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## flash Alert

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### Germany – 2016 Salary Criteria and Access by Nationals of Balkan Countries

by Sebastian Klaus and  
Thomas Wolf, KPMG  
Rechtsanwaltsgesellschaft  
mbH, Germany (a KPMG  
International member firm)

As of January 1, 2016, several new changes in German immigration law will become effective, among which (1) a modification to the annually adjusted minimum salary requirements for German EU Blue Cards and national visas based on the German EU Blue Card regulation and (2) broader access allowed to nationals of several Balkan countries to the German labor market.<sup>1</sup>

For so-called “shortage occupations,” the new minimum annual gross salary is EUR 38,688 (in 2015: EUR 37,752). For all other occupations, it will be EUR 49,600 (in 2015: EUR 48,400) gross. The general statutory minimum wage requirement will remain at EUR 8.50 gross per hour.

#### Why This Matters

Comparable to many other countries, Germany revises its salary criteria for EU Blue Cards on an annual basis. All applications related to a start date of January 1, 2016 or later for EU Blue Cards or EU Blue Card-based entry visas (national visas) have to comply with the new salary criteria. Additionally, pending applications have to meet the new salary criteria if the decision on the visa application or EU Blue Card application by the German diplomatic mission or in-country immigration office is made after January 1, 2016.

Companies intending to hire (non-privileged) third-country nationals have to take the new salary criteria into account when offering employment contracts to candidates. Existing offers may require amendment if the decision has not been made before January 1, 2016, and if the offered salary does not comply with the new salary criteria any more.

For the next five years, nationals of several Balkan countries will receive a privileged legal status partially comparable to that of Germany's “best friends” (for example, Australia, Canada, and the United States). These nationals may then also be admitted to work in Germany without having accomplished university studies or a vocational training.

#### EU Blue Card (General Requirements Including Minimum Salary Requirement)

The EU Blue Card is one important type of a combined residence and work permit under German immigration law. All foreigners except nationals of Australia, Canada, Japan, Israel, New Zealand, South Korea, and the United States are entry-visa-required for employment-related stays in Germany. Visas are regularly issued with a validity of 90 days. However, the entry visas are mainly issued under the same requirements as final EU Blue Cards.

Those requirements are:

- working in Germany with a local employment contract;
- being in possession of a German or equivalent foreign university degree;
- earning a salary that complies with the salary criteria.

In terms of salary, Germany's immigration law differentiates between shortage occupations (e.g., engineers or information technology (IT) specialists) and other occupations. The salary criteria stipulated by the EU Blue Card regulation are a mandatory requirement.

As a fundamental principle under German law, authorities have to apply the latest laws when issuing a permit. If the laws change between filing the application and the decision to issue a permit, the latest laws have to be considered. For example, an EU Blue Card based entry visa (national visa) was issued in December 2015 and the applicant's salary met the erstwhile salary criterion. Upon arrival in January 2016, the applicant applies for the final EU Blue Card; regarding this application, his or her salary must meet the salary criterion that has effect as of January 1, 2016.

#### **KPMG Note**

Already issued entry visas (national visas) and EU Blue Cards are not affected by the new salary criteria, so the corresponding employment contracts do not need to be amended. An amendment, however, can be necessary if the salary guaranteed in the employment contract was sufficient for the entry visa application, but is not sufficient for the final EU Blue Card application to be filed later than January 1, 2016.

#### **Additional Type of Permit for Highly-Skilled Specialists**

Nevertheless, the EU Blue Card is not the only type of combined residence and work permit for third-country nationals locally employed in Germany. Another type of permit for highly-skilled specialists exists. Amongst other requirements, the salary must be equal to the salary of local workers with a comparable professional background and working in a comparable position ("comparability requirement"). This is subject to an internal labor market test procedure performed by the German Federal Employment Agency ("Bundesagentur fuer Arbeit"). For these types of permits, there are no definite salary ranges; however, the salary must regularly not be below EUR 8.50 per hour (the statutory minimum wage requirement) – the actual comparable salary can only be defined on the basis of an actual comparison to the salary of local workers.

#### **Unchanged General Statutory Minimum Wage Requirement**

Holders of visas based on the EU Blue Card regulation or EU Blue Cards must additionally be paid under the statutory minimum wage requirement of EUR 8.50 (gross) per working hour. This also applies to visas and combined residence and work permits for third-country nationals locally employed in Germany as highly-skilled specialists, but who are not eligible for an EU Blue Card. The alternative of applying for a combined residence and work permit instead of an EU Blue Card, for example, may become relevant if the tightened requirement of an equivalent foreign university degree is not attained.

