

Netherlands

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A Modern Migration Policy for the Netherlands

The Modern Migration Policy bill was adopted on 7 July 2010 after 5 years of legislative activity. The new law, intended to come into effect on 1 January 2011, amounts to a complete revamp of the Aliens Act as regards employment, study and family reunification¹. The Modern Migration Policy (MMP) introduces a system which is entirely focused on the sponsor. Next to regular sponsors there will be 'recognized' sponsors, who have access to facilitated visa procedures. On the flipside, new and more severe sanctions will be implemented for irregular situations. This article will discuss the basic features of the MMP.

What is going to change?

Sponsors fulfil a dominant role in the MMP. They may submit residence applications on behalf of the foreign national that they sponsor, and can lodge objections and appeals. In fact, the sponsor will become indispensable: under the new law a residence application will be refused if a signed sponsor declaration has not been submitted to substantiate the application.

Companies and organisations will be able to apply with the Immigration and Naturalisation Service (IND) to become 'authorised' or 'recognised' sponsors. For some categories of sponsors, e.g. employers of highly skilled migrants and education institutions, the status of recognized sponsor is obligatory before applications can be filed for their employees or students.

The IND will have more possibilities to act against sponsors who do not fulfil their legal obligations. The same goes, by the way, for foreign nationals who do not keep by the rules. A system of administrative fines is introduced, i.e. the fines will be imposed by the IND.

Recognised sponsors

A significant feature of the new system is that recognised sponsors no longer have to submit the underlying documents (labor contract, degrees, etc) with their application. Their signed sponsor declaration, containing the relevant details (salary, term of the contract, etc). will, in principle, be accepted by the IND as proof that the application meets the criteria. This should ensure fast processing of applications. Recognised sponsors will also be the first to have access to electronic filing, once this has been introduced. This facilitated processing before entry will be compensated by a system of routine checks and audits afterwards, based on risk profiling.

How can a sponsor obtain recognised status? Companies and organisations who have acted as sponsor at least once in 2010, will automatically become a recognised sponsor under the new law. By estimation 5000 companies could fall into this category. Sponsors applying for a the first time will have to meet the following criteria to receive the recognized status:

1. They must have a registration with the Trade Register of the Chamber of Commerce
2. The solvability and continuity of the business must be guaranteed
3. The company's directors may not have a criminal record, including tax related offences
4. The company may not have been fined for illegal employment or labor conditions offences
5. All taxes and social premiums must be paid up until date

The underlying theme is *reliability*. The IND must be able to rely on the correctness of the sponsor's statements.

Obligations

According to the new law, all sponsors have essentially three obligations:

- a **duty to inform**. According to the MMP brochures of the IND, this means that the sponsor is obliged to report to the IND any change which may be relevant to the right of residence of the foreign national (for example if the employment relationship changes).
- an **administration duty**. This means that the sponsor has to include certain relevant information (for example on the income of the highly skilled migrant) in their records. Relevant data and documents must be saved for up to 5 years after the sponsorship has ended.
- a **duty of care**. The IND notes, for example, that sponsors of highly skilled migrants have the duty to ensure careful recruitment and selection of highly skilled migrants.

In addition, *recognised* sponsors have an obligation to "report all changes to the IND which are relevant to the recognition (for example a change in a company's financial position)". Another burden for the recognised sponsor are the repatriation costs in case the IND discovers a foreign national staying illegally in the Netherlands within a year after the sponsorship has ended. The IND may recover the transport costs in the Netherlands, the costs of travel documents and the airline ticket costs, from the former sponsor.

Sanctions

A first offence against these rules will lead, as a rule, to a warning. A second offence is fined with € 3,000.- Repeated offences lead to a 50% increase in the amount of the fine. The fines are administrative sanctions, imposed by the IND, i.e. the public prosecutor and the criminal judge are not involved. The imposition of a fine is subject to review, and subsequently appeal with the administrative sector of the District Court. However, the amounts are fixed and may only be mitigated in highly exceptional circumstances.

Offences of a very serious nature can be regarded as a criminal offence even the first time and be brought immediately before the public prosecutor, jumping the administrative fines stage. By 'serious' the government understands, for example: involving intentional abuse of immigration procedures and exploitation of immigrants. Frequently repeated offences may also be considered as a criminal offence.

Authorized sponsors can be temporarily suspended, or even barred for 5 years. This means that they can no longer employ highly skilled migrants (receive foreign students, etc), a sanction that will have a much harder impact, presumably, than the financial sanctions.

Comments

Criticism has arisen from an international, as well as a national law perspective. One of the first comments was that the absolute necessity to have a sponsor could conflict with international obligations. EU law prohibits that new requirements are introduced in areas that are already governed by EU law. For example, an applicant who fulfils the requirements for an EU Blue Card, cannot be refused residency on the simple ground that the application wasn't accompanied by a sponsor declarationⁱⁱ. The government has taken notice of this problem and proposes, in such circumstances, that the IND grants the permit anyway, but at the same time assigns a sponsor on its own account which, in this example, would be the employer of the Blue Card holder. This solution is, however,

questionable since the assigned sponsor is subjected to the obligations of care, information etc. that the new law prescribes, which could be viewed as additional requirements. After due consideration, the government has come to the conclusion that these obligations should not be considered as prohibitive in the sense that they would render the right to an EU Blue card ineffective. Due to recent case law, this solution was deemed unacceptable for only one category of migrants, family members of Turkish workers, who may also not be submitted to new requirements due to the standstill clause in article 6 of Decision 1/80 of the EC– Turkey association Councilⁱⁱⁱ. They cannot, therefore, be obliged to sign the sponsor declaration, and the government has decided that pending further case law, they will not be assigned as sponsor by the IND either.

There is only one more exception to the obligation to have a sponsor: young working holiday makers from Canada, New Zealand and Australia. Regardless the motives for this exception, this obviously regards an uncontroversial category which has therefore raised no debate.

On a national level it has been noted that the obligations of the sponsor leave quite some room for interpretation, which could result in sanctions being imposed arbitrarily. For sponsors who work frequently with knowledge migrants, the risk of getting suspended as a recognized sponsor will no doubt be felt as a sword of Damocles. The obligation to report “all changes which are relevant to the recognition” will probably not make them feel more comfortable.

Conclusion

The Modern Migration Policy is an ambitious project of which the legislative phase is now behind us. The next step is to see how it will function in practice. Will the claim to a modern policy for regular migration turn out to be justified? We will keep you posted.

ⁱ A separate bill of law was launched to completely redesign the Dutch asylum procedures, gone into effect recently on 1 July 2010.

ⁱⁱ Note that the EU Bluecard Directive 2009/50 will come into force in the Netherlands in January 2011. The government proposes to apply a salary threshold of € 60.000,- gross per annum, considerably higher than the € 50.183,- (resp. 36.801,- for those under 30) in the knowledge migrant scheme.

ⁱⁱⁱ EU court of Justice 29 April 2010, Case C92/07 (European Commission vs. The Netherlands)