

Working Paper

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**- German Corporate Immigration Law:
Overview and Latest Developments -
(October 2007)**

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I. Introduction

This report provides an overview on the main principles of German Corporate Immigration Law. Attention is, moreover, paid to the international transfer of employees and therefore the most important case groups for companies are explained.

Hereinafter, first of all a short overview is given on the legal provisions on entry and residence (II.) as well as on the principles according to which work permit is granted (III.).

Afterwards, in extracts, some specific immigration regulations for qualified labour are explained in detail: highly qualified persons; executives; activities of commercial character (IV.); academic persons, IT-Specialists and other specialists (V.). Subsequent thereto specific regulations on intra-company transfer are explained and those applicable for short-term and long-term assignments of staff which have - due to their flexible implementation possibilities - become more and more appreciated in practice (VI). Subsequently the proceeding for the obtainment of a residence title for the purpose of gainful employment is explained (VII.). Finally the requirements for the grant of a residence title to self-employed persons (VIII.) and those for the grant of a visitor's and business visa (IX.) are explained.

This report is finished with an overview on current reformatory efforts and a short outlook (X.).

II. Entry and residence

With regard to entry and residence it has to be differentiated between nationals of the European Union respectively the European Economic Area, nationals from all other privileged countries and so-called third-country nationals.

1. EU/EEA nationals

As far as entry and residence are concerned there are no limitations: According to Art. 18 EU Treaty any EU national is entitled to enter any member state and to stay there at will. In particular they do not require visa. EU-nationals, i.e. nationals of 25 member states at present (Belgium, Denmark, Germany, Finland, France, Greece, Great Britain, Ireland, Italy, Luxemburg, the Netherlands, Austria, Portugal, Sweden and Spain plus the following accession states: Estonia, Latvia, Lithuania, Malta, Poland, Slovenia, Czech Republic, Slovakia, Hungary and Republic of Cyprus) - like the members of their family - therefore do only have to keep their passports or any accepted alternative documents with them

and to produce such document on request to the responsible public officials. Moreover, any EU citizen will be entitled to get a so called certificate of residency right ("Bescheinigung über das Aufenthaltsrecht") which would be given to him officially by the responsible foreigners office. Further, he will have to keep his passport with him whilst crossing the border and to show it to public officials if he is asked so, s. also Freedom of Movement Act for EU Nationals ("Freizügigkeitsgesetz-EU") for further details.

Since January 1, 2005 the EU nationals of the member states specified above only have to fulfill the obligation to register with the responsible resident's registry office ("Meldebehörde") within the registration periods that are stipulated in the applicable statute of the respective German Federal State (approx. 7 to 14 days after taking residency). The resident's registry office will submit any information and supporting documents to the responsible foreigners office. The latter may also request that the preconditions for the right to free movement of workers is proven as probable within an appropriate period of time. The information required to establish the probability can be submitted to the responsible registry office when registration is made and shall be presented there - if required - the original document besides a certified translation.

On a par with EU nationals are the nationals of the states of the European Economic Area (Iceland, Lichtenstein, Norway); they also enjoy the freedom of movement and are solely obligated to get registered.

Finally, also Swiss nationals are entitled to move freely throughout the European Union and are also on a par with EU nationals (Freedom of Movement Act of June 21, 1999).

2. Nationals of central and eastern European member states

The same applies for nationals of central European and eastern European member states which have become part of the European Union with effect from May 1, 2004 (Estonia, Latvia, Lithuania, Malta, Poland, Slovenia, Czech Republic, Slovakia, Hungary and Republic of Cyprus) respectively with effect to January 1, 2007 (Bulgaria, Romania) - the so called "new" member states. As far as entry and residence are concerned there are no limitations: According to Art. 18 EU Treaty any EU national is entitled to enter any member state and to stay there at will. This also applies to nationals of the new member states. In particular they do not require visa, are entitled to get a so called certificate of residency right ("Bescheinigung über das Aufenthaltsrecht") and have to keep passports with them whilst crossing the border and to show it to public officials if asked so, cf. above for further details.

3. Privileged nationals

Finally, although not that far going, there are also privileges for certain (mostly industrial) states; their citizens enjoy a simple or in case they are subject to both circumstances - even a double privilege. On the one hand, due to a so called "Positivliste" (positive list) nationals of certain countries (e.g. Argentina; Brazil; Canada; Israel; Japan; USA) are exempted from the general obligation to apply for a visa before crossing the external borders of the European Union. On the other hand there is an exemption from the recruitment freeze: nationals of certain countries (Andorra; Australia; Canada; Israel; Japan; Monaco; New Zealand; San Marino; USA) may be granted a residence title for the purpose of taking up any kind of employment.

