

The work permit is dead. Long live the work permit



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2008 SAW THE BIGGEST CHANGE TO THE immigration system in the past 45 years. The government sought to replace the 80 or so current routes by which non-EEA nationals can enter to the UK for work, study or training, into a new five-tier, streamlined, points-based system (PBS). The PBS has been gradually introduced, with Tier 1 commencing in February 2008, Tiers 2 and 5 introduced in November 2008 and Tier 4 to be introduced towards the end of the first quarter of 2009. Tier 3 is currently suspended. For each Tier there is a points target that applicants will need to meet. Points are awarded according to objective and transparent criteria, enabling applicants to assess themselves to see if they will have enough points before making an application. The UK's five-tier system follows the model of the current Australian PBS.

TIER 1

Tier 1 was introduced on 29 February 2008. This tier closely resembled the previous Highly Skilled Migrant Programme, which allowed migrants from around the world to enter the UK based on factors such as their age, education, work experience and command of the English language. Migrants can come to the UK without a job offer and will have full access to the UK jobs market. They may also engage in self-employed activities and they are not subject to further immigration controls once in the UK for the duration of their visa (other than a prohibition on recourse to public funds), unless they are required to register with the police.

TIER 2

For a number of years employers have been used to the paper work permit process, a two-stage employer-led application in which an initial decision was made in Sheffield, followed by the applicant applying for entry clearance in their country of residence. On 27 November 2008 the work permit scheme was put to bed, save for Bulgarian and Romanian nationals, who still need to apply under the scheme.

Tier 2 replaces the work permit scheme. This tier enables migrants from outside the EEA to enter and work in the UK if they are in possession of a certificate of sponsorship (COS). This 12-13 digit unique reference number allows the migrant to apply for a visa to enter the UK, and once the migrant enters the UK, the employer has complex reporting and document retention duties in respect of the migrant until the migrant leaves the UK or is no longer subject to immigration controls.

Employers will become the sponsors of the non-EEA migrant worker under Tier 2. Sponsors must apply to the United Kingdom Border Agency (UKBA) to be graded according to legal right to work policies and

procedures, human resource systems, civil penalties and non-compliance. The UKBA will give an A-rating if an organisation receives a score of one in all of the relevant categories (that is, the organisation is found to be fully compliant or meet all criteria) and there are no other reasons for granting a B-rating or refusing the application. At the entry clearance stage the grading of a sponsor will enable the sponsor to guarantee the maintenance requirement for migrants and their dependants under Tier 2 for the migrant's first month of stay in the UK. This makes the entry clearance process more straightforward for the migrant.

The maintenance requirement is an important provision seen throughout the PBS. It imposes an obligation on prospective migrants from all over the world to have equal amounts of savings in order to have their application approved at the British overseas mission. The savings must be in place for a three-month period prior to applying for entry clearance. Using the current multipliers supplied by the UKBA, applicants from nations such as Bangladesh will need to find 5.3 times more savings in order to apply than applicants from western countries such as the US.

Sponsorship is the key theme throughout the PBS. The UKBA has sought to provide employers with substantial duties in relation to the non-EEA migrants they employ. These responsibilities are found in ss15-21 of the Immigration, Asylum and Nationality Act 2006, which imposes complex reporting and document retention duties on employers. The UKBA can fine non-compliant organisations. Employers who knowingly employ an illegal worker commit a criminal offence that could result in a custodial sentence.

In contrast to the work permit scheme, the decision-making process has now been transferred to British overseas missions. In the past, a high proportion of entry clearance officers' decisions have been incorrect, and up to 83% of refusals by entry clearance officers in the 'low-skilled sector' have been overturned on appeal. With more and more decisions being taken at the overseas missions, this number is likely to increase. It has also been noted that since the Tier 1 scheme was introduced worldwide, decisions by entry clearance officers in their respective jurisdictions have differed in the way they adopted the guidance laid out by the UKBA. Immigration practitioners expect similar discrepancies between jurisdictions under Tier 2. We are already seeing some British overseas missions expecting applicants to provide original documents, while others require just a fax or copy of the document. It will take many months before the government's streamlined objectives are achieved. >

Employers should also be aware that, under Tier 2, the validity of the COS has been curtailed to three months instead of six months for a valid work permit – the time frame whereby the prospective migrant must obtain entry clearance at the British overseas mission. Future problems may arise where delays by the migrant or by the employer could leave the migrant with an expired COS. This could then have an adverse effect on the migrant's future immigration applications or could require additional costs for employers.

