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DECEMBER 2016 GLOBAL IMMIGRATION UPDATE

Posted on December 5, 2016 by Cyrus Mehta

Headlines:

BELGIUM – Belgium has announced changes to existing "contribution to cover the administrative costs" rules and related proposals, and new 2017 salary thresholds for some fast-track work permits B.

ITALY – The government has lifted translation and legalization requirements for certificates of coverage in work permit applications; a new investment visa category has been introduced; residence permit fees have been abolished; and guidelines are now available for filing mandatory notifications in compliance with Posted Workers EU Directive 2014/67.

UNITED KINGDOM – The latest statement of changes to the Immigration Rules incorporates the Tier 2 changes announced by the government in March, following the Tier 2 review conducted by the Migration Advisory Committee last year. Also, a ruling has been issued on an important Brexit case. The UK Registered Traveller Service has been expanded, and the 28-day grace period for overstaying is changing to 14 days.

Details:

BELGIUM

Belgium has announced changes to existing "contribution to cover the administrative costs" rules and related proposals, and new 2017 salary thresholds for some fast-track work permits B.

Changes and Proposals Introduced for "Contributions to Cover the Administrative Costs"

Effective March 2, 2015, Belgium introduced a mandatory "contribution to cover the administrative costs" with regard to some first requests for residence

authorization (e.g., visa D applications) by foreigners. Work permit holders (€215) and most of their family members (€160) must pay the levy. Several categories of foreigners (e.g., European Economic Area citizens, Swiss citizens and their family members, minors) are exempt.

Theo Francken, Belgian federal Secretary of State for Asylum and Migration, has proposed a preliminary draft bill to allow municipalities to receive a similar contribution for the renewal, extension, or replacement of some residence permits. In practice, the request to renew, extend, or replace a Belgian residence permit must be filed with the municipal authorities of the town where the foreigner resides. Under the new rules, the municipal authorities will have the option to ask payment of a contribution for renewal of residence permit type A. The contribution, which would be paid in addition to administrative fees for processing the new residence permit, is considered an equitable compensation for the administrative services provided by the municipalities. The type A residence permit, valid for a definite term, is held by work permit B holders and most of their family members. The proposed change will thus have an impact on corporate immigration.

The Belgian federal government approved a second version of the preliminary draft bill on September 30, 2016, and submitted it as a draft bill to the Belgian parliament on October 20, 2016. The draft bill will now go through the legislative process before taking effect.

The maximum amount of the contribution must be fixed in a separate Royal Decree (decree implementing an Act): the federal government has agreed to limit the maximum amount to €50. The draft Royal Decree has not yet been published.

Mr. Francken also proposed increasing the existing "contribution to cover the administrative costs" for a first application. The current amounts (€215 for work permit holders and €160 for family members) do not reflect the actual cost, which would amount to €268 per application. The new amounts would be €350 (work permit holders) and €200 (family members). The Belgium federal government approved a draft Royal Decree on October 28, 2016. The draft bill will now go through the legislative process before taking effect.

New 2017 Salary Thresholds Established for Some Fast Track Work Permits B

One of the requirements for some Belgian fast-track work permits B—as well as for the Blue Card—is a salary threshold. The authorities will only issue or renew them if it is clear that the employee's annual gross remuneration will meet or has met the threshold amount, which is adjusted/indexated on a yearly basis.

The authorities will only consider amounts that will definitely be paid. Discretionary bonuses and COLA (Cost of Living Allowances) cannot be taken into account when processing work permit applications. Some benefits in kind may qualify, depending on the facts.

Work permits are processed by the Belgian Regions: Flanders, Brussels, and Wallonia.

The following new salary thresholds, effective January 1, 2017, have been confirmed by all regional authorities:

- For highly skilled work permits: €40,124 (€39,824 for 2016)
- For executive-level work permits: €66,942 (€66,442 for 2016)

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ITALY

The government has lifted translation and legalization requirements for certificates of coverage in work permit applications; a new investment visa category has been introduced; residence permit fees have been abolished; and guidelines are now available for filing mandatory notifications in compliance with Posted Workers EU Directive 2014/67.