4. Third country nationals

All other citizens, e.g. citizens that neither have EU or EEA nationality nor the nationality of a privileged country but want to stay in Germany for more than 90 days, to work or study in Germany do require visa. They have to apply for such visa before entering. These so-called third-country nationals do not benefit from any privilege, e.g. they will not be able to come to Germany without having applied for a visa with the German Embassy or Consulate in their home country first.

III. Residence title for the purpose of gainful employment (=Work permit)

1. EU nationals („old member states“) / EEA

Citizens of the "old" EU member states that have already been part of the European Union before May 1, 2004 (Belgium, Denmark, Germany, Finland, France, Greek, Great Britain, Ireland, Italy, Luxemburg, the Netherlands, Austria, Portugal, Sweden and Spain), are - as a result of the provisions of community law (free movement of labour, Art. 39 EU-Treaty) - exempted from the obligation to apply for and obtain a "residence title for the purpose of gainful employment". A certificate of residency right respectively an EU residence title is issued for them and the members of their family ex officio. There are no fees charged therefore.

On a par with EU nationals are the nationals of the states of the European Economic Area (Iceland, Lichtenstein, Norway); they also benefit from free movement of labour and are solely obligated to get registered.

Finally, also Swiss nationals are entitled to move freely and work throughout the European Union and are also on a par with EU nationals (Freedom of Movement Act of June 21, 1999).

2. EU nationals („new member states“)

However, transitory regulations take effect if the commencement of gainful employment is intended (except for the Republic of Malta and - under certain circumstances - the Republic of Cyprus). Such transitory regulations assure the stepwise implementation of the new law of the European Community; each and every member state is entitled to opt out from the full application of the freedom of EU nationals to move and work within the EU for a certain period of time:

- 1. Step: During the first two years after the accession date (May 1, 2004 / January 2007) the “old” member states shall (continue to) apply the national regulations or the provisions of bilateral conventions in order to regulate the access for the citizens of the “new” member states to their labour markets.

F applies to: Bulgaria, Romania

- 2. Step: After these two years, the “old” member states may adhere to their national work permit regulations for another three years.

F applies to: Estonia, Latvia, Lithuania, Poland, Slovenia, Czech Republic, Slovakia, Hungary

- 3. Step: After the expiry of another three years, the “old” member states are only allowed to stick to their national regulations or the provisions of bilateral conventions - for the period of seven years after the accession date - if there are grave disturbances or the danger of such disturbances is given for their labour markets.
- 4. Step: The regulations on the free movement of workers take effect in their entirety and apply to the nationals of all EU member states not later than after seven years.

According to the 2-3-2 formula, it has only been last year that Germany has made use of its right to opt out for another 3 years with regard to the first set of new member states. Hence, until Mai 1, 2008 nationals from these accession states will have to apply for a work permit in compliance with the old national regulations as laid down in §§ 284 subs. of the German Social Security Code III.

Unless otherwise agreed upon in a bilateral agreement these nationals are basically not entitled to work in Germany unless they are authorized to do so. Such authorization is granted in the form of a “work permit EU” (“*Arbeitsgenehmigung-EU*”).

3. Privileged and third country nationals

If neither EU resp. EEA citizens nor citizens of equal status are concerned for the grant of a residence permit for practicing employment the prior written consent of the Federal Employment Office (“Bundesagentur für Arbeit”) is required which is obtained internally by the foreigners office. Nevertheless, the legislator has, by means of a regulation, abandoned this requirement in certain cases; i.e. in these cases no consent has to be obtained.

1. General preconditions

The approval of foreign labour - according to § 18 para 1 Residence Act - is dependent on the requirements of the German economic location, wherefore the situation of the labour market as well as the need to efficiently fight unemployment are taken into consideration; however, international contracts remain unaffected thereby. Basically, a foreigner can be granted a residence title for practicing an employment, if the Federal Employment Office has approved so or by means of a legal regulation, or if an international agreement provides that the practicing of employment without the approval of the Federal Employment Office is acceptable. According to § 18 para 5 Residence Act, another general condition is to present a definite offer for work.

In general a residence title for the purpose of taking up an employment is only granted if:

1. the consent of the Federal Employment Office is given or such consent is not required due to regulations or bilateral agreements,
2. the examination of the labour market indicates that this job can not be filled from the German respectively EU/EEA labour market, and
3. a concrete job offer at usual working conditions is concerned.

