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Inward investment: entrepreneurs and investors in the UK immigration regime

THE PREVAILING ECONOMIC UNCERTAINTY has ignited significant debate in the media in respect of the desirability of bringing foreign nationals into the UK to participate in the UK labour market. Immigration remains at the forefront of political debate and, in particular, the impact of migration on the availability of work for resident workers and the impact on social infrastructure. It is likely to be a significant issue at the time of the next general election.

Balanced against the perceived negatives is the continued need to encourage inward investment from overseas. Foreign businesses and high-net-worth individuals create jobs for UK workers and contribute significantly to the public purse.

In this article we will look at three of the routes of entry that are available to foreign nationals to come to the UK as business entrepreneurs, representatives of overseas firms and investors.

POINTS-BASED SYSTEM (PBS)

Over the past few years, the UK Border Agency (UKBA) has designed and implemented a PBS for the control of foreign nationals coming to the UK to study, work, engage in business and invest. Prior to 2008 the UK immigration rules set out the criteria that applied to entrepreneurs and investors. Individuals were required to make applications for leave to remain or entry clearance against specific requirements set out within the rules.

Each of these routes of entry (with the exception of sole representatives of overseas firms) has now been incorporated within Tier 1 of the PBS. Tier 1 is the only route of entry that does not require the overseas national to have a 'sponsor'. Tier 1 migrants can act as their own sponsor as long as they meet the key criteria that apply to the sub-category of Tier 1 under which they seek entry.

Tier 1 is divided into the following sub-categories:

- Tier 1 (General) highly skilled migrants with the attributes to contribute to the UK growth in productivity (formerly known as the Highly Skilled Migrant Programme);
- business entrepreneurs wishing to invest at least £200,000 in and create work for at least two settled persons in UK businesses;
- investors wishing to invest £1m in the UK; and
- post-study workers (individuals who have obtained a degree here in the UK and wish to remain for two years following their degree to work).

Points are awarded for 'attributes'. These include, for example, having sufficient funds that are disposable in the UK and held in a regulated financial institution. In addition, points may be required for English language ability and the possession of funds to support the migrant and their dependents in the UK. The PBS is designed to make the process clear, transparent and objective, and to take away the elements of discretion that caseworkers and visa officers may have been able to exercise under the previous criteria.

INVESTORS

The investor category has existed in UK immigration law for many years and has proved to be a valuable source of entry for high-net-worth individuals and their family members. The key element of the investor rules is the investment of at least £1m in UK government bonds, share capital or loan capital in active and trading UK registered companies (other than those principally engaged in property investment). Under the old rules the requirements included:



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- the possession of at least £1m of the investors own money under the investors control;
- loaned funds if the investor owned personal assets with a value of over £2m;
- a required investment of at least £750,000 in bonds, share capital or loan capital;
- a requirement to invest the money within three months of arrival;
- a requirement to make the UK the investors main home; and
- prohibition on taking employment in the UK.

The UKBA has transferred these requirements almost entirely into the new scheme under Tier 1 as follows:

The applicant:

- 1) has money of their own under their control in the UK amounting to no less than £1m;
- 2) owns personal assets that, taking into account any liabilities to which they are subject, have a value of no less than £2m; and
- 3) has money under their control and disposable in the UK amounting to no less than £1m, which has been loaned to them by a financial institution regulated by the Financial Services Authority (FSA).

Applicants are not required to meet the English language requirement that applies to most other types of application under the PBS. This is because, while they are allowed to work in the UK if they wish to, they should not need to work. This lifting of the English language requirement appears to run counter to the government's integration and cohesion agenda, which seeks to promote English language ability as a means of promoting social cohesion. Furthermore, applicants are not required to meet the separate requirement for maintenance (funds) that applies to most other applicants under the PBS.

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This is because they have shown their ability to support themselves through the attributes section.

Successful applicants will be granted entry clearance (if applying from overseas) or leave to remain (if permitted to switch status in the UK to Tier 1 investor) for an initial period of three years. As with most other categories of the immigration rules, investors are prohibited from recourse to public funds. Investors are allowed to take employment in the UK except as a doctor in training.

Migrants who are currently in the UK with permission to stay under the old investor rules are prevented from taking up employment until they have been granted permission under Tier 1 (investor) category.

FUNDS

The money may be held overseas at the time of application or it may have already been transferred to the UK (within the past 12 months). In addition, the applicant may rely on money that is owned jointly with or solely by their husband or wife, civil partner, unmarried partner or same sex partner. However, applicants must have unrestricted rights to transfer or dispose of the funds and have permission from the spouse, civil partner, unmarried or same sex partner to have control of these funds. To establish funds one or more of the following is required:

- A portfolio report produced by an authorised financial institution (AFI) covering a three-month period immediately before the date of application.
- Where the portfolio is not managed by an AFI-regulated financial institution additional documents will be needed such as:
 - certified copies of bond documents, share documents, latest audited

annual accounts of the organisation in which the investment has been made or trust fund document;

- personal bank statements from a bank regulated by the home regulator showing the amount of cash available and in whose name they are held the funds must have been held for three months immediately before the application; and
- a letter from a bank that is regulated by the home regulator showing the funds and in whose name they are held (the funds must have been held for three months immediately before the application).

