

Immigration Law **TODAY**

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The Religious Worker Visa Program

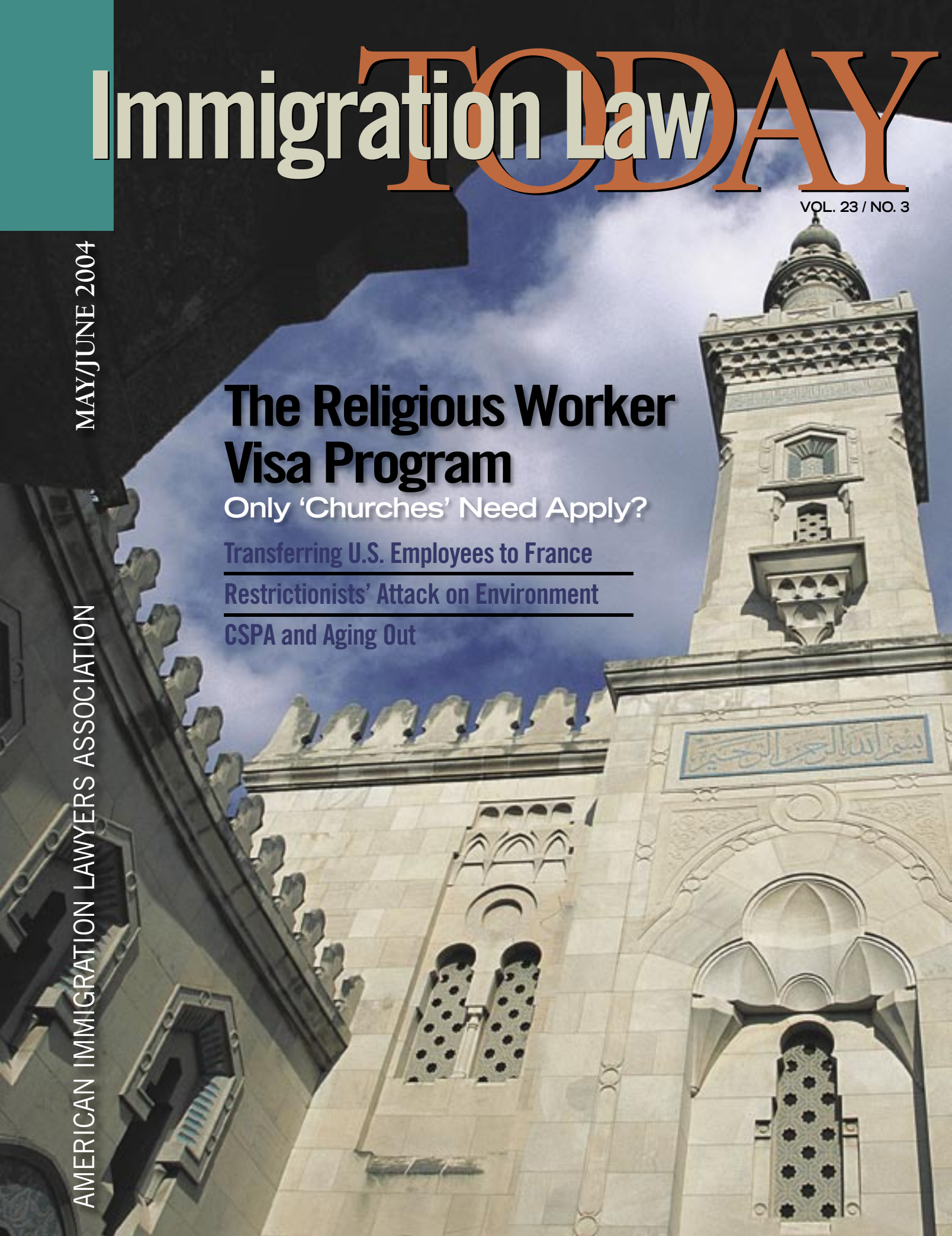
Only 'Churches' Need Apply?

Transferring U.S. Employees to France

Restrictionists' Attack on Environment

CSPA and Aging Out

AMERICAN IMMIGRATION LAWYERS ASSOCIATION



By Haywood M. Wise

An American in Paris



France is one of the most modern countries in the world and is a leader among European nations. Since 1958, it has constructed a presidential democracy resistant to the instabilities experienced in earlier parliamentary democracies. In recent years, its reconciliation and cooperation with Germany have proved central to the economic integration of Europe, including the introduction of the euro in January 2002. At present, France is at the forefront of European states seeking to exploit the momentum of monetary union to advance the creation of a more unified and capable European defense and security apparatus.