With respect to the obtainment of residence permits it is differentiated between foreigners living abroad and those who are already residing in the federal territory. For the first group the employment regulation of November 22, 2004 (“Beschäftigungsverordnung”, hereafter: “BeschV” or “Employment Regulation”) is applicable, whereas for the second group the regulation on employment procedure of November 22, 2004

(“Beschäftigungsverfahrensverordnung”, hereafter: “BeschVerfV”). The provisions of the latter one will not be explained hereinafter due to the fact that most applicants are anyway living abroad.

2. Specific groups of persons

Nonetheless, according to the provisions of § 7 Employment Regulation residence permits can be granted without prior consent to certain groups of persons or for a certain kind of activities: Artistic performances of particular importance, daily events; professional athletes/trainers; models; mannequins and male models. This is based on the consideration that these groups of persons are normally performing activities for which national applicants are suitable only to a limited extent and fields are concerned for which international exchanges are common practice or even obligatory.

However, the exemption from the requirement of consent is only applicable if the employer has informed the Federal Employment Office of the intended employment prior to its commencement - the respective forms are provided on the internet www.arbeitsagentur.de. Such notification is mandatory. If it turns out during the proceedings that indeed one of the aforesaid groups of persons is concerned the Federal Employment Office will inform the employer thereof and refer to the responsible foreigners office. Should the employer fail to notify the Federal Employment Office an administrative offence would be constituted according to § 404 SGB II which results in the imposition of heavy fines (for the employer up to 500.000 €, for the employee up to 5.000 €).

3. Numerus clausus

A residence permit for the purpose of employment may only be granted if the consent of the Federal Employment Office is not required either or such approval may be granted if the examination of the labour market shows that the preconditions of one of the facts of the case as stipulated in the Employment Regulation is fulfilled. In particular:

IV. Highly qualified persons, executives and activities of commercial character

As far as highly-skilled people, short- or long-term assignments or an international intra-company transfer is concerned there are some facilitations arising with view to proceedings. With regard to these rules there is no difference between nationals of privileged countries (like the US, Australia, Japan) and third country nationals from

countries not being privileged. If so called highly qualified persons, executives and activities of commercial character are concerned for the grant of a residence title for the purpose of gainful employment the prior consent of the labour office is not required. By means of this special arrangement further incentives for the employment of a certain category of persons shall be created.

1. Highly qualified persons

Highly-qualified persons do not need the approval of the Federal Employment Office, cf. § 3 Employment Regulation (“Beschäftigungsverordnung”) in connection with § 19 Residence Act (“Aufenthaltsgesetz”); they can directly be granted a permission of establishment, a permanent residence permit (“Niederlassungserlaubnis”). Thereby highly qualified persons shall receive planning reliability and an incentive for establishment.

According to the legal definition of Section 19 para. 2 Residence Act highly qualified especially are:

1. Scientists with special theoretical knowledge;
2. Teachers or professors of high standards or scientific assistants as high-standard people or;
3. Specialists and executives with a certain work experience, who earn a salary of at least double the income limit for the assessment of contributions of the social health insurance (therefore at present: 7.125,- € gross per month = 85.500,- € gross per year).

Against the background that there is a special economical and social interest in staffing the top positions in the fields of economy and science, the employment of highly qualified person shall be possible without prior permission. However, the requirements of the law concerning foreigners have to be complied; i.e. especially the integration in the standards of living in the Federal Republic of Germany and the living expenses must be assured without state subsidy. In the end the foreigners office “may” grant a permanent residence permit but is not obligated to do so; in fact the foreigner is only entitled to claim a decision without abuse of discretion.

2. Executives

Furthermore, executives / managers also do not need an approval according to § 4 Employment Regulation (“Beschäftigungsverordnung”), defined as follows:

1. Executives with complete authorization or “*Prokura*” (No. 1);

2. Members of the organ of a legal person, who are authorized to legally represent the company (No. 2);
3. Associates of a trading company or members of another trading partnership (GmbH; KG; GmbH & Co. KG), as long as they have been appointed by law, rules or by a contract of a company, in order to represent the trading partnership or the business management (No. 3); or
4. Executives of a company also active outside Germany for an employment at the level of a board of directors, management and a management board or for an occupation in other leading positions that are of essential importance for the development of a company (No. 4).

An explicit definition of the term “executive / manager“ is not possible. In general an executive is rather regarded as part of the company management with view to his/her function as he/she is entitled to carry out essential entrepreneurial activities on his/her own responsibility, which in particular cases have to be described and substantiated. Insofar, supervision and control of specialised and administrative staff; individual authorization to make staffing decisions etc. are amongst others to be taken into consideration. The executive is released from the obligation to obtain prior consent provided that he/she can prove that general power or power of procuracy was granted to him/her; therefore the registration in the commercial register is deemed to be decisive regularly for the foreigners office, but the contract of employment can also provide important indices with respect to the function. In case such proof cannot be furnished it is possible to prove that the employee has the function of an executive which is of significant importance for the company. Interesting possibilities are arising thereby with respect to the form of contract.

