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Changes affecting Tier 2 of the points-based system

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## Changes affecting Tier 2 of the points-based system

RECENT ARTICLES HAVE FOCUSED ON the removal of the self-sponsored category, Tier 1 (General) from the points-based system (PBS) and the consequences for migrant workers who wish to come to the UK and have free access to the labour market. Obviously, employers are also affected by the removal of Tier 1 (General) from the UK immigration landscape. However, there are also several other changes and amendments to the regime that employers should bear in mind in the coming months, the majority of those changes affect the employer-sponsored tranche of the PBS, Tier 2.

### UNDERSTANDING THE LIMITS FOR TIER 2

Much has been publicised and debated in the UK press concerning the UK government's commitment to reducing net migration to the tens of thousands, particularly around the employer-sponsored route, Tier 2 of the PBS. It is important to note that not all categories within Tier 2 will be subject to the limit. The following information is correct at the time of writing:

- From April 2011, Tier 2 (General) applications made outside of the UK will be subject to an annual cap of 20,700.
- Categories that will not be subject to the cap include:
  - Tier 2 (Intra company transfer (ICT)) applications made from within the UK or outside of the UK;
  - Tier 2 extension applications, where the applicant is already in the UK under Tier 2 and is extending in the same category as previously applied;
  - Tier 2 (General) applications made from within the UK and outside of

the UK, where the applicant will earn a salary of at least £150,000; and

- all applications made by dependants of Tier 2 migrants.

Effectively, this demonstrates that the annual limit for the employer-sponsored will affect only the Tier 2 (General) category, ie the category that caters for people coming to the UK with a skilled job offer to fill a gap in the workforce that the employer has proved (by advertising in the UK media and in most cases at Jobcentre Plus) cannot be filled by a resident worker.

It seems that the limit has only been placed on the Tier 2 category where employers have already proven that there are no resident workers who can fill the position. Arguably, when the limit of 20,700 is reached, the employer will not be able to fill the vacancy by reference to resident UK and European Economic Area (EEA) nationals or by non-EEA nationals. The position, therefore, could remain empty until:

- a) the annual limit is increased;
- b) the annual limit is renewed; or
- c) a settled, resident worker can fill the position.

### HOW THE LIMIT WILL WORK IN PRACTICE

Very little has been published in respect of how the mechanics of the system will operate. It seems likely that, for those employers who are already registered as sponsors, their individual allocation will not be renewed for an annual period after April 2011. Rather, employers will be subject to a monthly quota system where sponsors submit applications to a UK Border Agency (UKBA) panel to determine whether a restricted Certificate of Sponsorship can be fully assigned. Thus the Tier 2 (General) limit will be



***'The annual limit for the employer-sponsored will affect only the Tier 2 (General) category, (that caters for people coming to the UK with a skilled job offer).'***

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administered and implemented by a monthly quota, determined by officers at the UKBA. Does this sound like a reversal to the work permit system? Only time will tell.

The UKBA has not announced the exact figure of the monthly quota. However, it seems likely that the monthly quota will be 20,700 divided by 12 (1,725). Decisions by the newly formed panel could be based on:

- whether the Tier 2 (General) role is deemed to be a shortage occupation;
- the level of the prospective salary being offered;
- whether the candidate can score points in other areas (for example, their educational background); and
- whether the role meets other policy objectives (for example, is it in an area or industry that the UK government wishes to attract at any particular time (ie research and science)).

It seems very likely that those who can score more will have a greater chance of being granted a Certificate of Sponsorship. Therefore, employers will have to consider whether they should include all applicable allowances into the gross salary package when assigning a Certificate of Sponsorship, as a higher salary could attribute more points. Similarly, individuals may need to locate original degree certificates to ensure that they can score points for education, objects often found hanging on a wall in a home country, and sometimes very difficult to locate and transfer for the purpose of a visa application.

It seems very likely that, by the time the next *IHL* is published, the UKBA will have published guidance on the issues discussed

above. What is clear, however, is that employers will have even less freedom to assign Certificate of Sponsorship than they have had previously, in an area where restricting the freedoms and ability for employers to employ non-EEA nationals has become commonplace. The objectivity of the PBS, giving compliant employers the freedom to assign Certificates of Sponsorship to those eligible in areas where the resident market could not fill particular vacancies, seems very much a thing of the past.

