

## Immigration, Asylum and Nationality Act 2006

**These are interim guidelines to ensure that the Council is complying with the law. They will be divided into a policy and guidelines and will be put into plain English shortly.**

On 29 th February 2008, the Immigration, Asylum and Nationality Act 2006 replaced the Asylum and Immigration Act 1996.

The aim of the new act is to make it easier for employers to ensure their employees are legal workers and more difficult for illegal workers to remain in employment in the UK. The act also strengthens the powers of the (BIA) Border and Immigration Agency to take enforcement.

On February 29 th 2008 the Government introduced a new point-based immigration system. This system will be phased in over a five year period, so subsequent amendments to these guidelines may be necessary.

The Council will still be liable for prosecution under the 1996 Act where the Council did not establish the statutory defence at the point of recruitment and employed illegal workers between 27 th January 1997 and 28 February 2008.

Recruiters need to take care that in applying the Immigration, Asylum and Nationality Act 2006 they do not contravene the Race Relations Act 1976 and the Human Rights Act 1998 as many people from minority ethnic groups live in the UK and are British citizens. You should not employ anyone on the basis of their claim to be British or if you think they appear to be British. There is no maximum level of compensation for unlawful racial discrimination. It is therefore the Council's policy to check documentation for every person offered a job at the Council. The Chair of the recruitment panel should agree with Human Resources who is doing this. In some circumstances it would be advisable for the Recruiting Manager to check the documentation. It is the Council's policy that no member of staff is allowed to start work until the appropriate evidence has been produced.

### The Offer of Employment

All offers of employment should be conditional on individuals satisfying the requirements of the Act. The offer letter should draw the individual's attention to the Information sheet for applicants and employees. In accordance with legislation and Home Office guidance this information sheet sets out in writing the procedures for requesting, checking, copying or retaining documents.

Once an offer of employment is made, the Recruiting Manager or their delegate needs to ensure that the potential employee has the right to work in the UK. **The evidence needs to be checked before employment commences and not on the day that the employee starts employment.** The Recruiting Manager should agree with Human Resources, who is the most appropriate person to check this evidence.

The term "delegate" used in the above paragraph refers to someone who was on the selection panel or who will work at the same location as the new employee. This responsibility must be commensurate with the delegates job role.

## **Prosecution under the Act**

Under Sections 15-25 of the 2006 Act the Council has a responsibility to prevent illegal working in the UK.

If the Council employs someone subject to immigration control who is not entitled to undertake the work in question the Council would be liable to pay a civil penalty of up to £10,000 per illegal worker. Section 15 of the 2006 Act may enable employers to establish an 'excuse' against liability for payment of a civil penalty for employing an illegal migrant if they have verified the stated evidence. In order to establish the excuse Recruiting Officers are required to check and copy certain original documents before the employee starts work for the Council. In all cases the excuse must be established before the employment begins.

If the Recruiting Officer knowingly employs a person who is not permitted to work, then the Council will not be entitled to 'the excuse' and would be prosecuted for knowingly employing an illegal worker. This offence carries the potential of an unlimited fine and or prison sentence of up to two years.

## **The process that needs to be followed to avoid prosecution**

### **Step 1**

The prospective employee must provide:

- One of the original documents alone, or two of the original documents in the specified combinations given in List A
- One of the original documents alone, or two of the original documents in the specified combinations given in list B.

Details of acceptable evidence can be viewed in appendix 1.

If the person provides evidence from list A, this will 'establish an excuse' for the duration of their employment.

If the person produces a document or documents from list B this indicates they only have limited leave to be in the UK. In these circumstances checks have to be repeated on that employee at least once every 12 months. These repeat checks are required to retain the excuse. These repeat checks need to continue to happen until the person provides specified documents, indicating that they can remain permanently in the UK from list A, or they leave employment with the Council. People who produce documentation from list B must not be employed beyond any specified expiry date, if this date is before the 12 month check. The Recruiting Manager or their delegate is responsible for putting processes in place to ensure that documentation is re-checked. The Manager can ask Human Resources to input this reminder into the Corporate Personnel System. It is the responsibility of the Human Resources Section to periodically run off reports and remind Managers of any employees that need their evidence re-checking. Human Resources need to forward plan and run reports in advance of expiry dates. If an employee transfers departments the Corporate Personnel system will be able to identify that the person's evidence needs re-checking as long as the Corporate Personnel system is kept up to date. Every Human Resources section is therefore required to periodically run off reports even though they may believe they have no employees who need evidence re-checking. If Human Resources run a report and an

employee who has transferred internally appears on the report it is Human Resources responsibility to inform the new Recruiting Manager of the requirement to re-check evidence.

