

Critical Reflection on the *Law of Exit and Entry Administration of China 2013**

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2013년 중국 이민법은 중국 내 국제 거주 구역에서 가장 중요한 법이며, 1985년 중국 이민법 이후 가장 큰 점검을 마쳤다. 이 법은 중국 내외 이주를 규제할 뿐만 아니라, 중국의 외환과 개화를 촉진하기도 한다. 중국 이민법은 이 법이 구축하는 이민 제도 내에 결점을 가지고 있으며, 따라서 시행 세칙에도 결점이 있다. 이 법을 효과적으로 시행하고, 시행 세칙을 준비하는 동안, 법 집행의 영향을 조심스럽게 고려해 봐야 하며, 이 법의 단점을 정확하게 명시하는 것이 필요하다.

[주제어] 이민법, 국제 이주, 시행 세칙, 중국, 중국 내외 이주 규제

I. Introduction

The Law of Exit and Entry Administration (Chujing Rujing Guanli Fa, hereinafter referred

투고일 : 2014. 12. 19. / 심사회의일 : 2015. 1. 14. / 게재확정일 : 2015. 2. 3.

* Support of fund: Programming Research Project of the Human Social Science Fund, the Ministry of Education, China, No. 12YJA820040, Key Research Project of the Overseas Chinese Affairs Office, the State Council, China from 2013 to 2015, No. GQBZ2013004.

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to as LEEA) was promulgated in June 2012 by the Standing Committee of the National People's Congress and came into force as of July 2013. The new law integrated China's exit and entry administration laws and improved the exit and entry administration system. The LEEA is the primary law regarding international migration in China at this point, and the biggest overhaul of China's exit and entry administration law since 1985. The LEEA is expected to have a great impact on international migration to China from all over the world. It is necessary to meticulously analyze its legislation, main contents, implications, deficiencies, as well as to carefully explore its prospects. Considering the significance of regulations for the implementation of LEEA, these regulations will need to be well designed.

II . Context of the *Law of Exit and Entry Administration of China* 2013

The previous laws governing exit from and entry into China, the *Law of the Foreigner Entry and Exit Administration* (Waiguoren Rujing Chujing Guanli Fa) and the *Law of the Chinese Citizen Exit and Entry Administration* (Gongmin Chujing Rujing Guanli Fa) were adopted by the Standing Committee of the Sixth National People's Congress, China in 1985. To implement the law, the *Detailed Rule of the Implementation of Law of Foreigner Entry and Exit Administration* (Waiguoren Rujing Chujing Guanli Fa Shishi Xize) and the *Detailed Rule of the Implementation of Law of Chinese Citizen Exit and Entry Administration* (Gongmin Chujing Rujing Guanli Fa Shishi Xize) were then approved by the State Council, China in 1986. These above laws and detailed rules played an important role in regulating exit and entry administration, facilitating personal exchanges and promoting reform and opening in China after reforms were initiated in 1979.

As China has continued to open up to the outside world, international exchanges have become increasingly frequent and the numbers of Chinese citizens leaving China and foreigners entering China have increased significantly. In 1985 China experienced about 30 million exits and entries, of which 1.6379 million were entries by foreigners. By 2013, exits and entries had risen to 431 million, of which 54.3515 million were entries by foreigners. With these developments, new circumstances and problems relating to the exit and entry of these persons

into and out of China have become apparent. While the great number of foreigners coming to China for tourism and business activities has created opportunities for China's economic and social development, it has also created a need for higher requirements for national security. In addition, because of social issues relating to foreigners' illegal entry, illegal residence and illegal employment, further improvements are needed in exit and entry administration procedures.

It has become clear that the visa and residence system created by current law and regulation in China are incomplete and do not meet current needs. The gaps in migration law between China and the developed States and regions, such as Hong Kong and the European Union, have widened over the last almost three decades as great improvements in the migration laws in these developed States and region have not been matched by improvements in the exit and entry law in China.

III. The Contents and Deficiencies of the *Law of Exit and Entry Administration of China* 2013

The LEEA consists of eight chapters with 93 articles. It applies mainly to the administration of the exit and entry of Chinese citizens, the entry and exit of foreigners, the stay and residence of foreigners in China, and the exit and entry border inspection of transport vehicles. The administration of exit and entry has a great impact on China's national security, economic and social development, and the process of reform and opening up. In this context, the law's goals of safe guarding national security and serving economic and social development need to be finely balanced. The LEEA as promulgated has deficiencies in the immigration system it establishes and thus its implementing regulations.

1. To rigorously administer the entry, exit and residence of foreigners

The LEEA limits to 180 days the length of time foreigners may remain in China. In contrast, the *Law of Foreigner Exit and Entry Administration*, 1985, did not distinguish between the

concepts of a temporary stay and residence for a longer period, and the length of a foreigner's stay was not limited. Some foreigners have stayed in China for a long period by continually renewing their visas. Article 29 (1) and (3) of the LEEA provide that where the duration of stay specified in a visa held by a foreigner does not exceed 180 days, the holder may stay in China only for the duration specified therein, The accumulated length of extensions shall not exceed the original duration of stay specified in the visa.