3. Activities of commercial character

Finally, certain activities of a commercial character can also be performed without approval of the Federal Employment Office; according to § 6 Employment Regulation (“Beschäftigungsverordnung”), this applies for:

1. People who are employed abroad in a commercial division by an employer whose domicile is in the home country (No. 1) or
2. People who hold meetings or negotiations in the home country for an employer whose domicile is abroad, or who conclude contracts or purchase merchandise for exportation (No. 2)

For most of the groups of the pre-mentioned case, the legislator assumes that there are no detrimental implications to worry about concerning the special nature of the

occupation, there are even “complementary employment effects” to be expected. Insofar, the regulation respectively the entitlement to give consent for the grant of residence titles for the purpose of gainful employment to persons who shall be transferred to a foreign country for a short period of time during their employment in order to perform activities of commercial character for a foreign company or to those persons whose temporary employment at the establishment of the German employer is required in connection with the commercial representation of the company abroad.

4. Proceedings

It is to note that when the conditions of the aforementioned case groups are at hand before entering the country, it is recommended to contact both the German diplomatic representation respectively foreigners office and the labour office in order to get clearance. It is as well recommended to present the significant documents in the respective national language and also translated into German.

V. Academic Persons, IT-Specialists and other Specialists

In practice there are further facilitations applicable for the following groups of persons: for academics, IT experts and other experts the consent for the commencement of employment can be given – which is the normal case.

1. Academic Persons

Graduates, who own an university degree or a higher qualification, may be granted a residence title for the purpose of employment, if there is a public interest in employing them due to their professional knowledge; cp § 27 para 1 No. 2 Employment Regulation. The following criteria can be applied according to the official instructions of the Federal Employment Office respectively for an assessment of the public interest:

- creation of new jobs
- prevention of job loss
- opening new markets (“door-opening function“)

It is, moreover, required that no privileged job seekers can be employed.

2. IT-Specialists

The previous so-called green-card regulation for IT specialists has expired since 31st, December 2004. Instead, § 27 paragraph 1 No. 1 Employment Regulation provides for professionals - who own a university degree or a higher education or similar qualifications - the approval for a title of residency to practice an employment which can be given, if by employing them, there exists a special public interest. Another condition is that the foreigner is not to be employed under more disadvantageous conditions than those of a German employee. According to the official instructions of the Federal Employment Office the consent for an employment with the German establishment of a company can be granted only if this employment is subject to social security contributions.

3. Other Specialists

Furthermore, under certain conditions, specialists can also be given the approval for a residence title. According to § 28 Employment Regulation, it applies for:

- Executives and other people, who - by practicing their occupation - above all dispose of a special and specific corporate knowledge (specialists) of a company in the country for a qualified employment in this company (No. 1) or
- Executives for an employment at a common company based on international agreements (No. 2)

For an examination of the question whether these requirements are fulfilled the following documents are regularly requested:

- proof of the employee's qualification
- evidence on the company-related special knowledge
- job profile / job description

VI. Intra-company transfer / short- and long-term assignments

As specified before for the grant of a residence title for the purpose of gainful employment filing an application at the responsible foreigners office is regularly required. The foreigners office internally requests whether the responsible labour office gives its consent with view to the intended employment or not. However, according to the Employment Regulation ("Beschäftigungsverordnung") there are indeed various exceptions to this principle, in particular for employees with specific qualifications, specific knowledge or for those employed for certain activities. As far as those kind of employments are concerned there are some facilitations arising with view to proceedings.

1. Intra-company transfer

In practice, the foreigners office asks the labour office for its consent which can be granted once a so-called “examination of the labour market” has been executed. This procedure does usually take between 8 - 12 weeks. However, an examination of the labour market is not required for some kind of highly-qualified people, legal representatives of the company and executives or if an intra-company transfer is concerned and certain conditions as provided in § 31 Employment Regulation (“Beschäftigungsverordnung”) are met. The provision mentioned above words as follows:

“§ 31 International intra-company transfer, projects abroad

For an employment for a period of up to three years the consent for the grant of a residence title can be given without a priority check as laid down in § 39 para 2 sentence 1 no. 1 and 2 AufenthG [Residence Act]

- 1. if, within an intra-company transfer inside a worldwide-acting company or group company, skilled labour is concerned who provides university degree or higher education or similar qualifications*
- 2. if an employee of a worldwide-acting company or group company who is working abroad must necessarily be transferred to the inland establishment of the company or group company in order to ensure the preparation of a project abroad, if the employee is responsible for the realization of the project abroad and provides a qualification which is comparable to the qualification of skilled German workers and he/she, moreover, provides a specific and, above all, a company-related knowledge.*

In the cases specified in Sentence 1 no. 2, the consent for the grant of a residence title can also be given for the skilled labour of the initiator of the project abroad if such skilled staff is temporarily entrusted with the preparation works by the contractor, if the project assignment involves a respective obligation for the contractor and such employment is required with view to a future engagement within the finalised project. Sentence 2 is also applicable if the contractor has no branch or establishments abroad.”

