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NOTE

from: Presidency
to: Working Party on Integration, Migration and Expulsion
on: 30 May 2011

No. Cion prop.: 12208/10 MIGR 66 SOC 461 CODEC 689 + ADD 1, ADD 2

Subject: Proposal for a Directive of the European Parliament and of the Council on the conditions of entry and residence of third-country nationals for the purposes of seasonal employment

Delegations will find attached Presidency compromise suggestions for Articles 2, 3.b, 5.b, 9.6, 11.3, 6 and 7 of the above proposal on which the discussion will be focused at the meeting on 30-31 May in the indicated order. The Presidency would also like to have a discussion on Article 14 of the above proposal.

Changes to the previous text of these Articles, as it appeared in doc. 10162/11 (Articles 2.2, 3, 5-7), in doc. 7132/11 (Articles 9 and 11), and in doc. 6026/11 (Articles 2.1 and 9) are indicated with **bold** and [...].

Proposal for a
DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL
on the conditions of entry and residence of third-country nationals for the purposes of
seasonal employment

CHAPTER I
General provisions

Article 1

Subject-matter

This Directive determines the conditions of entry and residence of third-country nationals for the purposes of employment as seasonal workers and defines the rights of seasonal workers.

The provisions of this Directive shall be applied without prejudice to Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code) and the Convention implementing the Schengen Agreement (hereinafter 'the Schengen Convention').

Article 2

Scope

1. This Directive shall apply to third-country nationals who reside outside the territory of the Member States and apply to be admitted or who have been admitted, under the terms of this Directive, to the territory of a Member State for the purpose of employment as seasonal workers.

This Directive may also, if provided for by national law, apply to third-country nationals who are legally staying in the territory of a Member State and who apply for a seasonal worker permit in that Member State, **except for the following categories of third-country nationals:**

- (a) [...] beneficiaries of international protection under Council Directive 2004/83/EC of 29 April 2004 or have applied for international protection under that Directive and whose application has not yet given rise to a final decision;
- (b) **third-country nationals** who are authorised to reside in a Member State on the basis of temporary protection or have applied for authorisation to reside on that basis and are awaiting a decision on their status;
- (c) family members of Union citizens who have exercised their right to free movement within the Union, in conformity with Directive 2004/38/EC of 29 April 2004;
- (d) **third-country nationals** who enjoy long-term resident status in a Member State in accordance with Council Directive 2003/109/EC of 25 November 2003 and exercise their right to reside in another Member State in order to engage in seasonal employment activity;

[...]

2. This Directive shall not apply to third-country nationals:

- (a) who are temporarily posted in the framework of the provision of services, irrespective of whether the undertaking is established in a Member State or in a non-Member State, as long as they are posted.¹
- (b) **who are** working for and being assigned by employment agencies, temporary work agencies or any other undertakings engaged in making available labour [...] **to work under the supervision and direction of another undertaking.**

Article 3

Definitions

For the purposes of this Directive, the following definitions shall apply:

- (a) ‘third-country national’ means any person who is not a citizen of the European Union within the meaning of Article 20 (1) of the Treaty on the Functioning of the European Union;
- (b) ‘seasonal worker’ means a third-country national who retains his/her principal place of residence in a third country [...] **and** resides temporarily for the purposes of employment in the territory of a Member State to carry out an activity dependent on the passing of the seasons, as determined by [...] national law and/or practice, under one or more fixed-term work contracts concluded directly between the third-country national and the employer established in that Member State;²

¹ Recital (9): “This Directive should not affect conditions of the provision of services in the framework of the [...] **Treaty**. In particular, this Directive should not affect the terms and conditions of employment which, pursuant to Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services¹, apply to workers posted by an undertaking established in a Member State to provide a service in the territory of another Member State. [...] **Nor should** this Directive [...] apply to workers posted by undertakings established in a third-country to provide a service in the territory of a Member State.”

² Recital (10): "Member States should be able to determine specific sectors of the economy and/or activities that meet the criteria for seasonal work as defined in this Directive. [...]."