The *Law of Foreigner Exit and Entry Administration* 1985 contains no provision for collection of human biometric information from persons exiting or entering China. The collection of such information, which has become common in a international migration practice, will increase the efficiency of port clearance and facilitate exit and entry, and also benefit the exit and entry administration and the protection of national security. Accordingly, Article 7(1) of the LEEA provides that the MPS and the Ministry of Foreign Affairs may, upon approval by the State Council and on the basis of the need for exit and entry administration, set forth regulations for the collection and maintenance of fingerprints and other biometric identification information of persons who exit or enter China. Article 30(2) of the LEEA further provides that applicants for foreigners' residence permits shall provide biometric identification information such as fingerprints.

As one important measure for administering residence by foreigners, the registration of foreigner accommodation is generally regulated in the *Law of Foreigner Exit and Entry Administration* 1985. Beyond these general provisions, the LEEA sets out more specific requirements for the registration of accommodation of foreigners, both in hotels and other accommodations. Articles 39(1) and (3) of the LEEA provide that where foreigners stay in hotels in China, the hotels shall register their accommodation in accordance with the regulations on the public security administration of the hotel industry, and submit foreigners' accommodation registration information to the public security authorities where the hotels are located. Where a foreign national lives or stays in a dwelling other than a hotel, the foreign national shall personally, or the provider of such accommodation shall, provide this information to the public security authorities.

2. To improve the system of temporary entries and exits of foreigners

The port visa system was established in the *Law of Foreigner Entry and Exit Administration* 1985 and has played an active role in facilitating the temporary entry of foreigners into China for urgent reasons. However, in practice, issues have arisen which need to be addressed. Therefore article 20(3) and (4) of the LEEA provide that foreigners who apply to port visa authorities for visas shall submit their passports or other international travel documents, as well as specific application information. They shall go through relevant formalities in accordance with the requirements of the port visa authorities, and enter China at the ports where they apply for visas. Visas issued by port visa authorities shall be single entry and the duration of stay shall not exceed 30 days.

Matters such as the period allowed for a stay under the visa, guarantees of support and the scope of the temporary entry, unclear in the earlier *Law of Foreigner Entry and Exit Administration* 1985, are specified in the LEEA. Similarly, the new law addresses other issues raised by the 1985 law, which provided that a visa for temporary entry could be extended but failed to limit the term of the extension.

Article 23 of the LEEA provides that where certain categories of foreigners need to enter China temporarily, they shall apply to exit and entry border inspection agencies to go through the formalities for temporary entry: these categories include: (1) Foreign seamen and their accompanying family members disembark at cities where the ports are located; (2) Persons holding connecting passenger tickets in transit to a third country or region on an international carrier, as specified in Subparagraph (3) of Article 22 of the LEEA; or (3) Foreigners needing to enter China temporarily due to force majeure or for any other urgent reason. The duration of stay for temporary entry shall not exceed 15 days. For foreigners who apply to go through formalities for temporary entry, exit and entry border inspection authorities may require such foreigners, the persons in charge of the transport vehicles used for such foreigners' entry or the agencies handling the exit and entry business for transport vehicles to provide necessary guaranty measures.

3. To strengthen the administration of employment of foreigners

As the world's most populous country with a population of 1.37 billion, China's policy for employment of foreigners is to positively introduce foreign professionals with needed skills and to strictly limit the importation of other labor. According to the *Rule on the Administration of Foreigner Employment in China* 1996 (Waiguoren Zaizhongguo Jiuye Guanli Guiding) and the *Rule on the Processing of Foreign Expert Employment Permit Application* 2004 (Waiguo Zhuanjia Laihua Gongzuo Xuke Banli Guiding), foreigners shall have a Foreigner Employment Permit (Waiguoren Jiuye Xuke Zhengshu) or a Foreign Expert Certificate (Waiguo Zhunaji Zheng) when they are employed in China. Article 41 of the LEEA repeats the employment permit system in which provides that foreigners working in China shall obtain employment permits, but introduces a new requirement, that foreigners also obtain employment-type residence permits in accordance with relevant regulations. No entities or individuals shall employ foreigners without employment permits or employment-type residence permits.

Many countries use a skilled immigrant occupation list as a system for attracting foreign professionals. Unfortunately, neither the *Law of Foreigner Entry and Exit Administration* 1985 nor other laws related to foreigner employment provided for such a list. Article 42(1) of the LEEA provides for its creation, directing the Ministry of Human Resources and Social Security and the State Administration of Foreign Expert Affairs under the State Council, in conjunction with relevant departments under the State Council, such as the Ministry of Foreign Affairs and Ministry of Public Security, to formulate and regularly adjust a *Guiding Catalogue for Foreigners Employment in China* (Waiguoren Zai Zhongguo Gongzuo Zhidao Mulu) based on needs for economic and social development as well as the supply and demand of human resources.

A restriction on departure for foreigners refusing to pay past due wages is one legal measure to protect labor right and interests. Some foreign businessmen have refused to pay labor remuneration by exiting China since the economic crisis of 2008. Article 28(1) of the LEEA provides that if foreigners are in arrears of paying such labor remuneration, their departure may be restricted by relevant departments under the State Council, such as the Ministry of

Human Resources and Social Security or the Ministry of Public Security, or the governments of provinces, autonomous regions or municipalities directly under the Central Government, China.

