

## 8. The Swiss Labor Market Remains Open

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### Introduction

After the initiative on the control of mass immigration was accepted in a public vote, many corporations and in particular the press expected that the access to the Swiss labor market would be limited substantially. However, after the closure of the legislative process one must say that despite additional administrative burdens nothing of substance will change. Consequently, we want to take the opportunity to outline the major rules including the coming changes.

### Switzerland's Dual System

Switzerland possesses a dual system for granting foreign nationals access to the Swiss labor market. EU/EFTA nationals<sup>1)</sup> enjoy certain simplifications due to the Treaty on the Free Movement of Persons, concluded between Switzerland and the EU/EFTA. The purpose of said treaty is to prevent discrimination in the access to the respective labor markets due to nationality. Thereunder, all nationals of the contracting parties have an entitlement to the same living, employment and working conditions. However, non-EU/EFTA nationals (so-called "third state nationals") have to pass several hurdles under the Swiss Aliens Act in order to be granted access to the Swiss labor market.

Due to the aforementioned treaty, EU/EFTA nationals do not have to fulfil the requirements stipulated under the Swiss Aliens Act and, in general, have a legal claim to access the Swiss labor market (i.e. a respective work permit). In contrast to this, the grant of a work permit to third state nationals lies in the discretion of the authorities and is moreover limited by certain annual quotas. Consequently, it is certainly more difficult for non-EU/EFTA nationals to gain access to the Swiss labor market.

### "National Priority" under The Swiss Aliens Act

Third state nationals, besides other requirements, such as the interest of Switzerland's economy, the qualification, expertise, position, function and profession of the foreign national as well as the exhaustion of the annual quotas, have to overcome a so called "national priority" under the Swiss Aliens Act.

In summary, a Swiss employer trying to obtain a work permit for a third state national has to prove that there were no other suitable Swiss or EU/EFTA nationals for the job opening. Thereby, currently, by means of search efforts, the employer has to prove that he has conducted sufficient efforts by reporting the job opening to local employment bureaus, publishing it in the European Employment System (EURES<sup>2)</sup>), (internationally) advertising it in newspapers, respective magazines, journals, on internet platforms etc. Important is that actual and proper efforts have been made within an appropriate time period. Finally, during the recruiting process, the reasons for the rejections of candidates must be documented (mostly done in form of a chart) in order to prove that there were no other suitable Swiss or EU/EFTA nationals.

In general, it is rather difficult to meet these requirements, unless an exemption applies, e.g. for highly qualified specialists or intra-group transfers. Typically, although the limitations sound very restrictive, it is possible to obtain a work permit for very well paid specialists and management transfers within a group.

Most applications for standard positions are declined due the national priority or insufficient search efforts.

For 2017, the Swiss Federal Council set the annual quota for third state nationals at 7,500 work permits, divided into 3,000 permits for longer term permits and 4,500 permits for short-term permits.

### Initiative on the Control of Mass Immigration

On February 9, 2014, the Swiss population voted in favor of the initiative on the control of mass immigration. According to the initiative, residence permits and i.e. the access to the Swiss labor market shall be limited by annual quotas for all foreign nationals. Thereby Swiss citizens in comparison to foreign nationals shall have priority when it comes to job openings. Consequently, a new provision was implemented in the Swiss Federal Constitution, whereby the Swiss parliament had to come up with a respective amendment of the Swiss Aliens Act in order to duly comply with the constitutional provisions.

However, an implementation of annual quotas clearly constitutes a breach of the Treaty on the Free Movement of Persons. The EU exercised a lot of pressure and warned Switzerland that with a respective implementation of annual quotas the co-dependent treaties between the EU and Switzerland would be at risk, since the introduction of annual quotas would infringe the fundamental purpose of said treaty, namely enabling free movement and the guarantee of equal living, employment and working conditions towards all foreign nationals seeking employment in another country. The Swiss parliament therefore had a difficult task. It had to decide, whether to preserve the co-dependent treaties and its relationship with the EU or to implement the will of the Swiss population. On December 16, 2016, the Swiss parliament decided to adopt a lighter version of the national priority in the Swiss Aliens Act as requested in the initiative, thereby trying to preserve the co-dependent treaties with the EU, but also not fully implementing the will of the Swiss population. Against said amendment, a referendum could have been petitioned until April 7, 2017. However, the opponents failed to gather the necessary number of signatures until said date, wherefore the amendment of the Swiss Aliens Act stands as it is. Finally, the Swiss Federal Council now has to resolve when the amendment shall come into force.

