

European Legal Culture

Francesca Strumia

**Talent for Rejuvenation: Exploring the
Innovative Potential of Skilled Migration
in the EU**

Suggested citation

Strumia, Francesca, "Talent for Rejuvenation: Exploring the Innovative Potential of Skilled Migration in the EU", CDCT working paper 15-2013/ European Legal Culture 8, available at <http://www.cdct.it/Pubblicazioni.aspx>

ACKNOWLEDGMENTS

The research leading to these results has received funding from the University of Torino under the agreement with the Compagnia di San Paolo - Progetti di Ateneo 2011 - title of the Project "The Making of a New European Legal Culture. Prevalence of a single model, or cross-fertilisation of national legal traditions?" academic coordinator Prof. Michele Graziadei.

La presente pubblicazione è frutto della ricerca svolta nell'ambito del Progetto di Ateneo 2011 "The Making of a New European Legal Culture. Prevalence of a single model, or cross-fertilisation of national legal traditions?", coordinatore scientifico Prof. Michele Graziadei, finanziato dalla Compagnia di San Paolo.



Abstract

IT *L'immigrazione è per molti Stati, e in particolare per quelli della UE, alle prese con PIL in declino, debito pubblico galoppante e una popolazione che tende a invecchiare, un importante fattore di rinnovamento. L'immigrazione altamente qualificata esprime questo potenziale di rinnovamento con particolare intensità. La legislazione sull'immigrazione riserva, in diversi Stati, inclusi quelli della UE nella vigenza della direttiva sulle carte blu, un trattamento di favore agli immigrati altamente qualificati. Gli immigrati altamente qualificati portano idee, capitale, imprenditorialità e forza lavoro, dando così un impulso positivo alle economie degli Stati ospiti. Questo paper esplora come una politica di favore per l'immigrazione altamente qualificata possa contribuire a dinamiche di rinnovamento nella UE, e considera le scelte legislative che possono incentivare tali dinamiche.*

Parole chiave: carte blu, immigrati altamente qualificati, cittadinanza

EN *In an age of declining GDPs and surging public debt, on the background of aging populations, immigration represents for many countries, and particularly for European ones, a factor of innovation. But which kind of immigration harbors this innovative potential? Relevant legislation in several countries, including European Union ones in the wake of the E.U. blue card directive, singles out talented migrants for favorable treatment. Talented migrants bring indeed ideas, capital, entrepreneurship and quality workforce, thereby pushing for the revitalization of stagnating economies in the host countries. This paper proposes to spell out, with peculiar regard to the E.U., certain lines along which immigration policies favoring talented migrants may contribute to this revitalizing dynamic, and to identify suggestions on how to tailor relevant legislation for these purposes.*

Keywords: blue cards, economic migration, citizenship

TALENT FOR REJUVENATION: EXPLORING THE INNOVATIVE POTENTIAL OF SKILLED MIGRATION IN THE EU

FRANCESCA STRUMIA*

Introduction

In an age of declining GDPs and surging public debt, on the background of aging populations, immigration represents for many countries, and particularly for European ones, a factor of innovation. But which kind of immigration harbors this innovative potential? Relevant legislation in several countries, including European Union ones in the wake of the E.U. blue card directive,¹ singles out talented migrants for favorable treatment. Talented migrants bring indeed ideas, capital, entrepreneurship and quality workforce, thereby pushing for the revitalization of stagnating economies in the host countries. This paper proposes to spell out, with peculiar regard to the E.U., certain lines along which immigration policies favoring talented migrants may contribute to this revitalizing dynamic, and to identify suggestions on how to tailor relevant legislation for these purposes. Considerations put forth in this paper on skilled migration policies are of a preliminary nature. In order to verify their potential, they need to be subjected to empirical tests and to more rigorous analysis against existing literature. They are offered at this stage in the hope to foster further thinking and debate on relevant themes.

The first part of the paper examines European legislation on blue cards for highly qualified immigrants. It considers its policy justifications and contextualizes such legislation in respect of relevant choices of other countries such as Canada and the U.S. It then focuses on the implementation of E.U. blue cards in Italy.

The second part of the paper explores three ways in which policies favoring talented immigration may ingenerate revitalizing mechanisms in host European polities. First, it investigates potential synergies between talented migration and entrepreneurship. In particular it examines the phenomenon of start-up enterprises and legislative incentives for immigrant investors and workers to be involved in their establishment. In this respect, it looks at potential interactions and correspondences in the operation of legislation

* SJD, Harvard Law School, Fellow in Comparative Law, University of Torino and Attorney, Cleary Gottlieb Steen & Hamilton Milano. Email fstrumia@sjd.law.harvard.edu

¹ Council Directive 2009/50, of 25 May 2009, on the conditions of entry and residence of third country nationals for purposes of highly qualified employment, 2009 O.J. (L 155) 17.

recently introduced in Italy, respectively, on innovative start-ups and on highly qualified migrants. Second, this part questions potential rationales for eased naturalization of talented migrants in the host countries; it argues that considerations of talent for the award of citizenship may help to shake outdated conceptions and to ground novel and more flexible civic bonds. Finally, it considers how a rebalanced policy for economic migration, favoring merit and resourcefulness, may induce self-selection among migrants coming to the E.U. in search of work.

The conclusive part of the paper considers how to fine tune recent legislation on talented migration in Europe, in order to heighten its revitalizing effect. In particular, it considers which immigrants should be considered “talented” for purposes of favorable immigration treatment; which facilitations talented immigrants should have in terms of residence permits, family reunification, and mobility on the labor market; and finally whether the status of talented migrant warrants lenient application of certain naturalization requirements in nationality legislation of European countries, such as requirements of integration in the social fabric of the host polity and of acquaintance with its traditions.