Government Lifts Translation and Legalization Requirements for Certificates of Coverage in Work Permit Applications

In July 2016, the Ministries of Interior and Labour issued a joint circular (no. 35/0002777 dated 14/07/2016) about the requirements for highly skilled work permit applications filed pursuant to Articles 27 and 27-quater of Legislative Decree No. 286/98 (Italian Immigration Law).

Recently, the Ministries circulated a note amending the joint circular. Authorities have clarified that translation and legalization of the certificates of coverage is no longer required. From now on, certificates of coverage must be submitted as soon as they are issued by the relevant foreign authority. This is expected to reduce overall processing time.

Certificates of coverage are required when there is a bilateral Social Security Agreement between Italy and the country where the posted worker is employed. The certificates document the agreement conditions with respect to social security (exemption from host country social security contributions).

New Investment Visa Category Introduced

Italy has introduced a specific category of visas for investors. The new type of national visa, provided for in the 2017 Budget Law—yet to be confirmed by the Senate—can be granted to individuals who:

- Invest at least €2 million in government bonds and keep it for at least 2 years, or
- Invest at least €1 million in an Italian company and keep the investment for at least 2 years, or
- Make a donation of at least €1 million in a public interest project in the fields of culture, education, immigration management, scientific research, or protection of cultural or landscape heritage.

The Ministry of Economic Development will set forth the application procedure with a decree to be approved within 90 days from the publication of the Budget Law.

The investor can bring his or her family to Italy. The permit will be granted with an initial period of two years, renewable for three-year periods, upon verification that the investment is maintained as required by the law.

Residence Permit Fees Abolished

The Council of State has abolished the residence permit application/renewal fees that were introduced in 2011 (€80 to €200). The Ministry of Interior has provided that residence permit applications are no longer subject to the €80 to €200 fee (communication no. 43699 of October 26, 2016). Only fixed expenses remain in place of about €76 (€30.46 for the electronic card, €16 for the application stamp, and a €30 mailing fee).

Background. In October 2011, a joint Ministerial decree introduced high residence permit application/renewal fees (from €80 to €200, depending on the type and duration of the permit, in addition to the fixed expenses already in place). In 2015, the European Court of Justice judged the tax to violate European Union regulations. Subsequently, the Regional Administrative Court

of Lazio declared the residence permit tax illegal and abolished the fee on applications in May 2016.

On September 14, 2016, with Presidential Decree No. 03903/2016, the Council of State suspended the court order of the TAR, Lazio's Regional Administrative Court. The fees were temporarily reintroduced until a final decision was reached.

Italy Implements Posted Workers EU Directive 2014/67

Italy has implemented the European Union (EU) Posted Workers Directive (2014/67), which regulates the posting of workers in the context of the provision of services by means of Decree no. 136/2016.

The directive refers to the transnational provision of services in three situations: posting of a worker to another EU Member State under a contract concluded with the party for whom the services are intended (customer or other company); posting of a worker to an establishment or to a company owned by the group; and workers posted by placement agencies.

"Posted workers" are defined as workers "who habitually work in another Member State and are sent to work in Italy for a limited, predetermined or predictable period of time." During the posting, the worker maintains an employment relationship with the sending employer and is sent to work to another Member State with the aim of temporarily providing a service within the receiving country.

The Decree applies to:

1. *EU companies* posting workers to Italy in the framework of the provision of services either to a company that is part of the same group or to a customer or other company;
2. *Placement agencies* established in an EU state posting workers to companies established or operating in Italy; and
3. *Non-EU companies* posting workers to Italy in the framework of the provision of services either to a company that is part of the same group or to a customer or other company;

A number of obligations were introduced for employers posting workers in Italy.

Mandatory Communications *(effective December 26, 2016)*

The posting employer must create an account in the online dedicated system, which will be available on the Labour and Social Policy portal (http://www.lavoro.gov.it) by December 26, 2016. The information provided through the system (e.g., number of workers involved, start/end date of the posting, place of work, host entity) will be available to the Labour Inspectorate, National Social Security Agency (INPS), and National Workers compensation authority (INAIL).

