

Introducing Tier 5 of the points-based system



BY KELLY WHITER
assistant solicitor,
Magrath LLP



BY TRACY MAYO
paralegal,
Magrath LLP

IN MAY 2008 THE UK BORDER AGENCY (UKBA) issued a Statement of Intent concerning temporary workers and youth mobility (Tier 5) under the new points-based system (PBS). Tier 5 has now been launched and was rolled out worldwide on 27 November 2008.

The UKBA introduced Tier 5 with the aim of clarifying the rules governing the employment of non-EU temporary migrants by sponsors. The intention was to provide a more streamlined system, UKBA believing that the new rules would provide more clarity.

So how does Tier 5 work in practice and what sort of employment does it cover? The tier is divided into two categories: youth mobility and temporary workers. In the former, the applicant's government is the sponsor and in the latter it is the UK employer.

TIER 5: YOUTH MOBILITY SCHEME (YMS)

The UKBA defined the YMS as a 'cultural exchange scheme which aims to promote the UK overseas and to encourage further trade and tourism'. The scheme was designed to allow young people to travel to the UK for 'non-economic' reasons. It allows those from participating countries to work temporarily while experiencing life in the UK, essentially replacing its predecessor, the working holidaymaker scheme.

Broadly speaking, for a country to be accepted onto the scheme, the UKBA will need to be satisfied that:

- there are effective 'returns arrangements' for nationals to that country from the UK;
- nationals of that country are regarded as presenting a low risk of immigration abuse; and

- the country has provided reciprocal arrangements for UK nationals.

Currently, there are only four participating countries in the scheme and applicants must be a national of one of these countries to be eligible. They are:

- Australia;
- Canada;
- Japan; and
- New Zealand

Under the scheme, the applicant's national government is the sponsor, but this is deemed sponsorship and currently a certificate of sponsorship is not required as these are considered low-risk countries. In addition to the four named countries, British overseas citizens, British overseas territories citizens, and British nationals (overseas) can also apply under the scheme.

Each country has an annual allocation of places, which has been set at a minimum of 1,000, but there is a cap in place on the number of people allowed to enter the UK. If a participating country uses up its allocation the UKBA will not accept any further applications from that country under the YMS. However, this allocation restriction is not applicable to British overseas citizens, British overseas territories citizens and British nationals (overseas).

The UKBA will announce which nationals will require a certificate of sponsorship and how this can be obtained as and when a particular country is added to the list of participating countries. This would appear to contradict UKBA claims that the YMS would be fairer because all applicants would have to meet the same requirements when, potentially, as more countries are added to the scheme, the requirements may change.

The main features of the scheme are that applicants under it will require entry clearance before travelling to the UK and must be between the ages of 18 and 30. Successful applicants can work for any employer during their stay in the UK but must not engage in self-employment (subject to certain exceptions), work as a professional sportsperson (including as a sports coach) or work as a doctor in training. However, applicants may engage in privately funded studies, voluntary work and *au pair* placements.

YMS scoring requirements

An applicant must score 50 points overall to be eligible to apply; 40 points in attributes plus the mandatory 10 points for maintenance (see 'Tier 5 youth mobility scoring requirements', pXX). The applicant is required to meet all conditions to be

TIER 5 YOUTH MOBILITY SCORING REQUIREMENTS (overall pass mark = 50 points)	
Attributes (40 points required)	Points awarded
Nationality (ie from Australia, Canada, Japan, New Zealand, or a British overseas citizen, British overseas territories citizen or British national (overseas))	30
Age (ie 18 or over when the entry clearance becomes valid for use and under the age of 31 on the date the application was made)	10
Maintenance (10 points required)	Points awarded
£1,600 in available cash funds at the time of the application Shares, bonds, pension funds and agreed overdraft facilities are not acceptable as evidence. Evidence must be dated no more than one month prior to the date the application is submitted	10

TIER 5 TEMPORARY WORKERS: POINTS FOR ENTRY CLEARANCE (overall pass mark = 40 points)	
Attributes (30 points required)	Points awarded
The applicant holds a Tier 5 (Temporary Worker) certificate of sponsorship	30
Maintenance (10 points required)	Points awarded
The applicant has held funds of at least £800 for a period of three months prior to submitting their application	10
The applicant has an undertaking from an A-rated sponsor	10

eligible, otherwise the application will be refused. It is interesting that there is no English language requirement under Tier 5, despite it being a key feature throughout the other tiers.

