

## Labor & Employment



Information current as of 6 May 2022

# What to consider when hiring employees who have fled from Ukraine?

### 1. Valid residence permit with work permit is necessary

Ukrainian citizens and other persons who are not citizens of a country of the European Union, the European Economic Area, or Switzerland ("**Third Country Nationals**") require a valid residence permit which expressly permits employment to work in Germany.

### 2. EU-wide unbureaucratic immigration procedure for persons who fled Ukraine

Due to the Russian invasion in Ukraine, the European Union has decided to activate the so-called Temporary Protection Directive (*Council Directive 2001/55/EC of 20 July 2001*) which allows for the issuance of residence permits in a simple and largely unbureaucratic manner. In Germany, such residence permits are issued on the basis of sec. 24 of the Residence Act (*Aufenthaltsgesetz*) for an initial period of two years. Additionally, the residence permits will generally be issued with the permission to take up employment.

For the majority of people who fled Ukraine due to the Russian invasion, applying for a residence permit pursuant to sec. 24 of the Residence Act (*Aufenthaltsgesetz*) will be the least bureaucratic and fastest way to legalize their stay and receive permission to take up employment in Germany.

### 3. Temporary stay without residence permit

Pursuant to the Ukraine Residence Transition Ordinance (*Ukraine-Aufenthalts-Übergangsverordnung*) and its first amendment ordinance persons who resided in Ukraine on 24 February 2022 and fled to Germany without being in possession of a residence permit for Germany may stay until 31 August 2022. Until then, the necessary steps need to be taken to legalize their stay in Germany long-term, e.g. through submission of an application for a residence permit pursuant to sec. 24 of the Residence Act (*Aufenthaltsgesetz*).

*Note: Ukrainian citizens and persons with a refugee status or an equivalent national protection status in Ukraine who, on 24 February 2022, had a domicile or habitual residence in Ukraine, but who were temporarily not residing in Ukraine on that date, and who fled to Germany, are also exempt from the requirement of a residence permit until 31 August 2022. The same applies to Ukrainian citizens who on 24 February 2022 were already legally residing in Germany without possessing a German long-term residence permit.*

#### **4. Eligibility for a residence permit pursuant to sec. 24 of the Residence Act**

Persons qualify for a residence permit pursuant to sec. 24 of the Residence Act (*Aufenthaltsgesetz*) if they are

- Ukrainian citizens, or
- Third Country Nationals or stateless persons who
  - enjoy international protection or equivalent national protection in Ukraine,
  - are family members of a Ukrainian citizen or a person who enjoys international or equivalent national protection in Ukraine, or
  - are unable to return in safe and durable conditions to their country/region of origin and hold a valid permanent residence permit or a temporary residence permit in Ukraine valid for more than 90 days

*Note: According to the (non-binding) EU Commission operational guidelines, the inability to “return in safe conditions”, can result, for instance, from an obvious risk for the safety of the person concerned, situations of armed conflict or endemic violence, documented risks of persecution or other inhuman or degrading treatment or punishment. For the return to be “durable”, the person concerned should be able to enjoy in his/her country or region of origin active rights, enabling that person to have prospects for basic needs to be addressed in his/her country/region of origin, and the possibility to reintegrate into the society. Additionally, it should be taken into account whether a person still has a meaningful link with his/her country of origin, considering for instance the time spent residing in Ukraine or family in his/her country of origin.*

*Note: According to the non-binding notes from the German Federal Ministry of the Interior, persons who are in possession of a permanent residence permit from Ukraine should generally be assumed unable to return to their country/region of origin in safe and durable conditions as their ties to Ukraine are stronger compared to their connection with their country of origin.*

*Note: Persons whose country of origin is Eritrea, Syria, or Afghanistan are considered unable to return in safe and durable conditions by the German Federal Ministry of the Interior.*

and in addition, they

- can produce proof of their residence status in Ukraine (i.e., Ukrainian citizenship, residence title, international/national protection status etc.),
- resided in Ukraine before 24 February 2022, and
- fled Ukraine
  - on or after 24 February 2022 due to the Russian invasion,
  - not long before 24 February 2022 when tensions increased, or

- shortly before 24 February 2022 (e.g., on vacation or for work) and could not return to Ukraine due to the ongoing armed conflict.

