MAZZESCHI

Italian Immigration & Citizenship

APRIL 2021. VOL 3

News, updates and curiosities on
Italian Immigration and Citizenship

CONTENT

Italian Immigration

- Which is your "habitual residence" if you work in different EU countries?
- Citizenship by investment in the 13th century: the right to have rights …… and duties!
- BREXIT – Activities for which UK short-term business visitors do not need a work visa

Italian Citizenship

- Italian citizenship and delays caused by the Consulate: what can be done?

Living in Italy

- Non-EU family members of EU citizens living in Italy: what happens if the principal does not have an income in Italy?

These articles have been published during the period of Mar. 1st-31st on our website: www.mazzeschi.it

Which is your "habitual residence" if you work in different EU countries?

The European Court of Justice affirmed that a person cannot have simultaneously two habitual residences in two different Member States. "Habitual residence" is used as the connecting factor in many areas of EU legislation, such as:

-on jurisdiction and the recognition and enforcement of judgments in matrimonial matters (Regulation No 2201/2003)

-on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession (Regulation No 650/2012)

-on the law applicable to divorce and legal separation (Regulation No 1259/2010)

-on coordination of EU social security systems (Regulation No 883/2004)

The European Court of Justice (CJEU) held that the Member State of "residence" is "the State in which the persons concerned habitually reside and where the habitual centre of their interests is to be found.(1)

Habitual residence is considered the place where an individual has his/her centre of interests.

The **habitual centre of interests** must be determined on the basis of the facts, having regard to all circumstances which point to a person's real choice of a country as his or her State of residence. (2)

Criteria for determining the place of residence:

The criteria for determining residence are explicitly non-exhaustive but include (3):

-the duration and continuity of presence on the territory of the Member States concerned;

-the person's situation, including: the nature and the specific characteristics of any activity pursued, in particular the place where such activity is habitually pursued, the stability of the activity, and the duration of any work contract;

-his family status and family ties;

-the exercise of any non-remunerated activity;
in the case of students, the source of their income;
his housing situation, in particular how permanent it is;

-the Member State in which the person is deemed to reside for taxation purposes.

(1) CJEU, Case C-90/97 Swaddling [1999] ECR I-1075, paragraph 29
(2) CJEU, Case C-76/76 Di Paolo [1977] ECR 315, paragraphs 17 to 20, and Case C-102/91 Knoch [1992] ECR I-4341, paragraphs 21 and 23
(3) Art. 11(1) Regulation No 987/2009 of 16 September 2009

Residence vs temporary stay:

A distinction must be made between “residence” (the place where a person habitually resides) and “stay” (temporary residence).

The term **“stay”** is characterized by its temporary character and by the intention ofthe person to return to his or her place of residence as soon as the underlying purpose for the stay in another country has been reached.

“Stay” thus requires the physical presence of the person concerned outside of his or her habitual place of residence.

