



The Taylor Wessing Business Immigration Review of 2009

February 2010



Introduction

2009 was another busy year for businesses employing non-EU citizens, as the UK Border Agency (UKBA) frantically issued a stream of new rules and forms under the Points Based System (PBS). With a general election looming before the end of May 2010, and immigration continuing to be a political hot potato, UKBA is keen to ensure that it presents the message to the public during the economic crisis that only highly skilled non-EEA migrants will be allowed to work in the UK and that there is a tough enforcement regime for employers who break the rules. How else will the UK keep "British jobs for British workers"? All of this has led to a continual raising of the bar through the introduction of new immigration controls and processes. It has certainly kept us on our toes...

Tiers of frustration

31 March 2009 saw some significant changes to PBS. Under Tier 2 (General) – the main sponsored immigration route for skilled migrants with a job offer – the Resident Labour Market Test was tightened. From that point, employers could only recruit under Tier 2 (General) if the job was first advertised for up to two weeks in Jobcentre plus, in addition to one other method permitted by the relevant code of practice. Employers had to show that there were no suitably qualified "settled" workers who applied for the role. The much wider potential pool of applicants through Jobcentre plus meant that employers were naturally more nervous about using this route, especially during a credit crunch where high numbers of potentially suitable applications from EU nationals were possible.

However, a gap in the system is that enforcement has been partially outsourced to employers, meaning there is no "official" check at the time of the visa grant on whether the advertising is done correctly or not. Without big brother looking over their shoulder, it may well be that employers have been lulled into a false sense of security, with the chickens not coming home to roost until UKBA conducts employer audits in the coming years.

Tier 1 changes

The second major change that came in on 31 March 2009 was under Tier 1 (General). As a reminder, Tier 1 (General) is the immigration route available for highly skilled individuals who will not be sponsored by an employer. The visa is personal to the individual and no job offer is required. Previously, to qualify for Tier 1 (and its predecessor HSMP), the applicant had to score points for their previous earnings, age, UK experience and qualifications – with varying points for qualifications ranging from bachelor's degree to PhD.

From 31 March, to qualify for Tier 1 (General), it was mandatory for the applicant to have a master's degree or above. This was a huge detrimental change for employers and migrants because it immediately closed the door on this route to many thousands of potential applicants. Many highly skilled and highly paid workers (including many in the legal profession!) only have bachelor's degrees. In our experience, this change had the biggest impact on our smaller clients – start-up companies or small businesses that perhaps only want to recruit one or two highly skilled non-EEA workers every few years. These clients often plan to grow to become large contributors to the UK economy. Tier 1 (General) would have been ideal for them but as the applicants often didn't have master's degrees, the UK businesses were forced to incur additional costs and significant delay in obtaining a sponsorship licence. This was a major impediment to entrepreneurial and new economy businesses.

Despite the economic downturn, we are pleased that in December 2009 the independent Migration Advisory Committee (MAC) recommended to the Government that Tier 1 (General) be changed in certain areas. One of the key recommendations was that migrants with a bachelor's degree but no master's degree should be allowed to come to the UK, but only if their previous earnings are high enough (considerably higher than current earnings thresholds – potentially up to £75k). Other recommendations included:

- certain professional qualifications should be considered equal to a master's degree
- applicants should receive points for their age if they are 39 or under
- successful applicants should initially be granted a 2 year visa (rather than the 3 years currently granted) with the possibility of a further 3 year extension

We expect the Government to accept most or all of these recommendations and for them to come into place during the first half of 2010.

Surely PBS means quicker decisions?

Well, NO. Not if you are applying from within the UK anyway. One would be forgiven for thinking that the policy rationale for PBS – greater transparency, objectivity and consistency through a single visa decision – would speed the process up, or that the ever increasing development of technology would reduce unnecessary delays. Our experience is that as we head into 2010, our clients are facing greater delays for licence applications or for Tier 1 and Tier 2 visa extensions/switches, than ever before.

We are finding that some clients – especially those without an established immigration track record – are having to wait 3 months while their immigration licence application is processed. Until the system is streamlined, Tier 2 visa extensions submitted in 2010 and beyond currently face potential processing times of 2 months or more, during which time the applicant will be unable to travel as the passport must be submitted.

In an increasingly globalised business world, this has a devastating impact on the many executives and business leaders who depend on frequent overseas travel to do their job. Why is this? With a budget of more than £2bn and 25,000 staff, lack of UKBA resources should not be the problem. There are various reasons:

- Unlike under the old work permit system, representatives are unable to process Tier 1 or Tier 2 visa extensions on a same day basis
- Although applicants can, in theory, book up their own same day visa extension appointments, these are constantly booked up 2 months or more in advance, meaning that in practice this option is unavailable to most applicants
- From January 2010, all sponsored migrants (and any dependants) wishing to extend their permission under Tier 2 have to also attend a separate appointment to give biometric data (principally fingerprints) in order to satisfy the latest phase of the roll out of identity cards for foreign nationals (ICFN). This is thought to affect around 30,000 additional foreign nationals to those currently being issued with identity cards. The need to arrange and deliver biometrics inevitably means a greater delay before the application will be processed. The Government plans that by April 2011, any migrant extending their stay or applying to come to the UK for more than 6 months will need to apply for ICFN as part of the immigration application, so this potential for additional delay will cross over into Tier 1
- From January 2010, UKBA withdrew (without notice) its premium postal route for Tier 2 visa extensions. This was the mechanism for workers who frequently travel overseas to ensure that their application would be processed within one week.