1. Overview of Skilled Migration Policies in the E.U. and in Comparative Perspective

1.1 Skilled Migration Policy in the E.U.

While several countries have long favored talented and skilled migration, for the European Union the turn to legislation favoring talented immigration is a fairly recent innovation. In 2009 a directive was adopted introducing eased admission procedures and requirements for highly qualified migrants.² The color of talented immigration in Europe is the color blue. The residence permit which member states shall issue to highly qualified migrants according to the 2009 directive is indeed a blue card.³ Despite the assonance, the blue card is nothing comparable to the U.S. green card. To start, it is a temporary residence permit, and grants no indefinite leave to remain in the European Union.⁴ In addition, despite its E.U. law matrix, it is issued by the single member states, and with some exceptions, it is a permit of residence valid only in the state of issuance.⁵ Despite its limits, the blue card is a promising tool. It signals an intent to favor talented immigration in the European Union and a willingness to make the European maze of immigration legislation a touch more attractive for highly skilled migrants.

² See directive 2009/50, *supra* note 1.

³ *Id.* art. 2.

⁴ *Id.* art. 7.

⁵ For relevant exceptions, see Directive 2009/50, *supra* note 1, Chapter V and *infra* in the paragraph.

The blue card directive also fills an important vacuum in European Union Immigration Law. It is the first instrument of Union law which squarely addresses economic migration.⁶ It thus adds an important pillar to the burgeoning architecture of European immigration law. Such architecture finds its legal basis in the Title of the Treaty on the Functioning of the European Union (TFEU) devoted to the Area of Freedom, Security and Justice. In particular, articles 77 to 79 provide the legal basis for the development of a European immigration policy. The blue card directive finds its legal justification in article 63, par. 1 points 3 and 4 of the Treaty establishing the European Community. These provisions correspond to the current article 79 of the TFEU.⁷

Who are highly qualified immigrants according to the blue card directive? The directive refers to third country nationals (TCNs) who enter the European Union for purposes of carrying out highly qualified work.⁸ Highly qualified work is defined as work requiring either (i) a post-secondary degree or (ii) professional experience of at least five years at a level comparable to that guaranteed by a post-secondary degree and in an area relevant to the activity to be carried out within the European Union.⁹ The highly qualified work in question, to qualify under the directive, must be protected under national employment law of the relevant member state, or must be in any case carried out, regardless of the legal relationship, on behalf of, or under the direction of another person.¹⁰ Self-employed work remains thus outside the scope of the directive.

A person applying for a blue card must have an employment offer for the duration of at least one year to carry out an activity meeting the requirements for highly qualified work. In addition, a minimum salary threshold applies. Each member state sets the minimum salary threshold, which, in any case must be equal to at least 1.5 times the local average gross annual salary.¹¹

⁶ The European Commission proposed in 2001 a directive on common standards and procedures for the admission of third country nationals for the purposes of employment. The proposal never made it into law however. Proposal for a Council Directive on the conditions of entry and residence of third country nationals for the purpose of paid employment and self-employment economic activities, COM (2001) 386 final, 11/7/2001. Also in 2004 the Commission laid down the rationales and justifications for harmonization in economic immigration provisions in a green paper; Green Paper on an EU approach to managing economic migration, COM(2004) 811 final, 11 January 2005.

⁷ See Treaty Establishing the European Community, consolidated version of 29 December 2006, 2006 O.J. C 321 E/68; also see Treaty on the Function of the European Union, consolidated version of 30 March 2010, 2010 O.J. C-83, article 79.

⁸ See directive 2009/50, *supra* note 1, art. 3.

⁹ Id. art. 2.

¹⁰ Id. art. 2.

¹¹ Id. art. 5.

The directive also specifies that member states are free to enact maximum quotas for the admission of TCNs for purposes of highly qualified work and to condition the issuance of the blue card to a check that there is no Union citizen or already resident TCN who could fill the same vacancy.¹²

Holders of a blue card, during the first two years of stay in the host state, may only carry out work that meets the requirements of highly qualified work for purposes of the directive and they are entitled to equal treatment with nationals of the host state for several purposes, including working conditions, recognition of professional titles, access to education and vocational training, access to public services, social security.¹³ The most innovative part of the directive however has to do with the mobility rights which are granted to holders of blue cards.

The right to free movement in the European Union is, in general, linked to European citizenship. TCNs only acquire a limited free movement right once they become holders of a long term residence permit under E.U. law. As an exception to this rule, holders of a blue card after 18 months of residence in the member state which has issued the blue card are entitled to move to a second member state for purposes of carrying out highly qualified employment.¹⁴ Other than “regular” TCNs, blue card holders may also cumulate periods of residence in different member states for purposes of obtaining a E.U. long term residence permit.¹⁵

In addition to providing a fast track for the admission of skilled migrants, the blue card directive thus also lays the ground for a burgeoning scheme of free movement rights for TCNs. This is a welcome innovation. While the single market is a space virtually without frontiers for citizens, for TCNs the combined operation of immigration rules and requirements for nationality results into several obstacles to intra-Union migration.¹⁶ Mobility on the single market is an important asset for TCNs, and particularly for highly skilled TCNs. It allows pursuing employment opportunities in different parts of the Union and taking advantage of market demands in relocating one’s skills and activities.

As with other E.U. immigration law instruments, the blue card directive provides minimum standards with respect to the admission and treatment of

¹² Id. art. 8.

¹³ Id. articles 12 and 14.

¹⁴ Id. art. 18.

¹⁵ Id. art. 16. Under the provisions of Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long term residents, OJ (L 16) 44, TCNs may be issued a long term residence permit after having resided for five years in the same member state.