### Implementation of the Initiative on the Control of Mass Immigration / Amendment of the Swiss Aliens Act

Due to the amendment of the Swiss Aliens Act resulting from the initiative on the control of mass immigration, the following, summarized measures for employment seeking individuals were adopted:

In principal, the Swiss Federal Council determines measures in order to primarily guarantee the exhaustion of the national labor market. In certain sectors, professional groups and economic regions, in which the unemployment rate is above average, the Swiss Federal Council may impose timely limited measures in order to support unemployed people who are registered with a local employment bureau in Switzerland. Furthermore, in the fields, professional groups and economic regions, in which the unemployment rate is above average, the employers are obliged to report job openings to the respective local employment bureau. For a limited time, such information will be made available to the individuals registered with any local employment bureau in Switzerland on an exclusive basis.

Moreover, job openings in certain fields and professional groups in which the unemployment rate exceeds the average rate, must be disclosed by the employers to the respective local employment bureaus in order to give individuals registered with a local employment bureau an exclusive timely advantage to apply for such jobs. In addition, upon report of such job openings, the local employment bureaus will send dossiers of suitable candidates, registered with the local employment bureaus, to the respective employer. The employer is then obliged to call the respective candidates for an interview or at least assess their suitability. Finally, the employer must report the result (e.g. rejection) to the local employment bureau, which may remain unreasoned. The Swiss Federal Council may establish exceptions of said reporting duty, such as in the case of family businesses or regarding people who were already employed by the respective employer in the past. Furthermore, the Swiss Federal Council is obliged to establish lists of sectors and professional groups, in which the unemployment rate is above average and therefore a duty to report job openings to the local employment bureaus applies.

Finally, in case the duty to report job openings or conducting an interview / a suitability screening upon recommendation of suitable candidates by the local employment bureau is breached, a fine of up to CHF 20,000 and if infringed deliberately even a fine up to CHF 40,000 may be imposed.

As of December 2016, approximately 210,000 people were registered with a local employment bureau. While in theory even foreign nationals can register with a local employment bureau in Switzerland, in reality mostly Swiss citizens will register and therefore have a limited timely advantage in the application process. This in fact might constitute a breach of the Treaty on the Free Movement of Persons, by preventing EU/EFTA nationals from having the same job opportunities in Switzerland as Swiss nationals.

### **Impact of the Amendments of the Swiss Aliens Act for International Recruiting by Swiss Employers**

Due to the amendment of the Swiss Aliens Act, it becomes administratively more difficult and more time consuming for Swiss employers to recruit foreign nationals. As a consequence of the new obligation to disclose job openings in the above mentioned cases, Swiss employers are bound to spend a lot of time interviewing and screening candidates registered with a local employment bureau whose dossiers have been submitted by the local employment bureaus and assessed as suitable. This will certainly cost employers more time and force to create and keep records (i.e. the reasoning for rejections) on each application.

Nevertheless, many things at this stage are still uncertain though no one expects that the new rules will be enforced in an overly burdensome way. However, the uncertainty is that the local employment bureaus will have the power to establish their own practice in connection with the new provisions

on measures for employment seeking individuals. This certainly creates some uncertainty for the initial phase of the implementation of the amendments to the Swiss Aliens Act.

In addition, there are open issues in connection with the amendments which add to the uncertainty, such as:

- How are the respective sectors, professional groups or economical regions defined?
- What people or professions form a sector or professional group?
- Based on what factors will the unemployment rate be determined?
- How long do employers have to wait for the local employment bureaus to send, according to their view, suitable candidates?
- How many candidates does an employer have to interview or screen upon recommendation of a local employment bureau?
- How long does the timely advantage last for an individual registered with a local employment office?
- What additional measures will the Swiss Federal Council implement (e.g. by means of a directive)?

### **Countermovement Against the Initiative on the Control of Mass Immigration**

Some Swiss citizens are not ready to accept the downsides of the initiative regarding the control on mass immigration. Hence, they launched another initiative called “out of the impasse” that should completely erase the recently implemented provisions in the Swiss Constitution regarding the control on mass immigration. The Swiss Federal Council decided not to make a counter-proposal to the initiative. It will be very interesting to see the outcome of the consequential second vote on the initiative against mass immigration.

### **Conclusion**

In conclusion, there are open issues in connection with the amendments to the Swiss Aliens Act which create uncertainty until the case law establishes a clear practice. Additionally, it will certainly be important for employers to monitor the vote on the “out of the impasse”-initiative.

As for now, Swiss employers have the comfort that there are no substantial new restrictions on immigration, but “only” additional administrative burdens which result in higher costs for obtaining work permits.

- 1) Cf. for the countries concerned: [https://www.sem.admin.ch/sem/en/home/themen/fza\\_schweiz-eu-efta/eu-efta\\_buerger\\_schweiz.html](https://www.sem.admin.ch/sem/en/home/themen/fza_schweiz-eu-efta/eu-efta_buerger_schweiz.html), whereby transitory provisions (i.e. restrictions) apply to Croatian nationals.
- 2) <http://ec.europa.eu/eures>

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