

Employing migrant workers under the new UK immigration laws Lianne Shing, June 2009

As the trend towards globalisation and mobility continues, and with the widening of the European Union, immigration and visa requirements are increasingly playing a large role in the recruitment process and in business considerations. Time frames are often important in recruiting personnel and those involved in recruitment now face additional pressures introduced by the radical overhaul of the UK's immigration laws which took place in 2008 and continue into 2009. The most significant changes will affect employers who wish to sponsor migrant workers to work in the UK.

For workers who are citizens of the European Union, there is a right to work in the UK, unless they are from the new accession states of Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia or Slovenia, in which case they will need to register under the Worker Registration Scheme if they want to work for over one month. Details of this scheme will be covered at the end of this note.

Background

In February 2005, the Home Office announced a five year strategy for immigration following a review of the structure and services. Immigration law in the UK has now moved towards a "points-based system" in which individual applicants must score a certain amount of points to qualify for a visa. The aim of the points-based system is to make the system more transparent and objective and to punish non-compliance.

The most significant change is the streamlining of all visa types into five tiers:

- Tier 1 – highly skilled migrants
- Tier 2 – skilled workers
- Tier 3 – low-skilled workers
- Tier 4 – students
- Tier 5 – temporary or exchange workers

In reality, each tier is divided into sub-tiers and categories to cater for different migration scenarios and needs. Thus, much of the change is simply a re-branding of existing categories.

Perhaps the most important change for employers is the abolition of the work permit system and its replacement Tier 2, which took effect on 27 November 2008. In essence, Tier 2 is the means by which UK employers can sponsor an individual who requires immigration permission to work in the UK. The UK Border Agency (UKBA) manages immigration issues and has more details of the other tiers on its website at www.ukba.homeoffice.gov.uk.

Tier 2 – An introduction

Tier 2 allows UK employers to sponsor migrants to work in the UK. Some situations in which employers may want to hire migrant workers include:

- No one from the resident labour market can fill the vacancy
- The vacancy is listed in the skills shortage list
- Someone is switching from a post-study category
- Someone is moving as part of an intra-company transfer

The basic procedure under Tier 2 is that an employer with a licence to sponsor will sponsor an application made by an individual to a British diplomatic post overseas. A certificate of sponsorship must be provided and acts as confirmation that the employer is satisfied all the qualifying criteria have

been met. A successful applicant will be granted leave to work in the UK for three years with the option of the employer obtaining a two year extension if they wish to retain the employee, after which the employee can apply for indefinite leave to remain.

However, while the decision-making process is shifted overseas and much of the paperwork shifted onto the applicant, employers who sponsor migrant workers must comply with onerous reporting and record-keeping obligations.

The employer's licence to sponsor

Before an employer can employ any migrant under Tier 2 it must register with the UKBA and obtain a licence. This can be done online and processing can take approximately four weeks.

Employers must satisfy the UKBA that they are genuine employers, able to comply with employment and immigration law, and agree to perform a number of obligations. If successful, the employer will be awarded an "A" or "B" rating and a licence to sponsor which is valid for four years. Ratings reflect an employer's history or previous record in employing or teaching migrants and can be upgraded or downgraded depending on their ability to satisfy their sponsorship obligations. Licences may be refused for a variety of reasons including submitting false documents, not meeting the requirements of Tier 2 and dishonesty in the application.

The certificate of sponsorship and the points-based system

A sponsor must issue a certificate of sponsorship once the migrant is able to score 70 points across three categories. The categories are attributes, English language skills and maintenance funds. Of the 70 points, 10 must be gained for language and 10 must be gained for maintenance.

Attributes covers academic qualifications, prospective earnings and the basis of the appointment (eg. intra-company transfer, skills shortage or new hire). Points will vary on the strength of each attribute so a Bachelor's or Master's degree will be worth 10 points but a PhD will be worth 15 points, a job where there is a skills shortage will be worth 50 points and the higher your salary, the more points you get.

The English language requirement can be met in one of three ways: by being a national of a prescribed list of English speaking countries, by holding a degree taught in English and equivalent to a UK bachelor's degree (assessed by a separate UK body), or by passing an English language test.

The maintenance requirement aims to prove that the migrant can support themselves during the first three months of arriving in the UK as they should not claim any benefits. At least £800 of clear funds must be available and £533 for each dependant.

Both migrants and sponsors should be aware that numerous original documents are needed to prove that the migrant satisfies all three categories including degree certificates, payslips, bank statements and letters from banks or building societies. Owing to the potential delays in sitting exams and obtaining documents, migrants are encouraged to start the process of obtaining points as early as possible.

The sponsor's obligations

A sponsor is under onerous obligations from the moment it registers to be a sponsor. It was intended that the UKBA would visit potential sponsors to assess their HR and compliance systems before issuing a licence. The practical reality is that the UKBA will, in many cases, rely on the registration form which attests that the systems are in place. However, audits are performed and sponsors will therefore be under pressure to ensure their internal processes are compliant with the UKBA's standards. Non-compliance can lead to revocation of the licence.

