

UK Business Immigration Summer 2008

Introduction

Overseas nationals seeking to enter or remain in the UK are subject to immigration control, governing the entry, length of stay and conditions on which they may remain in the UK.

This briefing outlines some of the principal UK immigration categories for employment/business.

Certain overseas nationals (visa nationals) require a visa (entry clearance) from a British diplomatic post overseas (BDP) to travel to the UK regardless of the purpose of the travel, whilst others only require entry clearance to enter the UK for certain purposes. Overseas nationals who intend to come to the UK to work or to establish a business must obtain immigration permission to do so.

The Government has radically overhauled the UK immigration system introducing a new Points Based System (PBS) which replaces most of the existing work and study categories within the Immigration Rules. The PBS is comprised of five tiers and is currently being phased into UK immigration law.

Visitors

Permission to enter the UK as a visitor may be granted for a period of up to six months. An application may be made on arrival to the UK, unless the individual is a visa national who must apply for a visa before travelling to the UK. A visitor, whether for tourism or business, must show that he has sufficient funds to support himself (and any dependents) while in the UK and that he intends to leave at the end of the visit. A visitor is not permitted to undertake employment, produce or sell goods or provide services while in the UK. He may, however, engage in limited business activities such as attending meetings or negotiating a contract.

The Government has announced its intention to impose tough new sanctions on people who fail to ensure family members visiting from abroad abide by the Immigration Rules. Such proposals include individuals being licensed to sponsor family members and facing the risk of monetary penalties for failing in their duties. These sanctions will be phased into UK Immigration law in early 2009.

Employer's liability

The Immigration, Asylum and Nationality Act 2006 (the 2006 Act) sets out the law on the prevention of illegal migrant working affecting the recruitment and employment practices in the UK.

An employer who employs an overseas national without the necessary immigration permission faces a civil penalty, carrying a maximum £10,000 fine per illegal worker. A statutory defence may only be established if prescribed steps are taken to check and record specified evidence of the person's

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immigration status before employment. These document checks must be repeated every 12 months where the worker's permission to work is time-limited.

The penalty for the criminal offence of knowingly employing someone without permission to work is a maximum of two years' imprisonment and/or an unlimited fine.

An employer must take care to check the immigration status of all new staff to avoid allegations of operating discriminatory recruitment practices under the Race Relations Act 1976.

Work permit scheme

Work permits are issued to UK-based employers who want to employ a worker from outside the European Economic Area (EEA). Work permits are usually granted only for employment requiring workers with certain qualifications and skills, such as a degree or a number of years' specialist experience. In certain cases, the employer may be required to demonstrate that there is no suitable candidate available in the resident labour force.

Work permit applications involve a two stage process. The employer must first apply to the UK Borders Agency (UKBA) for a work permit to employ a migrant worker in the UK. Once the permit is issued the individual must apply for entry clearance from a BDP overseas (unless it is valid for six months or less and the holder is not a visa national). Work permits may be issued for up to five years at a time.

The work permit scheme is due to be replaced by Tier 2 of the PBS (skilled workers category) in November 2008. As sponsors, employers must register for a sponsor licence to enable them to issue Certificates of Sponsorship (COS) (rather than work permits) to migrant workers. As sponsors, employers face a greater level of responsibility and must ensure that any migrant worker being issued with a COS meets the criteria and adheres to the conditions of their leave.

Training and work experience scheme (TWES)

A UK employer intending to provide training for a professional qualification or work experience to an overseas national may apply to UKBA for a TWES permit. The position in the UK must be additional to the employer's normal staffing requirements. A TWES permit will only be granted on condition that the overseas national will leave the UK at the end of the training period. Normally, the overseas national will not be granted a further TWES or full work permit until he has remained outside the UK for a minimum of two years (or one year in certain circumstances). The procedure for TWES applications is similar to work permits.

This category is due to be replaced with Tier 5 of the PBS, for temporary workers (Government authorised exchange) in November 2008.

Tier 1 – Highly skilled migrants

Unlike all other PBS Tiers, no sponsor is required for applicants under the Tier 1 sub-categories.

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General

The Tier 1 (General) replaced the Highly Skilled Migrant Programme (HSMP) globally on 30 June 2008. This category is designed to allow highly skilled individuals to come to the UK for work or self-employment opportunities.

A minimum of 75 points must be scored for applicants' attributes relating to age, qualifications, previous earnings and UK-based qualifications/earnings and experience and additional mandatory English language and maintenance requirements must be fulfilled. There is no longer a provision for MBA graduate applicants. There are arrangements for individuals with leave under the HSMP to switch categories when their current leave under the HSMP expires.

Initial leave is granted for three years, and extensions for two years. Entry clearance must be obtained before entering the UK unless the individual is already in an immigration category that permits switching.

Post-study worker

The Tier 1 (Post-study worker) category was launched on 30 June 2008 replacing the International Graduate Scheme and Fresh Talent Working in Scotland scheme. This category acts as a bridge for students who have studied in the UK to access the labour market and gain work experience in the UK.

