

## **Prerequisites for Indian IT specialists to obtain work and residence permits in Switzerland**

### **1. General information on employment of Indian IT experts in Switzerland (as of February 2005)**

Switzerland's policy on foreign nationals is based on a two-tier recruitment system. A distinction is made between employees coming from the EU/EFTA area and those from other countries (third countries). This system was introduced in the light of the bilateral agreement on freedom of movement between the European Union and Switzerland (which is not an EU member). The new EU member states in Eastern Europe are currently still considered as third countries for the purposes of work permits.

As a result of the two-tier system, employees coming from EU/EFTA countries benefit from easier entry requirements, whilst for individuals from other non-European countries, work and residence permits are subject to more stringent conditions.

The following observations refer to conditions for obtaining work and residence permits in relation to nationals of third countries (non-EU/EFTA citizens).

### **2. Indians as citizens of a non-European country**

#### **2.1 Overview**

The rules currently applicable to foreign nationals are drawn from the Federal Law on the Residence and Establishment of Foreign Nationals and the Federal Ordinance on Restrictions of the Number of Foreign Nationals. According to these, a foreign national who arrives in Switzerland for the first time to take up employment may obtain the following types of work and residence permits. Any ensuing decision granting permission to reside always also incorporates the decision on the permission to work.

- (a) Annual residence permit: this type of permit is intended for those staying for longer periods. It is initially granted for one year, but can be extended on an annual basis.
- (b) Short-term residence permit: this allows a stay of a maximum of 12 months (364 days) for professional activities of a restricted duration and can be extended to 24 months at the most.
- (c) 4 month permit: this type of permit allows a stay of a maximum of 120 days in any one year. In between periods of residence, the foreign national must spend at least two months outside the country.

It should be noted that there is an annual maximum figure per category for stays lasting longer than four months (quota system). For the period from 1 November 2004 to 31 October 2005, the quota for the whole of Switzerland is 4,000 annual residence permits and 5,000 short-term residence permits. For the period from 1 November 2005 to 31 October 2006 it is probable that the same maximum figures will apply.

The work and residence permits mentioned above are issued by the respective cantonal authorities (see Para. 2.4 below) and are applicable only to specifically approved appointments in the canton concerned. Changing job, profession or canton is likewise subject to the duty of obtaining approval, any such approval as a general rule only being issued to those in possession of annual residence permits.

Those in possession of annual residence permits may also have their spouses and unmarried children aged under 18 join them in Switzerland, provided that the sojourn and the professional activity appear to be stable. In other categories, families are generally not permitted to join the employee.

After an uninterrupted period of 10 years' residence in Switzerland, a foreign national will be granted permanent domicile. This permit is not subject to any restrictions related to the labour market.

## **2.2 General conditions for work and residence permits**

When work permits are issued, priority will always be given to local (domestic) employees. Thereafter, permits are only issued if the employer has been unable to find local employees suitably qualified for the work in question and prepared to do the work subject to the customary conditions. Foreign nationals in possession of a permanent residence permit fall into the same category as Swiss citizens, and priority is also given to job-seeking foreign nationals already resident in Switzerland and authorised to work, and to EU/EFTA citizens generally.

Moreover, a permit may only be issued if the employee is in possession of an employment contract (and also a contract of secondment if remaining employed abroad) offering pay and working conditions corresponding to those customary in the local area, and if the foreign national is insured against loss of earnings in the event of sickness.

Finally, as already mentioned (see Para. 2.1), it is a condition of a work and residence permit lasting longer than 4 months that the respective quotas are not yet exhausted. There is no such quota system for short-term residence permits lasting less than 4 months.

To summarise, the issuance of a work and residence permit for a foreign national from a non-EU/EFTA country is therefore contingent upon the following preconditions:

- good professional qualifications;
- the existence of an employment contract (and possibly also a secondment contract) offering pay and working conditions corresponding to those customary in the local area;
- the impossibility of finding any suitably qualified and prepared Swiss nationals or foreign nationals already resident in Switzerland or any EU/EFTA citizens;
- non-exhaustion of quotas for new work permits in the relevant category.

However, even if all these conditions are fulfilled in a particular case, no actual legal claim exists to the issuance of a work and residence permit. The authorities responsible have considerable discretion in deciding whether or not such a permit should be issued.