- (c) 'activity dependent on the passing of the seasons' means an activity that is tied to a certain time of the year during which labour levels are required that are above those necessary for usually ongoing operations or during which specific operations need to be carried out;
- (d) 'seasonal worker permit' means an authorisation issued using the format laid down in Council Regulation (EC) No 1030/2002 of 13 June 2002 laying down a uniform format for residence permits for third-country nationals bearing the words 'seasonal worker' entitling its holder to reside and work in the territory of a Member State under the terms of this Directive;
- (e) 'short-stay visa' means an authorisation issued by a Member State in accordance with Article 2 (2) of the Visa Code;
- f) 'multiple-entry visa' means an authorisation issued by a Member State in accordance with Article 24 (2) of the Visa Code;
- (g) 'long-stay visa' means an authorisation issued by a Member State in accordance with Article 18 of the Schengen Convention as amended by Article 1 (1) of Regulation (EU) No 265/2010 of the European Parliament and of the Council of 25 March 2010 amending the Convention Implementing the Schengen Agreement and Regulation (EC) No 562/2006 as regards movement of persons with a long-stay visa;
- (h) 'single application procedure' means a procedure leading, on the basis of one application for the authorisation of a third-country national's residence and work in the territory of a Member State, to a decision on the application;
- (i) 'regulated profession' means a regulated profession as defined in Article 3(1)(a) of Directive 2005/36/EC.

Article 4

More favourable provisions

1. This Directive shall apply without prejudice to more favourable provisions of:
 - (a) Union law, including bilateral and multilateral agreements concluded between the Union or between the Union and its Member States on the one hand and one or more third countries on the other;
 - (b) bilateral or multilateral agreements concluded between one or more Member States and one or more third countries.
2. This Directive shall not affect the right of Member States to adopt or retain more favourable provisions for persons to whom it applies in respect of Articles 13, 14, 16 and 17 of this Directive.

CHAPTER II

Conditions of admission

Article 5³

Criteria for admission

1. Without prejudice to Article 9, a third-country national who applies to be admitted under the terms of this Directive or the employer shall:

³ New Recital: "In case of doubts concerning the grounds of the application for admission, Member States should be able to require all the necessary evidence to assess **the coherence of the application**, in particular evidence concerning the third-country national's purpose of stay, in order to **prevent** abuse and misuse of the procedure set out in this Directive."

- (a) present a valid work contract or, if provided for by national law, a binding job offer to work as a seasonal worker in the Member State concerned with an employer established in the Member State which specifies the rate of pay and the working hours per week or month and, **where** applicable, other relevant working conditions. Member States shall require that this contract or job offer is in conformity with the provisions of Article 16(1);
 - (b) provide evidence [...] **of having or being entitled to have by virtue of the application of national law, a** sickness insurance for all the risks normally covered for nationals of the Member State concerned for [...] periods where no such insurance coverage and corresponding entitlement to benefits are provided in connection with, or as a result of, the work carried out in the **Member State concerned**.
 - (c) provide evidence that the third-country national has accommodation as set out in Article 14.
2. Member States shall require that the seasonal worker will have sufficient resources during his/her stay to maintain him/herself without having recourse to the social assistance system of the Member State concerned.
 3. Third-country nationals who are considered to pose a threat to public policy, public security or public health shall not be admitted for the purposes of this Directive.
 4. Member States shall require the seasonal worker and/or the employer to present documentation attesting that the third-country national fulfils the conditions laid down under national law for the exercise by Union citizens of the regulated profession specified in the work contract or binding job offer as provided for in national law.

5. Third-country nationals shall be in possession of a valid travel document determined by national law. For stays exceeding three months, Member States shall require the period of validity of the travel document to cover at least the duration of the seasonal worker permit or the long-stay visa. In this case Member States may also require the period of validity to exceed the intended duration of stay by a maximum of 6 months.

Article 5a

Volumes of admission

This Directive shall not affect the right of a Member State to determine the volumes of admission of third-country nationals entering its territory for the purpose of seasonal work.⁴

Article 6

Grounds for refusal

1. Member States shall reject an application for admission to a Member State for the purposes of this Directive whenever the conditions set out in Article 5 are not met or whenever the documents presented have been fraudulently acquired, or falsified, or tampered with.
2. Member States may verify whether the vacancy in question could be filled by nationals of the Member State concerned or by other EU citizens, or by third-country nationals lawfully residing in the Member State and already forming part of its labour market in accordance with national or Union law, in which case they may reject the application.

⁴ Recital (8): "This Directive should be without prejudice to the right of the Member States to determine the volumes of admission of third-country nationals coming from third countries to their territory for the purposes of seasonal work as specified in the [...] Treaty."