It should be noted that an individual will not be eligible to apply under the YMS in the following circumstances:

- they have children under 18 years old who are either living with them or for whom they are financially responsible; or
- if they have previously been in the UK at any time as a working holidaymaker or under the YMS.

The applicant is required to declare the above in their entry clearance application and, while there is no documentary evidence required to support these assertions, if it were to be discovered that they had used deception on their application, the application will be refused and that would be likely to impact on any future applications that person made. Spouses and partners cannot apply as dependants of the applicant but may enter the UK if they qualify in their own right under the YMS or in another capacity.

There are similarities between the YMS and the former working holidaymaker scheme in that:

- the visa is valid for two years and cannot be extended; and
- it is not a route to settlement.

The main difference between the two schemes is that the successful applicant is now permitted to work for the full two years, whereas under the working holidaymaker scheme applicants were limited to only 12 months' employment. Additionally, whereas previously working holidaymakers could

extend their leave by switching into certain other categories, under the YMS migrants are not allowed to switch into any other category under the PBS, nor may they switch into the visitor category.

Access to NHS medical treatment

Participants under the YMS will be exempt from charges for NHS treatment after they have spent a period of 12 months in the UK. They will also be exempt in the first 12 months of their stay if they are in employment, but not during periods in that first 12 months when they are not working.

Transitional arrangements

Transitional arrangements have been put in place for those that may have been affected by the closure of certain schemes on 26 November 2008, which were:

- the working holidaymaker scheme;
- *au pairs*;
- the British Universities North America Club (BUNAC) scheme;
- Japan Youth Exchange scheme;
- Gap year entrants working in the UK schools concession; and
- the Member of Parliament's research assistant concession.

Those with valid entry clearances issued under the abolished provisions may enter and re-enter the UK in accordance with the validity of their entry clearances. Further, those who, at the date of abolition, had already been granted leave to enter of more than six months at UK ports under any of those provisions may also re-enter the UK within the period of that leave and complete the period of stay they had been granted.

However, anyone who was granted six months' or less leave to enter at UK ports under the previous provisions, and who leaves the UK prior to the expiry of their leave, will not be able to re-enter to complete their leave, as it will have lapsed on their departure.

Any entry clearance applications that were made by 26 November 2008 will be dealt with according to the terms of the provisions in place at the time. Entry clearances will also be issued when any appeals against decisions made under the provisions for the routes abolished are ultimately allowed.

It is worth additionally noting that since the date of the abolition of the above provisions there has been no provision for applications for extensions of stay to be accepted or granted under the terms of those of the abolished provisions that permitted such extensions, eg working holidaymakers extending their leave in the UK and switching into the visitor category.>

TIER 5 TEMPORARY WORKER CATEGORIES

Categories	Period of grant	Extensions
<p>1) Creative and sporting <i>Creative subcategory</i> A sponsor must guarantee that the applicant is seeking entry to the UK to work/perform in the relevant sector, that the applicant is not intending to base themselves in business in the UK, poses no threat to the resident labour force, and will comply with conditions of their permission to stay and leave the UK when their leave expires. It is possible to apply for a group certificate of sponsorship for an accompanying entourage and, even if the creative worker is performing at several venues, to apply for a single certificate of sponsorship provided certain criteria are met. This category is not for people who currently enter the UK under permit-free concessions</p>	The maximum period is 12 months or the period given in the certificate of sponsorship plus 28 days, whichever is shorter	Up to 12 months at a time to a total of 24 months Must remain with the same sponsor
<p><i>Sporting subcategory</i> The applicant will need to be internationally established at the highest level in their sport and/or their employment will make a significant contribution to the development and operation of their sport in the UK. To issue a certificate of sponsorship, the sponsor will need an endorsement for the applicant from the appropriate governing body for the applicant's sport that they are internationally established at the highest level, will make a significant contribution to development of that sport at the highest level in the UK, and that the post could not have been filled by a suitable European Economic Area national. This category is not for people who currently enter the UK under permit-free concessions</p>	As above	Not permitted
<p>2) Charity This category is for migrants to undertake voluntary work in the UK. To issue a certificate of sponsorship the sponsor will need to have guaranteed that the applicant intends to undertake voluntary field-work directly related to the purpose of the charity, will not receive payment for the work except reasonable expenses, will not take up a permanent position, and will comply with the conditions of stay and leave the UK when their leave expires.</p>	As above	Not permitted
<p>3) Religious This category is for applicants coming to work temporarily in the UK as a religious worker. Duties may include preaching, pastoral work and non-pastoral work. To issue a certificate of sponsorship, the sponsor will need to have guaranteed that the applicant is suitably qualified to do the job in question, does not intend to take employment for the sponsor except as a visiting religious worker or a religious worker in a non-pastoral role, will only work at specified location(s), except where working under the supplementary employment provisions, will not displace or deny an employment opportunity to a suitably qualified member of the resident labour force, and will comply with the conditions of their permission to stay and will leave the UK when that permission expires. In addition, the sponsor will accept the responsibilities of sponsorship for the applicant, as applicable, and support them with funds and/or accommodation that are sufficient to maintain the applicant throughout the duration of their certificate of sponsorship</p>	The maximum period is 24 months or the period given in the certificate of sponsorship plus 28 days, whichever is shorter	Not permitted