Leave may be granted to applicants who have successfully completed a qualifying course at an eligible UK institution when in the UK with student or dependant leave. Applicants must satisfy the maintenance criteria but should automatically score 10 points for English language requirement provided they have scored a minimum of 75 points under Tier 1.

Successful applicants are free to seek employment without requiring a sponsor. Leave will be granted for two years however it will not be extended and will not count towards the period required for settlement.

Entrepreneurs

This sub-category largely mimics the old self-employed business person category (pre 30 June 2008). It requires "access" to at least £200,000 (held in a regulated financial institution) which will be invested in establishing/buying/running a business in the UK and employment of two resident workers. The mandatory English language and adequate funds requirements will apply.

Investors

Like the investor category before 30 June 2008, the central criterion is possession of £1 million held in a regulated financial institution and disposable in the UK. Investors are now allowed to undertake employment under the PBS. This is the only sub-category within Tier 1 which does not require the applicant to demonstrate knowledge of the English language or to meet the maintenance test.

Maintenance requirement

All Tier 1 applicants (except investors) must demonstrate sufficient funds to maintain themselves and any dependants in the UK.

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Each overseas applicant must show a minimum of £2,800 held in their bank account for every day of the past three months. If the applicant will be accompanied by dependants an additional £1,600 will be required, for each dependant.

Applicants switching into a Tier 1 category within the UK, must show funds of £800 for themselves and £533 for each dependant, held for every day of the last three months.

Family members of overseas nationals with limited leave

The spouse/civil partner (or unmarried partner in certain circumstances) and unmarried dependent children under the age of 18 of an overseas national admitted to the UK in any of the employment based categories outlined above may obtain permission to enter the UK as his dependants. The overseas national must have sufficient funds to support his dependants, without claiming public funds (for Tier 1 dependents, specific sums are required). Family members must obtain entry clearance prior to travelling to the UK.

EEA nationals and family members of EEA nationals

Nationals of the European Economic Area (EEA) may live and work freely in the UK. The EEA comprises the following countries:

Austria	Belgium	Bulgaria**
Cyprus	Czech Republic*	Denmark
Estonia*	Finland	France
Germany	Greece	Hungary*
Iceland	Ireland	Italy
Latvia*	Liechtenstein*	Lithuania
Luxembourg	Malta	Netherlands
Norway	Poland*	Portugal
Romania**	Slovakia*	Slovenia*
Spain	Sweden	UK

* A8 countries

** A2 countries

Nationals of accession countries do not have full freedom of movement for the purposes of employment. Some A8 country nationals must apply for a Worker Registration Card within one month of commencing employment to enable them to work legally in the UK. It is the employer’s responsibility to ensure they register.

Nationals of the A2 countries must meet the requirements of one of the employment categories in the Immigration Rules and subsequently obtain an accession worker card or registration certificate authorising them to work in the UK.

Other EEA nationals may apply for a registration certificate to confirm their right of residence in the UK (this is not mandatory). Swiss nationals are also treated in a similar way to EEA nationals.

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Family members of EEA nationals

Non-EEA family members accompanying an EEA national who is exercising certain rights in the UK (such as working) may also work in the UK. The non-EEA family member will require an EEA family permit to enter the UK. An application may then be made to UKBA for a residence permit for the EEA national and a residence document for the non-EEA family member.

Spouse/civil partner/unmarried partner of a British citizen or person present and settled in UK

The spouse, civil partner or unmarried partner of two years' cohabitation of a British citizen or a person with indefinite leave to remain in the UK, may apply for leave to enter or remain in the UK on this basis (usually granted for two years initially) and may undertake any employment or self-employment in the UK.

Indefinite leave to remain

Under the current Immigration Rules, once an individual has completed five continuous years in the UK in certain categories such as Tier 1 (General) migrant, work permit holder or highly skilled migrant or an amalgamation of these, he may be eligible to apply for indefinite leave to remain (ILR) (also known as "permanent residence" or "settlement"). The individual should not have spent extensive periods outside the UK (normally no more than three months at any one time or in any 12 month period).

A test must also be completed to show that applicants have sufficient knowledge of the English language and life in the UK in order to qualify. A person holding ILR may undertake any employment or self-employment in the UK with no time limit on the duration of his stay.

British citizenship by naturalisation

On completing five years in the UK and having held ILR for at least twelve months, an individual may be eligible to apply to naturalise as a British citizen.

Further assistance

This document briefly outlines some of the ways in which overseas nationals may come to the UK and does not address all of the considerations involved. The information provided is for guidance only and is not intended as a substitute for full legal advice. Individuals should seek specialist legal advice regarding any enquiries they may have about their own circumstances.

Laura Devine Solicitors

Laura Devine Solicitors is a leading immigration firm, ranked in the top tier of the Legal 500 and Chambers directories, and advises on all aspects of UK and US immigration and by interviewees worldwide nationality law. Laura is the highest nominated UK immigration practitioner as rated by Who's Who Legal 2008.

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