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**Research Report**

## Diversity in the labour market: The legal framework and support services for migrant workers in Germany

HWWI Policy Paper, No. 3-4

**Provided in Cooperation with:**

Hamburg Institute of International Economics (HWWI)

*Suggested Citation:* Hailbronner, Kay (2007) : Diversity in the labour market: The legal framework and support services for migrant workers in Germany, HWWI Policy Paper, No. 3-4, Hamburgisches WeltWirtschaftsinstitut (HWWI), Hamburg

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# Diversity in the Labour Market: The Legal Framework and Support Services for Migrant Workers in Germany

Kay Hailbronner

HWWI Policy

Paper 3-4  
by the

HWWI Research Programme  
Migration Research Group

This Paper was commissioned by the Hamburg Institute of International Economics (HWWI) in the context of its research project on „Diversity, Integration and the Economy“ which is largely funded by the Volkswagen Foundation.

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ISSN 1862-4960

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## **1. Introduction**

This paper describes the legal and regulatory framework under the Immigration Act of 30 July 2004 (Zuwanderungsgesetz). The Immigration Act, made up of several acts and amendments to existing legislation, has established a new concept of managed migration by the Act on Residence, Economic Activity, and Integration of Foreigners on the Federal Territory (Residence Act). This Act describes as its purpose to manage and restrict the influx of foreigners into the Federal Republic of Germany and to enable and organize immigration with due regard to the integration capacity and the interests of the Federal Republic of Germany in terms of its economy and labour market policy.

The Residence Act has only entered into force on January 2005. Hence, relatively little is known concerning the effects of the Act, its successes and failures for the admission of migrant workers for labour purposes. The provisions of the Act on labour admission are supplemented by two regulations. The Employment Regulation on the admission of newly arriving migrants (Beschäftigungsverordnung – BeschV – of 22 November 2004) and the Employment Procedure Regulation on the procedure and admission of resident migrants to the labour market (Beschäftigungsverfahrensverordnung – BeschVerfV – of 22 November 2004).

Three additional laws complete the legal framework. They regulate the admission of nationals of the new Middle and Eastern European Member States of the EU to the German labour market: The Third Book of the Social Code (Sozialgesetzbuch Drittes Buch – SGB III – of 24 March 1997), the Work Permit Regulation (Arbeitsgenehmigungsverordnung – ArGV – of 17 September 1998), and the Regulation on Exceptions to the Recruitment Stop (Anwerbestoppausnahmereverordnung – ASAV – of 17 September 1998).

## **2. Categories of Migrants admitted for Employment**

In the following a brief description of different categories of migrants is given. These migrants are admitted to the labour market, either temporarily or for a longer term. This includes people who are obliged to leave but receive a tolerated status allowing them to work temporarily. The section will further provide a short statistical survey on different types of migrant workers, on employment rates etc. The framework of the Immigration Act and the implementing regulations are briefly explained.

In addition the section provides an overview of the procedure which is carried out by the Federal Agency of Employment in cooperation with the aliens authorities and the German embassies and consulates before a residence permit or a visa for employment purposes is issued.

The categories of migrants admitted for taking up employment are privileged Union citizens, nationals of associated states such as Turkey, with special rights for admission to the labour market, and finally third country nationals. The paper will also treat the particular legal regime of Union citizens from the newly acceded states who enjoy limited access to the labour market during an interim period according to the accession treaties. Furthermore, a special legal regime applies to EEA-nationals as well as to citizens of Switzerland. Another part of the section deals with the special rights of Turkish nationals who form a large part of the foreign resident population in Germany and who enjoy privileged access to the labour market under the association treaty EEC-Turkey.

## **2.1 Union Citizens and Privileged Third Country Nationals**

### *2.1.1 Union Citizens and Family Members under the EEC-Treaty from the Old Member States*

Union citizens from the old Member States and their family members enjoy **freedom of movement** within the European Union (Art. 39 EC-Treaty). Therefore, they do not need to apply for any permit to reside in Germany and to take up employment. They receive a confirmation ex officio that confirms their status. Third country family members receive a residence permit-EU. Under the term fall the Union citizen's spouse<sup>1</sup> and his / her<sup>2</sup> children if younger than 21. Furthermore, the Union citizen's direct descendants and ascendants are considered family relatives in terms of the Free Movement Act if the Union citizen or his spouse pays maintenance to them. To that extent, the Free Movement Act's definition corresponds with the one given in Art. 2 Nr. 2 EC-Directive 2004/38.

Family members who do not come under Sec. 2 para. 2 and are thus not entitled to free movement themselves have the right to entry and residence only if they install themselves with the worker in Germany. It is however not required that family life continues. If the worker and his spouse separate, their right to residence persists as long as the marriage is not divorced. Hence, the provision for Union citizens' spouses is more generous than that for German nationals' spouses (see 2.3.1). After five years of permanent legal residence in Germany the family member acquires an independent right of residence (Sec. 5 para. 5 Free Movement Act). The loss of this right can only be determined for exceptionally serious grounds according to Sec. 6 para. 3 Free Movement Act.

Family members of Union citizens have irrespective of their nationality unlimited access to the German labour market (Art. 11 EEC-Regulation No 1612/68).

### 2.1.2 *Union Citizens and Family Relatives from the Newly Acceded States under the Interim Regime of the Accession Treaties*

**Nationals of Cyprus and of Malta** are treated equal to Union citizens from the old Member States. However, different rules apply for **citizens of the Middle and Eastern European Member States**. Interim regulations in the accession treaties provide for a **limitation of free movement of workers** and services. Germany makes use of these interim regulations, which apply for at least two years, i.e. until 30 April 2006. Moreover, Germany has already announced to extend the interim period for at least three more years. Workers from these states have, as a rule, to apply for a temporary work permit-EU (Arbeitserlaubnis-EU) according to Sec. 284 Social Code, vol. III before they take up employment in Germany. Once a work permit is granted, nationals of the new Member States enjoy the same status as other Union Citizens under the Free Movement Act (Sec. 13 Free Movement Act). Thus, once the worker is admitted to the labour market, a residence permit is not required anymore. The person concerned only receives a declaratory document proving his right to residence according to Sec. 5 para. 1 Free Movement Act. **Self employed persons** do not need a work permit at all but enjoy free movement.

A **temporary work permit-EU** for workers in dependent employment may be issued under the conditions of Sec. 39 para. 2 Residence Act. These conditions are the same as for the issuing of a residence permit for employment purposes for third country nationals. The procedure is described in detail under No. 2.7 of this paper for all groups of concerned persons, since, apart from small differences, it is the same for most foreign nationals except EU-citizens and equally privileged persons. For **skilled workers** from the new Member States the recruitment ban as laid down in Sec. 39 para. 1 Residence Act does not apply (see Sec. 284 para. 3 Social Code, vol. III), i.e. they are not restricted to employments that are exempted from the recruitment ban in the Employment Regulation. Non-skilled workers residing outside the Federal Republic of Germany fall, however, under the recruitment ban (see Sec. 284 para. 4 Social Code, vol. III). Thus, a work permit may only be issued for employments that are exempted from the ban according to the Regulation on Exemptions from the Recruitment or the Employment Regulation respectively.

The work permit-EU is issued for one year. After one year of being continuously admitted to the German labour market, workers from the new Member States are eligible for an **unlimited work permit** (Arbeitsberechtigung - see Sec. 12a Work Permit Regulation). This does not only include workers who have carried out activities for which a work permit was granted under the general provisions, but also workers whose economic activities may be exercised without a work permit under Sec. 9 Work Permit Regulation. However, workers who have only temporarily been detached on the basis of a contract according to foreign law are not qualified for the unlimited work permit. Au-pair persons and persons carrying out



similar activities, trainees, or persons completing a professional training are not admitted to the German labour market either. The reason for the exclusion of such activities is that they do not qualify as participation in the labour market under general working conditions. The same applies for students who are allowed to work without a work permit on a very limited basis (see No. 2.3.2).

Workers from the new Member States may be admitted to the German Labour market as **seasonal, guest, or contract workers** (see No. 2.5.3 for details). Some types of employment are permit-free according to Sec. 9 Work Permit Regulation and Sec. 2 – 16 Employment Regulation resp. (see No. 2.5.1 for details).

**Family members** of workers from the new Member States are entitled to receive an unlimited work permit (Arbeitsberechtigung) if the worker himself holds the unlimited permit and the family member has a common residence with the worker and has been living legally on the Federal Territory for at least 18 months. The latter criterion will be dropped on 1 May 2006 (see Sec. 12a para. 2 Work Permit Regulation). Family members in terms of the Work Permit Regulation are the worker's spouse or his partner in a registered homosexual relationship and his descendants if they are younger than 21 or if the worker pays maintenance to them. If these conditions are not met, may be issued a work permit-EU only. That, however, requires again the fulfilment of the conditions laid down in Sec. 39 para. 2 Residence Permit (see above and No. 2.7).

