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The legal minefield of employing foreign workers

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## The legal minefield of employing foreign workers



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IMMIGRATION HAS ALWAYS BEEN A TOPIC that has generated a great deal of interest and debate due to the impact it has on the populace and on the economy as a whole. Recent examples of these have been the French-owned Lindsey Oil Refinery dispute that was settled when Total agreed to hire more local employees, and Ghurkhas who retired before 1997 are now being allowed to settle in the UK.

As an increased number of people migrate to different countries in search of a better standard of living, for employment or for family commitments, countries, including the UK, have had to tighten up their borders. This is not only to protect resident work forces, but also to ensure that existing infrastructures, such as schools and hospitals, can sustain their population.

Last year, to monitor and ensure that the appropriate migrants are entering the UK, the UK Border Agency (UKBA) undertook its biggest shake up in immigration history, with a view to merging over 80 categories into five tiers. On introducing the scheme, the UKBA stressed that the new system would be objective and would also be simpler, not only to manage, but also to understand.

This article will outline the steps to be taken to employ non-EEA nationals. It will also try to identify how employers can recruit the most suitable candidates without having to worry about the UKBA knocking on their doors to issue fines or, worse still, prosecute the management under the immigration legislation that has introduced criminal offences in certain circumstances.

### POINTS-BASED SYSTEM

The points-based system (PBS) consists of five tiers, with Tiers 1, 2, 4 and 5 being the most relevant for employers. Migrants from outside the EEA are allocated points depending on how beneficial their presence in the UK could be to the economy. The main aim of the PBS is to assess migrant's potential contribution by assessing attributes such as their qualifications, previous earnings, age, work history, proficiency of English language and the ability to maintain themselves without the recourse to public funds. The number of points awarded and how they are scored

depends on the tier under which the migrant applies.

Tier 1 caters for highly skilled migrants, investors, entrepreneurs and post-study workers, and these categories do not require the migrant to be sponsored by an employer. As a result, an employer hiring an applicant on a Tier 1 visa is not required to apply for any immigration permission for the individual to take up their employment.

Tier 2, on the other hand, requires the individual to have a sponsor in order to take up employment in the UK. Tier 2 is sub-divided into Tier 2 General and Tier 2 Intra-Company Transfers (ICT). While Tier 2 General is aimed at employing new recruits, Tier 2 ICT enables employers to transfer workers who have been in their employment for a minimum of six months to the UK. To employ a foreign worker under Tier 2 General, employers are required to provide evidence that they have tested the resident labour market (RLM) through advertising and only when no suitable candidate can be identified may a non-EEA national be recruited.

### SPONSOR LICENCE

Following the introduction of the PBS last year, employers are required to register with the UKBA for a sponsor licence in order to sponsor a foreign worker under Tier 2. The UKBA has, on some occasions, interviewed existing employees during the application process, to determine whether or not the company is compliant with the requirements under the rules.

Once registered, employers are able to issue certificates of sponsorship (COS), which act as work permits to foreign workers, without seeking further approval from the UKBA.

Before issuing a certificate of sponsorship registered employers have to satisfy themselves that:

- the role is a skilled job at N/SVQ3 level;
- the applicant has the required skills and/or qualifications to undertake the role; and
- the RLM has been tested unless the applicant is an ICT.

As a way to further restrict access to the UK labour market, the UKBA recently introduced a requirement that positions must be advertised in Jobcentre Plus for two weeks unless the salary on offer is above £40,000, in which case it can be advertised for just a week.

### SO WHAT ARE THE STEPS EMPLOYERS NEED TO FOLLOW WHEN HIRING A NON-EEA NATIONAL?

First a company must be registered as a sponsored licence holder and must possess a licence under the tier required

RLM before employing the individual. Depending on the role, the UKBA have issued a set of guidelines called codes of practice, which outline the roles and responsibilities expected for each position together with the minimum salary, as well as the acceptable medium where an advertisement must be placed before employing an individual.

The above steps are for employers wishing to employ overseas nationals. However, the case is slightly different if an applicant is a Bulgarian or Romanian national.

can only begin working for the employer once both stages have been completed and an accession worker card has been issued. The accession worker card is not transferrable and restricts the individual to the job specified on the card. Once the Bulgarian or Romanian national has spent 12 months working in the UK, they may apply for a registration certificate as evidence of their right to reside and work in the UK.