4. To combat illegal exit and entry

Restrictions on the ability of repatriated foreigners to return to China and the ability of Chinese citizens repatriated from other countries to depart China are among the new measures for fighting illegal exit and entry in China. Article 62 of the LEEA provides that repatriated foreigners may not enter China within 1 to 5 years from the day of repatriation. Additionally, article 75 of the LEEA provides that where a Chinese citizen who travels to another country is repatriated to China under the laws of that country, the exit-entry border inspection authority shall confiscate his or her exit and entry credentials, and the authorities issuing travel documents shall not issue such documents to him or her within 6 months to 3 years from the day of repatriation. Article 81(3) of the LEEA states that deported foreign nationals shall be prohibited from entering China within 10 years from the day of deportation.

Foreigners detained for investigation or whose repatriation has been ordered but cannot be executed immediately shall be detained according to article 5 of the *Rule of Implementation of Regulation of Detention Station* 2013 (Juliusuo Tiaoli Shishi Banfa). However, there is a question whether this provision for detention violates article 2 of the *Regulation of Detention Station* 2013 (Juliusuo Tiaoli), which provides that detention stations are only for persons detained as an administratively penalty by public security authorities and national security authorities, or by Court order. There is a demand by some to establish detention stations for foreigners detained for investigation and separate repatriation stations for those foreigners whose repatriation has been ordered but cannot be executed immediately, especially in certain provinces. In response to this discussion, article 63 of the LEEA states that foreigners detained for investigation or whose repatriation has been ordered but cannot be executed immediately shall be taken into custody at a detention or repatriation station.

5. To combat illegal employment of foreigners

To combat the illegal employment of foreigners, it is indispensable to strengthen enforcement procedures against employers who employ foreigners as well as against foreign employees themselves. However, a system of job invitation and employment information reports was not previously established in the *Law of Foreigner Entry and Exit Administration* 1985. To stop false invitations for jobs and capture foreigner employment information, article 19 of the LEEA provides that where foreign visa applicants need to provide written invitations from entities or individuals within China, the applicants shall provide such invitations in accordance with the requirements of China's visa-issuing authorities abroad. Entities or individuals issuing written invitations shall be liable for the truthfulness of the contents. Additionally, article 45(1) of the LEEA stipulates that entities employing foreigners shall report relevant information to local public security authorities in accordance with relevant regulations.

In addition, working for payment has been eliminated as the sole precondition of such illegal employment of foreigners. Article 43 of the LEEA provides that any of the following acts of foreigners shall be deemed to be illegal employment: (1) employment in China without work permits or work-type residence permits as required by relevant regulations; (2) employment in China beyond the scope prescribed in the work permits; or (3) employment of foreign students in violation of the regulations governing employment of foreign students to support their study in China, and work by students beyond the prescribed scope of employment or prescribed time limits.

The LEEA also imposes a range of new penalties on foreigners who are illegally employed, persons or entities who introduce jobs to ineligible foreigners (employment agencies) and individuals or entities that illegally employ foreigners in China. Under article 80, foreigners who are illegally employed in China shall be fined not less than RMB 5,000 yuan but not more than RMB 20,000 yuan; where circumstances are serious, they shall be detained for not less than five days but not more than fifteen days and shall also be fined not less than RMB 5,000 yuan but not more than RMB 20,000 yuan. Persons who introduce jobs to ineligible foreigners shall be fined RMB 5,000 yuan for each job illegally introduced to one foreigner,

with a cap of not more than RMB 50,000 yuan in total; and entities that introduce jobs to ineligible foreigners shall be fined RMB 5,000 yuan for each job illegally introduced to one foreigner, with a cap of RMB 100,000 yuan in total; and the illegal gains, if any, shall be confiscated. Individuals or entities that illegally employ foreigners shall be fined RMB 10,000 yuan for each illegally employed foreigner, with a cap of RMB 100,000 yuan in total; and the illegal gains, if any, shall be confiscated.

6. To establish a system for asylum seekers, refugees and humanitarian relief

The system for asylum seekers, refugees and humanitarian relief was established in principle in article 32(2) of the *Constitution, China* 1982 (revised in 2004) (Xianfa). The article provides that China may grant asylum to foreigners who request it for political reasons. In addition, article 15 of the *Law of Foreigner Entry and Exit Administration* 1985 provides that aliens who seek asylum for political reasons shall be permitted to reside in China upon approval by the competent authorities of the Chinese Government. China has also been a member State of the *International Convention of Refugee Status* 1951 since 1982. Article 46 of the LEEA implements the earlier laws, providing that foreign nationals applying for a refugee status may, while their applications are being considered, stay in China on the basis of a temporary identification issued by the public security authority. Those applicants identified as refugees may stay or reside in China on the basis of a refugee identification issued by the public security authority.

Moreover, foreigners are further protected by article 20(2) of the LEEA, which provides that foreign nationals needing to enter China urgently for humanitarian reasons, may apply for a port visa to port visa offices as authorized by the MPS at ports of entry approved by the State Council,. Furthermore, article 31(3) of the LEEA provides that where necessary to change the status of a foreign national from a temporary stay to residence for a longer period for humanitarian reasons, the foreign national may apply for a residence permit for foreign nationals with the approval of the exit-entry administration authority of the public security authority of the local people's government at or above the level of a districted city.

