

Working Paper

IMMIGRATION IN THE FIELD OF MEDIA & ENTERTAINMENT

- Residence law and work permit requirements -

Table of contents:

Introduction	2
I. Entry and Visa	2
1. Citizens of the European Union and the European Economic Area / Switzerland	2
2. Citizens of so called privileged states.....	3
3. Other nationals.....	3
II. Residence permit for practicing employment	4
1. General preconditions	4
2. Employments not requiring approval	5
a) Lectures or shows of special significance / sports events.....	6
b) Festivals, music and culture festivals / film and TV productions .	6
c) Daily shows.....	6
d) Professional athletes and professional trainers	7
e) Models, advertising types, mannequins und male models.....	7
f) Self-employment.....	7
3. Employment upon approval.....	8
a) Funfair workers	8
b) Culture and Entertainment	9
III. Summary / Prospects	10

Introduction

International dispatches have become more and more important during the last years. Even for nationally oriented industries, international dispatches not only imply an essential requirement for professional advancement but are indeed taken for granted and also experienced as a personal enrichment by the concerned employees. This applies to a very specific extent in the field of media and entertainment due to the fact that boundaries are increasingly getting blurred and very often nationals of quite different states are engaged for projects. For a long time, the activity of showmen has not been limited to their home country anymore. As a result of these dispatches many complex questions arise. The following explanations especially comprise the topic “entry and visa” as well as the topic “work permit”. In addition thereto social security and tax issues have to be considered; which are indeed not discussed herein.

I. Entry and Visa

The answer to the question whether and to what extent the obtainment of visa is required before entering first of all depends on the citizenship of the person entering the country. The extent of privileges to be applied varies in accordance with the respective nationality.

1. Citizens of the European Union and the European Economic Area / Switzerland

Special regulations are applicable for citizens of the European Union, the European Economic Area and Switzerland as a result of the provisions of the EU treaty, the EEA regulations, the Treaty establishing the European Economic Area and due to bilateral conventions.

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 27 member states at present (Bulgaria, Belgium, Denmark, Germany, Finland, France, Greece, Great Britain, Ireland, Italy, Luxemburg, the Netherlands, Austria, Portugal, Romania, 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 any such document

on request to the responsible public officials; they have to be in the possession of such document during their residence and in case of need they have to present or hand it out together with the certificate of residency right.

Since January 1, 2005 the EU nationals of the member states specified above have solely been obligated to register with the responsible resident's registry office ("Meldebehörde). The resident's registry office will submit any information and supporting documents to the responsible foreigners authority. 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. Citizens of so called privileged states

Due to a so called "Positivliste" (positive list) nationals of certain countries (e.g. Argentina; Israel; Japan; Canada; Korea, USA) are exempted from the general obligation to apply for a visa before crossing the external borders of the European Union, cp. www.auswaertiges-amt.de for details. However, if residence title is required the respective application shall be filed within a 3 month period after having entered the country; in the event of disregard criminal prosecution is imminent due to illegal residence in the Federal Republic of Germany.

3. Other nationals

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. The diplomatic and consular representations abroad are responsible for the grant of visas which - have been authorized accordingly by the Federal Foreign Office in compliance the provisions of § 71 para 2 residence act; a list of these missions is provided on the website of the Federal Foreign Office (www.auswaertiges-amt.de).

Moreover, in accordance with the provisions of residence law which is based on Community Law, citizens of certain states do not require a residence title for entering then, i.e. if they are not in gainful employment no application for visa is required. This is i.a. applicable to citizens of the following states: Argentina, Brazil, Chile, Israel, Japan, Canada, Mexico, New Zealand. However, this privilege is not applicable, i. e. an application for visa is required if the foreigner performs activities of up to three month within a 12-month period wherefore a consent of the Federal Employment Office would not be required, cp. below II. 2. for details.

II. Residence permit for practicing employment

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 is required which is obtained internally by the aliens registration authority. 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”) 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.

