

THE CORPORATE
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THE LAWREVIEWS

SWITZERLAND

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I INTRODUCTION TO THE IMMIGRATION FRAMEWORK

i Legislation and policy

As a general rule, national and international legislation governs immigration law in Switzerland.

The main relevant national legislation is the Federal Act on Foreign Nationals and Integration of 16 December 2005 (FNIA), as amended; the Ordinance on Admission, Residence and Gainful Employment of 24 October 2007 (OARG), as amended; and the Ordinance on the Agreement on Free Movement of Persons of 22 May 2002, as amended. Moreover, directives of the State Secretariat for Migration (SEM), as amended, are an important source for interpreting Swiss immigration law, even if they are not legally binding.

In addition to this national legislation, the main international legislation includes the Agreement on Free Movement of Persons between the European Union and Switzerland of 1 June 2002 (AFMP), as amended; the European Free Trade Association Convention of 4 January 1960 (EFTA), as amended; the Schengen Agreement of 12 December 2008, as amended; and the General Agreement on Trade in Services (GATS), as amended.

ii The immigration authorities

As Switzerland is a federal state, immigration authorities exist on two levels: the cantonal level and the federal level.

At the cantonal level, each canton determines its organisation autonomously, including the administration of its immigration authorities, which thus vary from one canton to another.

For example, in the canton of Geneva, there are two main competent authorities for immigration: the Cantonal Office of Population and Migration (OCPM) and the Cantonal Office of the Inspectorate of Labour Relations (OCIRT). The OCPM is the deciding authority for all permit applications not subject to local market testing (see Section IV.i), as well as for permit applications without gainful activity. The OCPM is mainly in charge of registering applications, especially those regarding work permits. The OCIRT is competent for employment-related aspects of immigration, such as verifying compliance with local market testing – in particular, the salary conditions, the candidate's diplomas, whether the candidate is highly skilled and whether the job announcement has been published on a local website (see Section IV.ii).

At the federal level, the competent authority for all matters covered by legislation on foreign nationals is the SEM. The SEM specifically regulates the conditions to be met for foreign nationals to reside and work in Switzerland. In addition, it in principle verifies

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that the cantonal immigration authorities comply with these conditions when deciding to issue a permit in favour of a foreign national. In this context, the SEM acts as a supervisory authority that must usually approve the decisions rendered by the competent cantonal immigration authorities.

In addition to the above-mentioned competent cantonal and federal immigration authorities, the Swiss authorities' representatives (e.g., embassies and consulates) around the world are also active in the immigration field. In particular, they are the issuing authorities for all authorisations (i.e., visas) to enter the Swiss territory for a maximum period of 90 days in any 180-day period.

iii Exemptions and favoured industries

As a general rule, Swiss immigration law does not provide for exemptions or favoured industries. However, Swiss immigration authorities may be more lenient when reviewing the work permit applications filed in relation to specific sectors where there is a labour shortage. In some cantons, this has notably been the case in the medical sector and the IT sector.

II INTERNATIONAL TREATY OBLIGATIONS

i The bilateral agreement on the free movement of persons

Switzerland is a party to the AFMP with the European Union. The AFMP gives nationals of Member States the right to work and to establish themselves (and, as the case may be, with their family) within the territories of other Member States. As a general rule, EU nationals are entitled to reside and work in Switzerland and thus to obtain the relevant permits in this respect.

Taking into account EU nationals' entitlement to reside and work in Switzerland, the authorities allow EU nationals to work in Switzerland as soon as a complete permit application is filed with the competent immigration authorities. As a consequence, EU nationals, in principle, do not have to wait until the issuance of their permit to start their gainful activity within the Swiss territory.

ii Schengen Agreement

Switzerland is part of the Schengen Agreement, which, in principle, allows Member State nationals to freely circulate within the Schengen Area without a visa. In this context, Schengen nationals are entitled to enter Swiss territory without having to obtain a visa. That said, Schengen nationals are not allowed to stay in Switzerland for more than 90 days in any 180-day period without a residence or work permit.

iii GATS

Switzerland is part of the GATS. With respect to the GATS, Switzerland has committed itself to respect the principle of equality of treatment in the context of an intra-company transfer to Switzerland of executives, senior managers and highly qualified specialists of foreign companies that provide services and maintain an establishment in Switzerland.

