



The US Labour Immigration Scheme – All about being attractive? EU Perceptions and Stakeholders' Perspectives Reviewed

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Abstract

Labour immigration schemes that effectively attract qualified immigrant workers are a policy priority for many governments. But what are 'attractive' labour immigration schemes and policies? To whom are (or should) such policies (be) attractive? In Europe, the US is often portrayed as one of the most 'attractive' countries of immigration – if not *the* most 'attractive'. This paper aims to analyse and provide a better understanding of the elements of the US immigration system that are supposedly attractive to foreign workers, by examining key features of the current and prospective US labour immigration rules. The paper finds that 'attractiveness' in this policy context is a highly malleable and flexible concept: What might be 'attractive' to one key stakeholder might not be to another.

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The US Labour Immigration Scheme – All about being attractive? EU Perceptions and Stakeholders’ Perspectives Reviewed Katharina Eisele*

CEPS Paper in Liberty and Security in Europe No. 67 / September 2014

1. Introduction

Labour immigration schemes that effectively attract qualified immigrant workers are a policy priority for many governments. But what are ‘attractive’ labour immigration schemes and policies? To whom are (or should) such policies (be) attractive? And who is attracting whom?

On the international stage states often operate on the rationale that they should entice highly skilled immigrants (‘the brightest minds’) to their territories with the aim of boosting economic vitality and competitiveness.¹ It is striking that most of the academic literature on highly skilled immigration adopts without question this rationale in which states participate in the ‘global race for talent’.

The US has always been considered a classic ‘attractive’ destination country for immigrants. America’s history is one of immigration: the US developed as a nation state first and foremost due to various waves of immigrants who have made it – with its approximately 314 million inhabitants – the third most-populous nation in the world today. After the colonial period, the 18th- and 19th-century mass migrations to the US culturally enriched the North American country with multiple ethnic and national groups from northern, southern and eastern Europe. From the 1960s onwards, Latin America and Asia have been the main continents of origin.²

Each year, the US admits approximately one million immigrants as lawful permanent residents and more than 50 million temporary visitors.³ Of those admitted as lawful permanent residents, by far the largest group are relatives of US residents (approximately 66%); the two leading source countries of lawful permanent residents are Mexico and China.⁴ The lawful permanent residents that enter the US specifically for the purpose of employment originate in particular from India, China and South Korea; but it must be borne in mind that a lot of people admitted under family reunification enter the US labour market at some point.⁵ It is true that the US has been a magnet for labour immigration. Foreign-born workers have formed a continuously increasing share of the US labour force from the 1980s onwards. According to the Bureau of Labor Statistics of the US Department of Labor and other projections on immigration trends, immigrants will remain significant drivers in the growth of the US labour market for some time in the future. In addition, foreign workers have constituted and continue to make up an important share of the US labour market across the skill

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¹ See F. Beaugé (2010), “Singapore plans for new wave of immigrants to help economy’s growth”, *The Guardian*, 3 August; M. Popp and J. Tietz (2013), “Tepid Welcome: Germany Struggles to Lure Skilled Workers”, *Der Spiegel*, 12 December; B. Trott, et al. (2014), “U.S. Proposes Immigration Rules to Help High-Skilled Workers”, *Reuters*, 5 May.

² See S. Martin (2011), *A Nation of Immigrants*, New York: Cambridge University Press.

³ M. Fullerton, (2014 forthcoming), “An overview of Labor Migration Policies in the United States”, in S. Carrera, E. Guild and K. Eisele (eds), *Rethinking the Attractiveness of EU Labor Immigration Policies – Comparative Perspectives on the EU, USA, Canada and Beyond*, Centre for European Policy Studies, Brussels.

⁴ *Ibid.*, quoting the 2012 Yearbook of Immigration Statistics of the U.S. Department of Homeland Security on Legal Permanent Residents.

⁵ *Ibid.*

spectrum.⁶ In the 1990s and 2000s the demand for immigrant labour in the US grew when the American economy flourished, and slowed only with the 2008 financial crisis that culminated in a global economic crisis.⁷ There is widespread agreement that present US labour immigration legislation needs to change, but consensus on the changes has been elusive. In 2013, the US Senate passed new rules for labour immigration as part of the proposed *Border Security, Economic Opportunity, and Immigration Modernization Act 2013*, but the House of Representatives has not agreed to that bill.⁸

In the European Union, by contrast, no common European labour immigration policy exists today, but one is gradually developing piecemeal.⁹ In 2012, 2.1 million first residence permits were issued to third-country nationals (non-EU nationals); 32% of these permits were issued for family reasons, 23% for remunerated activities, 22% for study and 23% for various other reasons.¹⁰ The highest number of first permits were given to US nationals (200,000 individuals, representing 9.5% of the EU total), followed by nationals of Ukraine, China and India (163,000, 161,000 and 157,000 respectively, each representing approximately 7.5% of the EU total). Significant numbers of permits (from 5% down to 2.5% of the EU total) were issued to nationals of Morocco (102,000), Russia (66,000), Philippines (62,000), Turkey (59,000) and Brazil (51,000).¹¹ The number of Schengen visas (allowing for stays of up to 90 days in any 180-day period in the Schengen area¹²) issued worldwide increased in 2012 to 14.2 million.¹³

The EU has repeatedly called for a common well-managed migration policy that effectively contributes to the Europe 2020 Strategy for smart, sustainable and inclusive growth. In March 2014 the European Commission reiterated that “Europe must attract new talent and compete on the global stage” and called for a “joint assessment of needs” in the member states.¹⁴ To recall, the 2001 Commission proposal covering entry and residence of (all) third-country nationals for employment purposes was rejected by the member states in the Council of the EU. The Commission opted to follow a sectoral approach as proposed in the 2005 Policy Plan on legal migration.¹⁵ The EU Blue Card Directive to attract “highly-skilled” immigrants from non-EU countries is one of the legal instruments of this sectoral approach.¹⁶ The EU Blue Card Directive sets out

⁶ L. Lowell, J. Gelatt and J. Batalova (2006), “Immigrants and Labor Force Trends: The Future, Past and Present”, MPI Insight No. 17, Migration Policy Institute, Washington, D.C.

⁷ P. Fargues, et. al. (2011), “Shared Challenges and Opportunities for EU and US Immigration Policymakers”, *Improving US and EU Immigration Systems*, Florence and Washington, D.C., European University Institute and Migration Policy Institute.

⁸ *U.S. Border Security, Economic Opportunity, and Immigration Modernization Act 2013*, bill number S. 744, 113th Congress (2013-2014).

⁹ See S. Carrera, and M. Formisano (2005), “An EU Approach to Labour Migration – What is the Added Value and the Way Ahead?”, CEPS Working Document No. 232, Centre for European Policy Studies, Brussels, October; S. Carrera (2007), “Building a Common Policy on Labour Immigration: Towards a Comprehensive and Global Approach in the EU”, Working Document No. 256, CEPS, Brussels, February.

¹⁰ European Commission (2014), 5th Annual Report on Immigration and Asylum, COM(2014) 288, Brussels, 22.5.2014, p. 3; 2012 Eurostat quoted.

¹¹ Ibid.

¹² The Schengen area consists of 26 states (22 EU member states and four non-EU countries, namely Iceland, Liechtenstein, Norway and Switzerland).

¹³ European Commission (2013), 4th Annual Report on Immigration and Asylum, COM(2013) 422, Brussels, 17.6.2013, p. 7.

¹⁴ European Commission (2014), Communication on an open and secure Europe: making it happen, COM(2014) 154, Brussels, 11.3.2014, p. 4; see below under 3.2.

¹⁵ European Commission (2001), 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, Brussels, 11.6.2001; European Commission (2005), Communication on a Policy Plan on legal migration, COM(2005) 669, Brussels, 21.12.2005.