¹⁶ For an analysis of the “immobility” of third country nationals in the European Union see Strumia F. (2009): “European Citizenship: Mobile Nationals, Immobile Aliens and Random Europeans”, in *Citizenship in America and Europe-Beyond the Nation-State?* (Michael S. Greve, Michael Zoller eds. Washington D.C., AEI Press), 45-70.

highly skilled TCNs. Member states retain a margin of discretion, in implementing relevant provisions in their domestic orders, for introducing more favorable provisions.¹⁷

Italian choices in this respect may provide a telling example. Italy implemented the directive with some delay with respect to the set deadline of January 2011 with a legislative decree of June 2012.¹⁸ The decree amended in relevant part the Italian Immigration Act, introducing new provisions devoted to the admission and residence of highly qualified workers.¹⁹

Italian implementing provisions are more stringent than the directive for certain aspects, and more indulgent for others. A highly qualified worker under relevant Italian provisions is a worker who has a post-secondary degree and any additional required qualifications for access to the practice of professions in certain identified sectors, including executive positions, intellectual and technical professions.²⁰ While under the directive a post-secondary degree and relevant professional experience are two fungible requirements, under Italian implementing law, holding a suitable education qualification is thus a necessary element. On the other hand, while the directive allows member states to subject the issuance of blue cards to domestically established quotas, Italian implementing legislation exempts blue cards from relevant annual quotas.²¹

A highly qualified worker as defined under Italian implementing provisions needs, in order to qualify for an Italian blue card, an employment contract of at least one year in duration, to perform highly qualified work under the direction and supervision of a physical or legal person, and for a salary equal to at least three times the threshold to qualify for an exemption from health assistance contributions (i.e. based on 2011 amounts, EUR 24,789).²² The reference to direction and supervision of another person probably encompasses a broader range of arrangements than just employer-employee relations, but seems to exclude, in any case, self-employed workers. Similarly to what happens in the case of general economic immigrants into Italy, the prospective employer acts as the sponsor of the highly qualified immigrant, initiating the procedure for the issuance of the blue card.²³

¹⁷ See directive 2009/50, *supra* note 1, art. 4.

¹⁸ Legislative decree of 28 June 2012, n. 108, O.J. n. 171 of 24 July 2012.

¹⁹ See legislative decree 286 of 25 July 1998 (Italian Immigration Act), O.J. n. 191 of 18 August 1998, S.O., articles 9-ter and 27-quater.

²⁰ *Id.*, art. 27-quater. This provision refers to professional qualifications in respect of professions belonging to the first three classes of the Italian National Institute for Statistics (ISTAT) classifications.

²¹ Legislative decree 286 of 25 July 1998 (Italian Immigration Act) *supra* at note 19, at 27-quater, par. 1.

²² *Id.*, art. 27-quater, par. 1 and par. 5.

²³ *Id.*, art. 27-quater, par. 5.

Italian provisions otherwise implement fairly faithfully the European directive. In particular, they provide that third country nationals who have held a blue card issued by another member state for at least 18 months have a right to be admitted in Italy for purposes of carrying out highly qualified employment.²⁴ In addition, consistent with the directive, a EU long-term residence permit in Italy may be issued to third country nationals who have held a EU blue card for at least five years, the last two of which spent in Italy.²⁵

The Italian implementing rules bring about some important facilitations with respect to the Italian regime of economic immigration: qualifying blue card applicants are not restricted to the annual admission quotas for economic migrants, and they benefit of favorable mobility conditions. On the other hand they are not exempt from the lengthy and demanding application process which is reserved to general immigrants. When applying for the blue card they need to have a job contract in hand already, and they need the active cooperation of an Italian employer. Some entrepreneurial immigrants may be deterred by such requirements.

1.2 Comparative Outlook in the Field of Highly Skilled Migration

Highly skilled migration is desirable for host countries. It brings valuable human resources to a country's economy and it helps fill skill gaps in a country's workforce. Several countries of immigration have made a point in their immigration policies to attract skilled migrants and provide for favorable conditions for their admission and integration. One of the most successful policies in this sense is the point based system in place in Canada since 1967.²⁶ The system is aimed at granting admission to people who, because of their skills, are likely to become successfully established in Canada. For these purposes, prospective immigrants are awarded points towards admission on the basis of education, experience, age, language knowledge and adaptability. Immigrants who score above the admission threshold of points are immediately granted permanent residence.²⁷ Also, certain E.U. member states, already before the blue card directive, provided for eased or fast-tracks for the admission of categories of skilled migrants. This is the case of the United Kingdom, Germany and the Netherlands, which enacted relevant policies between 2005 and 2008.²⁸ In Italy, special procedures were in place already

²⁴ Id., art. 27-quater, par. 17.

²⁵ Id. art. 9-ter.

²⁶ For a detailed description of this system, see Shachar A. (2006): "The Race for Talent: Highly Skilled Migrants and Competitive Immigration Regimes", 81 *New York University Law Review* 101.

²⁷ Id. at 122-129.

²⁸ For an analysis of relevant policies in the Netherlands, Germany and the U.K. see Wiesbrock A. and Hercog M., (2010): "The Legal Framework for Highly Skilled Migration to

before the blue card directive for certain categories, such as, among others, university professors and lecturers, and for nurses.²⁹

An important model of comparison, in the subject of skilled migration policies, is certainly the U.S., which, despite eliciting much critique and discontent,³⁰ have in place a comprehensive system for the admission of several categories of skilled migrants. The U.S. issue immigrant visa under the first Employment Based Preference to individuals of extraordinary ability in the arts, sciences, education, athletics and/or business, to outstanding professors and researchers, and to multinational managers or executives.³¹ Qualifying individuals of extraordinary ability do not need a sponsor employer and are exempt from the so called “labor certification”.³² The labor certification is a requirement that most other applicants have to meet in order to obtain an immigrant visa. It consists of a certification of the Department of Labor that there is no U.S. citizen or legal permanent resident (LPR) available to perform the activities that the relevant immigrant would perform.³³ It is thus a requirement akin to the preference for E.U. citizens which may be maintained by E.U. member states, according to the directive, in implementing the blue card regime.³⁴ While individuals of extraordinary ability are those one-of-a-kind or top-of-their-field, there is a distinct Employment Based preference for individuals of exceptional ability in sciences, arts or business.³⁵ Exceptional ability is somewhat less than extraordinary ability.³⁶ Relevant applicants in principle need a sponsor employer and a labor certification. However a national interest waiver may be granted, where the applicant can show that his/her admission is in the interest of the United States and/or beneficial for its economy.³⁷ Immigrant visa are also available for investors, who invest at least USD 1,000,000 in an economic activity in the United States

the EU. EU and US Labour Migration Policies Compared”, *Maastricht Graduate School of Government Working Paper* 2010/001.