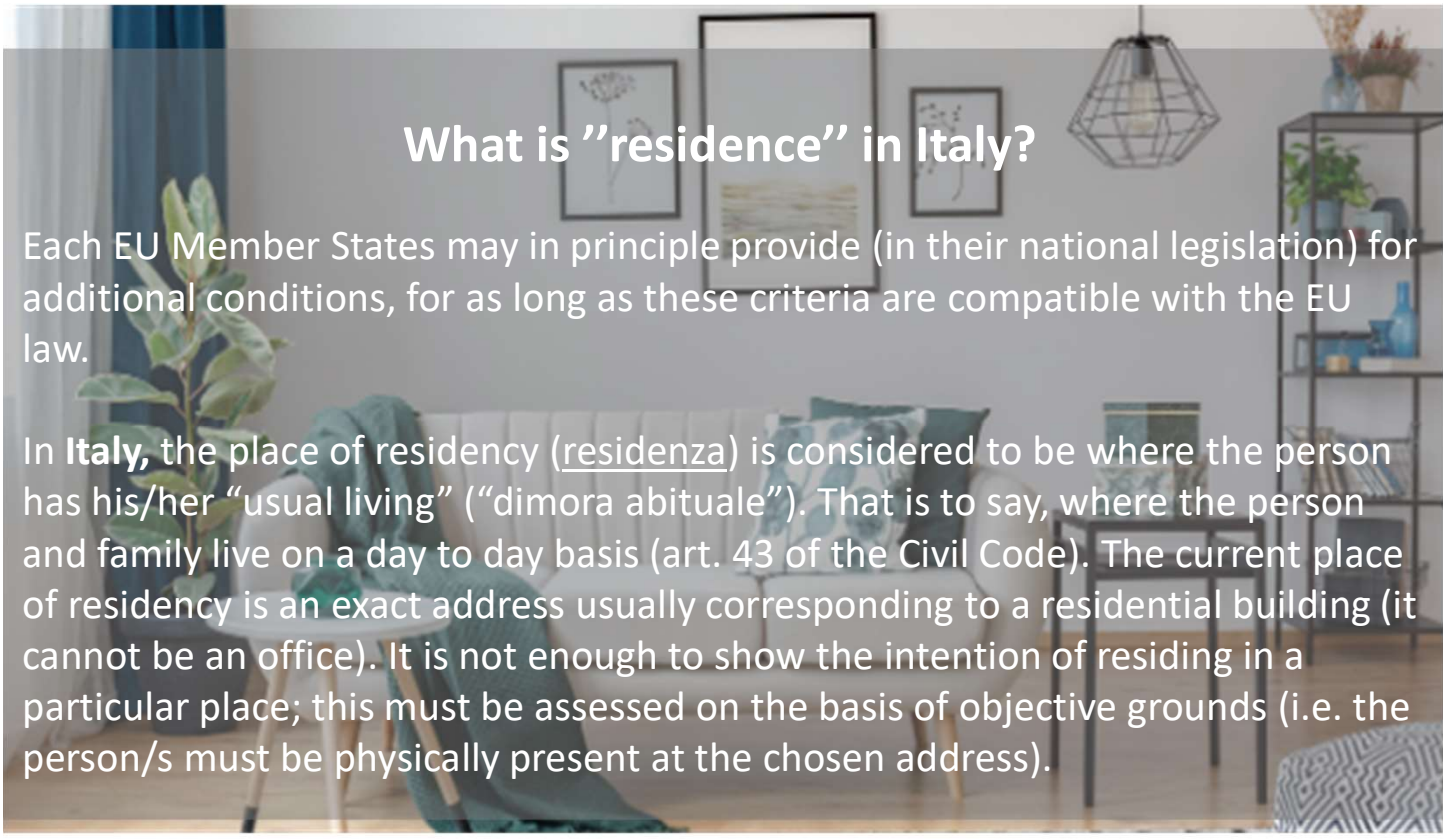
Can a person legitimately claim to have simultaneously two habitual residences in two different Member States? NO

For the purpose of application of Regulation No 1408/71, the ECJ (4) affirmed that it cannot be accepted, without depriving the provisions of the Regulation of all practical effectiveness, that a person may have, a number of habitual residences in different Member States.

That finding is supported by the Court’s case-law on the concept of ‘residence’ for the purposes of European Union legislation applicable to social security schemes for migrant workers.

Consequently, it must be concluded that Article 10 of Regulation No 1408/71 must be interpreted as meaning that,
a person cannot have simultaneously two habitual residences in two different Member States.

The principle has been confirmed by a recent decision of the CJEU (5) interpreting Regulation No 650/2012 (Succession Regulation), where the Court affirmed
The last habitual residence of the deceased, within the meaning of Regulation No 650/2012 , must be established by the authority dealing with the succession IN ONLY ONE **of those Member States.**



What is ''residence'' in Italy?

