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MIGRATION ADVISORY COMMITTEE

**CALL FOR EVIDENCE ON THE REVIEW OF THE SHORTAGE OCCUPATION LISTS FOR THE UK
AND SCOTLAND AND CREATIVE OCCUPATIONS**

RESPONSE BY THE EMPLOYMENT LAWYERS ASSOCIATION

30 November 2012

INTRODUCTION

i. The Employment Lawyers Association (“ELA”) is an unaffiliated group of specialists in employment law including those who represent both employers and employees. It is not our role to comment on the political merits or otherwise of proposed legislation; rather we make observations from a legal standpoint. Some of our members engage in advising clients on related immigration matters hence our response to the Call for Evidence.

ii. ELA’s Legislative and Policy Committee consists of barristers and solicitors (both in private practice and in-house) who meet regularly for a number of purposes, including considering and responding to proposed new laws.

iii. A working group was set up under the Chairmanship of Robert Davies of Dundas & Wilson LLP (“the Working Group”) to consider and comment on the Migration Advisory Committee’s Call for Evidence on the review of the shortage occupation lists for the UK and Scotland and creative occupations (“the Call for Evidence”). A full list of the members of the working group is attached.

Question 1: In which occupations or job titles skilled to at least NQF level 6 is there a shortage of labour that it would be sensible to fill using labour from outside the EEA and which therefore merit inclusion on the Shortage Occupation List (SOL)?

Response 1

It is important to highlight for the purposes of our response, consistent with the Introduction, that ELA is not an organisation that represents the interests of particular employers or categories of employers from particular sectors.

The Working Party comprises solicitors from private practice with clients across various sectors and the activities of which do utilise employees whose roles fall within the SOL. However, we have not undertaken a specific survey of clients or the broader ELA membership in respect of the various roles identified in the SOL and so cannot comment directly in relation to particular roles that it would be sensible to fill using labour from outside the EEA nor are we able to provide detailed evidence in relation to this in the form that is expressed to be preferred by the MAC at pages 9 -13 of the Call for Evidence.

However some members of the Working Party have received feedback from employers in relation to certain roles in particular which are considered by those employers to merit continued inclusion on the SOL:

- Civil Engineers – SOC 2121
- Geoscientists – SOC 2113

These are examples of roles which are perhaps more readily viewed as satisfying the three stage test referred to at paragraph 4.24 of the Call for Evidence in respect of the headline descriptors of: Skill; Shortage; and Sensible.

Members of the Working Party are aware of observations (hence this is an anecdotal rather than an empirical observation) that although there are many excellent undergraduate and post-graduate courses which are taught and pursued successfully in the United Kingdom there is a perception that these courses are increasingly being pursued by non-EEA students, which reduces the labour pool of EEA candidates. Also, the analytical and mathematical skills that form an integral element of such roles can make engineering graduates highly attractive to other employers where quantitative analytical skills can be particularly valuable, such as the financial services sector. (This remains the case notwithstanding the challenges faced by the financial services sector over the last 5 years.)

Question 2: The Government has indicated that it wishes to remove from the SOL all occupations that have been on it for more than a given period, in principle two years, regardless of shortages affecting the sectors concerned. This reflects the fact that inclusion on the SOL is intended to provide temporary relief while measures are taken to mitigate the shortages. The MAC is asked to advise on:

- (i) A standard period after which removal from the SOL should become automatic and whether exceptions should be permitted.**
- (ii) Whether a transitional period should be accorded to those occupations currently on the SOL and which have exceeded the advised standard period.**

In advising on 2 (i) and (ii), the MAC should have regard to time already spent on the SOL and mitigation measures taken, plans for further mitigation measures and the business impact of removal from the SOL.

Response 2

As a preliminary observation, ELA considers that if there is demonstrable evidence of clear skills shortages within the UK labour market of occupations or job titles that are skilled to at least NQF level 6 or above, then it is important for these occupations and jobs to be included on the Shortage Occupation List (SOL).

The SOL provides a sensible, straightforward and cost efficient route for employers to be able to sponsor individuals through Tier Two of the points based immigration system: the fact that employers do not have to incur the costs and time of satisfying the resident labour market test (**RLMT**) is a real benefit to employers.

There would not appear to be a good justification for requiring this RLMT process to be satisfied in cases where, on the evidence, there are appreciable shortages in particular occupations and jobs. We are not persuaded that an **automatic** mechanism of removal of a role after a set period is a proportionate, necessary or helpful step.

The Tier Two SOL route to sponsorship does not appear to be widely utilised by UK employers since only around 1500 individuals sponsored through this route this year. We therefore consider that limiting the amount of time that jobs can remain in the SOL will not result in a significant reduction in net migration. It will have a fairly minimal impact in terms of reducing net migration. However, at the same time it is likely to result in additional costs and administrative time for some employers who are faced with skills shortages.

ELA have the following comments to make about the specific areas indicated by the MAC:

- *Whether the Government's indicated time period of two years is a reasonable amount of time to enable mitigating action to be put in place and to have effect before an occupation or job title is removed from the list.*

ELA considers that the indicated time period of two years would appear to be an unduly short period of time in respect of many jobs/roles to enable mitigating action to be put in place and to have effect before an occupation or job is removed from the SOL.