²⁹ See TU Immigrazione art. 27.

³⁰ See e.g. “Let them stay, let them in. An area where Barack Obama has got it right”, *The Economist*, Feb. 2nd, 2013, available at <http://www.economist.com/news/leaders/21571145-area-where-barack-obama-has-got-it-right-let-them-stay-let-them>.

³¹ U.S. Immigration and Nationality Act, section 203(b)(1)(A-C).

³² For details on the requirements for immigration under the first employment preference, see United States Citizenship and Immigration Service, Employment-Based Immigration, First Preference, EB-1, at [USCIS EB-1](#) (last accessed April 2013).

³³ *Id.*, sect. 212(a)5(A).

³⁴ See above par. 0. Also see directive 2009/50, *supra* note 1 at art. 8.

³⁵ This is the so-called second employment based preference or EB-2. See Immigration and Nationality Act, section 203(b)(2)(A-C).

³⁶ For further details on the concept of exceptional ability, see United States Citizenship and Immigration Service, Employment-Based Immigration, Second Preference, EB-2, at [USCIS EB-2](#) (last accessed April 2013)

³⁷ *Id.*, section 203(b)(2)(B)(i).

and generate at least 10 full-time jobs in ten years.³⁸ The concept of “skill” for purposes of U.S. immigration law is thus much more various than the concept of skill underpinning European legislation on blue cards. It encompasses, for instance, creativity, ability in the sciences, specialized knowledge and education, and entrepreneurship.

In addition to immigrant visas, which open the way to permanent residence in the United States, U.S. immigration law also includes certain non-immigrant visa categories favoring skilled migration. The O-visa, for instance, is for persons “of extraordinary ability and achievement”, by which it is meant individuals who are at the top of their field and whose talent is recognized at either national or international level.³⁹ Also, one of the most renowned categories of non-immigrant visas, the H1-B, is aimed at applicants for occupations in fields requiring a highly specialized knowledge.⁴⁰ “Highly specialized knowledge” for these purposes is that acquired with a college degree, or equivalent, or earned through professional experience in the same field which may be equated to the achievement of a degree.⁴¹ The H1-B visa requires the sponsorship of an employer and a genuine employer-employee relationship.⁴² It is probably the visa category most closely comparable, for applicable requirements and for the advantages it grants, to the European blue card. Finally, the U.S. also provide for a non-immigrant visa for investors who are nationals of countries with which the U.S. have a treaty relationship.⁴³ The E-2 visa may be granted to individuals who invest a substantial amount of capital in a U.S. business, and who seek to enter the U.S. to develop and direct such business.⁴⁴

Under U.S. law, thus, skilled migrants face a range of admission facilitations. In some cases they are exempted from providing a labor certification; in others, they can “self-petition”, without need to have a

³⁸ Id., section 203(b)(5).

³⁹ Id., section 101(15)(O).

⁴⁰ Id., section 101(15)(H).

⁴¹ See United States Citizenship and Immigration Service, H1-B Specialty Occupations, [USCIS H1-B](#) (last accessed April 2013).

⁴² A 2010 USCIS memorandum has clarified that in the context of an H-1B petition, the petitioner has to establish that a valid employer-employee relationship exists between the U.S. employer and the beneficiary. According to USCIS, a number of factors may signal the existence of such a relationship, but the driving one will be whether the hiring party has the “right to control the manner and means by which the product is accomplished”. U.S. Department of Homeland Security, U.S. Citizenship and Immigration Service, Memorandum of 8 January 2010, ref. HQ 70/6.2.8 AD 10-24, available at [www.uscis.gov](#) (last accessed March 2013).

⁴³ See Immigration and Nationality Act, section 101(15)(E)(ii).

⁴⁴ See United States Citizenship and Immigration Service, E-2 Treaty Investors at [USCIS E-2](#) (last accessed April 2013).

sponsor in the U.S.; further, in some cases, such as E-2 visa holders, they are entitled to renewal of their visa an unlimited number of times.⁴⁵

In comparison, the regime introduced in Europe with the blue card directive, is more limited in scope and grants a reduced range of benefits. While in the U.S. a skilled migrant may obtain directly a “green card” i.e. a permanent residence permit, the blue card is a temporary permit.⁴⁶ Further, while in the U.S. the category of talented migrants is drawn by relying on several different indicators of skill, in the E.U. talented migrants for purposes of the blue card are only those who perform highly qualified work as defined in the directive. In particular, a significant exclusion from the scope of the directive is in respect of self-employed workers. Entrepreneurs cannot qualify for a blue card. Yet, they are one of the categories of immigrants whose talent would be more beneficial to the stagnating economies of potential European host countries.

2. The Revitalizing Potential of Skilled Migration

It has been noted that European legislation on blue cards does not add much to pre-existing policies of certain E.U. member states.⁴⁷ It introduces however in the discourse on a common European immigration policy a concern for skill which has the potential to give a new imprint to relevant policy choices. For certain countries, such as Italy, it brings about a new policy concern which was not consciously spelled out in pre-existing immigration legislation.

