

Magrath LLP
solicitors



Immigration briefing from Magrath LLP published in the
June 2010 issue of The In-House Lawyer:

To comply or not to comply?

THE 
IN-HOUSE
LAWYER

To comply or not to comply?

THE INTRODUCTION OF THE POINTS-BASED System (PBS) in November 2008 was the biggest change to UK immigration law for 45 years. Since the introduction of the PBS, the UK Border Agency (UKBA) has sought to re-align responsibility for non-European Economic Area (EEA) nationals from the UKBA to UK employers and the migrants themselves.

With the PBS came the concept of the 'sponsor' within UK immigration. Under current rules employers who wish to offer roles to non-EEA nationals (who don't have prior work authorisation) must apply for a sponsor licence. The process of applying for a licence requires employers to submit detailed information and several supporting documents to the UKBA. These documents are then graded. The UKBA makes a decision whether to issue the UK employer with 'A-rated' status, 'B-rated' status or to refuse outright the employer's sponsorship licence application.

Primarily, for a sponsor licence to be issued, the UKBA must be satisfied that the employer is able to take responsibility for ensuring that the non-EEA national has the correct work authorisation (through legal right to work checks) and will comply with the numerous sponsorship duties.

PRE-EMPLOYMENT DUTIES

When migrants work in the UK without permission to do so, the UKBA will impose a range of penalties on those who employ people illegally. Employers who have been issued with a sponsorship licence (and those who haven't) should make sure that migrants who are not settled in the UK are entitled to live and work here. This is usually completed through legal right to work checks.

Prior to the introduction of the Tier 2 scheme (previously the work permit scheme) the Immigration, Asylum and Nationality Act 2006 (the 2006 Act) came into effect. The 2006 Act strengthened the requirement for

employers to check documents to establish a person's eligibility to work in the UK. Along with the 2006 Act, new civil penalties were introduced with fines of up to £10,000 for each illegally employed worker, and unlimited fines and imprisonment of up to two years for knowingly employing illegal workers.

Employers are therefore required to check eligibility to work in the UK for each new starter before they commence employment. Employers must obtain copies of prospective employees' work authorisation and should ask all candidates to bring proof of their right to work to interviews for employers to check and take a copy. This check should then be completed on an annual basis.

EMPLOYERS WITH A SPONSORSHIP LICENCE

So what happens when a sponsor doesn't comply with its obligations?

Once a UK employer has been issued with a sponsor licence, if a sponsor employs a migrant without entitlement to work in the UK, the UKBA will either suspend, downgrade or withdraw a sponsorship licence. The UKBA has not listed all the circumstances in which they will suspend, withdraw, downgrade or take no action. The UKBA will consider:

- the seriousness of the sponsor's actions and the harm done;
- whether the sponsor's actions are part of a consistent or sustained record of non-compliance or poor compliance, or whether the sponsor's actions are a single event; and
- whether a sponsor has taken any action to minimise the consequences of what it has done or failed to do.

In what circumstances will the UKBA downgrade a sponsorship licence?

The UKBA will downgrade a sponsor from an A rating to a B rating if the UKBA issues the sponsor with a penalty for an offence



'Employers who have been issued with a sponsorship licence should make sure that migrants who are not settled in UK are entitled to live and work here.'

Mark Chowdhry, solicitor, Magrath LLP
E-mail: mark.chowdhry@magrath.co.uk

listed in Appendix C of the full sponsorship policy guidance (these are offences under the Immigration Rules) (unless the UKBA withdrew the penalty or cancelled it on appeal, it will withdraw the licence if the sponsor is issued with a maximum civil penalty). The UKBA will also downgrade a sponsor if the sponsor has certified that a migrant will not claim state benefits and that migrant then does claim benefits with the UK employer's knowledge.

In addition, the UKBA may also downgrade a sponsor from an A rating to a B rating if the sponsor assigns a certificate of sponsorship saying that a job was on the shortage occupation list and it was not, and/or any of the sponsor's level 1 or level 2 users disclose their sponsorship management system password to another person.

What happens when the UKBA downgrades a sponsorship licence?

If the UKBA decides to downgrade a sponsorship licence, the UKBA will amend a sponsor's entry on the online register of sponsors. The sponsor will still be able to issue certificates of sponsorship as a B-rated sponsor but the sponsor is unable to guarantee the maintenance requirement for migrants (this is the requirement that non-EEA nationals must have at least £800 available (with £533 per dependant) for 90 consecutive days prior to an application for entry clearance). Sponsors will also be given a 12-month action plan to implement changes to their HR practices. While the action plan is implemented, sponsors will receive several compliance visits from the UKBA enforcement and compliance teams, and the sponsor may receive further scrutiny in relation to business visitors.

Once the UKBA has issued a letter downgrading a sponsor, the sponsor will have 28 days to submit a written response. The sponsorship licence will be suspended until a decision is made by the UKBA on the sponsor's status.

What happens if the UKBA suspends a sponsorship licence?

