

Corporate Immigration - Switzerland

Cooling-off periods for non-EU/EFTA nationals in Switzerland

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November 09 2012

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Introduction

Switzerland has a dual system for the admission of foreign workers. Nationals from EU or European Free Trade Association (EFTA) member states, regardless of their qualifications, are granted easy access to the Swiss labour market under the Agreement on the Free Movement of Persons. Workers from all other states are admitted in limited numbers only. The admittance criteria for non-EU/EFTA nationals are contained in the Federal Act on Foreign Nationals and in the Decree on Admittance, Residence and Employment. They are explained in further detail in the directives on the implementation of the Foreign Nationals Act issued by the Federal Office for Migration.

In practice, a non-EU/EFTA national or his or her employer is often confronted with the problem of whether an existing work permit can be extended or converted to a different permit category, and particularly what kind of cooling-off period between the two work permits must be observed.

Work permit categories

Short-term work permit, short-stay permit or L-permit

A short-term work permit is granted for limited periods of up to one year. It is granted for a specific purpose and may be subject to additional conditions.

A short-term work permit can be extended for a further year. After two years, a long-term work permit is required.

A short-term work permit can be of various lengths, from one month and up to 12 months.

Some categories of short-term work permit may be subject to a quota system and are therefore granted in limited numbers only.

One to four-month work permit

Short-term work permits for between one and four consecutive months (ST4) are quota free. Furthermore, ST4 permits allow an employee to move to Switzerland without the obligation to take up residence there.

This type of permit allows the holder to work in Switzerland for a maximum duration of four months in a 12-month period. However, some cantonal authorities still follow an old interpretation (which is not in line with the law), according to which such a work permit allows the holder to work in Switzerland for a maximum of four months in a calendar year.

120-day work permit

A 120-day work permit is valid for 120 days within a 12-month period. These work permits are also quota exempted.

The 120-day work permit is not mentioned in the law, but is available in practice. It does not require the employee to take up residence in Switzerland. The 120-day permit is commonly used by employers that need to assign employees sporadically to Switzerland.

These permits are granted by the cantons, which means that practice may vary from canton to canton. The main difference with a 120-day permit lies in the fact that some

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cantons grant them 120 days within a period of 12 months and others within a calendar year.

Four to 12-month work permit

A short-term work permit for stays of between four and 12 months (ST12) requires the employee to take up residence in Switzerland and is subject to the quota system. Such permits can be extended to a total 24 months.

Long-term work permit, residence permit or B-permit

A long-term work permit is granted for stays of more than one year. It is granted for a specific purpose and may be made subject to additional conditions.

If, for example, an assignment initially lasts for more than 12 months (eg, 36 months), a long-term work permit may be issued. If a short-term work permit will be extended for over 24 months, a long-term work permit must be applied for.

Long-term work permits are subject to a quota system and are therefore granted in limited numbers only. Employees with a long-term permit must take up residence in Switzerland.

Cooling-off periods

Definition

A 'cooling-off period' is a period during which a person who has been granted a work permit in the past must stay outside Switzerland before being eligible to obtain a new work permit.

The fundamentals of cooling-off periods are stated in Article 32(4) of the Federal Act on Foreign Nationals and are outlined in Articles 56 and 57 of the Decree on Admittance, Residence and Employment.

Aim of cooling-off periods

Short and long-term permits are, in principle, granted for a specific purpose and may be made subject to additional conditions (eg, work for a specific Swiss client, a specific project or in a specific canton). In order to prevent misuse of temporary residence status, and to reflect the fact that a work permit should serve one specific purpose only, a cooling-off period between two permits is applicable.

Renewal of work permits

Article 56 of the Decree on Admittance, Residence and Employment states that a short-term work permit can be renewed only after a 12-month interruption or cooling-off period. This means that a person who has left and been de-registered from Switzerland must wait 12 months outside Switzerland before being able to obtain a new work permit.

Exceptions are possible in reasonable individual cases, especially in case of recurring activities.

Furthermore, between two ST4 permits, the person must stay outside Switzerland for at least two months.

Succession of work permit categories

Article 57 of the Decree on Admittance, Residence and Employment sets rules on the immediate succession of different work permit categories.