Immigration is an important factor of demographic innovation in the countries of the European Union, which face an inescapable demographic decline.⁴⁸ It is also a factor of innovation for their somnolent societies, used, in many cases, to ethnic and cultural homogeneity. At the same time, immigration generates several potential problems. It poses a problem of coexistence in diversity and of mitigating reactions of resistance on the part of local populations.⁴⁹ It forces to monitor and patrol vulnerable borders.⁵⁰ In certain cases it also puts a burden on already strained public resources.

⁴⁵ Id.

⁴⁶ Member states are free to set the duration of the blue card, in a range between one and four years. Directive art. 7

⁴⁷ Wiesbrock A. and Hercog M., “The Legal Framework for Highly Skilled Migration to the EU, *supra* note 28, at p. 15 and at p. 18.

⁴⁸ See Parsons C.A. and Smeeding T. M. (2006): “What’s Unique About Immigration in Europe” in *Immigration and the Transformation of Europe* (Craig A. Parsons and Timothy M. Smeeding eds.), Cambridge, Cambridge University Press.

⁴⁹ For a detailed analysis of the problem of co-existence with diversity that immigration brings about see Strumia F. (2009): *Supranational Citizenship and the Challenge of Diversity: Immigrants, Citizens and Member States in the E.U.*, S.J.D. Dissertation, Harvard Law School Library, Chapter Three.

A successful immigration policy is one that strikes an effective balance between the potential and the risks of immigration, and sets forth adequate incentives to encourage desirable streams of immigration. Skilled migration is one such stream. It may benefit host countries in several ways. In particular in the countries of the European Union, threatened by surging public debt, slow or inexistent growth, youth unemployment, and a certain general sense of unease and discouragement, skilled migration may contribute to some virtuous dynamics.

This part focuses on three such dynamics and considers how immigration policy choices may contribute to encourage or reinforce the same dynamics. First, skilled migrants may bring ideas and entrepreneurship. European polities are starved for entrepreneurial and innovative initiatives. Italy, for instance, has recently enacted legislation on technologically innovative start-ups.⁵¹ This is a kind of business that thrives on ideas. The pool of ideas of citizens and locals is not sufficient. Skilled migrants may bring new ones. Second, and keeping with entrepreneurial migrants, such migrants may work as a drawing force for migrants integration in a host society. Migrant entrepreneurs are more likely than locals to draw on a workforce with whose culture and habits they are familiar. They create thus employment opportunities and integration paths for other components of the immigrant community, thereby contributing to the effectiveness of a host country integration policies. Third, organizing a branch of immigration policy around a notion of talent and merit may give heightened resonance to these same values also in other policies of the host country. If skill and talent open up fast tracks to admission and integration, a self-selection mechanism is likely to gradually start operating among prospective migrants, thereby potentially altering the composition of migration streams. Further, if considerations of talent and merit are taken into account also in the award of citizenship to migrants, the same concept of citizenship potentially changes and takes on a new color.

The following paragraphs examine each of these three arguments in more detail.

2.1 Synergies between highly skilled migration and entrepreneurship

Skill does not necessarily coincide with entrepreneurship. The two notions however resonate with one another. As described above,

⁵⁰ An effort among E.U. member countries to coordinate the patrolling and management of external borders has found expression in the establishment of the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex). See Council Regulation n. 2007/2004 of 26 October 2004, 2004 O.J. L 349.

⁵¹ See Law Decree n. 179 of 18 October 2012, "Ulteriori misure urgenti per la crescita del Paese" (so called "Decreto Crescita 2.0"), converted into Law n. 221 of 17 December 2012, O.J. n. 294, of 18 December 2012, section IX, articles 25-33.

entrepreneurship is certainly a component of the idea of skill underlying U.S. policy on skilled migrants.⁵²

In European Union legislation on blue cards this association is not spelled out. As seen, blue cards are targeted to employees or in any case to persons who perform highly qualified work under the supervision of another person.⁵³ Attracting entrepreneurs does not seem to be a priority, at present, for European policies on skilled migrants.

Yet, fostering the development of new, and thriving enterprises, is certainly a priority for several E.U. countries faced with high unemployment and slow growth. Recently enacted Italian legislation, for instance, favors innovative start-ups through simplified corporate procedures, facilitations in seeking funding and tax benefits.⁵⁴ Innovative start-ups are born of, and depend on, skill. If the intent is to attract them and foster their growth, it is important to look for skill in any possible available pool. Talented migration is one such pool. In this sense, there is an important potential synergy between policies favoring skilled migration and policies favoring business and innovative entrepreneurship. Such synergy needs to be more profoundly explored and clearly spelled out.

Relevant discourses, at least in Italy, are however forgetful of such synergy. Even existing correspondences in relevant legislation have not been clearly spelled out. According to the Italian “decreto sviluppo”, one of the alternative requirements for a new company to qualify as an innovative start-up and take advantage of the benefits provided for in relevant legislation, is to employ, for at least a third of its workforce, employees with high qualifications, such as a research doctorate or several years of research experience.⁵⁵ Here’s where a first potential point of contact between legislation on innovative start-ups and legislation on skilled migration surfaces. The kind of workforce that qualifies a start-up for purposes of the “decreto sviluppo” is the same kind that may apply for a blue card under E.U. law and relevant Italian implementing provisions.⁵⁶ This is a first important synergy between the two policies. Indeed, it allows founders of innovative start-ups to draw on a larger pool of qualified workforce, attracting talent to support their business from around the world. Of course, other factors will affect the ability of the relevant entrepreneur to attract relevant workforce to his or her business. These include international competition, labor market conditions in the host country

⁵² See “The Jobs Machine-Immigration and America’s High Tech Industry”, *The Economist* 13 April 2013, available at <http://www.economist.com/news/business/21576101-start-ups-founded-immigrants-are-creating-jobs-all-over-america-jobs-machine> (last accessed April 2013).