#### **OTHER CHANGES TO TIER 2**

Other changes surrounding Tier 2 come into force shortly, these include the following:

- From April 2011, the minimum skill level for all Tier 2 positions (whether they are in the ICT or General category) will be graduate level. Effectively, this means an increase from the current skill level of NVQ level 3 to NVQ level 4+. On 7 February 2011, the Migration Advisory Committee (MAC) published a report that has considered all existing 353 standard occupational classification jobs (those that employers can currently use when assigning a Certificate of Sponsorship) finding 121 of those jobs to be NVQ level 4+. This compares to 191 previously considered to be NVQ level 3+. Therefore, the minimum skill level has already removed some possible roles being catered for by both the limited Tier 2 (General) and the arguably limitless Tier 2 (ICT).
- MAC has also been asked to consider how the Tier 2 shortage occupation list should be revised to remove any occupations that are below graduate skill level. Given the revisions to the list of occupations considered NVQ level 4+ above, it seems likely that MAC will further reduce those occupations

where there is a shortage (thus affording the applicant the maximum amount of points available under Tier 2 sponsorship). MAC is expected to report on this late in 2011.

- From April 2011, the level of English language on which Tier 2 (General) applicants will need to demonstrate competency will be increased from basic to intermediate level.
- From April 2011, only those who earn in excess of £40,000 per annum will be able to enter the UK for more than 12 months under the Tier 2 (ICT – established staff route). It is unclear as to whether there will be a set minimum time the individual will need to spend outside of the UK to make a subsequent application under this route. However, this seems very likely.
- From April 2011, Tier 2 (ICT – established staff) migrants who enter the UK and earn over £40,000 will only be able to remain in the UK for a maximum period of five years in any six-year period. Given that applicants have to be employed by the overseas company for a longer period to qualify for this visa; can only enter the UK initially for up to three years (so would have the cost and effort of extending anyway); have no route to settlement and on extension after three years must now demonstrate a higher English language competency under the same framework as Tier 2 (General), the traditional ICT route has grown less and less attractive than under the previous work permit and early Tier 2 PBS regime.

#### **CHANGES IN OTHER PBS ROUTES THAT WILL AFFECT TIER 2**

The changes to Tier 1 (General) have been discussed in previous articles. However, it is interesting to see how those changes affect the employer-sponsored Tier 2. Traditionally, if an applicant could not qualify for Tier 2 (ICT), or if the role was not one that could only be filled outside of the European Economic Community, employers could often rely on the personal skills and attributes of their prospective employee in making a Tier 1 (General) application and being given free access to the labour market for two years. Since

22 December 2010, this route has been closed for applications made outside of the UK, and potential applicants who are inside the UK have until April 2011 before the visa category is removed completely from the UK immigration regime. Undoubtedly this will have an affect on the employer-sponsored tier, with more applicants forced down the Tier 2 (General) route as less visa options are available to them.

Similarly, the government has already launched a consultation on the student tier of the PBS (as reported in *IHL*186, p30). This review of the student tier also incorporates a consultation on the Tier 1 (Post-study work) regime. Currently, there are 38,000 Tier 1 (Post-study work) applications each year. Successful applicants are given two years of access to the labour market. Given that recent government statistics have indicated that one in five graduates are currently out of work, it seems likely that the result of the current consultation will either see the Tier 1 (Post-study work) route disappearing altogether or being restricted, in either length or the requirements individuals need to meet to be granted a visa. In any event, it is clear that employers wishing to employ graduates who cannot meet the new

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requirements for Tier 1 (Post-study work) will have to look at other routes available, or not employ the graduate at all!

**CONCLUSIONS**

Although it is obvious that the self-sponsored have fared worse than the employer-sponsored, with those outside the UK being given less than 48 hours notice in December 2010 in which to make a Tier 1 (General) application before the route was closed permanently, the employer-sponsored have still been affected by the UK government’s wish to reduce net migration from hundreds of thousands to tens of thousands.

It is unlikely that the revisions will be sufficient to achieve this aim. Both the UK government and MAC have previously conceded that the reduction to Tiers 1 and

2 would not in themselves be sufficient to reach the policy objective from which they were born. The UK government will undoubtedly make further restrictions and potential limits in the student and family immigration routes, where the majority of non-EEA migration to the UK can be found. However, should the collective work of the UKBA not be as successful in reducing net migration, it is likely that other routes could be subject to annual limits. A review of how effective the Tier 2 (General) cap has been will occur annually. It seems very likely that if the UKBA deem the annual limit not as successful as hoped, other routes, such as the at present safe-guarded Tier 1 (ICT) could either be subject to an annual limit or restricted further.

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