Many occupations will take many years of training both in Universities and Higher Education Colleges, and through workplace training, in order to develop the required skills to carry out a skilled role. If significant shortages have been identified in the UK labour market for those jobs on the SOL - and provided, crucially, that the SOL is reviewed regularly to ensure that it is based on current evidence - it would appear to be unlikely that many of those shortages could be addressed within a 2 year period.

ELA considers that an alternative approach that would be worthy of further consideration would be for each job category to be reviewed on a case by case basis subject to an appropriate trigger period for review.

It may be that a two year trigger is felt appropriate for certain roles and potentially longer periods may be suitable for others.

For example, consideration should be given to the length of time that it takes to train someone to a required level for that job but this cannot be the only factor: indeed the four indicators highlighted at

paragraph 4.31 of the Call for Evidence would suggest that a "one size fits all" approach is not an optimal approach. Those factors should then determine the appropriate length of time that the job should remain on the SOL.

Although this approach lacks the simplicity of a single Sunset clause of two years duration, we consider that it would be better aligned to achieving the desired result of addressing shortages in the UK labour market in a practical and proportionate manner.

- *Whether there should be different time periods for different occupations and jobs, and what grounds might there be for awarding an extended time period.*

As noted above, ELA considers that there should be different time periods for different occupations and jobs and that the basis for awarding an extended time period should be based on the length of time that it is reasonably anticipated to take to address the skills shortages through training and other initiatives.

- *The likely business impact of removing an occupation or job from the shortage occupation list.*

The business impact of removing an occupation or job from the shortage occupation list will be increased planning time that will be required before an employer can sponsor someone (as the Resident Labour Market Test will need to be satisfied) and an application will have to be made to the UKBA for a Restricted Certificate of Sponsorship.

In addition employers will have increased management time incurred in assessing job applicants against the specified criteria for jobs.

There will also be advertising costs incurred in satisfying the RLMT each time the employer wishes to recruit someone for a role.

- *Whether there should be a transitional period for occupations or jobs that are on the list and how long that period should be.*

As noted above, ELA considers that the suggested Sunset Clause of 2 years is fairly short and that for many jobs, a longer period of up to 5 years would be more sensible.

- *Mitigating measures already taken to alleviate occupation shortages and whether these were effective. What further mitigating measures are planned.*

A variety of measures can be used by employers such as more effective graduate recruitment regimes and extensions of flexible working options across a workforce. The Government itself is targeting mathematics teachers through targeted remuneration improvements.

Question 3: Tier 2 is now reserved for occupations skilled to at least NQF level 6 and in general the SOL should be aligned with that policy. However, for those job titles currently on the SOL which are not skilled to NQF level 6, is there a shortage of labour that it would be sensible to fill using labour from outside the EEA and, therefore, a case for retaining them on the list? If so, which pay threshold should be applied in the relevant codes of practice for those job titles which the MAC recommends for inclusion on the SOL?

Response 3

ELA consider that there is a persuasive argument in principle to be made for retaining jobs that are not skilled to NQF level 6 or above on the SOL.

If such jobs were to be removed from the SOL there would be no means by which employers could recruit non EEA workers into such roles since Tier Two is otherwise effectively closed to any lower skilled jobs.

Although it may be possible in some cases for employers to try to reduce the skills shortages by way of training programmes or by increasing pay, for example, there will be some situations in which it is simply not possible for employers to fully reduce the impact of such roles becoming ineligible for sponsorship under Tier Two. If there is a labour requirement and no realistic method to innovate to remove that need, the removal from the list would seem counter-productive.

Ultimately, we readily acknowledge that it is for Government to determine whether policy levers should be used to encourage the EEA workforce to undertake roles that may (for some time) have proved attractive only for non-EEA workers.

Question 4: The Government has retained within Tier 2 the following creative occupations in the arts and design fields which are not skilled to NQF level 6: artists, authors, actors, dancers and designers. Does the MAC see a case for continued inclusion of certain creative occupations in Tier 2 and, if so, on what terms?

Response 4

ELA considers that it is appropriate for certain creative sector jobs to be included in Tier Two even if they are not skilled to NQF Level 6 or above.

Certain creative sector occupations can be highly skilled, and may take many years of training and/or may have a highly niche skills set notwithstanding the fact that they are not necessarily considered to be skilled in accordance with the NQF framework.

In addition there may be significant shortages in this sector and having the ability to recruit these roles under Tier Two may make a significant contribution to the UK economy.

If these roles were removed from Tier Two, there would be no alternative route available for employers to sponsor individuals from outside the EEA to work in the UK which would seem to reduce rather than increase opportunities for growth within the creative sectors.

List of Working Group Members

Robert Davies, Dundas & Wilson LLP (Chair)

Kate Gamester, Squire Sanders LLP

Stephen Hall, Kingsley Napley LLP

Elaine McIlroy, Dundas & Wilson LLP

Georgina Porter, Weightmans LLP