7. To facilitate the change of status of foreign professionals and investors

The prohibition on a foreigner changing status from temporary stay to longer-term residence set out in the *Law of Foreigner Entry and Exit Administration* 1985 is lifted in the LEEA. However, there has been a demand by foreign professionals in China for the ability to change their so as to remain in China for longer periods. For that reason, article 6 of the *Regulation of Foreigner Entry and Exit Administration* 2013 (RFEEA) that foreign professionals and foreign investors who conform to relevant State regulations, may apply for and obtain foreigner's residence permits upon approval by the exit and entry administrations of public security authorities under local people's governments at or above the city with districts.

The prohibition on foreign student employment contained in the *Law of Foreigner Entry and Exit Administration* 1985 has been relaxed in the LEEA. However, some foreign students are illegally employed in China in order to support their studies and know China better through employment. With the development of China's globalization, there have been demands by China's educational institutions and cultural authorities for China to recruit more foreign students, hence the need to help these students support their studies. Therefore, article 42(2) of the LEEA stipulates that the Ministry of Education under the State Council shall, in conjunction with relevant departments under the State Council, establish an administrative system for employment of foreign students to support their studies and set forth regulations on the scope of employment and limits on work time for such foreign students.

The LEEA emphasizes China's increasing efforts to attract foreign professionals to assist in China's development by creating a new talent visa category. Pursuant to article 16(3) of the LEEA, appropriate types of ordinary visas shall be issued to foreigners who enter China as foreign professionals. According to the earlier *Law of Foreigner Entry and Exit Administration* 1985, all foreigners employed in China must hold a Z visa (Employment visa). Article 6(1) of the *Regulation of Foreigners Entry and Exit Administration* 2013 (Waiguoren Rujing Chujing Guanli Tiaoli) further provides that the R visa (Talent visa) will be issued to highly skilled foreign professionals that China needs and also to foreigners with special expertise who are urgently needed due to short supply.

8. To clarify the legal remedies of foreigners subject to decisions under the exit and entry laws

Consistent with common practice under international migration law, very limited legal remedies are available to foreigners who are subject to a decision under the LEEA. This is true even though an individual's Chinese inviter may be one's direct relative. Article 21(2) of the LEEA provides that visa-issuing authorities are not required to give reasons for refusing to issue a visa. Article 36 of the LEEA provides that decisions not to grant an extension, replacement or re-issuance of an ordinary visa or not to grant a stay or residence permit or an extension of the period of residence shall be final decisions.

However, article 64(1) of the LEEA provides that foreigners who oppose decisions by the authorities for continued questioning, investigation while in detention, restrictions on their ability to move freely, or repatriation, may apply for administrative reconsideration, and such decision shall be final. Under Article 81(2) of the LEEA, foreign nationals may be deported by order of the MPA for serious violations of the LEEA, if the violation does not constitute a crime, and its decision shall be final.

9. To improve permanent residence system

The system of permanent residence has an active role in introducing foreign professionals and investment to China and is the international common practice. The *Measure for the Administration of Examination and Approval of Foreigners' Permanent Residence in China* 2004 (Wanguoren Zaihua Yongjiu Juliu Shenpi Guanli Banfa) was jointly promulgated by the MPS and the Ministry of Foreign Affairs in 2003. However, only 5,927 foreigners were issued permanent residence certificates from 2004 to 2013. To attract more foreign professionals and investment, the system of permanent residence must be improved and new regulations made. Article 47 of the LEEA provides that foreigners who have made remarkable contributions to China's economic and social development or meet other conditions for permanent residence in China may obtain permanent residence status upon application approved by the MPS. The administrative measures for examination and approval of permanent

residence by foreigners in China shall be determined by the MPS and the Ministry of Foreign Affairs in conjunction with relevant departments under the State Council.

10. To facilitate proof of one's Chinese citizen status by Chinese citizens who permanently reside in foreign countries and who wish to reside permanently in China

Two relatively major revisions have been made to respond actively to the practical needs of Chinese who permanently reside in foreign countries as regards proving one's Chinese citizen status while they either temporarily or permanently return to China. Since overseas Chinese have no residence certificate (hukoubu) or national ID card (shenfenzheng), living and engaging in other activities in China can be negatively impacted by the lack of these documents. To resolve the difficulties of Chinese who permanently reside in a foreign country in proving identity, article 14 of the LEEA provides that such Chinese may, within China, use their Chinese passports as evidence of identity to handle matters involving finance, education, medical treatment, traffic, telecommunications, social insurance, property registration, etc.

There are also changes to the system for overseas Chinese to apply and be approved for permanent residence in China. Under the *Law of Chinese Citizen Exit and Entry Administration* 1985, to apply for permanent residence, they should apply to the public security authority at the place where they intend to live. The provincial-level public security authority will check and issue the returning resident certificate. The overseas Chinese affairs authority, which specializes in administering matters for Chinese who permanently reside in foreign countries, has responsibility for receiving and thoroughly investigating their returning residence applications. The authority has a good understanding of overseas Chinese policies and can conveniently handle related procedures for Chinese who permanently reside in foreign countries. For this reason, article 13 of the LEEA provides that Chinese citizens residing abroad who desire to return to China for permanent residence shall, prior to entry, file applications with Chinese embassies or consulates or other institutions abroad designated by the Ministry of Foreign Affairs. They may also file such applications on their own or via

their relatives in China with the overseas Chinese affairs departments under the local people's governments at or above the county level of the proposed places of permanent residence.