At the time of this report, we are in discussions with UKBA about these issues and hope to see a positive resolution in 2010.

Money, Money, Money

There are two cash related issues that have arisen several times throughout 2009:

- Maintenance funds – especially in relation to Tier 1
- Payment of application fees by credit/debit card

Proving the applicant has enough funds has been particularly contentious since its introduction under PBS. The maintenance rule is the way for the applicant to show that he/she can support themselves whilst in the UK without using public money. It requires the applicant to prove that they have a minimum level of cash in their bank account for every day of the 3 month period prior to the application. Some object to the fact that the maintenance threshold (which depends on where the applicant is at the time of the application and the number of any dependants) is a flat sum, irrespective of the country where the employee is employed. They argue that the test is discriminatory to nationals of less developed countries, as there is no levelling multiplier (as there is in the earnings test for Tier 1 (General)).

More often, the objections relate to the inflexibility of the rules relating to supporting evidence. For Tier 1, this involves obtaining original bank statements, stamped bank statements from an online account or letters from the bank certifying that a certain level of funds are in place for the entire 3 month period. In our experience, all can be very difficult to obtain if the applicant holds a bank account overseas.

Generally, banks are reluctant to get involved with visa applications for their own risk management reasons, but even more so where they have no link to the country where the employee is working or plans to work. As a practical point, we always recommend that when an applicant arrives in the UK under a working visa, he/she opens a UK bank account which can then be used for maintenance or other evidence if necessary on an extension.

We also find that the flip side to the PBS having removed discretion is that visas can be refused over seemingly innocuous errors or misunderstandings over supporting evidence. The immigration appeal courts are full of cases where the applicant clearly had maintenance funds in place but the 3 month evidence fell short by a couple of days, where the running balance dipped below the maintenance threshold on one occasion over the 3 months, or where one piece of paper has not been stamped in the right way. Unfortunately, UKBA policy to date has simply been to refuse applications outright without contacting the applicant or their representatives for clarification or further information, which inevitably has resulted in some infuriating visa refusals, and increased stress, delay and expense in seeking to correct them. We are pleased to see a recent shift in policy, with caseworkers requesting clarification (where necessary) before making a decision.

Credit (card) crunch

While maintenance is less of an issue for Tier 2 (because the sponsor can certify this on the employee's behalf) the second issue we have seen across both Tiers is the increased rejection by UKBA of the debit/credit card payment for the application fee. Due to the increased need to apply by post (see above) and the knowledge that payment by cheque will take at least one week longer to clear (when timings are already strained), applicants are keen to pay by card.

However, with no facility to take card payments up front before the main application is posted, the card details have to be written into the form. Once submitted, it may take one to two weeks before payment is processed and the applicant is notified that their credit card has been rejected. If, like many people do, the applicant waits until immediately before his/her visa expires before applying, they would not know that their application has been rejected until the visa has expired. The application is not "received" until payment is taken, and so the applicant will not have made an "in time" application before the visa ended.

Although so far we have been able to persuade UKBA to still grant these resubmitted "out of time" applications following payment failure, it highlights what has become increasingly apparent in PBS – the details really matter. A seemingly small error or omission in an application can lead to a visa refusal, which can have a catastrophic consequence for an employer or a migrant's family.

As simple as it sounds, we recommend that employers:

- Ensure the card has sufficient funds and that the card is used regularly
- Double check that card details have been transcribed accurately
- Check that there is no extra security on the card from the issuer (e.g. electronic passwords)

Compliance – it really matters

If UKBA needed a high profile case to highlight the importance to employers of complying with the prevention of illegal working laws, they got one in September 2009. Attorney General Baroness Scotland – the Government's own top law officer – was fined £5,000 for employing an illegal immigrant as her housekeeper. She was also forced to issue an unreserved apology for failing to keep copies of the immigration documents of her housekeeper, a Tongan national who overstayed on a student visa by 5 years. The case was a timely reminder of the tough penalties that can be imposed on employers for failing to make the right checks. Civil penalties of up to £10,000 for each illegal worker can be imposed. In the most serious cases, employers who knowingly and deliberately use illegal migrant workers could commit a criminal offence, a criminal offence carrying a maximum custodial sentence of 2 years and/or an unlimited fine.