### 2.1.3 *EEA-Citizens and Family Relatives*

EEA-citizens and their family relatives are treated equal to Union citizens. This concerns citizens of Norway, Iceland, and Liechtenstein. Consequently, the Free Movement Act is applicable in the way as stated above (Sec. 12 Free Movement Act).

### 2.1.4 *Citizens of Switzerland*

The Agreement on Free Movement between the European Community and its Member States and the Swiss Confederation of 21 June 1999<sup>3</sup> grants Swiss citizens similar rights as Union citizens with regard to residence and employment (Art. 4 Free Movement Agreement). However, citizens of Switzerland are neither mentioned in the Residence Act nor in the Free Movement Act. Hence, the Free Movement Act is not applicable while the Residence Act applies with the modifications that follow from the Free Movement Agreement.

To take up an employment in Germany citizens of Switzerland do not need to apply for a residence title according to the Agreement on Free Movement (see Sec. 28 Residence Regulation – *Aufenthaltsverordnung* – and Art. 2 Annex 1 Free Movement Agreement). Instead they are issued with a residence permit-EU<sup>4</sup> to document their status. The residence

permit-EU must be issued for at least five years if the Swiss worker has a contract of employment with an employer in Germany for a period of at least one year. For contracts for a shorter period the residence permit-EU is issued for the same duration as the contract. For employments up to three months no residence permit is required.

Irrespective their nationality Swiss citizens' family members have unlimited access to the labour market as well. However, the definition of the term 'family member' differs slightly from the one used in the Free Movement Act-EU described above. It includes the Swiss nationals' spouse, his descendants younger than 21 or dependent, and dependent relatives in the ascending line as well as those of his spouse (Art. 3 para. 2 Annex 1 Free Movement Agreement). Partners in a registered homosexual relationship are not explicitly mentioned in the Free Movement Agreement. However, since the parties to the agreement are obliged to facilitate the admission of other family members living in the worker's household (Art. 3 para. 2 Annex 1 Free Movement Agreement), partners shall be admitted to the labour market as well.

#### *2.1.5 Turkish Nationals under the Association Agreement with Turkey*

Turkish nationals under the association treaty EEC-Turkey enjoy privileged access to the labour market once they have received a residence permit which allows them to take up employment. Turkish workers according to the Association Council Decision 1/80 have the following rights:

after one year of lawful employment the right to continue employment with the same employer,

after three years of lawful employment the right to change the employer and to seek employment in the same profession,

after four years of lawful employment the right of unlimited access to the labour market.

Relatives of a Turkish worker lawfully resident in Germany who have received a residence permit for the purpose of family reunion are entitled to take up employment subject to the priority of German and EU workers; after four years they are, according to Art. 7 of the Decision 1/80, entitled to unlimited access to the labour market. The same applies to children of Turkish workers, having completed a professional formation in Germany if one of their parents has been lawfully employed for at least three years.

German administrative courts follow the ECJ's jurisdiction to treat Turkish workers 'as far as possible' equal to nationals of the Member States in all areas of Free Movement<sup>5</sup>. Even so, the Free Movement Act does not apply to Turkish Nationals who are privileged under the Association Agreement with Turkey. Thus, they come under the Residence Act. However, they have a right of residence independently from holding a residence title. They

are obliged to hold a residence permit for reasons of documentation only (Sec. 4 para. 1 and 5 Residence Act).

It should however be noticed that these privileges do only apply to Turkish nationals who are already part of the regular labour market and thus enjoy a right to residence in Germany<sup>6</sup>. New arriving Turkish nationals applying for a residence permit for employment purposes are not privileged. They are to be treated as third country nationals with no special provisions applying to them<sup>7</sup>.

With regard to social security schemes Turkish workers are privileged by the Association Council Decision 3/80, which provides, as a rule, for equal treatment of Turkish workers with German citizens (Art. 3 para 1 Association Council Decision 3/80). This comprehends benefits with regard to sickness and maternity, invalidity, old age, survivor's pension, occupational accidents and diseases, death grants, unemployment, and family. For details concerning the individual benefits, see No 4.3 and 4.4.

Turkish workers entitled to work under the association treaty enjoy, with respect to the labour conditions, a right to non-discriminatory treatment on account of nationality. Their children have a right to access to education, professional formation and university education under the same conditions as German nationals and Union citizens.

## ***2.2 Third Country Nationals applying for a Residence Permit abroad to take up Employment in Germany (Legal Requirements and Procedure)***

Apart from some exceptions, two independent authorities are involved in the issuing of a residence permit for employment purposes: first the aliens authority, second the Federal Agency for Labour. The aliens authority examines the foreigner's application with respect to policy aspects of immigration, integration, and social matters. If it comes to the conclusion that a residence permit must not be issued for compelling reasons, it may reject the application without the Federal Agency for Labour's participation.

The Federal Agency for Labour is exclusively competent for examining the aspects related to the labour market as laid down in Sec. 39 para. 2 Residence Act. The Labour Agency's findings are binding for the aliens authority. However, the Labour Agency must not consider other aspects than those mentioned in Sec. 39 para. 2 Residence Act. The evaluation procedure carried out by the Federal Agency for Labour is described under No. 2.7 of this paper.

As a general rule, third country nationals must not be admitted to the German labour market. In Sec. 39 para. 1 Residence Act a **general recruitment ban** is laid down. However, **several exemptions** stated in the Work Permit Regulation create opportunities for third country nationals to take up an employment in Germany. These exemptions concern several occupational groups. They can be divided into three categories.

The first category refers to **permit-free employments**. In this category fall as different employment types as professional trainings, leading management positions, or holiday jobs<sup>8</sup>. For these cases the aliens authority may issue a residence permit for employment purposes without consulting the Federal Agency for Labour. Before issuing a residence permit for employment purposes the aliens authority has to consider the situation on the labour market and the necessity to fight domestic unemployment. Furthermore, the permit may only be issued if the foreigner has a concrete job offer. The residence permit must then be restricted to this actual employment.

The second category are **employments that require no special skills** (Sec. 18 para. 3 Residence Act). Third country nationals may receive a residence permit for employment purposes only with respect to a concrete job offer in one of the sectors laid down in Sec. 17 – 24 Employment Regulation<sup>9</sup>. The issuing of the residence permit requires the Federal Agency for Labour's approval which is granted under the conditions described in Section 2.7. If approval is granted, the aliens authorities may issue the required residence permit but has to include all restrictions imposed by the Labour Agency in its approval.

The third category is **employments that require a qualified vocational training of at least three years** (Sec. 18 para. 4 Residence Act). Third country nationals may receive a residence permit for employment purposes only with respect to an concrete job offer in one of the sectors laid down in Sec. 25 – 31 Employment Regulation<sup>10</sup>. The issuing of the residence permit requires the Federal Agency for Labour's approval which is granted under the conditions described in Section 2.7. In well-founded exceptional cases the aliens authorities may issue a residence permit even if the foreigner has an offer for an employment other than mentioned in Sec. 25 – 31 Employment Regulation (Sec. 18 para. 4 Residence Act). The employment has to be in public interest, particularly with respect to regional, economic, or labour market aspects.

For some **privileged groups of third country nationals**, the Federal Agency of Labour may give its approval to a residence permit even if no employment-related exemption from the recruitment ban applies. These privileged foreigners are nationals of Andorra, Australia, Israel, Japan, Canada, Monaco, New Zealand, San Marino, and the USA (Sec. 34 Employment Regulation). Recognized ethnic Germans are privileged in the same way (Sec. 33 Employment Regulation).

Additionally, third country nationals may receive a temporary residence permit for employment purposes as **guest workers** (Sec. 40 Employment Regulation) or **detached contract workers** (Sec. 39 Employment Regulation, see No. 2.5.3 for details).

In practice, a foreign person has to apply for a visa at a German embassy or consulate. If the foreigner wants to take up an employment for which a permit is required, the embassy or consulate contacts the competent aliens office which then handles the application

internally. The aliens authority refers to the competent Labour Agency with regard to the approval requirement. If approval is given and the visa is issued it authorises the foreign worker to enter Germany and to take up the employment. Since visas are issued for a maximum period of three months, the foreign worker has to apply for a residence permit if he wants to extend his stay. The Labour Agency's approval is usually granted for both, the visa and the following residence permit.

## **2.3 Third Country Nationals Legally Resident within Germany (Legal Requirements and Procedure)**

### *2.3.1 Family Members of German Nationals and Migrants with Residence Permit*

**Family Members of German nationals** are entitled to a Residence Permit which allows them to take up an employment. Family members of German nationals are, in terms of the Residence Act, his/her spouse or partner in a registered homosexual relationship, his/her unmarried minor children, and his/her parent if the German himself is an unmarried minor and the foreign parent has the right to the custody. If the foreign parent does not have the right to the custody, the residence permit may nevertheless be issued if family life already takes place in Germany (Sec. 28 para. 1 Residence Act).

After two years of matrimonial (partnership) life in Germany<sup>11</sup>, the spouse (or partner in a registered homosexual relationship) is entitled to a Residence Permit even in the case of separation. The same applies if the German spouse/partner dies.

