Global Immigration Update

UK

Government announces permanent immigration limit

On 23 November, the Home Secretary, Theresa May, announced the government's plans for a limit on work visas from 1 April 2011. There will be an annual cap of 21,700 on the number of skilled and highly skilled workers from outside the European Economic Area allowed into the UK.

Tier 1

The Tier 1 (General) non-sponsored route for the highly skilled will be closed. This route is already subject to an interim limit introduced on 19 April 2010 under which only 600 visas have been available globally per month. The Tier 1(General) monthly limits were filled on the day on which they were released on 1 December 2010.

A new Tier 1 route for persons of exceptional talent will be introduced. This will cover migrants who have won international recognition in scientific and cultural fields, or who show sufficient exceptional promise to be awarded such recognition in the future. Applications by those with exceptional promise will need to be endorsed by a competent body in the relevant field. The 'exceptional talent' category will be subject to a limit of 1,000 places.

Tier 2 (General)

The Tier 2 (General) route will be subject to an annual limit of 20,700 places for 2011/12.

The limit will not apply to in-country applications from those already in the UK, or dependants. Nor will it include Tier 2 (General) new hires who are filling a vacancy with a salary of more than £150,000. The Tier 2 (Sportsperson) and Tier 2 (Minister of religion) routes will also be exempt from the limit.

From 1 April 2011, Tier 2 (General) applications will be restricted to graduate-level vacancies. The Migration Advisory Committee will advise the UK Border Agency on what are to be considered graduate-level jobs, and the graduate occupation list will be amended accordingly. Existing Tier 2 (General) migrants in jobs below graduate level will be able to extend their permission to stay if they meet current requirements.

The minimum level of English language competency will be increased from basic to intermediate level (B1 on the Common European Framework of Reference).

Applications for certificates of sponsorship will, where the limit applies, be considered on a monthly basis. If the monthly allocation is oversubscribed, applications will be ranked according to whether they are for shortage occupations, the post requires higher academic qualifications and salary.

Potential workers who are granted a certificate of sponsorship will have three months in which to apply for a visa.

Tier 2 (Intra Company Transfers)

The limit will not include those applying under the Tier 2 (Intra company transfer) category. Intra-company transferees in the 'Established staff' sub-category paid more than £40,000 will be able to stay in the UK for up to 5 years; those paid between £24,000 and £40,000 will be able to enter for up to 12 months within a specified period. The current rules will continue to apply to Tier 2 (Intra company transfer) migrants in the 'Graduate trainee' and 'Skills transfer' sub-categories.

Settlement

There will be a new criminality threshold, requiring applicants to be clear of unspent convictions, for all those applying for settlement (permanent residence).

Tier 1 and Tier 2 migrants applying for settlement will need to meet the salary criteria that applied when they last extended their permission to stay and will be required to show English language skills (in addition to the current knowledge of Life in the UK).

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CANADA

Various changes will become law on April 1, 2011, affecting both Canadian employers and their temporary foreign workers.

These changes are aimed at reducing the opportunity for exploitation of temporary foreign workers by employers and third-party agents, introducing greater employer-accountability mechanisms to ensure adherence by employers to the terms and conditions of their job offers and clarifying the temporary nature of employment facilitated through the Temporary Foreign Worker Program.

Rigorous assessment of the genuineness of the employment offer

The amendments establish specific factors to assess the genuineness of an employer's offer of employment to a foreign worker both in Labour Market Opinion ("LMO") cases and in LMO-exempt cases. These factors include:

- Whether the offer is made by an employer that is actively engaged in the business with respect to which the offer is made;
- Whether the offer is consistent with reasonable employment needs of the employer;
- Whether the terms of the offer are terms that the employer is reasonably able to fulfill; and
- The past compliance of the employer, or any person who recruited the foreign national for the employer, with the federal or provincial laws that regulate employment, or the recruiting of employees, in the province in which it is intended that the foreign national work.

