

Working Paper

CORPORATE IMMIGRATION LAW

- Intra-company transfer,
short- & long-term assignments-

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I. 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, Greek, 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; they have to be in the possession of such document during their residence and in case of need they have to present it or hand it out together with the certificate of residency right.

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"). 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. 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 (so called “new” member states - Estonia, Latvia, Lithuania, Malta, Poland, Slovenia, Czech Republic, Slovakia, Hungary and Republic of Cyprus) respectively with effect to 1st, January 2007 (Bulgaria, Rumania) – 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. In particular they do not require visa. 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 authority. 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.

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; 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. On the other hand there is an exemption from the recruitment freeze: nationals of certain countries (Andorra; Australia; Israel; Japan; Canada; 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 to apply for a visa with the German Embassy or Consulate in their home country first.

If the planned stay is going to last for up to 90 days it will be possible to come to Germany after having applied for a business visa; however such business visa will not provide a permission to carry out work for any employer.

II. 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, Greece, 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) – 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 of 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 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.
- 2. Step: After these two years, the “old” member states may adhere to their national work permit regulations for another three years.
- 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 very recently that Germany has made use of its right to opt out for another 3 years. Hence, nationals from the accession states will have to apply for a work permit in compliance with the old national regulations as laid down in Section 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

In principle, before starting to work in Germany any third country national needs to be granted a “residence title for the purpose of gainful employment” (= work permit) which, in principle, will only be granted, if no privileged employees from the European Union, the European Economic Community and Switzerland are available to do the job. A residence title for the purpose of taking up an employment is only granted if:

1. the Federal Employment Office has given its consent or such consent is not required due to relevant regulations or bilateral agreements,

2. an examination of the labour market shows 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.

However, as far as a short- or long-term assignment or an international intra-company transfer is concerned there are some facilitations arising with view to proceedings. With regard to the rules on intra-company transfers and short- or long-term assignments there is no difference between nationals of privileged countries (like the US, Australia, Japan) and third country nationals from countries not being privileged.

1. Intra-company transfer

In practice, the foreign 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 Section 31 of the relevant Regulation (“Beschäftigungsverordnung”) are met. The provision mentioned above reads 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 Law)

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 foreign employees are transferred to Germany but to the same extent a transfer of German employees abroad is realized. 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 job market test has to be carried out when there is a transfer of personnel from the foreign country to Germany and from Germany to the foreign country between the companies of the employer or the group he belongs too. 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 job market - “10 in / 10 out”.

Please note, that 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 in a careful manner. In particular, the following documents need to be filed:

- 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 regulations
- 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

However, under certain conditions, the consent of the Federal Employment Office is not required for the grant of a residence title 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 Section 11 of the relevant 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 foreign 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 of 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 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 foreign 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 Section 36 of the relevant 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.

III. Labour law issues

Whether or not the assignees are to be employed by the foreign parent or the German subsidiary depends on various questions including social security issues. Basically it shall, first of all, be examined whether and to what extent the national insurance of the home country can possibly be continued on the basis of EU regulations respectively bilateral agreements. Based thereon such employment must either be based on a local contract of employment or merely on an “offer letter“ / “assignment letter“. In the latter case the substantial employment conditions must also be laid down in writing; in particular the amount of remuneration including any other components of remuneration must be stated in the respective documents.

IV. Summary

The facilitations arising for the proceedings concerning the short-term assignment of employees for the installation of machinery or implementation of software as well as the regulations on the international intra-company transfer can alternatively be taken into consideration in order to send employees flexibly and on short notice to Germany, wherefore not even an examination of the labour market is at issue. However, it shall be borne in mind that in both cases the facilitations of the proceeding only relate to the examination of the labour market and that there is no effect on the requirements for entry and residence. Insofar, any requirements stipulated above have to be fulfilled; it shall particularly be examined whether entry can be made without visa or if an application can solely be made abroad with the responsible representative office.

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