Other relatives of German nationals may only receive a residence permit if this necessary to avoid an undue hardship (Sec. 28 para. 4 and Sec. 36 Residence Act).

**Family members of third country nationals holding a settlement permit** have unlimited access to the labour market (Sec. 29 para. 5 Residence Act).

**Family members of third country nationals holding a (temporary) residence permit** are to the same extent admitted to the labour market as the third country national himself. A mandatory waiting period does not exist anymore. If the third country national needed the Labour Agency's approval to get his residence permit for employment purposes, the same applies for his family members. After two years of legal matrimonial/partner life in Germany the third country national's spouse/partner is entitled to a residence permit granting him unlimited access to the German labour market (Sec. 29 para. 5 and Sec. 31 para. 1 Residence Act).

### *2.3.2 Students*

Students holding a residence permit for study purposes are **admitted to the labour market on a limited basis**. Sec. 16 para. 3 Residence Act allows them to take up minor

student jobs<sup>12</sup> or to work full-time for 90 days a year at most (or, alternatively, 180 half-days). When the student has finished his studies successfully, a residence permit may be issued to him for one year at most to give him the opportunity to search an adequate job in Germany. This residence permit, however, does not allow the former student to take up an employment. If he receives a job offer, he has to apply for a residence permit for employment purposes, which may be issued only with the Labour Agency's approval according to Sec. 39 Residence Act (for details see No. 2.7).

### *2.3.3 Foreigners Admitted for Humanitarian Purposes and Refugees*

Foreigners who received asylum status in Germany have unlimited access to the labour market. The same applies for persons who are recognised refugees according to the Geneva Convention (Sec. 25 para. 1 and 2 resp. Residence Act) and for persons whose admission for urgent humanitarian reasons or with respect to international law was arranged by the Federal Ministry of the Interior (Sec. 22 Residence Act).

While the asylum procedure is pending, the applicant is not admitted to the labour market for the first year. After one year he/she may be admitted to the labour market if the Federal Agency for labour gives its approval (for details see No. 2.7) or if the employment is permit-free (Sec. 61 para. 2 Asylum Procedure Act).

## **2.4 Third Country Nationals Receiving Tolerated Status**

Foreigners who are obliged to leave the Federal Territory but whose obligation is not executed for humanitarian reasons according to Sec. 60a Residence Act receive a tolerated status. Since this tolerated status is **no residence permit** in terms of the Residence Act<sup>13</sup>, employment is admitted only as far as it is provided for in a regulation (Sec. 4 para. 3 and Sec. 42 para. 2 No. 5 Residence Act).

According to the Employment Procedure Regulation, third country nationals receiving tolerated status are admitted to the labour market after one year of tolerated or permitted sojourn in Germany, if the Federal Agency for labour gives its approval according to Sec. 39 – 41 Residence Act (for details see No. 2.7) or if the employment is permit-free (Sec. 1 No. 1 and 2 resp. and Sec. 10 Employment Procedure Regulation). The tolerated foreigner has to submit an application for admission to the labour market to the aliens authority<sup>14</sup>. A work permit must not be issued if the foreigner entered Germany with the intention to receive payments according to the Act on Payments to Asylum Seekers (Asylbewerberleistungsgesetz)<sup>15</sup> or if he/she intentionally prevents the authorities from executing his/her deportation (Sec. 11 Employment Procedure Regulation). If the tolerated

foreigner just does not return to his country of origin voluntarily, this does not create a refusal ground in terms of Sec. 11 Employment Procedure Regulation<sup>16</sup>.

If there are no refusal grounds according to Sec. 11 Employment Procedure Regulation and the Labour Agency gives its approval, it is, however, still within the aliens authority's discretion whether to grant a work permit, i.e. it may refuse to issue it for other reasons. A reason for refusal may be the intention to avoid a further consolidation of the foreigner's stay in Germany. This is considered legitimate if the foreigner's return to his country of origin is estimated feasible within the foreseeable future<sup>17</sup>.

## **2.5 Procedural Issues**

### *2.5.1 Permit-free Employment*

As an exemption to the rule that a residence permit for employment purposes may only be issued to foreigners outside of Germany with the Federal Labour Agency's approval, Sec. 2-16 Employment Regulation provides for a series of occupations for which the Agency's approval is not required. A residence permit for employment purposes is, however, obligatory. It is issued with restriction to the specific permit-free employment.

Permit-free according to the Employment Regulation are professional trainings, employment of high skilled workers, leading management positions, personnel for science, research and development, some selected office personnel, selected occupations in the artist and sports sector, journalists, caritative and religious occupations, holiday jobs, licensed voluntary services, selected short term occupations, personnel for international sports events, personnel in the transport sector, and service personnel employed with an employer in a Member State of the EU. The exemption for the last group is a consequence of the ECJ's *Vander Elst*-judgment.

Permit-free occupations according to Sec. 2 and 4 -13 Employment Regulation that are carried out for no longer than three months within one calendar year do not require a residence permit for employment purposes at all because they are not considered as employments in terms of the Residence Act (Sec. 16 Employment Regulation).

### *2.5.2 Self Employed Migrants*

A residence permit for employment purposes may be issued to a foreigner who intends to set up his own business in Germany if he meets the conditions laid down in Sec. 21 para. 1-3 Residence Act. This provision demands a **superior economic interest** in the occupation or a specific regional need for it. Additionally, it must be possible to assume that the occupation has **positive impacts on the economy**. As a rule, these conditions are met if the foreigner makes an investment of at least 1 Million Euro and creates at least ten jobs. This

does, however, not imply that foreigners who plan a smaller investment or create less jobs cannot be admitted. Such smaller projects are to be checked on an individual basis. Generally, the **financing must be secured** by own capital resources or by a credit agreement. An expert's prognosis is required to decide whether the conditions laid down in Sec. 21 para. 1 are met.

A residence permit for a self-employed occupation may also be issued with respect to international treaties on the basis of reciprocity. The most important treaties that apply are the Europe Treaties with Romania and Bulgaria. Art. 45 of the respective treaty provides for an equal treatment of nationals from these states to EU nationals with regard to self-employed occupations.

Foreigners who are older than 45 years must show document an adequate financial securities for their old age to be eligible for the residence permit.

### 2.5.3 *Seasonal Workers and Contract Workers*

Nationals of several Eastern and South Eastern European states can receive a temporary residence permit for up to four months in one calendar year that allows them to work in Germany as **seasonal workers** (Sec. 18 Employment Regulation and Sec. 4 Regulation on Exceptions to the Recruitment Stop resp.). This admission to the German labour market is restricted to selected economic sectors in order to meet seasonal demand for labour force. These sectors are the farming and the forestry sector, hotel and catering trade, fruit and vegetable processing, and sawmills. These occupation opportunities are, however, not eligible for all foreigners but only for those from a country that is party to a **bilateral agreement** with Germany on seasonal workers. The countries concerned are Poland, the Czech Republic, the Slovak Republic, Hungary, Slovenia, Croatia, Romania, and Bulgaria. These agreements have not become obsolete with the accession of most of the states concerned, since the admission to the German labour market has not been fully liberalised for those countries' nationals yet<sup>18</sup>. Sec. 18 of the Employment Regulation provides for a specific job placement procedure carried out by the German labour agency and the respective authorities in the country of origin. In the last years the reduction of admission contingents was discussed repetitively in order to force unemployed German residents into the seasonal jobs. Up to date, there have, however, not been any legislative consequences to that discussion.

A temporary residence permit may be issued to **fairground employees** for a seasonal employment for up to nine months in one calendar year (Sec. 19 Employment Regulation). Sec. 19 of the Employment Regulation provides for a specific job placement procedure carried out by the German labour agency and the respective authorities in the country of origin.



If a foreigner once received a temporary residence permit for a seasonal employment, a second temporary residence permit must not be issued within in the same calendar year (Sec. 17 para. 2 Employment Regulation). That way it is avoided that a foreigner manages to stay continuously in Germany by stringing several seasonal employments and that he thus achieves a consolidation of his residence status. For statistical data on seasonal workers refer to Table No. 1 in section 2.8

Another way how temporary admission to the German labour market is granted is the system of **contract workers**. This system provides for a contingent of foreign workers that is permitted each year to the German labour market on a temporary basis. This contingent is fixed annually with respect to the situation on the domestic labour market. Thus, the contingent has been reduced over the last years. (For statistical data refer to Table No. 2 in section 2.8). Contract workers may be employed by foreign subcontractors of German companies. According to the Law on the Posting of Workers (Arbeitnehmerentsendegesetz) contract workers must be paid equally to German workers in the same sector while social charges are to be paid in the countries of origin according to the respective social schemes<sup>19</sup>. Contract workers remain integrated in the foreign subcontractor's company who fulfils the terms of his contract with the German main contractor at his own authority. The labour agency's approval to issuing a residence and work permit for the contract workers regularly is limited to two years, in exceptional cases it can be extended up to three years, for management personnel and administrative staff of foreign companies up to four years (Sec. 39 Employment Regulation and Sec 3 Regulation on Exceptions to the Recruitment Stop resp.).

