EXPLANATORY MEMORANDUM TO

THE IMMIGRATION AND ASYLUM ACT 1999 (PART V EXEMPTION: LICENSED SPONSORS TIERS 2 AND 4) ORDER 2009

2009 No. 506

1. This explanatory memorandum has been prepared by the Home Office and is laid before Parliament by Command of Her Majesty.

This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

2.1 This Order exempts relevant employers and educational establishments who are licensed sponsors under Tiers 2 and 4 of the immigration points-based system from the requirements of Section 84(1) of the Immigration and Asylum Act 1999 (the 1999 Act). Section 84(1) of the 1999 Act sets out a prohibition on giving immigration advice or services unless qualified by virtue of the categories set out in Section 84(2)(a-e). However section 84(4)(d) allows the Secretary of State to specify, by order, persons to which section 84(1) does not apply. This Order exempts the licensed sponsors under Tiers 2 and 4 from the prohibition imposed under section 84(1) of the 1999 Act and the related criminal offence, if they provide immigration advice or services to the Tier 2 or Tier 4 migrant or that person's immediate family joining the migrant.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 The points- based system replaced all avenues for entry to the United Kingdom for students and workers. This Order applies to Tier 2 (skilled workers) and to Tier 4 (students). Tier 2 was implemented on 27 November 2008 and therefore the scheme has already started to operate without the exemption in the Order being in place. The delay in finalising details for the Order was because of discussions about the points- based system. The introduction of Tier 2 of the points- based system could not be delayed as the systems required to operate it and the related advertising were already in place. Licensed sponsors under Tier 2 have provided immigration advice and services to their employees without the exemption in place, but as the exemption only applies to services and advice provided free of charge, no person has made financial gain through acting without the cover of this Order. Licensed sponsors who it is intended should be exempted from the requirements of section 84(1) of the 1999 Act have not been required to apply for and pay for registration as an immigration adviser with the Office of the Immigration Services Commissioner (OISC). Tier 4 will come into effect on 31st March 2009.

4. Legislative Context

4.1 The 1999 Act prohibits anyone who is not a qualified (as defined under Section 84(2)), exempt or specified from providing immigration advice or services.

There currently exists an exemption for relevant employers created by SI 2003/3214 and an exemption for educational establishments created by SI 2001/1403. Exemption was granted to employers and educational establishments as it was recognised that they provide immigration advice and services to ensure that the migrant who is employed or enrolled with them complies with the conditions of their stay. The existing Orders came into force before the introduction of the points-based system, a major change to the immigration system that will replace over 80 existing routes to work and study in the United Kingdom with 5 Tiers. Under the points-based system British businesses and educational establishments can only recruit staff/enrol students from outside the EEA and Switzerland who qualify under the points- based system. The points-based system introduces a new category of person who is likely to give immigration or advice within the meaning of the 1999 Act that is the licensed sponsor. A licensed sponsor will be able to issue a certificate of sponsorship (COS) to a migrant and issuing a COS is likely to involve giving immigration advice or services in connection with an application by an individual for entry clearance or leave to enter or remain. This Order specifies employers and educational establishments acting as licensed sponsors for Tier 2 & Tier 4 migrants for the purposes of Section 84(4)(d) of the 1999 Act.

5. Territorial Extent and Application

5.1 This instrument applies to all of the United Kingdom.

6. European Convention on Human Rights

As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

7.1 The 1999 Act set up the Office of the Immigration Services Commissioner (OISC) as an independent public body to regulate immigration advisers. The Act established a framework for regulating immigration advice and services to ensure that those who provide these are fit and competent to do so. Persons providing immigration advice and services have to be qualified, and persons or organisations are defined as being qualified if they are registered with the OISC or are authorised to act by a professional body.