For the purposes of the law, the specified steps to be taken by the Council when checking a document or document specified in list A and B are:

## **Step 2**

To establish 'the excuse' the Council is required to check the validity of the document and satisfy itself that the prospective or existing employee is the person named and this evidence allows the person to do the work in question. This process also needs to be applied to retain 'the excuse' when list B documents have been supplied as evidence.

In order to acquire 'the excuse', you must carry out the following specified steps when checking all of the documents.

Check any photographs contained in the documentation are consistent with the appearance of the employee or potential employee. The person checking the evidence needs to be certain that the person presenting the evidence is the person who attended for interview or is the person who will be attending for work. On this basis the Recruiting Manager will have to decide who should carry out this task. They may consult with Human Resources and decide whether it is appropriate for Human resources to verify this information.

The person checking the evidence should treat with suspicion any passport that is excessively damaged. Photographs should be examined closely for signs of damage to the laminate or for excessive glue. If the photograph appears to be excessively large there may be another photo underneath. There should also be an embossed strip embedded into the laminate, which will catch a portion of the photograph, so check there is no damage in this area. If the passport is from a foreign national, you can still follow the same general procedures.

Check the date of birth listed, where available, to ensure that they are consistent across documents and that you are satisfied that these correspond with the appearance of your prospective or current employee.

Check that the expiry dates of any limited leave to enter or remain in the UK have not passed.

Check any UK Government endorsements to see if the prospective or current employee is able to do the type of work you are offering. Comprehensive guidance on immigration stamps and endorsements can be viewed by visiting the website detailed at the bottom of this document. \* Further guidance is available at the Employers Helpline on 0845 010 6677.

The person checking the evidence on behalf of the Council must satisfy themselves that the documents belong to the holder and have not been tampered with.

All documentation must be checked in person in order to confirm identification. If the Council employs a worker and that person has presented us with forged documents the Council will have to pay a civil penalty if it is reasonably apparent that the documents are false.

If the prospective or current employee supplies two documents which have different names, you will need to ask them for a further document to explain the reason for this. The further document could be a marriage certificate, a divorce decree, a deed poll document or statutory declaration.

### **Step 3**

The person checking the evidence on behalf of the Council must make a copy of the relevant page or pages of the document, in a format which can not be subsequently altered, for example a photocopy or scan. If the documents are scanned it must be made using Write Once Read Many/Worm Media, for example on a non-rewritable disk, such as a CD-R.

For Passports and travel documents, a copy should be taken of the document's front cover and any page containing the holder's personal details. In particular you should copy any page that provides details of nationality, his or her photograph, date of Birth, signature, date of expiry or biometric details and any page containing Government endorsements which allows your prospective or current employee to do the type of work that the Council is offering.

The person checking the evidence should write "original seen" on the photocopy or scan of the documentation as well as sign and date it.

All other documents presented as evidence should be copied in their entirety.

A record of every document copied should be made.

The copies of these documents should be kept securely for the duration of the individual's employment and for a further two years after their employment ceases.

On each occasion that a follow up documentation check is undertaken, the person checking the evidence on behalf of the Council should repeat the specified steps highlighted above within the given time period and record the date that each subsequent check has been carried out.

### **Who can be employed?**

#### **1. EEA Nationals who can work without restriction**

In practice there will be only a very small group of people whom it will be an offence to employ. The following European Economic Area ( EEA) Nationals can work in the UK without restriction.

Austria, Belgium, Cyprus, Denmark, Finland, France, Germany, Greece, Iceland, Ireland, Italy, Liechtenstein, Luxemburg, Malta, Netherlands, Norway, Portugal, Spain, Sweden, UK.

In addition nationals from Switzerland can enter the UK without restrictions.

The above mentioned nationals should be able to provide documentation from List A. In addition, their immediate family members are also able to work freely in the UK whilst their EEA family member is legally residing and working here. However, you should still check their documents to demonstrate this entitlement.2. Accession State Workers or A8 Workers.

The following EEA Nationals have had the right to live and seek work in the UK since 1 st May 2004. Workers from these countries are referred to as " Accession State workers" or "A8" workers.

## **2. Accession State Workers or A8 Workers**

### **Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia and Slovenia.**

These potential employees must be checked for proof of their right to work in the UK in the normal way. However, they **must** also obtain a registration certificate from the Home Office. This scheme eliminated the need for a work permit, the scheme requires migrants to register their details upon finding a job on a national database. It also prevents them accessing Social Benefits for at least two years. Employers are allowed to employ these people for a month, whilst they obtain a registration certificate, however the person checking the evidence will need to see a registration certificate within one month of them commencing employment. It should be noted that continued employment after one month without a registration certificate is a criminal offence. There are some A8 workers who will be exempt from the requirement to register. If the potential employee states they are exempt you will need to see documentary evidence of their exemption. The person checking the evidence should check, copy and retain a copy to have an excuse under section 15 of the Act. Details of acceptable evidence can be found in the Border and Immigration Agency document "Comprehensive Guidance for Employers on preventing Illegal Working, which can be viewed by following the procedure listed under \*". It should be noted that those who have worked continuously in the UK for 12 months are automatically exempt. Any periods of unemployment should not have exceeded 30 days.