Table continues on pXX

TIER 5 TEMPORARY WORKERS

Tier 5 (Temporary Worker) is divided into five subcategories, each for a different type of temporary employment. These are as follows:

- 1) Creative and sporting: for people coming to the UK to work and perform as sportspeople, entertainers or creative artists for up to 12 months.
- 2) Charity worker: for people coming to the UK to do voluntary, unpaid work for charity.
- 3) Religious worker: for people coming to the UK to work temporarily in a religious role. Applicants' duties may include preaching, pastoral and non-pastoral work.
- 4) Government authorised exchange: for people coming to the UK through approved schemes that aim to share knowledge, experience and best practice.
- 5) International agreement: for people coming to the UK under contract to provide a service

TIER 5 TEMPORARY WORKER CATEGORIES <i>continued</i>		
Categories	Period of grant	Extensions
<p>4) Government authorised exchange This category is for applicants coming to the UK through the approved schemes that aim to share knowledge, experience and best practice through work placements, while experiencing the wider social and cultural setting of the UK. It cannot be used to fill job vacancies or provide a way of bringing unskilled labour into the UK. Individual employers and organisations will not be allowed to sponsor applicants, even if they are licensed as sponsors under other tiers or categories of Tier 5. An overarching body will manage the scheme. This body will be the sponsor, who will issue the certificates of sponsorship. When the overarching body issues the certificate of sponsorship it will need to have guaranteed that the applicant is seeking to enter the UK to work or train temporarily through an approved exchange scheme, that they do not intend to establish a business in the UK and that they meet the requirements of the individual exchange scheme</p>	<p>The maximum period is 24 months or the period given in the certificate of sponsorship plus 28 days, whichever is shorter</p>	<p>Not permitted</p>
<p>5) International agreement This category is for applicants who are coming to the UK under contract to provide a service that is covered by international law. It includes private servants in diplomatic households, employees of overseas governments and international organisations, the General Agreement on Trade in Services (GATS) and similar agreements between the UK and another country. If a sponsor issues a certificate of sponsorship under GATS or international agreements, the sponsor will need to have guaranteed that the applicant: works for an organisation that is a member of the World Trade Organisation and has signed up to the agreement, or has a bilateral agreement with the UK or EU, or is a member of the EU; will be engaged in work that meets the terms and conditions of the relevant international agreement; and, where relevant, works for an employer that was awarded the contract or will provide services to a UK client.</p>	<p>As above</p>	<p>Not permitted</p>
<p><i>Private servants in diplomatic households</i> A sponsor issuing a certificate of sponsorship to private servants in diplomatic households will need to guarantee that the applicant is aged 18 or over, will be employed as a private servant in the household of a member of staff of a diplomatic or consular mission who has diplomatic privileges and immunity as defined by the Vienna Convention on Diplomatic Relations, or is an official employed by an international organisation with certain privileges and immunities under UK or international law, that the applicant intends to work full time in domestic employment, will not take up any other form of job for the sponsor other than as a private servant in the specified household, and will leave the UK when their permission to stay has expired. Domestic workers in private households remain outside the points-based system (PBS), so applicants should continue to apply as they did before the PBS was introduced.</p>	<p>As above</p>	<p>Up to 12 months at a time to a total of six years.</p>
<p><i>Employees of overseas governments</i> When issuing a certificate of sponsorship to employees of overseas governments and international organisations, the sponsor will need to guarantee that the applicant is under a contract of employment with the overseas government or international organisation, that they will not take up any job for the sponsor other than that for which the certificate of sponsorship was issued and not try to avoid immigration controls by changing to a different category after entering the UK.</p>	<p>As above</p>	<p>As above</p>

