

Part 8
Involvement of the Federal Employment Agency

Section 39
Approval of employment for a foreigner

(1) A temporary residence permit to take up employment is granted subject to approval from the Federal Employment Agency, unless approval is not required by law, on the basis of the Ordinance on the Employment of Foreigners or an inter-governmental agreement. Approval may be granted if it is determined by law, on the basis of the Ordinance on the Employment of Foreigners or an inter-governmental agreement.

(2) The Federal Employment Agency may give its approval to the employment of foreigners as skilled workers in accordance with sections 18a or 18b, if

1. the skilled workers are not employed under less favourable terms than German nationals employed in an equivalent position,

2. the skilled workers

a) will perform skilled work for which their training qualifies them under sections 18a or 18b (1), or

b) will pursue employment commensurate with their qualification under section 18b (2) sentence 2,

3. there is a national employment relationship, and

4. any further requirements of the Ordinance on the Employment of Foreigners regarding the employment are met.

Approval is granted without labour-market tests within the meaning of subsection (3) no. 3 unless the Ordinance on the Employment of Foreigners determines otherwise.

(3) The Federal Employment Agency may give its approval to the employment of foreigners irrespective of their qualification as a skilled worker, if

1. the foreigners are not employed under less favourable terms than German nationals employed in an equivalent position,

2. the requirements for approval stipulated in sections 19, 19b, 19c (3) or section 19d (1) no. 1 or in the Ordinance on the Employment of Foreigners and which

concern the employment are met, and

3. no German workers, foreigners having the same legal status as German workers with regard to the right to take up employment or other foreigners who are entitled to preferential access to the labour market under the law of the European Union are available for the type of employment concerned (labour-market test), provided this test is required by the Ordinance on the Employment of Foreigners or by law.

(4) To receive approval, the employer must furnish the Federal Employment Agency with information on pay, working hours and other terms and conditions of employment. Employers who employ or used to employ a foreigner must provide the information referred to in sentence 1 within a month of a request from the Federal Employment Agency.

(5) Subsections (1), (3) and (4) also apply if approval from the Federal Employment Agency is required for employment in case of residence for other purposes covered in Parts 3, 5 or 7.

(6) Subsection (3) applies accordingly to the granting of a seasonal work permit. In all other cases, the legal provisions governing the approval by the Federal Employment Agency apply to the work permit in the absence of any law or statutory instrument to the contrary. The Federal Employment Agency may determine demand-oriented admission figures with regard to approving a residence title for seasonal work and a seasonal work permit.

Section 40

Grounds for denial

(1) Approval pursuant to section 39 is to be denied if

1. the employment has come about on the basis of unlawful placement or recruitment or
2. the foreigner intends to take up employment as a temporary worker (section 1 (1) of the Act on Temporary Employment Businesses).

(2) Approval may be denied if

1. the foreigner has culpably violated section 404 (1) or (2) nos. 2 to 13 of Book Three of the Social Code, sections 10, 10a or 11 of the Act to Combat Clandestine Employment or sections 15, 15a or 16 (1) no. 2 of the Act on Temporary Employment Businesses,
2. important personal grounds relating to the foreigner exist, or

3. if the future employer or his or her representative as authorised by statutes or law has been subject to an incontestable fine within the past five years for a breach of section 404 (1) or (2) no. 3 of Book Three of the Social Code, or if they have been subject to an incontestable fine or convicted to a term of imprisonment for a breach of sections 10, 10a or 11 of the Act to Combat Clandestine Employment or of sections 15, 15a or 16 (1) no. 2 of the Act on Temporary Employment Businesses; this applies accordingly to the host entity in the case of an intra-corporate transfer pursuant to section 19 or 19b.

(3) Further, approval may be denied if

1. the employer or the host entity has failed to meet legal obligations regarding social security, taxation, labour rights or working conditions,
2. insolvency proceedings have been instituted against the employer's or host entity's assets aiming to wind up the employer or the entity and its business,
3. the employer or the host entity have been wound up in insolvency proceedings,
4. the institution of insolvency proceedings against the employer's or host entity's assets has been refused for lack of assets, and its business has been wound up,
5. the employer or the host entity does not pursue any economic activity,
6. the presence of the foreigner is aimed at or results in affecting labour management disputes or negotiations, or
7. the business or the host entity were established for the main purpose of facilitating the entry and residence of foreigners for the purpose of employment; the same applies if the employment relationship was established mainly for this purpose.

Section 41

Revocation of approval and withdrawal of the work permit

The approval may be revoked and the seasonal work permit withdrawn if the foreigner is employed on less favourable terms than comparable German nationals or the conditions stipulated in section 40 are met.

Section 42

Authorisation to issue statutory instruments and instructions

(1) The Federal Ministry of Labour and Social Affairs may determine the following by means of statutory instruments (Ordinance on the Employment of Foreigners), with the approval of the Bundesrat:

1. occupations in which foreigners may be employed with or without approval by the Federal Employment Agency under section 4a (2) sentence 1, section 16a (1) sentence 1, sections 16d, 16e (1) sentence 1, sections 19, 19b, 19c (1) and (2) and section 19e, and the requirements which need to be met,
2. occupations and conditions for which the Federal Employment Agency may grant approval for skilled work under section 19c (2), irrespective of the foreigner's qualification as a skilled worker, and
3. any further requirements relating to the performance of skilled work under sections 18a and 18b,
4. exceptions for nationals of certain states,
5. activities which for the purposes of enforcement of this Act are never, or only under certain conditions, to be regarded as employment.

(2) The Federal Ministry of Labour and Social Affairs may determine the following on the basis of the Ordinance on the Employment of Foreigners without the approval of the Bundesrat:

1. the conditions and the procedure for granting approval by the Federal Employment Agency; an alternative procedure for labour-market tests may be regulated as well,
2. details concerning restriction of the approval on a time-, plant-, occupational and regional basis,
3. cases covered by section 39 (2) and (3) where approval requires a labour-market test, for instance for the employment of skilled workers in geographic areas of the Federal Employment Agency to be determined and in certain occupations,
4. cases where foreigners who possess a temporary suspension of deportation or other foreigners who do not possess a residence title may be allowed to pursue employment under section 4a (4),
5. the requirements and procedures for granting a seasonal work permit to nationals of states listed in Annex II to Regulation (EC) No 539/2001 of the Council of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement (OJ L 81, 21.3.2001, p. 1),
6. occupations in which nationals of specific states are to be denied an EU Blue Card, because there is a lack of qualified workers in these occupations in the

country of origin.

(3) The Federal Ministry of Labour and Social Affairs may issue instructions to the Federal Employment Agency on implementing the provisions of this Act and the statutory instruments issued in connection with it, the provisions enacted by the European Union on access to the labour market and the intergovernmental agreements on the employment of workers.