

## Application of the “Sarkozy Law”: what implications for the HRD<sup>1</sup>?

April 2004

The so-called “Sarkozy Law” relating to the “control of immigration and residence of foreign nationals in France, as well as to nationality”<sup>2</sup> has now been followed up by an implementation decree or “*circulaire*”<sup>3</sup>. This “*circulaire*” is addressed to all the “*préfectures*”, and gives them precise instructions on how the Sarkozy law is to be applied. It also specifies which provisions are effective at once, and which will have to await additional decrees before becoming applicable.

As we have already pointed out in December 2003, the “Sarkozy Law” has numerous implications for your day-to-day management of expatriation. In the present article we will discuss ten of the principal changes:

### 1. Nationals of the EU, the EES and Switzerland

**Nationals of the current 15 members of the EU<sup>4</sup>, as well as nationals of the EEA<sup>5</sup> and of the Swiss Confederation who wish to establish their residence in France no longer need a residence permit (“*titre de séjour*”).** They may thus live in France on the basis of their currently valid passport or national identity card. They will nevertheless be given a residence permit by the French administration if they wish to obtain such a document<sup>6</sup>.

However, family members of a national of the EU, the EEA or Switzerland, who themselves are nationals of a third country and intend to join him/her in France, will still need a residence permit issued by the French administration.

Note, however, that Swiss nationals who intend to work in France will still need a work permit until June 1, 2004<sup>7</sup>.

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<sup>1</sup> The legal quotes included in this article are free translations of the official French language texts.

<sup>2</sup> Law # 2033-1119 of November 26, 2003 (“*Journal Officiel*” of November 27, 2003).

<sup>3</sup> *Circulaire* # NOR/INT/D/04/00006/C of January 20, 2004.

<sup>4</sup> The 15 current members of the European Union are: Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Portugal, Spain, Sweden and the United Kingdom.

<sup>5</sup> The EEA (European Economic Area) includes (non-exhaustive enumeration) the 15 members of the EU, Iceland, Liechtenstein and Norway.

<sup>6</sup> Article 9-1 of the ordinance # 45-2658 of November 2, 1945, as amended by the law of November 26, 2003.

<sup>7</sup> Articles 4 and 10 of the June 21, 1999 Agreement between the Swiss Confederation, the EU and its Members on the free movement of persons.

As regards the nationals of the ten countries which will join the EU on May 1, 2004<sup>8</sup>, they will not need a residence permit as long as they do not plan to work in France. Except for the nationals of Malta and Cyprus, however, a residence permit will be required for the nationals of the future EU member countries who intend to carry out a professional activity in France.

This requirement of a residence permit will remain in force for the duration of the preliminary measures on the opening of the national employment markets to the citizens of these new members, as provided under the terms of the treaties of accession to the EU. In fact – and notwithstanding the basic principle of the free movement of persons in the EU – **the citizens of the new member countries will still need a Temporary Work Permit** (“*Autorisation Provisoire de Travail*”, or “*APT*”), which may be refused if the conditions of the labor market in their particular profession do not justify<sup>9</sup>. These provisional measures are in principle expected to remain in force for five years, but may be waived for certain professions if the labor market improves. All these measures will enter in to force upon the admission of the new EU members, *i.e.* May 1, 2004.

## 2. Temporary residence cards (“*cartes de séjour temporaire*”)

### (a) Research Experts (“*Chercheurs*”)

The Law of November 26, 2003 provides that the duration of a temporary residence permit may not exceed one year<sup>10</sup> except for research experts, who may obtain a renewal for a **maximum of four years**<sup>11</sup>. The January 20, 2004 “*circulaire*” specifies in fact that this measure “reflects the wish of the government to render the French territory more attractive by simplifying the administrative procedures for foreign executives (“*cadres*”) and research experts”. The “*circulaire*” also warns, however, that this renewal beyond a period of one year “does not represent a systematic and general measure”, but applies only if it is likely to “facilitate the professional career” of the foreign research expert. In other words: the renewal will be granted on the basis of “a rigorous selection”. ***This new modality enters into force at once.***

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<sup>8</sup> These ten new members are the Czech Republic, Cyprus, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia.

<sup>9</sup> There are exceptions to this. In the first place, research experts do not need an “*APT*”. Furthermore, an “*APT*” may not be denied to seasonal workers (“*saisonniers*”) and young workers (“*jeunes travailleurs*”) who are nationals of countries that have concluded a bilateral agreement with France.

