

## Tier 2: Two Years on

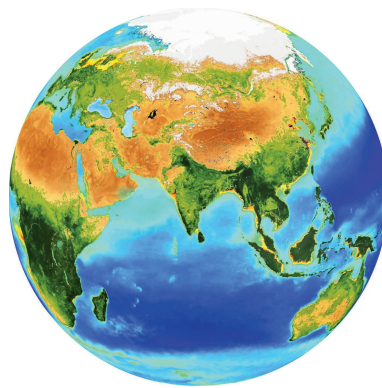
2008 saw the introduction of the Points Based System and in November 2008, Tier 2 of the five tier system was brought into force, replacing the long established Work Permit scheme. Two years on and there have been a myriad of changes since its inception, some for the better, and others for worse. We seek to review where we are now, identifying the key changes since November 2008.

### ■ Caps:

One of the most significant developments since 2008 has been the implementation of a **temporary cap** on migration by the **new Coalition government**, placing restrictions on skilled migration from outside the EEA.

The government has made it more difficult to qualify under the Tier 2 category by increasing the number of points needed to enter the UK and they have **set limits on the number of Tier 2 (General) Certificates of Sponsorship (CoS) Sponsors can issue**, which has already impacted many of our clients to their detriment.

On 28 June 2010, the government launched a **consultation** on how the limits on economic migration by non-EEA nationals, through Tiers 1 and 2 of the points-based system, should be implemented. It also announced a parallel consultation, to be led



by the Migration Advisory Committee (MAC), on the **levels** at which the limits should be set for the first full year of their operation. In developing its advice, the MAC has consulted on and is considering the economic, social and public service impacts of migration. It is anticipated that permanent limits on non-EU economic migration routes will be put in place by **1 April 2011**.

### ■ Tier 2 (General) – New Hires Resident Labour Market Testing:

A Sponsor must carry out a Resident Labour Market Test (RLMT) and consider whether there are any suitable resident workers who may be able to undertake the role before recruiting migrants from outside the EEA.

**Roles had to be advertised on Job Centre Plus (JCP) as well as on another suitable medium** as set out in the relevant codes of practice.

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immigration

Following concerns raised by employers that advertising on JCP was not an appropriate means of advertising for senior positions; the UKBA revised the RLMT requirements so that **senior positions no longer have to be advertised on the JCP** (however the requirement to be advertised in more suitable forums, as set out in the relevant occupational code still applies). This exception is subject to the senior role attracting a salary in excess of **£130,000** and falling under the occupational code for **Directors and Chief Executives or Legal Partners** (1112 and 2411 respectively) or where there are stock exchange disclosure requirements.

In December 2009, the UKBA also implemented an **extension to the advertising period for all jobs, from two to four weeks**. The UKBA stated that the new advertising period must be completed within a three month period (i.e., it does not have to be continuous).

Other exceptions to the RLMT include applicants filling graduate roles where recruited through the university milkround, creative sector jobs where the codes state that advertising is not required and named researchers.

#### ■ **Tier 2 (Intra Company Transfer):**

On 6 April 2010, further changes to the Tier 2 (ICT) route were introduced. The route has now been sub-divided into three categories: Established Staff, Graduate Trainees and Skills Transfer:



- **Established Staff:** The purpose of this route is to fill positions where company-specific knowledge is required, and would not otherwise be filled by the UK resident labour market. This sub-category is similar to the Tier 2 ICT scheme in place before 6 April 2010, the main difference being that ICT (Established Staff) migrants need to demonstrate that they have been **employed for at least 12 months** by the overseas company as opposed to six months as previously required. Migrants applying under this route can obtain **up to 36 months' leave to enter with the option to extend in-country**, should their sponsor require.
- **Graduate Trainees:** aimed at **recent graduates** hired to fill a role in a multi-national company overseas, and are being transferred to the UK

branch of the company to undertake further training towards a managerial and/or specialist role with the company overseas. The migrant must have been **employed by their sponsoring organisation for at least 3 months** at the date of the application. The UKBA have limited the number of Graduate Trainees each employer can issue to five per financial year. A migrant applying under this route can only obtain a maximum of **12 months leave to enter**, with no option to extend.

- **Skills Transfer:** for **new employees** of an overseas branch of the multi-national company, who are coming to the UK to **impart knowledge and skills relevant to their new position**. This sub-category is similar to the old Training and Work Experience Work Permit route. However,

under the Skills Transfer sub-category entry clearance will only be given for a maximum of **6 months leave to enter** and there is no option to extend.

More notably, time spent under the Tier 2 (ICT) category no longer counts towards settlement.

