



**FRISHBERG
& PARTNERS**
ATTORNEYS AT LAW



FRISHBERG & PARTNERS SEMINAR: "NEW-AND-IMPROVED IMMIGRATION RULES"

JULY 9, 2009

Ukrainian Chamber of Commerce and Industry

I. Introduction by Alex Frishberg: Thank you all for joining us today. It is very nice to have you here, even though the “new immigration rules” may not be the happiest of topics. Hopefully, you will come away from here with useful information, and not just be entertained at the expense of Ukrainian legislation.



To be honest, before we sent out the invitations, we expected comparatively few interested people to attend this seminar. And Robert McNeil, who I see is with us today, was kind enough to offer us a 15-20 person capacity conference room for our presentation. We really didn't expect that many people and so we gratefully accepted his offer. All of the sudden, the next day we had 65 immediate acceptances! That's when we realized that we were in much deeper trouble than we first thought because this was just the first day! Altogether, 125 or so people signed up, which was quite a lot more than we expected. This just shows you that the new work permit and immigration rules managed to upset more foreigners than anyone anticipated.

In fact, foreign employees are not only in panic for themselves, but for their families (their dependents) that stay here with them. So this is our topic of presentation: why things are the way they are today, how did we get here, where are we today, what exactly will we do next, and how do we deal with this new set of extremely interesting challenges called “new and improved” Ukrainian immigration legislation.



Robert McNeil is noted in attendance

Our presentation will be divided into four parts. In the first part our senior lawyer, Sergei Potabenko, will describe how easy life once was for foreigners in Ukraine. Because Sergei is a practitioner, he actually has many years of hands-on experience with these issues. Thus, his speech will be very quick and efficient. The second part will be presented by my partner, Scott Brown, who will describe what’s happening to us today. This portion of the presentation is entitled “Welcome to the Future: The Iron Rule of Law”. Next we will have a question and answer period, which will be very informal and mixed with discussion. We welcome your questions, comments, viewpoints, experience, etc.

Please note that will be recorded and there will be a transcript available. So if you wish to read everything that is being said during this presentation, please visit www.frishberg.com in a couple of weeks. This may also be interesting for your colleagues, who couldn’t make it here to day. Afterwards, there will be a reception in the main hall when you can share your thoughts over a glass of fine wine, courtesy of Shooters catering. And after this reception, an old friend of mine, Vadim Yatsenko, who owns a wonderful art gallery with the top world-class photographers on display there, has graciously offered a continuation of our reception at his place. It is not too far from here, so please feel welcome to visit Vadim’s art gallery and continue any discussions there.



The Ambassador of South Africa, Mr. Andries Venter, is one of the many distinguished guests

And now, without further delay, it is my genuine pleasure to introduce you to our senior attorney, Sergei Potabenko, who will briefly describe how easy life once was under the old immigration rules.

II. Sergei Potabenko: “How Easy Life Once Was...”



Sergei Potabenko is a senior attorney with Frishberg & Partners

Hello, my name is Sergei Potabenko, and I would like to explain how simple and easy it was for foreigners to live in Ukraine before the new work permit rules came into effect. I am not saying that you had it good, but it was quite a bit easier. Afterwards, Scott Brown will tell you about the minor changes that have taken effect, but with major consequences.

It would be wrong to say that foreigners are confronted with complete novelties because new legislation is really a regurgitation of something that was forgotten. In fact, these new rules are practically the same rules that always existed. Whereas in the past the responsible authorities did not enforce the “old” rules, the controlling bodies are now paying more and more attention to enforcing the letter of the law.

From immigration law viewpoint, foreigners can be separated into several categories: (i) those that are present in Ukraine for purposes of employment, i.e., those that work for legal entities (most often limited liability companies) and need to apply for work permits; (ii) employees of foreign representative offices; and (iii) family members of those foreigners in the two previous categories.

While there are other categories (such as foreigners working on the basis of contracts and hosted by a Ukrainian company), we will focus on these three main categories.

In practice, foreigners that worked in representative offices were subject to fairly simple rules. The representative office would apply for an accreditation (service) card for the foreign employee, allowing that employee to work in the representative office on the basis of a business visa (multiple entry business visas were very easy to receive). In the past, the representative office employee could even register with OVIR without any hardships.



