

Newsletter:

▶▶ Amendment to the regulations on labour migration in the Flemish Region



Dear reader,

On the Belgian labor market, companies have been facing a shortage of employees for several years. This labor market shortage combined with an increasing globalization are at the root of an increased recruitment of employees from outside of the European Union.

However, employees who are not nationals of an EEA member state or Switzerland (hereafter referred to as "*third-country nationals*") cannot automatically be employed on the Belgian territory. For an employee-third-country national who wishes to be employed on Belgian territory, an authorization to work - in the form of either a work permit (stay of less than 90 days) or a single permit (stay of more than 90 days) - will have to be applied for by the employer (or a proxy holder) with the competent Region, unless the person can legitimately claim an exemption.

The Flemish Region has recently made some changes to its migration policy, which will affect future applications for work permits, as well as single permits.

We hope you enjoy the read!

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1 In a nutshell

Since 1 July 2014, the competence on economic migration ("authorization to work") has been regionalized. Since then, each Region (and the German-speaking Community) can adopt its own regulation in this matter.

In 2018, the Flemish Region was the first to introduce such regulation. In 2021, this regulation was revised for the first time incorporating some substantive and technical changes. Whilst several key aspects were modified, the majority of the rules and the methodology specific to this matter remained largely unaltered.

This methodology can be summarized as follows:

- Step 1: If an employer wishes to employ a third-country national, it must first be verified whether this individual requires an authorization to work, as some foreign employees are automatically (by law) allowed to work in Belgium. For this, a distinction must be made between residence-related exemptions (at federal level) and work-related exemptions (at regional level).
- Step 2: If the employee does not benefit from an exemption, the employer (or its proxy holder) must apply for a work permit (for stays of less than 90 days) or a single permit (for stays of more than 90 days) with the competent Region.

The Flemish Region has three different types of profiles: highly skilled and special profiles, medium-skilled profiles (so-called official "bottleneck professions" listed on a dynamic bottleneck professions list) and other profiles that are subject to a labor market test and for which specific economic or social reasons must be demonstrated. The changes, which will come into force on 1 May 2024, aim to achieve three objectives:

- 1) The simplification of certain rules to ensure better fulfillment of bottleneck professions and to strengthen the economy in Flanders.
- 2) The tightening of certain rules following a number of scandals to prevent abuses and avoid improper economic migration.
- 3) The further transposition of a number of European directives (including Directive 2021/1883 (European Blue Card) and Directive 2014/36/EU (seasonal work)).

The changes are spread across the Flemish regulatory framework¹ and include changes regarding work-related exemptions (see under point 2.1), general changes (see under point 2.2), changes to the different types of profiles (see under point 2.3-2.5) and changes to the single permit of indefinite duration (see under point **Error! Reference source not found.**).

2 Substantive changes

2.1 Work-related exemptions

Third-country nationals falling under the scope of a work-related exemption are automatically (by law) allowed to work. These exemptions are related to the nature of the work and/or activities to be

¹ Decree of the Flemish Government amending the Decree of the Flemish Government of 7 December 2018 implementing the Act of 30 April 1999 on the employment of foreign employees, B.S. 28 March 2024.

performed. For these third-country nationals, the employer therefore no longer needs to apply for any additional authorization to work. However, they must always have lawful residence in Belgium.

These work-related exemptions fall into four categories in the Flemish Region.

1) Seconded employees subject to prior Limosa declaration

Certain seconded employees subject to a prior Limosa declaration are automatically (by law) allowed to work if all conditions are met.

The new regulation no longer refers to a maximum duration of three consecutive months, but to a rolling 90-day period within a 180-day period (to align with Schengen circulation rights or permitted short stays within the Schengen zone²).

The new regulation adds several categories to the work-related exemptions, more in particular:

- Third-country nationals serving as representatives of hotels, travel agencies, or tour operators, or attending or participating in a congress or fair as guides, or leading a tour that started on the territory of a third country;
- Translators and interpreters: third-country nationals providing translation or interpretation services as employees of a legal entity established in a third country.