—CIA World FactBook, updated December 2003

CORBIS

Successfully Transferring U.S. High-Level Executives and Employees to France

FRANCE IS A GATEWAY TO EUROPEAN BUSINESS, an ideal location for managing Europe, Middle East, and Africa (EMEA) commercial activity, and remains a great place to be an expatriate. The transfer of foreign executives to France is also facilitated by favorable French immigration regulations. Franco-American tax and Social Security treaties make the transfer of an employee or executive to a foreign office of the transferring company a cost-effective solution for training local personnel, dealing with the needs of multinational groups, and strengthening ties between foreign offices.

For transferred employees and high-level executives working in France for short periods of time, no new employment relationship exists and the U.S. employees in question remain subject to U.S. labor law. Indeed, unless the employee's situation is deemed to constitute employment in France, the French Social Security and income tax regime may be avoided. It is highly recommended, however, that the U.S. transferring company make clear—both in its certifications to the French Regional Labor Agency (*Direction Départementale du travail, de l'emploi et de la formation professionnelle*) (DDTE) and in agreements with its employee or executive—that the latter shall remain subject to the terms and conditions of his or her U.S. employment letter/contract, and that he or she will continue to be subject to U.S. Social Security coverage for the period of transfer in France.

Transfer of Foreign Employees

To qualify as a transferred employee (*salarié détaché*), the transferred employee must remain employed with the French host company for the entire term of the transfer (Circ. Min. DPM n° 236, 22 avr. 1988, BO Trav., 6 juill. 1988, n° 11, p. 37). Yet, he or she remains subject to the authority of the foreign employer. Unlike the foreign high-level executive category (*cadre de direction*) described below, this transfer need not be to a company belonging to the multinational group, and this category is more suitable for transferring employees to the business location of an independent entity.

Generally, to qualify for this category, the U.S. company should not have an establishment in France. If the U.S. company does have an establishment in France, the employment should be a French employment subject to normal rules (discussed below). However, the transfer can be made where the French host company is independent of the U.S. company (being a fully independent, corporate entity) within the multinational group. As an exception to the above rule, the U.S. company may have a correspondent French establishment that serves the sole purpose of being a mere host for the transfer.

■ Purpose of the Transfer

For an employee to qualify for a transfer, the purpose of the transfer cannot be effective participation in the activity of the host company. Indeed, the employee's duties must generally be limited in nature to financial auditing, technical assistance, or liaison with the foreign employer and the French entity. The DDTE engages in a review of an employee transfer to ensure that no subordinate relationship exists between the French host company and the transferred employee. The petition should demonstrate that the transferred employee is not considered to be an employee of the French host company and that he or she remains subject to U.S. management.

Similarly, the petition should not be framed in a manner that would suggest that the employee shall be acting in a management capacity in France, for example, if he or she were to be transferred to head up or create a French operational branch of a company belonging to the multinational group to which the U.S. company belongs. In such a case, the DDTE would object on the grounds that the person would normally require a French foreign merchant's card (*carte de commerçant étranger*) or residency card. →

■ The Transferred Employee's Qualifications

As is the case for H-1B and L-1B applications in the United States, the employee's qualifications are an important part of the petition. The transferred employee's prior work history and educational background (demonstrated in the certifications by the U.S. employer), the employee's curriculum vitae (translated), and diplomas (sworn translations) must demonstrate that his or her qualifications are compatible with the purpose of the transfer.

■ Limited in Duration

The duration of the foreign employee visa is nine months and may be renewed once. For a second renewal, special care should be made to explain why the extension is necessary. Applications for renewal should be filed at least two months prior to expiration of the temporary visa.

■ Limited in Number

The French administration does not accept the simultaneous transfer of a significant number of workers from the same company under the *salarié détaché* category. Indeed, should the purpose of the transfer require the presence of a number of employees, the standard introductory procedure would apply. This means that regardless of the nature of the transfer, as soon as more than one employee is considered at one time, the French employment authority generally will not apply the cursory procedures, as the transfer then amounts to job creation. In such a case, the employees will be subject to review by the presentation and posting of the positions at the French National Work Agency (*Agence Nationale de l'Emploi*), and the French employer will have the onus of establishing why foreign employees are required for the posts.

This does not, however, prohibit use of the favorable transfer procedures for high-level executives and transferred employees for a number of individual transfers—taken separately or collectively—if the transfer is for the accomplishment of a very specific mission. In a specific case, treatment of a group of transferred employees or executives will depend largely on the discretion of the French labor authority.

Transfer of High-Level Executives

In order to respond to the specific problems of multinational groups that have a presence in France, the French administration proposed new terms for expedited and limited review of high-level executives (*cadre de direction*) (DPM/DM2-3 no. 96256 dated April 15, 1996). The regulations provide that French labor authorities are to review the file within 15 days of filing, and shall not consider employment issues but merely verify the content of the request.