Each EU Member States may in principle provide (in their national legislation) for additional conditions, for as long as these criteria are compatible with the EU law.

In **Italy,** the place of residency (residenza) is considered to be where the person has his/her "usual living" ("dimora abituale"). That is to say, where the person and family live on a day to day basis (art. 43 of the Civil Code). The current place of residency is an exact address usually corresponding to a residential building (it cannot be an office). It is not enough to show the intention of residing in a particular place; this must be assessed on the basis of objective grounds (i.e. the person/s must be physically present at the chosen address).

---

(4) CJEU, Case C-589/10 Wencel, paragraphs 43 to 51
(5) CJEU, case C-80/19 E.E, paragraph 45
(6) see also Practical guide on the applicable legislation in the European Union (EU), the European Economic Area (EEA) and in Switzerland — European Commission — Employment, Social Affairs and Equal Opportunities (December 2013)

CITIZENSHIP BY INVESTMENT IN THE 13th CENTURY: THE RIGHT TO HAVE RIGHTS ….. AND DUTIES!

Obtaining citizenship by investment was common practice also in the 13th century.

- *This article is written by Marco Mazzeschi and contributed to our publication on Medium.com.*
- *Follow us on Medium.com/StudioMazzeschi for more latest articles.*

Many States are raising capitals and attracting wealthy individuals by "selling" citizenship (Citizenship by investment or CBI). But the concept of acquiring citizenship by a monetary or real estate contribution is not new.

Citizenship in the 13th century

Between the 11th and 13th century Northern and Central Italy was divided in hundreds of city-states (Comuni) which had their own form of independent governments. Within these entities the element of association was fundamental and participation played an essential role. (*)

Initially, in fact, the **Comune** was constituted by an oath and **all those who participated in swearing the oath became CITIZENS.**

Citizenship brought with it rights (political rights, privileges and tax exemptions) but at the same time imposed precise duties, such us:
(i) the obligation to reside in the city for a period of time
(ii) the monetary contribution to the City-State
(ii) the duty to own or build a house
(iv) the obligation to defend the City gate in person or through a paid deputy.

Here some examples:

The Statute of **Siena** (1296 a.C.) established that a foreigner could become citizen by submitting an application, to be approved by 2/3 of the City Commission (Consiglio della Campana) and the efficacy of the adjudication was subject to **(i)** the payment of "100 soldi" to the Camerlengo; and

(ii) the obligation to build, within one year, a new house to be used as collateral for 10 years toward the City, to guarantee the duties assumed by the individual by becoming a citizen. (**)

In **Venice**, citizenship could be granted to people or princes who had particular merits and has benefitted the city.

In **Florence**, the Grand Duke began to bestow Florentine citizenship by "grazia", as a gift, in exchange for the payment of a tax and the obligation to reside in the city for a period of time.

In the **State of Savoy**, citizens were obliged to reside in Turin, to make special donations in money to the Duke in case of necessity and to guarantee guard duty at the town gates.

Citizenship by investment in present times

The European Parliament and many scholars — for various reasons — have expressed concerns and objected to this practice. The main argument is that if citizenship becomes a commodity, the perception of citizenship itself — as bond of allegiance with a State and a community — could also be affected.

But is this practice really so bad? Some authors defend the sale of citizenship by pointing out that it is less arbitrary and more transparent than other ways of acquiring citizenship (such as those implied by the principles of jus soli and jus sanguinis, or discretionary naturalisation).

Why should those who have citizen parents or who have been born in the state's territory have a stronger moral claim to citizenship than foreigners who are ready to pay or invest?

It is also argued that monetary investment can be a way of contributing to the common good of a political community and should therefore not be summarily dismissed as a legitimate reason for acquiring citizenship.

Can you obtain Italian citizenship by investment?