In addition, the category of commercial representatives is significantly broadened. Previously, the work-related exemption applied only to commercial representatives who visited their customers in Belgium on behalf of foreign-based companies without an branch in Belgium. This definition was broadened to include third-country nationals who do not have a main residence in Belgium and who carry out one of the following temporary commercial activities that must be related to the employer's business interests and do not involve the supply of services or goods:

- attending:
 - conferences and seminars;
 - internal and external business meetings;
 - fairs and exhibitions;
- negotiating business agreements;
- undertaking sales or marketing activities;
- conducting internal audits or customer audits;
- exploring business opportunities;
- giving or attending training sessions.

This change aligns Flemish regulations with some free trade agreements and gives these exemptions a general scope of application.

2) Seconded employees not subject to prior Limosa declaration

Within this category, no changes were made by the new regulatory framework.

3) Researchers or international lecturers affiliated with a Belgian recognized research institution for a period of up to 90 days within each 180-day period

Within this category, no changes were made by the new regulatory framework.

² From 31 March 2024, Bulgaria and Romania also (partially) joined the Schengen area. From this date, there are no more checks at internal air and sea borders. However, there are still checks at land borders.

4) Flexi-jobs

The regulation provides for a fourth category: an automatic (by law) authorization to work to exercise a flexi job for single permit holders.

The regulatory framework does not allow for the application of one (or two) single permits for the same worker by two different employers. Until April 30, 2024, it was therefore not possible for holders of a single permit to perform a flexi-job.

However, under the new regulations, this will be made possible. The following conditions must be met:

- The employee-third-country national has been working for some time with the first employer, meaning that the employee must have worked for the first employer for at least 4/5th in the third quarter preceding the flexi-job (basic condition for flexi-job);
- Only possible in certain – albeit recently extended number of –sectors (basic condition for flexi-job);
- The employee must work for the original employer for at least 4/5th and reach the salary threshold for 100% employment.

Under these conditions, there is an automatic (by law) authorization to work, and no additional authorization is required to exercise a flexi-job.

2.2 General changes

2.2.1 Restriction on multiple employers

At present, the regulations already stipulate that authorization to work for a definite duration is limited to employment with one employer.

In addition to the possibility of exercising a flexi-job, the new regulatory framework adds, merely for the sake of clarity, that an employee can obtain only one authorisation to work in the same period.

2.2.2 Restriction on part-time employment

At present, the regulation does not contain explicit restrictions on part-time employment.

The new regulation introduces the rule that an authorization to work for a specific duration can only be granted if the third-country national works at least 80% of a full-time job. However, this limitation does not apply to highly skilled and special profiles (see point 2.3), but only to bottleneck professions (see point 2.4) and other profiles (see point 2.5).

2.2.3 Employer information obligation

The current regulation requires the employer to notify the Flemish Region in the event of termination or significant changes to the employment contract that may affect the authorization to work.

The new regulation introduces the rule that this notification must be made in writing within 15 days. To this end, the preparatory works refer to the following modalities:

- for termination: via the one stop counter (*Uniek loket / Guichet unique*);
- for significant changes: by letter or e-mail.

Taking into account a recent change to the legislative framework on sanctions, the deliberate failure to make this notification will henceforth also be criminally sanctioned with a fine of 800 EUR to 8,000 EUR.

2.2.4 Grounds for refusal and withdrawal

The Flemish regulations contain several grounds for refusal and withdrawal, which were divided into mandatory and discretionary grounds in 2021.

In the context of the new regulations, the Flemish Region has introduced some new grounds for refusal and withdrawal to expand the possibilities for proactive action and to provide further clarification.

Under the mandatory grounds for refusal and withdrawal, the following category is added: when the employer, host entity, or employee does not comply with the specific conditions attached to the authorization to work. This ground will primarily apply in the context of renewals, particularly if, at the time of renewal, the specific conditions as mentioned in the decision to authorize work were not complied with.

Under the mandatory grounds for refusal, the following category is added: when the proxy holder, acting on behalf and for the account of the employer, does not meet the legal obligations regarding private employment mediation (only if the proxy holder also mediates between the employer and the employee).

Furthermore, clarification is provided by stating that the authorization to work will be refused or withdrawn if insufficient (instead of no) income is associated with the employment.