Employers posting workers to Italy must submit, one day before the start of the posting, a compulsory electronic notification (electronic form UNI_Distacco_UE) through the Labour and Social Policy portal with the following information:

- Sending company details;
- Number and details of posted workers;
- Start date, duration, and end of assignment;
- Place of work;
- Host company details;
- Type of services;
- Data and address of the representative(s) domiciled in Italy; and
- Number of authorization, if applicable

Any variation in the posting conditions must be communicated through the same system within 5 days, including:

- Start date, end date, and duration of assignment;
- Place of work;
- Type of services (ATECO code);
- Details and address of the legal representative in Italy responsible for keeping/receiving the documents; and
- Details of the representative responsible for maintaining the relationship with the unions, government, and company representatives

Document Retention Obligations *(in force since July 22, 2016)*

During the posting and up to two years after its termination, the posting company must keep the documentation related to the assignment. The following documents must be stored, along with a translation into Italian:

- Job contract or any other equivalent document such as a recruitment letter, containing the following information:

- Personal data of employee/employer
- Place(s) of work and registered address of the employer
- Start date of work
- Duration of the contract (whether fixed-term or open-ended)
- Duration of trial period, if applicable
- Job position, job level, and qualifications or description of the worker's tasks
- Salary, salary structure, and period of payment
- Duration of paid vacation; how this is determined and enjoyed
- Working hours
- Applicable notice in case of resignation

- Payroll
- Record of start/end/duration of the working day
- Documents attesting the payment of salary
- Notification of employment or equivalent
- Social security certificate, if applicable

Obligations To Have a Representative Domiciled in Italy *(in force since July 22, 2016)*

The posting employer must:

- Appoint a representative domiciled in Italy. During the posting and up to 2 years after its termination, a legal representative based in Italy must be appointed in charge of receiving/sending any official documents. In absence of this, the host company is considered to act as the representative of the foreign posting entity.
- Appoint a representative responsible for dealing with the parties involved in labor negotiations.

Penalties

Article 12 of the decree lists the following penalties:

- Sanctions for non-compliance with mandatory communications: a fine of €150 to €500 for each worker involved (in any case, the fine cannot exceed €150,000)
- Sanctions for non-compliance with document retention obligations: a fine of €500 to €3000 for each worker involved (in any case, the fine cannot

exceed €150,000)
- Sanctions for non-compliance with the obligation to have a representative domiciled in Italy in charge of receiving/sending any official documents: a fine of €2000 to €6000

Open Points

- It is not clear if the provisions of Legislative Decree July 17, 2016, n. 136, apply specifically to posting of workers in the context of the provision of services or to any postings, even if not expressly linked to the transnational provision of services under a specific contract. In fact, the situation of workers who are posted to provide "services" in-house from the headquarters to the subsidiary appears to fall outside the objectives of the Directive and, consequently, outside the objectives of Decree July 17, 2016, n. 136. It is therefore not clear if there are exceptions to the obligations above.
- Apparently, penalties listed in article 12 of the decree do not apply to companies established outside the EU.
- The website where the posting employers must sign up is not active yet; it is expected to be available by December 26, 2016.
- It is not clear if a third party can act on behalf of the sending employer with regard to the obligations concerning mandatory communications and document retention.

More information is at http://www.lavoro.gov.it/strumenti-e-servizi/Distacco-transnazionale/Pagine/default.aspx (Italian only).

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UNITED KINGDOM

The latest statement of changes to the Immigration Rules incorporates the Tier 2 changes announced by the government in March, following the Tier 2 review conducted by the Migration Advisory Committee last year. Also, a ruling has been issued on an important Brexit case. The UK Registered Traveller Service has been expanded, and the 28-day grace period for overstaying is changing to 14 days.

Changes to Immigration Rules for Tier 2

As widely anticipated, the latest statement of changes to the Immigration Rules

incorporates the Tier 2 changes announced by the government in March, following the Tier 2 review conducted by the Migration Advisory Committee last year. The main changes, effective November 24, 2016, are summarized below.