III THE YEAR IN REVIEW

i Post-Brexit free movement of persons between the United Kingdom and Switzerland

The United Kingdom exited the European Union with effect from 31 January 2020.

However, the European Union and the United Kingdom agreed on a transition period, which ended on 31 December 2020. During this transition period, EU agreements with third countries, including the EU–Swiss bilateral agreements, remained applicable between the United Kingdom and Switzerland. Moreover, as part of its ‘mind the gap’ strategy, Switzerland has concluded a series of new agreements with the United Kingdom. As regards migration, the concluded bilateral agreement aims at preserving the rights of British and Swiss nationals acquired under the AFMP regime (i.e., acquired before the end of the transition period). This agreement, which has applied since 1 January 2021, allows UK nationals to retain the rights they acquired under the AFMP before 31 December 2020. The rights acquired under the AFMP are valid indefinitely, provided that the conditions stipulated in this agreement are met.

Since 1 January 2021, affected citizens who take up residence in the United Kingdom or Switzerland no longer benefit from any of the particular rights or protections granted under the AFMP. From a Swiss perspective, British nationals are therefore subject to the ordinary immigration regime applicable to all non-EU nationals – in particular, the FNIA (see Section IV.ii). The legal framework applying to British nationals intending to migrate to Switzerland has thus changed dramatically.

In any case, British nationals are still exempted from the visa requirement to enter Switzerland in an attempt to mitigate as much as possible the impact of the transition from the AFMP regime to the ordinary non-EU nationals regime.

ii Invocation of the safeguard clause to apply yearly quotas to work permits issued to Croatian nationals

On 16 November 2022, the Swiss Federal Council decided to apply yearly quotas to work permits issued to Croatian nationals, considering the high number of work permits issued to those nationals in 2022. Such a decision has been taken in accordance with the AFMP (invocation of the safeguard clause)² and took effect on 1 January 2023 for the whole civil year (i.e., until 31 December 2023). It could be extended for 2024 (to be decided by the Swiss Federal Council before the end of 2023). In this context, Croatian nationals are not allowed to work in Switzerland until they have received their work permit.

IV EMPLOYER SPONSORSHIP

i Work permits

Under Swiss law, there are three main types of work permits.

The issuance of the following types of work permits requires, in principle, obtaining the approval of the cantonal and, for non-EU nationals, federal authorities, depending on the circumstances.

² Article 10, Paragraph 4d, AFMP.

Short duration permits

The first type of work permit is a short duration work permit, referred to as an L permit. The purpose of this permit is to allow a foreign national to perform a short mission in Switzerland (employment in Switzerland or secondment to Switzerland). The validity of an L permit is limited to a period of one year, but it may be extended for another one-year period. Furthermore, in cases where the mission exceeds two years and depending on the circumstances, the L permit may be extended each year for a one-year period until the end of the mission.

Depending on the duration of the mission in Switzerland, different types of L permits may be applied for: an L permit for 12 consecutive months; an L permit for four consecutive months; or an L permit for 120 days per 12-month period, which allows the holder to stay and work in Switzerland for a maximum of 120 days within a 12-month period.

In addition, pursuant to the AFMP, EU nationals taking up employment, providing services or being seconded to Switzerland for a maximum period of 90 days per civil year – as well as non-EU nationals seconded to Switzerland for a maximum period of 90 days per civil year by EU companies and for which those non-EU nationals have worked for at least one year before coming to Switzerland – do not need L permits. They can instead benefit from an online registration procedure (the 90-day online registration).