Under the discretionary grounds for refusal, the following categories are added:

- the employer or the host entity does not comply with the provisions of tax, social security or corporate law;
- the employer or host entity does not engage in sufficient economic or social activities justifying the employment of foreign employees;
- the employer, host entity, or representative has used incorrect, falsified, or unlawfully obtained data, statements, or adjustments in an application for authorization to work within a year before the application;
- the enterprise in which foreign employees will be employed was established less than three years ago or has no employees.
- the creditworthiness of the company or host entity is unfavorable.

Regarding the first 2 discretionary grounds for refusal, withdrawal grounds are also provided.

The second discretionary ground for refusal and the last 2 discretionary grounds for refusal and withdrawal do not apply to holders of a European Blue Card, researchers, Intra-Corporate Transferees, interns, volunteers, and seasonal workers (so-called "European categories").

Furthermore, the framework for bankruptcy has been redefined and extended to include the directors of the company. However, in the context of withdrawal, this ground does not apply to holders of a European Blue Card.

2.3 Highly skilled and special profiles

2.3.1 Highly skilled personnel

For third-country nationals to qualify as highly skilled personnel, they must reach a certain salary threshold (i.e., a specific percentage of the average gross annual salary in Belgium - in the Flemish Region for 2024, this threshold is 46,632 EUR gross) and demonstrate higher professional qualifications with a higher education degree.

Regarding the salary threshold, the Flemish Region offers a reduced threshold of 80% (in 2024, equivalent to 37,305.60 EUR gross) for employees under the age of 30 and nurses employed locally by a Belgian employer. The new regulation adds teachers employed by an educational institution recognized by the Flemish Community to this category.

Regarding professional qualifications, the definition of "*higher education degree*" was modified. The reference to "*having lasted at least three years*" was hereby deleted as obtaining the required qualification level 5 (college - graduate) does not always precede three years of study.

2.3.2 Specialized technicians

An authorization to work can be obtained for specialized technicians coming to Belgium to carry out assembly, commissioning, or repair of an installation manufactured abroad or supplied from abroad for a period of up to six months. Starting from May 1, 2024, such authorization to work can also be obtained for technicians providing services under subcontracting based on a warranty clause in the original supply contract.

2.3.3 European Blue Card

For a third-country national to obtain a European Blue Card, similar criteria to those for highly skilled personnel must be met. This includes reaching a specific salary threshold. Under the old regulation, this threshold was set at 120% (equivalent to 55,958 EUR gross for 2024), and under the new regulation, it will increase to 130% (equivalent to 60,621.6 EUR gross for 2024).

Additionally, there is a degree requirement. Previously, a qualification level 5 was sufficient (as is the case for highly skilled personnel). However, under the new regulations, this degree requirement is raised to a qualification level 6. The new regulation also adds that managers or specialists in the field of information and communication technology with at least three years of relevant professional experience acquired within seven years before applying for the European Blue Card will be considered equivalent to higher professional qualifications.

Under the old regulations, a minimum employment contract of at least 1 year was required. The new regulations reduce this period to 6 months.

An important aspect of the European Blue Card is that the third-country national employee holding this card does not need to submit a new application when changing employers if this change occurs after two years of employment and provided that the employment meets the above conditions. This two-year

period is now reduced to one year of employment. The new regulation only requires the new employer to notify in case of changing employers during the first 12 months of employment. The Flemish Region can then object to this change of employer within 30 days.

Finally, holders of a valid European Blue Card issued by another European Union member state also have the right to short-term mobility in Belgium (up to 90 days in a period of 180 days) for temporary business activities (as defined under point 2.1) or intra-community service provision, provided that these temporary activities are directly related to the interests of the employer in the first European Union member state.

2.3.4 ICT manager³ and ICT specialist

Starting from May 1, 2024, the requirement for a managerial ICT specialist will no longer be based on a degree requirement but on the strict definition of "managerial personnel" in the Flemish Region. Similar to the European Blue Card, for the ICT specialist in the field of information and communication technology, a minimum of 3 years of relevant professional experience acquired within 7 years before the application will also be considered equivalent to higher professional qualifications.

