

Points Based System for Home Affairs Committee 20 July 2010

Immigration Law Practitioners' Association

The Points Based System condensed many different routes for people to come to the UK to work and study into five Tiers. Criteria are introduced for which applicants score points – the aim was to ensure that less was left to the judgement of immigration officers and Entry Clearance Officers than previously. A significant feature of the system is the notion of registered sponsors for most Points-Based System migrants. Sponsors – either employers or educational institutions – risk losing their capacity to sponsor future migrants if they failed to comply with extensive Home Office requirements for monitoring and reporting.

The five tiers are as follows:

- **Tier 1:** Highly skilled individuals who do not require sponsors, broken down into subcategories: General, Entrepreneurs, Investors, and Post-Study.
- **Tier 2:** Skilled workers with a job offer and a sponsor, broken into subcategories: general, intra-company transfers, ministers of religion, sportspeople
- **Tier 3:** Low skilled workers to fill specific temporary labour shortages. The Home Office has said that it has no plans to implement Tier 3.
- **Tier 4:** Students.
- **Tier 5:** Youth mobility and temporary workers: people coming to the UK for a temporary period.

The number of points required and the rules applying to the categories change frequently. Sometimes (not always) the changes are accompanied by transitional provisions to protect those who came to the UK under the old rules when it comes to applying for extensions.

Sponsorship

UK employers and other sponsors must apply for a licence to employ migrant workers or to offer educational courses under tiers 2, 4 and 5 of the points-based system, and in so doing agree to meet a number of sponsorship duties. Sponsors must apply to join the register of sponsors. If awarded a licence, they are then added to the register of sponsors, and can issue certificates of sponsorship, or in the case of education institutions sponsoring students Confirmation of Acceptance of Studies.

Sponsors must comply with certain duties, including a duty to inform the Home Office if migrants do not turn up for their job or course, or if they are absent without permission for a significant period. Sponsors must also keep records of the migrants they have sponsored, including contact details and supply them to the Home Office on request. The Home Office monitors sponsors' behaviour and compliance with their duties once they are licensed and can suspend or revoke a licence if not satisfied that the sponsor is carrying out his/her duties.

Documentary evidence and Home Office guidance

One of the features of the new Points-Based System is that the immigration rules set out the criteria governing whether an application will succeed, but the rules also specify that evidence specified in Home Office guidance must be submitted in order to satisfy the Home Office that the relevant criteria are met. Unlike the immigration rules, guidance is not laid before parliament and this is therefore controversial. The division between rules and guidance has very recently been the subject of successful challenge in *Pankina v SSHD* [2010]

EWCA Civ 719 and the High Court in *R (English UK) v SSHD* [2010] EWHC 1726. Guidance on how the Home Office will follow these judgments is awaited. The Home Office wants to appeal *Pankina* to the Supreme Court.

The requirements are extremely precise, and it is not hard to imagine what would otherwise be considered perfectly satisfactory evidence not meeting the requirements. Unsurprisingly, the strict and inflexible nature of these rules does lead to many refusals based entirely on submission of incorrect paperwork.

Tier 1: highly skilled

Tier 1, the highly skilled tier, embraces the following. All subcategories follow a similar pattern to Tier 1 (General):

- **General:** for migrants who wish to find highly skilled employment in the UK. Applicants do not need a job offer or detailed business plan to apply for Tier 1 (General) - highly skilled worker. On application they will be awarded points based on previous earnings (subject to a multiplier based on country of origin), United Kingdom experience, age, English language, and available maintenance (funds). **This group are subject to the interim cap from 19 July 2010.**
- **Entrepreneurs:** for those investing in the UK by setting up or taking over, and being actively involved in the running of, a business. Not really 'points-based' in practice as all criteria are mandatory.
- **Investors:** for high net worth individuals making a substantial financial investment in the UK.
- **Post-Study Work:** enables graduates of UK universities to apply to remain in the UK to work for up to two years. For many, this will make a later Tier 1 or Tier 2 application feasible if desired (because at the time they finish their studies, they are unlikely to have the funds to apply under Tier 1 or Tier 2). A person can only apply in this category once.

No recourse to public funds is permitted. Dependants can come with the migrant and can work. This is a route that can lead to settlement.

Tier 2: skilled workers

Allows employers to recruit individuals from outside the United Kingdom and European Economic Area (EEA) to fill a particular job that cannot be filled by a British or EEA worker. This category is a route that can lead to settlement. Tier 2 is broken down into the following four subcategories. All subcategories follow a similar pattern as that for Tier 1 General:

- (i) **Tier 2 (General):** enables employers to recruit foreign workers, subject to conditions including having attempted to recruit in the UK and having failed to do so (the Resident Labour market test) or recruiting for specified (and specific) shortage occupations. To be eligible for this category a migrant must have a job offer; certificate of sponsorship from a licensed sponsor; and points for attributes (sponsorship, qualifications and prospective earnings), English language skills and maintenance. **Subject to the interim cap from 19 July 2010 – achieved by limiting the numbers of certificates of sponsorship.**
- **Tier 2 (Intra-Company Transfer):** this category enables international companies to transfer an employee from another country to the UK in certain circumstances without having to attempt to recruit an alternative. Subdivided into three depending on length of stay – with different requirements as to length of prior employment with the company.
- **Tier 2 (Sportsperson):** this category applies specifically to sportspersons coming to work in the UK.
- **Tier 2 (Entertainer):** this category applies specifically to entertainers coming to the UK.
- **Tier 2 Ministers of religion** For Ministers of different religious faiths.