7.2 Employers or educational establishments carry out activities on behalf of the migrant that they have employed or enrolled that may be defined as immigration advice or services. Activities including making enquiries on behalf of the migrant with the immigration department about their status, advising the migrant on the length of leave they have been granted and conditions attached to it, reminding the migrant of the need to seek relevant extensions of stay are all matters that employers or educational establishments perform for the migrant they have sponsored. These activities all meet the definition of immigration advice or services in the 1999 Act and are not permitted to be undertaken by persons who are not qualified to do so. However responsible employers and educational establishments carry out such activities in order to ensure their employee/student acts in accordance with the immigration rules. Employers and educational establishments are currently exempt from the requirements of Section 84(1), provided that the services and advice are

given free of charge and relate to employees/students and prospective employees/students and their immediate families in the context of the current application/grant of leave to remain.

7.3 The points- based system has changed the way migrant students and employees can be granted permission work or study in the United Kingdom. The prospective employee or student must earn points against 3 sets of criteria, and they will also be assessed against the control factors indicating whether they are likely to comply with the terms of their permission to be in the United Kingdom. Central to this new system of immigration is a robust system of sponsorship. Applicants for Tiers 2-5 of the new system will need to provide a COS from a sponsor licensed by the UK Border Agency. If the applicant is granted permission to come to the United Kingdom to work/study the sponsor will be expected to accept certain responsibilities for the migrant.

7.4 The employers and educational establishments who will benefit from the migrant will act as licensed sponsors. They will be expected to monitor the migrant and will also provide advice concerning the conditions attached to the leave grant to them. The immigration advice or services provided by sponsors will be provided free of charge, not part of a business that provides such services or advice on a commercial basis, and will provided with the intention of ensuring that the migrant complies with the conditions attached to their stay.

7.5 The principle that employers or educational establishments should be exempt from Section 84(1) is to be applied to licensed sponsors. This Order is to ensure that the responsibilities of employers and educational establishments helping to maintain effective immigration control are continued, and that the exemptions granted under SI No.3214 of 2003 and SI No. 1403 of 2001 apply to licensed sponsors for Tier 2 and Tier 4 migrants.

8. Consultation outcome

8.1 This Order will ensure that the exemptions that are currently provided to employers and educational establishments are maintained, and that no employer or educational establishment is comparatively disadvantaged by the introduction of the points- based system. The Immigration Services Commissioner was consulted about the requirements of this Order, but as the exemptions will not alter the way employers, educational establishments or businesses operate then no opinions were sought from others outside of the UK Border Agency and the OISC.

9. Guidance

9.1 The Home Office is not providing any publicity or any guidance to users, stakeholders and enforcement agencies to explain the details of this Order. The details of the points- based system have been advertised widely and guidance is available through the UK Border Agency. Plans are being made to include in letters sent to licensed sponsors by the UK Border Agency confirmation of how they are exempted from the requirements of Section 84 of the 1999 Act and to inform the sponsors of their responsibilities under this section.

10. Impact

10.1 The impact is limited educational establishments and employers who are acting as licensed sponsors for Tier 2 and Tier 4 migrants. The 1999 Act requires persons to be qualified if they provide immigration advice or services, unless exempted. Educational establishments and employers who advise their students/ staff and monitor the terms of their leave are currently exempted, and this Order will ensure that there is a continuation of this exemption under the points- based system. There is no additional cost to business caused by this Order.

10.2 State funded educational establishments and National Health Service employers are covered by this Order. The impact of this Order will have the same legislative impact as the Orders that currently exist to exempt employers from the requirements of section 84(1). There is no additional cost to business caused by this Order.

10.3 An Impact Assessment has not been prepared for this instrument.

11. Regulating small business

11.1 The legislation reflects the provisions that already exist for small firms employing up to 20 people that employ workers who are non EEA residents. This Order will not create additional charges or impose additional costs to small businesses.

12. Monitoring & review

12.1 The Order will ensure that employers and educational establishments acting as licensed sponsors retain the same exemption from Section 84(1) of the Act, and there are no plans to review this provision. The points- based system is the biggest shake up of the immigration system in recent history and so the overall effectiveness will be subject to scrutiny. The exemptions from Section 84(1) will be reviewed in the context of any changes made to the points- based system or any problems that are identified. The 2 SIs that already apply to employers and educational establishments will remain in force until expiry of work permits issued prior to the points- based system. The decision whether to repeal the 2 SIs will be made after consideration has been given to whether all required provisions have been carried forward

13. Contact

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