly relevant national law was the 1985 Law. In 1986, *Rules Governing the Implementation of the Law of the PRC on the Control of Entry and Exit of Aliens* were adopted by the State Council with the view of regulating the procedures concerning entry and exit for aliens in a more detailed and better adapted manner. The rules

<sup>73</sup> Pan Xiaoling et al. (潘晓凌等), “Qiaokeli Zhi Cheng—Feizhouren Xunmeng Guangzhou” (“巧克力之城”——非洲人寻梦广州) [*Chocolate City – Africans Pursuing Dreams in Guangzhou*], *Jinri Keyuan* (今日科苑) [Science World Today], no. 7, 2008 at 102.

<sup>74</sup> *Id.*

were revised in 1994 (“the 1994 Rules”). The 1985 Law and 1994 Rules were the backbone of legal regime governing immigration in China. Based on the general practice of law-making in China, it can be expected that a new set of rules implementing the 2012 Law will be promulgated by the State Council in the near future. In this connection, *Nationality Law of the PRC*, adopted in September 1980, and *Passport Law of the PRC*, adopted in April 2006, are also relevant to the extent that they identify who are Chinese citizens and who are eligible to become a Chinese citizen.

Article 2 of the 2012 Law states that, “[t]his Law is applicable to the administration of exit and entry of Chinese citizens, entry and exit of foreigners, stay and residency of foreigners in China, and the exit-entry frontier inspection of means of transport.” Article 89 defines that “foreigners refer to persons without Chinese nationality,” which is in line with the generally accepted perception. For example, *Black’s Law Dictionary* defines “alien” as “a person who resides within the borders of a country but is not a citizen or subject of that country,” and “a person not owing allegiance to a particular nation.”<sup>75</sup> In addition, in English law, “aliens” are “those owing no allegiance to the British Crown.”<sup>76</sup> Both of these definitions stress the two central criteria qualify as “alien”: (1) having “no allegiance” to the country they are residing in, and (2) are “subject to a special legal regime” that does not apply to the citizens of the host country. The 1985 Law’s focus was to ensure that all foreigners who were supposed to just visit the country for temporary purposes would be under control, and to ensure that their exit would happen as required by visa conditions. The same focus can still be seen in the 2012 Law, with the exception that the latter law includes a large number of articles dealing with “*san fei*.” However, given that more and more foreigners working and even settling down in China, the 2012 Law is short of measures to protect their legitimate rights and interests.

On the entry management, the 1985 Law began to show its inadequacy in dealing with visa applications since the start of the 1990s. This partly explained why the State Council revised the original 1994 Rules, for the purpose of introducing the new types of visa to be granted to applicants with different motivations and reasons. There are four categories of visa: diplomatic visa, courtesy visa, official visa and ordinary visa.<sup>77</sup> As stipulated in Article 4 of the 1994 Rules, the types of visa are now diversified depending on the specific requests of applicants.<sup>78</sup> The different forms of ordinary visas are tabulated below, and they are marked with different Chinese phonetic letters and issued to different aliens according to their stated purposes of visit to China.

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<sup>75</sup> *Black’s Law Dictionary* 79 (8<sup>th</sup> ed. 2004).

<sup>76</sup> Ian A. Macdonald & F. Webber, *Macdonald’s Immigration Law and Practice in the United Kingdom* 2 (2001).

<sup>77</sup> *The 2012 Law*, *supra* note 6, art. 16.

<sup>78</sup> *The 1994 Rules*, art. 4.