In Italy, it is possible to obtain residency — NOT CITIZENSHIP ! — by different forms of investment. There some agencies which advertise the possibility of acquiring citizenship by investing some funds, but this is a wrong information and it is fraud. Citizenship can be acquired only if someone has Italian ancestors (**ius sanguinis**), by **marriage**, by naturalization (**after 10 years of residency**), for **special merits**.

INVESTMET

Investor Visa

Since January 2017, also Italy has introduced the possibility of acquiring residency by some forms of investments in the country. To qualify for the Investor Visa the applicant can:

•purchase at least € 2 million in Italian government bonds — funds to be kept for a period of at least 2 years; or

•invest at least € 500.000 in equity instruments of a company based and operating in Italy or € 250.000 in case of a start-up company; or

•donate at least € 1 million philanthropic funding supporting projects of public interest in the field of culture, education, immigration, scientific research, recovery of cultural assets and landscapes.

Enterpreneur Visa

Another option for indivuals who are willing to invest in Italy is to apply for a **self-employment visa for entrepreneurs**.

The applicant shall submit a business plan including an investment of at least 500.000 euros and the creation of at least 3 new jobs in Italy.

Start-up Visa

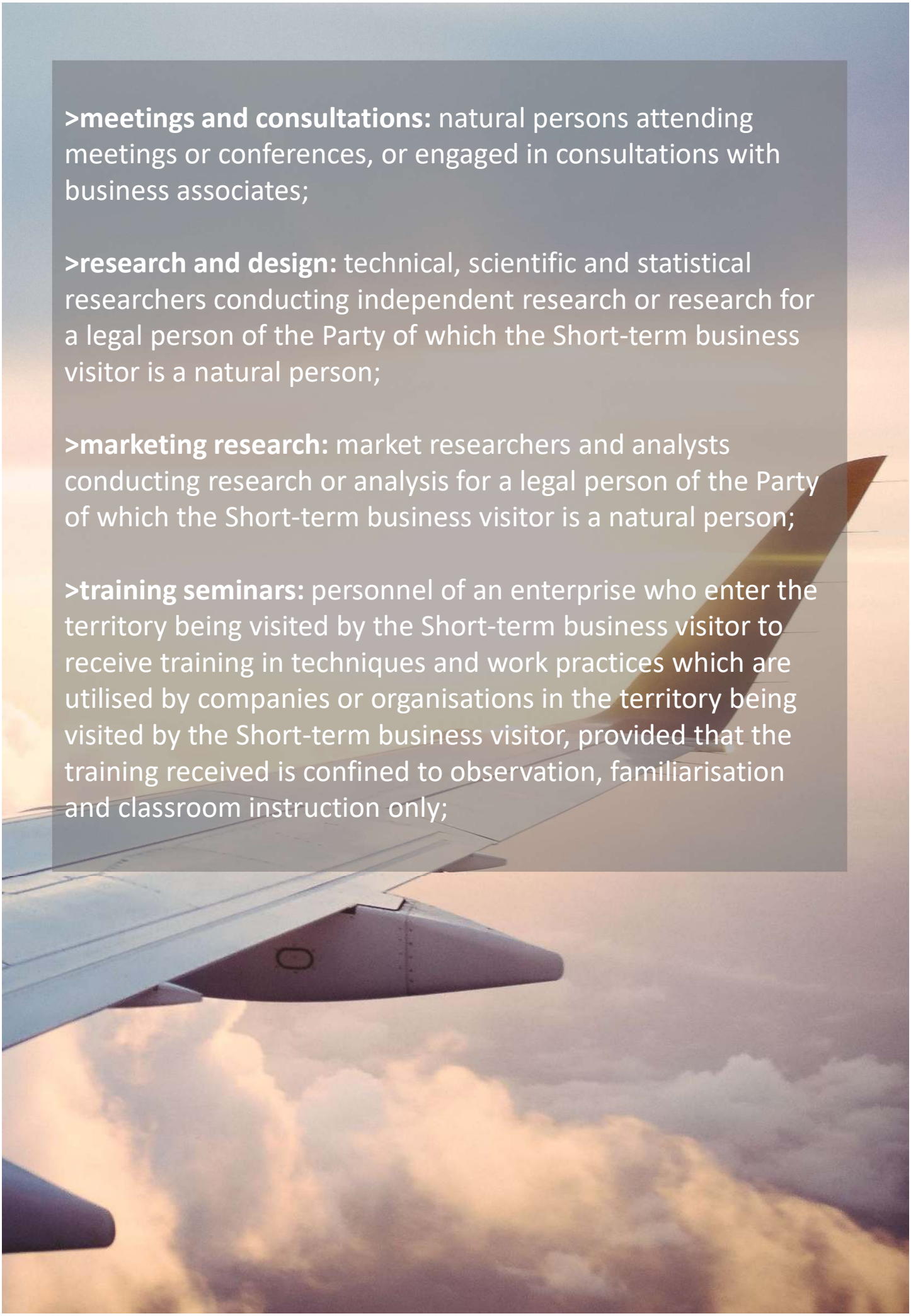
The Italia start-up visa program is aimed to entrepreneurs intending to relocate to Italy to set up an innovative start-up business (companies must meet the conditions set forth by law 221/2012) or to join an already established startup company.