*Note: According to the German Federal Ministry of the Interior persons have left Ukraine “shortly” before 24 February 2022 if they left up to 90 days before 24 February 2022.*

## **5. Process to follow to obtain a residence permit pursuant to sec. 24 of the Residence Act**

To obtain a residence permit pursuant to sec. 24 of the Residence Act, persons (who arrived in Berlin) must observe the following steps:

*Note: The following process refers to the state of Berlin. However, the process in general should be similar in other German states.*

### **Step 1 – Registration**

**Persons who have found permanent housing in Berlin may skip Step 1 and continue with Step 2.**

Persons who have not found permanent housing in Berlin (i.e., have not rented an apartment permanently or can stay with someone (e.g. relatives) for at least six months) must first register at the arrival centre at the former Tegel airport (*Ankunftszentrum TXL, Saatwinkler Damm, 13405 Berlin*) with the Berlin State Office for Refugee Affairs (*Landesamt für Flüchtlingsangelegenheiten*).

*Note: No appointment is necessary for registration.*

For the purpose of registration, an identification document must be produced, and Third Country Nationals must also produce their residence permit from Ukraine. The registration process involves taking fingerprints and documenting the following: current address in Berlin (if any), previous address in Ukraine, professional qualification, date of entry into Germany.

*Note: Persons who have not found permanent housing in Berlin might be relocated to a different German state (Bundesland) upon registration (→ see below for options to relocate). Exempt from relocation are, for instance, persons whose family members live in Berlin and persons who can demonstrate to have found employment in Berlin.*

### **Step 2 – Submitting an online application for a residence permit**

Persons who are registered (and have been allocated to Berlin by the Berlin State Office for Refugee Affairs (*Landesamt für Flüchtlingsangelegenheiten*)) or who have found permanent housing in Berlin must submit an online application for a residence permit pursuant to sec. 24 of the Residence Act with the Berlin State Office for Immigration (*Landesamt für Einwanderung*) under the following link, where certain personal details must be entered but no documents need to be uploaded:

[Aufenthaltserlaubnis zum vorübergehenden Schutz für Geflüchtete aus der Ukraine beantragen - Dienstleistungen - Service Berlin - Berlin.de](#)

**Step 3 – Downloading and printing of a certificate of online application (Fiktionsbescheinigung)**

After submitting the application form online, the applicant will be able to download a certificate of online application (*Fiktionsbescheinigung*) as a PDF. This certificate temporarily legalizes the applicant's stay in Germany and permits the applicant to take up employment until issuance of the final decision by the

*Note: The certificate of online application (Fiktionsbescheinigung) is only valid in connection with a valid passport or passport substitute and one of the following documents: (1) decision of the Berlin State Office for Refugee Affairs (Landesamt für Flüchtlingsangelegenheiten) regarding the allocation of the applicant to Berlin, (2) registration confirmation of a Berlin Citizens Registration Office, (3) permanent lease agreement, or (4) confirmation letter from the applicant's host stating that the applicant may stay at his/her apartment permanently (for at least six months).*

Berlin State Office for Immigration (*Landesamt für Einwanderung*). Thus, from this point onwards, the applicant may take up employment in Germany.

**Step 4 – In-person appointment**

After completion of the online application, the applicant will receive an email from the Berlin State Office for Immigration (*Landesamt für Einwanderung*) with a date for an in-person appointment.

*Note: Due to the high numbers of persons seeking protection in Germany, it might take some time to receive an appointment. The Berlin State Office for Immigration (Landesamt für Einwanderung) is anticipating for appointments to be spread over a period of nine months. However, until the issuance of the final decision of the Berlin State Office of Immigration (Landesamt für Einwanderung) the applicant's stay in Germany is legal and he/she may already take up employment.*

The applicant must attend the appointment with the Berlin State Office for Immigration (*Landesamt für Einwanderung*) in person and must bring the following:

- a filled application form (*Antrag auf Erteilung eines Aufenthaltstitels*) which may be downloaded under the following link: [https://www.berlin.de/formularverzeichnis/?formular=/labo/zuwanderung/\\_assets/leagen1-antrag\\_engl\\_frz\\_ital-112021.pdf](https://www.berlin.de/formularverzeichnis/?formular=/labo/zuwanderung/_assets/leagen1-antrag_engl_frz_ital-112021.pdf)
- a valid passport, passport replacement, or Ukrainian ID card,

*Note: If the document has expired, the applicant must first obtain an extension from the Ukrainian embassy or – in case of Third Country Nationals – the embassy of his/her country or origin.*