¹⁶ Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment; for a discussion on the definition of “highly qualified” in the EU Blue Card Directive, see K. Eisele, (2013), “Why come here if I can go there? Assessing the ‘Attractiveness’ of the EU’s

admission and residence conditions for the purpose of highly qualified employment, but it has been subject to EU inter-institutional struggles, which have considerably compromised the Directive's 'attractiveness'. Arguably, this situation has resulted in an approach that has ignored the interests of businesses and the individual immigrants who still may have to face a slow and oppressive bureaucracy. In contrast to the European Commission's initial proposal, the final version of the EU Blue Card Directive does not create a common European admission scheme for highly skilled immigrants, but rather only sets minimum standards.¹⁷

In Europe, the US is often portrayed as one of the most 'attractive' countries of immigration – if not the most 'attractive'. In the proposal on the EU Blue Card, the European Commission stated that "the EU as a whole, however, seems not to be considered attractive by highly qualified professionals in a context of very high international competition: for example, the EU is the main destination for unskilled to medium-skilled workers from the Maghreb (87% of such immigrants), while 54% of the highly qualified immigrants from these same countries reside in the USA and Canada." The Commission explains that "the attractiveness of the EU compared to such countries suffers from the fact that at present highly qualified migrants must face 27 [now 28] different admission systems"; that it is difficult to move cross-border to another member state for employment purposes; and that highly qualified immigrants in view of "lengthy and cumbersome procedures" choose non-EU countries with more favourable conditions for entry and stay.¹⁸

Thus the Commission defines the following three factors of 'attractiveness':

- one single admission system;
- the ability to easily move cross-border for work;
- fast-track, easy and unbureaucratic admission procedures.

This paper aims to analyse and provide a better understanding of the elements of the US immigration system that are supposedly attractive to foreign workers, by testing current and prospective US labour immigration rules against the three 'attractiveness' factors identified by the European Commission. Questions arise as to what it is that has made the US allegedly so popular among the global mobile workforce and whether the US labour migration policy is a model to emulate. Alternatively, which specific elements of US policy could be useful in the EU context? What does it tell us that the US is in the process of changing its immigration laws? Before examining these questions regarding the US system, the paper will first critically map the push/pull framework that sketches the general reasons for migration. The paper will then discuss the perspectives of the main stakeholders and actors on which elements make labour migration policies particularly attractive. This review of stakeholder perspectives allows the reader to better understand the malleability of the concept of 'attractiveness' and the important role of time.

The paper seeks to build on the research carried out within the project *Improving US and EU Immigration Systems* conducted by the European University Institute (EUI) and the Migration Policy Institute (MPI), which analysed key aspects of immigration policy in the EU and the United States and offered the opportunity to policy-makers on both sides of the Atlantic to learn from one another.¹⁹ Based on a legal analysis, the present paper seeks to add a new perspective to this research by integrating a migrant-centred approach that considers the interests of the individual migrants rather than focusing only on those of policy-makers and employers.²⁰

Blue Card Directive for 'Highly Qualified' Immigrants", Working Paper No. 60, *CEPS Liberty and Security in Europe Series*, CEPS, Brussels, October.

¹⁷ Ibid.; see also European Commission (2014), Communication on the implementation of Directive 2009/50/EC on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment ("EU Blue Card"), COM(2014) 287, Brussels, 22.5.2014.

¹⁸ European Commission (2007), Explanatory Memorandum to the Proposal for a Council Directive on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, COM(2007) 637, Brussels, 23.10.2007, p. 3.

¹⁹ For more information on this project, see: www.eui.eu/Projects/TransatlanticProject/Home.aspx.

²⁰ The report of D.G. Papademetriou, W. Somerville and H. Tanaka (2008), "Talent in the 21st-Century Economy", Migration Policy Institute, Washington, D.C., November, has integrated the perspective of highly skilled immigrants

2. Why do people migrate – or not? The Push/Pull Framework Reviewed

The issue of ‘attractiveness’ of immigration policies is closely related to the question of why people decide to migrate (or not) from one country to another. In the 1880s, the geographer E.G. Ravenstein presented “The Laws of Migration” on the basis of which he attempted to explain migratory movements within and between countries.²¹ These laws state, *inter alia*, that most migrants only move over a short distance; that every migration flow produces a compensating counter flow; and that economic factors are the main causes of migration. Regarding the last, Ravenstein observed that migration was driven by two sets of conditions: (1) unfavourable conditions in one place, e.g. oppressive laws and low wages; and (2) favourable conditions in another place, e.g. a favourable legal framework and higher wages.²² His theory formed the basis for the “push/pull-factor theory”, which was developed by E. Lee in 1966.²³ It has been pointed out that Lee was the first “to formulate migration in a push-pull framework on an individual level, looking at both the supply and demand side of migration.”²⁴ Lee contended that positive and negative factors at the places of origin and destination push and pull migrants towards or away from migration.²⁵ Which are those factors that push people to leave a place, and incite people to move to a specific (supposedly more attractive) country? For example, in view of pull factors it has been claimed that competitive salaries, better career opportunities, family links or a high-living standard make migrants opt for a certain destination country; such claims interpret labour flows as a result of poverty in the country of origin.²⁶ Theories on push and pull factors have been criticised – rightly so, as otherwise no professionals should be left in the southern hemisphere. In view of Lee’s model it was stated that “this is barely a theory, it is more a grouping of factors affecting migration, without considering the exact causal mechanisms.”²⁷ Another point of critique relates to the fact that such theories tend to be *post factum*, meaning they are applied to migration flows that are already taking place and are therefore inapt to explaining why similar immigration movements do not originate from equally underdeveloped regions or countries.²⁸ A. Portes and J. Böröcz consider that the push/pull theories are incapable of predicting the two main differences among individuals in the origin of migration: (1) differences among collectivities – primarily nation states – in the size and directionality of movements; (2) differences among individuals in the same country or region in their tendencies to migrate.²⁹

Different migration theories have proposed to explain why international migration begins (such as neoclassical economics, new economics of migration, dual labour market theory, world systems theory) and why it perpetuates across time and space (network theory, institutional theory, cumulative causation, migration systems theory).³⁰ However, as D. Massey, et al., pointed out in

and its findings are referred to in this article, but the report was drafted within the scope of the *Transatlantic Council on Migration*, see in particular pp. 22-30 thereof.

²¹ E.G. Ravenstein (1885), “The Laws of Migration”, *Journal of Statistical Society of London*, Vol. 48, No. 2, pp. 176-235; E.G. Ravenstein (1889), “The Laws of Migration”, *Journal of the Royal Statistical Society*, Vol. 52, No. 2, pp. 241-305.

²² See S. Hun Kim and W. Ma (2011), *The Korean Diaspora and Christian Mission*, Oxford: Regnum Books International, pp. 36-37.

²³ *Ibid.*; E. Lee (1966), “A Theory of Migration”, *Demography* Vol. 3, No. 1, pp. 47-57.

²⁴ J. Hagen-Zanker (2008), “Why do people migrate? A review of the theoretical literature”, MPRA Paper No. 28197, Maastricht Graduate School of Governance, p. 9.

²⁵ *Ibid.*

²⁶ See for example World Migration Report (2003), *Managing Migration – Challenges and Responses for People on the Move*, IOM, p. 218.

²⁷ Hagen-Zanker (2008), *op. cit.*, p. 9.

²⁸ A. Portes and J. Böröcz (1989), “Contemporary Immigration: Theoretical Perspectives on its Determinants and Modes of Incorporation”, *International Migration Review*, Vol. 23, No. 3, pp. 606-630, 607.

²⁹ *Ibid.*

³⁰ See in this regard D. Massey, et al. (1993), “Theories of International Migration: A Review and Appraisal”, *Population and Development Review*, Vol. 19, No. 3, pp. 431-466, which offers an evaluation of such theories; for a critical assessment of this article, see Hagen-Zanker, *op. cit.*

1998, “at present, there is no single theory widely accepted by social scientists to account for the emergence and perpetuation of international migration throughout the world, only a fragmented set of theories that have developed largely in isolation from one another, sometimes but not always segmented by disciplinary boundaries.”³¹

The perhaps more fundamental question to be raised is why do people not move – or why do so few move. A telling example is the EU where, under the umbrella of European citizenship, nationals of EU member states enjoy freedom of movement – one of the four fundamental freedoms of the EU.³² Despite this robust free movement scheme for EU citizens, the percentage of EU citizens living, working or studying in a member state other than that of their origin is rather low. According to the European Commission 14.1 million EU citizens were residing in another member state at the end of 2012 (mostly for employment-related purposes), which amounts to 2.8 % of the total population.³³ From 2006 onwards there has been a gradual increase of mobility due to the economic recession and the gradual reduction of mobility potential.³⁴

Thus push/pull considerations can only provide limited explanations for migration decisions. Immigration policies are only one factor that can play a role in a person’s decision to move to another country, given that the phenomenon of international migration is highly complex and multifaceted. The next section first briefly sketches some views in the academic literature on immigration policies and then concentrates on the main stakeholders’ perspectives.