This paragraph shall be applied without prejudice to the principle of **Union** preference as expressed in the relevant provisions of the Act of Accession of 2005.⁵

3. Member States may reject an application for admission to a Member State for the purposes of this Directive on the ground set out in Article 5a.
4. Member States may reject an application if the employer:
 - (a) has been sanctioned in conformity with national law for undeclared work and/or illegal employment;
 - or
 - (b) does not meet the legal obligations regarding social security, taxation and/or working conditions, [...] **set out in** national law.
5. Member States [...] **may** reject an application if the third-country national has not complied with the obligations arising from a previous decision on admission as a seasonal worker.⁶

⁵ **Recital (7) “This Directive should be applied without prejudice to the principle of Union preference as regards access to Member States’ labour market as expressed in the relevant provisions of Acts of Accession. Therefore, nationals of the [...] Member States concerned should be given preference over third-country nationals, during the transitional period specified in the relevant provisions of the [...] Acts of Accession, with respect to access to the labour market.”**

⁶ New Recital: "Member States should be able to reject an application for admission in particular when the third-country national has not complied with the obligation arising from a previous admission decision as a seasonal worker to return to a third country on the expiry of the permit."

Article 7

Withdrawal or non-renewal of the permit

1. Member States shall withdraw or refuse to renew the permit issued on the basis of this Directive in the following cases:
 - (a) when it has been fraudulently acquired, or has been falsified, or tampered with;
or
 - (b) where the holder is residing for purposes other than those for which he/she was authorised to reside.
2. Member States may withdraw or refuse to renew the permit issued on the basis of this Directive whenever the conditions laid down in Article 5 were not met or are no longer met.
3. Member States may withdraw or refuse to renew the permit issued on the basis of this Directive if the employer:⁷
 - (a) has been sanctioned in conformity with national law for undeclared work and/or illegal employment;
 - (b) does not meet the legal obligations regarding social security, taxation and/or working conditions, [...] **set out in** national law; or
 - (c) has not fulfilled the obligations based on the work contract.

⁷ New Recital: "Member States should be able to require the employer to cooperate with the competent authorities and to provide all relevant information concerning the seasonal employment of the third-country national concerned in order to prevent possible abuse and misuse of the procedure set out in this Directive."

4. Member States [...] **may** withdraw or refuse to renew the permit issued on the basis of this Directive if the third-country national has not complied with the obligations arising from the decision on admission during a previous stay as a seasonal worker.

Article 7a

Sanctions

Member States shall provide for sanctions against employers who have not fulfilled the obligations based on the work contract. Those sanctions shall be effective, proportionate and dissuasive.

CHAPTER III Procedure and permit

Article 8

Access to information

Member States shall take the necessary measures to make available information on conditions of entry and residence, including rights and all documentary evidence needed for an application to reside and work in the territory of a Member State as a seasonal worker.

Article 9

Applications for admission

1. Member States shall determine whether an application is to be made by the third-country national and/or by the employer.
2. Member States shall designate the authority competent to receive the application and to issue the seasonal worker permit.

3. The application to reside and work in the territory of a Member State as a seasonal worker shall be submitted in a single application procedure.
4. The Member State concerned shall grant the third-country national whose application for a seasonal worker permit has been accepted every facility to obtain a long-stay visa required for the purpose of initial entry.
5. Member States may accept, if provided for by national law, an application submitted when the third-country national concerned is legally staying in its territory.
6. For the purposes of **Article 11 (2) and (3)**, Member States shall accept an application for a new authorisation for the purpose of seasonal employment submitted by a third-country national admitted under the terms of this Directive to the territory of the Member State concerned.

...

Article 11

Duration of stay

1. Seasonal workers shall be allowed to reside for a maximum of five to nine months in any period of twelve months, after which they shall return to a third country.⁸
2. Within the maximum period determined by Member States in accordance with paragraph 1, and provided that the criteria of Article 5 are met, seasonal workers shall be allowed to extend their contract and apply for a renewal of the authorisation issued for the purpose of seasonal employment within the meaning of Article 10.

⁸ New Recital: "Member States should be able to determine the maximum duration of stay for the purposes of seasonal employment within any period of twelve months referred to in this Directive."

3. **Within the maximum period determined by Member States in accordance with Paragraph (1), seasonal workers may be allowed to be employed with a different employer.⁹**

Article 12

Facilitation of re-entry

1. Member States may
 - (a) upon application, issue up to three seasonal worker permits or multiple-entry visas covering up to three subsequent seasons within one administrative act,

and/or
 - (b) provide a facilitated procedure for third-country nationals who were admitted to that Member State as seasonal workers and who apply to be admitted as such in a subsequent year.

Article 13

Procedural safeguards

1. The competent authorities of the Member State shall adopt a decision on the application and notify the applicant in writing, in accordance with the notification procedures laid down in the national law of the Member State, as soon as possible but not later than 60 days of the complete application being lodged.
2. Where the information supplied in support of the application is inadequate, the competent authorities shall notify the applicant within a reasonable period of the additional information that is required and set a reasonable deadline for providing it.

