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OFF TO WORK WE GO: CREATING AN EFFICIENT LABOR FORCE THROUGH EUROPEAN UNION EMPLOYMENT REGULATION OF THIRD-COUNTRY NATIONALS

Lindsey Lovingood

In an era defined by globalization, the movement of people and blurring of borders is an issue governments must address. Serious concerns accompany proliferation of migration, concerns beyond regulated admittance into receiving countries. Countries must attend to the issues in the everyday lives of the large number of nationals leaving their home countries and relocating to regions offering better opportunities. Generally, existing regulation lacks protection of foreign nationals and their rights, especially in the area of employment. Where countries are worried about migration adversely affecting the economy by flooding the labor market and taxing a State's social system, a pre-emptive solution would be providing employment protections and advance regulations that incorporate foreign nationals into the State's general employment law.

One of the major developments in globalization is the creation of the European Union (EU), Europe's supranational organization whose legislation transcends state boundaries to create a unified policy for the majority of Europe. The EU has taken minimal measures to regulate third-country nationals, focusing mainly on controlling entrance to the EU and to some extent their impact on the social system.¹ There is a strong argument that the EU's role should be more significant, and should regulate the employment of third-country nationals. Currently the area of employment law lacks momentum, direction, and cohesiveness. EU employment regulations could serve as a roadmap for countries worldwide faced with the growing issue of third-country migrant workers.

This article will demonstrate that a unified employment policy for third-country nationals will only increase the influence of the European Union, both economically and internationally. The first section will outline the unique EU legislative structure, and its authority both explicitly and implicitly over

¹ "Third-country nationals" being defined as "Any person who is not a national of an EU Member State." Justice and Home Affairs: Glossary, Europa, http://ec.europa.eu/justice_home/glossary/glossary_t_en.htm (last visited December 30, 2007).

Member States and third-country nationals residing within the EU territory. The second section will provide background to the current employment legislation and the problems facing Member States under this plan. As an example of the need for an extensive EU regulation, the article will discuss the current economic and employment problems facing Germany and the third-country migrant workers currently residing in the State. The EU situation and Germany's case will demonstrate how the development of a common policy, and a detailed implementation plan, will bring positive benefits to the European Union. To achieve this policy goal, current legislation of both the Union and the Member States needs revitalization, with the institutions and Members of the EU motivated towards the advancement of a common goal. The EU should be the flagship of regulating foreign employment in the new world of globalization.

THE BIG BROTHER OF EUROPE: THE EUROPEAN UNION

Following World War II, European powers looked for a new way of governing that would ensure peace and economic cooperation. The answer, some countries believed, was the European Coal and Steel Community (ECSC), developed in 1951 by six countries seeking unified management of coal and steel industries.² Over the next half of the century, the ECSC grew and developed into the present-day European Union with twenty-seven Member States³ governed under the Treaty of Nice, which combined the Treaty of the European Union (EU Treaty) and Treaty of the European Community (EC Treaty).⁴ The basic principles of the EU, the "four freedoms," existed from its inception: free movement of persons, services, goods, and

² 1945-1959: A Peaceful Europe - The Beginnings of Cooperation, Europa, http://europa.eu/abc/history/1945-1959/index_en.htm (last visited December 28, 2007). The six original members were Germany, France, Belgium, Italy, Luxembourg, and the Netherlands.

³ Treaty Establishing the European Economic Community, EEC Treaty, Europa [hereinafter EEC Treaty], http://europa.eu/scadplus/treaties/eec_en.htm (last visited December 28, 2007).

⁴ Treaties and Law, Europa, http://europa.eu/abc/treaties/index_en.htm (last visited December 18, 2007). Consolidated Version of the Treaty On European Union, Feb. 7, 1992, 2002 O.J. (C 325) 5 [hereinafter EU Treaty], *available at* <http://eur-lex.europa.eu/en/treaties/index.htm> (follow "Founding treaties" hyperlink) (last visited December 27, 2007). Consolidated Version of the Treaty Establishing the European Community, March. 25, 1957, 2002 O.J. (C 325) 33, art. 249, 132 [hereinafter EC Treaty], *available at* <http://eur-lex.europa.eu/en/treaties/index.htm> (follow "Founding treaties" hyperlink) (last visited December 27, 2007).

capital.⁵ The principle of free movement of persons will later lead to the argument of third-country employment regulations.

The treaties of the EU establish the building blocks for legislation, and regulations, directives, and recommendations implement the common goals of the EC throughout Member States.⁶ Obstacles facing these institutions from their inception were the extent to which they would hold authority over Member States and how the creation of policy would respect the sovereignty of the Members. One of the benefits of the supranational characteristic of the EU is Member States have surrendered sovereignty to an extent, subjecting themselves to the legislation of the Council of the European Union, the European Commission, and the European Parliament. However, the authority of the EU over Member States is unlike that of a government over its citizens - it must consider States' domestic laws and the impact of implementing contradictory obligations.

In an organization created to enhance the economy of its members, regulation of foreign workers is reasonably expected. The EU, specifically, covers a wide territory that includes a large foreign population, "foreign" meaning third-country nationals, or citizens of countries outside of the EU. In 2005, around fourteen and a half million foreigners were living in the EU, creating about 3.2 percent of the population.⁷ During that same period, the EU unemployment rate was at nine percent.⁸ Regions vary significantly in the employment arena, with some Member States experiencing an unemployment rate twice that of others.⁹ An overall EU regulation or directive requiring coordination of a common employment policy would end such disparity

⁵ EEC Treaty, *supra* note 3.