The general statutory minimum wage requirement will remain EUR 8.50 per hour for 2016, but may increase as of January 1, 2017, subject to a decision of an expert committee (Minimum Wage Commission) in 2016.<sup>2</sup>

### **Labor Market Access for Nationals from the Balkans**

Nationals of Albania, Bosnia and Herzegovina, Kosovo, Macedonia, Montenegro, and Serbia may receive national visas and combined residence and work permits for all forms of employment in Germany between January 1, 2016 and December 31, 2020, according to Sec. 26 (2) of the German Employment Regulation.

They may even be granted labor market access without having accomplished university studies or a vocational training of at least two years. Similar to Sec. 26 (1) of the German Employment Regulation, which is applicable to nationals of Andorra, Australia, Canada, Israel, Japan, Monaco, New Zealand, San Marino, South Korea, and the United States, a local employment contract is generally required. It will depend on administrative practice whether intra-company transfers for nationals of these Balkan countries will also be accepted under this new regulation. Moreover, direct assignments to Germany without the involvement of a German entity of a company group will also be excluded from this new regulation.

Nationals of the aforementioned Balkan countries must first apply for a national visa at an overseas German diplomatic mission. According to the wording of Sec. 26 (2) of the German Employment Regulation, it will not be possible to obtain a pre-approval decision from the Federal Employment Agency as an “internal approval shall only be given if an application for a national visa has been filed at the German diplomatic mission abroad.” Hence, the internal approval procedure will only be initiated from the German diplomatic mission after the visa application has been filed. The regular processing time will be six to eight weeks counted from the day of filing the application and not, as in cases of pre-approval applications, one to two weeks.

When making the decision on labor market access in Germany, the Federal Employment Agency will not only consider the comparability requirement, but it will also assess whether “privileged” workforce – that is, German nationals or EU nationals – is available or not. If, for example, a German national is registered with the Federal Employment Agency as a job-seeker and has the required educational and professional background, the Federal Employment Agency will deny the labor market access for the third-country national.

Additionally, internal approval must be denied if the individual was already in Germany in the last 24 months and obtained social benefits according to Germany’s social welfare law for asylum seekers (“Asylbewerberleistungsgesetz”).<sup>3</sup> Such a denial would not be required, exceptionally, if the individual filed an application for asylum in Germany between January 1, 2015 and October 23, 2015, but repatriated from Germany on October 24, 2015 or immediately after.

#### **KPMG Note**

With the latter exception, the German government intends to reward individuals that had not pursued an unpromising asylum seeking process, but instead had returned to their home countries to pursue a regular visa application process for the purposes of working in Germany.

## Action Steps

For companies focusing on definite salary criteria when hiring (non-privileged) third-country nationals, the annual amendments made by the German government should be monitored closely. Where pending visa/permit applications are concerned, it is recommended that employment contracts be amended in-line with the new salary criteria as follows:

- Draft employment contracts with a start date later than January 1, 2016, in-line with the new salary criteria;
- Amend already-issued employment contracts in-line with the new salary criteria in cases of pending applications.

Otherwise, EU Blue Card-based applications will be rejected and the preferred candidate will not be able to start working in Germany, should he or she not qualify for a different type of combined residence and work permit. Such permits are not bound to defined salary criteria; approval can be uncertain if the working conditions are not comparable with those of local workers.

Companies should also be aware of the new options for hiring individuals from the above-mentioned Balkan countries who are not in possession of a university degree or a vocational training. For example, this may apply to highly-skilled IT specialists who obtained their knowledge because they are self-taught.

KPMG Law will endeavor to issue a further report should the Federal Employment Agency also apply this new regulation only to locally-hired Balkan nationals and/or to those who are intra-company transferees.

### Footnotes:

1 See: Sec. 26 (2) of the German Employment Regulation ("BeschV"), published in Federal Law Gazette (Bundesgesetzblatt (BGBl)): BGBl. I 2015, pages 1789 et sequens.

2 See Sec. 4 et sequens, especially Sec. 9 of the German Act Regulating a General Minimum Wage ("MiLoG") (in English): [http://www.gesetze-im-internet.de/englisch\\_milog/englisch\\_milog.html#p0025](http://www.gesetze-im-internet.de/englisch_milog/englisch_milog.html#p0025) .

3 See the Asylbewerberleistungsgesetz (in German): <http://www.gesetze-im-internet.de/asyblbg/> .

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