Persons falling under this status are being transferred to France presumably to work in a management capacity, although the regu-

lations do not specify this as a requirement. To qualify as a high-level executive, the employee must provide proof that he or she has worked more than one year within a corporate group whose parent company has a share capital of the equivalent of 450,000 euros, that the group has been in existence for at least three years, and that the host company is part of this group. The employee's wage must also surpass certain coefficients fixed by law, which, as of July 2003, should equal at least 3,835 euros monthly.

The duration of a foreign high-level executive's temporary visa shall depend on the nature of his or her mission and may be longer than one year. Applications for renewal must be filed at least two months prior to the expiration of the temporary visa.

The Filing Procedure

The filing procedures for both a transfer of a foreign employee or a foreign high-level executive are very similar. It is important to perform the request for a work visa properly in order to avoid unnecessary delays and costs. Unlike U.S. visa procedures, no government form applications are provided, so the petition requires attention to form and substance.

The foreign employee must remain in his or her country of origin or place of residence and obtain the visa before entering France. This will generally not preclude him or her from entering France on a tourist visa waiver for a period of up to three months, but the employee should avoid engaging in employment-related activity during this waiver period.

The French entity hosting the employee (the host company) petitions to introduce a foreign employee. The host company, along with the transferring company (the company transferring the employee to France) and the employee, must provide various documents and certifications regarding the purpose of the transfer and the specific need that the employee answers in regard to the French business. A written employment contract must also be provided. As is often the case, however, no written employment agreement has been signed between the employee and the U.S. company, so such documentation may need to be drafted for French visa purposes.

Once these documents are prepared and signed by authorized representatives of the transferring and the host companies, and sworn translations are obtained of certain personal documents (relevant diplomas, for instance), the application is sent to the competent labor authority, the DDTE.

■ DDTE Review

The DDTE will review the file for its completeness and determine, with reference to the employment situation in the geographic location, whether the transfer should be granted. For transferred employees, the administration has the discretion to refuse the application if the employment situation in the geographic zone in question precludes approval (no such limitation applies to →

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high-level executives). The DDTE, the International Migrations Authority, the Office des Migrations Internationales (OMI), and the French consulates possess broad discretion to approve or refuse French visas. When considering the transfer of top management, the stated policy of the DDTE is that highly paid executives offer significant financial and cultural contributions to France, and that their work visa requests should be approved in most cases. Upon approval, the DDTE will issue an approval letter and send the file to the OMI. The OMI then performs a cursory review of the documentation and thereafter sends it to the French consulate in the United States where the U.S. employee resides.

Note: If there is any question or objection made to the application, it is likely to be made at the level of the DDTE, since the OMI typically just processes the application once it has received DDTE approval.

■ Obtaining the Provisional Work Visa

The French consulate will then stamp the employee's passport and contact the employee directly to schedule a time to claim the provisional entry visa. Upon receipt of this provisional visa, the employee is free to enter France and begin working.

The host company then files a request for a provisional work visa at the municipal building (*Préfecture*). Thereafter, the employee will go to the *Préfecture* where he or she resides and claim the temporary work visa. The temporary work visa only allows a foreign employee to reside in France for the time indicated on the card, and renewals should be timely applied for (no later than three months prior to term). The *Préfecture* will send the em-

ployee to the OMI for a comprehensive physical examination as a condition to the granting of his or her visa.

It is important to specify whether the employee has family members who will be accompanying him or her, so that such dependents (only a spouse and children) can be included in the initial visa request as accompanying family members (*famille accompagnante*).

Social Security and Tax

For transferred employees, the DDTE requests a standard form certification of Social Security coverage, issued by the U.S. Social Security Administration (Form SE-404-2). The Franco-U.S. Social Security convention precludes liability for French Social Security coverage, providing that the individual's employment relationship remains exclusively subject to U.S. law, and that the transfer does not exceed five years.

With regard to French income tax, the employee would not generally be subject to income tax, provided that (1) he or she continues to be paid by the U.S. employer (or on behalf of the U.S. employer); and (2) for a given fiscal year, he or she did not live in France for a period greater than 183 days. In the event this 183-day period is surpassed, the employee would be deemed to have tax domicile in France and be subject to French income taxes. Nevertheless, he or she would be entitled to tax credits on the tax actually paid in the United States.

Conclusion

Recently faced with significant unemployment, the French State has established measures to limit the number of foreign workers. Nevertheless, exceptions have been carved out of the laws and regulations for the transfer of foreign high-level executives and employees. These types of foreign workers are deemed to fall within privileged categories and their visa applications are simplified and accelerated. Indeed, the transfer of a foreign employee, or an executive in particular, is a much simpler process than recruitment of a foreign employee by a French company—which, in the latter case, requires heightened review and presentation and posting of the petition to the French National Work Agency. ■

Haywood Martin Wise is an American-born attorney and has been consulting U.S. and foreign businesses in the development of their French business since 1996. He is Of Counsel to the U.S. immigration law firm, Goff & Wilson, P.A.

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