3. What kind of immigration policies? ‘Attractiveness’ Is in the eye of the beholder

The issue of how to configure immigration policies (and the underlying rationale thereof) has been analysed in academic literature. S. Legomsky has elaborated the distinct priorities of policy-makers in immigration policy as ‘missions’ in a philosophical context: “ ‘At the highest level of generality, is the goal solely to maximize the overall welfare of the country’s existing and future citizens, as is often assumed? Or, is there a moral obligation to take into account the interests of the prospective immigrants as well?’ Thus Legomsky points to the issue of conflicting interests and the necessity to prioritise: in view of economic objectives, is the focus purely economic vitality, or is the equitable distribution of economic resources a policy priority? What role should national security, diversity, population size, the safeguarding of democratic and constitutional ideals, or family reunification play in immigration policy? He concludes by stating, ‘symbolically, what statement should a country’s immigration policy make to its own people and to the world, about the nation’s basic values and self-identity?’”³⁵

S. Macedo takes the view that there is a special obligation of a country towards its “own” poor and less well-off citizens. In his chapter “The Moral Dilemma of U.S. Immigration Policy – Open Borders Versus Social Justice?”, he argues that US immigration policy must take into account that social and distributive justice for fellow citizens outweighs humanitarian concerns for the plight of poor persons abroad: “Immigration policy – as part of the basic structure of social institutions – ought to be answerable to the interests of the poorest

³¹ D. Massey, et al. (1998), *Worlds in Motion: Understanding International Migration at the End of the Millennium*, Oxford: Clarendon Press.

³² For a theoretical assessment on the challenges associated with EU citizenship, see E. Guild, C.J. Gortázar Rotaecche and D. Kostakopoulou (2014), *The Reconceptualization of European Union Citizenship*, Leiden: Martinus Nijhoff Publishers.

³³ European Commission (2013), Communication on free movement of EU citizens and their families: five actions to make a difference, COM(2013) 837, Brussels, 25.11.2013, p. 3; DG Employment estimates based on Eurostat migration statistics and the EU-Labour Force Survey (LFS).

³⁴ Ibid.

³⁵ S. Legomsky (2012), “Immigration Policy from Scratch: The Universal and the Unique”, *William and Mary Bill of Rights Journal*, Vol. 21, No. 2, pp. 339-366, 341-342.

Americans.”³⁶ J.H. Carens, however, argues that citizens and non-citizens should be treated alike when it comes to immigration policy, as will be further explained below.

What are the main stakeholders’ perspectives on ‘attractive’ policies in the field of labour migration? For whom are or should migration policies be attractive? There are a variety of actors one can think of; for the purpose of this paper, the perspectives of three main stakeholders are presented. These include the *individual immigrant worker* looking for job opportunities abroad; *the economies* (including the social partners); and *the receiving states* (represented by its civil servants).

3.1 The Individual Immigrant Worker

If we consider the individual immigrant worker, a number of factors are relevant to his decision to opt for a certain country in that they make a particular destination more attractive than others. However, migrants are not a homogeneous group and individuals take migration decisions based not purely on economic considerations; certain non-economic factors help explain why immigrants from certain source countries choose certain destination countries.³⁷ Such factors include, for example, existing migrant networks (including family ties), geographical and cultural distance (including historical links, ‘linguistic’ distance or proximity of religious beliefs), and immigration policies. Yet, other factors that make a certain country more attractive for immigrants may relate to employment (and career) opportunities, including wages, unemployment rates and skill-specific incentives to migrate³⁸ – however, as indicated above, any ‘pull considerations’ must always be taken with a grain of salt.

D.G. Papademetriou, et al., examined highly skilled immigrants’ work choices in the global economy.³⁹ The authors organised their analysis along three pathways:

- *Decision drivers* (“first-order” variables), which are essential in the process of deciding where to move; these “first-order” variables have permeable boundaries, allowing each variable to reinforce the others. Decision drivers include: opportunity (getting the best return on one’s own capital investments); capital infrastructure (research facilities, growth opportunities, dynamic environment); and substantial numbers of other talented professionals (synergistic work environments facilitating innovation).
- *Decision-making facilitators* (“second-order” variables), which influence the migration decision but are not likely to determine the outcome; their effects differ for each individual depending on personal and professional circumstances. Such facilitators can also be permeable. Facilitators include: a fair and generous social model; lifestyle and environmental factors; a tolerant and safe society.
- *The “total immigration package”* (defined as the immigration rules that apply to immigrants both upon and after entry and the treatment they can expect in the host country), which the authors classify as being between the drivers and facilitators.⁴⁰ The total immigration package can exert strong influence on the decision to choose a destination but is not necessarily a determinant thereof. These four elements are considered most essential to the package: (1) clear, fair and transparently applied immigration rules; (2) paths to permanent residency and citizenship; (3) recognition of foreign credentials⁴¹; (4) opportunities for family members.

³⁶ S. Macedo (2007), “The Moral Dilemma of U.S. Immigration Policy – Open Borders Versus Social Justice?”, in C.M. Swain (ed), *Debating Immigration*, Cambridge: Cambridge University Press, pp. 63-81.

³⁷ W. Geis, S. Uebelmesser and M. Werding (2008), “Why go to France or Germany, if you could as well go to the UK or the US? Selective features of immigration of four major OECD countries”, *CESifo Working Paper No. 2427*, CESifo, Munich.

³⁸ *Ibid.*, pp. 7-20.

³⁹ Papademetriou, Somerville and Tanaka, *op. cit.*, pp. 22-30.

⁴⁰ *Ibid.*, pp. 25-30.

⁴¹ See M. Sumption, D.G. Papademetriou, and S. Flamm (2013), “Skilled Immigrants in the Global Economy – Prospects of International Cooperation on Recognition of Foreign Qualifications”, Migration Policy Institute, Washington, D.C.

The total immigration package is of particular interest here because governments have the most direct control over shaping it.⁴² As D.G. Papademetriou, et al., explain, clear, fair and transparently applied immigration rules are key because they provide clarity to immigrants as regards their legal status and rights in the host state, and predictable outcomes of immigration-related issues. “In this regard, work visas that offer their holders security of permanent residence up front are unsurpassed in terms of the value to foreign workers”, which is limited mostly to traditional immigration countries.⁴³ This element is closely linked to paths to permanent residency and citizenship: while some countries only provide for temporary work visas without presenting the prospect of continued residence, other countries have clearer and flexible paths from temporary to permanent residency.⁴⁴

In terms of admission rules (meaning the ease with which migrants are admitted to a country for purposes of employment) the following questions arise that can play a vital role for a migration decision:

- How easy/difficult is it to be granted admission to a state for the purpose of work, i.e. what visa policies are in place?
- What are the procedures to obtain the right to admission in the form of a visa?
- How long do such procedures take (time being an important factor) and are they cumbersome or rather fast-track?
- What are the costs of the procedures for admission?
- How is the information for such admission procedures available and accessible?⁴⁵

In terms of treatment in the host country (after being legally admitted), the level of rights offered also plays a crucial role:

- How is access to the labour market regulated, and what are the possibilities to change employers? How is labour mobility guaranteed?⁴⁶
- What are the residence rights that the migrant worker enjoys in terms of length and security of residence?⁴⁷ Is there a relationship between the length of legal residence and protection against expulsion? If so, what is the relationship?
- Are work and residence permits interlinked, and if so, how?
- Under what terms is equality of treatment with nationals of the host state granted?⁴⁸ Does equality of treatment extend to working conditions, including pay and dismissal, and assistance by employment offices regarding information and counselling services? How is equality of treatment provided for in other areas of life, such as recognition of diplomas and other professional qualifications, social security, including health care and pensions, export of acquired pension rights to third states, education and vocational training, including study grants, housing, freedom of association and affiliation, tax benefits, social assistance, access to and supply of goods and services?