that is covered under international law. This subcategory also includes private servants in diplomatic households.

See the table on pXX and pXX for further details of these subcategories.

Requirements for employer

In order to sponsor applicants, an employer will need to have registered with the UKBA as a licensed sponsor and will need to meet the requirements for the particular category within Tier 5 and

also accept certain responsibilities to help with immigration control.

Requirements for employee/applicant

All applicants under Tier 5 temporary workers will need a sponsor, which needs to be a UK-based organisation that wishes to employ the applicant in the UK. The applicant will need to be issued with a certificate of sponsorship and apply for entry clearance prior to entering the UK. To apply for entry clearance the applicant will need to first check whether they have sufficient points >

to qualify for such clearance (see 'Tier 5 temporary workers: points for entry clearance', pXXX).

MAINTENANCE

One of the main stumbling blocks for applicants is the maintenance requirement (ie the need for the applicant to have funds to maintain and accommodate themselves). To qualify, the main applicant must be able to demonstrate that they have personal savings of £800 for at least three months prior to the date of the application and that the balance has not fallen below £800 during that three-month period. These funds need to be cash funds. In addition, applicants will need to demonstrate that they hold funds of £533 for each dependant that is accompanying them and, again, the balance should not fall below the required minimum during the three-month period prior to the application being made.

Even if the main applicant does have the required funds, they will also need to have proof of these funds in a specific format, eg bank statements, building society books or a letter from the bank. On the face of it, this may not seem too onerous. However, in practice, many applicants do not have the proof in the prescribed format. For example, they may have electronic bank statements and therefore require a supporting letter from their bank, but find that the financial institution is not willing to provide the letter necessary to make the application.

If you are an A-rated sponsor you can give the applicant an undertaking for their maintenance and accommodation. This removes the need for bank statements or other documentation and can speed up the time it takes to complete the immigration process, as there are no delays caused by, for instance, waiting to receive supporting letters from financial institutions.

A creative worker or sportsperson can apply for entry clearance from a country that is not their normal place of residence if the applicant is in another jurisdiction for a similar role to the one they are required to do in the UK. As previously mentioned, if

the applicant is a non-visa national and is seeking to enter under this category for less than three months, they will not need entry clearance.

When the entry clearance has been granted the temporary worker will then be able to enter the UK up to 14 days before the start date for the job for which they have obtained the certificate of sponsorship.

Non-visa nationals seeking to enter the UK for periods of less than three months in the creative or sporting subcategories will not be required to apply for a visa, but will still require a certificate of sponsorship.

SWITCHING

Switching into Tier 5 or between subcategories within the tier is not permitted, except for a sporting or entertainer visitor where the certificate of sponsorship has been assigned to the applicant before coming to the UK. These applicants are allowed to switch into the sporting and creative subcategories.

CONCLUSION

With the lack of countries currently approved for participation under the YMS and the lack of licensed sponsors under Tier 5, it feels that perhaps the introduction of the tier was rushed simply to meet UKBA's self-imposed deadlines.

However, with Home Secretary Jacqui Smith recently announcing proposed measures to raise the bar for foreign workers wishing to enter the UK, and to give domestic workers a greater chance of applying first for UK jobs, is it possible that we will see an increase in applications under the YMS by migrants of participating countries and their employers seeking to circumvent the burdensome requirements of Tiers 1 and 2 and undertake short-term assignments in the UK.

*By Kelly Whiter, assistant solicitor, and
Tracy Mayo, paralegal, Magrath LLP.
E-mail: kelly.whiter@magrath.co.uk;
tracy.mayo@magrath.co.uk.*