Highlights of Tier 2 (General) changes include:

- The salary threshold for experienced workers has been increased to £25,000 for the majority of new applicants (the salary threshold for new entrants stays at £20,800). An exemption from this increase applies to nurses, medical radiographers, paramedics, and secondary school teachers in mathematics, physics, chemistry, computer science, and Mandarin. The exemption will end in July 2019.
- As a transitional arrangement, the £25,000 threshold did not apply to workers sponsored in Tier 2 (General) before November 24, 2016, if they applied to extend their stay in the category. The government intends to increase the threshold to £30,000 in April 2017. There is no such transitional arrangement for workers sponsored in Tier 2 (General) between November 24, 2016, and April 2017—they will need to satisfy the £30,000 threshold in any future application.
- United Kingdom (UK) graduates who have returned overseas have been weighted more heavily in the monthly allocation rounds under the Tier 2 limit.
- UK graduates who apply in the UK continue to be exempt from the limit. A change is being made to facilitate changes of occupation for applicants sponsored in graduate training programs. This enables them to change occupations within the program or at the end of the program, without their sponsor needing to carry out a further Resident Labour Market Test or for them to make a new application.

The following additional changes to Tier 2 (General) are being made:

- Beginning in April 2017, a change to the rules on advertising via a milkround (companies touring universities each year to advertise job openings and recruit) will be introduced to close a loophole in which a sponsor can offer a job to a migrant four years after carrying out a milkround, without the need for a further recruitment search. Sponsors can continue to rely on a milkround that ended up to four years before assigning a Certificate of Sponsorship, but only if the migrant was offered the job within 6 months of that milkround taking place.

- Following a separate review by the Migration Advisory Committee on nursing shortages, nurses are being retained on the Shortage Occupation List, but a change is being made to require a Resident Labour Market Test before a nurse is assigned a Certificate of Sponsorship.

Tier 2 (Intra-Company Transfer) (ICT) changes made:

- The salary for short-term ICT applicants has been increased to £30,000 for new applicants. A transitional arrangement applies for those already in the UK under the short-term route.
- The closure of the Skills Transfer subcategory to new applicants.
- Changes to the Graduate Trainee subcategory. The salary threshold has been reduced from £24,800 to £23,000 and the number of places a sponsor can use has been increased from 5 to 20 per year.

Ruling Issued on Brexit Case

In the case of *R (on the application of Gina Miller and Ors) v The Secretary of State for the European Union,* the High Court ruled that the government is prohibited from giving notice of the UK's withdrawal from the European Union under Article 50 of the Lisbon Treaty without first consulting Parliament. Should the ruling be upheld by the Supreme Court, which recently gave the government permission to appeal, it could block or delay the Prime Minister's proposed timetable of beginning 'Brexit' negotiations by March 2017.

UK Registered Traveller Service Expands

The Home Office has announced the expansion of the UK Registered Traveller Service to applicants from 16 new countries. Membership is now also open to passengers from Argentina, Belize, Brazil, Brunei, Chile, Costa Rica, El Salvador, Guatemala, Honduras, Israel, Malaysia, Mexico, Nicaragua, Panama, Paraguay, and Uruguay, subject to meeting the membership criteria. Previously this was only available to applicants from Australia, Canada, Japan, New Zealand, the United States, Hong Kong (SAR), Singapore, South Korea, and Taiwan.

To qualify, applicants must:

- Be 18 years of age or more
- Hold a valid visa (except Tier 5 (Sporting & Creative Concessions), EEA family permits, discretionary leave, and leave outside the rules)
- Be a member of a diplomatic mission, or

- Be a "visitor" (and have visited the UK at least four times in the previous 24 months) in one of the following categories:

  - Business
  - General
  - Academic
  - In transit
  - Entertainment or sports
  -Parents with a child in a UK school
  - Medical

The service is available at:

•Gatwick
•Heathrow
•Birmingham
•East Midlands
•Edinburgh
•Brussels, Lille and Paris (Rail Terminals)
•Manchester
•Edinburgh
•Glasgow
•London City
•Stansted
•Luton

How to apply:

Step 1: Applicants must apply online via http://www.gov.uk/registered-traveller. The fee is £70 for a 12-month membership.

Step 2: The Home Office processes the application and conducts a number of checks. A decision will be reached within 10 days and applicants will receive an email notification.

Step 3: If successful, applicants must print the decision email and carry this when passing through immigration control on their next entry to the UK.