⁶ The EU at a Glance – Europe in 12 Lessons: How Does the EU Work?, Europa, http://europa.eu/abc/12lessons/lesson_4/index_en.htm (last visited Dec. 28, 2007).

⁷ Percentage calculated using the total population of the 25 EU Member States, 447660.2 (in 100s), and the total population of citizens of countries outside the EU residing in EU territory, 14370.0. The data is before the EU's expansion to 27 members. *See also* Eurostat, *statistics available at* <http://epp.eurostat.ec.europa.eu> (last visited Jan. 1, 2008).

⁸ *Id.* (calculated using unemployed of the total population, 19531.1, and the number included in the active population, 217351.6). The active population is persons who make up the supply of labor during a specific period. ILO, *available at* <http://laborsta.ilo.org/> (last visited Jan. 1, 2008).

⁹ Eurostat, *supra* note 7. In 2005 the United Kingdom's unemployment rate of the total population, including third-country nationals, was 4.7 percent, with a total population of 58421.4 and unemployment at 1399.1. Comparatively, Germany was experiencing an unemployment rate of 11.1 percent during the same year, from a total population 81528.7 and an unemployed population of 4572.9, well over twice that of the U.K.'s.

between regions. This would be a step towards achieving the presentation of a unified Europe that the European Union was meant to establish. While the EU institutions have the authority to accomplish this goal, the current legislation has been slow to develop, and contributes very little towards an actual EU employment plan that would encompass third-country national workers. This section of the labor force should be viewed as an asset in the Single Market structure, to help combat the inequality of labor market situations among Member States.

THE EUROPEAN EMPLOYMENT DISARRAY

The transition from domestic labor regulations to a unified policy has been one of trial and tribulation for the EU. Most development in the employment arena has been in an effort to structure a common policy while addressing the individual needs and concerns of Member States, and the advancement of EU citizens as a whole. As a result of this turmoil, the regulation of third-country migrant workers has been substantially overlooked, and most major acknowledgements towards this portion of the population are in attempts to hold back further economic migration.

Prior to the 1990s, labor regulation mainly existed in domestic policies. The Essen European Council made preliminary steps towards an employment strategy for the EU by requesting monitoring of Member State employment situations.¹⁰ The Council outlined five priorities for employment reform: promoting vocational training investment, creating employment-intensive growth, decreasing labor costs, more effective labor policies, and reinforcement of inclusion measures.¹¹

In the years following the Council meeting, Member States and the EU institutions took proactive steps to combat unemployment.¹² A broad effort was the inclusion of Title VIII in the EC Treaty by adoption of the Amsterdam Treaty in 1997.¹³ Title VIII addresses employment in the Union, and provides measures for action by the European Council.¹⁴ Each year the Council, working in consultation with the other institutions of the EU and the

¹⁰ Follow-up to the Essen European Council on Employment, Europa, <http://europa.eu/scadplus/leg/en/cha/c10223.htm> (last visited Feb. 13, 2007)

¹¹ *Id.*

¹² See *Commission Action for Employment in Europe: A Confidence Pact*, CSE (96) final (June 5, 1996), *Found at* http://aei.pitt.edu/5139/01/001617_1.pdf (last visited December 28, 2007).

¹³ The Amsterdam Treaty: the Union and the Citizen, Europa, <http://europa.eu/scadplus/leg/en/lvb/a15000.htm> (last visited Dec. 27, 2007). Title VIII: Employment, EC Treaty, *supra* note 4.

¹⁴ EC Treaty, *supra* note 4, art. 128 at 89.

appropriate committees, will create guidelines for the Member States' domestic employment policies.¹⁵ This title does not provide for the regulation of third-country migrant workers, but implicitly would allow for such regulation should the Council determine it necessary in furtherance of the overall employment goals of the EU. The Treaty of Amsterdam made significant changes to the major founding treaties of the present day European Union but left a void for secondary legislation to fulfill regulation of Member States' domestic policies. The Council then had the task of issuing the necessary directives to accomplish the principles of Title VIII.

Despite the adoption of Title VIII, the area of employment has been at a stalemate. While Title VIII establishes employment and the labor market as a principle concern of the EU, it excludes a common policy that would have a tangible impact. The EU struggles at regulating the workforce of EU citizens, and is even further from regulating third-country migrant workers.

The Tampere European Council in 1999 recognized the need for a cohesive migration policy that would affect the migrant employee population.¹⁶ The Tampere Council asked for a plan that collaborated with countries of origin to develop strategies on economic immigration that would bring positive effects for both the sources of migrants and the receiving Member States.¹⁷ Another important aspect of the Tampere Council's efforts was a movement for fair treatment of third country nationals, believing both domestic and EU integration policies needed to create equal rights and obligations on third-country migrants, similar to those of EU citizens.¹⁸ Paralleling the need for equal rights, the Council believed Member States needed to take efforts to combat discrimination, including equal status of third-country nationals who have enjoyed residence in a Member State for a number of years.¹⁹ This is a significant movement towards employment regulations and reform of domestic legislation. The Tampere Council recognized the large portion of third-country national migrant workers moving to and from the EU had a serious impact on the internal market.

