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Immigration briefing from Magrath LLP published in the  
April 2011 issue of The In-House Lawyer:

Restricted or unrestricted?

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## Restricted or unrestricted?

AFTER AN EVENTFUL END TO 2010 FOR UK immigration practitioners, February 2011 saw the UK Border Agency (UKBA) publish a document entitled 'Statement of Intent, Transitional Measures and Indefinite Leave to Remain' (the statement).

The release of the statement followed the Home Secretary's announcement on 23 November 2010 that the government was making substantial changes to the points-based system (PBS) and, furthermore, that these changes would include a limit of 20,700 for the Tier 2 (General) and 1,000 for the new Tier 1 (Exceptional Talent) routes.

In the statement, the UKBA said that the outline of the new measures should not be seen as a definitive account of the requirements that apply from the beginning of this month, but that the statement is providing information on how the new arrangements for Tier 2 of the PBS will operate. It is likely that the UKBA will implement most, if not all, of the proposed changes once these changes have received Parliamentary scrutiny.

### CLOSURE OF TIER 1 (GENERAL)

As a background, Tier 1 (General) concerns individuals who are self-sponsored, do not require prior employment and sponsorship with a UK-based employer or company, and are free to work and undertake business activity in the UK for the duration of their visa.

As discussed in previous *IHL* issues, Tier 1 (General) closed to overseas applicants on 22 December 2010 and Tier 1 (General) closed for new in-country applicants on 5 April 2011.

Non-European Economic Area (EEA) nationals who are currently in the UK as Tier 1 (General) migrants will be able to continue to extend their visas and will not be affected by the changes when applying

for further leave to remain. The points threshold for an extension will, however, be increased to 100 for non-EEA nationals who were required to obtain 100 points when they first entered the scheme.

### TIER 2 OF THE PBS

Tier 2 concerns those who are in possession of a job offer from a UK employer with a sponsor licence. From November 2008 until April 2011, licensed sponsors have been issued with a certificate of sponsorship (CoS) annual allocation, for licensed sponsors to use throughout the year at their own discretion.

From its inception, Tier 2 has been divided into two sub-categories, Tier 2 (General) and Tier 2 (Intra company transfer (ICT)). In changes to the immigration rules in April 2010, Tier 2 (ICT) was sub-divided into three further categories: Tier 2 (ICT – Established Staff), Tier 2 (ICT – Skills Transfer) and Tier 2 (ICT – Graduate Trainee).

Tier 2 (General) is the primary route for UK licensed sponsors to employ a non-EEA national to fill a vacancy that cannot be filled by a resident worker (an EEA national or settled person from outside the EEA). Licensed sponsors can either conduct a resident labour market test (RMLT) in relation to the vacancy or alternatively, if the vacancy is on the shortage occupation list, the licensed sponsor can issue a CoS without the need to advertise.

### WHAT IS CHANGING NOW?

The UKBA will be amending the eligibility criteria and will introduce a limit on certain Tier 2 applications.

### Skill levels: graduate occupation list

First, the minimum skill level will be raised to graduate level and sponsors will only be able to issue a CoS to roles that are listed on the graduate occupation list, as recommended by the Migration Advisory Committee (MAC). Previously, licensed



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*‘Since long before the 2010 general election, the Conservative party has been vocal in its support for limiting immigration to the UK. This policy has since been ratified by the coalition agreement.’*

sponsors would attest on the CoS that the vacancy was at NVQ Level 3 or equivalent.

**English language**

Secondly, the minimum level of English language competency for Tier 2 (General) applications will be increased from basic to intermediate level (B1 on the Common European Framework of Reference for Languages).

Individuals from Antigua and Barbuda, Australia, the Bahamas, Barbados, Belize, Canada, Dominica, Grenada, Guyana, Jamaica, New Zealand, St Kitts and Nevis, St Lucia, St Vincent and the Grenadines, Trinidad and Tobago, and the US satisfy the English language requirement by virtue of their nationality.

Individuals from countries not listed above will need to satisfy the English language standard either by passing an English language test (to a higher level) or by having completed a degree that was taught in English.

**Points test**

The UKBA will be now applying a new test to all Tier 2 applicants applying for entry clearance or switching employers. The UKBA will be replacing the current Tier 2 matrix, that allows migrants to gain points for a valid CoS, qualifications, prospective earnings, English language ability and maintenance to one that allows migrants to claim points for a valid CoS, prospective earnings, English Language ability and maintenance.

Migrants will be required to obtain 70 points and must still take into account the appropriate rates of pay from the relevant Code of Practice.

**RESTRICTED OR UNRESTRICTED?**

Since long before the 2010 general election, the Conservative party has been vocal in its

support for limiting immigration to the UK. This policy has since been ratified by the coalition agreement. April 2011 will see this policy put into practice but it is important to note that not all Tier 2 applications will be subjected to the limits.

Due to certain international agreements and intense lobbying from some business sectors, Tier 2 (ICT) will be exempt from the limits. In addition to ICTs, the following categories will not be subject to the limit:

- Tier 2 (General) in-country extension applications;
- Tier 2 (General) in-country change of employer applications;
- individuals switching in-country to Tier 2 (General);
- those seeking admission to fill a vacancy attracting a salary of £150,000 or more; and
- Tier 2 Sportsperson and Tier 2 Minister of Religion.