Germany has concluded **contract worker agreements** with Latvia, Poland, the Czech Republic, the Slovak Republic, Hungary, Croatia, Slovenia, Bosnia and Herzegovina, Serbia and Montenegro (Former Yugoslavia), Macedonia, Bulgaria, Romania, and Turkey. After the accession of most of these states to the EU the general freedom of services has replaced the contract workers agreements for most economic sectors in relation with these states. However, for some of the most important sectors it is still of importance, i.e. constructions, cleaning of buildings, equipment and means of transportation, and painting and decorating. For these sectors interim regulations apply that restrict the freedom of services for nationals of the newly acceded states (except Malta and Cyprus). For nationals of these Middle and Eastern European States the Regulation on Exceptions to the Recruitment Stop still applies as far as the Employment Regulation does not provide for more generous provisions.

Contract workers receive the consent to employment from the Labour Agency in a procedure independent from the visa proceedings (if such are necessary). It depends on the contract worker's nationality which local Labour Agency is competent to deal with the application. As long as the interim regulations to the accession agreement with the new

Middle and East European Member States apply, the Regional Direction of North Rhine-Westphalia in Düsseldorf and the Labour Agency in Duisburg are competent for Polish and Latvian nationals, the Regional Direction of Hessen and the Labour Agency in Frankfurt for Hungarian, Romanian, Czech, and Slovak nationals, and the Regional Direction of Baden-Württemberg and the Labour Agency in Stuttgart for Croatian, Slovenian, Macedonian, Bosnia-Herzegovinian, Bulgarian, Serbia-Montenegrin, and Turkish nationals. The aliens authorities are not involved in these proceedings.

## **2.6 Foreigners Receiving a Settlement Permit**

Foreigners receiving a settlement permit according to Sec. 9 Residence Act are admitted to the labour market without restrictions. However it should be considered that the immediate issuing of a settlement permit upon entry is restricted to a very limited number of cases. In fact, it can only be issued to **highly skilled foreigners** for whom the assumption is justified that they will integrate into the German society and who will be able to finance themselves without public aid (Sec. 19 Residence Act). Highly skilled foreigners are persons who come either under the definition of Sec. 19 para. 2 Residence Act (scientists with special professional knowledge, teaching personnel or scientific researchers in higher positions, and specialists and leading employees with special work experience who receive a salary of at least twice the earnings ceiling of the statutory health insurance system<sup>20</sup>) or hold a similar post with regard to qualification, income level and social status. The Federal Agency for Labour's approval is not necessary if the highly skilled foreigner belongs to the privileged persons mentioned in Sec. 19 para. 2 Residence Act (Sec. 3 Employment Regulation). The issuing of a settlement permit to other highly skilled foreigners must, however, be approved by the Federal Agency for Labour according to Sec. 39 para. 5 Residence Act if no other exemption according to Sec. 2-16 Employment Regulation is applicable. The approval procedure is less strict than that for other workers as it is described under No. 2.7. The Federal Agency for Labour may give its approval if there are no negative impacts on the labour market. It is, however, not obliged to examine if privileged persons are available on the job market.

The decision that a person may be considered highly skilled in terms of the Residence Act is taken on an individual basis upon application. A precise definition has not evolved yet. The decision should take into account the aim of the law to attract high potentials from economy and science for immigration into Germany if there is a special economic and social interest.

## **2.7 The Examination Procedure by the Federal Agency under Section 39 of the Residence Act**

Under the old Aliens Act each third country national who wanted to take up employment in Germany had to apply for a residence permit as well as for an employment permit. These double proceedings are now replaced by an approval procedure, i.e. the alien has to file only one application with the aliens authority who eventually issues the decision. The competence for the decision on the admission to the labour market remains, however, with the Federal Agency for Labour which gives its approval **only internally** to the aliens authority. The aim of this reform is to simplify the proceedings and to enable the labour administration to react flexibly to regionally and seasonally different needs of the labour market<sup>21</sup>.

With the exception of the permit free employments mentioned above, generally **all kinds of employment** of third country nationals **need to be approved** by the Federal Agency for Labour (Sec. 39 para. 1 Residence Act)<sup>22</sup>. The Federal Agency's approval is requested as a rule by the competent aliens authority at the local Labour Agency in the district where the employment shall be carried out. The employer's seat is regarded as the place of employment for this purpose. If the Labour Agency grants approval only with **restrictions**, these restrictions must be stated in the residence permit. If the third country national applies for a residence and work permit at an embassy or consulate abroad, the file is handed over to the competent local labour agency for approval. Should approval be denied, the Labour Agency informs the embassy or consulate about the reasons for denial which the embassy or consulate should include in the visa decision towards the applicant.

Approval for taking up employment is always granted for a **specified type of residence permit** (visa, residence permit, or settlement permit). Sec. 14 Par. 1 Employment Procedure Regulation makes clear that a general approval to a residence permit not yet specified in terms of type and legal status is not possible. Thus, the aliens authority has to clarify what kind of residence permit it plans to issue when requesting the Labour Agency for approval.

**Nationals of the new EU Member States** need to apply for a work permit-EU according to Sec. 284 Social Code, vol. III. The issuing of this work permit follows mainly the same procedure as the decision on an approval to the issuing of a residence permit to a third country national since Sec. 284 para. 3. refers to Sec. 39 para. 2-4 and 6 Residence Act. Therefore, the two procedures are explained together. Whenever differences occur, it will be stressed.

Whether approval is given or not depends on **several criteria**. Regardless of the fact that these criteria cannot always be divided properly, they have as a rule to be examined separately. The criteria defined by Sec. 39 Par. 2 Residence Act are: Impacts on the labour market, priorities, and similar working conditions.

Negative **impacts on the labour market** are to be considered particularly with respect to the employment structure, the regions, and the sector of the economy<sup>23</sup>. The term “negative impacts” (“nachteilige Auswirkungen”) is, however, not without ambiguity. Particularly with regard to the additional criterion that no other job seekers enjoying priority are available, it must be assumed that the lawmaker wanted the Labour Agencies to weigh all advantages and disadvantages of the admission to the labour market to come to a well-balanced decision. Even if the Residence Act’s restrictive function is taken into account it seems hardly possible to qualify the employment of foreigners as such as having a negative impact on the labour market. Consequently, some authors and the Federal Social Court argue that in cases where there is no job seeker enjoying priority no discretion is left for the Labour Agencies<sup>24</sup>. Negative impacts on the labour market are not imaginable in these cases since otherwise the job would remain vacant.

The next criterion is the **priority test**. The labour agency may only approve the issue of a residence permit for employment if there is a job vacancy that cannot be filled with persons who enjoy priority on the labour market and are available for employment. These privileges are enjoyed by nationals of Germany or another EU and EEA Member State and their family members and foreigners holding a residence permit allowing them to take up any employment. Among the privileged persons, albeit in a lower-ranking position, are nationals of the Middle and Eastern European Member States of the EU. The limitations on the freedom of workers laid down in the accession agreements do not exclude privileges with regard to the placement on jobs.

The term ‘availability for employment’ (“zur Verfügung stehen”) implies that the Labour Agency has to verify if there is any privileged worker who is able to take the job the foreign applicant otherwise would get. If the number of privileged workers to be considered for placement exceeds considerably the number of vacancies similar to the specific vacancy, workers are ‘available for employment’ in terms of Sec. 39 Par. 2 No. 1 Residence Act. It is not sufficient to refer to a generally high unemployment rate in a sector of the economy or a region. However, it is necessary to analyse the availability of privileged workers for the specific vacancy.

As a rule it can be assumed that no privileged worker is available if the vacancy has been advertised for four weeks and no successful placement could be undertaken.

The application of the priority test is not possible, however, if the job in question is not part of the general labour market. If it is a characteristic of the vacancy concerned that it cannot be filled with a privileged worker, the priority test is inapplicable. Among these cases are jobs that require special knowledge acquired abroad, jobs that serve as induction period for a foreign worker in order to send him as an employee into his country of origin, or the

renewal of an employment permit for a worker whose job would not be replaced if he was forced to terminate it.

Differing from the individual priority test, Sec. 39 Par. 2 No. 2 allows a **more general test of compatibility** with the above mentioned criteria for individual groups of professions or sectors of economy. The more general test proceeds in the same way as the individual one analysing potential negative impacts of the admission of non-privileged third country nationals to the job market. Unlike the individual test, it does not focus on one specific vacancy but takes a broader perspective. If compatibility is once assessed, this assessment is valid for all vacancies in the analysed group of profession or sector of economy respectively and replaces the individual priority test. It does, however, not replace the approval as such because the criterion of similar working conditions remains to be examined.

The priority test may be dropped as a whole with respect to a small number of occupations laid down in Sec. 39 Employment Regulation. This applies to skilled experts with university degree (or equivalent) in the context of personnel exchange within an international company or corporate group and to abroad working experts within an international company or corporate group if the employment is necessary to prepare a project abroad, the employee is going to work within this project.