**Visa Categories**

<b>Visa Type</b>	<b>Recipient Class</b>
<b>Visa D</b>	Aliens who are to reside permanently in China
<b>Visa Z</b>	Aliens who come to China to take up posts or employment and to their accompanying family members
<b>Visa X</b>	Aliens who come to China for study, advanced studies or job-training for a period of six months or more
<b>Visa F</b>	Aliens who are invited to China on a visit or on a study, lecture or business tour, for scientific-technological or cultural exchanges for a period of less than six months.
<b>Visa L</b>	Aliens who come to China for sight-seeing, visiting relatives or other private purposes (a group visa may be issued to a group of nine or more aliens on a sight-seeing trip to China)
<b>Visa G</b>	Aliens passing through China
<b>Visa C</b>	Aliens training as attendants, air crew members and seamen operating international services, and to their accompanying family members
<b>Visa J-1</b>	Resident foreign correspondents in China
<b>Visa J-2</b>	Foreign correspondents who make short trips to China on reporting tasks

The eight types of visa represent at least eight categories of applicants and the ever-increasing variety of people interested to come to China. To standardize application procedure and work flow, the Ministry of Public Security issued two working documents, respectively entitled *Working Norms Concerning Visa Application and Resident Permit of Aliens*<sup>79</sup> and *Working Norms Concerning Visa Application at Entry Ports of Aliens*.<sup>80</sup> They provide in detail the procedures of visa application in different situations.

Interestingly, the 2012 Law specifies that “talent introduction” is one of the reasons supporting the application of an “ordinary visa,” in addition to such other reasons as work, study, family visit, travel, and business activities.<sup>81</sup> This partly underlines the purpose of the amendment of law and the institution of permanent residency system with a view to attract talents from overseas. The State Council has not revised yet the above-mentioned measures regarding types and issuance of visas required by the 2012 Law.<sup>82</sup>

## V. LAW REFORM: MOVING WITH THE TIMES?

### A. Institution of the “Green Card System” to Seize Talents

Understandably, as a result of economic globalization, China is fast becoming an important locomotive for the world economy and it is rising as a major international political and economic player. This means that a number of visa applicants will wish to work and stay in China for longer periods of time for different reasons such as representing foreign investors, being employed by multinational corporations, or providing services to those corporations. This development led to the adoption of the Regulations on Administration of Employment of Foreigners in China,<sup>83</sup> jointly promulgated

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<sup>79</sup> Waiguoren Qianzheng he Juliu Xuke Gongzong Guifan (外国人签证和居留许可工作规范) [Working Norms concerning Visa Application and Resident Permit of Aliens] (promulgated by Ministry of Public Security, Jan 7, 2004, effective Apr. 1, 2004), available at Peking University Law Database.

<sup>80</sup> Waiguoren Kouan Qianzheng Gongzong Guifan (外国人口岸签证工作规范) [Working Norms concerning Visa Application at Entry Ports of Aliens] (promulgated by Ministry of Public Security, Jan 7, 2004, effective Apr. 1, 2004), available at <http://www.nxga.gov.cn/content.jsp?urltype=news.NewsContentUrl&wbtreid=1026&wbnewsid=2906>.

<sup>81</sup> *The 2012 Law*, *supra* note 8, art. 16(3).

<sup>82</sup> *Id.*

<sup>83</sup> Waiguoren zai Zhongguo Jiuye Guanli Guiding (外国人在中国就业管理规定) [Regulations on Administration of Employment of Foreigners in China] (Promulgated jointly by the Ministry of Labour, Ministry of public Security, Ministry of Foreign Affairs and the Ministry of Foreign Trade and Economic Cooperation, Jan. 22, 1996, effective May 1, 1996), available at [http://www.jshrss.gov.cn/jyzj/rjyy/zcfg/200710/t20071015\\_12794.htm](http://www.jshrss.gov.cn/jyzj/rjyy/zcfg/200710/t20071015_12794.htm).

by the Ministry of Labor, Ministry of Public Security, Ministry of Foreign Affairs and Ministry of Foreign Trade and Economic Cooperation in January 1996 ("the 1996 Regulations on Employment"). It is applicable to all "aliens" or "foreigners," as defined in the aforementioned 2012 Law. As a major piece of administrative law, it has been playing a central role in regulating and administering foreigners' work and life in China. Soon after the publication of the above Regulations, all provinces and municipalities made their own implementing rules.<sup>84</sup>