The rules aim to prevent abuse by switching from one permit category to another in order to evade the applicable rules.

According to Article 57, the following work permit categories may not immediately succeed one another:

- ST4 permits;
- ST12 permits; and
- work permits for a maximum of eight months (only for, among others, artists, musicians and authors).

A cooling-off period of two months is in principle applicable in all such cases.

Cooling-off periods in practice

ST12 permit to ST12 permit

A cooling-off period of 12 months is applicable between two ST12 permits. This is also a general rule with which the authorities must comply.

ST12 permit to ST4 permit

After a cooling-off period of two months, most cantonal authorities allow an ST4 permit to follow an ST12 permit (practical rule). However, there are various interpretations of the law. When does the 12-month period of an ST4 permit start? And do we count

forwards or backwards from the start of the 12-month period when calculating the cooling-off period? When counting forwards from the start of the 12-month period the practical rule is applicable. When counting backwards from the start point a cooling-off period of 8 months would be necessary in order for a new ST4 permit application to be filed (a four-month stay in Switzerland based on an old ST12 permit + 8 months cooling period = 12 months).

ST4 permit to ST12 permit

A cooling-off period of two months is applicable between an ST4 and an ST12 permit.

However, it is also possible that no cooling-off period need be observed. This is possible only if a foreigner need to stay longer in Switzerland than initially planned. In such case the four-month period of the ST4 permit will be deducted from the 12-month period of the ST12 permit. This means that the ST12 permit will be granted for an additional eight-month period only.

ST4 permit to ST4 permit

A cooling-off period of two months is applicable if an ST4 permit is followed by another ST4 permit. For example, if the ST4 permit is valid for three months, a cooling-off period of two months is applicable and afterwards a new ST4 permit, valid for one month, can be granted.

In case the initial ST4 permit was granted for a period of four months, the cooling-off period will be eight months. This is because an ST4 permit allows the holder to work in Switzerland only for a maximum duration of four months within a 12-month period.

ST4 permit to 120-day permit

The applicable cooling-off period is, in principle, eight months.

However, depending on the interpretation of the authorities (ie, four months' work in a 12-month period or a calendar year), the cooling-off period can be shorter than eight months, but will be at least two months.

120-day permit to ST4 permit

According to the practice of the authorities, a cooling-off period of two months is applicable.

ST12 permit to 120-day permit

According to the practice of the authorities, a cooling-off period of two months is applicable.

120-day permit to ST12 permit

Where a 120-day permit is followed by an ST12 permit, a cooling-off period of two months is applicable.

However, under certain circumstances it is also possible that no cooling-off period need be observed. If a 120-day permit has been obtained for a specific activity to be sporadically performed in Switzerland and the employee must perform the same activity in future on a permanent basis in Switzerland, an ST12 permit can be granted without a cooling-off period. However, the 120-day period (ie, four months) of the 120-day permit will be deducted from the 12-month period of the ST12 permit. This means that the ST12 permit will be granted for an additional eight-month period only.

120-day permit to 120-day permit

According to the authorities, no cooling-off period is applicable between two 120-day permits.

ST12 permit to ST4 permit to ST12 permit

Some employers have attempted to combine more than two different work permit categories in order to achieve the following result: an ST12 permit, after a cooling-off period of two months, is followed by an ST4 permit and the ST4 permit, after another two-month cooling-off period, is followed by an ST12 permit.

This scenario is not possible in principle, because as a general rule, a cooling-off period of 12 months must be observed between two ST12 permits. The intended combination is interpreted by the authorities as an attempt to evade both the law and the 12-month cooling-off period.

B-permit to L-permit and B-permit to B-permit

The Federal Act on Foreign Nationals does not mention any cooling-off period with regard to an L-permit following a B-permit or a B-permit following a B-permit. Hence, such successions of permits should work without a cooling-off period in principle. In practice, however, the authorities are seldom confronted with such cases.

Comment

The different cooling-off periods for non-EU/EFTA nationals are, both in theory and in practise, complicated. Employers should include cooling-off periods in their human resource planning to ensure the sustainability and continuity of their businesses in

Switzerland.

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