### A8 COUNTRIES

The regime for nationals of the group of countries that joined the EU on 1 January 2004 (the A8 countries: Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia and Slovenia) is slightly different. These nationals do not require work authorisation but must instead register with the UKBA under the Worker Registration Scheme (WRS). Registration must be completed within one month of starting employment in the UK. The individual A8 national employee is responsible for completing the worker registration. The employer is required to provide a letter confirming the details of the employment for submission with the registration application. Employers must ensure that the registration is completed within the required timeframe and the individual must provide evidence of the registration to the employer to keep on record for the purposes of checking the individual's permission to work in the UK.

Once A8 and A2 nationals have completed 12 consecutive months of employment in the UK, they are given access to the UK labour market without the need to further registration. They will be able to apply for an EEA registration certificate as evidence of their right to reside and work in the UK in the same way as other EEA nationals, and will be granted full access to the UK labour market.

The government recently reviewed the restrictions on A8 and A2 nationals following a review by the Migration Advisory Committee (MAC), the independent body set up to review and report on the impact of migration on the UK. It was decided that these restrictions should remain in place for the time being.

### ILLEGAL WORKING AND PENALTIES FOR EMPLOYERS

To ensure that employers remain compliant with the UK immigration rules, the UKBA has introduced penalties and offences to serve

***'The UKBA recently introduced a requirement that positions must be advertised in Jobcentre Plus for two weeks unless the salary on offer is above £40,000, in which case it can be advertised for just a week.'***

to employ its workers. For example, if a company is transferring its overseas workforce, who have been employed for over six months, it must register under Tier 2 ICT, while if a company will be employing new workers it must register as a Tier 2 General.

Once registered, the company can then employ foreign workers. If a candidate has been identified and is an ICT, the employer will issue a COS (which is a unique reference number) to the applicant, who in turn will use the COS to obtain an entry clearance visa in their country of origin. One thing to note is that, before an entry clearance visa is issued, applicants must prove that they meet the requirements by submitting original documents such as degree qualification certificates, payslips from the past six months, a letter from the company confirming that it has issued a COS and an application fee. Once the application is successful, the applicant can enter the UK to take up their employment.

### TIER 2 GENERAL

For individuals who have not been employed by a company for up to six months, the process is slightly different. This is because the company will be required to test the

### EMPLOYING NATIONALS OF BULGARIA, ROMANIA AND THE A8 COUNTRIES

Access to the UK labour market for nationals of the two groups of eastern European countries that joined the EU in 2004 and 2007 respectively remains restricted. The appropriate processes must be followed when seeking to employ nationals of these countries.

### BULGARIANS AND ROMANIANS: A2 NATIONALS

Employers who are employing nationals of Bulgaria or Romania, which both joined the EU on 1 January 2007, are required to obtain work authorisation from the UKBA in respect of that employment before the individual can begin working. The old work permit regime (which has been replaced by the new PBS) remains operational in respect of Bulgarians and Romanians.

The work authorisation process has two stages. Employers must first obtain work permit approval in the form of a work permit approval letter. The work permit approval will be valid for that particular employment only and is not transferrable to another job or employer. Once the work permit has been approved, the second stage is to obtain an accession worker card for the individual. The individual

as a deterrent to employers hiring illegal workers. The government's penalty-based regime came into force in February 2008. The system of civil penalties means that a penalty of up to £10,000 per illegal worker can be imposed on an employer found to be employing workers illegally in the UK, without the need for a court conviction.

As well as the penalty scheme, employers can also be subject to criminal liability for knowingly employing an illegal migrant worker and can face a fine of up to £5,000 for each offence. In a recent case heard at Harwich Magistrates Court, the judge imposed a record fine of £96,000 on the bosses of a Colchester restaurant after they were found guilty of employing illegal workers.

### STATUTORY 'EXCUSE'

Employers will be glad to know that the legislation also provides a statutory 'excuse' that will act to offset the civil penalty. To rely on this, employers are

required to check that all prospective employees have a valid right to work in the UK. This must be done by checking original documents provided by the prospective employee as evidence of their entitlement to work in the UK. There are documents specified in the appendices to the *Code of Practice – Civil Penalties for Employers*: List A (eg an original passport confirming the holder is a British citizen) and List B (eg original passport endorsed with entry clearance as a work permit holder or leave to remain as the spouse of a British national) that an employer can use to establish the statutory excuse. The check must be completed prior to the employee commencing work. Copies of the original documents checked must be kept on the employee's records as evidence that a check was completed and these records must be held for at least two years following the end of the employment.

