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22nd April 2016

Freedom of Information request (our ref: 38117): internal review

Dear J Beneke,

Thank you for your e-mail of 24th March 2016, in which you ask for an internal review of our response to question 5 of your Freedom of Information (Fol) request 38117. Your full request can be found in Annex A.

You asked nine questions relating to EEA family member visa applications. In question 5, you asked:

Can the applicant assert that the EEA national is exercising more than one qualification status in his/her treaty rights during the period of application e.g. both in the capacity of self sufficient and a jobseeker, or student and worker. As a six month period is mandated for consideration, rather than a specific day, such transitions may naturally occur, which is catered for in the EEA 2006 regulations. If this is the case, would all assertions (qualification statuses) be tested for validity? Would the application then be approved if at least one of those assertions was found to be in existence on the date of consideration?

The Central Correspondence Team responded to your request outside the FOI Act as general correspondence. In response to question 5, the Home Office confirmed the EEA national can be a qualified person in any capacity, in line with regulation 6 of the EEA regulations. The full response can be found in Annex B.

In your request for an internal review, you stated question five had not been answered and asked for it to be fully addressed. You specifically asked whether an applicant can simultaneously hold two or more qualification statuses. Your full request for an internal review can be found in Annex C.

I have now completed the review. I have examined all the relevant papers and have consulted the policy unit which provided the original response. I have considered whether the correct procedures were followed. I confirm that I was not involved in the initial handling of your request.

I find the Home Office correctly responded to your request as general correspondence, as opposed to under the FOI Act, as you asked for an explanation as opposed to recorded information. However, this should have been communicated to you and you should have been advised that a further request would be considered under the FOI Act if you outlined what specific recorded information you were interested in.

It is acknowledged the response did not fully address question five of your request and it will be answered as part of this review.

Regulation 17(1) of the Immigration (European Economic Area) Regulations 2006 requires the Secretary of State to issue a residence card to a family member of a qualified person or of an EEA national with a permanent right of residence under regulation 15. EEA nationals who reside in the UK for more than three months must be exercising free movement rights. In doing so, they are classed as a 'qualified' person. A qualified person is defined in regulation 6 of the regulations as an EEA national who is living in the UK as a job seeker, worker, self-employed person, self-sufficient person, or student.

An EEA national can change the basis of their stay in the UK, if, for instance, they enter the UK as a jobseeker and then become a worker after gaining employment. In such cases, the EA national can count both periods towards the five year qualifying period for permanent residence. If it is established the EEA national is exercising Treaty Rights in one category, there is no requirement to test eligibility under another category.

I confirm an applicant can simultaneously hold two or more qualification statuses.

Yours sincerely

L. Picton
Information Rights Team

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Annex A – Initial request

1. Do the EEA 2006 regulations preclude a new EEA(FM) application from being submitted whilst an appeal at the immigration tribunal is underway for a previously lodged, yet declined, EEA/UK residence card?
2. Do the EEA 2006 regulations preclude an EEA(FM) application from being considered should the applicant fail to surrender a previously issued EEA/UK residence card with the new application? If such documentation needs to be assessed with the new EEA(FM)
3. application for validation purposes, is a certified photocopy of the previously issued (and still valid) EEA/UK residence card considered acceptable?
4. If the applicant chooses not to use the template form EEA(FM) in applying for a EEA/UK residence card, what essential information and documentation is required as a minimum standard for the Home Office to assess the application?
5. In the case of a second/third/etc application of a EEA/UK resident card by means of an EEA(FM) application, whereby residence documentation was previously issued to the same individual in an unchanged relationship with the same EEA spouse, is a photocopy of the EU national's passport sufficient for the application to be processed? This is based on the assumption that the still-valid EEA national's passport has already been verified when the initial residence documentation was granted and is presumably still on file. The case of Barnett and others (2012) UKUT 142 (IAC) would seem to support this.
6. Can the applicant assert that the EEA national is exercising more than one qualification status in his/her treaty rights during the period of application e.g. both in the capacity of self sufficient and a jobseeker, or student and worker. As a six month period is mandated for consideration, rather than a specific day, such transitions may naturally occur, which is catered for in the EEA 2006 regulations. If this is the case, would all assertions (qualification statuses) be tested for validity? Would the application then be approved if at least one of those assertions was found to be in existence on the date of consideration?
7. In the case of a "worker" pursuing multiple contractual temporary positions through an employment agency, is it sufficient to include details of the employment agency, rather than any specific organisation where the "worker" is temporarily based.
8. If the answer to point 6 is no, how should the applicant, in reality, keep the Home Office abreast of upcoming work assignments when he/she might only know about these assignments (through the employment agency) a day or two in advance? What if the application were to be assessed when the applicant is taking a short break between jobs? Are any safeguards in place to cater for such eventualities? Or is this down to sheer luck?
9. Please would you clarify the minimum requirements for 'Comprehensive Sickness Insurance' in the case of a EEA national asserting self sufficient qualification status.
10. In the case of a jobseeker seeking to assert that he/she stands a genuine chance of engagement, what form of evidence would the Home Office expect the applicant to provide? What time horizon would the Home Office typically consider, prior to EEA(FM) application submission, to assess relevant job applications, interview invitations etc.

Annex B - Response

Dear Mr Beneke

Thank you for your letter of 14 January about the issue of Residence Cards to non EEA spouse's of EEA nationals. Your correspondence has been passed to Customer Service Operations to reply. Please accept our apologies for the delay in replying.

The questions you have asked are listed below and these have been answered separately for ease of reference.

