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57

Due to Brexit stricter requirements apply to the grant of work permits for newly employed citizens of and cross-border service providers from the United Kingdom as of 1 January 2021

Hence, the start of employment for British citizens and the provision of cross-border services by British businesses in Switzerland need to be duly planned in advance.

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Newly employed British citizens qualify as third-country citizens from now on



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Since the United Kingdom (UK) left the European Union (EU) the Agreement on the Freedom of Movement (AFMP) ceased to apply to the UK. Under the AFMP, employed British citizens could take up employment under simplified requirements in Switzerland until recently. As of 1 January 2021, they now must generally fulfil the stricter requirements of the Swiss Foreign Nationals and Integration Act (FNIA).

Background

On 31 January 2020, the UK's long exit process from the EU ended with the conclusion of a withdrawal agreement. To negotiate their long-term relationship, the EU and the UK agreed on a transition period until 31 December 2020. During said transition period all EU agreements, particularly the AFMP, preliminarily continued to apply to the UK. Thus, the AFMP also remained in force between the UK and Switzerland. By the end of 2020, the EU and the UK finally concluded a trade and cooperation agreement.

Hence, the UK is now no longer part of the EU. The UK and Switzerland concluded various bilateral agreements to define their relationship. Particularly, they concluded the Agreement on Citizens' Rights (ACR), which protects the rights (incl. residence titles) obtained under the AFMP. Further, the UK and Switzerland concluded the Services Mobility Agreement (SMA), which governs the short-term provision of cross-border services by UK-based businesses. The SMA has been preliminarily valid since 1 January 2021 and has been temporarily concluded for two years. On 21 December 2020, nevertheless, the UK and Switzerland declared their intentions to examine further cooperation possibilities concerning the immigration area.

General remarks regarding the start of employment by British citizens in Switzerland

Although the UK left the EU on 31 January 2020, newly employed British citizens still benefited from the simplifications under the AFMP until 31 December 2020. Any respective residence rights obtained by British citizens until the end of 2020 are principally (still) protected by the ACR. As of 1 January 2021, however, British citizens qualify as third-country citizens. Consequently, taking up employment is now governed by the FNIA. Thus, British citizens lost their general claim to a residence title and now must apply for a residence permit in advance. Nonetheless, British citizens require no visa for a stay without employment for up to 90 days within 180 days.

For 2021 the Swiss Federal Council granted totally 3,500 quotas for employed UK citizens. The cantons may issue 2,100 residence permits (permit B: stay of more than one year) and 1,400 short-term residence permits in total (permit L: stay of less than one year). These quotas will be allocated quarterly to the cantons (B: 525 per quarter; L: 350 per quarter). Further, these quotas do not apply to short-term residence permits in case British citizens take up employment for at

most four months within 12 months in Switzerland, as long as 1) the duration and purpose of the stay are determined beforehand and 2) the number of temporarily hired foreign nationals only exceeds 25% of the entire workforce of the (Swiss) business in exceptional cases.

Employment (local employment relationship)

As of 1 January 2021, a Swiss employer may hire a British citizen if generally the following customary admission criteria of the FNIA concerning third-country citizens are cumulatively fulfilled:

- The admission of the British citizen to the Swiss labour market lies in Switzerland's macroeconomic interest
- The quotas have not been exhausted
- No other suitable candidate with priority for the job is present on the Swiss and EU/EFTA labour market (so-called 'national priority')
- Any possible prior job notification duty has been observed¹
- The salary and employment conditions customary for the location, profession and sector have been met
- The British citizen is a highly qualified worker, such as a manager or specialist (personal requirement)
- The British citizen has suitable accommodation

With respect to the macroeconomic interest, the respective labour market situation, the sustainable development of the economy and the integration ability² of the British citizen are particularly considered. The job notification duty concerns professions, fields of activity and industries in which the nationwide unemployment rate amounts to 5% or more. With respect to national priority, a Swiss employer must credibly demonstrate genuine search efforts in terms of

time, geography and content to hire a Swiss or EU/EFTA citizen for the respective position. In doing so, profession and industry-specific recruiting channels must be used. Further, a list regarding all candidates shall be kept. The national priority requirement is notoriously hard to meet since the authorities often consider rejected candidates suitable or deem the search efforts insufficient. Hence, even after conducting this lengthy process, a rejection of the application for a residence permit is possible. Potential British employees and potential Swiss employers (as applicants) now face these hurdles. Nonetheless, internationally active companies may examine an intra-group transfer of management employees or indispensable specialists, which in exceptional cases may exempt applicants from observing national priority.

