

6 Legal context

The following explanation gives an impression of the legal situation of both, businesses and migrant workers have to face when they plan to employ immigrants/immigrate to a country for working purpose.

6.1.1 Visa, residence and work permits

The admittance of new immigrants to Spain is based principally on the necessity to staff positions. Usually, non-EU immigrants need to get a visa in the country of departure which allows them to work or to search for employment in the country of destination.

Within the unified immigration policies for the European Union, legislation is pretty much the same for all countries belonging to the European Union. For stays in a European country for a period of a maximum of 90 days or various stays of a total of 90 days within 6 months (short-term stay) for Mexican citizens the agreement of Schengen applies: visa is waived for visits that are not on the purpose of generating income to the foreigner. In order to perform a professional activity or to get the authorization to stay for a period longer than 3 months, foreigners need to obtain a visa in advance from the respective agency abroad in charge. The following types of visa exist:

In order to get employed or engaged in any professional activity, non-EU immigrants need to give proof of the activities planned (working contract or offer of a working contract) and must obtain a work permit which is an administrative authorization to work legally in Spain (and other European countries such as France or Germany. In Spain, applications must be made to the Foreigners' Office or to the provincial office of the Ministry of Labor in case of that the foreigner stays within the country. If not, the application must be made to the Consular office of the applicant's home country. The Provincial labor offices will decide whether the work permit will be granted or not. (Spainlawyer.com, 2009)

A permit can only be given when:

- a) There is a documented labour requirement.
- b) The documented labour requirement cannot be staffed by the National Institute of Labour (OECD, 2006).

The Spanish government wants to speed up the process of granting work permits and introduced the target of one month for the processing of new claims and three months for the reissuing (OECD, 2006). To accelerate the authorization process, since 2000 a so called catalogue of hard to fill occupations has been published by the Spanish National Institute of Labour. Positions that have been found hard to staff are enlisted in this document. For all those vacancies that appear in the list, it is immediately possible for employers to request residence and work

permits for foreign labour. Other vacancies that employers find hard to fill by nationals must be reported to the Labour Office (INEM, 2009).

For employees, the different types of work permits exist:

- (1) Type A: For seasonal or time-limited work within a maximum period of 9 months.
- (2) Type B: For a specific profession, activity and region with a maximum duration of 1 year; this work permit can be renewed after its expiry.
- (3) Type C: For various professions, activities and areas with a maximum duration of 2 years, can only be obtained through the renewal of work permit B once it expires.
- (4) Type D: For unlimited professional activities without regional limitation; is issued once work permit C expires.

Non-EU immigrants must further obtain a residence permit to reside legally in Spain. The most relevant types of residence permits in this case are:

- § Tourist residence permit: for stays up to 90 days, can be extended.
- § Temporary residence permit: valid for more than 90 days and less than 5 years; this permits get usually granted when the applicant has a work permit.
- § Permanent residence permit: consecutive temporary permits for a period of more than 5 years entitle an immigrant for a permanent residence permit (OECD, 2006).

The application for a residence permit has to be made personally at the Foreigners' Office or to the nearest National Police Station having a foreigner's department (Spainlawyer, 2008).

6.1.2 GATS Mode 4

When talking about services in an international context we must also specify the General Agreements of Trades and Services GATS and especially the part most closely linked to the issue of temporary international migration- Mode 4. The GATS is "a multilateral framework covering the trade in services, which applies to all 148 WTO Members. It supplies a framework for countries to decide which service sectors they want to open to foreign suppliers , and under what conditions" (OECD, 2005). According to their means of supply, the GATS is divided into 4 parts (Development Research Centre on Migration, 2005):

- (1) Mode 1: cross-border.
- (2) Mode 2: consumption abroad.
- (3) Mode 3: via commercial presence.

(4) Mode 4: temporary physically present natural persons in territory foreign to their own.

Suppliers that work under Mode 4, usually show the following characteristics (IOM, 2005):

- § The entry is permitted for a particular purpose.
- § There is no permission to move between sectors (consignation to one specific sector).
- § Migration doesn't occur on a permanent basis (only temporally intentions).

Mode 4 is the most closely linked part of the GATS to international labour migration. It includes all movements of persons that supply services, in theory at all skill levels but actually, most countries' commitment is to a great extent limited to the higher skilled. The section is usually understood to cover (IOM, 2005):

- § Business visitors (not receiving any remuneration in the foreign country).
- § Intra-corporate transferees (of one single company).
- § Employees of foreign service companies sent out in order to provide a service (gained a contract abroad).
- § Foreigners that work for foreign enterprises in the host country
- § Individuals that obtained a contract with a client of the host country.

Considering the previous point there is no consensus on the question if foreign employees contracted at a domestic company of the host country are considered similar or opposed to foreigners that gain a contract to provide services for a company. Especially for the hotel and tourism sector this distinction is exceedingly difficult.

6.1.3 Preliminary Conclusions

As the necessity to staff a position must be given, documented and as it must be demonstrated that the vacancy can't be staffed by the national labour institutions in order to generate a work permit which is obligatory for an immigrant to enter the country legally, the admittance of migrant workers is generally difficult. The most convenient case would be that the respective position would be listed in the catalogue of hard-to-fill vacancies. But this takes some time and would slow the process of admittance by months. Furthermore it is complex to show that a position can not be staffed by domestic workers when there is rather a situation of mismatch and not a situation of general labour shortage within the industry. Currently, none of the positions listed in the catalogue are related to the hospitality industry.

Another method to enter Spain for working purposes would be a legitimization within the GATS Mode 4. As the question if foreign employees that are contracted by a domestic company of the host country are considered similar or opposed to foreigners that gain a contract to provide services for a company is not formally cleared, a wide interpretation of the GATS Mode 4 is always risky for companies. Depending on the economic situation foreigners might be accepted or not within the regulations of the GATS Mode 4.

To sum up, legislation could result in difficulties when Mexican workers would want to work in the Spanish hotel and tourism industry even though traditionally there is considerable demand for skilled workers coming from Latin American countries in this specific sector. Hotels must be cautious when they try to recruit staff abroad and clinch to the formal requirements. They should support probable migrant workers and try to find solutions to make admittance easier. Especially for the hospitality industry, it is important that the admittance process doesn't take on a lot of time due to the great seasonal variations and the relatively short planning lapses.