- **Other Changes relating to both Tier 2 (General) and Tier 2 (ICT):**

#### Salaries and Allowances

Salaries paid to Tier 2 migrants can now be **paid from either the UK or abroad**. Where salaries are not paid to the migrant in pounds sterling, the amount should be converted according to the exchange rate on [www.oanda.com](http://www.oanda.com) before being confirmed on the CoS.

The salary must also include any guaranteed allowances to be paid to the migrant which would also have been paid to an employee in the same role recruited from the resident labour market.

#### Maintenance

On 22 February 2010, the UKBA enabled A-rated sponsors to **confirm the maintenance** requirement of a sponsored migrant by way of a tick box **on the CoS**. This has removed the

requirement for a migrant to obtain a letter confirming maintenance from the UK A-rated sponsor when making the visa application. However, the CoS only confirms maintenance for the main applicant. **Where there are dependants evidence of maintenance for dependants still needs to be provided** (either by a letter from the A-rated Sponsor or original bank statements covering the immediate three month period preceding the submission of the application showing that £533 per dependant has been held in available cash funds).

#### Promotions/Change of employment

There is no longer a requirement on sponsors of Tier 2 migrants to update the UKBA each time their role with the same employer changes in line with **natural career progression**, provided the role remains within the **same Occupational Code** as stated on the CoS initially issued.

A **change of employment application** will need to be made where the **migrant changes employer** or where their **new role** falls under a **new Occupational Code**. Change of Employment applications will also need to be filed where the sponsored migrant's salary falls below that which was stated on the CoS (the

only exception to this is where the reduction in salary is enforced companywide).

#### Biometric Residence Permits:

Since 6 January 2010, migrants applying for leave to remain in the UK are required to provide their biometric data before their applications are processed, resulting in them being issued with a **Biometric Residence Permit** (previously known as Identity Card for Foreign Nationals) instead of a vignette in their passport. This has resulted in significant **delays** in processing of Tier 2 applications submitted by post. Appointments for the Premium (same day) Service at the Public Enquiry Office in Croydon are scarce, taking over six weeks to secure in some cases.

**Magrath LLP** continues to be an **accredited representative** and has a Tier 2 slot each week. In addition, we were selected to participate in the UKBA's pilot scheme, enabling our clients to file Tier 2 applications using the **Premium Service** at the **Public Enquiry Office in Sheffield**. This scheme enables our clients to submit their biometrics and have their Tier 2 applications **processed on the same day** with their documents returned within 5-10 days.

# Economic Migration to the UK: A Testing Time

The arrival of the coalition government has heralded the most significant immigration challenge to UK employers since the advent of the Points Based System. Ray Rackham examines the history and consequences of the proposed quota system, and reviews what else the government is doing to tackle the alleged unrestricted migration to the UK.

Tackling alleged uncontrolled migration with a tough new limit was a mainstay of the Conservative Party's 2010 election manifesto. In the run up to the recent General Election it was less a matter of *if* a permanent annual limit for economic migration would be imposed (marking a significant shift away from over 90 years of British immigration control) but when. The answer arrived in June 2010, when the new Home Secretary announced interim caps in respect of both the highly skilled migrant route, Tier 1 (General), and the employer sponsored migrant route, Tier 2 (General), at the same time launching a twelve week consultation on the implementation of a permanent annual limit within these Tiers from April 2011.

As interim measures, the Home Secretary placed an immediate monthly limit on Tier 1 applications; out of country applications for Tier 1 (General) from 19 July 2010 to 31 March 2011 are limited to the number of equivalent applications made from the same period in 2009-2010. The Home Secretary also announced an interim limit on the

number of migrants who can be offered jobs by sponsor employers through Tier 2 (General), by means of a 5% reduction in the number of certificates of sponsorship an employer can issue in this category compared to the equivalent period in 2009. All licensed sponsors have now received a new allocation of available certificates of sponsorship for the period July 2010 to 31 March 2011.

The interim measures have been in operation for almost three months and, in respect of a more permanent limit come April 2011, the devil will undoubtedly be in the detail, as the public consultation had now closed for contributions from stakeholders, with resultant policies scheduled to be announced in December.

The question remains, why is the government now proposing to cap the revenue generating, business and enterprise oriented, economic migration categories? Undoubtedly, the economic downturn and 2009's calls for 'British jobs for British workers' had some impact on the wording of the Conservative Party's 2010 election manifesto. Conversely, however, annual net immigration in the categories the government now wishes to cap decreased during the recent economic downturn, as overseas workers returned home and the British pound lost strength to other international currencies; and a recent increase in net migration cannot be attributed to those categories the Government now wishes to cap.

The issue of limiting the number of migrants into the UK is not a new phenomenon. It appeared in the Conservative Party's 2005 election manifesto and was widely believed

to be a key tranche of the Conservative Party's mandate in the intervening years between a Labour success in 2005 and the formal Coalition agreement in 2010. Interestingly, it did not appear in the Liberal Democrat manifesto, and as an issue was widely contested by Nick Clegg, leader of the Liberal Democrats and now Deputy Prime Minister, in the much publicised, and televised, debates in the run up to polling day.