Nonetheless, in some cases it is not required to obtain prior consent in the field of media and entertainment.

2. Employments not requiring approval

According to the provisions of § 7 BeschV residence permits can be granted without prior consent to certain groups of persons. 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 aliens registration authority. 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)

a) Lectures or shows of particular importance / sports events

According to § 7 no. 1 BeschV, first of all the Federal Employment Office's consent is not required for granting a residence permit to persons, including their auxiliary personnel, who are normally resident abroad and perform lectures or shows of special scientific or artistic value or take part in sports events within the country, unless such activity exceeds 3 months within a 12 month period. For these employments individual performances are effected by certain persons who cannot be easily replaced by national applicants and wherefore international exchanges are common practice.

According to the provisional hints for application the decision whether performances or lectures indeed are artistic performances of special artistic value has to be made in each individual case, if possible with involvement of suitable experts. However, a high degree of international popularity based on the artistic competence may be an indication. The responsible agency abroad is granted a far reaching discretion for the decision on the question whether a "special artistic value" is given or not.

b) Festivals, music and culture festivals / film and TV productions

Furthermore, for persons dispatched for festivals, music and culture festivals, guest performances or foreign film and TV productions no consent is required for the grant of residence permit, provided that the length of service does not exceed 12 months in duration, cp. § 7 Nr. 2 BeschV. As shown in the preamble to this law – besides performances by foreign artists and performers this regulation also comprises the international short-term performances by foreign guest groups or performances by artistic guest groups at festivals or during culture and music festivals as well as crew members of foreign film and TV productions who support turning operations.

c) Daily shows

Also persons performing daily shows on up to 15 days a year do not require the consent of the Federal Employment Agency for their residence permit. Basically the days shall not be consecutive; however shows taking place on two consecutive days – e.g. on weekends – can be accepted. A daily show is concerned if it takes place out of the ordinary business operation as a special event which is recognizable as such from the outside. A daily show – as provided by the

implementation hints to this provision - shall basically be particularly announced by means of advertisements in press or posters. Finally it shall be considered that the regulation shall only be applicable for persons ordinarily resident abroad.

d) Professional athletes and professional trainers

The approval of the Federal Employment Office is also not required for the grant of a residence permit to professional athletes and professional trainers to be engaged for German sports clubs or comparable sport institutions that take part in competitions if they have reached the age of 16. Moreover the club or institution must pay a gross salary in the amount of at least 50 % of the income limit for the assessment of contributions to the pension insurance (i.e. presently: € 2.625 / month; € 31.500 / year) and the respective athletic qualification as professional athlete respectively the professional qualification as trainer has to be confirmed the responsible German central organisation of the respective sport.

e) Models, advertising types, mannequins und male models

§ 7 no. 5 BeschV provides that the grant of a residence permit shall be granted without prior consent for the following groups of persons:

- models;
- advertising types;
- Mannequins or male models.

However, this is applicable only if the employer has informed the Federal Employment Office of the respective employment prior to its commencement. Such notification is obligatory. If it turns out during the proceedings that one of the aforesaid groups of persons is concerned indeed the Federal Employment Office will inform the employer thereof and refer to the responsible aliens registration authority. Should the employer fail to notify the Federal Employment Office an administrative offence would be constituted according to § 404 SGB III.

f) Self-employment

Moreover, no consent is required if self-employment is concerned and therefore no (dependent) employment given at all. The term “employee” is not defined by law. However, § 84 para. 1 sent. 2 HGB 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.

Also for the term “self-employed”, there is no legal definition. Self-employment is an independent entrepreneurial occupation of a natural person in another company on a service or works-contractual basis. According to the regulation of § 84 para. 1 sent. 2 HGB, it is significantly essential for a self-employed that he/she basically can arrange his/her work activity (occupation) and who can independently determine his/her working hours without being completely bound to another’s working organization.