As observed above, the focus of the law in place has been placed on the control of entry and exit, and employment of foreigners in China. Liu Guofu recognized the necessity for China to transform China's law of control of entry and exit towards a law of migration.<sup>85</sup> He also explained that the transformation of law from control of entry and exit to migration has been a general trend even in developed countries without a strong historical tradition of immigration such as Italy, Germany, United Kingdom and Japan, as well as in economically ascendant countries and regions including Singapore, Hong Kong, Chile, South Korea, Taiwan and Russia, and in non-developed countries like the Philippines, Botswana, India, Kazakhstan, Tajikistan, Vietnam and Cambodia.<sup>86</sup>

Comparative experiences show that the new trend of international migration is to "seize talents."<sup>87</sup> Indeed, skilled worker immigration and investor immigration, in place of family immigration, partner immigration and humanitarian migration, have been the focus of national policy in many developed countries such as Australia, New Zealand and Canada from the 1970s.<sup>88</sup> Business and investment immigration is clearly spelt out in Canada's Immigration and Refugee Protection Act, and a number of provisions are directed at facilitating the continued development of the Canadian economy through investment by foreign nationals who intend to relocate to Canada.<sup>89</sup>

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<sup>84</sup> Examples of such local rules can be found online. For example, the implementing rules adopted by the Autonomous Region of Inner Mongolia, *Guanyu Waiguoren zai Zhongguo Jiuye Guanli Guiding Shishi Xize* (关于外国人在中国就业管理规定实施细则) [The Implementing Rules of the Autonomous Region of Inner Mongolia on Regulations on Administration of Employment of Foreigners in China] (promulgated by the Labor Department et al., June 25, 2006), available at [http://www.btphr.com/s\\_law/law6989.shtml](http://www.btphr.com/s_law/law6989.shtml); and *Jilin Sheng Guanche Waiguoren zai Zhongguo Jiuye Guanli Guiding Shishi Xize* (吉林省贯彻《外国人在中国就业管理规定》实施细则) [The Rules of Jilin Province on Implementing the Regulations on Administration of Employment of Foreigners in China] (promulgated by Labor Department et al., Apr. 15, 2006) available at <http://www.chinabaike.com/law/df/jilin/1405536.html>.

<sup>85</sup> Liu, *supra* note 35, at 101.

<sup>86</sup> *Id.*, at 99-101.

<sup>87</sup> Huang, *supra* note 63.

<sup>88</sup> Liu, *supra* note 35, at 104-6.

<sup>89</sup> For more information, see generally the website of Canadian Citizenship & Immigration Resource Center at [www.immigration.ca/permres-investment-immigration.asp](http://www.immigration.ca/permres-investment-immigration.asp).

Interestingly, Chinese law governing immigration has been experiencing some significant changes in line with this international trend, and these changes have been taking place unconsciously and unexpectedly. For example, the practice of “seizing talents” was first incorporated in the package of national policy regarding foreign investment.<sup>90</sup> To facilitate the creation of a system in favor of “brain drain,” the State Council progressively adopted the Measures of Administration on Examination and Approval of Foreigners’ Permanent Residency in China on August 15, 2004 (“the 2004 Measures,” or commonly known as “the Green Card Measures”).<sup>91</sup> The significant aspect of the Measures is that it applies a selective approach to international immigration and institutes a so-called “Green Card System” in China to attract categories of “talented” immigrants under Article 6 of the Green Card Measures.<sup>92</sup>

The institution of the “Green Card System” reveals an important paradigm shift in policy-making regarding immigration in China and brings to light the orientation of national policy to induce high-end talents and experts to work and stay in China for a longer period of time. Article 7 and Article 8 of the 2004 Measures specify with great exactitude the talents China is pursuing and state that foreign investment exceeding \$US500,000 in western China, \$1 million in central China or \$2 million in total is the threshold for a green card or else the foreigner must be employed by a college, university, engineering project or major state sponsored scientific project. Although China’s green card system is in its early days, it has been undersubscribed<sup>93</sup> because its requirements are perceived to be too onerous.<sup>94</sup>

