

March/2007

IMMIGRATION DIRECTORATES' INSTRUCTIONS

CHAPTER 6 SECTION 2

**PERSONS INTENDING TO ESTABLISH THEMSELVES
IN BUSINESS UNDER THE PROVISIONS
OF EC ASSOCIATION AGREEMENTS – APPLICATIONS FOR INDEFINITE LEAVE
TO REMAIN**

This document contains the guidance for caseworkers considering applications from persons intending to establish themselves in business under provisions of EC Association Agreements.

INTRODUCTION

EC Association Agreements ("ECAA")

The agreements with Bulgaria and Romania came into force on 1st February 1995. The Agreements were drafted in very similar terms. Each agreement contained provisions on granting rights of establishment to Bulgarian and Romanian nationals in all EU Member States. In this context, "establishment" meant the right to pursue economic activities in a self-employed capacity.

Nature and purpose of Agreements

The European Community Association Agreements represented the first stage in preparation for the accession of Romania and Bulgaria into the European Union.

Non-discrimination

The establishment provisions ensured that self-employed ECAA nationals were not to be treated in a discriminatory fashion. Each Member State was required to ensure that Bulgarian and Romanian companies and nationals were treated no less favourably than its own companies and nationals, both in their establishment and in their operation.

Entry controls

A right to enter and reside in the Member State was implied in the Agreements, as a corollary of the right of establishment. Member States were not prevented from applying national rules governing entry to and residence in the State. National rules should not however effectively nullify or impair rights of self-establishment. The ECJ confirmed [1] that the UK was able to apply the entry controls which were previously set out in paragraphs 212 to 216 of the Immigration Rules (HC 395). These paragraphs – now deleted - set out the requirements for leave to enter the UK as a person intending to establish himself in business under the provisions of an ECAA. Business meant an enterprise as a sole trader, a partnership or a company registered in the UK. Dependants are dealt with in paragraphs 240 to 245 of the Immigration Rules. [1] ECJ case C-257/99: *Barkoci and Malik*

Public policy proviso

The right of self-establishment could be limited on grounds of public policy, public

security or public health. The relevant test was the EU public policy test (see ECI Chapter 8).

DEVELOPMENTS RESULTING FROM ACCESSION

Bulgaria and Romania joined the EU on 1 January 2007. Bulgarian and Romanian nationals may exercise their treaty right of self-employment and so do not need grants of leave under ECAA. The Agreements in any case lapsed upon accession. We have therefore deleted the immigration rules relating to leave to enter and limited leave to remain under ECAA, but we have retained those for indefinite leave to remain, to allow people who have been granted leave under ECAA to achieve settlement under domestic law should they wish to apply for it. They will otherwise be eligible for permanent residence under EU law if they exercise treaty rights for five years under the Accession Regulations. This document therefore deals only with applications for ILR.

Applicants for ILR under ECAA need to have been granted initial leave in the category and then at least one extension of their leave. They do not need to obtain a second extension, even if their leave to remain expires before they have spent five years in the category. Time spent purely as a self-employed person under the Accession Regulations may therefore count towards the five years, but applicants must still meet all the requirements of paragraph 222 throughout the period of five years.

ECAA INDEFINITE LEAVE TO REMAIN APPLICATIONS

1. This guidance is for caseworkers considering applications from those who were granted leave under the provisions of an EC Association Agreement (ECAA) and who are seeking indefinite leave to remain (ILR) pursuant to that leave.

General

2. The requirements which applicants who are seeking indefinite leave to remain under ECAA must meet are set out in paragraphs 222-223 of the Immigration Rules.

3. In all cases, the onus is on the applicant to demonstrate that he meets the requirements under the Rules. The easiest way for him to do this is to provide all the information requested in the ECAA (Main) application form, and for the documentation to be provided wherever possible in a recognisable format which is easily verifiable by the caseworker.

Establishment of business

4. All applicants must meet the requirements of paragraph 222(iv-v). In order to demonstrate that 222(iv) is met, we would expect to see supporting documentation. Possible evidence to demonstrate this will depend on the sector in which the applicant is operating, but might include:

Employers or Public Liability Insurance Certificate.

Copies of contracts awarded to or by the applicant.

Copy of the tax return (P35) for any staff whom the applicant engages.

Business rental documents for premises or equipment copies of invoices for work done or materials purchased.

We would also expect to see sufficient testimony and verifiable references to support the claims made in the application about work which has been undertaken.

5. There may be some applicants for ILR who for whatever reason were granted initial leave to remain under the ECAA without a valid entry clearance in this category (as required by 222(ii)). These applications should be considered using this guidance in the normal way (but see "History of Application" section below).

6. It is permissible for the applicant to be engaged in more than one business simultaneously.

Maintenance and accommodation

7. It is important for caseworkers to examine the particular circumstances of each individual case to establish to their satisfaction that 222A(i) is met. The income required for an applicant realistically to maintain and accommodate themselves and any dependants without recourse to employment or public funds should be assessed on a case by case basis, taking any relevant factors into account, and bearing in mind that income derived from sources other than businesses established in the UK should not be included. This includes anything earned by dependants of the primary applicant.