Other than this integration, and in particular, the disputing personal dependency of the employee’s capacity is named as main criteria of the definition. This is mainly expressed in an organizational, unnecessary spatial integration in another company. An integration in the company is however opposed to the possibility of independently organizing the own working hours and manpower, particularly by refusing single contracts. The relevant relationships are the actual ones which are indeed naturally examined on the contractual basis of the act (employment).

3. Employment upon approval

If none of the aforesaid groups of persons is concerned or if the time limits for the exemption from the requirement of consent specified before are exceeded a residence permit for taking up employment may not be granted until internal consent is given by the Federal Employment Office.

a) Funfair workers

According to § 19 BschV the consent required for the grant of a residence permit for an employment in the funfair industry may be granted for up to 9 month per calendar year if the persons concerned have been chosen as a result of the proceedings and selection carried out on the basis of an agreement concluded between the Federal Employment Office and the labour administration authority of their home country. If an employment exceeds the period of 6 months in a year the exclusion of a re-employment with the same employer during the next year is

abandoned, by means of this regulation. Thereby - as shown in the history of law - it is taken into account that these employments are necessary with a view to the high technical requirements for the installation and secure operation of roundabouts, a longer period of time is required to become acquainted with this work and therefore frequent exchanges shall be avoided.

For the application of this regulation a job placement to the persons concerned is required on the basis of an agreement concluded between the Federal Employment Office and the labour administration authority of their home country on the proceeding and selection. Such agreements are already in force e.g. with Poland, Slovenia, Hungary as well as with the Czech and Slovak Republic.

b) Culture and entertainment

An approval for a residence permit for practicing employment can – in accordance with the provisions of § 23 BeschV – also be granted to persons who

- perform an artistic employment or an employment as support personnel which is required for the performance,
- are dispatched for an employment for guest performances or foreign film and TV productions exceeding a period of three month.

Notwithstanding the above mentioned provisions of § 7 no. 1 BeschV, § 23 no. 1 BeschV provides that foreign artists whose engagement shall last for a longer period of time or whose performances do not imply an extraordinary significance may only be admitted provided that the possibility to employ national artists was excluded before. Supplementing no. 2 which covers employments not requiring approval for temporary stays of up to three months which e.g. applies to foreign members of guest performance groups like circuses, ice revues, dancing shows as well as to crew members of foreign film productions, § 7 no. 2 BeschV provides the opportunity of longer engagements in these fields which are subject to approval.

Performing artists can again be regarded as employees or self-employed. The decision whether the artist takes up an employment - wherefore approval would be required - is made in compliance with the degree of personal dependence. According to established practice of courts this decision depends on the practical realisation of the contractual relationship if it differs from the contractual provisions. For the decision whether foreign artists engaged in the fields of theatre, orchestra, radio and TV providers, film and TV productions requires work permit is also subject to the

extensive catalogue of differentiation as from 05.07.2005 which comprises persons engaged in the fields of theatre, orchestra, radio and TV providers, film and TV productions.

III. Summary / Prospects

In comparison to other fields the admission of foreign artists, actors, performers and athletes to the German employment market is not subject to extremely strict regulations. Especially the short-term dispatch for periods of up to 3 months is regularly possible without difficulties. In many cases the successful statement of self-employment is considered due to the fact that no work permit is required therefore. Regardless of the relevant groups of persons it is not only obligatory to comply with the respective application and notification requirements but also the documentation to be submitted should be prepared professionally in order to increase the chances of success effectively.

Cologne, March 2007

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”)

Contact details

RA Dr. Gunther Mävers,
Maître en Droit (Aix-en-Provence)

Mütze Korsch Rechtsanwaltschaftsgesellschaft mbH
Erftr. 19 a (Am MediaPark), 50672 Cologne,
Germany

Tel. : +49-221-50003-603

Fax : +49-221-50003-636

E-mail : maevers@mkrq.com

Internet: www.mkrq.com - www.visalawint.com



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