In order for A8 workers to obtain a registration certificate the Council will need to provide the potential employee with evidence of their employment such as a contract or offer letter.

The person needs to complete a registration application form which can be downloaded. See \*\* below for the procedure. The person must complete this as soon as they have been offered the job.

The Council must make a copy of the employee's completed registration application form before the employee sends it to the Border and Immigration Agency.

The Workers Registration team will send the council a copy of the registration certificate or a copy of the refusal letter. The Council is required to retain this copy on the employee's personal file.

The employee can check the progress of his/her registration application by telephoning the Worker's Registration Team on 0114 259 6262.

If the Council continues to employ a non-exempt unregistered national from one of the A8 countries for more than one month without retaining a copy of their registration application and the certificate of registration, the Council will have committed a criminal offence under the Act. If the Border Immigration Agency notifies the Council that an employee's application has been refused, it will be an offence for the Council to continue to employ that person.

## **3. A2 Workers**

The following EEA Nationals have been free to come to the UK since 1 st January 2007, but may be subject to worker authorization. Workers from these countries are referred to as "A2 workers"

## **Bulgaria and Romania.**

Worker authorization means that they are only able to work in the UK if they hold a valid accession worker document or if they are exempt from authorization. Exemptions are set in the comprehensive guidance for employers, which can be viewed by following the procedure listed under \*. It should be noted that those who have worked continuously in the UK for 12 months are automatically exempt. Any periods of unemployment should not have exceeded 30 days. The worker authorization will be in the form of a card or a certificate which will set out any conditions on their employment. These conditions must be followed.

It is necessary to take a copy of the relevant worker authorization document before the A2 worker starts working for the Council. You should otherwise take copies of documents that establish that the person is exempt from authorization.

If the Council employs any non-exempt A2 workers without authorization the Council will have committed an offence and will be liable to prosecution under the Act.

If the potential employee is entitled to work in the UK then the Council will still need to confirm that the person is a national from Bulgaria or Romania by asking them to produce their EEA national passport or national identity card. You must follow the 3 stage process highlighted earlier on in this document.

## **Non EEA Workers**

Non EEA Workers are those people from any other country, previously not detailed. These people are subject to immigration control, however it is not an offence to employ these people as long as their leave to enter or remain in the UK has not expired and these guidelines have been followed.

## **Lack of evidence**

If an individual is unable to provide acceptable evidence the Recruitment Manager should be consulted and the employee's commencement date initially deferred. If the Council is not satisfied that the conditions of the Act have been met, the offer of employment may need to be withdrawn.

There may be some people who have an outstanding application or appeal with the Border and Immigration Agency. In these situations the employer can check if the person is allowed to work by calling the Border and Immigration Agency Employers helpline (0845 010 6677). They can also verify whether holders of Application Registration cards and Certificates of Application are entitled to work.

If the Council uses the checking service the Council has a responsibility to inform the applicant that the Council is undertaking a check on them with the Border and Immigration Agency.

## **Post Employment Concern**

If a Council employee becomes concerned that an employee does not have the right to work in the UK then this must be discussed with the Recruitment Manager. If the Council is suspicious about someone's entitlement it is in the Council's interest to declare this to the Border and Immigration Agency. Any concerns should be reported on the Employers helpline on the number detailed in the section above.

## **TUPE Transfers**

If the Council acquires staff as a result of a Transfer of Undertakings (Protection of Employment) transfer the Council must undertake the appropriate document checks within 28 days following the date of transfer.

## **Conclusions**

Managers must follow these guidelines to avoid conviction under this act.

\* = [www.employingmigrantworkers.org.uk](http://www.employingmigrantworkers.org.uk), click on preventing illegal working and then click on the side box on the link, Guidance booklets for Employers.

\*\* = [www.ukba.homeoffice.gov.uk](http://www.ukba.homeoffice.gov.uk), click on working and then on worker registration scheme and then click on workers.

## **List of Specified Documents**

In accordance with the Immigration, Asylum and Nationality Act 2006 the prospective employee must provide one of the following documents in list A to show that they are permanently entitled to work in the UK.