The Tampere Council acted as a catalyst for European employment law reform at the turn of the century. In 2000, following the release of a comparative study of Member States' domestic policies, the Lisbon Special European Council continued the Tampere Council's work towards a detailed

¹⁵ *Id.*

¹⁶ European Council, Tampere European Council: Presidency Conclusions, http://www.europarl.europa.eu/summits/tam_en.htm#a (follow "A. A Common EU Asylum And Migration Policy" hyperlink) (last visited Jan. 1, 2008).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

employment strategy.²⁰ The Lisbon Objectives created the standard the EU aims to achieve in the employment field, seeking to remedy the weaknesses of the market that were causing high unemployment in regions of the EU. They identify the problems as insufficient job development in service sectors, regional disparities since the 2004 enlargement, and a labor supply that exceeds demand, among other issues.²¹ In one manner, the Lisbon Council began examining the internal regulation of third-country nationals and the need of better integration and education.²² Providing for integration into the education systems of Member States would provide solutions for inequality in the social sector, and enhance the abilities of third-country workers in the EU.

It appeared in 2001 that the Lisbon Objectives had lead to a significant reform in regulating third-country workers. The Commission of the European Communities presented a proposal for a European Council Directive entitled, "Council Directive on the Conditions of Entry and Residence of Third-Country Nationals for the Purpose of Paid Employment and Self-Employed Economic Activities."²³ While the main objective was to regulate migration for economic reasons, the proposed directive had a dual affect of regulating migrant residents as well.²⁴ The proposal is the most aggressive action taken by the European institutions, but never made it very far. It was never officially adopted and never made it beyond a first reading by the Council.²⁵

The most recent push for employment reform occurred in 2005 when the Commission reevaluated the Lisbon strategy. Based on poor reports of the

²⁰ ECOTEC, *Admission of Third Country Nationals for Paid Employment or Self-Employed Activity* (2000), available at http://ec.europa.eu/justice_home/fsj/immigration/work/fsj_immigration_work_en.htm (follow "comparative study" hyperlink) (last visited Dec. 27, 2007).

²¹ The Lisbon Special European Council, Europa, <http://europa.eu/scadplus/leg/en/cha/c10241.htm> (last visited Dec. 27, 2007).

²² *Id.*

²³ *Proposal for a Council Directive on the Conditions of Entry and Residence of Third-Country Nationals for the Purpose of Paid Employment and Self-Employed Economic Activities*, COM(2001) 386 final (July 11, 2001), available at http://eur-lex.europa.eu/LexUriServ/site/en/com/2001/com2001_0386en01.pdf (last visited Jan. 1, 2008).

²⁴ *Id.* One objective of the proposal was creating criteria for inclusion in employment of third-country nationals, not merely their admittance to the EU for that purpose. Fulfillment of this objective would establish internal regulations beyond the enforcement of external borders.

²⁵ *Commission Green Paper on an EU Approach to Managing Economic Migration*, COM (2004) 811 final (Jan. 11 2005), available at http://ec.europa.eu/justice_home/doc_centre/immigration/work/doc/com_2004_811_en.pdf (last visited Jan. 1, 2008).

implementation of the Lisbon plan the Commission changed direction, focusing on the actions taken towards achievement of the goals outlined in Lisbon, rather than actual goals set for 2010.²⁶ In the Lisbon review, the Commission prioritized creation of jobs to foster economic growth and a better approach at governing the employment market. While the communication does not directly address third-country nationals, like many other EU initiatives, there is implication such migrant workers would be included in the employment reform. The Commission proposes complete overhaul of Member State programs for better implementation of the Lisbon strategy between 2008 and 2013.²⁷

The most notable effort since the proposed directive in 2001 is the Green Paper released by the Commission.²⁸ The Green Paper not only suggests several options for EU employment regulation but attempts to begin discussion between Member States that would hopefully lead to development of a Union policy. The Commission's suggestions include a possible broad approach to the conditions of entry and residency of migrant workers from third-countries desiring to stay in the EU longer than three months.²⁹ A narrower approach offered is to focus on certain sectors, such as researchers and corporate transferees.³⁰ The report evidences the numerous options available to the European Community, even on an initial basis, to reform the employment field.

Through all the discussions, communications, proposals, and councils the actual EU regulations seem confusing and, at times, non-existent. Any regulation of third-country national employment should be based on free movement of workers and the development of a single economic market, both fundamental principles of the European Union. Article 39 establishes free

²⁶ A new start for the Lisbon Strategy (2005), Europa, <http://europa.eu/scadplus/leg/en/cha/c11325.htm> (last visited Dec. 28, 2007). See *Commission Report to the Spring European Council "Delivering Lisbon: Reforms for the Enlarged Union"*, at 2, COM (2004) 29 final, available at http://eur-lex.europa.eu/LexUriServ/site/en/com/2004/com2004_0029en02.pdf (last visited Dec. 28, 2007) (stating that the success of the Lisbon objectives depends on EU regulation as well as reform of Member State policies which have not been achieved).

²⁷ Communication from President Barroso in agreement with Vice-President Verheugen, *Working Together for Growth and Jobs, A New Start for the Lisbon Strategy*, at 26COM (2005) 24 final (Feb. 2, 2005), available at http://ec.europa.eu/growthandjobs/pdf/COM2005_024_en.pdf (last visited Jan. 1, 2008).