<sup>10</sup> Article 11 of the 1945 ordinance, as amended.

<sup>11</sup> Article 13 of the 1945 ordinance, as amended.

**(b) Students**

Under the Law of November 26, 2003, a foreigner studying in France does not need a long term visa (“*visa de long séjour*”) to obtain a temporary residence card. This applies in particular to foreign minors who have undergone their schooling in France, who, upon their eighteenth birthday, wish to continue their studies in a university there even if, as a matter of law, they may not directly qualify for a residence permit. ***This measure will enter into force only on the basis of a future supplementary decree of the Council of State.***

**(c) Family regrouping:** Temporary residence card for “private and family life” (“*carte de séjour temporaire ‘vie privée et familiale’.*”)

The Law of November 26, 2003 changes the modalities of family regrouping. First of all, the foreigner residing in France who wishes his family to join him must file a request with the mayor (“*maire*”) of his domicile. ***Note, however, that new regulatory provisions will be needed before mayors will be able to assume this function.***

Furthermore, the Law of November 26, 2003 reinforces the criteria that must be met to qualify for a temporary residence card for “private and family life” in contemplation of a family regrouping. Such a card, which entails the right to exercise the profession of one’s choice, can be requested *inter alia* by<sup>12</sup>:

- the foreign parent (father or mother) of a French minor residing in France, upon the condition that he/she ***actually participated in the child’s education since birth, or at least during the past year.***  
The January 20, 2004 “*circulaire*” specifies that if the parent claiming the provisional residence status does not have the financial means to meet the material needs of the child, but complies with his obligations in terms of surveillance and education, his application for a temporary residence card cannot be denied. The same applies where there is a “community of residence” between the parent and the child. Moreover, “if the issuance of a first residence card is subordinated to the French child’s minority status, its renewal [will not be denied] when the child attains majority.”
- a foreign national married to a spouse holding French citizenship, as long as his entry into France has been lawful, ***and the “community of living” has not been discontinued.*** The burden of proof of the “continuity of living” rests on the claimant.

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<sup>12</sup> Article 12 bis of the 1945 ordinance, as amended.

Upon the first claim, a simple declaration “on honor” signed by both spouses before a representative of the “*préfet*” within whose jurisdiction lies their domicile will be sufficient. If the *préfet* has any doubt on the veracity of the declaration, however, he may call for supporting documents, or order an investigation. The January 20, 2004 “*circulaire*” specifies that the doubts must be substantial, giving the following example: “old marriage, and recent entry into France or claim”. On the other hand, if “the entry into France is recent, follows immediately upon a marriage concluded in a foreign country, or occurs shortly before a marriage concluded in France”, such doubts do not obtain.

When applying for the renewal of the temporary residence card, the following documents constitute proof of the “community of living”: lease, rent receipts, electricity bills, taxation notice, tax return signed by both spouses, proof of a joint and regularly maintained bank account, etc.

**Note:** French law draws a difference between “community of living” and “living under the same roof”. Spouses who have two separate places of residence (*e.g.* for professional or health reasons) may in fact be considered as sharing a “community of living”<sup>13</sup>.

The January 20, 2004 “*circulaire*” also provides that ***the foreign national who has ceased the “community of living” with the French spouse for reasons of domestic violence may nevertheless be entitled to the renewal of his temporary or, when appropriate, his regular residence card.***

***All these new provisions relating to family regrouping are applicable at once.***

### 3. Long term residence cards (“*cartes de résidents*”)

A foreign national who can prove five years of regular, uninterrupted residence in France (instead of three before the Sarkozy Law) may claim a resident card valid for ten years, which will also give him the right to exercise the profession of his choice<sup>14</sup>. The card will be issued to the claimant in function of his “***republican integration***”<sup>15</sup>.

The January 20, 2004 “*circulaire*” specifies the criteria to be applied in determining the “republican integration”, among them in particular “[the fact of] having acquired a mastery of the French language, knowledge of, and respect for the principles governing the French Republic, children’s schooling, professional training, as well as participation in the social life of the local community”. In that connection, the opinion of the mayor of the claimant’s residence may be sought. Beyond this, “the fact of having signed an ‘agreement of welcome and integration’ (“*contrat d’accueil et d’intégration*”) – as introduced experimentally in several French regions and to be extended in the future to the entire national territory – will of course also be a key element to be taken into consideration”.