1. Do the EEA 2006 regulations preclude a new EEA(FM) application from being submitted whilst an appeal at the immigration tribunal is underway for a previously lodged, yet declined, EEA/UK residence card?

There is nothing within the EEA regulations that would prevent the submission of a new EEA (FM) application whilst a previously refused application is progressing through the courts.

2. Do the EEA 2006 regulations preclude an EEA(FM) application from being considered should the applicant fail to surrender a previously issued EEA/UK residence card with the new application? If such documentation needs to be assessed with the new EEA(FM) application for validation purposes, is a certified photocopy of the previously issued (and still valid) EEA/UK residence card considered acceptable?

The regulations do not specifically preclude the consideration of an application if the valid residence card is not submitted however if a residence document is still valid this should be submitted with any subsequent application as it will need to be cancelled prior to the issue of any new document.

3. If the applicant chooses not to use the template form EEA(FM) in applying for a EEA/UK residence card, what essential information and documentation is required as a minimum standard for the Home Office to assess the application?

The minimum evidence required would be the EEA passport or identity card if not seen on a previous occasion, the Non EEA national passport, evidence of relationship and evidence that the EEA is a qualified person or has permanent residence together with two passport sized photographs. The applicant will also be asked to provide biometric information. Additional evidence may be required to cover different circumstances and further information is set out on the website www.gov.uk and the accompanying guidance notes for the application form EEA (FM).

4. In the case of a second/third/etc application of a EEA/UK resident card by means of an EEA(FM) application, whereby residence documentation was previously issued to the same individual in an unchanged relationship with the same EEA spouse, is a photocopy of the EU national's passport sufficient for the application to be processed? This is based on the assumption that the still-valid EEA national's passport has already been verified when the initial residence documentation was granted and is presumably still on file. The case of Barnett and others (2012) UKUT 142 (IAC) would seem to support this.

Generally the EEA national's passport need only be submitted once in line with the Barnett ruling however the ruling also indicated that the EEA identity document may be requested again if there is valid reason.

Annex B (cont)

5. Can the applicant assert that the EEA national is exercising more than one qualification status in his/her treaty rights during the period of application e.g. both in the capacity of self sufficient and a jobseeker, or student and worker. As a six month period is mandated for consideration, rather than a specific day, such transitions may naturally occur, which is catered for in the EEA 2006 regulations. If this is the case, would all assertions (qualification statuses) be tested for validity? Would the application then be approved if at least one of those assertions was found to be in existence on the date of consideration?

The EEA national can be a qualified person in any capacity as stated in regulation 6 of the EEA regulations.

6. In the case of a “worker” pursuing multiple contractual temporary positions through an employment agency, is it sufficient to include details of the employment agency, rather than any specific organisation where the “worker” is temporarily based.

An applicant applying as a worker should include details of their employer therefore in this case if the employment contract is with the agency and the salary is paid by the agency, the agency details should be provided.

7. If the answer to point 6 is no, how should the applicant, in reality, keep the Home Office abreast of upcoming work assignments when he/she might only know about these assignments (through the employment agency) a day or two in advance? What if the application were to be assessed when the applicant is taking a short break between jobs? Are any safeguards in place to cater for such eventualities? Or is this down to sheer luck?

The applicant should provide full details of their situation including any registration as an unemployed person or registration with employment agencies so this can be correctly assessed as they may retain worker status

8. Please would you clarify the minimum requirements for ‘Comprehensive Sickness Insurance’ in the case of a EEA national asserting self sufficient qualification status.

Comprehensive sickness insurance should cover the costs of the majority of medical treatment an applicant may receive in the UK.

9. In the case of a jobseeker seeking to assert that he/she stands a genuine chance of engagement, what form of evidence would the Home Office expect the applicant to provide? What time horizon would the Home Office typically consider, prior to EEA(FM) application submission, to assess relevant job applications, interview invitations etc.

A jobseeker should be able to provide evidence of job applications and any relevant responses, such as rejection letters or invitations to interview , they should provide evidence they are registered to seek employment through the jobcentre or other appropriate agencies and evidence they are applying for jobs appropriate to their skills such as appropriate qualifications. A person could hold the status of jobseeker for no longer than six months unless they can provide compelling evidence to show they are continuing to seek employment and have a genuine chance of employment.

I hope this information has been helpful.

Yours sincerely
J Harvey

Annex C – Internal review request

Dear Central Correspondence Team

Thank you for your response today. The information provided is indeed helpful.

However, kindly note that question 5 has not been answered. This states:

"Can the applicant assert that the EEA national is exercising more than one qualification status in his/her treaty rights during the period of application e.g. both in the capacity of self sufficient and a jobseeker, or student and worker. As a six month period is mandated for consideration, rather than a specific day, such transitions may naturally occur, which is catered for in the EEA 2006 regulations. If this is the case, would all assertions (qualification statuses) be tested for validity? Would the application then be approved if at least one of those assertions was found to be in existence on the date of consideration?"

Merely pointing to regulation 6 in the EEA regulations in no way addresses this. The question is whether an applicant can *simultaneously* hold two or more qualification statuses e.g. self sufficient *and* worker

Please also note that the ICO has set a deadline of 29th March to receive a full response. I would therefore appreciate receiving this information in the next week to bring this matter to a close.

Yours sincerely,

J Beneke

Annex D

This completes the internal review process by the Home Office. If you remain dissatisfied with the response to your Fol request, you have the right of complaint to the Information Commissioner at the following address:

The Information Commissioner
Wycliffe House
Water Lane
Wilmslow
Cheshire SK9 5AF