⁴² See D.G. Papademetriou and M. Sumption (2013), “Attracting from the Global Talent Pool – Policy Challenges”, Migration Policy Institute/Bertelsmann Stiftung, Washington, D.C. and Gütersloh, 8.

⁴³ Papademetriou, Somerville and Tanaka (2008), op. cit., p. 26.

⁴⁴ Ibid., p. 27.

⁴⁵ See for example the EU Immigration Portal (<http://ec.europa.eu/immigration/>) that provides for immigration information for non-EU nationals wishing to come to the EU.

⁴⁶ The European Commission has always emphasised the importance of intra-EU mobility, e.g. European Commission (2013), Communication on the EU Citizenship Report 2013 – EU citizens: your rights, your future, COM(2013) 269, Brussels, 8.5.2013, p. 6.

⁴⁷ In the EU context, Council Directive 2003/109/EC of 25 November 2003 on long-term resident status strengthens the legal status of third-country nationals who have legally and continuously resided in an EU member state for five years.

⁴⁸ The principle of non-discrimination is a fundamental principle in the EU but applies with limitations to third-country nationals, see Article 21 of the EU Charter of Fundamental Rights, *OJ C 83*, 30 March 2010, p. 389; for a discussion on this matter, see K. Eisele (2014), *The External Dimension of the EU's Migration Policy. Different Legal Positions of Third-Country Nationals in the EU. A Comparative Perspective*, Leiden: Martinus Nijhoff Publishers, pp. 190-212.

- What are the legal rules on family reunification?⁴⁹ What are the rules for family members of the admitted worker to access the labour market?⁵⁰ Do any integration requirements apply?
- Is free access to the territory of the host state guaranteed?
- Are language courses offered for free/at a reasonable price, and are such courses obligatory or voluntary?

3.2 The Economies

What kinds of immigration policies does the economy, including social partners (meaning employers and trade unions), favour? Businesses give preference to immigration policies that are clear and that allow them to speedily and unbureaucratically recruit those foreign workers and professionals that they need for running their respective enterprises and firms.⁵¹ Trade unions have repeatedly called for the observance of the human rights of migrants in migration policies by respecting the most important international conventions and standards.⁵² In 2014, the European Commission called for a “joint assessment of needs” to better identify economic sectors and occupations that face recruitment difficulties or skills shortages.⁵³ Such an assessment should be created via “structural dialogues with Member States, businesses and trade unions on the demand and labour migration and trade related mobility; *recognising that different needs may exist in Member States*, a platform of coordination at EU level would be useful...”⁵⁴ Thus in the light of differing needs, the Commission favours coordinating action in the EU.

The private sector prefers transparent and clear rules in the field of immigration as they enable businesses to prepare the recruitment of foreign professionals as thoroughly as possible. Employers are interested in fast-track admission so that the person in question can as soon as possible start to work in the envisaged capacity.⁵⁵ From the employers’ perspective, the aspect of temporariness plays a central role in ‘attractive’ migration policies that factor in the concept of (labour market) ‘need’. The need for manpower is always linked to a specific time period. For example, if a business requires urgently specialised IT experts who it cannot find on the national labour market, time-consuming procedures for their recruitment from abroad would be to the great detriment of that business. In this context, it has been stated that “timeliness of response is crucial for ensuring relevance of policy measures to the actual labour market needs. Even the best labour market analysis systems take time to deliver an updated picture of labour shortages. Many countries, such as Sweden and the United States therefore exert clear preference for a predominantly employer-led system due to its quick reaction to the changing labour market conditions and demand, and avoiding the costly and flawed process of analysing occupational shortages and applying them to immigration policy.”⁵⁶

⁴⁹ See Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification.

⁵⁰ See for example Article 15(6) of Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment (EU Blue Card Directive) that guaranteed family members of Blue Card holders immediate access to the labour market.

⁵¹ See in this regard: M. Cerutti, Director of Social Affairs of Business Europe, who spoke at the NEUJOBS Seminar jointly organised by CEPS and the European Economic and Social Committee on “Labour Migration and Mobility in the European Union – Assessing Attractiveness and Labour Market Needs” held on 7 May 2013 (speaking notes available at: www.businesseurope.eu/DocShareNoFrame/docs/4/APHCPMCEBMJOMCKLGPBGIGEPDW69DB1B39LTE4Q/UNICE/docs/DLS/2013-00507-E.pdf).

⁵² See Joint Letter of ETUC (European Trade Union Confederation) and ITUC (International Trade Union Confederation) to Herman Van Rompuy, President of the European Council, at the occasion of the 2013 UN High-Level Dialogue on Migration and Development of 1 October 2013, available at: www.etuc.org/sites/www.etuc.org/files/011013_President_Van_Rompuy.pdf.

⁵³ European Commission, COM(2014) 154, op. cit., p. 4.

⁵⁴ Ibid.

⁵⁵ See N. Rodriguez (2004), “Workers Wanted: Employers Recruitment of Immigrant Labour”, *Work and Occupations*, Vol. 31, No.4, pp. 453-473, p. 465 on H1-B visas in the US.

⁵⁶ International Organisation for Migration (2012), “Labour Shortages and Migration Policy”, IOM Regional Office for EU, EEA and NATO, Brussels, p. 16.

Regarding the type of labour wanted, it has been pointed out that the US economy has a preference for “the import of (i) workers bringing high levels of human capital, and (ii) low-wage workers for services and labor-intensive production, notably agriculture and trade-sensitive light manufacturing.”⁵⁷ Employer-led systems provide firms and enterprises with the freedom to select the workers on the basis of their skills and qualifications. But it must indeed not be forgotten that “the government sets regulatory parameters for selection”, including the minimum level of education or wage to be earned.⁵⁸

3.3 The Receiving States

How does ‘attractiveness’ translate into migration policies for states and governments? Crucially, international law provides states the prerogative to determine the conditions of admission for non-nationals on the basis of the principle of territorial supremacy. In line with this prerogative, it is of vital importance for national authorities to determine the number and identity of persons who enter their territories, and thus to be in ‘control’ of them. Such control can take the form of quotas, selective policies that favour certain types of immigrants (and prevent unwanted migration) and visas that specify the duration of stay for the person(s) admitted. For instance, as opposed to an employer-led system, ‘points systems’ allow governments to screen immigrants in relation to their age, occupation, education and language.⁵⁹ Concerning the question of how many people should be granted admission to a state, views differ considerably. Some indicate this using the variable of ‘absorptive capacity’ or ‘optimum numbers’. It has been stated that absorptive capacity is contingent on mortality and fertility rates, rates of immigration and emigration in relation to the existing population, but also on a state’s geographical characteristics, including natural resources, environment and infrastructure.⁶⁰ And yet, another viewpoint is one that promotes an open border policy acknowledging that free migration may not be immediately achievable but should be a future goal.⁶¹ For such an open border policy the interests of non-citizens are of equal value as to those of citizens. This, J.H. Carens specifies, does not mean that there is no distinction between members and non-members: “Those who choose to cooperate together in the state have special rights and obligations not shared by noncitizens.”⁶² This principle, which informs free movement of persons in the EU, is accompanied by a prohibition on discrimination on grounds of nationality.⁶³

Lengthy, cumbersome, opaque and costly admission procedures allow state authorities to delay the decision-making process and provide civil servants with more discretion so they can evaluate each application on an individual basis. While economic growth and improved well-being of a population are highly desirable for most states, it must be born in mind that governments are made up of various ministries having different and at times competing interests. It is clear that the ministry in charge of employment matters has a different policy agenda than the one responsible for interior affairs, which deals with immigration policy. In addition, national authorities might not always be aware of the actual labour needs of the economy, and even if employment ministries are generally informed it is not a given that such specific needs are communicated. Lack of knowledge, miscalculations or misconception of labour market needs may pose considerable

⁵⁷ C. Holguín (2001), “US Immigration Policies, US Labor, and the Role of Immigrants in the U.S. Labor Market”, Center for Human Rights & Constitutional Law, Los Angeles, p. 6.