⁵³ See directive 2009/50, *supra* note 1, art. 2(b).

⁵⁴ See Law n. 221 of 17 December 2012, *supra* at note 51, articles 26, 29 and 30.

⁵⁵ *Id.*, art. 25 par. 2.

⁵⁶ See *id.* art 25 par. 2, compared with the definition of “highly qualified employment” of directive 2009/50, *supra* note 1, art. 2(b) and (g).

(Italy, in this case), tax treatment and other features of the general and economic environment of the host country.⁵⁷ Consistency of applicable legal schemes is in any case an important starting point. It signals a first way in which immigration policy may support or contribute to a country's growth strategy.

The synergy could (and perhaps should) go much further. As evidenced in the previous part, European legislation on blue cards, and relevant Italian implementing provisions, are aimed at employees and not at self-employed workers. Yet new business, and new innovative business in particular, depends on the intake of good ideas and entrepreneurial resources. Creating a legal, corporate and financial environment favorable to innovative entrepreneurship, but then restricting such environment to citizens is a self-defeating choice. Relevant ideas and resources may come precisely from the immigrant community, or from new immigrants. It is in the interest of E.U. countries to attract those ideas, nurture them and provide them with an adequate breeding ground.

However, in keeping with the Italian case, at present, immigrating as self-employed workers is quite difficult. Prospective migrants have to meet several requirements such as availability of sufficient resources to maintain themselves and to carry out their proposed activity, they need to satisfy all applicable licensing requirements and to obtain a *nihil obstat* of the territorially competent chamber of commerce or other competent authority.⁵⁸ What is more, the number of visas issued annually for self-employed workers is very limited.⁵⁹

There is a broken link thus in the virtuous chain that connects policies on skilled migration and policies favoring innovative entrepreneurship. This is one place to look in order to catch, and reinforce, the rejuvenating potential of skilled migration for European polities.

2.2 The integration role of talented migrants

Talented migrants who manage to establish successful economic activities in the host community also represent potential catalysts for the

⁵⁷ See Wiesbrock A. and Hercog M.: "The Legal Framework for Highly Skilled Migration to the EU", *supra* note 28, at p.4.

⁵⁸ Legislative decree 286 of 25 July 1998 (Italian Immigration Act) *supra* at note 19, art. 26.

⁵⁹ The number of visas to be issued annually for employed and self-employed third country nationals is set through a decree of the President of the Council of Ministers (the "Decreto Flussi"). See Legislative decree 286 of 25 July 1998 (Italian Immigration Act) *supra* at note 19, art. 3. In 2012, no "decreto flussi" has been adopted; however, two transitional decrees have been issued, one setting forth quotas for seasonal workers, the other one setting forth quotas for employed and self-employed workers. The 2012 quota for self-employed workers according to these decrees was 2000. See Decree of the President of the Council of Ministers, 16 October 2012.

integration of other categories of immigrants.⁶⁰ Immigrant enterprises indeed are likely to draw on immigrant networks in seeking employees and commercial partners. Cultural, religious or ethnic affinity may fuel, at least in a first phase, the level of trust necessary to ground commercial and employment relationships. The diaspora character of immigrant communities in a host country fosters the establishment of more or less tight knit networks, grouping around such cultural, religious or ethnic affinities.⁶¹ These networks provide the first port of call for immigrant entrepreneurs to seek their workforce.

Depending on the frequency and intensity of dynamics of this kind, skilled migration thus also has a potential role with respect to the integration of pre-existing communities of migrants. Employment is one of the most important factors in promoting the social and civic integration of immigrants in a host community. Involvement in an immigrant enterprise may bring for an immigrant financial security and a sense of social purpose. A co-ethnic business environment may be an easier first platform from which to gain a level of economic involvement in the host polity. The relevant experience may subsequently support the relevant immigrant in obtaining other opportunities in the broader general business environment of the host polity.

Integration is an increasingly urgent problem for E.U. countries which have become recipients of increasing streams of immigration from Eastern Europe, North Africa, and other parts of the globe.⁶² Many polities within the European Union are endeavoring to shape effective strategies to promote the social integration of their immigrant communities,⁶³ and to foster the acculturation of immigrants to their constitutional, historical and cultural traditions. Many of these strategies focus on the promotion of civic integration and citizenship practice courses, and on the administration of integration and

⁶⁰For references to the role of co-ethnic promotion of entrepreneurial immigrants, see Aleinikoff T.A., Martin D.A., and Motomura H. (2006): *Immigration and Citizenship, Process and Policy*, Chapter 4, Thomson West.

⁶¹For a review of arguments in respect of the “residential congregation” of immigrants, see Mendez P. (2008): “Immigrant Residential Geographies and the Spatial Assimilation Debate in Canada 1997-2006”, *Metropolis British Columbia, Centre of Excellence for Research on Immigration and Diversity, Working Papers Series*, n. 08-07, at 6.

⁶²Integration of third country nationals is a policy goal high on the agenda of the European Union. See e.g. 2011 Agenda for the Integration of Third Country Nationals, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, “European Agenda for the Integration of Third Country Nationals”, COM(2011) 455 final, of 20 July 2011, available at http://ec.europa.eu/home-affairs/news/intro/docs/110720/1_EN_ACT_part1_v10.pdf (last accessed April 2013).

⁶³See e.g. Legislative decree 286 of 25 July 1998 (Italian Immigration Act) *supra* at note 19, art. 42 titled “Misura di integrazione sociale”.

citizenship tests which immigrants have to pass, in order to obtain or renew a residence permit, or in order to be naturalized.⁶⁴

All these “integration” policies can only go so far. Part of the reason is that integration is mostly a grass-root, bottom-up process, which feeds itself of life and experience of the host community⁶⁵. For these reasons, the generation of immigrant-targeted economic opportunities through the attraction of skilled migrants may provide an important complement to policies of this kind. Immigrant enterprises offer a privileged vehicle for immigrants to experience the life of the host polity from a protected position. Market interests may provide to such enterprises an important incentive to conform, and to induce relevant workforce to conform, to the commercial and other practices of the host polity. Yet in coming to terms with such practices, immigrant enterprises also provide a safe haven where to protect pre-existing identities, and thus offer a path to integration, which possibly appears less threatening for the immigrant and his identity.