However, limiting migration in the visa categories that genuinely make a positive effect on the economy is not only a belief of the British Conservative Party. Internationally, many countries have longstanding annual quotas that affect a variety of migrant visa categories. The US immigration regime has had an 'annual limit' on a number of visa categories, which was as strictly administered during the 'boom' years as it has now been in the bust. There are similar quota systems in New Zealand and Russia, for example, that predate both the global recession and the boom years that preceded it. The new Home Secretary believes that "*over reliance on migrant labour has done nothing to help the millions of unemployed and low-skilled British citizens who deserve the government's help to get back to work and improve their skills*". Are the calls for annual quotas on migrant workers an attempt to ring fence opportunities for existing settled workers, or does it represent a form of protectionism that the UK immigration regime has not seen in this increasingly globalised world since the early twentieth century?

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## Tiers before Bedtime?

The annual limits for Tiers 1 and 2 are not the only proposals on the agenda. Tier 3 (the low skilled tier) remains inoperable and it seems very unlikely that it will be opened in the coming years, as the new Government adopts the previous Government's stance that low skilled roles can be filled from within the European Economic Area. Correspondingly, after the publication of immigration figures for the 2009/2010 year, marking a sharp, 35% increase in those wishing to come to the UK as a student, the Government has given urgent priority to reviewing the student category, Tier 4.

The widely used "uncontrolled immigration" phrase in respect of the economic tiers has been replaced with a new "unsustainable" adjective in the student category. Interestingly, this particular review will look more to establish which universities and colleges in the student tier are genuine bona fide institutions and which institutions should be removed for abusing the system, as a means to reduce foreign student numbers. This is arguably a means that could have also been adopted in the economic tiers, rather than an insistence on arbitrary quotas. It is also understood that the Tier 1 (Post Study Work) route, which was initially excluded from the consultation surrounding economic migration quotas, will be included within the scope of the student review. One option under consideration is to allow only those studying specified courses



at particular institutions to qualify for the scheme. It will be very interesting to review the responses from universities and colleges who rely on international student enrolment as a vital source of income, calls have already been made to suggest that such a step would lead to the closure of institutions that have had a long history of teaching international students but do not 'make the grade' in the eyes of the UK Border Agency.

## Is the Points Based System the Limit?

The Tiered Points Based System is not the only immigration regime under review. The question of how migrants may permanently reside in the UK, after an initial period of temporary residence, has also been raised. A recent Government sponsored report found that, of those individuals granted permanent residency in 2009, only 34% of those granted first entered in a work route (of which Tiers 1 and 2, and their predecessors the highly skilled migrant and work permit schemes are part). The majority, 49%, entered via either a

family route or a direct permanent residency category. Of the other 17% who entered in categories that do not initially lead to permanent residency, 13% entered as students.

In light of the 2009/2010 figures, demonstrating a sharp increase in those coming to the UK to study, the Government has expressed an obvious desire to further study how and why those who initially enter the UK in immigration routes that do not lead to permanent residency are able to change immigration route into one that does. This further study could result in a major overhaul of immigration routes that had escaped revision with the advent of the Points Based System in 2008, for example possibly withdrawing the rule enabling permanent residency after a period of 10 years legal residence in the UK.

## Will it work?

The Government has committed itself to the reduction of net migration from the hundreds of thousands to the tens of thousands, a

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representative figure that was last seen in the pre 1997 Conservative regime. The Government has also, however, expressed a desire to weigh both the competing economic considerations and the wider social and public service implications when setting a permanent cap in April 2011. Stakeholders have already made their opposition to the introduction of arbitrary caps clear. Indeed, the Government's own Secretary of State for Business, Innovation and Skills has argued that the interim caps are doing 'huge damage' to employers, who are moving operations overseas as they cannot source the right people for the jobs from within the UK.

What is clear is that the recent consultation was a result of growing unrest in public confidence in the UK immigration regime. However, arguably that unrest was more directed to the sharp increase of asylum applications throughout

successive Labour governments, and the introduction of new Eastern European member states in 2004 and 2006. The introduction of an annual cap primarily on the Points Based categories of Tiers 1 and 2 will itself not solve the public concerns surrounding immigration to the UK, as the Points Based System accounts for a relatively small proportion of current immigration flows.

Competing demands of a free economy, which should arguably have the freedom to recruit the brightest and the best, and public concerns surrounding population growth may seem at complete odds, however a delicate balance must be achieved. Whether or not the Government will be able to achieve this balance in April 2011, whilst focussing solely on a reduction of bottom line net migration, remains to be seen.

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