Step 4: To complete enrollment at:

- Gatwick**,** join the lanes for Registered Travellers.
- Heathrow, join the "other passports" lane, or go to the "Fast Track" desk if

you have a "Fast Track" ticket.
- Manchester, Edinburgh, Glasgow, London City, Luton, Birmingham, East Midlands, or Stansted**,** join the "other passports" lane.
- Those who applied in a visitor or diplomatic category can also join the "other passports" lane at Brussels, Paris, or Lille

Completion of Membership:

Acceptance is recorded in the Home Office system to facilitate easier transit though immigration control on subsequent entries to the UK. Membership is valid for 12 months and is evidenced by a membership card. Applicants are issued a card on which they must write their name and membership number as stated on the decision email.

The 28-Day Grace Period for Overstaying Changes to 14 Days

The 28-day grace period for overstaying has been reduced to 14 days. The 28-day period allowed many applicants to apply for further leave to remain after their current leave had expired.

The standard expectation is to submit applications for further leave to remain before an applicant's current UK visa expires. The 28-day period had been introduced so that applicants who had made an innocent mistake or were restricted due to circumstances beyond their control were not penalized. As such, a period of overstaying for 28 days or fewer by itself was not considered a ground for refusal of those applicants.

The recent statement of changes to the Immigration Rules proclaimed this to be inconsistent with the UK's immigration laws and accordingly abolished the 28-day period. Instead, the revised practice will be **not** to refuse an "out-of-time" application submitted within 14 days of the expiration of a UK visa and where the Secretary of State considers that there is "*good reason beyond the control of the applicant or the representative*," set out in or with the application, why a timely ("in-time") application could not be made.

It is likely that each application will be considered on a case-by-case basis. Alternatively, guidance may be published on what the Secretary of State will deem a "good reason" when the changes take effect.

There is considerable debate about whether the 28-day period should have been abolished. On the one hand, it is very rare that an applicant will actively

delay submitting a timely application unless there is a good reason beyond his or her control. On the other hand, and rather controversially, if the 28-day period is inconsistent with the UK's immigration laws, why allow **any** period of overstaying?

Allowing 14 days will resonate with those who remain in the UK with leave extended by section 3C of the Immigration Act 1971, as they find that their permission to continue to stay in the UK will be reduced to 14 days from the expiration of any 3C leave. The purpose of section 3C leave is to protect a person who makes an in-time application to extend his or her leave, from overstaying illegally while awaiting a decision on an application or while any appeal or administrative review to which he or she may be entitled is pending.

Without this new 14-day arrangement, the abolition of the 28-day period or potentially any period of grace leave would mean that any further applications made by 3C leave individuals would be deemed to be out of time. This demonstrates a real need for some type of grace period, as this is paramount to protect individuals who are entitled to remain in the UK, either as a result of circumstances beyond their control, while an application is in process, or while an administrative review or appeal is under consideration. A period of overstaying therefore is incorporated in UK immigration law to protect certain otherwise law-abiding individuals.

There is a genuine need for leniency and realistic time frames. This is vitally important to protect those who are entitled to be in the UK as a direct result of their complying with the UK's immigration laws. The specified period should allow the applicant, representative, or sponsor to review the situation and administer necessary action.

Consider, for example, these realistic scenarios:

1. Company A's employees are all TUPE'd across to Company B after an acquisition. Company A omits reporting the TUPE and also inadvertently allows its Sponsor Licence to lapse. The Home Office proceeds to curtail the leave of Company A's Tier 2 sponsored workers.

   Company A decides to take legal advice to rectify the situation. The lawyers submit representations to the Home Office requesting a reversal of the curtailment. While the Home Office is considering the representations, a sponsored worker's UK visa expires and the clock now starts ticking. The

Home Office finally decides to reverse the curtailment but it is now day 24 of the 28-day period.

Under the new "14-day period with good reason" practice, this Tier 2 sponsored worker would most likely already be deemed to be overstaying illegally and have no basis to remain in the UK. Would the Home Office exercise any discretion in these circumstances? Would the Home Office even consider the above scenario a good enough reason beyond the control of the applicant or representative?

2. An applicant receives a Home Office refusal decision and finds he or she no longer has valid leave to remain in the UK. This person will need an appropriate amount of time and funds to obtain legal advice in order to understand their immigration position and pursue viable options. These aspects can logically eat into the 14 days, which imposes excessive pressure on applicants and representatives.

This revised time frame from 28 to 14 days appears to serve no real purpose. What "good reason" is there to this approach of limiting overstaying?

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