In this regard, the 2012 Law and the new ministerial regulations have made it clear that China welcomes application of the Chinese “green card” and has for the first time provided for package arrangements and facilities for the

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<sup>90</sup> Ministry of Commerce, *The Chinese Government Policy [regarding foreign Investment] and Preferential Treatment* (a working document released on June 6, 2006), Part VI, [www.china.com.cn/chinese/PI-c/1231553.htm](http://www.china.com.cn/chinese/PI-c/1231553.htm).

<sup>91</sup> Waiguoren Zai Zhongguo Yongjiu Juliu Shenpi Guanli Banfa (外国人在中国永久居留审批管理办法) [Measures of Administration on Examination and Approval of Foreigners’ Permanent Residency in China] (promulgated by Ministry of Public Security and Ministry of Foreign Affairs, Aug. 15, 2004, effective Aug. 15, 2004), *St. Council Gaz.*, Jun. 30, 2005, at 22), available at [http://news.xinhuanet.com/newscenter/2004-08/20/content\\_1835174.htm](http://news.xinhuanet.com/newscenter/2004-08/20/content_1835174.htm).

<sup>92</sup> *Id.*, art. 6.

<sup>93</sup> Zhang Jing (张静), Zhongguo “Lü ka” Fagei Shui? (中国“绿卡”发给谁?) [To Whom Chinese Green Cards Have Been Issued?], *Liaowang Dongfang Zhoukan* (瞭望东方周刊) [Oriental Outlook], May 16, 2011, available at [news.cn.yahoo.com/yypen/20110516/364013.html](http://news.cn.yahoo.com/yypen/20110516/364013.html).

<sup>94</sup> Zhao Chao (赵超), Yin Weimin: Woguo Jiang Jinkuai Yanjiu Zhiding Jiangdi “Lü ka” Menkan Zhengce (尹蔚民: 我国将尽快研究制定降低“绿卡”门槛政策) [China Will Study and Make New Policy to Lower Down the Threshold of “Green Card”], *Xinhuanet* (新华网) [Xinhua Net], Aug. 22, 2011, available at [big5.xinhuanet.com/gate/big5/news.xinhuanet.com/politics/2011-08/22/c\\_131066621.htm](http://big5.xinhuanet.com/gate/big5/news.xinhuanet.com/politics/2011-08/22/c_131066621.htm).

successful applicants. This welcoming principle is clearly stated in the 2012 Law as follows: “foreigners who have made remarkable contributions to China’s economic and social development or meet other conditions for permanent residency in China may obtain the qualification of permanent resident upon application by them and approval by the Ministry of Public Security”; and “foreigners who have obtained the qualification of permanent residency may reside or work in China on the strength of permanent resident permits, and exit or enter China on the strength of their passports and permanent resident permits.”<sup>95</sup>

The situation of undersubscription is mainly due to the high qualifying threshold, complicated application process, narrow scope of application, and unclear and ill-defined entitlements.<sup>96</sup> Moreover, the lack of regulation on the entitlements of green card holders in China is certainly a major reason too. This has been partly and gradually addressed and improved by the central authorities. Two regulations issued in the last two years concerning green-card holders in China deserve particular attention. One is the Interim Measures for the Participation in Social Insurance of Foreigners Employed in China,<sup>97</sup> published by the Ministry of Human Resources and Social Security in 2011, which stipulates how employed immigrants can partake in China’s social insurance scheme. Second is the above mentioned 2012 Circular that provides for measures “to effectively ensure the lawful rights and interests and the entitlements of foreigners with permanent residency in China.”<sup>98</sup> Since the Circular is already effective, foreigners in theory have the right to “enjoy the same rights and bear the same obligations as the Chinese citizens except for political rights and the rights and obligation as otherwise specified by laws and regulations,” including these rights concerning direct investment, children’s education, social insurance, housing provident funds, purchase of self-use and self-occupation houses, tax, foreign exchange transactions, and exit-entry and other life facilities.<sup>99</sup> However, the effect of this fresh Circular deserves our further observation.