No recourse to public funds is permitted. Dependants can come with the migrant and can work. This is a route that can lead to settlement.

Tier 3 Low skilled migration

This Tier is for low-skilled migration. It is an empty set as the current intention is that 'low-skilled' vacancies are filled by migrants from the European Economic Area.

Tier 4: students

Again the scheme is not properly one that can in fact be described as 'points based'. The fiction of points is maintained, but the reality is that there are inflexible requirements that must be met. There are two types of student visa under Tier 4:

- **General students.** Points scored for confirmation of acceptance for studies, funds and maintenance. There are no points for English language but the UK Border Agency imposes minimum standards on the sponsor. A change to the minimum requirement has recently been the subject of a successful challenge in *R (English UK) v SSHD* [2010] EWHC 1726 .
- **Child students** Points scored for confirmation of acceptance for studies, funds and maintenance. For children going to private schools.

Student visitors and prospective students are dealt with outside Tier 4.

Students can work for 20 hours a week (10 if studying below degree level, not on a foundation course). No recourse to public funds is permitted. Partners and children can accompany the student and partners can work. This is not a route that leads to settlement, although it may be a gateway to Tier 1 (Post-Study) work.

The sponsor is the education provider in the UK that has accepted the student on a course of study. Sponsoring education providers issue would-be students with a Confirmation of Acceptance for Studies (CAS). Would-be students cannot apply for a visa without a Confirmation of Acceptance for Studies. Education providers cannot issue a Confirmation of Acceptance for Studies without being licensed by the Home Office. To get a licence, all education providers need to show they are inspected or audited or hold valid accreditation with one of the UK Border Agency approved accreditation bodies. If an educational provider fails in their application for a Sponsor Licence or has their Licence revoked they cannot bring in international students. Should significant numbers of students drop out or fail to enrol with a particular education provider, this will raise concerns about the sponsor's recruitment processes and their overall suitability as a licence holder and this could result in the loss of the licence to sponsor students. Only 'Highly Trusted Sponsors' can sponsor students for courses below degree level that involve a work placement.

There are a number of general restrictions on applying under Tier 4 (General). These include provisions for courses that are considered security-sensitive, for students in receipt of sponsorship from their home government and for post-graduate doctors and dentists.

Tier 5

This part of the Points-Based System collected together and replaced a range of schemes and programmes that formerly existed both inside and outside the immigration rules, most notably the working holiday maker scheme. Entry clearance is mandatory under Tier 5. It is divided into two main groups

- **youth mobility**
- **temporary workers**

Youth mobility

Open only to nationals of Australia, Canada, Japan, New Zealand and Monaco and British Overseas Citizens, British Overseas Territories Citizens or British Nationals (Overseas) aged 18 to 31.

Entry clearance is mandatory and there is no facility to extend leave or switch in the UK from another category of leave into Tier 5 (Youth Mobility). People can only come to the UK once in this category. Leave lasts two years. Applicants must demonstrate that they have sufficient funds. They have no recourse to public funds. No dependants can come with them (although this does not prohibit a dependant coming at the same time under his/her own steam).

Temporary workers

Entry clearance is required (save for non-visa nationals sponsored under the creative and sporting part of the scheme for three months maximum and certain former work permit holders). There are maintenance requirements and there is no recourse to public funds. Stay is time limited, there is no route to settlement nor provision for extensions (save one very specific provisions, one for academic researchers and one for footballers).

The principle requirement for Tier 5 (Temporary Worker) is the obtaining of a Certificate of Sponsorship. Under each of the different temporary worker categories different types of sponsor are identified. Unlike Tier 2, the sponsor need not necessarily be the migrant's employer as such. However, the sponsor must apply to join the register of sponsors and must therefore comply with the UK Border Agency requirements to join the register.

Categories are

- **Creative** (24 months max, sponsor e.g. national body, event organiser, producer, venue, agent) and sporting (12 months max, sponsors e.g. sporting body, sports club, events organiser)
- **Charity worker** (12 months max, voluntary work only. Dependants can come and can work)
- **Religious worker** (maximum 24 months. Sponsors are *bona fide* religious institutions. This is defined. Dependants can come, and can work). Applies only to certain work within an order or for work directed by the order, otherwise see Tier 2.
- **Government authorised exchange** (max 24 months. For people coming to the United Kingdom through approved schemes that aim to share knowledge, experience and best practice. This category must not be used to fill job vacancies or to bring unskilled labour to the United Kingdom. Sponsors are 'overarching bodies with the support of UK government departments/their executive agencies. The exception is where an educational institution is licenced to bring in sponsored researchers)
- **International agreement** (maximum 24 months, with possible extensions in some subcategories to 72 months. List of approved sponsors) migrants who are coming to the United Kingdom under contract to provide a service that is covered under international law, including the General Agreement on Trade in Services (GATS) and similar bilateral agreements; private servants in diplomatic households.

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