²⁸ *Green Paper on an EU Approach to Managing Economic Migration*, *supra* note 25.

²⁹ *Id.*

³⁰ *Id.*

movement of workers and the Community's objective to end employment discrimination based on nationality between Member States.³¹ The scope of Article 39 is restricted to prior offers of employment and does not mention discrimination based on nationality for those migrating in search of employment.³² Older Member States may also restrict market access to not only third-country nationals, but also Members of the EU since the 2004 and 2007 expansions, with a seven-year limitation on such interim measures.³³ These fundamental applications, which now arguably include all employed residents of a Member State, initially only sought rights for EU citizens. In seeking a single Europe, the EU wanted all EU citizens to move freely within the territory, and enjoy the rights of Member State nationals outside of their own country. Council regulations require Member States to treat non-national workers living in that State's territory the same as national workers in all aspects.³⁴ The 1968 Council Regulation establishing the free movement of workers did not allow workers from non-EU countries to enjoy the protections of that Regulation.³⁵ The early employment regulations sought to protect EU citizens and left a substantial population of third-country workers without protection, in doubt about the applicability of future regulations.

Prior to the Tampere Council and other major movements for employment reform, the European Council released a resolution regarding the limitations on admission of third-country nationals for purposes of employment in 1994.³⁶ It required the present admission criteria, procedures, and period of stay regulation in domestic policy but did not bind Member States with compliance.³⁷ Admittance of third-country nationals for employment is very restrictive, and was allowed only where no Member State national or EU citizen already exists to fill a job vacancy.³⁸ The resolution requires Member States to operate in a "named worker" system, permitting economic migration where a third-country national has already been offered a specific position, including seasonal workers, trainees, frontier workers, and

³¹ EC Treaty, *supra* note 4, art. 39, at 51.

³² *Id.*

³³ Free Movement of Workers: Introduction, Europa, <http://europa.eu/cgi-bin/etal.pl> (last visited Nov. 12, 2007).

³⁴ Free Movement of Workers: General Provisions, Europa, <http://europa.eu/scadplus/leg/en/lvb/123013a.htm> (referencing Council Regulation 1612.68 (1968), http://www.ilo.int/public/english/employment/skills/hrdr/instr/eu_26.htm (last visited Dec. 27, 2007)).

³⁵ *Id.*

³⁶ Limitations of the admission of third-country nationals for employment, Europa, <http://europa.eu/scadplus/leg/en/lvb/133068.htm> (last visited Dec. 27, 2007) (summarizing Council Resolution of 20 June 1994, 1996 O.J. (C 274)).

³⁷ *Id.*

³⁸ *Id.*

intra-corporate transferees.³⁹ Other limitations are the requirement of employment permits or necessary visas, but exceptions are granted for long-term residents of Member States and family members of either those currently living in Member States or EU citizens.⁴⁰ This policy seems restrictive upon third-country migrant workers, but only focuses on those migrating for economic reasons. It does not address the large number of asylum seekers from third-countries that are entering under other pretenses and allowed work permits.

In many cases the regulations are contradictory and confusing. While immigration measures are meant to combat the inflow of third-country workers to a market with contrasting employment issues, there are large gaps in knowledge on the issues of third-country nationals currently residing in Member States. Integration efforts overlook this existing population and concentrate on newly arriving migrants. Third-country migrants are left with problems transitioning to a new market because of social differences and restrictive hiring due to discrimination or national legislation requirements.

THE GERMAN CASE

Germany presents a perfect example of the need for a common European policy for employment. The country is Europe's largest economy and second largest population.⁴¹ In the European Union, it boasts the largest Member State population.⁴² It also has an extremely high unemployment rate and an aging population. Similar to the EU, Germany has recently pushed major reforms in the area of foreign migration, including addressing migrant worker employment.

The path of German third-country national employment has been tumultuous. In 1950, the foreigners made up about one percent of the German total population.⁴³ Like Europe as a whole, the post-WWII reconstruction left the German economy in need of reform. A significant labor shortage prompted

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ CIA World Factbook: German, <https://www.cia.gov/library/publications/the-world-factbook/geos/gm.html> (last visited Dec. 28, 2007).

⁴² Facts About Germany, Germany- A Constructive EU Member, <http://www.tatsachen-ueber-deutschland.de/en/> (follow "foreign policy" hyperlink; then follow "Germany-a constructive EU member" hyperlink) (last visited Dec. 27, 2007).