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<sup>95</sup> *The 2012 Law*, *supra* note 8, art. 47 & art. 48.

<sup>96</sup> Zhao Chao (赵超), Chi Zhongguo “Lüka” Waiguoren Ruhe Xiangshou Guomin Daiyu (持中国“绿卡”外国人如何享受国民待遇) [*How Can Foreigners holding Chinese “Green Card” Enjoy National treatment?*], Xinhua wang (新华网) [Xinhua Net], Dec. 12, 2011, available at [http://news.xinhuanet.com/politics/2012-12/11/c\\_113989043.htm](http://news.xinhuanet.com/politics/2012-12/11/c_113989043.htm).

<sup>97</sup> Zai Zhongguo Jingnei Jiuye de Waiguoren Canjia Shehui Baoxian Zanxing Banfa (在中国境内就业的外国人参加社会保险暂行办法) [Interim Measures for the Participation in Social Insurance of Foreigners Employed in China] (promulgated by the Ministry of Human Resources and Social Security, Sep. 6, 2011, effective Oct. 15, 2011), available at [http://www.gov.cn/gzdt/2011-09/08/content\\_1943787.htm](http://www.gov.cn/gzdt/2011-09/08/content_1943787.htm).<sup>98</sup> *The 2012 Circular*, *supra* note 68, Preamble.

<sup>98</sup> *The 2012 Circular*, *supra* note 68, Preamble.

<sup>99</sup> *The 2012 Circular*, *supra* note 68, art. 1, 3, 5, 6, 8-17.



## B. Will there be a Uniform Immigration Law?

The 1985 Law has been effective for over twenty-six years before it was officially revised by the Standing Committee of the National People's Congress in June 2012. The revision processes started in late 2004 and there had been more than ten drafts until 2008.<sup>100</sup> As we can see now, the new law has combined provisions governing entry and exit of both Chinese citizens and foreigners, and is now named *Law on the Administration of Entry and Exit*. In contrast with the immigration law of some major receiving countries such as the United States (*Immigration and Nationality Act 1965*), Canada (*Immigration and Refugee Protection Act 2001*), Australia (*The Australian Citizenship Act 2007*) and Britain (*Immigration, Asylum and Nationality Act 2006*), the 2012 Law is narrow in scope and minimal in content, and is not a true "Immigration Law of China." Considering the ever-changing situation of international migration across countries, we still observe that there is a pressing need for legal and administrative reform. When reforming current law in the future, the competent authorities should seriously consider adopting a holistic way rather than a piecemeal approach of law-making and prioritize some matters such as providing an access to minimal social rights to foreigners, not just green card holders, in accordance with the Constitution. A comprehensive law of immigration, as advocated by this study, shall certainly be able to suit the continuing development of international immigration.

At a symposium on the administration of foreigners in China in the 21st century held in 2008, scholars were divided into two camps: one representing the majority of scholars supporting the idea of continuing the current legal regime based on the 1985 Law and the other minority group represented by Liu Guofu, who advocated a remaking of the current law and shaping it to a law of immigration.<sup>101</sup> The majority was clear that it was necessary to revise and refine the 1985 Law to make it up-to-date and responsive to the real needs of the Chinese "national situations." However, the minority's position still deserves further consideration. First, when reforming the Chinese law, it is worth developing and adopting a comprehensive law of immigration. We recognize that both the law of administration of exit and entry of foreigners and the law of immigration are branches of public law and are on the side of procedural law. They involve the use of public power and invite reflection on issues such as nationality, citizenship and sovereignty. The range covered by

<sup>100</sup> Sheng Xinwang et al. (申欣旺等), *Churujing Guanlifa (Songshengao) yi Tijiao Fazhiban Youwang Jinru Lifa Chengxu* (出入境管理法(送审稿)已提交法制办 有望进入立法程序) [*The Law of Control of Exit and Entry (version for examination) Has Been Submitted to the Legal Bureau (of the State Council) and is Expected to Enter into Legislative Procedure*], *Fazhi Ribao* (法制日报) [Legal Daily], Oct. 17, 2008, at 2.