Switzerland and the United Kingdom have concluded an agreement on the mobility of service suppliers. This agreement, which has applied since 1 January 2021, is valid until 31 December 2025 and can be renewed. It allows self-employed cross-border service providers who are British nationals with company headquarters in the United Kingdom to provide services in Switzerland for a period of 90 days per civil year. It also allows companies based in the United Kingdom to second employees to Switzerland – non-EU nationals and EU or EFTA nationals who have worked for at least one year in the United Kingdom before coming to Switzerland, as well as British nationals – for a period of 90 days per civil year.

In accordance with the 90-day online registration, companies need only to inform the immigration authorities of the employment or the secondment by completing a form online.³

In cases of employment in Switzerland, companies need to complete this form at least one day before the beginning of the activity, whereas in cases of secondment to Switzerland, companies need to complete it at least eight days before the beginning of the secondment.

In any case, as soon as the competent immigration authorities issue their confirmation, the foreign employee is allowed to work in Switzerland for a maximum period of 90 days per civil year.

Note that, in principle, the 90-day online registration does not apply if the employment does not exceed eight days per civil year (except for (1) construction, civil engineering and finishing industries; (2) landscaping or landscaping maintenance; (3) catering; (4) industrial or domestic cleaning; (5) guard and security services, (6) itinerant trade; and (7) the sex industry).

3 <https://meweb.admin.ch/meldeverfahren/login.do>.

Long duration permits

The second type of work permit is a long duration work permit, referred to as a B permit. The purpose of this permit is to allow foreign nationals to reside and work in Switzerland for more than one year. Unless it is subject to specific conditions (e.g., restriction to a specific employer or achievement of certain targets), the renewal of the B permit is, in principle, a formality.

Cross-border commuter permits

The third type of work permit is a cross-border commuter work permit, referred to as a G permit. The purpose of this permit is to allow EU nationals to work in Switzerland while residing in an EU country. Non-EU nationals can also benefit from a G permit provided that certain conditions are met – in particular, they must have resided near the Swiss border in an EU country for at least six months. As with the B permit, the renewal of the G permit is usually also a formality.

ii New hires

In principle, EU nationals are entitled to work in Switzerland, whereas non-EU nationals may work in the country only under strict conditions.

As a general rule, all non-EU nationals must be highly skilled to obtain a Swiss work permit. In this context, when employers wish to hire non-EU nationals in Switzerland, they must demonstrate beforehand that there were no suitable candidates on the local market (i.e., Switzerland and the EU and EFTA labour markets) to fill the position.

Employers can prove that adequate testing has been conducted by publishing job announcements on specialised websites and by sending the job description to the local authorities that advertise for candidates. Once the local market test has been completed and if no suitable candidate has been found, employers may file a work permit application.⁴

The Swiss Federal Council sets yearly quotas for the different kinds of work permits to be issued in favour of non-EU nationals (excluding the L permits for four consecutive months and the 120-day work permits, which are, in principle, not subject to quotas). For 2023, the quotas are 4,000 for L permits and 4,500 for B permits⁵ (i.e., the same numbers as for 2019, 2020, 2021 and 2022). Specific quotas are applicable for British nationals. For 2023, the quotas are 1,400 for L permits and 2,100 for B permits (i.e., the same numbers as for 2021 and 2022).

Before deciding whether to issue a work permit in favour of a non-EU national, the competent immigration authorities verify that the non-EU candidate is highly skilled and that quotas are available.

In addition, the hiring of a non-EU national in Switzerland must serve the economic interests of the country and comply with the work and salary conditions applicable in Switzerland. In this context, the competent immigration authorities also verify that these conditions are fulfilled before issuing a work permit in favour of a non-EU national.

The issuance of work permits for non-EU nationals usually takes about 10 to 12 weeks after filing. Non-EU nationals are not allowed to work until they have received their work permit.