Self-employment (own business)

As of 1 January 2021, British citizens who wish to take up self-employment in Switzerland must principally cumulatively fulfil the following customary admission criteria of the FNIA:

- The admission of the British citizen to the Swiss labour market lies in Switzerland's macroeconomic interest
- The quotas have not been exhausted
- The necessary financial and operational requirements regarding the respective activity are fulfilled and there is a sufficient and independent livelihood
- The British citizen is a highly qualified worker, such as a manager or specialist (personal requirement)
- The British citizen has suitable accommodation

A macroeconomic interest may exist if there is a strong demand and no excessive supply for the offered service

or product, jobs are created or investments are made. Typically, a business plan (incl. financial plan) must be presented. Further, in addition to sufficient starting capital, an appropriate business organisation, in particular business premises, must be present. However, proving the macroeconomic interest is often quite hard in practice since there is often no strong demand, but rather an excessive supply – especially in the financial industry. Nevertheless, it remains a case-by-case assessment. Ideally, the demand should be documented with correspondence, relationships and contracts with potential clients. Further, the establishment of a firm and the lease of appropriate business premises seems indispensable. Consequently, British citizens must now prepare thoroughly before a respective permit application may be filed.

Provision of cross-border services from the UK to Switzerland (secondment)

A secondment exists if a UK-based business posts its employees for a limited amount of time to Switzerland, for work or to provide services in its name and on its account. A typical example is a UK-based IT firm that implements a software with its employees at a Swiss business (on-site) under a service agreement. In addition, a secondment exists if self-employed individuals and British citizens, respectively based in the UK work or provide services in their own name and on their own account in Switzerland.

Based on the SMA cross-border service providers from the UK may, as under the AFMP, generally provide services in Switzerland for up to 90 days per calendar year by using the (online) notification procedure for up to 90 days per calendar year. Therefore, they generally do not need a permit. These 90 days count per employer and per posted worker (employee or self-employed individual).

Third-country citizens and EU/EFTA citizens who are posted for cross-border service provisions from the UK to Switzerland may only use the notification procedure if they have been admitted to UK's labour market for at least 12 months prior to the secondment. Additionally, the activity of the posted employee or self-employed service provider must generally only be reported when it exceeds eight days in total per calendar year.³ For cross-border service provisions exceeding 90 days per calendar year, the provisions of the FNIA apply. Accordingly, such longer secondments require a permit, as for all other EU/EFTA countries. Further, the set quotas for employed British citizens only apply to activities of service providers exceeding 120 days (short-term residence permit, L). Hence, the special 120-day permit may be a valuable option since no quota applies and an additional 30 days may be granted.

Regardless of the duration of the cross-border service provision, the salary and employment conditions customary for the respective location, profession and sector need to be observed. Thus, service providers from the UK may potentially need to be granted additional entitlements while on secondment. It is advisable for UK-based employers to conclude a secondment agreement (incl. the new salary and employment conditions) with their employees and obtain a confirmation regarding the applicable social security system from the UK. British citizens in Switzerland need to carry these documents with them at all times.

Conclusion and outlook

While the cross-border service provision preliminarily follows the old system of the AFMP (notification procedure or permit), British citizens now must generally overcome the admission criteria of the FNIA for taking up employment in Switzerland. Consequently, British citizens must now comply with the

formal (permit) procedures in Switzerland, for which sufficient preparation time must be calculated. Additionally, the processing time of the authorities, which may amount to a few weeks, must be considered.

The Swiss Federal Council created a substantial number of separate quotas for employed British citizens for 2021 (third-country citizens in total: 8,500 (local hire) + 3,500 (secondment) and for the UK: 3,500), which may indicate a simplified admission. This is also supported by the fact that the issuance of the permits for British citizens lies in the competence of the cantons.

Finally, it remains to be seen whether any new agreements or modalities are enacted in the future. In particular, the SMA expires by the end of 2022. Further, it is possible that the separate UK quotas are integrated into the total third-country citizen quotas for 2022.

Employment News reports on current issues and recent developments in Swiss labor law. These comments are not intended to provide legal advice. Before taking action or relying on the comments and the information given, addressees of this Newsletter should seek specific advice on the matters which concern them.

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Endnotes

1 Please see: https://www.walderwyss.com/user-assets/publications/EmploymentNews-54_E.pdf.

2 Please see: https://www.walderwyss.com/user-assets/publications/EmploymentNews-42_english.pdf.

3 For further information please see: https://www.sem.admin.ch/sem/de/home/themen/fza_schweiz-eu-efta/meldeverfahren.html.

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