*Note: If the applicant is not in possession of any documents, he/she shall request a certificate of identity with a photo from the Ukrainian embassy or – in case of Third Country Nationals – the embassy of his/her country or origin.*

- certificate of online application (*Fiktionsbescheinigung*),
- biometric photo,

- proof of permanent housing in Berlin

*Note: As proof of permanent housing in Berlin applicants must submit one of the following documents: (1) decision of the Berlin State Office for Refugee Affairs (Landesamt für Flüchtlingsangelegenheiten) regarding the allocation of the applicant to Berlin, (2) registration confirmation of a Berlin Citizens Registration Office, (3) permanent lease agreement, or (4) form filled by their host confirming that the applicant may stay at his/her apartment permanently (for at least six months); the form is available under this link:*

*[https://www.berlin.de/formularverzeichnis/?formular=/labo/zuwanderung/assets/bestatigung\\_uber\\_da\\_uerhafte\\_gewahrung\\_einer\\_unterkunft\\_fur\\_ukrainische\\_gefluchtete.pdf](https://www.berlin.de/formularverzeichnis/?formular=/labo/zuwanderung/assets/bestatigung_uber_da_uerhafte_gewahrung_einer_unterkunft_fur_ukrainische_gefluchtete.pdf)*

- the email from the Berlin State Office for Immigration (Landesamt für Einwanderung) with the date of the appointment.

### **Step 5 – Issuance of residence permit**

Generally, the residence permit pursuant to sec. 24 of the Residence Act (*Aufenthaltsgesetz*) will be issued during the in-person appointment at the Berlin State Office for Immigration (Landesamt für Einwanderung). It will be valid for two years from the date of issuance. If grounds for temporary protection persist beyond the two years, the European Council may decide to extend temporary protection by up to one year. This cannot be predicted yet.

*Note: The residence permit will be issued with the following two provisions: (1) residence must be taken in the state of Berlin (“Wohnsitznahme im Land Berlin erforderlich”) and (2) employment permitted (“Erwerbstätigkeit erlaubt”).*

## **6. Allocation to and moving between German states**

Persons who registered with the Berlin State Office for Refugee Affairs (Landesamt für Flüchtlingsangelegenheiten) will be allocated to a German state where they have to take up residence.

Persons who have found permanent housing in Berlin themselves and have, therefore, not registered with the Berlin State Office for Refugee Affairs (Landesamt für Flüchtlingsangelegenheiten) will only be allocated to Berlin upon issuance of the residence permit. Accordingly, the residence permit will include a provision that residence must be taken in Berlin.

However, if certain requirements are met, this restriction may be lifted. If persons find employment in a German state different from the state they have been allocated to, they may move if the employment

- is for at least 15 hours per week,
- is subject to social insurance contributions, and
- generates an income that ensures the person’s subsistence pursuant to sec. 20 and 22 of the Second Social Code (*Zweites Sozialgesetzbuch*) (currently at least € 785 net).

## **7. Points of attention for contract drafting and during employment**

The most important rule when employing persons who require a residence permit is to ensure that a valid residence permit, including a work permit, is in place and has not – in the meantime – expired.

While an employment contract may be signed directly, commencement of actual employment activity should only take place once the employer has confirmed that the employee is in possession of a certificate of online application (*Fiktionsbescheinigung*) or residence permit which expressly states

permission to take up employment. These documents must be kept by the employer in electronic form or as a hard copy for the duration of employment.

In cases where employees are in possession of a certificate of online application (*Fiktionsbescheinigung*) only, the employer should confirm that the employee potentially qualifies for a residence permit pursuant to sec. 24 of the Residence Act and that the certificate of online application is valid. This should be done by checking the following documents:

- Passport,
- in case of Third Country Nationals their residence status in Ukraine,
- proof of permanent housing in Berlin (one of the following documents suffices): (1) decision of the Berlin State Office for Refugee Affairs (Landesamt für Flüchtlingsangelegenheiten) regarding the allocation of the employee to Berlin, (2) registration confirmation of a Berlin Citizens Registration Office, (3) permanent lease agreement, or (4) form filled by the employee's host confirming that the employee may stay at his/her apartment permanently (for at least six months).