11. Deficiencies of the *Law of Exit and Entry Administration of China 2013*

The LEEA as promulgated has deficiencies in the immigration system it establishes and thus its implementing regulations, because it does not sufficiently reflect lessons learned from migration laws in developed States and regions, there was not full public discussion of the LEEA draft, and insufficient consideration was given to the concerns of academics and individual stake holders. The main and obvious deficiencies of the LEEA are as follows: an insufficiently comprehensive legislative purpose, insufficient reasons for unifying the regulation of exit and entry of Chinese citizens and foreigners, the lack of features of an advanced immigration system, vague regulation of port visas for temporary entrance, the lack of legal status for talent visa holders, insufficient legal liability of inviters and employers of foreigners, the unresolved issue of exits and entries of refugees, the lack of guidance for implementing regulations, inadequate penalties for individuals or entities that illegally employ foreigners and individuals in charge of transport vehicles illegally exiting and entering, and insufficient attention to integration of migrants, among others. In order to enhance China's social and economic development, safeguard its sovereignty, security and social order, promote the integration of international migrants, and also protect the rights and interests of international migrants, these deficiencies must be kept in mind and addressed in due course.

IV. Prospects for Regulations to Implement the *Law of Exit and Entry Administration of China 2013*

Efficient implementation of the LEEA cannot take place without implementing regulations because the LEEA, as the general law, does not address many situations which will arise under the law. Such regulations will enable the LEEA to achieve its legislative purposes and address its deficiencies.

1. Four regulations to implement the LEEA to be made or amended

Although there is no detailed legislative schedule for implementing regulations, four such regulations will be made or amended.

The *Regulation of Foreigner Entry and Exit Administration* (Waiguoren Rujing Chujing Guanli Tiaoli) was promulgated by the State Council, China in June 2013, becoming effective in September 2013. This *Regulation* 2013 was formulated in accordance with article 16(3) of the LEEA, which provides that the types and methods for issuance of ordinary visas shall be determined by the State Council. The regulation also contains provisions governing temporary stays and residence for a longer period by foreigners, as well investigation and repatriation.

The *Rule on Procedure for the Handling of Administrative Cases by Public Security Authority* (Gongan Jiguan Banli Xingzheng Anjian Chengxu Guiding) was promulgated by the MPS in December 2012 and effective in January 2013. It replaced the *Rule on Procedure for the Handling of Administrative Cases by Public Security Authority* 2006. Details for handling foreign cases provided for in the LEEA are detailed in this Rule 2013.

The *Rule of Processing of Permanent Residence in China of Chinese Citizens Residing Abroad* (Huaqiao Huiguo Dingju Banli Gongzuo Guiding) was jointly promulgated by the Office of Overseas Chinese Affairs of the State Council, the MPS and the Ministry of Foreign Affairs in June 2013. It provides details for implementation of LEEA article 13, which simplifies and standardizes processing of permanent residence in China for Chinese citizens residing abroad. Article 4 of Rule 2013 provides that Chinese citizens residing abroad may apply to return for permanent residence in the city in which one's household registration was cancelled, if they have lived in China for a specified period and have stable financial support and a legal domicile. Chinese citizens residing abroad may apply to return for permanent residence to a city which is not the city in which their household registration was previously cancelled, if they have lived in China for a specified period and have stable financial support and a legal domicile, and comply with the regulations jointly promulgated by the overseas Chinese office, the local government, and the public security authority under the provincial level government to which they apply to return for permanent residence.

The *Rule of Implementation of Regulation of Detention Station* 2013 (Juliusuo Tiaoli Shishi Banfa) was promulgated by the MPS in December 2013. This regulation implements article 63 of the LEEA, which prescribes that foreigners detained for investigation or whose repatriation has been ordered but cannot be executed immediately, shall be taken into custody at a detention or repatriation station.

2. Nine new regulations to implement to the LEEA will be made

In the light of the LEEA, the following nine new regulations, which will play an important role in its implementation, will be drafted.

Article 7 of the LEEA provides that upon approval by the State Council, the MPS and the Ministry of Foreign Affairs may, on the basis of the need for exit and entry administration, establish a rule for the collection and maintenance of fingerprints and other biometric identification information of persons who exit or enter China.

According to article 10 of the LEEA, Chinese citizens who travel between the Mainland and the Hong Kong Special Administrative Region, between the Mainland and the Macao Special Administrative Region, shall apply for exit and entry permits and abide by the relevant provisions of the LEEA. Specific administrative measures shall be issued by the State Council.

According to article 10 of the LEEA, Chinese citizens who travel between the Mainland and Taiwan Region, shall apply for exit and entry permits and abide by the relevant provisions of the LEEA. Specific administrative measures shall be issued by the State Council.

Pursuant to article 16(2) of the LEEA, the Ministry of Foreign Affairs shall determine the scope and methods for issuance of diplomatic, courtesy and service visas.

Pursuant to article 41 of the LEEA, administrative regulation for employment of foreign nationals within China shall be formulated by the State Council.

Pursuant to article 42 of the LEEA, the human resources and social security department and the foreign experts department of the State Council shall, in conjunction with other relevant departments of the State Council, formulate and regularly adjust a catalogue for guiding the employment of foreign nationals in China on the basis of the need for economic and social development and the demand and supply status of human resources.