The applicant must prove the availability of at least € 50,000 to be used for the sole purpose of establishing and operating the start-up and submit a detailed business plan for an "**innovative**" project with a strong character of technological innovation.

BREXIT–ACTIVITIES FOR WHICH UK SHORT-TERM BUSINESS VISITORS DO NOT NEED A WORK VISA:

In the Working Paper of January 20, 2021 , the Council of Europe provides some clarifications regarding the EU-UK Trade and Cooperation Agreement.
With reference to "short-term business visitors", Member States are prevented from requesting a work permit (unless they have scheduled a reservation on this issue in Annex SERVIN-3) in respect of Business visitors for establishment purposes and **Short-term business visitors** (Article SERVIN 4.2(1)(a)(ii) and Article SERVIN 4.3(2).

The activities Short-term business visitors are permitted to engage in are:

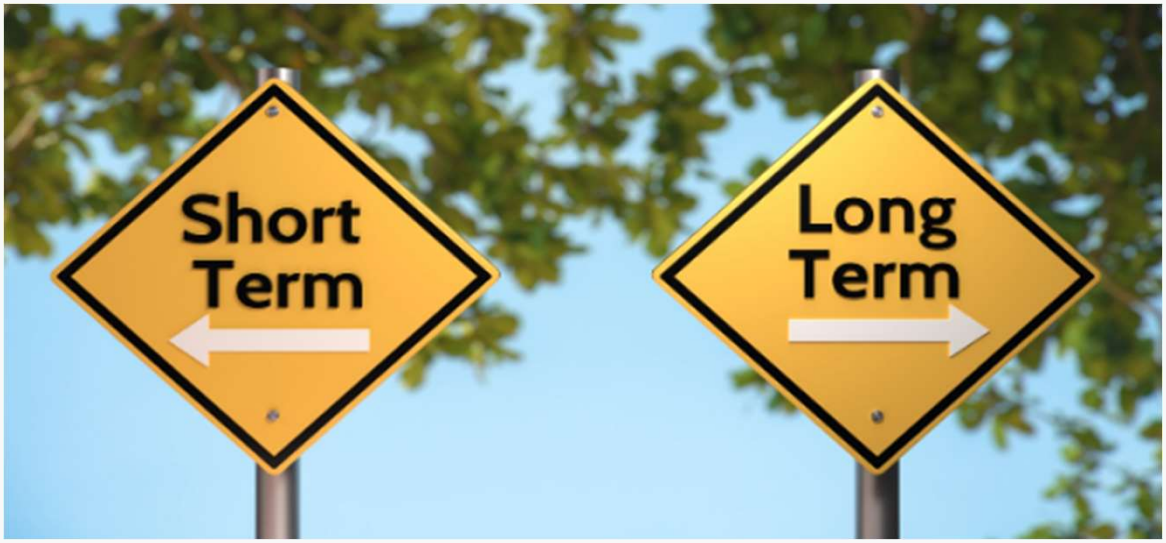


>meetings and consultations: natural persons attending meetings or conferences, or engaged in consultations with business associates;

