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MAJOR CHANGES TO UK IMMIGRATION PROCEDURES – A SUMMARY OF THE NEW POINTS BASED SYSTEM – TIER 2 AND EMPLOYER SPONSORSHIP

1. **Overview.** The Government has recently published its Statement of Intent of Sponsorship under the terms of the new Points Based System ('Statement of Intent'). The Points Based System ('PBS') will result in the overhauling of the current UK immigration system, and the reduction of the more than 80 current routes of entry into the UK into a tiered system consisting of 5 Tiers. Under the PBS applicants will be assessed against an objective list of criteria and will be required to achieve a minimum number of points to enter the UK under each prospective Tier.
2. **Changes affecting employers.** Applicants in four of the five Tiers, Tiers 2-5, will require sponsorship from a UK employer or educational establishment in order to enter the country. This paper deals only with Tier 2, which will cover individuals who previously entered the UK under the Work Permit Scheme. Under Tier 2 sponsoring employers will first need to apply for a Licence, and then will be required to assess the suitability of the migrant for the proposed job under the PBS requirement. This is a critical part of the PBS, and will place major duties and obligations on UK employers. The sponsorship relationship is also intended to provide evidence that the migrant has a genuine job to go to in the UK.

The Statement of Intent reflects current Home Office policy intention in respect of sponsorship under the PBS. Whilst parts of the Statement of Intent may change ahead of implementation of the PBS, it offers clear guidance as to how the sponsorship regime will operate, and there are unlikely to be significant changes.

The Sponsorship Register, for which employers will apply for Licences, will be open for applications during the first quarter of 2008, and it is likely that Tier 2, which will replace the current Work Permit scheme, will come into effect in the third quarter of 2008. Tier 1, which will cover Highly Skilled Migrants, will come into effect in March 2008, and UK employers will not need sponsorship certificates to employ Tier 1 migrants. However, sponsorship certificates will be required for employers to employ Tier 2 (Work Permit holders) and Tier 5.

3. **The process for license application.** Gross & Co. will be pleased to act as Employer's Representative with the Border & Immigration Agency in relation to the Licensing Application, issuing of Sponsorship Certificates, and subsequent applications for entry clearance.
- (a) A UK employer wishing to obtain a Licence from the Border & Immigration Agency will need to make an application electronically completing the application form. The prospective sponsor will need to provide specified information in relation to the Company, which will vary depending on the nature of the legal entity. If the application is successful, the Licence will be granted for an initial period of 4 years unless withdrawn by the Border & Immigration Agency, and is expected to cost approximately £1,500. Companies will have a choice of applying for a single Licence to cover all their work sites, or multiple Licences. When applying for a Licence, an employer will be asked to give an indication as to the likely number of Sponsorship Certificates it will issue on an annual basis. As yet, no information has been issued as to the cost to obtain and issue a Sponsorship Certificate.
 - (b) The Border & Immigration Agency will have the power to refuse Licence applications so great care must be taken when applying as without the Licence the sponsor will not be able to issue a Certificate of Sponsorship. Without a Licence, not only will a sponsor not be able to employ foreign non-EEA nationals who do not qualify for Tier 1, but the rights of existing work permit holders to continue employment with the Company will be terminated.
 - (c) If the sponsor is granted a Licence, it will be granted either an A or B status. Most sponsors will be granted A-rating for most of the time and this will make the process easier for them to bring non-EEA nationals into the UK. A sponsor will become B-rated if he fails to comply with any of its duties and obligations under the PBS and will be required to comply with a time-limited plan to regain an A-rating. Repeat offenders will find their sponsorship Licences ultimately withdrawn.
 - (d) Sponsorship Certificates will be issued in the form of an electronic number issued by the Border & Immigration Agency.

