

TO: Clients and Friends of the Firm
FR: Frishberg & Partners
RE: **New Ukrainian Work Permit Procedure for Foreigners**

On April 8, 2009, the Cabinet of Ministers of Ukraine passed Resolution No. 322 “On Approval of the Procedure of the Issuance, Extension and Annulment of Work Permits for Foreign Citizens and Stateless Persons” (hereinafter the Resolution), which will come into effect on May 14, 2009. This new Resolution has introduced several novelties that are worth mentioning, along with its most pertinent provisions.

I. Discussion

The Resolution now extends the tedious and time-consuming work permit procedure to a whole new category of foreigners; specifically, those foreigners sent to Ukraine as “internal corporate assignees” or “persons who provide services without a commercial presence in Ukraine” pursuant to the World Trade Organization’s General Agreement on the Trade of Services with Ukraine. Previously, foreign work permits were only required for foreigners hired by Ukrainian legal entities or foreigners sent to Ukraine to perform a specific volume of services under a contract between a Ukrainian party and a non-resident party.

Moreover, unless otherwise provided by an international agreement, Ukrainian employers may only obtain work permits for foreigners if (a) there is an absence of Ukrainian citizens capable of performing the required work or (b) there are substantiated grounds for the necessity to hire a foreigner. Thus, Ukrainian legal entities are required to exhaustively search the Ukrainian job market for capable Ukrainians before submitting an application for a work permit for a foreigner. In theory, such search should be done through a company’s monthly reporting of vacancies to the local Employment Center. In practice, a company has to report a vacancy to the Employment Center for the specific position to be occupied by a foreigner at least 1 to 2 months before submitting the application for the work permit.

II. Issuance of a Foreign Work Permit

Work permits are issued by the State Employment Center at the employer’s location on the basis of an application with supporting documents. Each local Employment Center creates a special

commission for reviewing work permit applications and issuing or refusing work permits (Work Permit Commission).

The Work Permit Commission usually meets twice per month and consists of representatives of the Ministry of Internal Affairs, the Security Service of Ukraine, the State Border Service and the State Tax Administration. Significantly, the members of the Work Permit Commission were not directly provided in the previous legislation. This means that the Ukrainian government is streamlining its efforts to coordinate the activities of these authorities and consolidate foreign immigration procedures.

Whereas in the past the above authorities were isolated in their separate functions, now it seems that they will work closely in verifying the immigration status of foreigners in Ukraine. For example, the Employment Center and the State Tax Administration will now be able to cross-reference each other to verify whether work permit holders are properly registered as tax residents, submit proper personal income tax returns, and have their taxes and social contributions duly withheld by their employers. This unprecedented coordination system has been long utilized by most civilized countries, including the United States.

Moreover, the Employment Center's issuance of a work permit will now determine the type of visa for which a work permit holder must apply. In the past, the Employment Center and the Ukrainian consular departments abroad did not coordinate with each other in this respect, and foreigners were able to apply for multiple entry business visas after the issuance of work permits. According to the new rules, the Employment Center will now send copies of all issued work permits to the Ukrainian consulate at the place of permanent residence of the recipients for purposes of executing IM-1 visas to such recipients. Thus, upon receipt of a work permit, a foreigner may only apply for IM-1 visas, which are single entry visas requiring registration with the local immigration authorities or "OVIR" (temporary residency certificates). Furthermore, it appears by the text of the new rules that foreigners who intend to work in Ukraine on the basis of a work permit will only be able to apply for visas in their home countries rather than at any Ukrainian consulate abroad. At present, foreigners are still able to apply for IM-1 visas at any Ukrainian consulate abroad. Therefore, it still remains to be seen how the authorities will monitor this situation.

III. Temporary Residency Certificate

Thus, with an IM-1 visa and work permit in hand, foreign employees of Ukrainian companies will be forced to register with OVIR within 90 days of their entrance in order to receive a temporary residency certificate. A temporary residency certificate will allow a foreigner to exit and enter the country for the duration of the work permit without having a multiple entry visa.

Additionally, it now seems that companies hiring foreign employees will no longer be able to avoid registration with OVIR – as they most often did in the past - as companies with authorization to employ foreigners. Like many other finely crafted Ukrainian resolutions, this one leaves some key questions open: for example, will OVIR refuse to register foreigners, who do not possess IM-1 visas and wish to overstay 90 days in Ukraine? Will the border control authorities have the proper internal instructions to control foreign work permit holders without IM-1 visas? If these issues remain unresolved, it may well result in “discretionary enforcement” on a case-by-case basis.

The Resolution also contains an amazingly extensive list of documents that must be submitted to the Employment Center to obtain a foreign work permit (please see Appendix A). The most glaring novelty in that list is the requirement to submit a police clearance certificate either from Ukraine or the foreigner’s last place of residence. While this is not difficult to do when a foreigner is in Ukraine, the procedure may be quite extensive and expensive if the foreigner is located in a country other than his or her domicile country. In addition, it is very difficult to understand how, from a purely practical viewpoint, the Ukrainian authorities plan to verify the authenticity and authority of such certificates issued abroad. Obviously, this requirement will require further clarification and elaboration by Ukrainian lawmakers.