>research and design: technical, scientific and statistical researchers conducting independent research or research for a legal person of the Party of which the Short-term business visitor is a natural person;

>marketing research: market researchers and analysts conducting research or analysis for a legal person of the Party of which the Short-term business visitor is a natural person;

>training seminars: personnel of an enterprise who enter the territory being visited by the Short-term business visitor to receive training in techniques and work practices which are utilised by companies or organisations in the territory being visited by the Short-term business visitor, provided that the training received is confined to observation, familiarisation and classroom instruction only;



> trade fairs and exhibitions: personnel attending a trade fair for the purpose of promoting their company or its products or services;

> sales: representatives of a supplier of services or goods taking orders or negotiating the sale of services or goods or entering into agreements to sell services or goods for that supplier, but not delivering goods or supplying services themselves. Short-term business visitors shall not engage in making direct sales to the general public;

> purchasing: buyers purchasing goods or services for an enterprise, or management and supervisory personnel, engaging in a commercial transaction carried out in the territory of the Party of which the Short-term business visitor is a natural person;

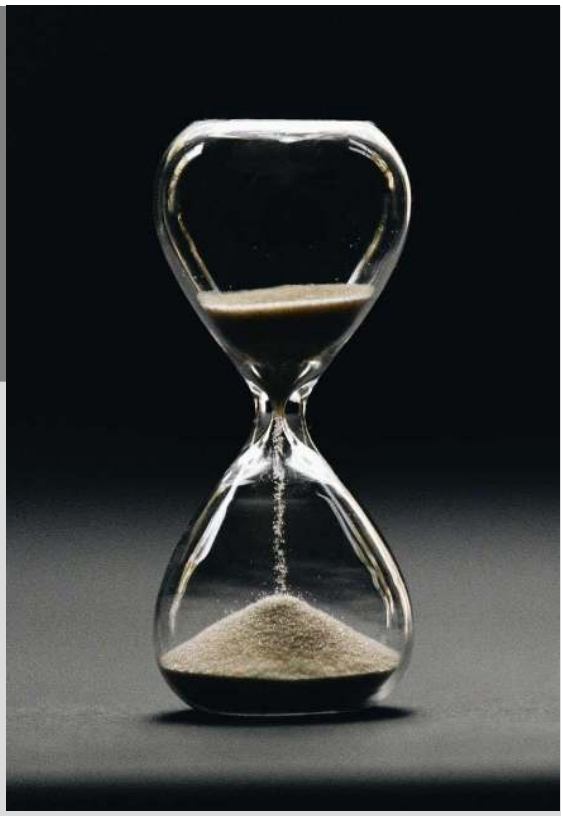
> after-sales or after-lease service: installers, repair and maintenance personnel and supervisors, possessing specialised knowledge essential to a seller's contractual obligation, supplying services or training workers to supply services pursuant to a warranty or other service contract incidental to the sale or lease of commercial or industrial equipment or machinery, including computer software, purchased or leased from a legal person of the Party of which the Short-term business visitor is a natural person throughout the duration of the warranty or service contract;

> commercial transactions: management and supervisory personnel and financial services personnel (including insurers, bankers and investment brokers) engaging in a commercial transaction for a legal person of the Party of which the Short-term business visitor is a natural person;

> tourism personnel: tour and travel agents, tour guides or tour operators attending or participating in conventions or accompanying a tour that has begun in the territory of the Party of which the Short-term business visitor is a natural person; and

> translation and interpretation: translators or interpreters supplying services as employees of a legal person of the Party of which the Short-term business visitor is a natural person.