⁵⁸ D.G. Papademetriou and M. Sumption (2011), “Rethinking Points Systems and Employer Selected Immigration”, *Improving US and EU Immigration Systems*, Florence and Washington, D.C., European University Institute and Migration Policy Institute, p. 3.

⁵⁹ See H. Antecol, D.A. Cobb-Clark and S.T. Trejo (2001), “Immigration Policy and Skills of Immigrants to Australia, Canada and the United States”, *IZA Discussion Paper Series No. 363*, Institute for the Study of Labor, Bonn, p. 2.

⁶⁰ S. Legomsky (1993), “Immigration, Equality and Diversity”, *Columbia Journal of Transnational Law*, Vol. 31, pp. 319-335, p. 323.

⁶¹ J.H. Carens (1987), “Aliens and Citizens: The Case for Open Borders”, *The Review of Politics*, Vol. 49, No. 2, pp. 251-273.

⁶² *Ibid.*, p. 270.

⁶³ See E. Guild (2005), “The Legal Framework: Who is Entitled to Move?”, in E. Guild and D. Bigo (eds), *Controlling Frontiers: Free Movement into and within Europe*, Aldershot: Ashgate, pp. 14- 48.

obstacles when formulating a labour immigration policy that should ideally meet actual demands for labour.⁶⁴ From this, it also becomes apparent that labour market ‘needs’ are very much framed by a selective, utilitarian approach, which serves the demands of a state as framed by the government. In the EU, this could be observed in the 2008 European Pact on Immigration and Asylum, and in the 2009 Stockholm Programme that set out the priorities and actions for justice and home affairs.⁶⁵ In the EU’s efforts to externalise labour immigration policy, S. Carrera and R. Hernández i Sagrera have indicated that non-EU nationals “are therefore not treated as workers and holders of human rights but rather as financial units (or numbers) at the service of the economic and labour market needs of the states.”⁶⁶

The governments’ role to mediate between the interests and the decisions of firms on the one hand, and individuals and society at large on the other, by formulating the conditions for foreign workers to legally access their territories is a balancing act and has placed a growing responsibility on the shoulders of nation states.⁶⁷ Moreover, there is the argument of fairness – fairness to the migrant and fairness to the host society. For instance, when John F. Kennedy entered into office in 1961 he launched an immigration reform and called for the repeal of the discriminatory system of national origin quotas and racial exclusion. “His approach recognized the interdependence among nations, making the old system appear anachronistic.”⁶⁸

3.4 Various Stakeholders – Competing Interests?

From this synopsis, it turns out that the three key stakeholders’ views and interests as to how immigration policies should be framed are malleable and to a large extent competing – or even conflicting – with one another. While states have the monopoly to stipulate entry and residence rules for non-nationals, other stakeholders have a keen interest in recruiting foreign nationals in a fast-track and easy fashion. The question arises who decides on the concrete set of admission and residence rules in the end. It is the legislator, the state authorities, and the civil servants working on the files that have the final say when it comes to determining and implementing the rules agreed upon.⁶⁹

Aside from individual immigrant workers, economies and receiving states, other stakeholders may have different conceptions of ‘attractive’ immigration policies, namely conceptions that correspond to their respective interests. For instance, many universities are active in attracting professors and researchers from abroad to build their international reputation, which is a strategy for attracting students. An international orientation might also play a decisive role for universities when applying for funding such as research grants. Professional sport clubs are interested in special visa categories that allow them to employ highly talented foreign athletes. Other civil society actors, such as NGOs aiming to strengthen migrants’ rights, may have a great interest in having clear and transparent rules on immigration statuses.

We will now look across the Atlantic and discuss key features of the US labour immigration scheme.

4. Key Features of the US Labour Immigration Scheme

This section aims to identify key characteristics of the US labour immigration scheme, which is based on one single admission system. It should be noted that under the US statute the term *immigrant* applies to a non-citizen who is authorised to take up permanent residence in the US (also commonly known as permanent

⁶⁴ See Papademetriou and Sumption, *op. cit.*, p. 9.

⁶⁵ See Council of the European Union, “European Pact on Immigration and Asylum”, document number: 13189/08 of 24 September 2008; and “The Stockholm Programme – An Open and Secure Europe Serving and Protecting Citizens, OJ C 115, 4 May 2010, p. 1.

⁶⁶ S. Carrera and R. Hernández i Sagrera (2009), “The Externalisation of the EU’s Labour Immigration – Towards Mobility or Insecurity Partnerships?”, Working Document No. 321, CEPS, Brussels, October, p. 34; see also Carrera, *op. cit.*

⁶⁷ Papademetriou, Somerville and Tanaka (2008), *op. cit.*, p. 9.

⁶⁸ B. Ong Hing (2004), *Defining America Through Immigration Policy*, Philadelphia: Temple University Press, p. 95.

⁶⁹ On the question of “who makes immigration policy?” see also T. Hammar (2009), *European Immigration Policy – A Comparative Study*, Cambridge: Cambridge University Press, p. 284.

resident or green card-holder)⁷⁰; by contrast, a *non-immigrant* is a non-citizen who seeks temporary entry to the US for a specific purpose during a temporary stay, such as a tourist, student, temporary visitor for business, foreign government official or temporary worker.⁷¹

4.1 Employer-Driven Labour Immigration

US labour immigration policy is known for its employer-led immigration system, which seeks to select foreign workers that match the demand of businesses in ‘real time’ and avoid the delays that accompany government-led systems that select immigrants on the basis of a points system.⁷² It has been argued that employer selection guarantees the employability of immigrant workers.⁷³

Employment-based immigration in the US is largely subsumed within the *immigrant* group. Under the Immigration Act of 1990 approximately 140,000 combined annual admissions are available for the following five employment-based categories, or ‘preferences’; this numerical limit includes spouses and children of the employment-based immigrants.

1. The first preference foresees roughly 40,000 admissions for so-called priority workers which include aliens with “extraordinary ability” as well as outstanding professors and researchers, and certain multinational executives and managers.
2. The second preference sets out about 40,000 admissions for professionals holding an advanced degree or its equivalent, or who “because of their exceptional ability in the sciences, arts, or business will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States.”
3. The third preference, which targets 40,000 admissions, includes professionals who hold only baccalaureate degrees, and for skilled and unskilled workers who would fill positions for which there is a shortage of American workers.
4. The fourth preference stipulates 10,000 admissions for certain special immigrants as defined in the Immigration and Nationality Act (INA) § 101(a)(27)(C)-(M), such as religious workers and employees of international organisations.
5. The fifth preference foresees about 10,000 admissions for investors who will create at least 10 jobs in the US economy. The baseline minimum investment is \$1 million but this amount is lowered in certain cases, such as if the investment is in a rural or high unemployment area.

Most non-citizens admitted in the framework of the employment-based immigration scheme are skilled workers, usually members of a profession.⁷⁴ According to the Yearbook of Immigration Statistics, in 2012 the limit of employment-based preferences led to the issuing of 144,951 visas.⁷⁵ It has been pointed out that the relatively small number of permanent admissions under the preferences is compensated by the much greater number of temporary workers admitted.⁷⁶

Businesses that wish to employ immigrants under these employment-based preferences have to show that no domestic workers are available to carry out the envisaged work (with the exception of the first preference group to which no labour market test applies) and that the entry of the non-citizen will not adversely affect

⁷⁰ See US Immigration and Nationality Act (INA) § 101(a)(15).

⁷¹ On non-immigrant admission, see INA § 101(a)(15) in combination with INA § 214.

⁷² Fargues, et. al., op. cit., p. 3.

⁷³ D.G. Papademetriou and M. Sumption (2011), “The Role of Immigration in Fostering Competitiveness in the United States”, *Improving US and EU Immigration Systems*, Florence and Washington, D.C., European University Institute and Migration Policy Institute, p. 9.