IV. Internal Assignees and Persons without a Corporate Presence

In case a foreign assignee is sent to Ukraine to perform a specific assignment or provide a specific service under a contract between a Ukrainian entity and a non-resident, the employer must submit a copy of the relevant contract along with the work permit application. In this case, the employer will not be required to submit a draft employment contract or a Ukrainian police clearance certificate.

Likewise, for “internal corporate assignees” and “persons who provide services without a commercial presence in Ukraine”, an employment contract and the Ukrainian police clearance certificate do not need to be submitted with the work permit application. However, the following additional documents are required in such cases:

- 1) the decision of the foreign company to transfer the foreign employee for work in Ukraine;
- 2) a copy of the contract of the foreign employee with the foreign company regarding work transfer to Ukraine with an indication of the term of work in Ukraine;
- 3) a copy of the contract on the direct provision of services in Ukraine (for a foreigner, who belongs to the category of “persons who provide services without commercial presence in Ukraine”).

V. Document Preparation

All documents issued in a foreign country in its official language must be translated into Ukrainian, certified by a notary, and either certified by Apostille or legalized with the Ukrainian consulate in the country of origin. As Ukraine is a signatory to the 1961 Hague Convention Abolishing the Requirement of Legalization for Foreign Public Documents, Apostille stamps from most countries are accepted with the glaring exception of Germany, where the more cumbersome procedure of legalization with the Ukrainian consulate is required. Accordingly, if the issuing country is not a member of the 1961 Hague Convention, then legalization is applicable, unless otherwise provided by another international treaty.

In the past, certified translations of the above documents were accepted for work permit applications. However, with the additional requirement of notarization and certification by Apostille, the procedure of gathering documents abroad will become lengthier and costlier for the applicant.

The Work Permit Commission has 30 calendar days to review a work permit application (or application for extension) and issue its decision to the employer in writing once it receives the entire packet of documents in good order. Work permits are issued for a term of up to one year and must be extended at least one month before expiration. However, in case of “internal corporate assignees” and “persons who provide services without a commercial presence”, work permits are issued for a maximum term of three years with the possibility of extension for an additional term of up to two years. This application for extension must be filed at least one month prior to expiration.

VI. Refusal of Foreign Work Permit

Regardless of the labor market conditions and its developmental tendencies, a work permit will not be issued or extended in certain cases (please see Appendix B).

While some of these reasons for refusal seem quite standard, a few points are worth mentioning. First is the issue of salary conditions for foreigners. A strict reading of the Resolution leads one to believe that a foreigner’s salary must be comparable to a Ukrainian counterpart’s salary at the local level. Thus, a foreigner could conceivably be hired in Ukraine for a very low salary in comparison with salary levels for the same positions in other countries, especially the EU or the US. In light of this reality, in the past the Ukrainian tax authorities often refused (wrongly and without justification) to accept a foreigner’s salary that is at the same level as his/her Ukrainian colleagues, citing higher standard of living levels in other countries. This issue seems to be resolved by the Resolution and the tax authorities should have no reason to inquire how a foreigner can live on such a low salary level. Will this be the case in practice? Doubtful.

Second, the Employment Center will now be aware visa denials by Ukrainian consulates abroad and, more specifically, refusals to issue the coveted IM-1 visas. Thus, all visa and work permit applications must be prepared with extreme care and submitted in time to avoid refusals. Alternatively, a foreigner will have to wait one year from the date of a visa refusal to re-apply. Regrettably, our experience with procurement of work permits indicates that sometimes visa applications are refused for rather insignificant, subjective reasons. Hopefully, in light of such strict provisions, the Ukrainian authorities will be reasonable and fair in issuing refusals of visas and/or work permits or, in the very least, offer relaxed procedures for submitting additional documents and information not contained in initial work permit applications.

Finally, the last reason for refusal needs no deep analysis. In essence, it gives the Employment Center a wide range of authority to refuse work permits due to its extreme vagueness. Just what confirming documents or information is required to justify that the use of a foreigner's labor is not necessary "due to changes in the labor market of the country"? And, who will have the authority to determine that such changes dictate a need to refuse work permits to foreigners?

In addition to the increased expenses for executing the documents for work permit applications, the state fee for the consideration of work permit applications or prolongation applications has also significantly increased from 170 Ukrainian Hryvnias (UAH) to 2,500 UAH. And, further minor increases are expected as the year progresses to 2,520 UAH (from June 1, 2009), to 2,600 UAH (from October 1, 2009) to 2,676 UAH (from December 1, 2009). For comparison purposes, the state fee increased from 22 USD to 325 USD on May 14, 2009.

VII. Annulment

A work permit may be annulled by the Employment Center in the following cases:

- 1) premature termination of the foreigner's employment contract with the employer;
- 2) discovery of falsification of documents or the provision of false information in the work permit application documents (or extension applications);
- 3) early termination of a foreigner's temporary stay in Ukraine for legal reasons or due to such foreigner's deportation from Ukraine;
- 4) discovery that a foreigner's labor conditions are in contradiction to those indicated in the work permit or that a foreigner is employed by different employer.