If the potential employee produces evidence from list B then the evidence must be re-checked every 12 months.

## **Extract from the Act**

### **List A Documents which provide an 'Ongoing Excuse.'**

- A passport showing that the holder, or person named in the passport as the child of the holder, is a British citizen or a citizen of the United Kingdom and Colonies having the right of abode in the United Kingdom.
- A passport or national identity card showing that the holder, or a person named in the passport as the child of the holder, is a national of an EEA country, or Switzerland.
- A residence permit, registration certificate or document certifying or indicating permanent residence issued by the Home Office or the Border and Immigration Agency to a national of an EEA country or Switzerland.
- A permanent residence card issued by the Home Office or the Border and Immigration Agency to the family member of a national of and EEA county or Switzerland.
- A Biometric Immigration Document issued by the Border and Immigration Agency to the holder which indicates that the person named in it is allowed to stay indefinitely in the United Kingdom or has no time limit on their stay in the United Kingdom.
- A passport or other travel document endorsed to show that the holder is exempt from immigration control, is allowed to stay indefinitely in the United Kingdom, has the right of abode in the United Kingdom or has no time limit on their stay in the United Kingdom.
- An immigration status document issued by the Home Office or the Border and Immigration Agency to the holder with an endorsement indicating that the person named in it is allowed to stay indefinitely in the United Kingdom or has no time limit on their stay

in the United Kingdom **when produced in combination with** an official document giving the person's permanent National Insurance Number and their name issued by a Government Agency or a previous employer.\*

- A full birth certificate issued in the United Kingdom which includes the name(s) of at least one of the holder's parents, **when produced in combination with** an official document giving the person's permanent National Insurance number and their name issued by a previous Government Agency or a previous employer.\*
- A full adoption certificate issued in the United Kingdom which includes the name(s) of at least one of the holder's adoptive parents **when produced in combination with** an official document giving the person's permanent National Insurance Number and their name issued by a Government agency or a previous employer. \*
- A birth certificate issued in the Channel Islands, the Isle of Man or Ireland, **when produced in combination with** an official document giving the person's permanent National Insurance Number and their name issued by a Government agency or a previous employer. \*
- An adoption certificate issued in the Channel Islands, the Isle of Man or Ireland, **when produced in combination with** an official document giving the person's permanent National Insurance Number and their name issued by a Government agency or a previous employer. \*
- A certificate of registration or naturalisation as a British citizen **when produced in combination with** an official document giving the person's permanent National Insurance Number and their name issued by a Government agency or a previous employer.\*
- A letter issued by the Home Office or the Border and Immigration Agency to the holder which indicates that the person named in it is allowed to stay indefinitely in the United Kingdom **when produced in combination with** an official document giving the person's permanent National Insurance Number and their name issued by a Government agency or a previous employer.\*

#### **List B – Documents which provide an 'excuse' for up to 12 months**

- A passport or travel document endorsed to show that the holder is allowed to stay in the United Kingdom and is allowed to do the type of work in question, provided that it does not require the issue of a work permit.
- A biometric immigration document issued by the Border and Immigration Agency to the holder which indicates that the person named in it can stay in the United Kingdom and is allowed to do the work in question.
- A work permit or other approval to take employment issued by the Home Office or the Border and Immigration Agency **when produced in combination with** either a passport or another travel document endorsed to show that the holder is allowed to stay in the United Kingdom and is allowed to do the work in question, or a letter issued by the Home Office or the Border and Immigration Agency to the holder or the employer or prospective employer confirming the same.
- A certificate of application issued by the Home Office or the Border and Immigration Agency to or for a family member of a national of a European Economic Area country or



Switzerland stating that the holder is permitted to take employment which is less than 6 months old **when produced in combination with** evidence or verification by the Border and Immigration Agency Checking Service.

- A residence card or document issued by the Home Office or the Border and Immigration Agency to a family member of a national of a European Economic Area country or Switzerland.
- An Application Registration Card issued by the Home Office or the Border and Immigration Agency stating that the holder is permitted to take employment, **when produced in combination with** evidence of verification by the Border and Immigration Agency Employer Checking Service.
- An Immigration Status Document issued by the Home Office or the Border and Immigration agency to the holder with an endorsement indicating that the person named in it can stay in the United Kingdom, and is allowed to do the type of work in question, **when produced in combination with** an official document giving the person's permanent National Insurance number and their name issued by a Government Agency or a previous employer. \*
- A letter issued by the Home Office or the Border and Immigration Agency to the holder or employer or prospective employer, which indicates that the person named in it can stay in the United Kingdom and is allowed to do the work in question **when produced in combination with** an official document giving the person's National Insurance number and their name issued by a Government Agency or a previous employer. \*