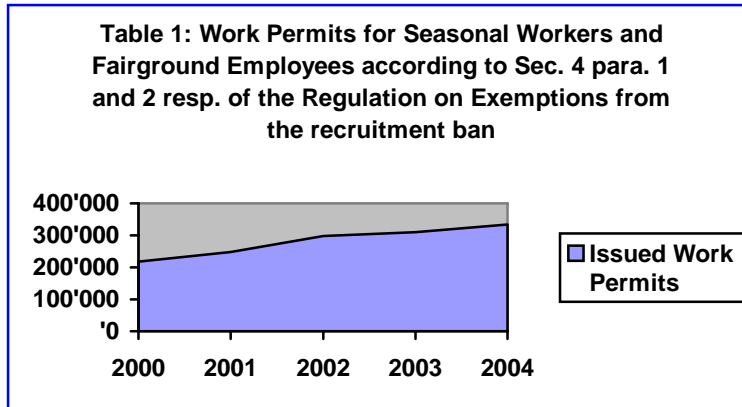
Finally, the Labour Agency has to make sure that the alien is not going to be employed under **less favourable terms than German employees** in similar jobs. Thus, the employer has to inform the Labour Agency about the terms of employment, including wages, hours, and other working conditions.

The law is aimed to prevent employees from exploitation as well as to hinder a creeping replacement of privileged workers by lower paid alien workers.

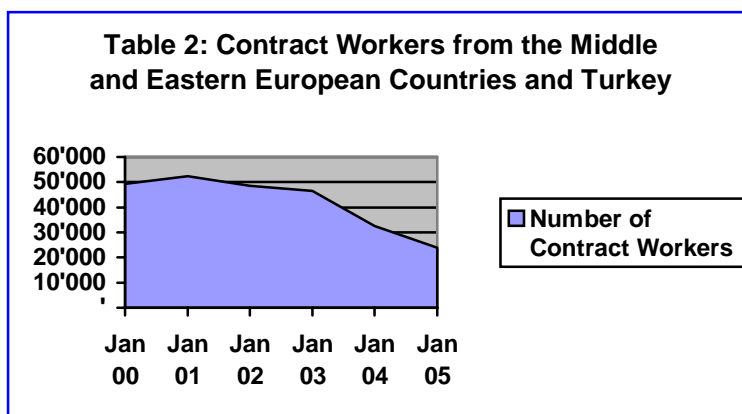
Even if all conditions are met, the Labour Agency's approval is not mandatory but discretionary. The scope of discretion will, however, be restricted if the applicant is a national of a new EU Member State. Although freedom of movement is restricted for workers from these states, the purpose of the restrictions, which is to protect the German labour market, has already been taken into account by checking if the conditions of Sec. 39 para. 2 Residence Act are met.

If approval is given for a specified employment, the approval expires if the employment is terminated.

## 2.8 Statistical Survey



Data Source: Bundesagentur für Arbeit



Data Source: Bundesagentur für Arbeit



Data Source: Bundesagentur für Arbeit

### **3. Rights of Migrant Workers under German Law**

This section describes some of the particular problems migrant workers are facing with respect to access to employment, discrimination, and integration. Attention is particularly drawn to aspects relating to non-discrimination legislation, the most recent integration provisions of the Immigration Act, and efforts to fight the very high unemployment rate of migrants.

#### **3.1 Application of German Employment Legislation**

Legally employed migrants enjoy full equal treatment in employment conditions whether under employment provisions or under trade union agreements. Therefore, no particular issue arises with legally employed workers. Problems may, however, arise with respect to illegally employed workers although under German employment legislation such workers are fully entitled to claim the same amount of payment, holidays, wages etc. as legally employed workers. Whether these rights may in practice be easily enforced is a different issue which can hardly be explored in this paper. The problems arising with respect to the fight against illegal employment, discriminatory working conditions, and human trafficking in general raise particular issues that cannot be dealt with in this paper.

#### **3.2 Non-Discrimination**

The EC-Directive 2000/43 of 29 June 2000 implementing the Principle of Equal Treatment between Persons irrespective of racial or ethnic Origin<sup>25</sup> is not yet transformed into German law. The Act on the Implementation of European Anti-Discrimination Law (Gesetz zur Umsetzung europäischer Antidiskriminierungsvorschriften) was adopted by the Bundestag on 17 June 2005 but rejected by the Bundesrat. Since the period of legislature was interrupted by the decision to dissolve the Bundestag and to hold new elections, the attempt to get the Act adopted by both parliamentary chambers failed.

A new draft of an Anti-Discrimination Act has not yet been presented. The parties forming government, however, announced that the implementing German law will not grant rights beyond the minimum standard provided for in the EC-Directive.

#### **3.3 Efforts to Fight Unemployment among Migrants**

The unemployment rate among foreign nationals in Germany is considerably higher than the general quota. This situation grew even worse in the last years since the unemployment among foreigners increased disproportionately strong (see table 3, section

2.8). Fostering the immigrants' integration into the German society is regarded as a means to fight this development.

The Residence Act provides for **Integration Courses** made up of a basic and an intermediate language course and an orientation course to impart knowledge of Germany's legal system, culture and history to the participant. As a rule, all foreigners who reside in Germany on a long-term basis and for the first time receive a residence permit for employment purposes, for family reunification purposes, or on humanitarian grounds are entitled to attend an integration course on a voluntary basis<sup>26</sup>. The participation is mandatory, though, if the foreigner lacks basic oral communication skills in German. The same applies if the foreigner is unemployed, receives unemployment benefits according to the Social Code, vol. II and his participation is recommended by the benefit granting authority.

The rules governing mandatory participation in the integration courses will soon be amended with respect to the EC Directive on the Status of Long-Term Resident Third Country Nationals 2003/109. According to Art. 15 para 3 of the Directive an integration course must not be mandatory for a third country national who has already attended such a course in another Member State in order to receive long-term resident status<sup>27</sup>.

Additionally, foreigners who are entitled to secondary unemployment benefits according to Social Code, vol. II (see No 4.4.1 for details) get support in order to reintegrate them into the regular labour market. However, these **supporting measures** are not in particular designed for foreigners but for unemployed irrespective their nationality.

#### **4. Regulation of Employment-Related Areas**

This section of the paper focuses on related issues which are of particular importance to the admission of foreigners to the German labour market such as acceptance of diplomas and certificates, access to education, and social benefits. German legislation does in principle not distinguish between foreigners and German nationals with respect to social benefits. Special aspects of export of social benefits are regulated in bilateral or multilateral social insurance agreements. With respect to general social benefits, not part of a social insurance scheme, there may, however, be restrictions concerning the access to such benefits on the basis of the residence title. The paper outlines some of the major differences concerning the access to social benefits, taking into account the more recent legislation, such as the provisions on the job seekers allowance (Hartz IV).

##### **4.1 Acceptance of Diplomas and Certificates**

Restrictions imposed on foreigners by regulations of profession create the most important obstacles to foreigners' job opportunities in Germany. Even high skilled migrants



holding a work permit are often not permitted to their respective occupational field because their vocational skills are not considered equivalent to German certificates.

This does not only concern academic professions (e.g. physicians) but also the craft sector. The Craft Trades Act (*Handwerksordnung*)<sup>28</sup> provides for very strict regulations for the access to the occupation in crafts. The **system of “master craftsmen”** (*Handwerksmeister*) prevents foreigners in most cases from running their own craft business since this is a privilege being left to master craftsmen possessing a specific master craftsman’s certificate acquired in Germany. However, for Union Citizens and equally privileged foreigners EC law provides for exemptions to these rules<sup>29</sup>. For non-privileged foreigners this system means in many cases that they, if occupied at all, will work in jobs not adequate to their actual qualification. The Craft Trades Act provides, however, for some exemptions to the master privilege which soften its rigidity. An exceptional admission to the craft trades will be granted according to Sec. 8 Craft Trades Act if the foreign craftsman proves an equivalent qualification and the acquisition of a master’s certificate is considered unreasonable.

Special provisions apply to Craftsmen who acquired a French or Austrian craftsman’s certificate. These countries’ master certificates in some crafts are generally accepted in Germany<sup>30</sup>.

## **4.2 Education and Skills Training incl. Loans and Grants for University Education**

### **4.2.1 Children of School-Age**

Children of school-age who are resident in one of the German Federal States (Länder) are generally **obliged to visit school** no matter of what nationality they are<sup>31</sup>. The obligation is to fulfil by visiting either a German public school or a licensed German private school. The visit of a private foreign school is regularly not sufficient.

There are **no school fees for public schools** in Germany. Books and other equipment must, however, be financed privately in some of the Federal States. Others provide them on loan for the period of the school term.

### **4.2.2 Admission to University Studies**

Union citizens are treated equally to German nationals with regard to the admission to higher education since university studies are regarded as part of professional training and thus fall within the range of the free movement guarantee of the EC Treaty. This applies of course only for Union citizens who fulfil the general admission requirements for university studies, particularly with respect to the necessary language skills (Sec. 27 para. 1 and 2

Federal Framework Act on Higher Education – *Hochschulrahmengesetz*). Other criteria with discriminating character must not be applied.