4 Article 21 FNIA.

5 Article 19 OARG.

The hiring of EU nationals is not subject to local market testing, except if hiring from abroad in economic regions or sectors that have high rates of unemployment (defined as 5 per cent unemployment as of 1 January 2020). This is due to the fact that EU nationals are entitled to work in Switzerland on the basis of the AFMP, except for seconded workers.⁶ Furthermore, no yearly quotas apply to the hiring of EU nationals, except for Croatian nationals. In accordance with the AFMP (invocation of the safeguard clause) the Swiss Federal Council has decided to set quotas in 2023 for the different kinds of work permits to be issued in favour of Croatian nationals (excluding the L permits for four consecutive months and the 120-day work permits, which are, in principle, not subject to quotas). For 2023, the quotas are 1,053 for L permits and 1,204 for B permits. Furthermore, quotas are released on a quarterly basis and are granted on a first-come, first-served basis.

The issuance of work permits for EU nationals usually takes about eight weeks after the work permit application is filed (depending on the canton). That being said, EU nationals who are not seconded are, in principle, able to start working from the moment they have filed a complete work permit application, except for Croatian nationals, who need to wait to receive their work permit before starting work in Switzerland.

When taking their decision on work permit applications, the competent immigration authorities render a formal decision. Should this be a decision of refusal, an appeal may be filed with the competent authorities or courts to contest it.

The procedure varies depending on whether the refusal decision is rendered by the cantonal or the federal immigration authorities.

Should a refusal decision be rendered by the cantonal immigration authorities, an appeal may be filed with the competent cantonal authorities or courts. In this context, as each canton autonomously determines its organisation – in particular, the administration of its authorities or courts – the procedure varies from one canton to another. For example, in the canton of Geneva, there are two instances: the Administrative Tribunal of First Instance and the Administrative Chamber of the Court of Justice at second instance.

Should a refusal decision be rendered by the federal immigration authorities (i.e., the SEM), an appeal may be filed with the Federal Administrative Court (FAC).

Depending on the circumstances, the Swiss Federal Supreme Court may constitute the final appeal court to review the decisions issued by the final cantonal instance appeal court and the decisions issued by the FAC.

iii Intra-company transfers

In Switzerland, an intra-company transfer may be allowed under the GATS or under national legislation.

In both cases, the local market testing condition is not applicable. The employing company must qualify as part of a group of companies. According to the SEM, a legal entity abroad must have a legal entity or a branch in Switzerland to qualify as part of a group of companies.

Under the GATS, intra-company transfers of non-EU nationals are possible for executives and senior managers, as well as highly qualified specialists. The SEM considers that executives and senior managers are the people whose essential task is to manage the company or one of its departments. They answer only to the company's board members or

6 Article 21 FNIA.

shareholders. In addition, highly qualified specialists are the people who are indispensable when providing a determined service by their specific knowledge and experience regarding services, research equipment, technical skills or firm management.

According to the GATS, international groups of companies can transfer non-EU nationals to Switzerland for up to four years, provided that the employee is an executive, a senior manager or a highly qualified specialist (as described above); the employee has worked for the group of companies, outside Switzerland, during at least the whole year preceding the filing of the Swiss work permit application; the hiring of the employee complies with the work and salary conditions applicable in Switzerland; and quotas are available.

Under the national legislation, intra-company transfers of non-EU nationals are possible for executives and senior managers, as well as indispensable specialists.⁷ According to the SEM, these executives and senior managers are people with a right to make decisions within the company. In addition, indispensable specialists are highly qualified people in economics or research working for international companies or research institutes.

In this context, work permits can be granted to executives or senior managers and indispensable specialists (as described above) provided that the transfer serves the economic interests of Switzerland;⁸ the employer has filed a request;⁹ quotas are respected;¹⁰ the applicable minimum wages set by collective labour agreements, Swiss law or local customs are complied with;¹¹ and employees have adequate housing.¹²

Notwithstanding the above, EU nationals are entitled to work in Switzerland based on the AFMP. Therefore, in principle, the rules set out above do not apply except in cases of secondment.