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<sup>13</sup> Article 108 of the *Code Civil*.

<sup>14</sup> Article 17 of the 1945 ordinance, as amended.

<sup>15</sup> Article 14 of the 1945 ordinance, as amended. This expression refers to the foreigner’s willingness to live according to the French Republic laws. (It has nothing to do with political ideas).

The requirement of five years of uninterrupted regular presence in France is reduced to two years **for the beneficiaries of family regrouping**, and the parents of a French child, on condition of fully meeting the criterion of republican integration. **Henceforth, the issuance to them of a resident card is no longer assured as a matter of law.**

Furthermore, the foreign national married to a French spouse who wishes to acquire the status of resident must have been married **for at least two years**<sup>16</sup> (instead of one year before the Sarkozy Law), as long as **the “community of living” has not been interrupted**. The burden of proof of continuity rests upon the claimant – in the same manner and based on the same documents as for the renewal of the temporary residence card for “private and family living” (cf. above). Where the community of living has been interrupted due to domestic violence committed by the French spouse, the foreign claimant may nevertheless obtain a resident card.

**All these provisions relating to the claims for residence cards are applicable at once.**

<b>4. Responsibility of employers of foreign nationals lacking a work permit (“titre de travail”)</b>
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**The penalties have been increased: five years imprisonment and a fine of 15.000 Euros** for any employer (whether a physical or legal person) who employs, directly or indirectly, a foreigner who does not have a work permit authorizing him to carry out a salaried activity in France (the previous sanctions were three years imprisonment and a fine of 4.500 Euros)<sup>17</sup>. The fine is levied for every foreign national concerned. It rises to 100.000 Euros and ten years imprisonment, as well as the seizure of assets and closure of the premises, where the offense is found to have been committed by an “organized gang” (“*bande organisée*”). **If the guilty employer is himself a foreign national, he may be subject to a prohibition of residence of up to five years, as well as to being barred from entering the territory of France for up to ten years, or permanently.** As to the foreign national found to be working without an appropriate permit, he may be deprived of his temporary residence card and be expelled from the national territory.

**All these measures – of which most represent changes in the “Code du Travail” – are applicable at once.** Employers are henceforth held to make sure of the existence and validity of the work permits of their foreign employees. They may check with the “*Préfectures*” to find out whether or not a given work permit is forged. Personnel registers must now mention the employees’ nationality, as well as the type and number of their work permits.

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<sup>16</sup> Article 15 of the 1945 ordinance, as amended.

<sup>17</sup> This constitutes a violation of article L.341-6, first paragraph, of the “*Code du Travail*”, whereby “no one may, directly or through a third person, hire, maintain in his service or employ for any period of time of a foreign national who is not in the possession of a document authorizing him to carry out a salaried activity in France”.

- **Role of labor inspectors:** they are henceforth enabled to inquire as to any violation concerning the direct or indirect assistance to the illegal entry, movement and employment in France of foreign nationals. If they find that such violations have occurred, they may themselves issue an official notification (“*procès verbal*”). They are also enabled to check the identity and address of all employers and employees subject to the “*Code du Travail*”. ***These provisions are applicable at once.***
- **Repatriation expenses:** any firm that employs foreign workers who lack the appropriate work permit, will be held to pay a lump sum toward their repatriation to their country of origin (in addition to the sums due to the OMI, the Office of International Migration.)<sup>18</sup> ***This clause will enter into force only after the adoption of an additional regulatory provision.***

## 5. Air and maritime transport companies

***Air and maritime transport companies are also subject to sanctions if they introduce into French territory foreign nationals lacking a travel document or, when called for, an appropriate visa.*** Although this provision was already covered by French law following the Schengen agreement of June 14, 1985, the Law of November 26, 2003 raises the maximum fine from 3.000 to 5.000 Euros per passenger.

The “*circulaire*” of January 20, 2004 also specifies in this connection that the fine may be waived where the passenger introduced into France without proper documents “is admitted onto the national territory as an asylum seeker, *i.e.* where his claim has not been rejected as being manifestly without foundation”. This waiver does not apply, however, where the transport companies have illegally introduced into France foreign nationals who are subsequently released because the waiting period in the reception center was too long, or where their release has been ordered by a qualified judge (“*juge des libertés*”).