Article 42(1) of the LEEA provides that the education department of the State Council shall, in conjunction with other relevant departments of the State Council, establish rules for the administration of work-study by foreign students, providing for the scope of employment under work-study programs and work-study periods of foreign students.

Pursuant to article 47 of the LEEA, the MPA and the Ministry of Foreign Affairs in conjunction with other relevant departments of the State Council shall formulate administrative regulations for the examination and approval of applications by foreign nationals for permanent residence in China.

Under article 90 of the LEEA, provinces and autonomous regions bordering on neighboring countries may, upon approval by the State Council and in accordance with the boundary administration agreements signed by China with those countries, formulate local regulations or local government rules to regulate the association of residents in border areas of the two countries. Such regulations are intended to facilitate border crossings by residents of border areas.

Of the nine regulations described above, four regulations have already been drafted and submitted for comments. These are the *Regulation of Administration of Chinese Citizens who Travel between the Mainland and the Hong Kong and Macao* (Zhongguo Gongmin Wanglai Neidi Yu Xianggang Tebie Xingzhengqu Aomen Tebie Xingzhengqu Guanli Tiaoli), the *Regulation of Administration of Chinese Citizens between the Mainland and Taiwan Region* (Zhongguo Gongmin Wanglai Dalu Yu Taiwan Diqu Guanli Tiaoli), the *Regulation of Foreigner Employment in China Administration* (Waiguoren Zaihua Gongzuo Guanli Guiding), and the *Rule of the Administration of Work-study Foreign Students* (Waiguo Liuxuesheng Qinggong Zhuxue Guanli Banfa).

3. Proposals for Five Regulations to Implement the LEEA

Although the following five implementing regulations are not required by the LEEA, international migration law theory makes them necessary. Otherwise, the relevant parts of the LEEA will exist only on paper.

A regulation of foreign temporary entry administration would be based on article 23 of

the LEEA, which provides that where foreigners need to enter China temporarily as foreign seamen disembarking or foreign passengers transferring, because of force majeure, or for any other urgent reason, they shall apply to exit and entry border inspection agencies to go through the formalities for temporary entry.

A regulation on restrictions on foreigners and foreign institutions from establishing places of residence or work in certain areas would be based on article 44 of the LEEA, which states that on the basis of the need for maintaining national security and public security, public security authorities and national security authorities may impose restrictions on foreigners and foreign institutions from establishing places of residence or work in certain areas. Those authorities may also order that established places of residence or work be relocated within a prescribed time limit. Without approval, foreigners shall not access foreigner-restricted areas.

The regulation require in reporting of foreigner employment and student information would be based on article 45(1) of the LEEA, which provides that entities employing foreigners or enrolling foreign students shall report relevant information to local public security authorities in accordance with relevant regulations.

A regulation on reporting illegal migrants would be based on article 45(2) of the LEEA, which provides that Chinese citizens, legal persons or other organizations who find foreigners illegally entering, residing or working in China shall duly report such matter to the local public security authorities.

A detailed regulation on refugee administration would be based on article 46 of the LEEA, which provides that foreigners applying for refugee status may, during the screening process, stay in China on the strength of temporary identity certificates issued by public security authorities; foreigners who are recognized as refugees may stay or reside in China on the strength of refugee identity certificates issued by public security authorities. In 2008, the *Rule of Refugee Identification and Administration* (Draft) (Nanmin Zhenbie He Guanli Banfa) was jointly drafted by the Ministry of Foreign Affairs and the Ministry of Civil Affairs and the Ministry of Public Security and submitted to the Legislation Office of the State Council for deliberation in 2008, but was not approved.

4. Five laws, regulations and rules related to the LEEA might be revised

The following five laws, regulations and rules related to the LEEA might be revised to support implementation of the LEEA, although the LEEA does not provide for amendment of these laws, regulations and rules.

The *Nationality Law (Guoji Fa)* was approved by the National People's Congress in September 1980. Article 7 of the *Nationality Law 1980* provides that foreign nationals or stateless persons who are willing to abide by China's Constitution and laws and who permanently reside in China may be naturalized upon approval of their applications. However, the conditions for naturalization by permanent residents are not specified in the *Nationality Law 1980*. The permanent residence system for foreigners established in the *Measures for the Administration of Examination and Approval of Foreigners' Permanent Residence in China 2004* (Waiguoren Yongjiu Juliu Shenpi Guanli Banfa) will be improved by articles 47-49 of the LEEA, which relax conditions for foreigners to become permanent residents and later naturalize. The legislation is a response to calls for bridge between nationality and permanent residence in China. The amendment of *Nationality Law 1980* is on the legislative schedule of the MPS. The meeting for the amendment of the *Nationality Law 1980* was held in August 2013 in Beijing.

The *Regulations on Exit and Entry Border Inspection 1995* (PRC) (*Chujing Rujing Bianfang Jiancha Tiaoli*) was promulgated by the State Council in July 1995. New measures and procedures for exit and entry border inspection are made in the LEEA, including on-the-spot interrogation, continued interrogation, detention for investigation, restrictions on movement and repatriation, as well border inspection of transport vehicles exiting and entering China etc.. The amendments to the *Regulations on Exit and Entry Border Inspection 1995* is on the legislative schedule of the MPS.