The timeline for issuance of work permits for EU and non-EU nationals based on an intra-company transfer after filing does not differ from the timeline that applies for new hires. Moreover, the same conditions apply regarding the possibility to file an appeal against a formal refusal decision rendered by the competent immigration authorities (see above).

iv Labour market regulation

Switzerland has implemented several rules on the prevention of illegal working. In particular, the main sources governing illegal work in Switzerland are the FNIA; the Federal Act on Illegal Work of 17 June 2005, as amended; the OARG; the Federal Act on Employment Services of 6 October 1989, as amended; the Federal Act on Posted Workers of 8 October 1999, as amended; and the Federal Labour Act of 13 March 1964, as amended.

The cantons are responsible for ensuring compliance with the illegal work rules.¹³ In this context, each canton independently determines its organisation – in particular, the administration of its authorities that ensure compliance with these rules. For example, in the canton of Geneva, the OCIRT is the competent authority.

Employers are especially responsible for declaring their employees for the purposes of social security and unemployment insurance. Employers must also comply with Swiss

7 Article 46 OARG.

8 Article 18 FNIA.

9 Article 18 FNIA.

10 Article 20 FNIA.

11 Article 22 FNIA.

12 Article 24 FNIA.

13 Article 4 Federal Act on Illegal Work of 17 June 2005, as amended.

law, collective labour agreements and local customs such as the minimum wage, holidays, a certain amount of working hours, security, hygiene and health standards, and providing lodging for posted workers.¹⁴

As a general rule, the cantonal authorities do not operate a system of compliance inspections of employers that regularly employ foreign nationals. However, cantonal immigration authorities have inspectors who ensure that foreign nationals working in their canton have the proper immigration status and documents.

That being said, there are no routine inspections of employers that employ foreign nationals in Switzerland. Indeed, Swiss authorities operate mainly through either denunciations of potentially illegal situations or random inspections.

Should cantonal immigration authorities find that an employer is employing foreign nationals without permission to work, the employer may incur criminal penalties. The penalties usually range from fines to a one-year jail sentence. In more serious cases, jail sentences can reach three years. If a jail sentence is ordered, it is combined with a fine.¹⁵

v Rights and duties of sponsored employees

General requirements

As a general rule, the holders of an L permit or a B permit have the obligation to announce their arrival to the competent authorities of their place of residence in Switzerland (these authorities vary in each canton).

Moreover, in principle, within two months of their arrival in the country, non-EU L or B permit holders must provide the competent cantonal authorities with a criminal record check from their country of origin.

The immigration authorities may also decide to grant to non-EU nationals specific B permits that are subject to conditions. As the case may be, the granting of a B permit to non-EU nationals may, in particular, be restricted to a specific employer or to the achievement of certain targets. Non-EU nationals may also be hired under the condition of having to achieve certain objectives or results set at the beginning of their employment contract. In this context, non-EU nationals must meet the conditions linked to the granting of their B permits for the immigration authorities to renew them.

Rights given to the permit holders depend on the type of permit granted. In this context, the permit holders have the right to reside and work in Switzerland for a specific period. Furthermore, they may be entitled to renew their permits.

Permanent residence permits

As a general rule, B permit holders (EU and non-EU nationals) may apply for a permanent residence permit (referred to as a C permit) in Switzerland if they comply with the rules set in the FNIA. In this context, they may apply for a C permit provided that they have resided in Switzerland for a minimum of 10 years, including the previous five years without interruption under a valid B permit, and that they are well integrated into the country.¹⁶ However, nationals of countries that have concluded a residence agreement or that offer reciprocity with Switzerland (such as Austria, Belgium, Denmark, France,

14 Articles 2 to 4 Federal Act on Posted Workers of 8 October 1999.

15 Article 117 FNIA.

16 Article 34 FNIA.

Germany, Greece, Italy, Liechtenstein, the Netherlands, Portugal and Spain, as well as Andorra, Canada, Finland, Ireland, Island, Luxembourg, Monaco, Norway, San Marino, Sweden, the United Kingdom, the United States and the Vatican City) may apply for a C permit after a regular and uninterrupted stay of five years in Switzerland.