2.3 The pervading character of talent-based inclusion

The focus on talent brought about by the remodeling of immigration policies may have a contagious potential and spread to other sectors of communal and civic life.

First of all, the strengthening of policies favoring skilled migration may in the long run induce a process of self-selection among aspiring immigrants. Policies of this kind have a strong signaling function. On the contrary awareness of lack of effective coordination among E.U. countries in managing their immigration streams, and the absence of a focus on skill and desert cannot but encourage resourceless streams of immigration, which arrive without a plan and are at risk of falling, in the host polities, in the ranks of the emarginated and the petty criminals.

Focusing on skilled migration does not mean pushing back immigrants who leave their countries because of need. It means however conveying the message that admission, and integration in a host E.U. polity is to some extent a benefit to be earned and that requires a measure of effort and preparation on the part of the immigrant. It means appealing to some of the best human virtues and encouraging immigrants to give the best they are capable of in their choice, voluntary or forced, of migration.

⁶⁴ See for instance, provisions on the “integration agreement” which immigrants into Italy have to underwrite upon receiving a residence permit. Legislative decree 286 of 25 July 1998 (Italian Immigration Act) supra at note 19, art. 4-bis. Thoughts also go to the “Life in the UK” test, which immigrants into the U.K. have to take in order to become settled in the U.K. UK Border Agency, Life in the UK Test, available at <http://www.lifeintheuktest.gov.uk/> (ultimo accesso aprile 2013).

⁶⁵ See Dimitry Kochenov, *Mevrouw De Jong Gaat Eten: EU Citizenship and the Culture of Prejudice*, EUI Working Papers 2011/6, at 11.

Talented immigrants should not only be rewarded with admission, but also with eased pathways to naturalization and full membership. Well-rounded political, social and civic inclusion through citizenship should not be held back from them. For instance, residence periods required for naturalization could be shortened for skilled migrants. Building on, and expanding the limited free movement rights recognized to blue card holders by recent E.U. legislation, it could also be provided that skilled migrants may cumulate periods of residence in different member states for purposes of access to citizenship.⁶⁶ Further, integration requirements could be watered down in respect of skilled migrants who possibly have already shown integration by successfully spending their skills in the host community, and by engaging in a successful economic activity.⁶⁷

In this way citizenship, or at least citizenship awarded by naturalization, would become in part a reward for merit. This focus on merit and talent has a signaling function not only for the immigrant community, but also, potentially for the citizenry of the host community. Citizenship is a status that many Europeans bring along by default rather than as the result of a conscious choice of belonging. Witnessing the experience of a growing, and hopefully thriving, immigrant community may be of example also for natural born European citizens. It may help them to shake the dust off their status of belonging, and to reassess the value of their citizenship.⁶⁸

This way European polities would be renovated both in their demographic composition and in the attitude of their citizenry.

3. Fine Tuning European Policies on Skilled Migration

The previous part of the paper has suggested three possible ways in which skilled migration, and policies favoring this kind of migration, may support dynamics of innovation and revitalization of the economic and civic outlook of host E.U. polities. This conclusive part considers a few suggestions on how to fine tune relevant European immigration policies in order to foster and support these potential rejuvenating dynamics.

⁶⁶ See Bauböck R. and Perchinig B. (2006): “Evaluation and Recommendations” in *Acquisition and Loss of Nationality-Policies and Trends in 15 European States* (Rainer Bauböck, Eva Ersboll, Kees Groenendijk and Harald Waldrauch eds.) at 446, who first proposed to count years of residence in different member states for purposes of naturalization in a member state.

⁶⁷ For the idea of “mutual recognition of belonging” and its practical implications, see Strumia F., *Supranational Citizenship and the Challenge of Diversity: Immigrants, Citizens and Member States in the E.U.*, supra at note 49, Chapter Four.

⁶⁸ For an argument in respect of the internalization of a sense of groupness among European citizens, see Strumia F. (2011): “Softening Divides through Legitimacy-the case of EU Citizenship”, *IUSE Working Papers*, 2011/1, available at <http://workingpapers.iuse.it/softening-divides-through-legitimacy-the-case-of-e-u-citizenship-francesca-strumia/?lang=it>.

As observed in the first part of the paper, the concept of skill underlying the European blue card directive is quite limited in scope. Evidence of skill, for purposes of the award of a blue card, is to be found in the holding of a post-secondary degree, or in the alternative in a certain level of professional experience. Italian implementing provisions take an even narrower stance, referring exclusively to relevant levels of education, without providing for an alternative professional experience threshold.⁶⁹ The kind of skill which may benefit European polities and their citizenry is however much broader than that. The concept of skill could then be declined along a wider spectrum to include not only education and professional experience, but also other factors warranting adaptability and versatility. In this sense, the Canadian point-based system may provide a useful source of inspiration.⁷⁰

In particular, an important gap left open by the blue card directive is the case of self-employed workers. As noted, the directive refers to the carrying out of highly qualified employment on behalf of, or under the direction of another person.⁷¹ Self-employed workers, and notably entrepreneurs, do not fit within this definition. Yet, it is really important for European polities to attract entrepreneurs. Policies favoring the establishment of innovative start-ups, such as that enacted in Italy in 2012, witness to the favor for channeling human and financial resources towards talent-driven, technologically pioneering and profitable business. There is no reason to screen off foreign entrepreneurs from such policy.⁷² On the contrary, facilitating investments in European polities by foreign entrepreneurs cannot but enlarge and enrich the pool of ideas, which potentially materialize into new business opportunities. Fast-tracks to visa issuances, security of status and intra-Union mobility are particularly important to attract foreign entrepreneurs. Policies on skilled migration should thus not be forgetful of this aspect, and relevant notions of skill should take into account business and entrepreneurial skill, as well as possibility to invest capital in a host polity business.