According to the implementing provisions of the foreigners office a worldwide-acting company in this connection is a company whose foreign part of business (holding company or subsidiary) is holding a capital share of at least 50 %. An intra-company transfer is on hand in case not only when foreign employees are transferred to Germany

but there must be a transfer of German employees abroad to the same extent. With view to the contractual implementation an employment contract of a foreign employee is regularly either supplemented by a secondment agreement or suspended for the period of transfer. However, in any case it is required that the return of the employee concerned has previously been determined.

The idea of an intra-company transfer is that no examination of the labour market must be carried out in the event of a transfer of personnel from abroad to Germany and from Germany abroad which takes place between the companies of the employer or the group it belongs to. It goes without saying that the exchange of personnel needs to be roughly the same in terms of the number of employees involved so there is no impact to the German labour market - "10 in / 10 out".

In practice, it is some times not easy to prove that the conditions for an intra-company transfer are met when the application is filed for the first time and therefore should be prepared carefully. In particular, the following documents are required:

- curriculum vitae (both in English and German if possible)
- photographs
- copy of the identification card / passport
- job description form
- offer of employment / employment contract / assignment letter
- health insurance coverage equivalent to German standards
- excerpt from the commercial registry
- annual report of the company
- report on the personnel exchange

Moreover, the annual report of the company and the report on the personnel exchange between the companies involved need to be filed on a yearly basis.

The intra-company transfer application procedure is likely to take 6 - 10 weeks once all documentation has been compiled and the application has completely been filed. The permit will be granted for a period of up to 3 years.

2. Short-term assignments

Furthermore, under certain conditions, the consent of the Federal Employment Office is not required for the grant of a residence title for the purpose of gainful employment to persons who are sent to Germany for a period of up to three months (within an overall period of twelve months) by an employer who is domiciled abroad.

According to § 11 Employment Regulation (“Beschäftigungsverfahrensordnung”) it is possible to assign employees to Germany for a period of up to 3 months without the need for the consent of the labour office. However, such assignment has to be declared to the foreigners office before the assignment. The provision mentioned above reads as follows:

“Short-term assignment of employees

There is no consent required with view to the grant of a residence title to persons who are sent to Germany for a period of up to three month, within an overall period of twelve month, by an employer who is domiciled abroad, in order to

- 1. set up and install, to give operation instructions, to maintain or repair machinery, plants and programs of electronic data processing which have been provided by the employer for commercial purposes*
- 2. inspect or receive instructions for the operation of machinery, plants and other equipment acquired*
- 3. remove used and acquired plants for the purpose of reconstruction in the residence country of the employer*
- 4. install, remove and attend to company-owned stands at trade fairs or to those for foreign companies which are residing in the residence country of the employer, or*
- 5. take part in a company training course in the context of export and licence agreements*

(...).”

The release from the obligation to obtain consent, however, requires that the employer has, prior to the commencement of the intended employments, informed the Federal Employment Office about them and used the official application forms therefore.

Whether the conditions are met depends from case to case, e.g. on the kind of software installed; according to the official instructions the labour office complies with, this stipulation is not only applicable for software packages, i.e. the programmes of electronic

data processing, that are sold by the foreign company, but also for the programmes based thereupon.

In general, the following information has to be provided:

- details of the foreign company
- details of the client in Germany
- details on the number of employees to be assigned
- details on the duration of the project

In particular, the applicant will have to attach the following documents:

- service contract with the client
- description of performance
- list of names indicating all employees sent

Please note that it will be mandatory to file such application before the employment will commence and that the stay is basically limited to 3 months otherwise the normal proceedings would apply. Regarding proceedings filing the application would mean that the foreigners office will not have to be asked for its consent; furthermore, an examination of the labour market would not be required. As a consequence it will still be necessary to apply for a visa first depending on the nationality of the employees involved.