If the money has not been held in a portfolio or bank account for three months or more, the applicant must provide every item of evidence to establish the source of funds. All of the £1m sum required to meet Tier 1 (investor) requirements must be freely transferrable to the UK and convertible to pounds sterling. Where funds are not held in the UK the applicant must provide a letter from a financial institution evidencing that the funds can be transferred. The institution must be regulated by the Home Regulator.

If the funds are held joint with or solely by the applicant spouse, civil partner, unmarried or same sex partner, then that person must give permission for the applicant to control these funds in the UK. The applicant will need to provide evidence of the legitimacy of the relationship, as well as a declaration from the partner or spouse that the funds will be under the control of the applicant.

TIMINGS

The investment must be made within three months of the date of entry or leave to remain in the UK. At least £750,000 must be invested in the prescribed way, UK government bonds, share capital or loan

capital in active and trading companies that are registered in the UK. Investment can be held in foreign currencies. The types of investments that are excluded are offshore companies or trusts, open-ended investment companies, property investment companies and banks, and other enterprises whose normal course of business includes accepting deposits.

Once the investor has resided in the UK for a three-year period and has maintained their investment continuously over that period, an application for an extension may be made for a further two years.

Issues that may arise at the extension stage include a failure to make the investment within the first three months. In these circumstances, the UKBA has the power to curtail leave to remain. Furthermore, the value of the investment must be maintained over the full three years. In the current economy this can be difficult. Fluctuations in valuation must be corrected by the next reporting period.

Once an investor has resided in the UK for a continuous period of five years, an application may be made for indefinite leave to remain. However, the principal applicant must be cautious of the need to spend a full five-year period in the UK. Excessive absences could result in the application being declined. It is particularly important for investors who travel around the world on a regular basis to be aware of this requirement.

TIER 1 (ENTREPRENEUR)

The Tier 1 entrepreneur route is an amalgamation of the innovator and business person routes that previously existed under the UK immigration rules. The entrepreneur category is designed for those investing in the UK by setting up or taking over and being actively involved in the running of one or more businesses in the UK.

Business entrepreneurs must have access to no less than £200,000 of money held

in a regulated financial institution that is disposable in the UK. 75 points are awarded for meeting these criteria. In addition, business entrepreneurs are required to establish the English language requirement and meet a maintenance requirement (having at least £2,800 available to them for a three-month period preceding the date of applying for entry clearance).

Within three months of obtaining entry clearance the applicant must register with HM Revenue and Customs (HMRC) as self employed or register a new business in which they are a director, or register as a director of an existing business.

The applicant must establish a business that creates the equivalent of two new full-time jobs (ie 30 hours a week minimum) for people settled in the UK or take over a business with similar job creation.

The business entrepreneur route is an 'active' investment programme. The applicant must be engaged in business activity at the time of their application for their leave to remain. As with the investor route, a business entrepreneur will be granted a period of three years entry to the UK and an extension application may be made for a further two years.

FUNDS

In support of the initial application the entrepreneur should provide a letter from each financial institution holding their funds to confirm the amount available. If the funds are not held in the UK the entry clearance officer will use the OANDA Database to convert the given amount to pounds sterling. Third parties (other contributors of funds) may include family members and other investors.

Where third parties have contributed to the investment, a declaration from each third party that the funds have been made available to the applicant in the UK is required, as well as a letter from a legal

representative confirming the validity of each third-party declaration.

To obtain an extension of stay as a Tier 1 (entrepreneur) following three years in the UK, the applicant will have to establish that they are engaged in business activity at the time of the Tier 1 entrepreneur extension application and that they have established a new business or businesses that have created the equivalent of at least two new full-time jobs for persons settled in the UK, or, taken over or joined in existing business or businesses, and the investment has created the equivalent of two new full-time jobs.

Documents required will include evidence that the individual has registered as self employed, or, as a director and that they are engaged in business activity (eg a copy of a quarterly National Insurance bill from HMRC, a copy of the Small Earnings Exception Certificate or current appointment report from Companies House. Evidence of job creation will include a copy of the employees passport, terms and conditions of employment, MP11, pay slips or bank statements.

In addition, UKBA will require sight of a P35 form and an accountants letter confirming that new posts have been created, as well as evidence of direct investment of funds into the business. Evidence of the UK business will include details of a registered office, bank account and that the business is subject to UK taxation.

It is not necessary for the business to be profitable but the money must be fully used in the business (ie the business must benefit from the cash investment) and not simply be held in a bank account. Funds invested in residential property will not be taken into account.

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