⁷⁴ See INA § 203 (b); see T.A. Aleinikoff, D.A. Martin, H. Motomura and M. Fullerton (2012), *Immigration and Citizenship – Process and Policy*, St. Paul: Thomson Reuters, pp. 279-280 and pp. 348 et seqq.

⁷⁵ See 2012 Yearbook of Immigration Statistics, US Department of Homeland Security, Annual Flow Report of March 2013 on US Legal Permanent Residence (Preference Immigration); 140,000 admission plus unused visas in the family-sponsored preferences in the previous fiscal year 2011.

⁷⁶ M. Boyd (2014), “Recruiting High Skill Labour in North America: Policies, Outcomes, Futures”, *International Migration*, Vol. 52, No. 3, pp. 40-54, p. 48.

the wages and working conditions of similarly employed US workers.⁷⁷ To ensure that these prerequisites are met a process called “labour certification” is in place. Labour certification was first created with the objective to protect US workers and the US labour market against competition from foreign workers. Owing to the economic growth of the 1990s, and the subsequent increase in immigrants hoping to take advantage of it, the labour certification process led to huge backlogs. To overcome such backlogs, the US Department of Labor introduced in 2005 the Program Electronic Review Management (PERM), which aims to process labour certification applications in shorter time periods by setting out clearer requirements and by relying on attestations by employers that are subject to review. Under PERM the original structure of labour certification remains the same: “Employers are supposed to make a good-faith recruitment effort to find qualified US workers able and willing to work at the place of intended employment, and they will be denied certification if such workers are available or if the labor market testing was inadequate. Employers must show that they offered the ‘prevailing wage’ as defined in the regulations, that the job requirements are not unduly restrictive, and that they interviewed interested US workers and rejected any such applicants for lawful, job-related reasons.”⁷⁸

In addition to the employment-based *immigrant* visa, the *non-immigrant* visa category covers workers, business people, investors and entrepreneurs who arrive *for temporary stays in the US*. In 2012, the number of temporary workers and their family members amounted to 3,049,419 admissions (5.7% of all I-94 *non-immigrant* admissions⁷⁹).⁸⁰ This visa category is intended to serve employers who might require a worker only on a temporary basis, or immediately for their operations. The INA contains certain *non-immigrant* classifications that provide for relatively quick entry for foreigners for particular purposes and limited time periods.⁸¹ Most employment-based *non-immigrant* visas must be sought by a US employer. As with employment-based immigrants, the employer petitions on behalf of the prospective foreign employee.⁸²

Temporary workers in specialty occupations can enter on H-1B visas for up to three years initially, extendable for up to six years, and they are allowed to travel abroad.⁸³ An H-1B visa is a non-immigrant visa that allows US employers to hire foreigners in specialty occupations that require theoretical or technical expertise. While the H-1B visa category was initially limited to 65,000 annually, this cap was readjusted when the demand for IT personnel increased.⁸⁴ The H-1B visa programme has been criticised for the numerical limit and also for the \$1,500 fee to file an initial petition, seek an extension of stay, or employ an H-1B visa-holder who is already employed by another US employer.⁸⁵ This highlights the powerful role the US employer plays, which might work to the detriment of the dependent employee.

4.2 The More ‘Attractive’, the More Welcome

One argument often advanced by governments is that labour immigration can boost economies by strengthening competitiveness and revitalising productivity. Policy-makers increasingly subscribe to the rationale that selective approaches to migration, in particular to highly-qualified and exceptionally talented

⁷⁷ INA § 212 (a)(5)(a)(i); see Aleinikoff, Martin, Motomura and Fullerton, op. cit., pp. 349 et seqq.

⁷⁸ Ibid., p. 353.

⁷⁹ In 2012, applicants for non-immigrant admission were required to complete a paper Form I-94/I-94W (which is an arrival/departure record issued by the U.S. Customs and Border Protection) or the Electronic System for Travel Authorization (ESTA) registration to enter the United States.

⁸⁰ See 2012 Yearbook of Immigration Statistics, US Department of Homeland Security, Annual Flow Report of August 2013 on Nonimmigrant Admissions to the United States: 2012.

⁸¹ Ibid., p. 395.

⁸² S.J. Klearman (1992-1993), “Non-immigrant Business Visas After the Immigration Act of 1990”, *Gonzaga Law Review*, Vol. 28, No. 53, pp. 53-65, p. 55.

⁸³ See INA § 214(g)(4), 8 Code of Federal Regulations (C.F.R.) § 214.2(h)(9)(iii)(A), 8 C.F.R. § 214.2(h)(15)(ii)(B), 8 U.S.C. § 214.2(h)(13)(iii)(supp. 1992).

⁸⁴ See Aleinikoff, Martin, Motomura and Fullerton, op. cit., pp. 403-404.

⁸⁵ INA § 214(c)(9); *ibid.*, p. 404.

potential immigrants, are “a valuable asset for the economy.”⁸⁶ States determine the ‘usefulness’ of the worker in question contingent on the perceived demand and supply of labour markets. This view is very much state-centred and ‘utilitarian’, reducing immigrant workers to economic actors who contribute to increasing the country’s GDP.⁸⁷ This approach is in fact reflected in the immigration policy is shaped in the US and in other countries as well: the more ‘beneficial’ national administrations deem a foreign national in economic terms with regard to specific abilities and skills, the more welcome this person will be – meaning facilitated legal access will be granted. In line with this, it is not surprising that US employment-based immigration policy is most open at the level of the most talented,⁸⁸ although it also holds partly true for the work-based immigration systems in the EU. Quite strikingly, many academic studies dealing with the immigration of the highly skilled fail to call into question have taken over the international competition logic, namely that governments regard skilled workers as a ‘scarce good’ and as economic units contributing to increasing the state’s economic output.⁸⁹

The US has been very effective at attracting highly skilled immigrants. One reason for this success is the competitive advantage that the US enjoys due to the top quality of its Ivy League universities and research opportunities, large and competitive global corporations, and the highly entrepreneurial-friendly environment which has proved profitable for successful business people. Also crucial are an environment (and narrative) that accepts and rewards talent regardless of origin; an employment economy endowed with “the ability to provide total compensation packages that offer great returns to those who have made serious investments in their own human capital; and an immigration system that despite being creaky and inefficient, and full of contradictory goals, still offers multiple opportunities for talented foreigners to be employed by US firms.”⁹⁰ This competitive advantage, it has been contended, could be lost if not backed by reinvigorated and active strategies addressing the highly qualified.⁹¹ The US system for highly skilled immigrants has also been criticised for its inflexibility, the inability to prioritise flows in an effective manner, and a complex bureaucratic process for adjusting from temporary to permanent status.⁹² “The shortage of visas essentially forces employers to guess their worker needs 6 to 18 months in advance”, which is difficult to assess at the beginning of the federal fiscal year.⁹³ This debunks to some extent the presumption that the US immigration system is easy and fast-track.

In comparison, some EU member states have introduced specific schemes for highly skilled immigrants that provide for eased admission requirements and procedures and that relax administrative requirements, including the prerequisite to advertise job openings locally before employing non-EU nationals.⁹⁴ Initially, an open, easy and fast-track admission scheme was also envisaged for the (supposedly) EU-wide Blue Card with the objective to attract highly qualified immigrant workers. Yet research shows that the final version of the Blue Card in fact lays down a bulk of admission requirements, including a salary threshold – which in some national highly skilled admission schemes exist already – for EU Blue Card applicants, which to a certain extent compromised the attractiveness of the Blue Card system.⁹⁵ By comparison, the US rules do not

⁸⁶ Fargues, et. al. op. cit., p. 3.

⁸⁷ Carrera, op. cit., p. 2.

⁸⁸ Papademetriou, D.G. and M. Sumption (2011), “The Role of Immigration in Fostering Competitiveness in the United States”, *Improving US and EU Immigration Systems*, Florence and Washington DC, European University Institute and Migration Policy Institute, p. 9.

⁸⁹ M. De Somer (2012), “Trends and Gaps in the Academic Literature on EU Labour Migration Policies”, NEUJOBS Working Paper No. 5, December, p. 6.