Sergei Potabenko starts off by explaining how easy the foreigners once had it in Ukraine, and the reasons for the subsequent changes (see slides 1-4)

By way of background, OVIR is the state body, and it is a special department of the police that is responsible for overseeing immigration issues. In the past, OVIR would rarely check to see if the foreigner actually lived where he or she was registered. In fact, they would not even monitor the type of visa foreigners received for purposes of registration. And none of the Ukrainian authorities would exercise control over the amount of visas issued to foreigners.

In the good old days, if a foreigner possessed a business visa, he or she could be located on the territory of Ukraine for 90 days, take a short leave from the territory of Ukraine, and return

immediately for another 90 days. This could continue without any limits and was entirely too convenient for foreign businessmen and their families if they wanted to avoid OVIR registration. Thus, no one would bother to do anything further after they received their business visas and accreditation (service) cards.

For clarification purposes, with respect to limited liability companies, the procedure was very similar. Firstly, the company would need to be registered, then the foreign employees could obtain work permits on the basis of whichever visa they had in their possession (mostly business visas). The Ukrainian Consulates would not be aware of the existence of foreigners’ work permits and, thus, would be happy to issue business visas (instead of the required immigration (IM-1) visas – which, incidentally, existed in the past as well). Finally, the foreign employees could be registered with OVIR on the basis of their business visas (even without a work permit!). Now, this is not an option. Consequently, the foreigner’s dependents could also register with OVIR, having their private or business visas only.



*Gregor Postl (Austrian Embassy) and colleague
are taking copious notes throughout Mr. Brown’s presentation*

As you can see, a foreigner would obviously prefer to receive a business visa due to the fact that it is a multiple entry visa, whereas the IM-1 visa is a single entry visa. At the time, we could

even safely advise our clients to take such route, as there was no enforcement of the IM-1 visa by the local authorities whatsoever. You could even apply for a work permit *after* receipt of your business visa (which is not the case today). All of this was done without any problems from the authorities, and quite quickly. However, this wasn't the law as it was written. It's just that the various immigration-related authorities did not bother to monitor the situation or enforce the distinction between IM-1 visas and business visas. Therefore, business visas were given out left and right! Ah, that was the easy life.

In this short presentation I tried to show you why it was so easy in the past to receive work permits as opposed to today; and how easy it was to live in Ukraine! As a last comment, I'd like to briefly touch upon the sensitive issue of dependents. It was quite simple in the past due to the rather lax visa and visa-free regimes, and dependents could accompany their spouses/parents in Ukraine for 90 days and simply register for an extension of such 90-day term if they were unable to leave in time. Or, alternatively the family members could simply come in and out on the visa-free regime every 90 days.



Over the past few months there have been numerous accounts from clients and bureaucrats alike regarding the application of fines or refusal to grant entrance to foreigners due to violations of the 90-day sojourn rule or the rule which allows a foreigner to be present on the territory

of Ukraine for no more than 90 days within a 180-day period. In light of the inconsistencies which have become painfully apparent, we recommend to our clients’ dependents to obtain P-1 visas (personal/private visas) and extend the right to stay in Ukraine for the duration of the said visas (either by extending sojourn or registering with OVIR on the basis of the principal’s work permit or other legal grounds).

In conclusion, I would like to emphasize that there really is nothing new here as far as legislation is concerned. This most apparent problem is that the Ukrainian government has now tried to regulate the presence of foreigners on the territory of Ukraine when in the past it simply did not try to regulate their presence. So, in order to strengthen control over illegal and legal immigrants, the following measures were applied. The government now wants to enforce the legislation and make sure that all foreigners abide by the legislation as well. I must stress that this was not a personal attack on foreigners, nor an attempt to deport all foreigners with their investments. It was simply a misguided effort to flush out illegal immigrants that live amongst us. By tightening the screws, foreign businessmen unfortunately got caught in a very broad net. So please do not be offended.



For an inherently boring topic such as immigration law, there is entirely too much laughter in the audience (mostly at the expense of the Ukrainian immigration legislation)

To summarize, the legal screws have been tightened and the various authorities (OVIR, border patrol, Employment Center, consular departments, etc.) are now exercising control (albeit not always consistently). The volume of documents required for work permits, visas and immigration have greatly increased and become more complex, and the work permit applications have become even more cumbersome and lengthy. Scott Brown will address the documentation in greater detail later – especially the ones that may make you a laugh (or cry) over. What we are basically seeing is strict enforcement of the rule of law.