⁴³ Federal Ministry of the Interior, *Immigration Law and Policy* (2005), available at www.bmi.bund.de (follow "Publications" hyperlink; then follow "Immigration Law and Policy" hyperlink) (last visited Jan. 1, 2008).

the Gastarbeiter (Guest Worker) program.⁴⁴ Between 1955 and 1968, as the beginning of the EU was developing, Germany entered into bilateral agreements with Italy, Spain, Greece, Turkey, Portugal, and Yugoslavia for the recruitment of foreign labor, mainly for the industrial sector of the country.⁴⁵ The agreements established a rotation system where migrants would enter Germany for one to two years and then return to their country of origin.⁴⁶ With the construction of the Berlin Wall, West Germany's recruitment intensified, and the foreign population reached 6.7 percent of the country's total population, with twenty-three percent of migrants coming from Turkey.⁴⁷

The recession in the 1970s caused Germany's need for foreign labor to decline, but by this period large numbers of migrants had received residence permits and further inflows occurred under the pretense of family reunification.⁴⁸ While the foreign population remained consistent in Germany, around 4.5 million people accounted for 7.3 percent of the total population, and only around 1.7 million people were employed or self-employed.⁴⁹ In 2003, the legal foreign population made up 8.9 percent of the German population.⁵⁰ The most predominant group was still the Turks, and almost 600,000 had naturalized and were not counted in the foreign population.⁵¹

Prior to a recent complete reformation of immigration, the Aliens Act regulated the flow of third-country nationals by the Ausländerbehörde (Alien's Office).⁵² The Alien's Office only controlled migration, and foreigners must then seek a work permit from the Arbeitsamt (Labour Office) to be granted a work permit.⁵³ Germany followed the restrictive practice of the EU in first attempting to fill any job vacancies with German nationals, EU citizens, and then third-country nationals already legally residing in a Member State.⁵⁴ The Labour Office only allowed work permits on a limited basis, due

⁴⁴ Veyssel Oezcan, *Germany: Immigration in Transition*, MIGRATION INFORMATION SOURCE, July 2004, available at <http://www.migrationinformation.org/Profiles/display.cfm?id=235>.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* Comparatively, US foreign born, non-citizens are 6.9% of the total population in 2003. US Census Bureau, Table 1.1a, <http://www.census.gov/population/www/socdemo/foreign/acst2.html#cit>. Neither of these estimates account for the illegal migrant population.

⁵¹ Oezcan, *supra* note 44.

⁵² ECOTEC, *supra* note 20, at 103.

⁵³ *Id.*

⁵⁴ *Id.* at 106.

to the large number of foreigners already residing in the country, and the country's unemployment rate remained significantly high.

As the EU simultaneously developed, the German government saw a need to reform not only migration laws for third-country nationals, but also labor laws that would control a feared wave of migrant workers from EU states. The first of these reforms followed the EU expansion in 2004, and was implemented on a temporary basis until a reassessment of the economic situation in 2006.⁵⁵

The next reform affecting third-country nationals living in German developed in 2004 and became effective January 1, 2005.⁵⁶ This marked one of the first admissions by the German government of its status as a migrant state and worked to control both admittance and integration of foreigners in a single act of legislation. In a federally released report, The Federal Minister of the Interior acknowledged that almost one of every five foreigners living in Germany was born there and that there is an immense second and third generation migrant population.⁵⁷ The new Immigration Act affected not only admission of foreigners into Germany but also their legal status to work in the country. It has effects on new migrants and those currently living in the country.⁵⁸

Prior to the Act to Control and Restrict Immigration and to Regulate the Residence and Integration of EU Citizens and Foreigners (Immigration Act) of 30 July 2004, migrants must first apply for admittance, and then for a work permit. The Act combined the numerous permits that were required, and migrants are now granted a work permit along with their residency permit, rather than applying to two different government agencies for legal entry and legal employment.⁵⁹

Under the Residence Act, foreigners will be admitted for employment based on the conditions and needs of the labor market, the same as before and

⁵⁵ Oezcan, *supra* note 44.

⁵⁶ See Act to Control and Restrict Immigration and to Regulate the Residence and Integration of EU Citizens and Foreigners [Immigration Act], July 30, 2004, Federal Law Gazette Volume 2004, Part I, No. 41, *available at* http://www.zuwanderung.de/english/downloads/act_of_general_movement.pdf (last visited Dec. 28, 2007).

⁵⁷ Federal Ministry of the Interior, *supra* note 43, §1.4 at 9.

⁵⁸ *Id.*, §2.1 at 30.

⁵⁹ *Id.* §2.2 at 30. (referencing Aufenthgengl [Residence Act], §39(1), at 38, June 30, 2004, Federal Law Gazette Volume 2004, Part I, No. 41, *available at* <http://www.zuwanderung.de/english/downloads/aufenthgengl.pdf> (last visited Dec. 27, 2007)).

mirroring the Council's resolution.⁶⁰ Approval by the Federal Employment Agency is conditioned upon the employment of the foreigner not resulting in "adverse consequences" for labor market.⁶¹ Also, no German or other foreigner with employment preference, such as nationals of EU Member States, can be available for the area of employment.⁶² The Federal Employment Agency may also grant a work permit if they find that, regardless of the other criteria, filling the position with a foreign worker is justified by the market and integration goals.⁶³ These requirements on migrant employment seem overly restrictive, especially considering the preference given to EU Member State nationals.

The question remains as to the effect of these reforms without the support of the EU. Germany is in need of regulation of *all* third-country nationals, not merely those currently immigrating. 2001 marked the fortieth anniversary of the Turkish-German Gastarbeiter agreement, which has led to the largest group of foreigners living in Germany.⁶⁴ While there has been some repatriation of migrants, a large proportion of this includes first generation migrant workers and their second and third generation descendents. The result is that nearly every sixth citizen has migrated to Germany or comes from a migration background.⁶⁵

There is severe disparity between German nationals and foreigners. In 2005, the first year of the Immigration Act, Germany's unemployment rate was 11.1 percent.⁶⁶ However, the unemployment rate for German nationals was 10.2 percent while third-country nationals were at 24.4 percent.⁶⁷ Since

⁶⁰ Aufenthengl, *supra* note 59, § 18, at 24.

