



MKRG Newsletter

German Immigration Law News

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I. Employer has to bear the costs for the deportation of an illegally employed alien

In accordance with a recent decision of the Higher Administrative Court Rhineland-Palatine, the employer has to bear the costs arising out of the deportation procedure of the alien he employed illegally.

During a control by the Employment Office a Kosovo Albanian was caught performing kitchen work. Several weeks before he, who was obligated to leave the country, absconded in order to avoid repatriation. He was held in custody to secure deportation and deported to Pristina by plane. The costs arisen for the transportation in the amount of DM 1,548.11 (€ 791.54) and the costs for the custody in the amount of DM 3,024.00 (€ 1,546.15) were enforced against the plaintiff by the public authority responsible for aliens.

It is said that an employer who employs an alien without work permit, has to bear the costs for the deportation of the alien. He could not argue a deportation would have been necessary anyway, regardless of the illegal employment, as the alien has not been willing to leave the country voluntarily already before. For the liability of the employer it shall be sufficient that he made possible an illegal employment and therewith supported the continuance of the illegal residence. This is the only way to meet the purpose of such liability, i.e. to protect the employment market and to avoid the illegal employment of foreign employees.

Higher Administrative Court Rhineland-Palatinate, Ref.: 7 A 10817/05.
(Press release dated May 10, 2006)

II. Work permit for residents of third countries being related by marriage

With the judgment dated March 30, 2006 the European Court of Justice stated its position to the question whether a spouse of an EU national who is residing in a third country shall have free access to the employment market of the European Union. According to this judgment which was given during a preliminary ruling procedure, the spouse of an EU national shall be free to access the employment market as long as husband and wife are working in the same member state.

In the case this decision is based on, a Yugoslavian national, who was married to a Luxembourg and applied for a work permit to be able to take up an employment in Luxembourg. The wife of the applicant was doing a professional training and an internship in Belgium. After the Luxembourg Department of Labour refused to grant the respective work permit, the case was, with respect to the Community Regulation No. 161/68, presented in an administrative court proceeding before the European Court of Justice. According to Clause 11 of this Regulation the spouse of an EU national who performs work dependently or independently is entitled to practice any profession in the territory of this member state.

Irrespective of, whether the practical training of the wife is regarded as an occupation in the sense of Clause 11 Regulation no. 1612/68 the European Court of Justice stipulates that the right to access the employment market may only be derived from the occupation of the spouse if he performs his work in the respective member state. The gainful employment of the EU national and his/her spouse residing in a non-European country, must take place in the same member state. But in this case, this was definitely not applicable as the wife performed her practical training in Belgium while her husband wanted to work in Luxembourg. The refusal of the work permit has also been made on the basis of regulation 1612/68 and justifiably so.

III. Contract drafting: Analogy of the limitation of work permit and contract of employment

Against the background that the residence title for the performance of work is regularly granted for a limited period of time the question comes up how this affects the conclusion of contracts of employment. Therefore the conclusion of contracts of employment for an indefinite period is indeed problematically.

In case a work permit is not granted, a person-related dismissal would be possible, see judgement of the Federal Labour Court dated February 7, 1990 - Ref.: 2 AZR 359/89 -, AP No. 14 of § 1 Protection against Dismissal Act 1969 Person-related dismissal. However, this opinion is not entirely without controversy, see e.g. Higher Labour Court Hamm, judgment of February 9, 1999 - Ref.: 6 Sa 1700/98 -, NZA-RR 1999, 240, on the one hand and judgment of June 25, 1998, Ref.: 6 Sa 1/98, NZA-RR 1998, 492 given by the Higher Labour Court LAG Baden-Württemberg on the other hand. Against this background, in case of an unlimited

contract of employment a person-related dismissal should be made in due time prior to the expiry of the last possible period of notice, whereby the employment relationship may be taken up again at a later date after the work permit has been granted. Out of the guidelines of the Higher Labour Court Hamm quoted subsequently, it is not predictable whether such work permit is applicable:

1. If a new work permit is not granted the continuity of the employment relationship with an employee being engaged for an indefinite period of time is not affected thereby. A routine dismissal however is socially justified for person-related reasons as the employee will not be able to fulfil his contractual obligations in the long run.
2. A dismissal is justified also if no final court decision was made on the new work permit if, at the time of the announcement of dismissal, it can not be expected under objective evaluation that a work permit will be granted within a short period of time and the employer is not expected to reserve this job for the employee.
3. In this situation, it is neither contravene the principles of good faith nor offending against the principles of § 162 German Civil Code if the employer explains to the employment office that he is no longer interested in the continuation of the employment relationship with this employee and asks for the placement of another person who is privileged to be considered first.

An effectual alternative is the limitation of the duration of the contract of employment in compliance with the period of validity of the work permit. This is easily possible as the time limitation of the contract of employment is accepted due to the limitation of the work permit. Such a clause could be drafted as follows:

“The employee shall commence his/her work in the function of a [function] on [date] if by this date the residence title permitting gainful employment has been submitted to the employer; the employment relationship shall be limited to the term of this work permit, respectively to two years in case the validity of the permit exceeds the time of two years.”

IV. Case Study

A Czech national shall be assigned by his employer, an US multinational having a subsidiary in Germany, to the German operation for a period of 6 months; he would like to be accompanied by his wife; if possible she would like to work too. Please find set out hereafter in a very briefly manner what has to be done:

1. The husband

In principal, as a national of one of the member states the husband is entitled to any rights applicable to him out of the EU regulations. He is therefore entitled to enter Germany without having to apply for a visa firstly; further he is entitled to reside in Germany. However, he 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 foreign 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.

However, there are some transitory regulations with respect to the right to work, according to which each and every member state is entitled to opt out from the full application of the freedom of EU nationals to move and work for a certain period of time. 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. Basically, these nationals are not entitled to work in Germany unless they have an authorisation to do so (= work permit), unless otherwise agreed upon in a bilateral agreement.

As to the prerequisites to get such a work permit there are of course ways to get smoothly through the application process; however it would first of all have to be checked what the employee would be doing in Germany. Basically, it would be possible to get a work permit if nobody else from the German and the European market would be in a position to fit the job description. As a national from one of the accession states he will have to be taken into account on a privileged basis compared to non-EU nationals. It would therefore be necessary to make an job advertisement for a certain period of time before you can get the work permit. The whole application is likely to take between 4 - 8 weeks once the application package is complete. Usually, the following information would be required:

- curriculum vitae
- copy of the identification card / passport
- document of apprenticeship / profession
- information on the announced employment, especially description of the job
- information on the spouse and children, if necessary
- job description
- offer of employment

2. The wife

As a matter of visa & immigration law, the situation of the wife, first of all, is dependent on the prospects of success of his application of course. According to German immigration & residence law, she would also be entitled to enter Germany and reside in Germany without having to apply for a visa beforehand. Further, as a non-EU national she will be granted a so-called Certificate of Residency Right for non-EU nationals ("Aufenthaltserlaubnis-EU"). It goes without saying that the employee's wife should also make sure to have her passport with her all the time. However, it should be checked whether or not there are any bilateral agreements between the Federal Republic of Germany and the US granting her an even better standing.

Finally, regarding the chances to get a work permit for her, here again it should be checked what kind of job she would be doing. Other than her husband, she will not be privileged compared to other non-EU nationals.

Any more questions with regard to German immigration & labour law ? Do not hesitate to contact us:

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