***Boris Abramov (Director) and Fedor Krat
(General Producer, Kiev International Film Festival) are mildly amused***

All of the government authorities that are involved in the sphere of immigration of foreigners (including the Ministry of Labor, the Ministry of Economy, the Ministry of Internal Affairs, the Ministry of Justice, the Employment Center, the Border Patrol, etc.) have all been in discussions to bring their internal legislation into compliance with the new rules. In other words, each of the authorities involved have realized the problems they have caused by passing the new work permit rules and the heartache most of the foreigners are going through. Therefore, they are all frantically submitting their proposals to remedy this small disaster. As usual, however, because they all put forth their own proposals, there is no cohesive unity among them yet and, basically, they are still fractionalized propositions. I'm sure that Scott Brown will be able to explain more about the consequences of this non-cohesive attempt to clean up the current legal mess.

And now, I'd like to pass on the microphone to our partner, Scott Brown.

III. Scott E. Brown: “Welcome to the Future: The Iron Rule of Law”



Scott Brown outlines the new rules applicable to any foreigner entering Ukraine

Good afternoon. In follow up to Sergei’s excellent overview of how things were in the past, I’m going to give you the “wake-up call”, which is the new rules for foreigners’ stays and immigration rules for Ukraine. I think that Sergei put it pretty well – there are legitimate reasons why Ukraine instituted these new rules for immigration. First of all, we, the foreign business community, are not the targets; the targets are the illegal aliens that work on the markets that are taking jobs away from Ukrainians that can do the same jobs.



With respect to the new rules, I think that most countries of the world face the same type of immigration problems, so it's not Ukraine implementing something drastically different than what we see in our countries. This includes not only US, EU or other foreign investors and companies, but all of the countries of the world



Also, one of the main reasons that the new rules have been passed is not only to clean up the illegal alien situation, but also to bring the various authorities together that in the past preferred to work separately. We’re talking about OVIR, the border patrol, the Ukrainian consulates abroad and the Employment Center. As Sergei explained quite clearly, these authorities all used to work on a separate basis and, in doing so, there were inconsistent demands from each authority. Of course, there are plenty of perfectly good reasons why they preferred to work separately –to keep their pockets separate, or to maintain their own little “kingdoms” or “fiefdoms”, etc. This is something that happens in any bureaucracy.



Now, the new Resolution is bringing these authorities together by requiring them to keep a unified database, which is affecting you and I as foreign investors and businessmen. They are now checking foreigners at the border – I’ve heard many different stories about people being turned away from Ukraine, fines being levied against foreigners, etc. The fines can be official or unofficial, depending on how you interact with the authorities and, most often, the border patrol. In trying to find information out from the various authorities, the border authorities were the most difficult to deal with. Their response was often “Who cares? These are the rules and we follow them regardless of your specific circumstances.” You can not find out why, when or what happens – every trip through passport control is a throw of the dice.



Mr. Brown is a partner with Frishberg & Partners, and has co-authored numerous publications, including a recent article about the new immigration rules ([click here](#))

We've looked at the basic categories of foreigners affected by the new rules: the investors, company founders, work permit holders (usually in legal entities), representative office employees, spouses and children. As we've mentioned, it really hasn't changed that much in terms of categorization. For foreigners, we still have a visa-free regime and multiple entry business visas, which in my view do not vastly differ from each other. Sergei has explained this in more detail, so I will move forward and talk about work permits.

Before I move forward to the work permit rules, however, I should speak a little about the rules for foreigners' stays in Ukraine, because they have changed due to the new Resolution No. 322. In the very beginning, a foreigner could stay in Ukraine for 90 days within a period of 180 days. This meant that you had two periods of 90 days that you could be in Ukraine. Upon Ukraine's joining of the WTO, however, the rule changed to 180 days within one calendar year. That is, starting from the first day you came to Ukraine, just count one calendar year and a foreigner would have 180 days within that year to stay in Ukraine.