Ban on employers for non-compliance with a previous LMO

The amendments will render an employer ineligible to seek a work permit on behalf of a foreign worker

unless, during the period beginning two years before the initial request for an LMO is made to Service Canada or, in the case of an LMO-exempt work permit, beginning two years before the work permit application is received by Citizenship and Immigration Canada ("CIC") or the Canada Border Services Agency ("CBSA"):

- The employer provided each of its foreign workers with wages, working conditions and employment consistent with the wages, working conditions and occupation set out in the employer's offer of employment; OR
- The failure to do so was justified. Justifications include:
  - A change in federal or provincial law;
  - A change in the provisions of a collective agreement;
  - The implementation of measures by the employer in response to a dramatic change in economic conditions that directly affected the employer, provided that the measures were not directed disproportionately at foreign nationals employed by the employer;
  - An error in interpretation made in good faith, or an unintentional accounting or administrative error by the employer with respect to its obligations to a foreign national if the employer subsequently provided compensation or made sufficient attempts to do so to all foreign nationals who suffered a disadvantage as a result of the error;
  - Circumstances similar to those set out above.

The assessment is undertaken when a new LMO is requested or, in the case of an LMO-exempt work permit application, when the work permit application is received by CIC/CBSA.

Employers must review all LMO applications to ensure compliance during the two-year period preceding April 2011. An internal immigration audit is recommended.

List of banned employers posted on CIC website-Naming and Shaming

The amendments authorise CIC to maintain a list of banned employers on its website, stating the names and addresses of each employer and the date that the determination was made. Service Canada will not issue an LMO and CIC/CBSA will not issue a work permit for any employer on the list.

Four-year cap applying to most temporary foreign workers

The amendments provide for a cumulative four-year cap on foreign workers until a period of 48 months (i.e., 4 years) has elapsed. However, exemptions from the four-year cap exist in the following situations:

- The foreign worker intends to perform work that would create or maintain significant social, cultural or economic benefits or opportunities for Canadian citizens or permanent residents.
- The foreign worker intends to perform work pursuant to an international agreement NAFTA GATS, or the Canada/ Chile and Peru Free Trade Agreements

A foreign worker who has reached the four-year cap may be permitted to apply for status under a non-work category such as a visitor or student. Given the foregoing, it will be necessary for employers to ensure that foreign workers who intend to remain in Canada indefinitely apply for permanent residence immediately in order to prevent the refusal of future work permits.

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TURKEY

Turkey Implements significant changes to Work Permit Criteria.

Turkey's Ministry of Labour and Social Security released a communiqué on 28 July 2010 which has for the first time made public the criteria to be considered in deciding work permits applications. The Ministry indicates that the following criteria must be met:

1. **New 5:1 Ratio**: Employers must demonstrate that they have least 5 Turkish citizen employees per work permit applicant as evidenced on payroll records. An exception exists for certain newly established legal entities founded by a foreign individual where it can be shown that the 5 employee criteria can be met within 6 months, in which case a work permit may be approved for the foreign partner/investor.
2. **Capital Requirements**: The employer's *paid up capital* cannot be less than TRY 100,000. In the alternative, the employer can show gross annual sales amounting to TRY 800,000, OR exports with a gross annual value of USD 250,000.
3. **Salary**: The foreign employee's salary must be commensurate with the position offered. More specifically, certain managers, pilots and engineers/architects and teachers cannot be paid less than a specified amount times the minimum wage. All others cannot be paid less than 1.5 times the minimum wage. The communiqué offers guidance on other professions and workplaces as well.