### 2.3 Exceptions for Indian executives and IT specialists

As a consequence of the priority granted to local and EU/EFTA employees, the issue of first-time work and residence permits to nationals of third countries is limited. Exceptions can be made, however, if the foreign nationals in question are executives or specialists:

#### (a) Exceptions for executives and highly qualified specialists

The priority accorded to local employees and EU/EFTA employees is not applicable in relation to the following categories of employees:

- executives or highly qualified specialists working for companies operating internationally where a company-internal executive transfer is arranged;
- executives or highly qualified specialists essential for important research projects in enterprises and research institutes or indispensable for the performance of particular, specialised tasks.

At the discretion of the authorities, exceptions to the priority rule in favour of local and EU/EFTA employees may also be made in the case of employees from third countries who wish to come into the country for a limited period for the purposes of further education or vocational training.

The category of ‘executives’ is deemed to include those exercising an executive function and other senior managers with wide-reaching company responsibility and the corresponding capacity for decision-making, and executives in connection with an international company-internal executive transfer. Employees who are highly qualified and engaged in scientific research activities are also given preference.

In practice, advantage is frequently taken of the possibility of obtaining work permits in the context of an internal executive transfer, since this is a situation for which the requisite preconditions can be furnished by the company itself.

However, there is no actual legal claim to the issuance of a work and residence permit even for these privileged staff members.

**(b) Exceptions for qualified staff**

In the case of qualified staff, such as IT technicians, who do not fall into the category of executives or highly qualified specialists, there must in addition be special reasons why the rule of giving priority to local employees and those from EU/EFTA member states should not apply.

In the IT and telecommunications sector, in particular, the following grounds may apply:

- The existence of co-operation agreements in connection with IT and telecommunications projects: joint ventures, safeguarding service and guarantee work, temporary assignments linked to large-scale projects, and the execution of exceptional contracts. Those wishing to be considered as sufficiently qualified to justify implementation of this exception must be technically specialised staff with a college or university qualification in a relevant discipline and at least 2 years' specialised professional experience or, in the absence of a college or university qualification, with at least 10 years' practical specialist professional experience, as a general rule.
- Company-internal know-how transfer for the purpose of acquiring particular business experience in Switzerland. Employees with a college or university qualification are (generally) deemed to be adequately qualified.

**3. Procedures and responsibilities**

As a general rule, it is the cantons which bear responsibility for issuing and extending work and residence permits. Thus, it is the labour market authority in the canton of the place of work who makes the preliminary decision as regards compliance with the labour market regulations, whereafter the cantonal foreigners' registration office will issue the work and residence permit.

In the case of short-term and annual residence permits, the cantonal labour market authority will also obtain the consent of the relevant Federal body (Federal Office for Migration) prior to issuing the permit.

All requests for issuance of a work and residence permit must be submitted by the employer to the appropriate cantonal labour market authority. In cases where also a visa is needed, as is the case with Indian nationals, the employee must apply to the appropriate Swiss diplomatic representation for such a visa.

#### 4. **Planned statutory amendment**

It is planned to replace the statutory basis mentioned at the outset with a new Foreign Nationals Act, which is currently being debated in Parliament. It is not yet known when the new law may come into force.

The conditions mentioned for non-EU/EFTA citizens for obtaining a work and residence permit are, however (as things stand currently), to remain essentially unchanged under the new law. By contrast, the position of legitimately long-term resident foreign nationals is to be improved by measures such as abolishing obstacles when changing profession or job or canton, and also as regards being joined by family members.

#### 5. **Summary**

When foreign employees are employed in Switzerland, priority is given to local employees, including those from EU/EFTA member states.

Exceptions to this position are possible if the foreign employee is an executive or a highly-qualified specialist who is to work in Switzerland in connection with a company-internal executive transfer or is needed as a specialist for particular tasks.

In the case of other qualified staff such as IT technicians, there must be special reasons justifying an exception to the principle of priority. In the IT and telecoms field, co-operation agreements and company-internal know-how transfers constitute grounds for justifying an exception.

However, the cantonal authorities have substantial discretion in applying the exception conditions mentioned above, and not all cantons treat these conditions in the same way. Each application must therefore be judged individually in order to assess the chances of a permit being issued.

There is no actual legal claim on the part of a foreign national to the issuance of a work and residence permit.

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