The *Measures for Foreigner Accommodation Registration of Public Security Police Station 2007* (for trial implementation) (Gongan Paichusuo Waiguoren Zhusu Dengji Guanli Banfa (Shixing)) was promulgated by the MPS in October 2007. However, the reporting period after arriving was not specified in the Measures 2007. Article 39(2) of the LEEA provides that for foreigners who reside or stay in domiciles other than hotels, they or the persons

who accommodate them shall, within 24 hours after the foreigners' arrival, go through the registration formalities with the public security authorities in the places of residence. For this reason, this Measures 2007 needs to be amended to specify the reporting period and to impose the appropriate legal liability.

The *Circular of Foreigner Station of the Detention for Investigation on Relevant Issues* 2001 (Guanyu Dui Waiguoren Juliu Shenchangchangsuoyouguan Wenti De Tongzhi) was promulgated by the MPS in June 2001. However, this Circular 2001 applies to foreigners held pursuant to an order for detention for investigation (Decision of Exit and Entry Detention for Investigation/Churujing Guanli Juliu Shenchangchangsuoyouguan Wenti De Tongzhi). Article 63 of the LEEA provides that persons who are detained for investigation or who are subject to orders of repatriation but cannot be repatriated promptly shall be held in custody in detention houses or places of repatriation. As a result, this Circular 2001 needs to be amended to cover foreigners who are subject to orders of repatriation but cannot be repatriated promptly.

The *Operational Criteria for Foreigner Port Visas* 2004 (PRC) (Waiguoren Kouan Qianzheng Gongzuo Guifan) was promulgated by the MPS in April 2003. However, the criteria do not specify the conditions of such visas, the duration of entry permitted, and the ports authorized to issue port visas, creating ambiguities that make enforcement difficult. Article 20 of the LEEA addresses these matters. For this reason, the Operational Criteria need to be amended to be consistent with article 20 of the LEEA.

5. Laws and regulations to be repealed

With the implementation of the LEEA on 1st July 2013, The *Law of Foreigner Entry and Exit Administration* 1985 and the *Law of Chinese Citizen Exit and Entry Administration* 1985 were repealed simultaneously. When the *Regulation of Foreigner Entry and Exit Administration* took effect on 1st September 2013, the *Detailed Rules of the Implementation of the Law of Foreigner Entry and Exit Administration* 1986 (revised in 2010) were abolished at the same time. Logically, the *Detailed Rules of the Implementation of the Law of Chinese Citizen Exit and Entry Administration* 1986 were repealed when the *Law of Chinese Citizen Exit and Entry Administration* 1985 was annulled.

Additionally, the *Measures for the Administration of Examination and Approval of Foreigners' Permanent Residence in China* 2004 will be repealed when the *Regulation on Foreigner Permanent Residence Administration* is adopted by the State Council and becomes effective. Similarly, the *Rule on the Administration of Foreigners Employment in China* (PRC) 1996 will be repealed when the *Regulation on Foreigner Employment Administration* is adopted by the State Council and becomes effective.

V. Recommendations for Key Regulations to Implement the LEEA

To implement the LEEA efficiently, it is imperative to carefully consider and address the law's deficiencies while its implementing regulations are being prepared. The following four regulations for implementation of the LEEA are proposed on the basis of the analysis above of impacts, deficiencies and prospects of the regulations implementing the LEEA.

1. The Regulation of Foreigner Employment in China Administration

The Regulation of Foreigner Employment in China Administration is scheduled to be formulated by the State Council pursuant to article 41 of the LEEA. The State Administration of Foreign Experts and the Ministry of Human Resource and Social Security have been jointly drafting the new regulation and holding seminars for comments in Beijing and Shanghai since July 2013 when the LEEA was promulgated by the Standing Committee of the National People's Congress.

To uniformly regulate the employment of foreigners in China, the scope of the Regulation of Foreigner Employment in China Administration will need to cover all foreign employees, including foreign professionals, highly skilled foreigners, foreign students, foreigners with lower skills and self-employed foreigners. Labor market tests will need to be detailed and able to be implemented so as to protect the employment rights of Chinese citizens and permanent residents. A system of guarantees by employers of foreigners or their sponsors will need to be established to reduce the cost and risk of employing foreigner in China and

increase the efficiency of introducing foreigner to be employed in China. To prevent illegal employment of foreigners, new penalties will need to be strictly implemented, including penalties on foreigners who are illegally employed: persons or entities who introduce jobs to ineligible foreigners; and individuals or entities that illegally employ foreigners in China.

2. The Guiding Catalogue for Foreigners Employment in China

Pursuant to Article 42(1) of the LEEA, the Guiding Catalogue for Foreigners Employment in China will be formulated based on national needs for economic and social development as well as the supply and demand of human resources. The State Administration of Foreign Experts and the Ministry of Human Resource and Social Security, in conjunction with relevant departments under the State Council, have been jointly drafting the new regulation since July 2013, when the LEEA was promulgated by the Standing Committee of the National People's Congress.

The guiding catalogue for employment of foreigners in China cannot be limited to adjustment on a scheduled basis, as the needs for economic and social development and also the supply and demand of human resources are subject to change without notice. Consequently, the Guiding Catalogue for Foreigner Employment in China will need to be adjusted regularly and irregularly. Regular adjustment is adjustment on a scheduled basis, irregular adjustment is adjustment on an emergency basis.