Changes to the application process

Additionally, changes to the work permit regulations were issued in the Official Gazette on July 31, 2010. The two most significant amendments specify:

1. **On line Filing**: Work Permit applications may now only be filed electronically online. The signed application form and supporting documents must be sent to the Ministry within **6 business days** from the on-line application date.
2. **Employer's Finances**: The Ministry now again requires the last year's profit and loss statement and balance sheet approved by the certified financial advisor or Tax Office. (*Note that this is reverse of the decision in Feb. 2010 to no longer require them in most cases.*)

2010 has seen an unprecedented level of changes in Turkish immigration law, both in procedure and detail of adjudication criteria. This autumn, the implementation of the on-line filing system has caused a tremendous increase in decision times and formal "requests for further documentation." It is hoped that by 2011, many of the above changes will be integrated fully so that adjudication will return to a smoother process.

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FRANCE

Changes to short term work visas, internships and clarifications on assignees and their families

Visa waiver for short-term work in France

Nationals of Australia, Brazil, South Korea, United States, Japan, Mexico, Singapore and Venezuela, travelling to France to work for less than three months do not now need to obtain a visa before travelling as long as they have their work permit with them on arrival in France.

Interns at Work

Changes to the 2006 law were completed on 25 August 2010 decree and redefined and detail the conditions under which students, including foreign students, can complete internships. These new regulations apply to all student internships in the workplace, whether they are enrolled in a French or foreign teaching establishment. As from 1 September 2010, internships that are not part of an academic course are no longer permitted.

New measures for employees on assignment and their family

A November 2010 circular from the Ministry of Immigration details the procedures applicable to employees on assignment and their family. The status of "employee on assignment" has existed since 2007 and facilitates mobility within groups for foreign employees sent on assignments or hired in France by a company from the same group as their home employer. Qualifying employees must have over three months employment in the group, be coming to France for an initial period of three months to three years, and must be paid at least one and a half times French minimum wage (SMIC).

Short-term Assignments: Creation of a Specific Procedure

The "employee on assignment" status now contains a specific procedure for shorter assignments of under three months. In an effort to simplify procedures, work permit requests of under three months which meet the "employee on assignment" criteria will lead to the issuance of twelve-month work authorisations. Visas with multiple entries will also be delivered to those who are required to obtain visas. The beneficiary can now undertake assignments of up to three months in a six month period, instead of having to request an authorization for each short-term assignment.

Length of "Employee on Assignment" Residence Permits

When a work permit authorization under "employee on assignment" status has been granted for a period of over three months, the residence permit delivered must now be valid for three years. Contrary to practices observed up until now, the Préfectures will not be allowed to limit the validity of residence permits when the assignments are planned for duration of less than three years.

New Procedures for application Processing

From 1 December 2010, to 30 June 2011, the districts of Paris, Hauts de Seine, and Rhône, will put in place a new "guichet unique" (single counter) service for the "employee on assignment" procedures. Work authorization requests will have to be sent directly to the OFII, which will liaise with the Labour Authorities and Consulates.

The Right to Work for the Spouse of an Employee on Assignment

The circular restates the fact that spouses of employees on assignment for six months or more are to be given dependant residence permits and are allowed hold a professional occupation while in France. When the assignment of the employee is less than six months, the spouse is given a visitor status, which does not permit him or her to work.

A Reminder: No Second-Rank Secondments

The circular reconfirms the position that employees on assignment seconded to a French company belonging to the same group as the home employer cannot then be seconded by this host company to another firm.

Renewal of the "employee on assignment" residence permit

The circular confirms that the residence permit is, in principle, renewable, so long as evidence is provided to show that the initial conditions (terms and compensation) that led to the delivery of the initial residence permit are still met. However, the text also confirms that the status of "employee on assignment"-seconded, cannot be maintained indefinitely and cannot lead to ten-year residence cards, as their presence is temporary in nature.

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AUSTRALIA

Major changes to Australian immigration programs

The Australian government has made sweeping changes across a number of Australian immigration programs. Following a review of the skilled independent General Skilled Migration (GSM) program and taking into account the impact of the global financial crisis there has been a shift from the supply-driven GSM program to demand-driven employer sponsored migration. Employer nominated applications for temporary and permanent residence are now prioritised.