Checking these documents serves to avoid that it turns out later that the certificate of online application (*Fiktionsbescheinigung*) was ineffective because the employee does not belong to the eligible group of persons or does not have the documents to which the validity of the certificate of online application (*Fiktionsbescheinigung*) is linked.

For employment contracts, there are several clauses to link the contract term to the employee's residence status. We recommend using the following two clauses:

- **Clause 1: Presentation of valid residence permit as condition precedent**  
A so-called condition precedent can be included in the employment contract. Hereby, the validity of the employment contract depends on the presentation of a valid residence permit or certificate of online application (*Fiktionsbescheinigung*), together with all necessary additional documents, authorizing the employee to perform the agreed work.
- **Clause 2: Fixed-term contract with maximum permissible term of two years**  
As an alternative to clause 3, a fixed-term contract with the maximum permissible term of two years can be agreed upon. Longer fixed-term contracts are only permissible if there is a specific reason for the fixed-term as set out by statutory law. Any fixed term must be agreed in writing prior to the commencement of work.

A clause that is also commonly used in employment contracts cannot be recommend generally:

- **Clause 3: The expiry/loss of the residence permit as a condition subsequent**  
It is not legally safe to stipulate that the employment ends with the expiration/loss of the residence/work permit. Without tangible facts for the prognosis that a subsequent permit cannot be obtained, such a condition subsequent is likely invalid. Therefore, an employer should not rely solely on this option (→ rather use the above clauses).

In the event that the residence/work permit expires during the employment, the employer must immediately stop assigning work to the employee (regarding legal risks from continued assignment of work, see section 9 below). In return, the employer is no longer obliged to pay salary.

*Note: It should also be agreed that the employee must apply for an extension of the residence permit in due time, e.g., at least four months in advance, and shall immediately provide the employer with a copy of the extended residence permit. To ensure future compliance, the employment contract should also include an obligation to inform the employer immediately of any changes to the residence permit or certificate of online*

While the expiration/loss of a residence permit is not per se a valid reason for termination of employment, termination for personal reasons may be possible under certain circumstances, which must be examined on a case-by-case basis.

In general, all employees enjoy protection against dismissal under German law if the employment has existed for more than six months and there are more than ten employees at the employer's respective business site. Also, German labor law applies in all other respects, including the Working Hours Act (*Arbeitszeitgesetz*), the German Federal Vacation Act (*Bundesurlaubsgesetz*), the Minimum Wage Act (*Mindestlohngesetz*), etc.

When employing foreign nationals, the employment contract should contain, in addition to the German version, a language version that the employee understands. Therefore, we recommend using a bilingual contract with the German version as the authoritative one.

## **8. (Business) Travelling**

Persons who have been issued a residence permit pursuant to sec. 24 of the Residence Act (*Aufenthaltsgesetz*) enjoy the right of travelling to other EU Member States for a period of 90 days within a 180 days-period. When traveling outside of the EU, the employee must obtain the necessary visa for the destination country.

*Note: If the employee leaves Germany for more than six months (e.g. in case of a temporary posting abroad) the residence permit generally expires. To prevent this, an application for a longer period must be submitted to the Berlin State Office for Immigration (Landesamt für Einwanderung).*

## **9. Risks of illegal employment of foreign nationals**

Employing persons who are not in possession of a valid residence/work permit may result in a variety of consequences for the employee and the employer/the employer's management. For the employee, potential consequences are, among others, denial of a work permit, refusal or withdrawal of the residence permit, a fine of up to € 5,000 as well as criminal charges. Employers may face, for instance, fines of up to € 500,000 and their management may face criminal charges.

*Note: In some cases, even negligent behavior can be sanctioned. Intent is not always required.*

## **10. Social security and wage tax**

The social security and wage tax treatment of persons with a residence/work permit pursuant to sec. 24 of the Residence Act (*Aufenthaltsgesetz*) or certificate of online application (*Fiktionsbescheinigung*) is governed by the regular legal provisions. In this regard, there are no new legal regulations specific to persons who fled Ukraine.

**Social security:**

- As a general rule, employees' income/salary is subject to the social security system of the country in which they are physically present when performing their work, i.e., persons who fled Ukraine generally fall within the German social security system when starting to work in Germany.