⁶¹ *Id.* § 39 at 38

⁶² *Id.*

⁶³ *Id.*

⁶⁴ Ayça Kiliçli. *Turkish Migrants in Germany, Prospects of Integration*, OBSERVATORI DE POLITICIA EXTERNA I DE SEGURETAT COMUNA [Observatory of European Foreign Policy], EUTR 16/2003, available at http://selene.uab.es/_cs_iuee/catala/Obs/dossier_turquia/tk_analisis/eutr_16_2003klicli.pdf (last visited Jan. 1, 2008).

⁶⁵ Facts About Germany, Immigration and Integration, <http://www.tatsachen-ueber-deutschland.de/en/> (follow "Society" hyperlink; then follow "Immigration and integration" hyperlink) (last visited Dec. 27, 2007).

⁶⁶ Eurostat, *supra* note 7. Calculated using total population, 81528.7 (in 100s), and unemployed population, 4572.9.

⁶⁷ *Id.* Calculated using total German National active population, 27866.7, the German National unemployed population, 3799.3, the active population of citizens of countries outside the EU, 2397.0, and the unemployed population of third-country nationals, 584.0. For comparison purposes, the European Union's unemployment rate was nine percent overall, and 1.7 percent of third-country nationals were unemployed, or .6 percent of the total unemployment.

Gastarbeiter recruitment was for reconstructive purposes and very few skilled positions, the majority of the third-country population is only eligible for employment as unskilled workers. Germany's focus on recruitment in the previous years, and in the 2005 reformation, is to bring skilled technical workers and specialists to the country. While this restriction may ebb the flow of unskilled workers, there are no provisions for the unemployed designated unskilled workers currently living in Germany. Reviews of the 2005 policy implications are mediocre. At the one year anniversary, news reports revealed disappointment in a policy that was meant to aid third-country nationals.⁶⁸ Integration still creates significant inequalities between the Turkish population and the German nationals. While new legislation offers some integration assistance, it lacks the detail and implementation plan that would allow true aide to Turkish migrants experiencing difficulty establishing themselves within Germany.

THE NEED FOR REFORM

It is obvious by the actions of the European Union institutions that employment regulation is becoming a prioritized issue. It is obvious by their inaction that a new approach needs to be taken towards employment, and a successful approach should be fully inclusive of third-country migrant workers. In order to mobilize the European labor force to revitalize the economy, legislation must take into account the needs of a portion of the population that contributes to overall productivity. While regions are currently suffering high unemployment rates, the EU is facing a complex problem of an aging work force. Even if the Lisbon objectives are achieved by 2010, which is unlikely, the employment level will decline due to demographic changes in the Union population.⁶⁹ Between 2010 and 2030 the employment force will drop by an estimated twenty million people, a number which accounts for migration at the current level.⁷⁰ The utilization of third-country migrant workers presents a possible solution to this dilemma if the Council is able to develop appropriate regulation of that portion of the population.

As was proposed nearly a decade ago at the Tampere Council, the EU needs a common policy addressing all aspects of employment. The majority of

⁶⁸ See Bernd Gräßler, *First German Immigration Law Takes Effect*, DEUTSCHE WELLE, Jan. 1, 2005, available at <http://www.dw-world.de/dw/article/0,1564,1442681,00.html> (last visited Dec. 19, 2007); Hardy Graupner, *Germany's Immigration Law Marks One Year*, DEUTSCHE WELLE, Jan. 2, 2006, available at <http://www.dw-world.de/dw/article/0,2144,1841955,00.html> (last visited Dec. 19, 2007).

⁶⁹ Commission *Green Paper on an EU Approach to Managing Economic Migration*, *supra* note 25.

⁷⁰ *Id.*

third-country regulation has focused on migration for economic purposes, but the situation calls for more than this. Consideration should be given to those already present in Member States, and those that are entering under presumed purposes other than employment. With the asylum laws differing between Member States, third-country nationals may enter into a State with lenient regulation for asylum purposes, but then must enter the employment market. This would have dual effect on migration if the Union began a uniform regulation of employment.

Employment legislation needs to address specific needs of Europe in its entirety and Member States individually. Current proposals and reform efforts look at the broad scope of employment and the labor market, such as developing a better-educated labor force and fostering investment and job creation. A successful policy includes requirements of Member States on specific issues. Action is necessary to combat disparities arising due to nationality. Article 12 of the EC Treaty prohibits discrimination based on nationality in the implementation of the Treaty, which now would include Title VIII on employment.⁷¹ The Council is empowered under its authority in the treaty to act to hinder such discrimination, thus allowing it the ability to make such directives as deemed necessary to ensure equality of third-country nationals seeking employment.⁷² A common policy may also ensure efficiency in implementation and enforcement. A uniform plan mandating the establishment of rights and responsibilities of third-country nationals wishing to work within the EU is easily enforced by the creation of an agency to monitor this, much like some of the agencies that have been developed to monitor migration within countries.⁷³

The Council took some action in 2003 by adopting a directive regarding the rights of long-term resident third-country nationals.⁷⁴ The directive recognizes the need to integrate long-term residents for the good of both the Member States' economies and the European economy as a whole and states that third-country nationals should receive equal treatment as Member State nationals.⁷⁵ Requirement of third-country nationals to achieve

⁷¹ EC Treaty, *supra* note 4, art. 12, at 43.