New income threshold and assessment of skills for employer sponsored temporary residence 457 visas

For employer sponsored temporary skilled entrants on subclass 457 visas, the income threshold has been increased to A$47,480 p.a. with effect from 1 July 2010. This does not affect the need for foreign national employees to be paid at market salary rates. Occupations eligible for sponsorship under the 457 visa scheme have also changed with applicants in some trade occupations from certain countries now required to have their skills assessed by a relevant Australian assessing body prior to grant of a 457 visa.

Prioritised processing for agent certified employer nominated permanent residence applications

From 10 October 2010 the Australian government has introduced an express pathway where immigration professionals who are Registered Migration Agents can certify that applications are *fully documented and decision ready*. Certified applications are being processing in 1 – 2 weeks. ENS applications lodged prior to 10 October 2010 are taking an average of 5 months to process but cannot be removed from the old queue and relodged to access the new express processing.

National Health Waiver in place for ENS

All States and Territories in Australia have now joined the Health Waiver program for ENS permanent residence applicants. The Health Waiver program allows applicants to seek a State/Territory government sanctioned waiver to heath criteria required to be met under immigration law where the health of the applicant – or a family member – might otherwise lead to visa refusal.

New Skilled Occupation List introduced 1 July 2010 and revised 5 December 2010

A new General Skilled Migration (GSM) occupation list for independent applicants issued on 1 July 2010 and was further revised with effect from 5 December 2010. The new Skilled Occupation List (SOL) contains less than half the occupations under the old SOL. As a result and due to the express 1 – 2 week processing times for ENS applications, many potential GSM applicants are now looking to their employer to nominate them for permanent residence.

New SOL from 1 July 2011

The Minister for Immigration has announced that the Government will overhaul the points tested GSM program 1 July 2011 with a greater emphasis on high level English language skills, work experience and degree qualifications from Australia or overseas. The age level for applicants will increase from 45 to 49.

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ITALY

Italy introduces new procedure for intra company transfers and highly skilled workers.

The Italian Government recently approved and introduced a new procedure which will help facilitate the transfer of intra-company assignments and highly skilled workers. This new online procedure will be available only to companies who register with the Ministry of Interior and comply with the mandatory requirements, such as applicable minimum social security payments. Participating companies will be entitled avoid filing work permit applications and submitting documents which have been previously requested. The registration procedure will be facilitated for any company which is a member of an Industrial Association.

As the government is currently in the process of introducing this on-line work permit application process, the details of the new procedure are still in implementation stage of the process and not all information has been provided. The new procedure will include the following:

1. The company must sign a framework agreement with the Ministry. For this purpose, the company must contact the Ministry and provide a copy of a Certificate filed with the Company's Register, bylaws and articles of incorporation.
2. The Ministry will forward to the company a draft framework agreement which will have to be approved and signed by the company. The company can also ask the local Industry Association (Confindustria), provided it is a member, to adhere to the agreement which has already been stipulated between the Confindustria and the Ministry.
3. After the execution of the agreement, the company is given a password and access to the online system and can file new applications according to the new procedure;
4. Applications filed under the new procedure will be subject to the security checks on each individual by the Police, while the clearance from Labour Office will no longer be required;
5. As soon as the application is approved (the process status can be checked through the online system), the individual applicant will receive a work permit approval and will be entitled to request the employment visa at the relevant Consulate;
6. Once the employment visa is issued, and within eight (8) days from the entry in Italy, the individual applicant will still be required to execute the Contract of Stay at the Immigration Office (Sportello Unico) and subsequently file the permit of stay application.

Serious bureaucratic delays expected in December

While new simpler procedures are being introduced, serious delays in work permit issuance are occurring as a result of Government cut backs and resulting strikes at various Prefecture offices, which issue work permits, across Italy. In addition, many Prefectures are not issuing appointments for those work permit holders who have entered Italy

and are required to sign a contract of stay within eight days, as a result of which they cannot apply for their residence permits.

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