A further consideration is whether to strengthen incentives for talented immigrants who have conducted their studies in a European member state to stay after having graduated and seek employment in a European Union country. Under the Italian immigration act, foreign students who graduate from Italian universities with a master degree or research doctorate have a 12-month bonus period to seek employment. During this time frame, they are

⁶⁹ See above paragraph 0.

⁷⁰ See Shachar A. (2006): “The Race for Talent: Highly Skilled Migrants and Competitive Immigration Regimes”, *supra* note 26.

⁷¹ See above paragraph 0. Also see directive 2009/50, *supra* note 1, art. 2.

⁷² The United States Citizenship and Immigration Service, for instance, within the frame of the White House-launched program “Start-Up America” (relevant fact sheet at <http://www.whitehouse.gov/startup-america-fact-sheet>), has developed a resources centre devoted to immigrant entrepreneurs. See “Entrepreneur Pathways-A Resource for Immigrant Entrepreneurs”, available at <http://www.uscis.gov/portal/site/uscis/eir>.

able to convert their residence permit for study purposes into a residence permit for employment purposes.⁷³ The blue card directive is silent in this respect.⁷⁴ Immigrants who have been educated in the universities and school system of the host state hold particular promise as skilled migrants as they are already familiar with, and likely integrated into, the community of the host polity. In addition, the state has already spent resources for their education, and thus has a precise interest in retaining their talent. It seems thus that it would be reasonable to supplement the blue card policy with measures favoring third country nationals who have studied in the European Union, allowing them eased access to the labor market of the member states and a fast track to security of status.

Turning to security of status, this is an additional element which should be taken into account in the frame of a skilled migrants policy. In order to be able to carry out an economic activity, and to devote to it resources and investments, it is important for the immigrant to feel, and be safe, in his or her status. As things stand, the blue cards issued by the member states may be for a duration of between one and four years.⁷⁵ Then, after five years of continuous residence in the European Union (including thus at least one blue card renewal), a blue card holder is entitled to a E.U. long term residence permit.⁷⁶ This is in principle an open term permit, with which the holder can also reside, for qualifying reasons such as work or employment reasons, in a second member state.⁷⁷ One more aspect to consider is whether skilled migrants should also enjoy a beneficial treatment in terms of access to citizenship. A reform in this sense would involve both E.U. level legislation and member states' level legislation, as nationality is one of the subjects of exclusive competence of the member states.⁷⁸ E.U. law could however play its

⁷³ See e.g. Legislative decree 286 of 25 July 1998 (Italian Immigration Act) *supra* at note 19, art. 22 par. 11-bis.

⁷⁴ See Wiesbrock A. and Hercog M.: "The Legal Framework for Highly Skilled Migration to the EU", *supra* note 28, at 16, emphasizing that the original Commission proposal entailed additional advantages for younger skilled migrants and former students, which did not make it to the final version of the directive. Also see Directive 2004/114 of 13 December 2004 on the conditions of admission of third country nationals for purposes of studies, pupil exchange, unremunerated training or voluntary service, 2004 O.J. L 375, which provides at article 17 that students admitted into the European Union under the provisions of the directive may carry out economic activities in the host member state while pursuing their studies. The directive however does not provide for eased conditions for the access of the migrant student to the host member state's labor market upon completion of his or her studies.

⁷⁵ See directive 2009/50, *supra* note 1, art. 7.

⁷⁶ See directive 2003/109, *supra* note 15.

⁷⁷ *Id.*, articles 14 and 15.

⁷⁸ See Declaration on Nationality of a Member State annexed to the 1992 Treaty on European Union, available at <http://eur-lex.europa.eu/en/treaties/dat/11992M/htm/11992M.html#0098000022> (last accessed April 2013).

part by fostering a measure of mutual recognition among requirements for citizenship met by skilled third country nationals in different member states. Making skill relevant for purposes of eased access to citizenship would help to re-conceptualize citizenship, or at least European citizenship, as a reward for merit. As was suggested in part II of the paper, such a reconceptualization may have an important signaling function.

Conclusion

Europe is the destination of several immigration streams. Immigration brings resources, but also several issues to host E.U. polities. It poses the problem of co-existence in diversity, of fostering inclusion and avoiding the marginalization of immigrants. The discourse on immigration in the European Union usually focuses on immigration as a problem. The immigration policy of European member states has long been characterized by efforts to tackle this problem by, on the one hand devising criteria to contain the influx of migrants, and on other one by trying to accommodate needy migrants and to provide viable paths to integration of the newcomers. In the last few years, attention has turned, in certain E.U. countries and at E.U. level, to skilled migration, which is treated as a desirable stream. This paper has taken inspiration from this policy change to focus on immigration as opportunity. Opportunity for renewal and rejuvenation of the demographic composition of European member states, of their business models, and implied social contracts. It has advanced in particular three suggestions of possible ways in which a policy favoring talented migration may benefit E.U. countries. Each of these suggestions needs of course to be further tested and analyzed, and it has been offered here to steer thoughts rather than to draw conclusions. A comprehensive analysis of skilled migration policy also needs to take into account the points of view of sending states, and of immigrants themselves. This paper has rather focused on the point of view of host polities. The goal of this paper has not been however to provide a comprehensive analysis of skilled migration policies and their merits, but rather to offer hints for further research on how migration, which is a matter of fact for many E.U. countries, may turn into a valuable factor of innovation and regeneration at a time of downturn, economic crisis and political fragility.