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Once a licence is granted, a sponsor has continuing obligations to prevent illegal working. For example, sponsors must:

- obtain the migrant's original "right to work" documents, check them and save copies of them
- ensure no new employee performs any work duties before those documents have been seen
- have a system to track the visa expiry of all migrants and continually monitor the migrant's visa status
- keep full and historical contact details of all migrant workers
- retain copies of the migrant's degree certificates and professional qualifications and ensure copies are available to the UKBA
- report to the UKBA within ten days of certain circumstances such as the migrant not commencing work or not commencing on the specified start date, being absent for more than ten days without permission, terminating the contract of employment, any changes to the category or type of visa or in the migrant or sponsor's circumstances, or suspicions of a breach of conditions of leave.

A sponsor is also responsible for any action or omission committed by an employee purportedly on the sponsor's behalf. The risks associated with non-compliance include a downgrading of ranking or revocation of the sponsorship licence. There are also criminal and civil penalties, including a possible two year custodial sentence and/or an unlimited fine, or a maximum £10,000 fine for negligently employing a migrant who does not have immigration permission and/or publication of the details of sponsors who are penalised. It is therefore vital that employers comply with their sponsoring obligations and, more generally, with immigration and employment law.

Once a visa has been issued under Tier 2, it is in the sponsor's best interests to ensure recruitment is smooth and timely. Although not obliged to do so, the sponsor should investigate the migrant's immigration history to ensure entry clearance can be obtained, as it is now mandatory that clearance be granted before arriving in the UK. A Tier 2 visa is valid for three years and one month on initial application. If the sponsor wishes the migrant to continue working in the UK, another certificate of sponsorship must be issued and they should ensure the migrant applies for a new visa on this basis.

The migrant's obligations

Under Tier 2, a migrant's main obligations are to obtain all the necessary documentation to support their application. For example, original degree certificates are needed if claiming points for academics, while evidence of employment with the company overseas is needed if the sponsorship is part of an intra-company transfer. Sitting the English language test may also be part of the migrant's obligations.

Independent of the type of visa, all migrants are obliged to obtain entry clearance to the UK before they arrive and irrespective of the length of time they may spend here. If issued with a Tier 2 visa, the migrant may arrive in the UK fourteen days before the date start on their certificate of sponsorship and may start work (triggering the sponsor to notify the UKBA of a change in start date).

Migrants should request their documentation and sit any exams as early as possible in the process as delays will impede a timely recruitment.

How employers can avoid the obligations under Tier 2

Perhaps the easiest way of avoiding the process involved with a Tier 2 visa is to employ someone who can work in the UK. It may sound obvious but many employers are not aware who requires immigration permission and who does not. As a brief overview, those employees who can work in the UK include:

- British citizens (but not British Dependent Territories citizens or British Overseas citizens)
- those who have the right of abode in the UK

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- those who have indefinite leave to remain in the UK (also known as settlement or permanent residence)
- European Economic Area (EEA) nationals (but not those from the Czech Republic, Estonia, Latvia, Lithuania, Hungary, Poland, Slovenia and Slovak Republic as they are subject to the Workers Registration Scheme, see below)
- Swiss citizens
- Commonwealth nationals who have a grandparent born in the UK or British islands (known as UK ancestry)
- Spouses of British citizens, EEA nationals and Swiss nationals

If an employer wishes to employ a candidate who does not fit into any of those categories but does not wish to become a sponsor under Tier 2, owing to the expense or the onerous obligations attached, they may wish to use Tier 1 (General) as a way of bringing migrant workers to the UK. This is particularly attractive for employers of migrants who are educated to a Master's degree level, are high earners, and have good English language skills. A Tier 1 applicant must score 75 points for their application, but similar to the Tier 2 applications, ten of those points must be for English language skills and ten must be for maintenance requirements with the remainder consisting of points for age, qualifications, previous earnings and UK experience.

However, prospective employers should be aware that, under Tier 1, immigration permission attaches to the individual and not to the sponsor and therefore migrants may work for their employer of choice or on a self-employed basis.

Worker Registration Scheme

Workers from the new accession states to the European Union, who want to work legally for more than one month, will need to apply for registration under the Worker Registration Scheme ("WRS").

The worker does not apply in advance, but must apply within the month of starting work/a new job in the UK. The application for registration to the UK Border Agency is by form, supported by identification documents, two passport photos, an employer's letter confirming the start date of employment and a £90 fee.

Full details are given on the UK Border Agency website.

Within one month, most applicants that are accepted will be sent a worker registration card and a certificate authorising the worker to work for his employer. When changing job, the worker will need to apply for a new certificate, although no additional fee will be payable.

After 12 months of continuous work (excluding up to 30 days) the worker will acquire full EU rights to work without registration.

If the worker's registration certificate is refused, the employer will be notified direct and must cease to employ that person or risk being prosecuted and face a fine of up to £5,000.

Conclusion

The new immigration laws have imposed numerous obligations on UK employers who wish to employ migrant workers. The process of obtaining a licence to sponsor and of obtaining a visa involve onerous record-keeping, reporting and monitoring obligations which add to the already significant time pressures of both immigration and recruitment processes. UK employers of migrant workers are encouraged to familiarise themselves with the recent changes in the law and with the process of sponsoring a migrant under Tier 2 so as to avoid potentially hiring illegal workers and thereby committing an offence.

For further information or assistance with the immigration procedure, please contact Lianne Shing on l.shing@beale-law.com or Michael Archer on m.archer@beale-law.com.

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