⁹⁰ Papademetriou, Somerville and Tanaka, op. cit., p. 7.

⁹¹ Fargues, et. al., op. cit., p. 4; Papademetriou, Somerville and Tanaka, op. cit.

⁹² Papademetriou and Sumption, op. cit., p. 10.

⁹³ Ibid.

⁹⁴ See Fargues, et. al., op. cit., p. 4.

⁹⁵ Eisele (2013), op. cit.

foresee a minimum salary threshold and applicants are able to qualify for an H-1B visa on the basis of their professional qualifications or a combination of qualifications and work experience.⁹⁶

4.3 Labour Mobility

The ability to easily move cross-border for work has been identified as another key ‘attractiveness’ factor in the view of the European Commission. In the US, labour mobility has traditionally been quite high when compared to other countries.⁹⁷ Quoting *The Economist*, “Americans are famously footloose” when it comes to migration across state lines.⁹⁸ For 2012, the inter-state mobility rate in the US amounted to 2.28% of America’s total population,⁹⁹ despite the fact that Americans’ propensity to move from one state to another has declined since the 1990s.¹⁰⁰

For EU citizens the free movement of persons is guaranteed under EU law for economic and non-economic purposes.¹⁰¹ In the 2013 EU Citizenship Report, the Commission stressed that “labour mobility can...be a powerful adjustment mechanism to address imbalances and contribute to a better matching of jobs and skills, whilst restoring dynamism and alleviating social suffering among EU citizens. It increases citizens’ chances of a smooth transition into employment and opens opportunities for personal and professional development.”¹⁰² EU Commissioner for Employment, Social Affairs and Inclusion László Andor emphasised in a February 2014 speech that “for all countries with an ageing population, like the UK, the availability of migrant workforce is an asset.”¹⁰³ As indicated previously, however, only about 3% of working-age EU citizens live in a member state other than their own. Annual cross-border mobility within the EU stands at an average annual rate of only 0.29%, which is far below the internal mobility rates in other countries such as Australia and the US.¹⁰⁴ Commissioner Andor attributed this to the linguistic diversity and institutional differences across the EU, but he also stressed the leeway for more geographical mobility.¹⁰⁵ Free movement in the EU applies currently only to EU citizens. However, the importance attached to intra-EU mobility is also reflected by the EU legislation applicable to third-country nationals. For example, the EU Blue Card Directive and the Directive on Long-Term Resident Status both allow for residence in another (second) member state.¹⁰⁶

It is difficult to draw a direct comparison between the US and the EU in terms of labour mobility, for a number of reasons. First, the US is a federal state, while the EU is not. This has major implications relating to, e.g. differing labour and employment legislation in EU member states. Moreover, cultural, linguistic and

⁹⁶ M. Hercog (2014), *Highly-Skilled Migration and New Destination Countries – How government policies shape destination choices*, Maastricht: Boekenplan.

⁹⁷ For the US-EU comparison, see B. Theodos (2006), *Geographic mobility and geographic labour mobility in the United States*, Washington: The Urban Institute.

⁹⁸ *The Economist* (2012), “Free Exchange – Move Over”, *The Economist*, 7 July (from the print edition) reporting of research of Greg Kaplan of the University of Pennsylvania and Sam Schulhofer-Wohl of the Federal Reserve Bank of Minneapolis.

⁹⁹ United States Census Bureau, Geographical Mobility/Migration, 2012 Table on State-to-State Migration Flows (www.census.gov/hhes/migration/data/acs/state-to-state.html).

¹⁰⁰ R.A. (2012), “Labour Mobility – America Settles Down”, *The Economist*, 5 July; and *The Economist*, op. cit.

¹⁰¹ On labour mobility after the 2004 and 2007 EU enlargements, see M. Kahanec (2012), “Labor Mobility in an Enlarged European Union”, *IZA Discussion Paper No. 6485*, Institute for the Study of Labor, Bonn.

¹⁰² European Commission, COM(2013) 269, op. cit., p. 6.

¹⁰³ Speech by L. Andor (EU Commissioner for Employment, Social Affairs and Inclusion), “Labour Mobility in the European Union – The Inconvenient Truth”, delivered at the University of Bristol on 10 February 2014, SPEECH/14/115.

¹⁰⁴ European Commission, COM(2013) 269, op. cit., p. 6, quoting the OECD Economic Surveys – European Union – March 2012.

¹⁰⁵ Speech by L. Andor, op. cit.

¹⁰⁶ See Article 18 of the Blue Card Directive and Article 14 of the Long-Term Resident Directive; see also European Commission (2013), “Intra-EU Mobility of Third-Country Nationals”, *European Migration Network Study 2013*.

social differences between member states pose barriers that do not exist in the same way in the US.¹⁰⁷ One also has to take into account the structural difference in the role of the state: in the US, mobility is seen as “the outcome of free market choices of the two main stakeholders in the labour market: employers and employees. In this case, no distinct role is played by the government.”¹⁰⁸ Considering such differences, it has been suggested that it is more useful to compare internal mobility in the US with geographic mobility, not between, but within EU member states.¹⁰⁹

5. The 2013 US Immigration Bill

In May 2013, the US Senate approved the bill *Border Security, Economic Opportunity, and Immigration Modernization Act 2013*, which provides for a general overhaul of current immigration legislation. The bill foresees considerable amendments in all areas of the US immigration scheme, including admission and residence, legalisation, and border security. Since its Senate approval, the bill has been pending in the House of Representatives, but swift agreement is nowhere in sight. The gridlock is caused by opposition by the conservative wing of the Republican Party.

The bill was originally drafted by the so-called ‘Gang of Eight’, a bipartisan group of eight Senators mandated to propose comprehensive immigration reform. The bill provides, *inter alia*, for changes concerning immigration on the basis of skills and employment. More specifically, some of the new features of the bill are as follows:

- a larger employment-based visa pool and a new merit-based visa that is offered on the basis of a points system;
- quotas are abolished for a number of visa categories;
- green card quotas have been abolished that were in the past allocated per country;
- a new INVEST visa enabling future foreign entrepreneurs to stay in the US and start up companies easily;
- foreign students who have earned at least a master’s degree in science, technology, engineering or mathematics profit from up to 25,000 more visas and green cards;
- options to change visas from temporary to permanent;
- high-, middle- and low-skilled workers benefit from the new rules with regard to temporary and permanent work visas;
- family-related immigration would be facilitated for nuclear families.

Therefore, the bill foresees major changes in the area of legal economic immigration by establishing enhanced immigration opportunities to the US on the basis of skills and employment. In the past, the share of immigrants admitted to US territory for the purpose of work was rather low. There are estimates that predict a two- or threefold increase of employment-based immigration to the US if the bill becomes law.¹¹⁰

Regarding employment-related immigration for highly qualified foreigners, the bill provides for a gradual increase of H-1B non-immigrant visas (allowing US companies to temporarily employ foreign workers in speciality occupations) from 85,000 to 205,000 maximum per year. Next, the visa pool is enlarged for the green card system as the annual cap on employment-based green cards is eliminated, including for spouses and minor children of principal applicants.

¹⁰⁷ E. Recchi, et al. (2006), “Empirical evidence on job and geographical mobility in the European Union”, *Study for DG Employment, Social Affairs and Equal Opportunities*, CIUSPO, University of Florence, Florence.

¹⁰⁸ P. Ester and H. Krieger (2008), “Comparing labour mobility in Europe and the US: facts and pitfalls”, *OVER WERK Tijdschrift van het Steunpunt WSE*, pp. 94-97, p. 95.

¹⁰⁹ European Commission (2006), *Employment in Europe 2006*, Luxembourg: Office for the Official Publications of the European Communities, p. 223.

¹¹⁰ M. Sumption and C. Bergeron (2013), “Remaking the US Green Card System: Legal Immigration under the Border Security, Economic Opportunity, and Immigration Modernization Act 2013”, *MPI Issue Brief No. 6*, Migration Policy Institute, Washington, D.C.