VIII. Employer's Obligations

Once a foreigner commences work in Ukraine on the basis of a work permit, the employer must inform the Employment Center of this fact within three business days and handle the foreigner's registration with OVIR. The employer must also inform the Employment Center regarding the foreigner's OVIR registration within five business days. Once again, this new requirement to inform the Employment Center regarding successful OVIR registration did not exist in the past and exemplifies the government's efforts to bring all immigration-related authorities into one basket. Moreover, it gives the Employment Center an additional ability to monitor a foreigner's presence in Ukraine during the validity of his or her work permit.

The employer is also responsible for informing the Employment Center regarding the termination of the foreigner's employment within three business days of the date of such termination. Likewise, if a work permit is issued and the foreigner fails to work in breach of his or her employment contract at some point during his or her work permit's validity, then the employer must inform OVIR, the state border service and the Employment Center within three business days. In such case, the foreigner may be deported from Ukraine and the employer will be responsible for compensating the state for the expenses associated with such deportation.

Finally, the Resolution grants to the Employment Center the ability to conduct investigations of Ukrainian employers who use the labor of foreigners under work permits. Theoretically, these investigations are supposed to ensure that the employer provides the necessary residency and labor conditions for foreigners and that the employer effectively uses the labor of foreigners during the validity of their work permits. While the procedure and requirements for carrying out such investigations is still unclear, it is clear that the Employment Center has yet another tool to monitor foreigners and their employers.

IX. Conclusion

In conclusion, from a purely legal point of view, Resolution No. 322 clarifies and solidifies the immigration process for foreigners who are hired to work in Ukrainian legal entities. It has closed many of the loopholes used by companies to avoid OVIR registration, IM-1 visas, and other cumbersome procedures associated with immigration. It also has enabled the various authorities to coordinate their efforts in monitoring the legal stay and employment of foreigners in Ukraine. This advancement, from a practical point of view, however, may also serve to curtail the desire/ability of foreign specialists and business owners alike to live and work in Ukraine. The outcome will largely depend on a number of sub-legislative acts and internal instructions which hopefully will bring about the smooth implementation of these strict procedures.

APPENDIX A

LIST OF DOCUMENTS REQUIRED FOR A FOREIGN WORK PERMIT APPLICATION

- 1) an application in standard form;
- 2) two 3.5 x 4.5 cm color photographs;
- 3) substantiation of the necessity to hire a foreigner and the possibility to create for such person the corresponding conditions for residence and work;
- 4) the duly executed document (order, extract from minutes, proxy, etc.), which evidences the right of the person submitting the work permit application to represent the employer's interests before the Employment Center;
- 5) a certificate from the state tax body evidencing payment by the employer of taxes and duties (mandatory payments);
- 6) a certificate from the Employment Center evidencing the absence of debts before the Unemployment Fund;
- 7) a receipt evidencing payment of the application consideration fee;
- 8) a copy of the draft employment agreement (contract) certified by the employer;
- 9) a statement confirming that the workplace or position for which the work permit will be issued does not require Ukrainian citizenship and does not require the granting of access to state secrets. This statement must be affixed with the employer's official seal and signature;
- 10(a) a certificate from the internal affairs body evidencing the absence or existence of convictions of the foreigner, who is present on the territory of Ukraine on the date the work permit is executed ("Ukrainian police clearance certificate");
- 10(b) a certificate from the authorized body of the country of origin (stay) evidencing that the foreigner, who is located outside of Ukraine on the date the work permit is executed, is not serving a sentence for committing a crime and is not under investigation;
- 11) a copy of the charter and certificate of registration of the employer, certified pursuant to the established procedure;
- 12) a copy of the documents evidencing the foreigner's education and qualifications;
- 13) a copy of the identification page of the foreigner's passport.

APPENDIX B
REASONS FOR FOREIGN WORK PERMIT REFUSAL

- 1) the documents submitted in the work permit application contain information which conflicts with the requirements of legislation and international agreements of Ukraine;
- 2) the work conditions for the foreigner under the labor agreement (contract) provide for work conditions which are worse than those for Ukrainian citizens, who work in analogous work, *including salary conditions*;
- 3) the employer intends to hire a foreigner for work which requires Ukrainian citizenship or the granting of access to state secrets;
- 4) intentionally false information or false documents are submitted;
- 5) the foreigner is subject to deportation from Ukraine;
- 6) less than one year has passed since the date of the previous *refusal to issue an IM-1 visa* to the foreigner or the annulment of a prior permission;
- 7) the employer has a debt before the Unemployment Fund;
- 8) the foreigner is serving a prison sentence for committing a crime or is under investigation on the date the work permit is executed;
- 9) the employer violated the term for the submission of documents to extend the validity term of a work permit;
- 10) the necessity for the employer's hiring of a foreigner ceases due to changes to the labor market in the country (region).