The fine is increased to up to 10.000 Euros where the foreign national illegally brought into France is a single minor, but it will be lowered where the faulty transport company has made timely effort to check the travel documents and visas of its passengers.

***The new provisions concerning transport companies will enter into force upon adoption of a decree in the Council of State.***

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<sup>18</sup> Article 21 (5) of the 1945 ordinance, as amended.

## 6. Consequences of facilitating the illicit entry, sojourn and circulation in France of foreign nationals

Any person who, directly or indirectly, facilitates or attempts to facilitate the illegal entry, circulation and sojourn (“*séjour*”) of foreign nationals in France is subject to **five years imprisonment and a fine which may, according to the applicable legal provisions, amount to up to “200.000 F” (sic)**.<sup>19</sup>

The January 20, 2004 “*circulaire*” specifies that this provision applies not only to the French territory (land and territorial waters of metropolitan France as well as of its overseas departments [DOM]) but extends also to the territory of the 140 member countries of the **Palermo Convention** on the illegal traffic of migrants<sup>20</sup>.

The Law of November 26, 2003 also introduces a series of “aggravating circumstances”. Beyond the concept of “organized gangs”, this includes “the direct exposure of foreign nationals to an immediate risk of death, or serious bodily harm likely to result in a mutilation or permanent infirmity”; “exposing foreign nationals to conditions of life, transport, work or shelter incompatible with the dignity of human beings”; “offenses by which minors are removed from their family setting or their traditional environment”, etc. **In these cases, the offenses are punished by ten years imprisonment, and a 750.000 Euro fine.**

The law specifies, however, that these actions do not constitute penal offenses if it is found that “they were necessary, in the face of an actual or imminent danger, to preserve the life or the physical integrity of the foreign national”<sup>21</sup>.

**The provisions concerning the illegal entry, sojourn and circulation of foreign nationals in France are applicable at once.** Their application in the territories of the Palermo Convention has started only last January, when the Convention entered into force.

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<sup>19</sup> Article 21 of the 1945 ordinance, as amended.

<sup>20</sup> Palermo Convention of December 12, 2000. As noted by the French Senate this Convention negotiated under the sponsorship of the United Nations, has been signed by 140 countries – among them the 15 EU members, the other European countries – including Central and Eastern Europe – as well as all other members of the OECD. Among the non-signatories are essentially African, Middle Eastern and Asian countries (among them India, Iran, Iraq, North Korea, Jordan, Bahrain, UAE, Oman, Qatar, Somalia, Chad, Gabon, Guinea, Liberia, the Central African Republic, Djibouti, Kenya...). It should also be noted that only part of the signatories has so far ratified the Convention.

<sup>21</sup> Article 21-3 of the 1945 ordinance, as amended.

## 7. The residence permit commissions (*“commissions du titre de séjour”*)

The 26 November 2003 Law strengthens the role of the *“commissions du titre de séjour”*, broadening the scope of intervention of the *“préfets”*: e.g. in cases of refusal to issue or renew a temporary or regular resident card when the foreign national has asked his family to join him otherwise than in the context of a family regrouping. Beyond this, the *“prefectures”* may now call for the opinion of the *commissions* on general issues concerning the application of the law, and not only, as heretofore, for particular cases relating to individual situations.

***All these provisions are applicable at once.***

## 8. Medical insurance

Up till now foreign nationals intending to live in France were not required to subscribe to a medical insurance. The Law of November 26, 2003 has introduced the following new requirements:

“To enter into France, all foreign nationals must be able to produce [...] documents relating to [...] the coverage by an agreed insurance operator of the medical and hospital expenses, including the coverage of social assistance, which may result from treatment undergone in France, as well as guarantees with regard to his repatriation.”<sup>22</sup>

This new provision follows the model applied in the legislation of several other European countries; according to the January 20, 2004 *“circulaire”*, its purpose is to “deal with difficulties that may occur in situations of insolvency”. The concept of “expenses that may result from treatment undergone in France” includes treatment received during the period of regular residence, as well as that which may result from it even beyond the period of authorized residence in France.

If the foreign national intending to come to France is not in a position to furnish such proof, and plans to live with relatives or friends during his sojourn in France, he may ask his host to acquire the required coverage for him. In fact, the implementation *“circulaire”* specifies that “the presentation by the foreign national of proof of insurance coverage may be substituted by the presentation by his host of proof of equivalent insurance coverage subscribed for the benefit of the foreign national. This proof will have to be submitted with the request for a visa, after validation of the ‘host attestation’ (*“attestation d’accueil”*).