Where documents checked are List B documents, there is a continuing obligation

on the employer to make regular repeat checks. These repeat checks must be carried out every 12 months to ensure that the employee still has a valid and unexpired right to work in the UK. By contrast, where an individual has provided original documents from List A, they are valid for the duration of the employment.

### CHECKING VALIDITY AND ISSUES OF FRAUD

Employers are required to take reasonable steps to check the validity of the documents they are presented with. It is not sufficient for the purposes of the legislation to simply receive a document and file it away. The employer must satisfy itself that the documents presented are genuine, belong to the individual presenting them, and are current and valid. For example, it is important to check that the photographs and identity details given on a passport are consistent with the individual presenting the passport.

## SUMMARY OF KEY STEPS TO EMPLOYING FOREIGN NATIONALS IN THE UK

Nationality	Summary of applicable procedure	Step 1	Step 2	Step 3
Non-EEA nationals (eg US, Australian and Indian)	Application under the PBS – Tier 2 sponsored migrant	Check that the job is at the appropriate skill level – S/NVQ 3 or above; the appropriate salary will be paid; and the RLM test has been met where relevant	Licensed employer issues a certificate of sponsorship to individuals who must score points under attributes, maintenance and English language to qualify under the PBS	Individual obtains a visa or leave to remain; employer checks original entry clearance or leave to remain and retains copy on file
Bulgarian/Romanian	Application for work authorisation (work permit approval) and accession worker card	Apply for work authorisation from UKBA, ie work permit approval for the specific role	Apply for an accession worker card for the specific role before starting work	Employer checks original passport and accession worker card and retains copies with work permit approval letter
A8 nationals (eg Hungarian, Polish and Czech)	Registration under the WRS	Individual applies to register within one month of starting employment	Employer checks original passport prior to starting work and ensures application under the WRS is submitted within one month	Employer checks original passport and issued worker registration card and retains a copy on file
Other European nationals (eg French, German and Italian)	Exercising treaty rights under European law to work in the UK	No authorisation required from UKBA	Can apply for residence permit to evidence right to work in the UK	Employer checks original passport or identity card to confirm nationality and retains a copy on file

The Public Register of Authentic Identity and Travel Documents Online (PRADO) (<http://www.consilium.europa.eu/prado/EN/homeIndex.html>) is available for employers to check the features of passport and identity documents from all EU countries. This developing database

be able to confirm the individual's status usually within five working days.

#### CONCLUSION

The heart of any business is its work force and employers will always try to recruit the most qualified candidates based on their

a permission to work and, if so, going through not only the rudiments of applying for permission but also having to carry out regular checks to determine whether the individual continues to satisfy the requirements. This can be time consuming for large multinationals and can lead to asking an employee personal questions that should normally be of no concern to an employer.

***'The employer must satisfy itself that the documents presented are genuine, belong to the individual presenting them, and are current and valid.'***

will be updated regularly with further information. The UKBA Sponsorship Employer Helpline (0300 123 4699) is also a valuable resource if in doubt about the authenticity or eligibility of documentation provided.

Where an individual provides documents indicating that they have an outstanding application with the UKBA and it is not clear to the employer whether or not this individual has the right to work in the UK, the employer can make use of the UKBA Employer Checking Service to verify the information provided. The service is available free of charge by sending the completed form by fax to the UKBA together with the relevant information. The UKBA will then

skills and experience to remain competitive within the market.

The introduction of the PBS has placed a huge responsibility on employers to recruit from the EU/EEA before offering any roles to non-EEA nationals. This has affected the way employers recruit employees and may mean that they miss out on those individuals who are most qualified for the position due to certain restrictions placed on them by the new PBS route.

Employers may rightly feel that they have enough responsibility running their day-to-day affairs without having the additional responsibility of determining whether a particular individual requires

One cannot but agree that a change was required under the previous immigration rules as, since February 2008, the UKBA has issued fines to the tune of nearly £14m for illegal working and has also managed to secure several convictions. Going by recent media reports, while it appears that only small businesses such as restaurants and butcher shops have been caught so far, it is only a matter of time before a multinational corporate entity finds the UKBA knocking on its doors and issuing fines or, worse still, obtaining a conviction against senior management. It seems that under the new scheme, legal, HR representatives and in-house compliance officers have their work cut out for them.

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