8. Applicants need not have generated the level of profit required to maintain and accommodate themselves solely from the business which forms the basis of their ECAA application throughout the first year of their stay, while the business was being set up (although they must be able to demonstrate how, in the absence of such profits, they have maintained themselves in that time). Applicants should provide evidence that such profits have been generated for the full three/four (as appropriate) years following their initial grant of leave.

9. Evidence of the level of income from the business should be demonstrated through the audited accounts required by paragraph 222(vi) of the Rules, together with invoices and evidence of work undertaken which is in accordance with the original business plan and any other evidence submitted by the applicant. These accounts should also show expenditure on items crucial to the running of the business for the whole of the period in which it has been operative, such as essential equipment and travel costs. Evidence of personal expenditure should be provided through bank statements and documents relevant to significant expenditure such as tenancy agreements, utility bills, and Council Tax. "Audited accounts" in this context should be taken to mean accounts compiled by a fully qualified or chartered accountant. Checks should be undertaken where necessary to verify the professional status of these individuals.

Employment status

10. When considering whether an applicant has met the requirements of paragraphs 222B or 222C, it is particularly important to consider whether the work on which the applicant has been engaged amounts to concealed employment. There is no statutory definition of self-employment, although previous decisions by the courts have established a number of criteria to distinguish between employment and self-employment. The kind of factors which need to be taken into account in deciding whether a particular engagement is one of employment or self-employment include:

- the degree of financial risk involved;
- the amount of control the worker has over what, when and how he / she does the work;
- the way in which pay is determined - set fee or regular payment based on hourly, daily, weekly or monthly rates;
- whether the worker is required to work at the premises of the person worked for;
- whether the worker provides the services personally or has the right to send someone else in his/her place.

The common thread running through these indicators is that no single factor is conclusive; for each engagement the whole picture needs to be looked at in the light of all the facts.

11. The applicant, or the person who is engaging him, cannot simply choose that an engagement is one of self-employment. It will depend on the terms, conditions and facts of the relevant working engagement. The fact that someone has registered to pay tax and National Insurance contributions as a self-employed person with the Inland Revenue is not sufficient evidence that they are truly self employed as the system is one of self assessment.

12. If 'yes' can be answered to all of the following questions, it will usually mean that they are not self-employed:

Does the person have to do the work themselves?

Can someone tell the person at any time what to do, where to carry out the work or when and how to do it?

Does the person work a set amount of hours?

Can someone move the person from task to task?

Is the person paid by the hour, week, or month?

Can the person get overtime pay or bonus payment?

However any combination of some of these factors might also indicate employment.

13. If 'yes' can be answered to all of the following questions, it will usually mean that they are self-employed:

Can the person hire someone to do the work for him/her or engage helpers at his/her own expense?

Does the person risk his/her own money?

Does the person provide the main items of equipment which they need to do their job (not just small tools which many employees provide for themselves)?

Does the person agree to do the job for a fixed price regardless of how long the job may take?

Is the person able to decide what work to do, how and when to do the work and where to provide the services?

Can the person regularly work for a number of different people?

Will the person have to correct unsatisfactory work in their own time at their own expense?

Again, any combination of these factors might also indicate self-employment.

14. Broadly, someone is self-employed if they can demonstrate that they are in business on their own account and bear the responsibility for the success or failure of that business.

Consideration and verification procedures

15. Caseworkers should seek to verify key aspects of the application wherever practicable through the checking of references and documents, and confirmation of any relevant agreements and business activities. In some cases it may not be possible to establish, solely on the basis of the documents available to the caseworker, the true nature of the circumstances surrounding the application with sufficient confidence to allow an informed and reasonable judgement to be made. This may be owing to doubts about the authenticity of documents, apparent inconsistencies in the evidence submitted, or significant omissions which seem unlikely merely to be a result of oversights in the preparation of the application. In these cases, consideration should be given to interviewing the applicant in person before making a decision in order to explore further the areas of doubt, and to contribute to the overall assessment of the application. There may also be cases where the application has been submitted by a third party and it would be helpful to test the credibility of the claims being made on their behalf through a face to face interview with the applicant. This may especially be so if a number of similar applications have been made by the same representative on behalf of different clients.

History of application

16. Although each application should be considered on the basis of current circumstances, the circumstances surrounding the original grant of entry clearance or further leave to remain for these applicants should be checked. If a caseworker feels that, for whatever reason, any particular aspect of the case was not examined sufficiently at the time of any previous decision, it would be appropriate for it to be looked at in more detail now, if it was felt that such examination would help to inform the decision on the current application. Such checks may also help the caseworker to form a judgement regarding the overall credibility of the application.

17. In this context, previous immigration history may be taken into account, and may point towards further investigation and exploration of particular aspects of the application. But a "negative" history, including previous unlawful presence in the UK, cannot, in itself, be conclusive in refusing an application.

Forgery / falsification

18. Caseworkers should be aware of all current guidance regarding forgery and falsification of relevant documentation, and should take expert advice, whether locally or elsewhere, whenever there is doubt regarding a document submitted as evidence.