Another distinction from the old work permit scheme are the changes affecting migrants who have already been granted leave to enter the UK. Under the old work permit scheme, an employer who wished to employ a migrant who was working for another employer on a work permit found that it would be quite easy to transfer this migrant if they were taking a similar role with the proposed new employer. A change of employer application was required. This process allowed migrants from non-EEA countries with work permits easy access to the jobs market once they were in the UK. Under Tier 2 for these same migrants, if they choose to change employers, their prospective employer is required to carry out a resident labour market test; a test to see if employers can find a British or EEA national willing to take up the role. The government notion that they can create British jobs for British people falls foul of EU regulations. All jobs in the UK can now be offered to any national of a member state of the EEA, with the exception of nationals of Bulgaria, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Slovakia and Slovenia, who may need to be registered or authorised to work.

Sponsor Management System

The Sponsor Management System (SMS) is the IT system that allows employers or their legal representatives to issue COSs. In practice, the SMS has a number of evident flaws. When creating the COS, the employer must describe the resident labour market test. UKBA provides a free text box, which enables the employer to provide details regarding the length and depth of the resident labour market test that the employer has conducted with respect to the proposed role.

Ill-advised entries in this text box could see employers' COSs annulled for not following the codes of practice relating to the role.

Codes of practice set out the acceptable advertising procedures that may be followed and the minimum salary a prospective migrant employee should be paid. Clarifications and changes since Tier 2 was introduced may mean that some employers that decide to use the SMS without legal representation may overlook vital criteria. This could see some potential migrants being refused a COS by an overzealous HR department, incorrectly believing they are following the published guidance. Alternatively, the SMS may see COSs incorrectly issued in order to meet business requirements. There is also the issue of payment for individual certificates. Employers paying for the COS by cheque may wait up to 15 days until the cheque has cleared, compared to the instant assignment of a COS if paid by credit card. The UKBA will update the SMS but fail to inform the employer that the COS has been assigned. Without the SMS under constant supervision, this failure to inform employers of an assigned COS needs to be addressed in the future, as a non-vigilant employer or a small employer could go a number of weeks without realising that the COS has been assigned.

Mismanagement of the SMS could result in the sponsor being downgraded from an A-rated sponsor to a B-rated sponsor or a loss of licence. The evident flaws could provide substantial issues for employers with respect to their current non-EEA migrant workforce and those non-EEA migrants that the employer wishes to employ in the future. It is therefore of paramount importance that employers and their legal representatives work with the SMS in an effective and efficient manner, and those given powers to use the SMS exercise their discretion wisely.

All employers should check prospective employees' entitlement to work in the UK, or they risk breaking the law under the new immigration regulations. The checks that should be, or have been, undertaken depend on when the employee was recruited. The UKBA seeks to work with employers to enable compliance with the legislation, yet it reserves the right to publish the details of employers who have been found liable for the payment of a civil penalty for employing illegal migrant workers.

TIER 3, TIER 4 AND TIER 5

Tier 3 relates to low-skilled workers with a job offer filling specific temporary labour shortages. This tier has been suspended, possibly indefinitely. The government has insisted that low-skilled migration to the UK can be made up of those migrants from

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the EU, mainly eastern European nations rather than from migrants from outside the EU.

Tier 4 relates to those migrants entering the UK to study. Current proposals for migrants wishing to enter the UK to study provide that each migrant needs to be sponsored by an educational institution. Educational institutions will now face similar complex reporting and document retention duties as sponsors under Tier 2 above. UKBA is currently accepting applications for sponsor licence applications from those wishing to provide courses for foreign students in the UK.

Tier 5 went live at the same time as Tier 2. Migrants under this Tier fall into a number of the old catch-all provisions. Tier 5 migrants can be made up of temporary workers or migrants under the government authorised exchange, who, under the old rules, came to the UK under the working holidaymaker scheme. It appears the launch of Tier 5 has been rushed in order to meet the strict PBS deadlines set out in the 'Controlling our borders: making migration work for Britain – five year strategy for asylum and immigration' report in February 2005. A number of sponsors under this Tier still need to be identified, and the next few months should iron out some of the creases.

CONCLUSION

The PBS has sought to mend the piecemeal approach to immigration taken in the past under a new simple and easy-to-understand system. In practice, along with some advantages of the new system, the complexities of the old rules have been mirrored in a number of the five new tiers. Some tiers are seeing sub-categories being introduced that have provided employers with a minefield of continuing obligations for their non-EEA migrant workforce. Potential migrant workers are being refused entry to the UK as they do not meet the maintenance requirements. The next few months will see a number of new amendments while the system is put into practice and the publicising of these changes to users of the system is vitally important in maintaining the integrity of the system. 2009 sees the government embarking on changes to the route of settlement for those non-EEA migrants currently working in the UK. It is hoped that more dialogue with stakeholders and users of the new system will enable the government to avoid some of the pitfalls seen in the introduction of the PBS.

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