Unlike Union citizens, third country nationals are not entitled for equal access to university studies, but to a correct decision on their application with respect to the exercise of discretion.

Whether a foreign school diploma is considered equivalent to the German Abitur is laid down in laws and regulations of the Federal States (Länder). Therefore, it is not possible to give a comprehensive overview in this paper.

If the number of students is limited in certain courses of studies, a quota for foreign students is fixed in advance. Among the foreign applicants for these places some are considered privileged. This applies first of all to foreigners who achieved their school leaving exam in Germany. They form about two thirds of foreign students at German universities<sup>32</sup>. Additionally, obligations of international law must be considered. Apart from these formal criteria, the degree of qualification is as a matter of course the main criterion to select foreign students for university education.

#### 4.2.3 *Loans and Grants*

A **public funding scheme** for the individual support of students and other persons enjoying education or training is established by the Federal Act on individual grants (*Bundesgesetz über individuelle Förderung der Ausbildung – BAFöG*<sup>33</sup>). The law is meant to support persons who cannot afford the education that suits their dispositions, talents and performance.

Grants are paid not only to German nationals but also to foreigners if they qualify for it. The act makes a distinction between foreign nationals who are eligible to the grant under the same conditions as Germans and foreigners who are eligible only if they have lived and worked in Germany for at least five years. To the first group belong foreigners with asylum status and recognized Convention refugees, foreigners with expatriate status (*heimatloser Ausländer*), foreigners holding a settlement permit, foreigners with residence in Germany whose spouse is German national or who has a parent being a German national, family members of Union citizens with residence in Germany, and Union citizens and EEA-citizens who previously carried out an employment in Germany if there is a link between the employment and the education<sup>34</sup>.

Foreigners of the second group are also entitled to grants if at least one parent lived in Germany for at least three years within the last six years and carried out an employment legally. If the parent could not carry out an employment due to a reason beyond his responsibility (e.g. sickness, pregnancy, education of children, or invalidity), an employment carried out for at least six months is considered sufficient.

### **4.3 Social Insurance Benefits e.g. Health Insurance, Family Benefits, Child Care etc.**

#### **4.3.1 Health Insurance**

Health insurance benefits do not depend on the nationality but on the existence of an **insurance contract**. There are two forms of health insurance schemes in Germany, a statutory insurance that is mandatory for most employees (Sec. 5 Social Code, vol. V) and a private one (Sec. 9 Social Code, vol. V). Employed persons are as a rule obliged to be insured with the statutory health insurance scheme. Only for employees with a wage exceeding €47,250.00 per year, the obligation is cancelled (Sec. 6 Social Code, vol. V). For self-employed persons there is no obligation to get a health insurance.

For unemployed but employable persons the state pays the health insurance contributions as part of the social assistance.

#### **4.3.2 Unemployment Insurance**

The mandatory social insurance scheme in Germany includes all workers irrespective of their nationality (Sec. 2 para. 2 Social Code vol. IV). Foreign employees are therefore entitled to unemployment benefits under the same conditions as German nationals. The benefits include **primary unemployment benefits** (Arbeitslosengeld – the amount of this benefit depends on the last working income, Sec. 117 ff. Social Code, vol. III), **secondary unemployment benefit** (Arbeitslosengeld II – an amount of 345 Euro per month and unmarried person, Sec. 1 ff., 19 ff. Social Code, vol. II), and **support of further professional training** (Sec. 77 ff. Social Code, vol. III). The secondary unemployment benefit is not exclusively based on insurance contributions. Entitled to the secondary unemployment benefits are all employable people in need with regular residence in Germany (Sec. 7 para. 1 Social Code, vol. II). The secondary unemployment benefit scheme is therefore treated in the following section.

The primary unemployment benefit is an insurance benefit to pay the unemployed person's living expenses. To become eligible to the primary unemployment benefits the unemployed person must have paid insurance contributions for at least 12 months within the last two years and be available for placement on the labour market (Sec. 118 and 123 Social Code, vol. III).

There are privileges for employees from the EU Member States and other states Germany has concluded social insurance agreements with. Under certain conditions the times of insured employment in these states may be acknowledged completely or at least in parts. However, a minimum period of time of insured employment is still a precondition for the eligibility to primary unemployment benefits.

Refugees who have previously been employed abroad are not automatically eligible to primary unemployment benefits. Insurance periods are only acknowledged with respect to employment in EU Member States (Art. 2 para. 1 EC Regulation 1408/71)

A Union citizen being eligible to primary unemployment benefits may return to his country of origin to search for work without losing his eligibility to the benefits (Art. 69 ff. EC Regulation 1408/71).

#### **4.4 Other Social Benefits on the Federal Level, e.g. Social Assistance etc.**

##### *4.4.1 Secondary Unemployment Benefits*

With the recent amendments to the social legislation a **new scheme of basic social assistance for work seekers** has been established on 1 January 2005<sup>35</sup>. According to Sec. 7 para. 1 Social Code, vol. II, it applies to all people older than 14 but younger than 65 who are employable and in need and have their regular residence in Germany.

Foreign nationals are considered employable if they are admitted to the labour market or may be admitted (Sec. 8 para. 2 Social Code, vol. II). It is considered sufficient if an employment is not completely impossible. The mandatory approval procedure according to Sec. 39 para. 2 Residence Act does not exclude the foreigner's **employability** in terms of the Social Code, vol. II. Only if the foreigner has no realistic chance to be admitted to the labour market, an entitlement to secondary unemployment benefits may be denied<sup>36</sup>. Asylum seekers are not entitled to secondary unemployment benefits even if they are admitted to the labour market (Sec. 7 para 1 Social Code, vol. II)<sup>37</sup>.

If the foreigner receives secondary unemployment benefits according to the Social Code, vol. II, his application for a residence title or prolongation of an existing residence title may be rejected (Sec. 5 para. 1 and Sec. 8 para. 1 Residence Act). However, the reception of secondary unemployment benefits is no ground for expulsion.

A bill, recently initiated by the Bundesrat<sup>38</sup>, contains the provision that foreigners should generally not be eligible to secondary unemployment benefits or social assistance within the first three months of their stay in Germany. Foreigners entering for the purpose of job seeking will be excluded from secondary unemployment benefits for the whole period of their job search. The amendments drafted to implement the EC-Directive on Free Movement intend to prevent nationals from the new member states to engage in a kind of "social tourism".

##### *4.4.2 Social Assistance*

Foreigners who factually reside in Germany are, as a rule, entitled to receive social assistance in terms of the Social Code, vol. XII, if they are **not employable**. In certain cases,

however, the entitlement is restricted or does not exist at all. The **Act on Payments to Asylum Seekers** (Asylbewerberleistungsgesetz)<sup>39</sup> provides a special assistance scheme applicable to asylum seekers, foreigners with tolerated status, foreigners holding a residence permit for humanitarian reasons, foreigners whose obligation to leave is executable, and their family members (Sec. 1 para. 1 Act on Payments to Asylum Seekers). Hence, these persons are not entitled to social assistance in terms of the Social Code, vol. XII (Sec. 9 para. 1 Act on Payments to Asylum Seekers).

Apart from these exemptions, social assistance payments to foreigners are granted according to Sec. 23 Social Code, vol. XII. According to these provisions foreigners with factual residence in Germany are entitled to subsistence support, sickness benefit, support for expectant mothers and women in childbed, and care support. Other social assistance benefits, German nationals might be entitled to, are only granted within the authority's discretion. The scope of discretion is narrowing in correspondence with the duration of the foreigner's stay in Germany.

Some foreigners are even treated equal to German nationals and are entitled to social assistance to the same extent. This applies to **recognised refugees** (Sec. 2 and 3 Asylum Procedure Act), **homeless aliens**, and **Union Citizens** (Art. 7 para. 2 Regulation 1612/68). Nationals of States who are party to the European Convention on Social and Medical Assistance<sup>40</sup> enjoy a privileged position as well. They are treated equal to German nationals except with respect to special assistance to overcome particular social difficulties (Sec. 67 ff. Social Code, vol. XII). The effect of this Convention has, however, become limited since all parties, except Turkey, are Member States of the European Union or the EEA.

Subsistence support is paid to finance the entitled person's needs, including food, housing, clothing, personal hygiene, household effects, heating, and personal everyday needs. For special urgent needs a single payment may be granted<sup>41</sup>.

There is no entitlement to social assistance benefits according to Social Code, vol. XII, if the foreign national has entered the Federal Territory with the intention to receive social assistance benefits (Sec. 23 para. 3 Social Code, vol. XII). This intention must have been the main incentive for immigration, for which the burden of proof lies with the authorities<sup>42</sup>.

As a rule, social assistance is granted only if the concerned person has no legitimate claim to maintenance against his family members. Whether such an obligation to maintenance exists is determined according to German law of maintenance.