The bill repeals the diversity visa programme, also known as the Green Card Lottery, which provides annually 50,000 permanent resident visas to nationals from countries deemed to have low rates of immigration to the United States.

6. Conclusion

This paper has examined questions relating to the ‘attractiveness’ of labour immigration policies with a special focus on the US immigration system from a European perspective. One key finding relates to the fact that ‘attractiveness’ is a very malleable and flexible concept that very much depends on the perspective of the actor at hand. What might be ‘attractive’ to one key stakeholder might not be to another. Interests in the shaping of ‘attractive’ immigration policies might even be competing or conflicting. When formulating such immigration policies for immigrant workers, governments should consider the different viewpoints of stakeholders regarding ‘attractiveness’. While stakeholders can in some way or another influence the decision-making process, it is the state that has the power to adopt a law in the end.

In the discourse on attractiveness of immigration policies, push/pull frameworks are often quoted. However, push/pull considerations can account for migration decisions only in a limited way: the existing fragmented set of theories (that developed mostly in an isolated fashion) aims to explain the emergence and perpetuation of international migration, but there is no single theory that is widely accepted. In addition, such theories are often applied to migration flows that are already taking place, which makes it difficult to explain why similar flows do not originate from equally underdeveloped states. Push/pull frameworks have therefore been described as “a grouping of factors affecting migration” without taking account of the specific causal dynamics. As has been pointed out, the perhaps more fundamental question in this context is why do people *not* move – or why do so few move. The analysis shows that migration decisions are far more complex and that attempts to simplify the issue at stake might lead to incoherent conclusions.

On the European continent the US is often used as an example of a highly ‘attractive’ country of destination for foreigners who look for work abroad. It is true that the US has been one of the major destinations for employment-based immigration in the past. Yet the analysis of the current rules has demonstrated that the US system also has its shortcomings. It is employer-driven, which translates into less protection offered to immigrants. To counterbalance this situation, the introduction of hybrid systems that combine employer-driven and government-led systems have been proposed.¹¹¹ The three ‘attractiveness’ factors that the European Commission identified when it proposed the EU Blue Card Directive have to be considered in a nuanced way as regards the US scheme.

First, admission procedures under the US immigration scheme are not as unbureaucratic and fast-track as assumed. The labour certification process, despite having been amended, still demands employer resources and time, and might actually create an administrative burden. One also has to bear in mind that the US has initiated legislative action to overhaul its labour immigration rules via the bill *Border Security, Economic Opportunity, and Immigration Modernization Act 2013*. Certain elements of this bill, such as a larger employment-based visa pool, the new merit-based visa and enhanced options to change temporary into permanent labour migration (“temporary-to-permanent visa pathways”)¹¹² will address some of the shortcomings, such as the facilitation of family-related immigration and enhanced opportunities to enter the US for work.

Second, in the US, the labour mobility rate has been rather high: it is common for Americans to move from one state to another for a job, although the rate has in fact dropped in recent years. For a number of reasons,

¹¹¹ D.G. Papademetriou, et al. (2008), “Hybrid Immigrant-Selection Systems – The Next Generation of Economic Migration Schemes”, *Transatlantic Council on Migration*, Migration Policy Institute, Washington, D.C.; Papademetriou and Sumption, “Rethinking Points Systems...”, op. cit.; see also R. Koslowski (2014), “Selective Migration Policy Models and Changing Realities of Implementation”, *International Migration*, Vol. 52, No. 3, pp. 26-39 for a comparison with Australia and Canada.

¹¹² See Papademetriou, D.G. and M. Sumption (2011), “Eight Policies to Boost the Economic Contribution of Employment-Based Immigration”, *Improving US and EU Immigration Systems*, Florence and Washington, D.C., European University Institute and Migration Policy Institute, p. 1.

including structural, linguistic and cultural differences, it is difficult to simply compare geographical mobility in the US with intra-EU mobility. Most disparate, the US is a federal state while the EU is a supranational entity composed of 28 nation states.

Third, while the US, as a federal state, disposes of one single admission system, the EU does currently not have a common labour immigration policy. It is to be welcomed that the Commission, in March 2014, underlined the need to implement – and monitor the application of – the existing EU rules on admission of migrants and on their rights in an effective and coherent way by all member states against the background of the current fragmented framework for EU migration law and policy.¹¹³ The Commission took a step forward by calling for the creation of a “single area of migration”, which would be accompanied by codifying and streamlining the substantive admission conditions, as well as the rights of third-country nationals, with a view to promoting intra-EU mobility.¹¹⁴ The EU Blue Card Directive, the flagship of the EU labour migration policy, aims to make Europe more attractive for highly skilled immigrants from non-EU countries. The EU Blue Card Directive has, however, failed to create a common European admission system for highly qualified non-EU immigrant workers (as the member states may keep their own national admission systems for the highly skilled).¹¹⁵

Given these inherent differences between the US and the EU, the question is what elements of the US immigration system could be useful for EU policy- and law-making in the field of migration with a view to raising the level of ‘attractiveness’. An immigration policy that benefits high-, middle- and low-skilled workers would be a useful policy option for policy-makers in Europe. At the moment, the different EU migration directives cover a variety of – *but very specific* – categories of workers, including researchers, the highly skilled, seasonal workers and (soon) intra-corporate transferees. The definitions as to who qualifies as “highly skilled” or “seasonal worker” have been subject to meticulous negotiations in the EU decision-making process. While the time does not seem ripe for another Commission proposal covering all third-country workers, policy-makers could consider (re-)negotiating more comprehensive definitions that would include a broader and more diverse (in terms of skill level) target group. Here, the Commission could play a key role not only in the negotiations but also as the EU institution that has the power to propose legislation.

Another key feature of the US immigration bill relates to attracting and keeping foreign students who have earned at least a master’s degree in science, technology, engineering or mathematics. For this purpose the bill foresees more visas and green cards for graduates of such disciplines. The Commission emphasised the importance of both attracting and retaining international students in the EU.¹¹⁶ In this context, it is to be welcomed that the recast of the Researchers’ and Students’ Directive that was put forward in 2013 provides for enhanced procedural guarantees, facilitated intra-EU mobility, and improved access to the labour market for students.¹¹⁷ This proposed Directive includes for students (and researchers) the possibility to remain for 12 months on the territory after graduation (finalisation of research) in order to look for work or set up a business.¹¹⁸ Given that member states are competent to issue work permits, this possibility is not a “right” as such. The Commission could, however, actively promote this policy option among the member states by stressing its benefits. Interestingly, Germany introduced a new visa category for foreign professionals holding a university degree (either a German degree or a comparable foreign one) to search for employment for up to six months in Germany provided they have sufficient financial resources to sustain themselves.¹¹⁹

¹¹³ European Commission, COM(2014) 154, op. cit., p. 4.

¹¹⁴ Ibid.

¹¹⁵ See European Commission, COM(2014) 287, op. cit.

¹¹⁶ European Commission (2014), Communication on an open and secure Europe: making it happen, COM(2014) 154, Brussels, 11.3.2014, p. 4.

¹¹⁷ European Commission Communication, “Proposal for a Directive of the European Parliament and of the Council on the conditions of entry and residence of third-country nationals for the purposes of research, studies, pupil exchange, remunerated and unremunerated training, voluntary service and au pairing”, COM(2013)151, 25.3.2014.

¹¹⁸ Ibid., Article 24 thereof.

¹¹⁹ See German law: Article 18c *Aufenthaltsgesetz* (German Residence Act).

Other elements of the proposed US Act are difficult to copy in the EU, such as a larger employment-based visa pool, because the competence to stipulate (and thus to increase) quotas for third-country nationals to enter the EU for the purpose of work is firmly in the hands of the member states.¹²⁰ Similarly, more temporary-to-permanent visa options would require the green light from the member states. With regard to the EU Blue Card Directive, for example, member states may issue Blue Cards with a period of validity of between one and four years. Only after five years are Blue Card holders (and other third-country nationals) eligible for long-term resident status, which provides for a more secure legal status in the EU.¹²¹

¹²⁰ See Article 79(5) TFEU.

¹²¹ Council Directive 2003/109/EC, *op. cit.*

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