As we have highlighted above, in the absence of an immigration official looking over the shoulder of employers to check that they have retained the right paperwork, it is possible that employers can be overly relaxed about the obligations they are under. For example, these duties include:

- Taking appropriate document checks for all UK employees in line with prescribed guidance
- For all migrant employees hired after 1 March 2008, ensuring that appropriate checks are repeated at least once every 12 months
- If the UK employer holds a sponsorship licence, ensuring that the sponsor and the holders of the designated roles comply with their duties under the published sponsor guidance, including retention of supporting documentation (as set out in Appendix D), record keeping and staff monitoring duties
- For **any** UK business with sponsored migrants (Tier 2 or work permit) notify to UKBA any reportable change in circumstances (e.g. promotions/material pay rise) or departures

The future

With a general election on the immediate horizon, and a possible change of Government (which could lead to Tier 2 annual quotas), we can be sure that 2010 will see more frenetic rule changes. As at January 2010, we already know the following:

- Probable changes to Tier 1 (General), as identified by MAC – **timing to be identified**
- Minimum of four weeks advertising under Tier 2 (General) - **from December 2009**
- Introduction of biometrics/ICFN for Tier 2 extensions and removal of Tier 2 premium postal route – **January 2010**
- "A rated" sponsors being able to confirm through the SMS that it will support a migrant worker to meet the maintenance requirement, although a letter will still be required in respect of dependants – **from 22 February 2010**
- A facility will be introduced into the SMS by which the sponsor can inform UKBA of minor changes to a certificate of sponsorship before it is used – **from 22 February 2010**
- Minimum period of service in the overseas company to qualify for Tier 2 (ICT) will be increased from 6 to 12 months – **from April 2010**
- Unlike the current position, time spent under Tier 2 (ICT) will **not** lead to indefinite leave to remain (permanent residency) – **from April 2010**
- Specific professional qualifications will be taken as equivalent to NVQ level 3 or Bachelors or Masters Degrees – **from April 2010**
- Possible introduction of new rules relating to temporary staff transfers and/or interns - **from April 2010?**
- Increase in all application fees (generally up to 2.5%) - **to be determined**

What can we take away from all of this? The only certainty is change in this politically uncertain time.

For further information, please contact Charlie Pring or your usual Taylor Wessing immigration contact.



Charlie Pring
Senior Associate
+44 (0)20 7300 4256
c.pring@taylorwessing.com



Nick Cody
Senior Associate
+44 (0)20 7300 4845
n.cody@taylorwessing.com



David Kent
Partner
+44 (0)20 7300 4696
d.kent@taylorwessing.com



Mark McCanney
Associate
+44 (0)20 7300 4119
m.mccanney@taylorwessing.com



Sean Nesbitt
Partner
+44 (0)20 7300 4294
s.nesbitt@taylorwessing.com



Vikki Wiberg
Senior Associate
+44 (0)20 7300 4738
v.wiberg@taylorwessing.com

Berlin
Ebertstraße 15
10117 Berlin
Tel +49 (0)30 88 56 36 0
Fax +49 (0)30 88 56 36 100

Brussels
Trône House
4 Rue du Trône
1000 Brussels
Tel +32 (0)2 289 6060
Fax +32 (0)2 289 6070

Cambridge
24 Hills Road
Cambridge, CB2 1JP
Tel +44 (0)1223 446400
Fax +44 (0)1223 446401

Dubai
P.O. Box 33675
28th Floor Al Moosa Tower II
Sheikh Zayed Road
Dubai, United Arab Emirates
Tel +971 (0)4 332 3324
Fax +971 (0)4 332 3325

Düsseldorf
Benrather Straße 15
40213 Düsseldorf
Tel +49 (0)211 83 87 0
Fax +49 (0)211 83 87 100

Frankfurt a. M.
Senckenberganlage 20-22
60325 Frankfurt a. M.
Tel +49 (0)69 971 30 0
Fax +49 (0)69 971 30 100

Hamburg
Hanseatic Trade Center
Am Sandtorkai 41
20457 Hamburg
Tel +49 (0)40 36 80 30
Fax +49 (0)40 36 80 3280

London
5 New Street Square
London EC4A 3TW
Tel +44 (0)20 7300 7000
Fax +44 (0)20 7300 7100

Munich
Türkenstraße 16
80333 Munich
Tel +49 (0)89 2 10 38 0
Fax +49 (0)89 2 10 38 300

Paris
42 avenue Montaigne
75008 Paris
Tel +33 (0)1 72 74 03 33
Fax +33 (0)1 72 74 03 34

Representative offices:

Alicante
Paseo Explanada de España
No. 1, 4-Izda
03002 Alicante
Tel +34 (0)96 51 42 805
Fax +34 (0)96 52 00 248

Beijing
Unit 1503, Prosper Center,
Tower 2
No. 5 Guanghua Road
Chaoyang District
Beijing 100020
Tel +86 10 8587 5886
Fax +86 10 8587 5885

Shanghai
15th Floor United Plaza
Unit 1509
No. 1468 Nanjing West Road
200040 Shanghai
Tel +86 21 6247 7247
Fax +86 21 6247 7248

Associated office:

**BSJP Legal
Warsaw**
Al. Armii Ludowej 26
PL-00-609 Warsaw
Tel. +48 (0) 22 579 89 00
Fax. +48 (0) 22 579 89 01

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Certificate No. EMS 532521

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