A bill, recently initiated by the Bundesrat<sup>43</sup>, provides for some further restrictions, e.g. no entitlement to social assistance for foreigners in the first three months upon arrival, restricted entitlement to social assistance for foreigners who are staying illegally in Germany, the burden of proof in regard of the immigration incentive being shifted to the immigrant.

#### 4.4.3 *Child Benefits*

The child allowance is aimed at compensating families' expenses on children and thus fostering and protecting the family. It is regulated in the Act on Child Allowance (Bundeskindergeldgesetz)<sup>44</sup>. The entitlement to child allowance follows the **principle of territoriality**. The parent's and the child's place of residence or usual stay in Germany is a precondition for entitlement (Sec. 1 para. 1 No 1, para. 2 No 1; Sec. 2 para. 5 Child Allowance Act). Foreign nationals need in addition a residence title according to Sec. 1 para. 3 Child Allowance Act. They are only entitled to child allowance if holding a settlement permit (Sec. 1 para. 3 No 1 Child Allowance Act), a residence permit for employment purposes (para. 3 No 2), a residence permit for humanitarian reasons according to Sec. 25 para. 1 and 2 Residence Act, an independent residence permit for spouses according to Sec. 31 Residence Act or a residence permit because of a special right of residence according to Sec. 37 and 38 Residence Act (para. 3 No 3), or a residence permit for family reunification purposes if the family member with residence in Germany is a German national or a foreigner mentioned in Sec. 1 para. 3 No 1-3 Child Allowance Act (para. 3 No 4). Seasonal workers, contract workers, and temporarily detached workers are not entitled to receive child allowance.

Special rules apply to **Union citizens** and nationals of other states that are party to a bilateral agreement on the coordination of social protection schemes. EU-workers entitled to free movement are entitled to receive child allowance for their children living in another Member State. The principle of territoriality does not apply (Art. 73 EC-Regulation No 1408/71). Bilateral agreements exist e.g. with Turkey, former Yugoslavia, Switzerland, Morocco, and Tunisia. For some of these countries lower rates apply corresponding to lower costs of living.

#### 4.4.4 *Parental Allowance*

Similar rules apply to the entitlement of foreign workers to parental allowance<sup>45</sup>. The Act on Parental Allowance and on Parental Leave (Bundeserziehungsgeldgesetz – BErzGG)<sup>46</sup> is aimed at reducing families' costs for the bringing up of small children. Parental Allowance is paid either for twelve months at most (450.00 Euro/month) or for 24 months at most (300.00 Euro/month). It is recently discussed to replace the described parental allowance scheme with a new, more generous scheme.

#### 4.4.5 *Housing Allowance*

The entitlement to housing allowance is regulated in the Act on Housing allowance (Wohngeldgesetz – WoGG)<sup>47</sup>. Housing allowance is granted as rent allowance to tenants

and as a burden allowance to owners. It is aimed at ensuring housing which is adequate and suitable for families by compensating unreasonable high expenses for housing in the Federal Republic of Germany. Hence, an entitlement to housing allowance does exist only if the concerned person has his/her **place of residence or usual stay in Germany**.

According to No 1.01 of the General Administrative Instruction for the Application of the Housing Allowance Act (Allgemeine Verwaltungsvorschrift zur Durchführung des Wohngeldgesetzes – WoGVwV 2002)<sup>48</sup> foreigners holding a residence title or documented tolerated status and foreigners whose asylum procedure is pending are entitled to receive housing allowance. This provision in the administrative instruction is to be interpreted in a restrictive way. According to the Federal Administrative Court of Appeal's jurisprudence an allowance may be granted only to housing (*Wohnraum*) which is adequate and meant for long-term use<sup>49</sup>. Consequently, only foreigners with a consolidated right of residence are entitled to receive housing allowance. Foreigners whose residence is permitted only temporarily or who stay in Germany for a purpose that is clearly limited in time are therefore not entitled to housing allowance<sup>50</sup>.

The same principles apply to the entitlement to other types of housing allowances<sup>51</sup>.

#### 4.4.6 Other Social Benefits

The above list of social benefits is not exhaustive. Additional benefits for foreigners may be regulated in federal laws and, to an even larger extent, on the level of the Länder and the communal level.

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<sup>1</sup> If the Union citizen lives in a registered homosexual relationship, his/her partner is eligible to a residence permit allowing him/her to take up employment according to the provisions of the Residence Act, see Sec. 3 Par. 6 free Movement Act and Sec. 27 Par. 2 and Sec. 28 Residence Act.

<sup>2</sup> For reasons of simplicity only the masculine form is used in the following text. This does, as a matter of course, include female persons as well.

<sup>3</sup> O.J. (2002), L 114, p. 6-63

<sup>4</sup> In order to limit costs, the aliens authorities use the same document for non-EU family members of Union citizens and for Swiss citizens and their family members.

<sup>5</sup> ECJ of 31 May 1979, case 182/78, '*Pirik*', II, coll. 1979, p. 1977; decision of 6 June 1995 case C-434/93, '*Bozkurt*', coll. 1995, I-1475; decision of 23 January 1997 case C-171/95, '*Tetik*', coll. 1997, I-329; Federal Social Court, judgment of 10 September 1998, file-no B 7 AL 70/97 R.

<sup>6</sup> The ECJ defines the term 'worker' in a very broad way, see e.g. decision of 5 October 1994 case C-355/93, '*Eroglu*', coll. 1994, I-5113 (vocational training); decision of 6 June 1995 case C-434/93, '*Bozkurt*', coll. 1995, I-1475 (permit-free cross-border truck driving); decision of 23 January 1997 case C-171/95, '*Tetik*', coll. 1997, I-329 (deliberate unemployment). See in addition Federal Administrative Court of Appeal, judgment of 12 April 2005, file-no 1 C 9/04 (No legal employment in terms of Art. 6 para 1 Association Council Decision 1/80 if residence permit was achieved by means of deception).

<sup>7</sup> New arriving Turkish nationals are however slightly privileged within the scope of the priority test according to Sec. 39 Residence Act because Art. 8 para. 1 Association Council Decision 1/80 provides for a privileged consideration of Turkish nationals over other third country nationals. In practice the effect of this privilege is, however, very limited.

<sup>8</sup> Furthermore, the employment of high skilled workers, personnel for science, research and development, some selected office personnel, selected occupations in the artist and sports sector, journalists, caritas and religious

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occupations, licensed voluntary services, selected short term occupations, personnel for international sports events, personnel in the transport sector, and service personnel employed with an employer in a Member State of the EU is permit-free according to Sec. 2-16 Employment Regulation.

<sup>9</sup> These occupational groups are seasonal occupations in specified sectors of economy (see No. 2.5.3 for details), temporary fairground employments, occupations as au-pair, some household-related services, artists and acrobats and their personnel, and practical employments if they are necessary to achieve acceptance for foreign diplomas and certificates.

<sup>10</sup> These occupational groups are language teachers, cooks for local specialities, academic professions, particularly in the IT-sector, leading management posts and posts that require special knowledge, social workers with special knowledge, nursing staff, and highly skilled personnel that is exchanged internationally within one company

<sup>11</sup> In exceptional cases the independent residence permit may be issued earlier if this is necessary to avoid an undue hardship, Sec. 31 para. 2 and Sec. 28 para. 3 Residence Act.

<sup>12</sup> A student job must not endanger the studies which are the main purpose of the residence permit. As a rule, the work must not exceed 15 hours work per week. See Christen, T. (2005), 'Regelungen für den Arbeitsmarktzugang für Drittstaatsangehörige', *Bundesarbeitsblatt*, 6, p. 9.

<sup>13</sup> Foreigners enjoying tolerated status remain obliged to leave the country.

<sup>14</sup> This competence has been recently shifted to the aliens authorities. Before, the Labour Agencies had been competent. On the implications of this reform, see Leineweber (2005), 'Die Beschäftigung von geduldeten Ausländern seit Inkrafttreten des Zuwanderungsgesetzes', *Informationsbrief Ausländerrecht* 7/8, p. 302.

<sup>15</sup> This is the case if receiving payments was the foreigner's main motive for immigration. However, it cannot automatically be concluded that this was the foreigner's aim if his asylum application was rejected, Federal Administrative Court of Appeal, judgment of 4 June 1992, file-no. 5 C 22/87.

<sup>16</sup> See Administrative Court of Koblenz, judgment of 4 March 2005, file-no. 3 L 278/05.

<sup>17</sup> Zühlcke, J. (2005), 'Die Zulassung von geduldeten Ausländern zur Ausübung einer Beschäftigung nach dem neuen Zuwanderungsrecht', *Zeitschrift für Ausländerrecht und Ausländerpolitik* (ZAR – Journal for Aliens Law and Policy), 10, p. 320; dissenting: Administrative Court of Karlsruhe, decision of 15 April 2005, file-no 10 K 493/05.

<sup>18</sup> Brand, J. (2004), 'Einsatz von Arbeitnehmern und Niederlassungsfreiheit von Unternehmen aus den neuen EU-Mitgliedsstaaten in Deutschland', *Betriebs-Berater* 38, supplement.