Moreover, work permit holders can obtain an anticipated C permit provided that they have resided for five years uninterrupted under a valid B permit in Switzerland, they have adapted themselves to the Swiss way of life (e.g., by taking part in local events, buying property and sending their children to local schools) and they have mastered their place of residence's national language to a certain level.¹⁷

In any case, a C permit will not be issued if:

- a* the work permit holder or their legal representative has given false information or hidden important facts during the work permit issuance procedure;
- b* the work permit holder threatens or endangers the internal or external security of Switzerland or public order, from inside or outside Switzerland;
- c* the work permit holder does not comply with the conditions set by a work permit issuance decision; or
- d* the work permit holder or one of their dependants (e.g., spouse or children under 18) is relying on social assistance support.¹⁸

In these situations, the work permit holder may also lose their work permit.

V INVESTORS, SKILLED MIGRANTS AND ENTREPRENEURS

As a general rule, all non-EU nationals must be highly skilled to obtain work permits in Switzerland.¹⁹ Consequently, there is no specific immigration category for highly skilled non-EU nationals. That being said, Swiss immigration authorities may be more lenient when reviewing work permit applications filed in relation to specific sectors where there is a labour shortage (see Section I.iii).

Moreover, there are, in principle, no specific work permits based on investment in a particular sector in Switzerland. However, the immigration authorities may highlight some sectors in which investments could serve the economic interests of the country and thus be more tolerant when reviewing work permit applications filed in relation to these sectors.

Furthermore, according to the FNIA, non-EU nationals may apply for self-employed work permits, which are granted if the Swiss authorities can determine that, among other things, the self-employed activity may lead to substantial investments in favour of the Swiss economy, the applicant possesses sufficient financial means to conduct business and such a business would create new jobs in the country.

As EU nationals (except for seconded workers) are entitled to work in Switzerland on the basis of the AFMP, they may apply for a self-employment work permit should they carry on a self-employed activity. EU nationals are usually required to evidence that they perform such an activity (e.g., business plans and financial statements).

17 Article 34 FNIA.

18 Article 62 FNIA.

19 Article 23 FNIA.

VI OUTLOOK AND CONCLUSIONS

Following the entry into force of the AFMP in 2002, the Swiss immigration authorities have become stricter with non-EU nationals. Indeed, as EU nationals have since then been entitled to reside and work in Switzerland, the Swiss immigration authorities have been able to use discretionary power to limit immigration into the country only while reviewing permit applications in favour of non-EU nationals.

In addition, over the past few years, it also seems that the Swiss immigration authorities have become less flexible towards EU nationals – in particular, towards EU nationals seconded to Switzerland and, more recently, towards Croatian nationals. The same approach has been observed in relation to EU nationals applying for Swiss residence permits without gainful activity (there is notably a more conservative review as to whether applicants have sufficient financial means to support their stay in the country).

That being said, following Brexit, Switzerland and the United Kingdom have been holding talks on their future immigration regime. In that regard, they have signed a memorandum of understanding on mobility and enhanced cooperation in the field of migration. This agreement, which is not legally binding, underlines the close cooperation between the two countries in the field of migration. It is intended to serve as a basis for further cooperation and is part of the Swiss Federal Council's 'mind the gap' strategy, which aims to ensure the continuity of relations between the two countries following Brexit.

Also, the Swiss Federal Council suggested in October 2022 amending the FNIA in order to exempt non-EU nationals who have completed studies in Switzerland from the applicable yearly quotas in case they start a work activity in Switzerland after their studies. Such an exception would apply only to non-EU nationals who obtained a diploma from a Swiss high school and for whom work activity in Switzerland would have an overriding scientific or economic interest. The Swiss Parliament will have to discuss this suggested amendment and, as the case may be, to adopt it.

The above shows that when it comes to immigration, Switzerland adopts protectionist trends while remaining open to international cooperation and amendments in its internal legislation.

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