Applications for Tier 2 CoS in the circumstances listed above will be known as ‘unrestricted’, and licensed sponsors will be able to issue the CoS without the need for approval from the UKBA.

The limit will therefore only affect those seeking admission to the UK as a Tier 2 (General) migrants. These CoS, unsurprisingly, will be known as ‘restricted’ CoS.

**HOW DO SPONSORS APPLY FOR A RESTRICTED CoS?**

The UKBA will operate the limit by not allowing sponsors to issue a restricted CoS unless they obtain prior approval from the UKBA using the new monthly panel process.

4,200 restricted CoS are now available nationwide to all sponsors, with 1,500 available monthly thereafter.

Every month on a set and published date, the UKBA will consider all applications for a restricted CoS and set these applications against ranking criteria that will predominately relate to salary. Therefore, licensed sponsors should be aware that the higher the prospective migrant’s restricted CoS is, the higher the likelihood that the UKBA will allow the sponsor to issue a restricted CoS.

Underpinning restricted CoS applications is a new points table that will allow points to be awarded from a minimum of 32 points for a restricted CoS application (that has passed a RMLT), and attracts a salary of £20,000, to a maximum of 60 points for a restricted CoS application (that has passed a RLMT), and attracts a salary of between £100,000 and £149,999. Additional points will be awarded to roles on the shortage occupation list and roles that are at PhD level and have passed a RLMT.

Following approval of a restricted CoS application, the licensed sponsor is required to issue the restricted CoS within three months of its allocation by the UKBA, otherwise it will be returned to the UKBA to be used in subsequent monthly allocations.

In the Immigration Rules, the UKBA will make it clear that when the monthly allocation has been reached and is subsequently oversubscribed, all applications will be approved where the monthly allocation will be exceeded by no more than 100. In a month where this occurs, the following month’s allocation will be reduced by the exceeding amount.

Where applications score the same number of points and straddle the monthly allocation limit by over 100, all applications with the same number of points will be refused.

Furthermore, licensed sponsors should be aware that if they have applied for restricted CoS, but have not been allocated a restricted CoS in that month, they will be required to re-apply to the following month’s allocation as their restricted CoS application will not be automatically carried forward.

**TIER 2 (ICT)**

The UKBA intends to make two significant changes to Tier 2 (ICT) that relate to the proposed UK salary levels of the intra-company transferees.

The UKBA intend that Tier 2 (ICT) migrants, who will be remunerated in the UK between £24,000 and £40,000, will be given leave to remain in the UK for no longer than 12 months. At the expiry of the visa, the Tier 2 (ICT) migrant will only be able to reapply for a Tier 2 (ICT) visa when they have completed at least 12 months outside the UK, from the date of expiry of their last Tier 2 (ICT) visa.

Proposed Tier 2 (ICT) migrants who are due to be paid a salary in excess of £40,000 will be able to apply for a three-year Tier 2 (ICT) migrant visa, as is currently the case, with the option to extend for a further two years. Employers and migrants should be aware that the Tier 2 (ICT) visa will be capped at a maximum of five years in the UK, and the individuals will not be able to reapply to return to the UK until 12 months has expired since the expiry of the last Tier 2 (ICT) visa.

**LONG-TERM PROSPECTS FOR MIGRANTS**

In addition to the changes relating to Tier 1 and Tier 2 contained in the statement, the UKBA intends to introduce a new criminality threshold, requiring applicants to be clear of unspent convictions and a new income requirement for Tier 1 (General), Tier 2 (General) and work permit holders applying for settlement (also known as indefinite leave to remain/permanent residence).

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Tier 1 (General) migrants will need to score points against the same criteria as their last application as set out in Appendix A of the Immigration Rules; and Tier 2 (General) migrants and work permit holders will need to continue to be paid at the appropriate rate for which the visa was issued.

**WHAT HAPPENS NEXT?**

The Court of Appeal ruling in *Secretary of State for the Home Department v Pankina* [2010] held that the only binding and effective parts of the PBS rules and guidance are those set out in the Immigration Rules themselves. The rationale behind this is that these are the only provisions that have been properly laid before Parliament in accordance with s3(2) of the Immigration Act 1971. Therefore, for the changes discussed above to be legally binding, in mid-March 2011, the UKBA laid out the necessary changes to the Immigration Rules before Parliament and the UKBA has published detailed guidance for both migrants and employers. However, as already noted, most, if not all, of the changes discussed here will be implemented.

**END IN SIGHT?**

It is well known that the government’s intention is to reduce net levels of immigration to tens of thousands rather than hundreds of thousands, in response to public concern and social impacts. To achieve this goal, the government cannot stop here. As noted by David Metcalf of the MAC to the Home Affairs Select Committee:

‘One thinks of [UK Immigration] as a 3 x 3 matrix. You’ve got three routes in: work, study and family. You’ve got three groups: British, EU and non-EU. So you’ve got nine cells, and [presently, the government is] only dealing with one of those cells.’

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*Secretary of State for the Home  
Department v Pankina [2010] EWCA 719 Civ*