<sup>19</sup> Maiß, S. (2005), 'Einsatz osteuropäischer Subunternehmer nach der EU-Osterweiterung', *Wirtschaft und Recht in Osteuropa*, 12, p. 355; Temming, F. (2005), 'EU-Osterweiterung: Wie beschränkt ist die Dienstleistungsfreiheit?', *Recht der Arbeit*, 3, pp. 188 f.

<sup>20</sup> This means that a foreigner has to receive a salary of at least 7,125.00 Euro per month to meet this requirement (2006).

<sup>21</sup> For details of the legislation proceedings and the explanation of the legislature's motives refer to Parliamentary Document No. 15/420, pp. 62 and 85 ff.

<sup>22</sup> Exemption may apply with respect to international treaties, Sec. 41 Employment Regulation.

<sup>23</sup> This clause is similar to the predecessor provision in Sec. 285 Par. 1 Social Code III (Sozialgesetzbuch III) codifying that a work permit may be issued if negative impacts on the labour market with regard to the employment structure, the regions, and the sectors of the economy do not occur. Sec. 285 Social Code III was repealed by the Immigration Act.

<sup>24</sup> Bieback (2004) in Gagel and others (eds) *SGB III*. Sec. 285, passage 20; Düe (2002) in Niesel and others (eds) *SGB III*. Sec. 285, passage 3. Other authors want to give the Labour agency a discretion to consider non-judicial extra-legal aspects, see Bartz (2004) in Wissing (ed.) *Nomos -SGB III*. Sec. 285, passage 6.

<sup>25</sup> O.J. L 180, p. 22 of 19 July 2000.

<sup>26</sup> In 2005, 124,505 persons attended an integration course. This is about 58% of all entitled foreign nationals, see Parliamentary Document No 16/592.

<sup>27</sup> Hailbronner, K. (2004), 'Langfristig aufenthaltsberechtigte Drittstaatsangehörige', *Zeitschrift für Ausländerrecht und Ausländerpolitik*, 5/6, p. 166.

<sup>28</sup> Gesetz zur Ordnung des Handwerks (HandwO) of 28 December 1965, Federal Law Gazette (1966) I, p. 2; revised form by announcement of 24 September 1998, Federal Law Gazette I, p. 3074, last amendment through Art. 1 Law of 24 December 2003, Federal Law Gazette I, p. 2934 and Art. 35 b Law of 24 December 2003, Federal Law Gazette I, p. 2954.

<sup>29</sup> These rules are implemented into German law by Sec. 9 Craft Trades Act in combination with the Craft Trades Regulation-EEC/EEA (EWG/EWR-Handwerksverordnung of 4 August 1966, Federal Law Gazette I, p. 469, last



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amendment through Act of 25 March 1998, Federal Law Gazette I, p. 596), the history of the relevant EC Law and its implementation is illustrated in Schwannecke, H. (2001), 'System und Fortentwicklung der Anerkennung von Qualifikations- und Beschäftigungsnachweisen auf europäischer Ebene und seine Ausstrahlung auf das Handwerk', *Wirtschaft und Verwaltung*, 4, pp. 247 ff.

<sup>30</sup> See Regulation on the equivalence of Austrian master certificates with master certificates in crafts of 31 January 1997, Federal Law Gazette I, p. 142, and Regulation on the equivalence of French master certificates with master certificates in crafts of 22 December 1997, Federal Law Gazette I, p. 3324.

<sup>31</sup> Some exceptions apply with respect to international treaties that provide for something different, e.g. for diplomat's children. In some cases Education Acts allow exemptions for children who already finished obligatory school in their country of origin, particularly if only a short period of compulsory education remains since a useful education cannot be expected then. The laws slightly differ in the individual Länder legislation. For the State of Baden-Württemberg see Sec. 72 Par. 1 Education Act (Schulgesetz).

<sup>32</sup> Migrationsbericht der Integrationsbeauftragten (Migration Report of the Federal Government's Integration Commissioner), January 2004, p. 67.

<sup>33</sup> BAföG of 26 August 1971, Federal Law Gazette I, p. 1409, revised form by announcement of 6 June 1983, Federal Law Gazette I, p. 645, 1680, last amendment through Art. 1, Act of 2 December 2004, Federal Law Gazette I, p. 3127.

<sup>34</sup> Relevant Judgments: OVG Berlin (Administrative Court of Appeal), judgment of 18 January 2001, NVwZ-RR (Neue Zeitschrift für Verwaltungsrecht – Rechtsprechungsreport – New Journal on Administrative Law – Jurisdictional Report) 2002, p. 118; OVG Hamburg, judgment of 22 June 2001, NVwZ-RR 2002, p. 121.

<sup>35</sup> 4th Law on Modern Services concerning the Labour Market (Hartz IV), Federal Law Gazette (2003) I, p. 2954; very critical of the reform Butterwege, Chr. and Reißlandt, C. (2004), 'Folgen der Hartz-Gesetze für Migrant(inn)en', *Gesundheits- und Sozialpolitik*, 3/4: 20-24, also see Sieveking, K. (2004), 'Zur Bedeutung des Arbeitslosengelds II für Ausländer', *Zeitschrift für Ausländerrecht und Ausländerpolitik*, 8: 283-287.

<sup>36</sup> Federal Social Court, judgment of 17 January 1991, file-no 7 RAr 70/90

<sup>37</sup> Asylum seekers receive benefits according to the Act on Payments to Asylum seekers (Asylbewerberleistungsgesetz – see note 39) instead. However, this excludes asylum seekers from support to reintegrate them into the labour market as Sec. 14 ff. provides for.

<sup>38</sup> Bill of 14 December 2005, Parliamentary Document No 16/239.

<sup>39</sup> Asylbewerberleistungsgesetz as announced on 5 August 1997 (Federal Law Gazette I, p. 2022), last amendment of 14 March 2005 (Federal Law Gazette I, p. 721).

<sup>40</sup> European Convention on Social and Medical Assistance of 11 December 1953 Federal Law Gazette II, 1956, p. 564.

<sup>41</sup> This includes, e.g., the costs for the extension of the foreigner's passport, see Administrative Court of Appeal of Baden-Württemberg, judgment of 14 June 1994 in Informationsbrief Ausländerrecht (Information Letter Aliens Law) (1996), p. 346; Federal Administrative Court of Appeal, judgment of 13 December 1993 in BVerwGE (Published Decisions) vol. 87, pp. 212, 214.

<sup>42</sup> See Federal Administrative Court of Appeal, judgment of 4 June 1992 in BVerwGE (Published Decisions) vol. 90, p. 212; Federal Administrative Court of Appeal, judgment of 30 October 1979 in BVerwGE (Published Decisions) vol. 59, p. 73; Administrative Court of Appeal of Hesse, judgment of 18 January 1993 in Informationsbrief Ausländerrecht (Information Letter Aliens Law) (1993), p. 141.

<sup>43</sup> Bill of 14 December 2005, Parliamentary Document No 16/239.

<sup>44</sup> Bundeskindergeldgesetz of 11 October 1995, Federal Law Gazette I, pp. 1250, 1378; revised form by announcement of 22 February 2005, Federal Law Gazette I, p. 458.

<sup>45</sup> Additionally, frontier commuters from Switzerland are entitled to parental allowance, Sec. 1 para 7 No 2 Parental Allowance Act.

<sup>46</sup> Bundeserziehungsgeldgesetz of 6 December 1985, Federal Law Gazette L, p. 2154, revised form by announcement of 9 February 2004, Federal Law Gazette I, p. 206; last amendment by Art. 2 of the Act of 27 December 2004, Federal Law Gazette I, p. 3852.

<sup>47</sup> Wohngeldgesetz of 14 December 1970, Federal Law Gazette I, p. 1637, revised form by announcement of 13 January 2002, Federal Law Gazette I, p. 474, last amendment by Art. 23 of the Act of 21 March 2005, Federal Law Gazette I, p. 818.

<sup>48</sup> WoGVwV as announced on 5 November 2001, Federal Gazette No 211 of 10 December 1992, p. 23237.

<sup>49</sup> Federal Administrative Court of Appeal, judgment of 18 January 1991 in BVerwGE (Published Decisions) vol. 87, p. 299. Consequently the Federal Administrative Court of Appeal has denied the housing (*Wohnraum*)

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characteristic for rooms in a temporary hostel, see judgment of 14 October 1992 in BVerwGE (Published Decisions) vol. 90, p. 315.

<sup>50</sup> For a different opinion, see Administrative Court of Appeal of Hesse, judgment of 24 July 1987, in *Zeitschrift für Familienrecht (FamRZ)* 1987, p. 1201 (syllabus).

<sup>51</sup> Act on Ensuring the Appropriation of Council Houses (Wohnungsbindungsgesetz – WoBindG) of 19 August 1984, Federal Law Gazette I, p. 2166; revised form by announcement of 13 September 2001, Federal Law Gazette I, p. 2404.

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