Local governmental authorities also need to be authorized to make local guiding catalogues for employment for foreigners, since China has a vast territory of 9.6 million square kilometers and faces serious imbalances in regional economic and social development. The guiding catalogue for employment of foreigners in China can integrate both national and regional catalogues.

The Guiding Catalogue for Foreigner Employment in China needs to be made by independent professional entities authorized by government authority. The government authority may be in charge of design criteria and quality control of the guiding catalogue. The relationship between the guiding catalogue and labor market test needs to be clear. Normally, foreigners who pass the labor market test should not need to meet the requirements

of the guiding catalogue for foreigner employment in China. Otherwise, foreigners who desire to be employed in China will have to meet duplicate employment requirements.

3. The Rule of Foreign Students Employment to Support Their Study in China

Pursuant to Article 42(2) of the LEEA, the Ministry of Education under the State Council will establish an administrative system for employment of foreign students to support their studies in China. The new regulation, will govern, among other things, the scope and time limits of such employment. The Ministry of Education has been drafting the new regulation, the Rule of Foreign Students Employment to Support Their Study in China, since July 2013, when the LEEA was promulgated by the Standing Committee of the National People's Congress.

The concept of foreign student employment to support their study needs to be interpreted broadly as there has been a high demand by educational institutions and cultural authorities for foreign students to be employed in China to support their study and know China. Such employment could be on or off campus, directly and indirectly related to their studies, and limited to 20 hours working time per week during the academic semester and full time employment during the vacations.

To prevent foreign students from working more hours and not studying as required by the X visa (study visa), educational entities that enroll foreign students shall report information regarding foreign students, including their attendance and examination scores to local public security authorities to support the supervision of public security authority on foreign student employment.

To reduce application costs and simplify application procedures so as to facilitate foreign student employment in China, the processing of applications for employment to support study need not require an independent investigation by the public security bureau.

4. The Regulation of Foreigner Permanent Resident Administration

Article 47(1) of the LEEA provides that a Regulation of Foreigner Permanent Resident

Administration shall be formulated to attract foreigners who have made remarkable contributions to China's economic and social development or who meet other conditions for permanent residence in China. Responsibility for this regulation has been given to the MPS and the Ministry of Foreign Affairs in conjunction with relevant departments under the State Council. The subject matter of foreigner permanent resident administration was increased in 2013 from a rule at the ministerial level to regulation at the State Council level. The *Regulation of Foreigner Permanent Resident Administration* (Draft) was released for comments by relevant ministries under the State Council in October 2013 by the MPS.

For skilled immigration, current requirements for employment and residence in China for foreigners with high skills are set out in the *Measures for the Administration of Examination and Approval of Foreigners' Permanent Residence in China* 2003. Pursuant to Article 6 of this regulation, these requirements include having held the post of deputy general manager, factory deputy director or above or of associate professor, associate researcher and other associate senior titles or above or enjoying an equal treatment, for at least four successive years, with a cumulative period of residence in China not less than three years in a four-year period and a good tax paying record during that time. These requirements need to be revised to expand ways for foreigners with high skills to reside permanently in China. Foreigners with high skills and employment and the necessary time of residence only in other States might also be entitled to apply for permanent residence in China.

For investment immigration, the existing requirements of investment experience in China are found in Article 6 of *Measures for the Administration of Examination and Approval of Foreigners' Permanent Residence in China* 2003. It provides that foreigners who have made a direct investment in China in a stable business entity and have a good tax paying record for three successive years may apply for permanent residence in China. This regulation also needs to be revised to attract foreign investors to China.

For marriage immigration, the current regulation's residence requirement in China needs to be shortened to protect the spouse's right of reunification. Article 6 of the *Measures for the Administration of Examination and Approval of Foreigners' Permanent Residence in China* 2004 (PRC) provides that a foreigner who is the spouse of a Chinese citizen or of a foreigner with permanent residence status in China, who has been married at least five years, has resided

at least five successive years in China and at least nine months each year, and has a stable income and a dwelling place, may apply for permanent residence in China. The right of family unification cannot be separated from the permanent residence status of one's foreign spouse.

Additionally, systems of guarantees of support by relatives, former Chinese citizen permanent residence, and refugee permanent residence need to be separately established for foreigners whose direct relatives are Chinese citizens or permanent residents, foreigner once having Chinese nationality and foreigners recognized as refugees. The risk and cost of granting foreigner permanent residence could be reduced with the establishment of a system of guarantees of support by relatives. Further, foreigners who once held Chinese nationality will have greater opportunities to reside permanently in China under a system of former Chinese citizen permanent residence. Finally, a system of refugee permanent residence is significant for the implementation of China's human rights strategy and overseas Chinese policy.

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[Abstract]

Critical Reflection on the *Law of Exit and Entry Administration of China* 2013

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Law in international migration area in China, and the biggest overhaul of China's exit and entry administration law since 1985. This Law not only regulates China's exit and entry administration, but also promotes China's foreign exchanges and opening to the outside world. The LEEA as promulgated has deficiencies in the immigration system it establishes and thus its implementing regulations. To implement this Law efficiently, it is imperative to carefully consider its impacts and address the Law's deficiencies while the implementing regulations are being prepared.

[Key Words] Exit and entry administration law, International migration, Implementing regulation, China, Regulates China's exit and entry administration

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