⁹ **New Recital: “The possibility to change employers is important to reduce the risk of abuse that seasonal workers employed by one single employer might face.”**

3. Any decision rejecting an application, or any decision not to renew or to withdraw the permit, shall be notified in writing to the applicant and shall be open to a legal challenge in the Member State concerned in accordance with national law. The notification shall specify the reasons for the decision, the possible redress procedures available and the time limit for taking action.

Article 14

Accommodation

Member States shall require the applicant to provide evidence that the seasonal worker will benefit from accommodation that ensures an adequate standard of living according to national legislation and/or practice. If the accommodation is provided by the employer and the seasonal worker is required to pay rent for such accommodation, its costs shall not be excessive in relation to their remuneration.

CHAPTER IV RIGHTS

Article 15

Rights on the basis of the seasonal worker permit/visa

During the period of validity of a seasonal worker permit, the holder shall enjoy at least the following rights:¹⁰

¹⁰ New Recital: “Third-country nationals who are in possession of a valid travel document and an authorisation for the purpose of seasonal work issued under this Directive by a Member State applying the Schengen acquis in full, should be allowed to enter into and move freely within the territory of the Member States applying the Schengen acquis in full, for a period up to three months in accordance with Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) and Article 21 of the [...] Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders (Schengen Implementing Convention).”

- (a) the right to enter and stay in the territory of the Member State issuing the permit;
- (b) free access to the entire territory of the Member State issuing the permit within the limits provided for by national law;
- (c) the right to exercise the concrete employment activity authorised under the permit in accordance with national law.

Article 16

Rights

Whatever the law applicable to the employment relationship, seasonal workers shall be entitled to:

1. working conditions, including pay and dismissal as well as health and safety requirements at the workplace, applicable to seasonal work as laid down by law, regulation or administrative provision and/or universally applicable collective agreements in the Member State to which they have been admitted according to this Directive.

In the absence of a system for declaring collective agreements to be of universal application, Member States may, if they so decide, base themselves on collective agreements which are generally applicable to all similar undertakings in the geographical area and in the profession or industry concerned, and/or collective agreements which have been concluded by the most representative employers' and labour organisations at national level and which are applied throughout national territory;

2. equal treatment with nationals of the host Member State as regards at least with regard to:
 - (a) freedom of association and affiliation and membership of an organisation representing workers or of any organisation whose members are engaged in a specific occupation, including the benefits conferred by such organisations, without prejudice to the national provisions on public policy and public security;
 - (b) provisions in national laws regarding the branches of social security as defined in Article 3 of Council Regulation (EC) No 883/04;

- (c) payment of statutory pensions based on the worker's previous employment under the same conditions as nationals of the Member States concerned when they move to a third country;
- (d) access to goods and services and the supply of goods and services made available to the public, except public housing and counselling services afforded by employment services.

The right to equal treatment provided for in paragraph 2 shall be without prejudice to the right of the Member State to withdraw or to refuse to renew the permit in accordance with Article 7.

Article 17

Facilitation of complaints

Member States shall ensure that third parties which have, in accordance with the criteria laid down by their national law, a legitimate interest in ensuring compliance with this Directive, may engage either on behalf of or in support of a seasonal worker, with his/her approval, in any administrative or civil proceedings provided for with the objective of implementing this Directive.

CHAPTER V

Final provisions

Article 18

Statistics

1. Member States shall communicate to the Commission statistics on the number of residence permits and visas issued for the first time or renewed and, as far as possible, on the number of residence permits and visas withdrawn for the purpose of seasonal employment to persons who are third-country nationals, disaggregated by citizenship, age and sex, length of validity of the permit and economic sector

2. The statistics referred to in paragraph 1 shall be communicated in accordance with Regulation (EC) No 862/2007 of the European Parliament and of the Council.
3. The statistics referred to in paragraph 1 shall relate to reference periods of one calendar year and shall be communicated to the Commission within six months of the end of the reference year. The first reference year shall be [*the year following the point of time referred to in Article 20(1)*].

Article 19

Reporting

Every three years, and for the first time no later than [*three years after the date of transposition of this Directive*], the Commission shall submit a report to the European Parliament and to the Council on the application of this Directive in the Member States and shall propose any amendments necessary.

Article 20

Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by (*24 months from the date of publication in the Official Journal of the European Union*) at the latest. They shall forthwith communicate to the Commission the text of those provisions and a correlation table between those provisions and this Directive.

When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Article 21

Entry into force

This Directive shall enter into force on the day following its publication in the *Official Journal of the European Union*.

Article 22

Addressees

This Directive is addressed to the Member States, in accordance with the Treaty on the Functioning of the European Union.

Done at Brussels, [...]

For the European Parliament

For the Council

The President

The President
