

The LA employment

alert!

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Business Immigration

- the basics



Immigration has been a hot topic recently and in this month's Alert we are giving a brief overview of the business immigration system.



IMMIGRATION CHECKS

This is a key area for employers.

The Attorney General Baroness Scotland recently received a penalty fine of £5,000 for not having completed the correct document checks. She had in fact carried out the checks but she had failed to take and keep a copy of the documents that she had inspected! A simple but costly mistake!

There are two offences for employers to be mindful of for workers employed on/after 29 February 2008:

- negligently employing an illegal worker – a civil penalty of up to £10,000 per worker may be imposed.
- knowingly employing an illegal worker – a criminal offence which could result in a prison sentence of up to 2 years and/or an unlimited fine.

The UK Borders Agency (UKBA) has a framework which it uses to assess the level of any civil penalty. The framework includes factors such as whether it is a first or second offence, reporting illegal workers and co-operation.

Good news! As an employer, you may have a defence to the civil penalty by establishing a "statutory excuse". To rely on this you need to check and copy certain original documents before the individual starts work for you:

Request to see certain original documents

The UKBA has established two lists of documents, List A and List B.

List A - if the individual has documents from this List then you only need to undertake the check once - these documents mean that the individual is not subject to immigration control or that there are no restrictions on their stay.

List B - if the documents are from this List, the individual will only have limited leave to remain and you must repeat the checks at least every 12 months. Make sure you have systems in place to track this and ensure the repeat checks are conducted!

Check the validity of the document

Employers aren't expected to be forgery experts, but you should be looking out for any 'reasonably apparent falsity'.

Are any photos consistent with the applicant you have met? What about the date of birth? Have any of the expiry dates passed? Do any of the government endorsements place restrictions on working?

Make and retain copies of the documents

Keep these for at least two years after the employment ends.

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Discrimination warning!

- Avoid arguments of race discrimination by carrying out checks on all applicants and not just those who appear to be of non-British descent.
- Be consistent and request documents from all applicants at the same stage of your recruitment procedure.
- Refer to the UKBA's "Guidance for Employers on the Avoidance of Unlawful Discrimination in Employment Practice While Seeking to Prevent Illegal Working". Failure to comply with the Code can be taken into account by a Tribunal in considering whether there has been discrimination.

Tier 1

Highly Skilled,
Entrepreneur,
Investors, Post-study
work

Tier 2

Skilled Workers &
Intra-Company
Transfers

Tier 3

Low Skilled, currently
suspended

Tier 4

Students

Tier 5

Youth Mobility and
Temporary Workers

THE POINTS BASED SYSTEM

You've heard of the Australian system of immigration – based on points scoring. The Government has now introduced this into the UK, streamlining what was over 80 different routes to coming to the UK under the Immigration Rules into a 5 tiered 'points based system'! (see left)

Tier 1 – contributing to the productivity and growth of the UK!

Tier 1 can apply to highly skilled migrants, entrepreneurs and investors. This tier is a form of self-sponsorship as the migrant doesn't need any support or a job offer from an employer or other person.

Tier 1 can be useful to employers who aren't registered sponsors, but probably only in relation to fairly senior and skilled employees due to the points the individual must earn - for example, highly skilled migrants need to have at least a Master's degree, £2,800 in available maintenance funds and previous earnings of at least £20,000 per year!

Tier 2 – filling gaps in the labour market

Tier 2 covers off the old work permit arrangements and applies to skilled workers and to intra-company transferees. One of the changes under this system is that employers are now involved in making decisions about eligibility.

An employer must be registered to sponsor a migrant under this tier. The application process can include a visit from the UKBA to audit the employer's internal HR systems. Once registered, you have access to the Sponsorship Management System and are subject to certain 'sponsorship duties' including reporting (eg. if the contract of employment is terminated) and recording (eg. up to date contact details of the migrant worker).

Skilled Workers

The Sponsor must assess an individual's eligibility under the Tier before issuing them with a Certificate of Sponsorship (or "CoS") (a reference number which is then used by the migrant in their application for entry clearance).

Before issuing a CoS you must check:

- Can the individual earn the requisite number of points?
- **Have you satisfied the resident labour market test or is the job on the shortage occupations list?** The test requires you to advertise the job to UK settled workers before you can issue a CoS to recruit a migrant worker. There are also requirements as to how and where you advertise the job under this test. If the job is on the shortage occupations list then you don't have to satisfy the resident labour market test and the individual automatically gets the maximum number of points for this part of the criteria.

- Does the rate of pay comply with the UKBA requirements? These are set down by the UKBA in Codes of Practice in relation to various jobs and categories of work.
- Is the post a 'skilled' job? This usually requires NVQ 3 or equivalent and the Codes of Practice help classify certain positions as skilled, borderline or unskilled for the purposes of Tier 2.

“Employers are doing part of the Home Office's job for them in making decisions about eligibility”

Once you have issued a Certificate of Sponsorship, the migrant should then apply for entry clearance (or leave to remain if they are already in the UK) - this is where they have to show that they earn the correct number of points to qualify.

Intra-Company Transfers

To qualify under this tier the individual must meet the points requirements and have spent at

least 6 months working for the overseas branch of the business, which is linked by common ownership. In 2010, this requirement is likely to increase to 12 months' employment.

Tier 4 – Students – a source for the UK economy

Students at registered education institutions are generally able to work for up to 20 hours per week and full time outside of term time. Of course, you still need to conduct ID checks as part of your pre-employment procedure!

Tier 5 – a non-economic purpose

This Tier replaces a range of previous schemes including the youth mobility scheme and also temporary workers (eg. creative and sporting, charity workers and religious workers).





WHAT ABOUT EUROPEAN WORKERS?

Generally citizens from the European Economic Area (and also Switzerland) have unrestricted access to the UK labour market and don't need permission to work here. All that you need to do is to check copies of the necessary documents such as a passport or national identity card and retain copies.

A8 Worker Registration Scheme

The Accession 8 countries are Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia and Slovenia. Workers from these countries have certain restrictions on their ability to work.

You are authorised to employ A8 workers during their first month of employment, but in this time

they must generally apply for a Worker Registration Certificate and you must retain a copy of this application form. Once they receive their certificate then you should retain a copy of this too.

After 12 months' employment in the UK, A8 workers can work in the UK without restriction. They have the option of applying for a residence certificate or permit which confirms this, although they don't have to.

At the moment this scheme is set to remain until April 2011 when it looks like the restrictions for this group of workers will be removed.

A2 Work Permits

The Accession 2 countries are Romania and Bulgaria. There are different restrictions again for

workers from these two countries.

The old work permit system is still in operation for these workers.

Unless the employment you are offering falls in to one of the limited 'permit free' categories, generally, you as employer must apply to the UKBA for a work permit. If this is successful then the employee needs to make their own application to the UKBA for an accession worker card.

The same 12 month employment period rule applies as it did with A8 workers.

The Government announced last month that these restrictions will remain until the end of 2011.

FINALLY

This is a very brief summary of the system and does not cover all of the ways an individual may have permission to live and work in the UK. Further information, including a points calculator, is available on the UKBA website (www.ukba.homeoffice.gov.uk).

Immigration can often throw up a variety of issues which can often be complicated and unfamiliar and advice should be sought where necessary.

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