

GMS Flash Alert

Immigration

2024-138 | June 26, 2024

European Union – Court Rules on Residence Permits in the Home and Host Countries for Posted Workers

The Court of Justice of the European Union (CJEU) ruled that third-country nationals posted from one European Union (EU) member state to another EU member state for more than three months can be required to obtain a residence permit in both the home and the host countries.¹

CJEU underlined, among other things, that although EU rules for posted workers also apply to postings of third-country nationals, these rules apply without prejudice to national laws relating to the entry, residence, and access to employment of workers who carry a nationality of a third country. This means that, in this case, a requirement to obtain a residence permit in the host country – even if there is already one issued in the home country to the individual – is a legitimate one.

WHY THIS MATTERS

The number of posted third-country nationals in the EU is on a steep increase.² It is important for EU employers posting third-country nationals to observe not only the rules and requirements relating to posted workers, but also rules and requirements relating to residence permits in the host country.

When third-country nationals who hold a temporary residence permit in the home country are posted to another EU member state for more than three months,³ there may be requirements to obtain a residence permit in the host country. The duration of a residence permit in the host country is subject to local laws.

This means that third-country national employees being posted in the EU – and the managers responsible for those employees – could have additional administrative steps to take and may incur additional costs.

Posted EU nationals are not subject to the rules for residence permits.

Context

Entry to, and residence in, the territory of an EU member state by third-country nationals in connection with a posting by an employer established in another EU member state is a matter which has not been the subject of harmonisation at the EU law level.

This means that the right to entry and stay in an EU member state is a matter of national law when an individual is a national in a non-EU country.

However, if a third-country national holds a temporary residence permit in an EU member state, it is possible for this worker to be posted to another EU member state without a requirement for a residence permit in the home country, provided that posting does not exceed three months in any 180-day period.⁴

Prohibition of restrictions to freedom of movement in the EU apply directly to EU nationals. Therefore, only EU nationals can move freely in the EU and are not required to obtain a residence permit.

About the CJEU Case

The case concerns Ukrainian nationals who were all holders of temporary residence permits issued by the Slovak authorities with validity lasting until 21 November 2020. They worked for a Slovak employer who posted them to the Netherlands.

The Slovak employer registered the Ukrainian workers in the Dutch registry for posted workers. The expected duration of work in the Netherlands was from 4 December 2019 to 4 March 2020. However, the posting was extended until 31 December 2021.

As their stay in the Netherlands exceeded 90 days, the Slovak employer applied for residence permits on behalf of each of the Ukrainian workers in the Netherlands. Each of the applications entailed a fee of EUR 290 or EUR 320.

The Dutch authority issued residence permits, but not for the duration of the posting, but, rather, for the duration of the existing residence permit the workers obtained in Slovakia, which was shorter than the duration of their posting.

In 2021, the Slovak employer lodged new applications for residence permits in the Netherlands on behalf of some Ukrainian workers whose residence permits in Slovakia were valid until 31 March 2022. However, here the Dutch authorities issued residence permits for the duration of the posting, 31 December 2021. In addition, on 20 May 2022, the Slovak employer again lodged applications for residence permits for some of those applicants with a view to assigning them to another activity in the Netherlands.

Objection

The posted Ukrainian workers challenged the obligation to obtain a residence permit in the Netherlands during their posting, when there are already existing valid residence permits issued in Slovakia.

Further, they objected to the validity of their residence visas being limited to the duration of their residence permits in Slovakia and not to the duration of the posting.

Lastly, the posted Ukrainian workers objected to the cost of an application for a residence permit and an extension of a residence permit in the Netherlands. Taking into account that the Dutch authority has all necessary information and documentation to grant a residence permit (or extension of one), the fee for an application appeared excessive.

Ruling

- CJEU concluded that by having residence permits in Slovakia, the posted Ukrainian workers do not automatically have a “derived right of residence” in the Netherlands that exempts them from applying for a residence permit in the Netherlands. When their posting in the Netherlands exceeds 90 days, they are subject to requirements for a residence permit in the host country, the Netherlands. Such requirement for a residence permit is not contrary to EU law.
- Further, CJEU concludes the freedom to supply services across EU borders (that is enshrined in EU law) does not preclude national legislation that regulates right to enter, the right to stay, and the right to employment of third-country nationals, including posted third-country nationals. Requirements for residence permits are subject to national legislation, which means that the duration of such residence permit is also subject to national legislation.
- Lastly, CJEU finds that the fees payable for a residence permit to a posted third-country national are greater than those payable for the grant of a certification of residence to an EU national. Therefore, CJEU recalls that the amount of those fees cannot be excessive or unreasonable and must approximately correspond to the administrative costs generated by the processing of an application for such permit. CJEU concluded that this assessment of fees for the grant of a residence permit for posted third-country nationals is for the court in the Netherlands to make.

MEIJBURG & CO. INSIGHTS

With the number of mobile workers with third-country nationality on the rise, postings within the EU of such third-country workers, which are increasing, are attracting a heightened focus.⁵

When an employer posts workers temporarily to another EU member state, the employer must comply with certain terms and conditions for employment according to the rules in the host country, and the employer must register all posted workers prior to the commencement of work in the host country. These requirements derive from the EU rules for posted workers.

In addition to the rules for posted workers, an employer that posts workers who are not nationals of an EU country must observe immigration requirements in the host country too. Posted third-country nationals who hold a temporary residence permit in one EU member state can be posted to another EU member state. However, if their stay in the host country exceeds 90 days, there are local requirements for residence that must be met. Otherwise, lack of a residence permit would make work in the host country illegal.

This case illustrates that it is immensely important for employers that post third-country nationals in the EU to be diligent and to plan postings in a way that takes on board all the requirements for each posted worker.

If employers need support in devising, implementing, and managing their policies and processes in respect of the posting of workers, they are advised to reach out to their global mobility adviser and/or immigration counsel, or their local KPMG contact.

FOOTNOTES:

1 Court of Justice of the European Union, Case C-540/22 *Staatssecretaris van Justitie en Veiligheid (Posting of workers from third countries)*, 20 June 2024.

2 See [GMS Flash Alert 2024-108](#), 9 May 2024.

3 Foreign nationals who hold a valid residence permit issued by one EU member state, on the basis of that permit and valid travel document, may move freely for up to 90 days in any 180-day period within the territories of the other EU member states, provided that that foreign national fulfills the entry conditions referred to in Article 6 (1)(a), (c), and (e) of [the Schengen Borders Code](#) and is not on the national list of alerts for the member states concerned, cf. Article 21 (1) in [the Convention implementing the Schengen Agreement of 14 June 1985 \(CISA\)](#). (The Schengen *acquis*.)

4 See Footnote 3.

5 See Footnote 2.

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Contact us

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