2.3.5 Seasonal work

In certain cases, the employer may be liable to pay an indemnity to the seasonal worker if their work permit is prematurely withdrawn.

Additionally, seasonal workers can change employers during the validity of their seasonal work permit. The new employer is only required to notify within 15 days. The Flemish Region can then object to this change of employer within 30 days.

2.4 Bottleneck professions

If the third-country national does not fall under a specific category, then a work permit for a specific duration is generally only granted if it is not possible to find an employee within a reasonable period on the European labor market who can perform this function (see point 2.5). However, this condition is automatically presumed to be fulfilled if it concerns a position listed on the dynamic list of middle-skilled bottleneck professions.

At present, this list is updated every two years.

The new regulation provides for the possibility of revising the list of bottleneck professions prematurely, but at least every two years. Such early revision of the list of bottleneck professions can be initiated by the Economic Migration Advisory Committee of the SERV, sectoral organizations, or the Economic Migration Service of the Flemish Region based on motivated advice.

Moreover, more documents will need to be submitted to obtain a work permit for a bottleneck profession. These include:

- an extensive description of the function and the tasks;

³ ICT here stands for " *Intra Corporate Transferees*".

- documents demonstrating the qualification of the employee: resume with a complete overview of the foreign worker's education, work experience, and other professional activities;
- if available: degree, certificate, or proof of experience demonstrating the qualification of the worker for the specific position.

In case of doubt about the authenticity of the documents, the Administration may request confirmation from a foreign authority

2.5 Other category

If the employee does not fall under an exemption or one of the specific categories or bottleneck professions, the (future) employer must demonstrate that it is impossible to find a suitable candidate on the labor market of the EEA within a reasonable period who, with or without further professional training, is able to fulfill the position with satisfaction and within a reasonable timeframe.

Previously, this meant under the old regulations that a so-called "labor market test" had to be conducted by the VDAB, where a job vacancy had to be posted on the VDAB website in shared management for at least 6 weeks before the application for a work permit could be submitted. Additionally, the employer had a duty to provide justification that there were special economic or social reasons.

The new regulations have significantly changed this category and provide that the application must meet the following cumulative conditions for it to be admissible:

- the position is listed on the extensive bottleneck professions list of the VDAB. Currently, this list contains 241 professions.
- the position requires a qualification of level 2, 3, or 4. It cannot be unskilled labor (level 1) or highly skilled labor (from level 5).
- the job vacancy must have been published for a consecutive period of at least 9 weeks in the 4-month period (3 weeks in the 1-month period for seasonal work) immediately preceding the application for authorization to work on the platforms of the VDAB and EURES.
- furthermore, the job vacancy still needs to be posted in shared management on the VDAB website. This has not changed compared to the old regulation. However, the VDAB is reportedly expected to play a larger role in this process.

Only if the employer still fails to find a candidate after these steps, a third-country national can be hired.

Additionally, more documents will need to be submitted to obtain an authorization to work for a bottleneck profession. These include:

- an extensive description of the function and the tasks.
- documents demonstrating the qualification of the employee: resume with a complete overview of the foreign worker's education, work experience, and extracurricular activities.
- if available: degree, certificate, or proof of experience demonstrating the qualification of the worker for the specific position.

In case of doubt about the authenticity of the documents, the Administration may request confirmation from a foreign authority.

Authorizations granted under the old regulations remain valid until they expire and applications to renew these authorizations are also assessed on the basis of the old regulation insofar as the application is made by the same employer and for the same job.

2.6 Single Permit indefinite duration

A third-country national can obtain a single permit in the Flemish Region for an indefinite duration if he or she is in one of the situations below:

- The third-country national legally resides in Belgium and proves that he or she has worked there for at least 4 years during the 5 years immediately preceding the application (although exceptions exist for certain nationalities);
- The third-country national has long-term resident status in another European Union member state, legally resides in Belgium and proves that he or she has worked there for at least 12 months during the 18 months preceding the application.

The old regulation already provided for periods of total incapacity for work due to illness, occupational disease, or occupational accident to be considered equivalent. The new regulations have added temporary unemployment due to force majeure, bad weather, collective closure, strike, or lock-out to this provision.

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