<sup>101</sup> Qi Jianxia (戚建霞), "21 Shiji Churujing (Yimin) Guanli Xueshu Yantaohui" Zhuti Zongshu ("21 世纪出入境(移民)管理学术研讨会"主题综述) [*Summary of "the Symposium on the Administration of Exit and Entry (Migration) in the 21st Century"*], *Shanghai Shangxueyuan Xuebao* (上海商学院学报) [Journal of Shanghai Business School], no. 1, 2009 at 17.

the law of immigration is obviously wider than the law of administration of exit and entry. The law of immigration needs to integrate principles governing entry, exit, right of abode and nationality, passport, naturalization, integration, refugee, asylum, and other related social, economic and cultural matters into one cogent body. Entry, exit and control of domicile, that are the focus of the current Chinese law, shall continue to be the major aspects of the law of immigration. Second, in the process of law-making, the Chinese authorities should take into account the changing policy regarding skilled immigration, settlement and integration, the legitimate labor right of legal immigrants, and the protection of their lawful rights and interests. Fortunately, this policy has been incorporated into the 2004 “Green Card Measures” and the 2012 Circular, both administrative regulatory documents. To reinforce their authority and effect, they should be upgraded to the level of national law and when possible, be liberalized to allow entry to a broader category of foreign talents. With regards to the implementation of international trends, Liu Guofu thinks that “skilled immigration” is now the most important approach, and “investment immigration” is “a perfect combination of immigration and investment.”<sup>102</sup>

By making such a new law, the objectives of immigration and citizenship can be clearly articulated. One of the ultimate objectives should be the provision of facilitation and assistance to immigrants in their integration into the local community and the promotion of cultural diversity. In connection, this law should aim at eradicating physical barriers between local inhabitants and immigrants, eliminating discrimination and realizing ethnic harmony within the community. This should be taken as the noble goal of the law.

### C. To Build a National Immigration Agency

In association with the law-making, the idea to set up a central immigration office (“China Immigration Services”) was proposed by Wang Li.<sup>103</sup> This deserves serious consideration by the Chinese authorities. Wang’s suggestion actually echoes a proposal put forward in 2007 to Guangzhou City to set a central department dealing with all immigration-related matters.<sup>104</sup>

<sup>102</sup> Liu Guofu (刘国福), *Yiminfa de Zuixin Fazhan – Jianlun Zhongguo Churujing Guanlifa de Gaizao he Chongsu* (移民法的最新发展——兼论中国出入境管理法的改造和重塑) [*The Latest Development of Law of Immigration – On the Remaking and Reshaping of China’s Law of Administration of Exit and Entry*], Henan Sheng Zhengfa Guanli Ganbu Xueyuan Xuebao (河南省政法管理干部学院学报) [Journal of Henan Provincial Institute of Administrative Cadres of Politics and Law], no. 5, 2008, at 49–51.

<sup>103</sup> Wang Li (王莉), *Woguo Xianxing Churujing Guanlifa Chuyi* (我国现行出入境管理法刍议) [*Discussion of the Current Law of Administration of Exit and Entry of China*], *Zhongguo Renmin Gong’an Daxue Xuebao* (中国人民公安大学学报) [Journal of Chinese People’s Public Security University], no.2, 2009, at 89.

<sup>104</sup> Guangzhou Committee of Chinese People’s Political Consultative Conference, *supra* note 32.

The idea was mainly based on the unsatisfactory situation of law enforcement and the need to streamline administrative organs. To achieve this, conducting functional adjustment among different departments such as public security and foreign affairs, and the creation of one bureau, which shall be the Immigration Bureau, should be considered.