In these circumstances, sponsors will be suspended in all the tiers, categories and sub-categories in which they are registered. The UKBA will also remove a sponsor's entry from the online register of sponsors. The sponsor will not be able to

'If the UK Border Agency finds that sponsors have assigned a certificate of sponsorship to a migrant during their suspension, it will take further action against the sponsor.'

issue any certificates of sponsorship while it is suspended, but sponsors must still comply with all the sponsorship duties for the migrants they currently sponsor. If the suspension is lifted, the UKBA will reinstate the sponsor's name on the online register with the rating awarded.

If the UKBA finds that sponsors have assigned a certificate of sponsorship to a migrant during their suspension, the UKBA will take further action against the sponsor. The UKBA will initially refuse the migrant's application, on the basis that their certificate of sponsorship is invalid. Migrants who are already being sponsored at the time of the suspension will not be affected, unless consideration of the case leads the UKBA to withdraw the sponsor licence.

In what circumstances will the UKBA withdraw a sponsorship licence?

Sponsors will lose their sponsorship licence if the sponsor:

- stops trading or operating for any reason, including insolvency;
- stops being accredited or registered with any body that an employer needs to be accredited or registered with to get a licence;
- is issued with a civil penalty for employing one or more illegal workers and the fine imposed for at least one of those workers is set at the maximum amount;
- is issued with a civil penalty (as detailed above) of below the maximum amount for a first offence and fails to pay the fine imposed within the 28-day time limit given; or
- is issued with a civil penalty for a repeat (second or subsequent) offence while the sponsorship licence is valid.

The UKBA will also withdraw the sponsorship licence if the sponsor:

- has been B-rated and has not complied with an action plan for a period of 12 months or more;
- is a B-rated Tier 2 sponsor and has been assigned a certificate of sponsorship saying the job was on the shortage occupation list when it was not; or
- has been awarded or downgraded to a B-rating and has failed to pay the sponsorship action plan fee within 14 calendar days.

Sponsors will normally have their sponsorship licence withdrawn if the sponsor or another relevant person is convicted under the following legislation (unless it is a spent conviction under the Rehabilitation of Offenders Act 1974):

- Immigration Act 1971;
- Immigration Act 1988;
- Asylum and Immigration Appeals Act 1993;
- Immigration and Asylum Act 1999;
- Nationality, Immigration and Asylum Act 2002;
- Immigration, Asylum and Nationality Act 2006; or
- UK Borders Act 2007.

Licences can also be withdrawn under any offence relating to trafficking for sexual exploitation or any other offence that shows that a sponsor poses a risk to immigration control.

‘Sponsors will lose their sponsorship licence if they, or another relevant person, are dishonest in any dealings with the UK Border Agency.’

Sponsors will also normally lose their sponsorship licence if they, or another relevant person, are dishonest in any dealings with the UKBA. This includes, among other things:

- making false statements, or failing to disclose any essential information, when applying for a sponsorship licence; or
- making false statements, or failing to disclose any essential information, when issuing a certificate of sponsorship, for example, falsely claiming to have met the resident labour market test.

Sponsors will also normally lose their sponsorship licence if:

- they employ a migrant in a job that would not satisfy the appropriate skill level (for example, a skill level equivalent to S/NVQ level 3 or above in Tier 2);
- they do not pay a migrant in the Tier 2 (skilled workers) category at least the salary (and/or allowances or benefits) specified on the certificate of sponsorship;
- they, or another relevant person, become legally prohibited from acting as a company director;

- they, or another relevant person, become an un-discharged bankrupt; or
- they fail to comply with an action plan set by the UKBA.

In addition, a sponsorship licence may be withdrawn if a sponsor fails to comply with any of its duties and the UKBA is not satisfied that the sponsor is using the processes or procedures necessary to fully comply with its duties. The sponsorship licence may also be withdrawn if:

- the sponsor, or another relevant person, is convicted of an offence that the UKBA considers to be serious;
- the UKBA finds that migrants that have been sponsored have not complied with the conditions of their permission to stay in the UK; and
- the sponsor has not been following good practice guidance set out by the UKBA.

What happens if the UKBA withdraws a sponsorship licence?

If the UKBA withdraws a sponsorship licence, it will:

- immediately end the permission to stay in the UK of any migrants

whom the UKBA believes were actively involved in any dishonesty by the sponsor; and

- reduce the length of the permission to stay in the UK of any other migrants (those who were not actively involved) to 60 days, to give them a chance to find a new sponsor.

If the migrant has less than six months permission to stay left, the UKBA will not reduce the length of their permission. Finally, if the UKBA immediately ends the permission to stay, the migrant will have to leave the UK or face enforced removal.

CONCLUSION

UK employers have considerable duties and responsibilities under the PBS regime. It is therefore of paramount importance that employers take all steps necessary to comply with their responsibilities in relation to employing non-EEA nationals. In addition to seeing a sponsorship licence suspended, downgraded or withdrawn, employees who have the responsibility for the sponsorship licence could face several additional penalties under the Immigration Rules.

In conclusion, employers should make sure that their HR practices are fit for purpose so that they don't fall foul of the many continuing obligations.

*By Mark Chowdhry, solicitor,
Magrath LLP.
E-mail: mark.chowdhry@magrath.co.uk.*