3. Long-term assignments

Under certain conditions a long-term assignment without a priority check (examination of the labour market) can be possible; therefore the prior consent of the Federal Employment Office is required as provided for in § 36 Employment Regulation ("Beschäftigungsverfahrensordnung"). This shall be possible if the employees are sent to Germany for a period of more than three months by an employer, who is domiciled abroad, in order to

1. *set up, install, maintain or repair, and to give instructions on the operation of industrial machinery, facilities and programs of electronic data processing which were provided by the employer*
2. *to dismantle used facilities for the purpose of reconstruction in the residence country of the employer*

If consent is given the duration of employment shall be limited in time and may not exceed the period of three years.

VII. Proceedings

Unless nationals of privileged states are concerned, the residence permit is to be obtained by means of a visa before entering into Germany. The responsible diplomatic representation abroad, respectively the foreign office ("*Ausländerbehörde*") solely is responsible for the applicant, which nevertheless reconciles with the Federal Employment Office ("*Bundesagentur für Arbeit*"). Since January 1, 2005 residence and work permits are granted in the form of one residence title for the purpose of gainful employment ("*Aufenthaltstitel zur Ausübung einer Beschäftigung*"), which is granted by the foreign office, respectively after the Federal Employment Office has agreed thereto with one permission if required so („one-stop-government“).

It is recommended to apply personally at the German diplomatic agency - if necessary - in order to be able to give explanations on the submitted documents, or to find out which documents are possibly needed. Usually the following documents should be submitted for insertion in the files:

- curriculum vitae;
- copy of the identification card / passport;
- 2 biometrical photographs;
- document of apprenticeship;
- document of profession;
- information on the announced employment, especially description of the job;
- information on the spouse and children, if necessary;
- proof of sufficient health insurance cover during the period of stay.

The decision on the approval to practice an employment is made by the Federal Employment Office, where the place of employment of the person concerned is located. The place of employment is the place where the company's domicile is situated or where the head office of an employer is situated. Concerning employments at various work places, the company's domicile is the place where the corresponding payroll accounting of the employer is found.

Consent is given for the duration of the employment, though for the period of three years, see § 13 para 2 *BeschVerfV* (cp. § 44 *BeschV*). However, it is common practice to give such consent at first for the period of one year only, regardless of the intended duration of the employment relationship.

The approval to practice an employment can be limited in regard to

- the job-related occupation;
- the employer;
- the district of the Federal Employment Office;
- the situation and the allocation of the working hours.

This proceeding usually lasts 8 to 12 weeks once all documents have been submitted. The fee for a so called national visa (residence permit applies for Germany only, long-term residence of more than three months - e.g. studies - is intended) amounts to 30 €

VIII. Self-employment

If self-employment is intended the following regulations apply:

1. Entry and residence

The status of self-employment does not cause any particularities with a view to the preconditions for entering and residing in Germany. The nationality shall be decisive solely, insofar it is referred to the preceding comments.

2. Taking up gainful employment

For self-employment the preconditions specified above do not apply; however § 21 Residence Act includes certain restrictions for the grant of residence permits with a view to self-employment. In the sense of this Act, residence permits may only be granted if:

- there is a higher economic interest or a certain local requirement;
- the activity is expected to have positive effects on the economy and
- the financing of the implementation is assured by equity or promised credit.

The preconditions mentioned under n° 1 and 2 shall be regarded as compiled if at least an amount of 1.000.000,- € is invested and 10 jobs are created. Furthermore, the following criteria is given, inter alia, for the assessment of the preconditions: carrying capacity of the business idea; entrepreneurial experiences of the foreigner; amount of the capital investment. In order to be in the position to assess the foreign office regularly asks for an experts' statement with a competent authority, e.g. with the local Chamber of Industry and Commerce.

A residence permit for the purpose of self-employment may be granted by the foreign office according to § 21 par. 2 Residence Act if there are privileges due to bilateral conventions, like for Japan and the USA.

3. Proceeding

The application for a residence permit for the purpose of self-employment is to be filed with the responsible foreign office; i.e. with the authority situated nearest to the (future) place of residence of the applicant. There are numerous other regulations to be considered which will not be specified herein - like the registration with the Chamber of Industry and Commerce on the basis of trade law.

IX. Business Visa

If the commencement of employment is not intended the application for the grant of a visa for the purpose of a business trip is deemed to be sufficient.

1. Requirements of granting a business visa

The grant of a business visa is regulated in the provisions of § 6 Residency Law as well as by the regulations of the Schengen Implementation Convention and the implementing regulations issued thereupon. The member states of this convention are Belgium, Denmark, Germany, France, Finland, Greece, Italy, Island, Luxemburg, the Netherlands, Norway, Austria, Portugal, Sweden and Spain. For the time being the provisions of the Schengen Convention are not or solely partially applicable for the new member states that have joined the European Union since May 1, 2004 (Estonia, Latvia, Lithuania, Malta, Poland, Slovenia, Czech Republic, Slovakia, Hungary and Republic of Cyprus) and since January 1, 2007 (Bulgaria, Romania).