⁷² *Id.*

⁷³ For example, The Bundesagentur für Arbeit [German Federal Agency for Employment] already offers comprehensive services in Germany and throughout Europe for employment purposes. Such State agencies like this could be required by EU regulation and State legislation to monitor the employment and treatment of third-country migrant workers. <http://www.arbeitsagentur.de/> (last visited Dec. 28, 2007).

⁷⁴ Council Directive 03/109, 2003 O.J. (L 16) (EC), *available at* http://eur-lex.europa.eu/LexUriServ/site/en/oj/2004/l_016/l_01620040123en00440053.pdf (last visited Dec. 27, 2007).

⁷⁵ *Id.* at 1, art. 2, 4.

such status is proof they will not burden the Member State, by showing they have adequate resources and insurance, as well as a broad allowance of individual domestic integration requirements imposed by the Member States.⁷⁶ Upon such showing, and after being granted the status by domestic authorities, long-term residents have equal treatment to nationals, including access to employment.⁷⁷ While this directive does provide protections to third-country nationals, it is extremely conditional, and a broad reading of the directive would allow much leeway to Member States in conferring the status. The terms upon which migrants are granted this standing are contradictory and arguably self-defeating. They must demonstrate they have the means to care for themselves and their dependants, but yet they have only equal access to the labor market after demonstrating this. They can have access to welfare and sickness benefits but only once they have proven they already hold insurance. This also excludes those that have resided in the Member State for less than five years. Thus, this leaves a large group with no equal protection in which to establish themselves and no way to meet the requirements for acquiring long-term residency or fulfilling any additional domestic integration requirements.⁷⁸

The long-term resident directive appears to move in the direction of providing the employment and establishment rights of third-country nationals but falls short. This is the trend in the EU legislation, which is either incomplete, insufficient, or unenforceable.

The EU institutions need to refocus the policy development to create a single policy. Rather than leaving certain aspects of employment law to Member States' discretion, an efficient policy would regulate all aspects of third-country national employment.⁷⁹ The policy is currently scattered, and the EU should concentrate on generating a single document that encompasses all current and reformed legislation. This would allow for efficient implementation, permitting Member States to reference a single directive or regulation rather than the multiple documents currently making up the third-country national employment strategy. Problems and gaps in the legislation, creating regional disparities in employment and the domestic issues causing disparity between Member State nationals and third-country nationals, could be more easily identified in a single document.

⁷⁶ *Id.* at 4, art. 5.

⁷⁷ *Id.* at 6, art. 11.

⁷⁸ *Id.* at 4, art. 5.

⁷⁹ National employment legislation presents an obvious sovereignty issue. While the EU may, and does, regulate some aspects of national employment, a comprehensive policy should address third-country national employment only.

With the European Union expanding further, a reformed, common employment policy would provide guidance to new Member States in respect to their obligations towards third-country nationals currently living in their territory as well as those migrating in the future from both their home country or other Member States.⁸⁰ The accession of more States to EU obligations will complicate compliance with a common third-country national employment policy should the EU institutions postpone implementation. Current Member States would have to modify domestic legislation, while future states would be required to adopt the EU's uniform policy as a condition of admittance. The more Member States that must alter their current laws, the less likely such a policy would be accepted. Therefore, immediate action is essential to the level of success a unified employment plan would achieve.

Overlooking the large group of third-country nationals that reside in the EU territory only reinforces the occurrences of nationality discrimination. The EU, in a sense, is creating outsiders that live within its own boundaries. By not establishing clear rights and responsibilities for third-country nationals, EU citizens may believe that unequal treatment is acceptable. In fact, the EU regulations appear more restrictive on third-country nationals. There are severe psychological results of establishing a division in protections between two groups living in the same area. The EU must acknowledge that Member States are experiencing serious problems with the integration of third-country nationals and that a consistent regulation must be applied to create harmony within the Union, both between Member States and among EU citizens and third-country nationals. If such a large population is to reside and contribute to Europe as a whole, there must be clear guidelines that would promote a positive co-existence with Member State nationals.

Legislation regarding third-country nationals is primarily left to the discretion of Member States' domestic policies. Repeatedly in the employment policy field, EU institutions recognize the acknowledgment of third-country nationals as a right of individual countries, with the exception of broad anti-discrimination and immigration requirements.⁸¹ Hesitation to implement a common, binding regulation may rise out of sovereignty concerns. The EU is still developing as an organization and structuring its authority, which

⁸⁰ The History of the European Union: 2000-today, Europa, http://europa.eu/abc/history/2000_today/index_en.htm (last visited Jan. 1, 2007) (stating that in 2007, the EU expanded to include Bulgaria and Romania, totaling ten new Member States in three years. Croatia, the Former Yugoslav Republic of Macedonia, and Turkey are currently candidates for EU membership. The addition of Turkey would have a drastic impact on the status of Turks residing in Germany.)