*Note: No bilateral social security agreement between Germany and Ukraine is in place. Therefore, an obligation to pay social security contributions in both countries is theoretically possible if Ukrainian law were to continue to place such obligation on the employee/employer. For Third Country Nationals this may be different, depending on the country, and must therefore be examined on a case-by-case basis.*

- No special regulations with respect to social security apply, i.e.,
  - employees must register with a statutory health insurance provider;
  - the employer must register its new employees with the German pension insurance (*Deutsche Rentenversicherung*). Since people from Ukraine will not have a social security number yet, the employer must request the social security number from the German pension insurance;

*Note: This can be done through a payroll program or sv.net ([sv.net](https://sv.net) - [Startseite \(itsg.de\)](https://sv.net)). Additional information to be provided are name of birth, place of birth, country of birth. The German pension insurance will inform the employer of the social security number through the health insurance.*

- the usual social security contributions must be paid (health and nursing care, pension and unemployment insurance) as well as the contributions to the continued remuneration insurance (U1, U2), the insolvency benefit contribution and the contributions to the statutory accident insurance. Insofar as social security insurance is compulsory, the employee will also acquire regular entitlements from these statutory social insurance schemes.

**Wage Tax:**

- Persons who fled Ukraine are unlikely to have a German tax identification number which is required for necessary tax deductions by the employer. They must therefore register with the responsible registration office (*Meldebehörde*) at the place of their residence.
- If the salary is paid by a German resident employer or a permanent establishment in Germany of an employer, wage tax must be transferred by the employer starting with the first payment of salary.

*Note: Since the employee's salary is paid by a German employer, the 183-day rule, which is set out in many bilateral double taxation agreements (e.g. between Germany and Ukraine) and assigns the right of taxation to one of the two countries depending on the duration of the stay, does not apply, even if the employee remains a tax resident in Ukraine.*

**11. Other regular residence permits which may be an alternative option**

Instead of applying for a residence permit pursuant to sec. 24 of the Residence Act (*Aufenthaltsgesetz*), persons who fled Ukraine may also apply for other residence permits they qualify for. According to the Ukraine Residence Transition Ordinance (*Ukraine-Aufenthalts-Übergangsverordnung*) which is valid until 23 May 2022, such application may be submitted in Germany. However, it should be examined in each individual case whether it would be advantageous to apply for such an alternative residence permit (e.g. with regard to the period of approval or the acquisition of a permanent right of residence).

There are the following residence permits, among others:



- **Residence permit for professionals with vocational or academic training, sec. 18a, 18b para. 1 of the Residence Act (Aufenthaltsgesetz)**

This permit is available for persons who have completed vocational training or academic training recognized in Germany (see qualifications on the "ANABIN list" of the Central Office for Foreign Education (ZAB), → link below) or comparable to those from a German higher education institution. They must have an offer for a job which their recognized qualifications enable them to perform. If they are over 45 years old, their gross annual salary for the job must be at least € 46,530 (as of 2022), or they must provide proof of adequate old age pension provisions. A residence permit for the purpose of obtaining qualified employment is issued for a maximum of four years. If the employment contract has a shorter term, a residence permit shall be issued for the contract term.

<https://www.make-it-in-germany.com/en/working-in-germany/recognition/academic-qualifications>

- **EU Blue Card, sec. 18b para. 2 of the Residence Act (Aufenthaltsgesetz)**

This permit is available for persons who have a German higher education degree, a recognized foreign higher education degree or a foreign higher education degree that is comparable to a German one. They must have an offer for a job that is appropriate for someone with such higher education degree. Their gross annual salary must amount to at least € 56,400 (as of 2022). A gross annual salary of at least € 43,992 (as of 2022) is required for employees in the fields of mathematics, IT, natural sciences, engineering and human medicine. In such cases, the German Federal Employment Agency must approve the request for employment. The EU Blue Card is issued for the term of the employment contract, including three additional months, and is limited to a maximum four-year period.

- **Residence permit for recognition of foreign professional qualifications, sec. 16d of the Residence Act (Aufenthaltsgesetz)**

This permit is available for the recognition of foreign qualifications while attending a qualification program in Germany in order to acquire the theoretical and/or practical skills that are missing for the recognition of the person's professional qualification as determined by the competent authority.

- **Residence permit for participation in professional training programmes, sec. 16a of the Residence Act (Aufenthaltsgesetz)**

This permit is available for persons who are accepted at inter alia a company-based professional training program. In general, language skills of a minimum level of B1 are required. Applicants must be able to cover their costs of living, which means, in general, to provide evidence of having at least € 832 per month (as of 2022) at one's disposal.

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