Then Resolution No. 322 came into force, and the rule went back to 90 days within each 180 day period. Although, when I was doing my research of the WTO General Agreement on Trade in Services (GATS), I found out that the rule still reads 180 days within one calendar year in Ukraine’s Specific Commitments to GATS. But when I called the Border Patrol Hotline (you’ve probably seen the advertisement each time you pass through passport control in the airport), they told me their internal instructions read “90 days within each 180-day period”. So, if you come to Ukraine for 90 days, for example, and you leave, then you have to wait another 90 days before you can enter Ukraine once again for 90 days. There is no official explanation or answer to this very disturbing discrepancy.



Mr. Brown, shown above, has co-authored a legal reference guide, “Doing Business in Ukraine” (five editions)

And who, exactly, counts those days? Well, the border patrol is supposedly counting, but you should be counting as well. They are more likely counting on you to count! A lot of people are “slipping” in and out, and I have to admit that I am one of those people. At the same time, more and more foreigners are going to be facing the border patrol’s questions. By now they should have a database that is connected with OVIR, the Consulates and the Employment Center so that they can determine who is entering Ukraine without, for example, an IM-1 visa but still holding a work permit. What about the fines for overstaying 90 days without OVIR registration? There is an official fine, but I’ve heard more often that 100 Euros in cash should clear you. The question is whether the new database will now enable the border patrol to more effectively count and put violators on a so-called “black list”.



*Ms. Kateryna Grushenko, a seasoned reporter from Kiev Post,
is entertained by some of the comments*

Let's move on to the work permit application process, which has basically stayed the same. Many of you have seen my article on the new work permit rules and you have seen the extensive list of documents required from both the local employer and the foreign employee. I want to stress that work permits must be issued to foreigners that work in legal entities. There are also two new categories of work permits that I will touch on a little bit later, which were issued on the basis of WTO membership and the GATS. Whether they are being implemented consistently by the Employment Center is far from clear.



For the work permit application, any foreign national who will work in Ukraine will need to gather quite a number of documents (again, you've seen the list). What is interesting are the documents that were not required in the past as well as the additional steps required to execute the documents. The first novelty is the police clearance report, which you can get in Ukraine if you are located in Ukraine at the time your work permit application is filed. However, if your company is applying for a work permit for you while you are still outside of Ukraine (for example, at your old job), you need to get this police clearance report from your home country (or "last place of permanent residence"). Where do you get that from? I don't know... I made some inquiries in the US about a similar type of document and I understand that you would need to apply to the FBI to get it. At the same time, this seems like a violation of human rights and privacy!



David C. Allen, from the U.S. Embassy, is listening carefully

Whether this silly requirement stays or will be replaced is anyone’s guess. Again, if you are in Ukraine, it is pretty easy: you can get it from the Ministry of Internal Affairs, and I can give you the relevant addresses after the presentation. However, I should point out that the police clearance certificate requirement in other countries means that you are applying for permanent residency, not for temporary residency under a work permit. Whether this novelty will be removed by the authorities is also currently in discussion.

Another difficulty with the work permit documents is obtaining your diploma. How many of you remember where your diploma is? It may take a long time to find your diploma if you are applying for a work permit for the first time. Not only do you need to find your diploma, but you also need to send it for certification by Apostille. Some diplomas, like mine, are quite large, and it can be tricky to send them by mail for apostillization.

There are also the substantiations and qualifications required for explaining *why* your company needs a foreigner to be employed in place of a similarly qualified Ukrainian. The rules are similar to the past rules. As a law firm, we would need to inquire about the activity of your company and your special qualifications. Then, we would need to draft a legally sound argument as to why your qualifications make you “unique” and make it important for you to be employed by the Ukrainian company.



The Ambassador of Norway, Mr. Olav Berstad, is taking notes

It sounds simple, but speaking from experience, there have been arguments against such substantiations by the Employment Center. For example, there are mysterious ways that you can lose your qualifications – about six years ago when I applied for an extension of my work permit, the Employment Center suddenly stated that I no longer had the required qualifications after four years of working here. It took a long time to rectify this situation, and there were no substantiations from the Employment Center as to why they felt I was no longer qualified to work as director of our law firm. How will they deal with this now under the new rules? It is difficult to say because not many have gone through the new work permit procedure and it is unknown whether the Employment Center will institute even stricter rules for submitting substantiations and qualifications.