⁸¹ *Commission Green Paper on an EU Approach to Managing Economic Migration*, *supra* note 25.

expanded significantly in recent decades. While Member States released some influence over domestic issues to the EU institutions, States do not wish to have a single controlling body that completely regulates the domestic policies of the individual States. The States demonstrated this reluctance in the recent problems regarding the adoption of the European Union Constitution.⁸² In a period of expansion and uncertainty, Member States appear to be reigning in the EU's control. The States demonstrated further reluctance in 2001 when they allowed the proposed comprehensive directive regarding regulation of economic migration to come to a standstill.⁸³ States may be weary to relinquish control of what is traditionally viewed as a domestic concern to a supranational governing body.

A properly developed strategy for the regulation of third-country migrants, while encroaching on the sovereignty of the Member States, would create a cohesive approach that would benefit the countries' economies in the long-term. In many cases, a detailed policy would merely supplement pre-existing legislation or provide guidance where such regulation does not exist currently. Variations and troubles between countries in unemployment and migration would be alleviated. While the neighboring countries of France and Germany both have combined residence and work permits, the criteria for obtaining such permits vary between the two countries, as well as the length of the permits and the allowances afforded to a possessor.⁸⁴ This allowance would be an extension of the principles set out in the EC Treaty by broadening the protections to include third-country nationals residing in the territory, and would affect third-country nationals more than burdening EU citizens. It would also alleviate burdens on domestic agencies by creating a structure for

⁸² See *What the EU Constitution Says*, BBC NEWS, June 22, 2004, <http://news.bbc.co.uk/1/hi/world/europe/2950276.stm> (last visited Jan. 1, 2007) (stating generally that the EU Constitution was proposed in 2004 and, while claiming to protect Member State powers, appeared to expand EU authority further, including in the area of immigration); see *EU Constitution: Where Member States Stand*, BBC NEWS, March, 25, 2007, <http://news.bbc.co.uk/1/hi/world/europe/3954327.stm> (last visited Jan. 1, 2007) (stating that the Constitution was rejected by France and the Netherlands in 2005, and seven other countries have delayed ratification, leaving the Constitution's future undecided).

⁸³ *Proposal for a Council Directive on the Conditions of Entry and Residence of Third-Country Nationals for the Purpose of Paid Employment and Self-Employed Economic Activities*, *supra* note 23.

⁸⁴ Compare ECOTEC, *supra* note 20, at 96 (stating that France grants two combined residency and employment permits, a "salaried" card allowed ten years of employment in any job, and a "temporaire" card for one year with limited employment access) with Federal Ministry of the Interior, *supra* note 43 (stating that Germany grants two permits, a temporary and permanent).

which to operate and address the problems state legislators are currently facing.

Returning to the case of Germany, it is easy to see how EU regulation would improve the social and economic troubles of the large third-country national population. With a regulated employment system, those currently residing in Germany could obtain necessary work permits, since the new German legislation only focuses on granting permits to newly migrating individuals. The large third-country national population that has previously migrated to Germany from their home countries, as well as other Member States, must be utilized to stimulate the German economy. At the same time, the unemployed population may find it easier to migrate to areas with more opportunity if granted an EU work permit, rather than seeking a new permit from each individual state.

Protections for third-country nationals in Germany and assistance in obtaining fair and equal employment would also lessen tensions and violence frequently occurring, especially between the large Turkish population and German nationals.⁸⁵ Remedying the employment disparity between the third-country national population and the German and EU citizens would aide in integration, a goal Germany admits is significant in the success of their social system. Protecting Turkish migrants from discrimination in employment is a step towards utilizing Germany's diverse population to benefit the countries large economy.

The EU is fully capable of developing a plan addressing third-county nationals and determining which employment rights would best serve the Union while allowing fair treatment of these workers. For more than ten years, the Commission and the Council have requested significant research in this area of law.⁸⁶ The best resource the Council currently has is the Commission's Green Paper on an EU Approach to Managing Economic Migration.⁸⁷ While the focus of the Green Paper is stemming migration in the best interest of the economy, it addresses the employment problems created by the inconsistent

⁸⁵ See Michael Scott Moore, *Turkish-German or Just German?*, SPIEGEL ONLINE, April 5, 2006, <http://www.spiegel.de/international/0,1518,409914,00.html> (last visited Jan. 1, 2007) (stating that Berlin school teachers call for vocational school to close because of violence by Turkish and Arab students). See Ray Furlong, *'Honour Killing' Shocks Germany*, BBC NEWS, Mar. 14, 2005, available at <http://news.bbc.co.uk/2/hi/europe/4345459.stm> (last visited Jan. 1, 2007) (stating that German experiences honor killings, with Turkish women being killed by family for defying Islamic culture).

⁸⁶ See generally ECOTEC, *supra* note 20.

⁸⁷ Commission Green Paper on an EU Approach to Managing Economic Migration, *supra* note 25.

rights and protections granted throughout the Member States, as well as the various practices in granting employment statuses to third-country nationals. It also contains several options as to strategies that could serve as starting points for constructing a large policy that would take account of all aspects of third-country national migration in the EU and the related employment questions.

As the European Union faces an aging demographic in the next decade, immediate action would avoid any detrimental economic implications that might occur. The EU is based on the fundamental theory that a single market would benefit all people of Europe. This should take into account the population of third-country nationals that are affecting that economy. This work force should be utilized to have a positive impact on the EU. The Union, as a supranational body that is developing unlike any other, should assume the responsibility for this regulation, and provide a framework as issues similar to this develop in the globalizing world.