Practically, a central administration must strive to be more efficient and cope better with the huge number of entries and exits. The figures speak for themselves. In 2007, the number of exits and entries collected from all ports rose to 345 million entries and exits, representing an increase of 8.38 percent as compared to the number in 2006.<sup>105</sup> The figures of entries and exits from 2009 to 2012, including foreigners' but excluding residents from Hong Kong, Macau and Taiwan, are tabled below for ease of better comparison:

	Total Number of Entry and Exit	Entry and Exit of Foreigners
2009 <sup>106</sup>	348,000,000	43,727,000
2010 <sup>107</sup>	382,000,000	52,112,000
2011 <sup>108</sup>	411,000,000	54,120,000
2012 <sup>109</sup>	431,000,000	54,350,000

Though without any change in terms of the administration of immigration, the 2012 Law does make a timid but positive step towards concerted effort in streamlining and homogenizing the experience of visitors to China, that is, the establishment of a uniform exit-entry administration information platform to accomplish information sharing among relevant administrative departments.<sup>110</sup> Based on the 2012 Law, we see that the major players concerned in the process of administration of immigration are the Ministry of Public Security and the Ministry of Foreign Affairs;<sup>111</sup> two others are concerned too, they are the organ in charge of affairs of overseas Chinese<sup>112</sup> and the Ministry of State Security.<sup>113</sup>

<sup>105</sup> Wang, *supra* note 103, at 89.

<sup>106</sup> A press release by the Ministry of Public Security on Jan. 14, 2010, available at [http://www.china.com.cn/policy/txt/2010-01/14/content\\_19239489.htm](http://www.china.com.cn/policy/txt/2010-01/14/content_19239489.htm).

<sup>107</sup> A press release by the Ministry of Public Security on Jan. 12, 2011, available at <http://www.mps.gov.cn/n16/n84147/n84196/2666368.html>.

<sup>108</sup> A press release by the Ministry of Public Security on Jan. 14, 2012, available at [http://news.xinhuanet.com/politics/2012-01/14/c\\_111437519.htm](http://news.xinhuanet.com/politics/2012-01/14/c_111437519.htm).

<sup>109</sup> A press release by the Ministry of Public Security on Jan. 15, 2013, available at [http://news.xinhuanet.com/politics/2013-01/15/c\\_114378807.htm](http://news.xinhuanet.com/politics/2013-01/15/c_114378807.htm).

<sup>110</sup> *The 2012 Law*, *supra* note 8, art. 5.

<sup>111</sup> *The 2012 Law*, *supra* note 8, art. 4.

<sup>112</sup> *The 2012 Law*, *supra* note 8, art. 13.

<sup>113</sup> The Ministry of State Security has the jurisdiction over criminal offence concerning state security. A number of articles in the 2012 Law relates to state security, *cf.* arts. 3, 21, 44, 49, 56, 59.

## CONCLUSION

Based on the above examination of the current situations of international immigration, the existing laws and policies in place, and on the identification of flaws and insufficiencies of laws and institutions, we have come to understand the pressing need for law reform and institution-building. When reforming the current law, the competent authorities are expected to seriously consider adopting a holistic rather than a piecemeal approach of law-making, and also to handle certain increasingly pressing matters such as, but not limited to, providing an access to a platform of social rights to foreigners contingent upon a determinant immigration status. A comprehensive law of immigration, as advocated by this study, will promote the continuing development of international immigration and an enlargement of the Chinese concept of citizenship. A central administration specifically and solely in charge of immigration is a feasible option for consideration too.

Since immigration law also has an international dimension, the Chinese authorities are strongly advised to consider incorporating the general international standards and practices in the process of law and policy-making. International and comparative experience is valuable to China. They may prevent it from, as the saying goes, “ending up where it is heading” – a chaotic, arbitrary and unprincipled domestic environment for its millions of visitors, investors and aspiring citizens. The adoption of the 2012 Law is an encouraging step toward a different reality of Chinese immigration law.