Under certain circumstances a foreigner can, on the basis of these regulations, be granted a Schengen Transit Visa or a Schengen Visa permitting stays in the signatory states of the convention for a period of up to three months. The visa for short-term stays can also be granted for several stays for a period of validity of up to 5 years; provided that the duration of stay does not exceed a period of three months within a 6-month period, counting from the first day of entry.

The applicant must be in possession of a valid passport and, if required so, hold a valid visa unless there is an exemption from the duty to obtain visa. He/She moreover is obligated to produce such documents upon request in order to substantiate the purpose

and circumstances of his/her stay. Which documents are required in the particular case depends on the possible risk of illegal immigration and the respective conditions.

The visa may only be granted if the presence of the foreigner is not affecting or endangering the interests of the Federal Republic of Germany. In order to make a decision on the application the personal interests of the applicant and humanitarian issues shall be considered as well as the security interests of Germany and the Schengen partners and the prognosis made by the representation abroad for the traveller's willingness and possibility to return. Therefore for each application the individual case shall be examined. The applicant shall moreover prove that his/her stay in the Federal Republic of Germany is financially secured. Above all he/she may be dependent on the use public funds for his/her stay in Germany. If he/she is not in the position to finance his/her trip and stay from own funds a host residing in Germany may assume liability for any costs arising from the visitor's stay in Germany, including the costs for possible medical treatments. The German foreigners office at the place of residence of the person inviting shall be responsible for the recording of such a declaration of commitment. Moreover, as a result of a decision of the European Council a travel health insurance with a sum insured of 30,000 € is required for all Schengen states. Such insurance should preferably be effected by the applicant in his home country, but can also be effected by the person inviting. In any case it should be effected in due time so that the policy or an equivalent certificate - preferably in German or English language - can be submitted when the application is filed.

The accession to the Schengen territory shall be denied if the applicant is registered by the Schengen information system for denied entry.

Third country nationals holding a visa which is not limited in space (visits and business stays of up to three months during a six-month period as well as transit and airport visas) and which is issued by a state which has implemented the Schengen acquis to its full extent, are allowed to stay in the other states fully implementing the Schengen convention within the scope of validity and in compliance with the purpose of visa; they are also not subject to controls when crossing internal frontiers.

2. Proceeding

In general, the following information will have to be presented when applying for the business visa with the German representative office abroad:

- passport valid for the period of the planned stay and 3 months thereafter;
- application form for a "Schengen visa" in duplicate;
- 2 biometrical photographs;
- official affidavit of support, e.g. confirmation to cover the costs of immigration and emigration ("Verpflichtungserklärung");
- letter of the inviting person or company confirming and supporting the planned stay;
- documentation about the financial situation of the applicant (copies of the bank account statements of the last 6 months);
- certificate about the residential status of the applicant;
- certificate about health insurance coverage for all Schengen countries for the planned period of stay;
- proof of hotel reservation and airline reservation and one copy

This is an exemplary listing only; the responsible representation abroad should definitely be asked which further documents are possibly required. In principle the applicant's personal appearance is required when the application is filed; in spite of this applicants have recently been enabled to file applications online. However, one should make use of this online proceeding only if applications are filed repeatedly and if it is for sure that the requirements are fulfilled due to the fact that during online proceedings it is not possible to answer possible questions of public authorities, which might cause delay in proceedings.

The fee for a so called national visa (residence permit applies for Germany only, long-term residence of more than three months - e.g. studies - is intended) amounts to 30 €. For applicants who intend to stay in Germany for a period of more than 90 days and who want or have to enter another Schengen state during the first three months of residence already it is possible to obtain a so called "hybrid visa". The fee for such hybrid visa amounts to 60 €. The fees for a Schengen visa (residence permit applicable for 15 Schengen States, duration of stay up to 90 days) amounts to 60 € as well.

The proceeding regularly lasts 2 to 10 days once the application is filed; however, the proceeding can also take shorter or - e.g. during the high travel season - longer in particular cases. Finally it shall be pointed out that there is no right to obtain a visa; the grant is rather subject of the discretionary approval by the responsible authority which is obligatory.

3. Inadmissibility of taking-up employment

In practice very often no attention is paid to the fact that there is no entitlement for taking-up gainful employment (i.e. for taking-up an dependent employment) deriving from a visitor's visa which is granted e.g. on the occasion of a business trip. The term "employment" is not defined by law. However, § 84 para 1 sentence 2 German Commercial Code ("Handelsgesetzbuch") includes, according to prevailing opinions, a first indication for an attempt of a definition. Hereafter, self-employed is a person who basically can arrange his/her work (occupation) and who can independently determine his/her working hours. An employed person and therefore personally dependent is a person who cannot do so, and who - for this reason - is commonly classified as an employee, unless he/she is working for another person on the basis of a private-law contract.