4. **Duties and obligations of the sponsor**

(a) **Complying with the PBS system**

In order to issue a Sponsorship Certificate, a UK employer will be required to confirm that the position offered to the foreign national is at least NVQ level 3 or above, and that the foreign national passes the Tier 2 points test. Details of this points test have not yet been published. However the requirements are likely to be similar to the current Work Permit requirements with some important changes. There is likely to be an English language test requirement equivalent to IELTS Band 5.5. For positions with salaries above £40,000 per annum there will be no requirement to carry out a resident labour test. For all other cases where a resident labour test is required under the present Work Permit scheme, it will still be required, and it will become the obligation of the employer to prove if required that the test has been carried out satisfactorily and that there were no suitable resident worker candidates.

It is clear that this whole self-certification process is potentially fraught with problems, particularly with position on the border of NVQ level 3, and in relation to the resident labour test. Employers will need to use extreme care, bearing in mind that the licence can be lost in the event of serious breach.

(b) **Duties and obligations prior to and during employment**

The sponsor is also responsible for a number of significant duties and obligations prior to and during the employment of non-EEA nationals.

Record Keeping

Each sponsor will be required to keep copies of each migrant's passport or UK immigration status document showing evidence of their entitlement to work in the UK. They must also keep the migrant's contact details and be in a position to cooperate with the Border & Immigration Agency providing documentation they consider relevant, such as evidence of the sponsor's recruitment practices. It is also important to note that from 2008 non-EEA migrants will be required to hold UK biometric identity cards and copies of these will have to be kept by the sponsor.

Reporting Duties

Sponsors must report to the Border & Immigration Agency if the sponsored migrant does not turn up for work, or if he is absent for more than 10 working days without reasonable permission, if the sponsor stops sponsoring the migrant, or if there are any significant changes in the migrant's or sponsor's circumstances e.g. change of job or change of salary other than annual salary increase. In addition, there is a duty to report if the sponsor suspects that the migrant is breaching his conditions of leave. In addition, at all times the sponsor must ensure that the migrant is lawfully able to work in the UK. These checks must be carried out at least once every 12 month period and prior to the commencement of employment.

Failure to comply with these duties and obligations will not only put the sponsor's ability to issue Certificates of Sponsorship at risk, but will also open the sponsor up to possible civil and criminal action, including a maximum fine of £10,000 per illegal worker. Compliance is therefore imperative under the PBS, and indeed if there is full compliance then the sponsor has a statutory defence against civil and criminal action if, despite his best endeavours, he employs an illegal worker.

5. **Applications for entry clearance** Under the PBS system, a completely new procedure will be introduced for prospective employees to obtain entry clearances to the UK. Following the issuing of a Sponsorship Certificate by the prospective employer, the prospective employee will need to apply for entry clearance to the nearest British Consulate or High Commission in their country of residence or origin.

It is at this stage that all background checks will be made into the application e.g. verifying academic and work references. It is not clear yet as to whether, at this stage, the British Consulate officials will investigate in any way the issue of the Sponsorship Certificate e.g. to check whether in their opinion the position is at NVQ Level 3, or to ask for details of the resident labour test. It is likely that some checks on this aspect will be made at this stage, primarily in relation to the level of the job offered. Once the British Consulate is satisfied with everything, the entry clearance will be granted and the individual will be able to travel to the UK to commence employment.

It appears that the British Government has concluded that British Consulates and High Commissions do not need additional resources to carry out the increased work that will be required to issue entry clearances. However, this does mean that applications to employ foreign nationals are likely to take longer than under the present Work Permit system.

In addition, no announcement has been made as yet as to the cost of applying for entry clearances.

6. **Summary.**

These changes represent the most substantial changes to UK immigration law for over 40 years. The PBS is a highly significant change from the current immigration system. The concept of 'sponsorship' means that great care must be taken by UK employers to ensure full compliance under the new system so that employers are able to efficiently and lawfully operate within the new legal structure.

Further information will be provided as it becomes available.

**For further advice and assistance please contact Graeme Kirk [gdk@gross.co.uk],
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