ITALIAN CITIZENSHIP AND DELAYS CAUSED BY THE CONSULATE: WHAT CAN BE DONE?



The Court of Rome has recently established that in those cases where the Italian consulate has not ensured a response in a reasonable time, it becomes possible to obtain the recognition of the citizenship directly from the judge in Italy.

An interesting path has been opened for those individuals who are seeking to obtain the Italian citizenship by "iure sanguinis" that are currently living in countries where the application numbers are high (such as Brazil and USA) and therefore, the processing time of their applications are very long.

The Court of Rome, by judgement of December 10th 2020, while addressing the issue of the unreasonable waiting time required by some Consulates, upheld the action brought by some Brazilian citizens for the obtainment of the citizenship, even though it hasn't even passed 2 years since the submission of the application to the Embassy.

This judgement is particularly relevant for those subjects that live under the jurisdiction of Consulates affected by major temporal dysfunctions in the definition of citizenship applications, as they will now be able to obtain their citizenship in about 2 years.

Facts of the case

In 2017, a family composed by Brazilian citizens had applied for the recognition of the Italian citizenship by "iure sanguinis" to the Italian Consulate in Curitiba, which is competent for the family's place of residency.

All the applicants where descendants from an Italian man who had emigrated to Brazil, died there, and he had never given up to his Italian citizenship, therefore he has never been naturalised as a Brazilian citizen.

In accordance with art. 3 D.P.R 362/1994, the Consulate has 2 years to process the case and to give an answer.
Instead of waiting the 2-year-period within which the Consulate would have had to decide either by approving or rejecting their request, the Brazilian family has requested the Court of Rome to process their citizenship application by alleging that they had filed their application to the Italian Consulate in Curitiba, a diplomatic representation that normally takes around 10 years to process such applications.

Court's findings

The Court of Rome, following a previously consolidated path, has deemed the Consulates' unreasonable response time a denial of justice and it has acknowledged the request of the claimants necessity to resort to the judge, and it declared them Italian citizens.

When appealing to the judge, it presupposes an accurate and meticulous preparation of the allegations and the documents on which these are based.

NON-EU FAMILY MEMBERS OF EU CITIZENS LIVING IN ITALY

What happens if the principal does not have an income in italy?

According to Decree 30/2007 – an EU citizen can register with personal income, not specifying this should be generated in Italy.

Indeed, one can register with foreign payslips or foreign bank account statement (though some local Municipalities may ask for an Italian bank account), if the minimum income requirement is met (for the year 2021 this is € 5.983,64 per person + € 2.991,82 per each additional family member).

But what happens when the EU citizen has NON-EU family members joining in Italy and there is no Italian income? In such cases, things might get a little bit trickier than one could expect.

Non-EU family members of EU citizens must apply for the "**carta di soggiorno**" art. 10 of Decree 30/2007. This is a paper format permit and is issued for a validity of 5 years for the first application, once renewed it will have an indefinite duration, as long as requirements continue to be met. The EU citizen will have to provide proof of being registered with local Town Hall and sufficient proof of income will be requested for the "**carta di soggiorno**" application of the non-EU citizens. Most individuals would have just settled in Italy and would not yet have an Italian tax return nor income generated in Italy. This should not be a problem if there is sufficient income generated elsewhere. However, this is far from being the case, as in practice, there is a well-established tendency to request Italian income among most Immigration offices.

The result is that when there is no income generated in Italy the "**carta di soggiorno**" is often not issued and a 2-year family permit is granted instead.

Contact information

Mazzeschi SRL
www.mazzeschi.it
info@mazzeschi.it

WRITERS

Marco Mazzeschi
Costanza Petreni
Giuditta Petreni
Giuditta De Ricco
Yuu Shibata
Olimpia Ballardin