Against this background any activities implying such dependent employment are not admitted. This particularly applies for, but is not limited to the following activities:

- participation in trainings;
- organisation of training courses for the transfer of knowledge;
- participation in the operational business, resp. in production;
- performance of services.

Accordingly, the following activities are admitted:

- participation in meetings;
- conducting negotiations;
- purchase of goods;
- conclusion of contracts with German business partners.

If it is unclear whether the intended activity is still covered by a visitor's visa or the prior acquisition of a residence permit for the purpose of gainful employment is obligatory already it is recommended to contact the responsible foreigners office. In each individual case the office will, if so required, contact the employment office which is responsible for the internal approval of the intended employment.

The contempt of the aforesaid restrictions is especially problematic if the country was entered with a visitor's visa in order to take-up a gainful employment at a later date. Insofar the sanctions against such commencement of work without a residence title for the purpose of gainful employment have recently been tightened with lasting effect. If no attention is paid thereto the administrative fines of up to € 50,000 can be imposed; in

individual cases the person concerned can be expelled from the country and an (re-)entry ban can be imposed.

X. Summary and outlook

The German residence and work permit regulations imply a genuinely complex matter. Therefore regulations have to be well-known for the realisation of international transfers. Even if the German labour market is basically still affected by the so called ban on recruitment (i.e. the categorical ban on the recruitment of foreign employees) foreign employees can regularly be occupied under certain circumstances in practice.

It should be noted that, in particular the employment of highly qualified staff in comparison to "normal" staff" is indeed subject to numerous facilitations. Nevertheless there is a considerable accumulated need against the background of an intensified global competition for the most qualified labour. Therefore e.g. the earnings level for executives and specialists which presently amounts to 85.500 € should be reduced clearly in order to enable also medium-sized companies to employ such labour. A step in the right direction was made by means of the resolution of the federal government as of August 24, 2007; according to this decision executives and specialists may obtain a residence permit for an indefinite time with effect from November 1, 2007. Besides this, hope is raised also with view to the intended omission of the examination of the labour market for engineers from the new EU member states. However, this is by far not sufficient in order to be competitive on a global level - which is in particular and rightly claimed on the part of economy.

Insofar the further development remains to be seen. The same applies for the EU proposals regarding the "Blue Card" which has recently been put up for discussion by Mr. Frattini, the EU Commissioner for Justice, Freedom and Security on Justice and Home Affairs. The EU Commission intends With a particular work and residence permit for highly-qualified employees from third countries (non-EU) intends to increase the competitiveness of the European economy. The "Blue Card" shall attract the attention of experts to Europe instead of the USA, Australia or Canada which have been the preferred work countries up to now. The EU commission wants to introduce a simplified, accelerated and EU-standard admission proceeding for persons that provide special professional qualifications, an employment contract with a company based in the EU and those persons earning at least the triple of the national minimum wage. By means of this "Blue Card" highly qualified staff shall be granted residence and work permit which also involves special rights – e.g. if accompanied by family. Upon the presentation of the "Blue Card" Mr. Barroso, the EU Commission President, left no doubt that Europe is an immigration continent indeed. Europe would be attractive indeed but highly qualified persons would not be attracted sufficiently. In Germany it is quite obvious that these

proposals are so far predominantly rejected whereby reference is made to the high unemployment as well as the preferred recruitment of employees from the (extended) EU member states. As an implementation of such regulations requires unanimity presently it cannot be assumed that the "Blue Card" will become accepted in the medium term.

Attachment

Overview on the legal regulations in force

- Ø Regulation (EWG) no. 1612/68 on the free movement of workers throughout the European Community of 15.10.1968
- Ø Law on the entry and residence of the nationals of member states of the European Economic Area dated. 30.07.2004 („*Aufenthaltsgesetz/EWG*")
- Ø Freedom of Movement Act for EU nationals from 30.07.2004, BGBl. 2004 I, 1950 subs. („*EU-Freizügigkeitsgesetz*")
- Ø Law on the regulation and limitation of immigration and on the regulation of the residence and the integration of EU nationals and foreigners of 30.07.2004, BGBl. 2004 I, 1950 subs. („*Zuwanderungsgesetz*")
- Ø Employment Regulation 22.11.2004 ("*Beschäftigungsverordnung*")
- Ø Regulation on employment procedure of 22.11.2004 ("*Beschäftigungsverfahrensverordnung*")

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