***All these new provisions relating to medical insurance will become applicable only following the publication of a supplemental decree of the Council of State.***

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<sup>22</sup> Article 5 of the 1945 ordinance, as amended.

## 9. 'Host attestation' ("*justificatif d'hébergement*")

The new provisions concerning medical insurance do of course not obviate the need, in compliance with current law, to present a 'host attestation', *i.e.* proof of being hosted by someone in France.

“Any foreign national who declares that he intends to remain in France for a period not in excess of three months in the context of a family or private visit, must present a “*justificatif d'hébergement*”. This takes the form of an attestation signed by the person who agrees to provide lodgings to the foreign national, or that person’s legal representative, and validated by the administrative authorities. This attestation represents the document envisaged in the convention signed in Schengen on June 19, 1990<sup>23</sup>.

The Law of November 26, 2003 provides for two exemptions from this requirement of a “*justificatif d'hébergement*”. Under the terms of the January 20, 2004 “*circulaire*”, these exemptions concern persons who “wish to effect in France a sojourn of a humanitarian character, or a cultural exchange”, as well as to those who “intend to come to France for an urgent medical purpose, or by reason of a serious illness or funeral of a close relative”.

Except for these two cases, the “*justificatif d'hébergement*” continues to be required. The November 26, 2003 law introduced some changes in the modalities of its validation by the administration. Until now, the responsibility for this validation was shared between the mayor of the host’s domicile, the “*gendarmerie*” and the police. Henceforth only the mayor will be enabled to validate such an attestation. He may also ask the municipal agents or the Office of International Migrations (OMI) to verify the real conditions of the proposed lodging.

In the event that his “*justificatif d'hébergement*” is rejected by the mayor, the “host” (“*hébergeant*”) may lodge an appeal with the competent “*préfecture*” following the procedures of administrative review. If the “*préfet*” fails to respond within a month, it will be deemed that the appeal has been rejected.

If the attestation is accepted by the mayor – or if the appeal with the “*préfecture*” is granted –the host will have to pay the sum of **15 euros for each foreign visitor**, to be paid in the form of fiscal stamps.

Moreover, the “host” is held to assume the responsibility for the cost of the foreign visitor’s sustenance in France – and this “for the entire duration of the visa’s validity, or for a period of three months from the date of the visitor’s entry on the territory (Schengen), in the event that the visitor would not pay for it”. At present these costs are estimated at 47.80 Euros per day,

***These new provisions concerning the “justificatif d'hébergement” will be applicable only following the publication of a supplemental decree in the Council of State.*** However, the mayors may already deny such a *justificatif* following the current procedures.

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<sup>23</sup> Article 5-4 of the 1945 ordinance, as amended.

## 10. Visas ; fingerprinting

The foreign nationals – except the citizens of the EU, the EEA or Switzerland – who apply for a residence permit may be fingerprinted and photographed, and the data may be memorized and computer-processed in line with the conditions set by the CNIL<sup>24</sup>.

A similar measure is taken with regard to foreign nationals applying in a consulate located outside the Schengen zone<sup>25</sup> for a visa for France or elsewhere in the Schengen zone. When the visa is granted, the claimant will necessarily be fingerprinted and photographed.

*These new provisions concerning the fingerprinting and photographing of foreign visitors will be applicable only following the publication of a supplemental decree of the Council of State.* It is also stated in the January 20, 2004 “circulaire” that a reflection is being undertaken on the European level in order to establish a European data bank on visa applicants, including their biometric data. Since then, and because of the Madrid terrorist attacks, the European Union has decided to use biometric data for visa applicants before the end of 2005.

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<sup>24</sup> Article 8-3 of the 1945 ordinance, as amended. The CNIL: *Commission Nationale de l'Informatique et des Libertés* – National Committee for Computer Data Processing and Liberty. This committee enforces the law guaranteeing the respect of people's freedom and privacy when information about them is stored in computers.

<sup>25</sup> The members countries of the Schengen zone are the following: Austria, Belgium, Denmark, Finland, France, Germany, Greece, Iceland, Italy, Luxembourg, Netherlands, Norway, Portugal, Spain, Sweden.