As I mentioned before, in addition, there are the two new categories of foreigners subject to work permits under WTO: the so-called “intra-corporate assignees” and natural persons who supply services in Ukraine without a commercial presence. These two new categories require additional documentation for the work permit procedure, as they do not work on the basis of employment contracts. Thus, the work permit procedure in these cases requires the submission of the relevant contract on the basis of which the foreigner will be stationed in Ukraine and other documents, confirming the relationship between the foreigner and the ultimate service provider (including the

duly executed company decision to send the foreigner to Ukraine). In these cases, it is not clear from the law who will be required to apply for the work permit, but I presume that the Ukrainian “host” will need to apply and cover this obligation in their commercial relations with the foreign counterpart.

As you can see by the wide-range reach of these two categories, especially the intra-corporate assignee, work permits will be required for virtually any foreigner doing business in Ukraine. An intra-corporate assignee is, for example, a person employed by a foreign-based company, who sends such person to work in its Ukrainian-based subsidiary but continues to pay such person’s salary outside of Ukraine. Even though such assignee will not be directly employed by the subsidiary, the assignee will need to obtain a work permit through the Ukrainian subsidiary nevertheless.



The second category is the natural person providing services in Ukraine without a “commercial presence”. For purposes of WTO, when one mentions a “commercial presence”, this includes a company’s representative office (even though they are usually non-commercial entities). Thus, this category covers the remaining foreigners, including free-lancers, who come to Ukraine to provide services and generate income from those services. This can also be a broadly interpreted category, especially here in Ukraine.

Once the work permit application has been filed, the relevant Employment Center has 30 calendar days to decide whether to issue or refuse to issue the work permit to the applicant/employer. If

everything goes well and the work permit is issued, the foreigner will next need to apply for an immigration visa or so-called “IM-1 visa”. IM-1 visas are *single entry* visas – which means that if you come in with your IM-1 visa, and you fail to register with OVIR and you leave on that IM-1 visa, then in order to enter Ukraine you will need to get another IM-1 visa. In addition, I have been told that because IM-1 visas are issued on the basis of specific work permits (the work permit forms are numbered), the foreigner may need to apply for another work permit before he can get a second IM-1 visa. I could not confirm this information, but it should be kept in mind. Therefore, we strongly recommend going straight through to the OVIR registration once you first enter the country on your IM-1 visa.



We’ve been through the work permit procedure, which is quite extensive, and, therefore, if you have specific questions, please feel free to ask them during the Q&A session. We’ve also been through the IM-1 visa process, which requires a work permit before its issuance. One question that arises is which Consulate should you go to for receipt of your IM-1 visa? In the new Resolution it states that the employer is supposed to send a certified copy of the work permit to the Consulate at the foreigner’s “last place of residence” so that the foreigner can go to that Consulate to apply for an IM-1 visa. This seems to be untrue. I’ve spoken with a representative of the Ministry of Foreign Affairs by phone, and the representative said that the foreigner can go to any Consulate outside of Ukraine to apply for the IM-1 visa, regardless of their last place of residence. Practically speaking,

you should be able to go to any Ukrainian Consulate outside of the territory of Ukraine to apply for an IM-1 visa, provided that your work permit is sent to that Consulate. In any case, I would verify this before going to the Consulate to apply for your IM-1 visa by contacting that specific Consulate. They may have a different viewpoint...

And now, we can move on to the so-called “post immigration procedures”. Once you get to Ukraine, the border patrol should verify whether you have the proper visa (in our case, an IM-1 visa). The border authority should not start counting 90 days on your IM-1 visa, but it should register your date of entrance on that IM-1 visa. Once you start to work on your employment contract after entering the country, your employer must notify the Employment Center within 3 working days that you have commenced employment. Then, within 5 days, you should apply for registration with OVIR.



Unfortunately, OVIR’s registration procedure is unreasonably complex at the moment. Again, the goal of the new Resolution was to put all of the authorities on the same page. But, as usual, it is not happening right now. So for the moment the 5-day OVIR registration requirement is not being strictly enforced, and you can wait to register with OVIR as long as your 90 days have not expired. The reason is that the authorities are still not on the same page and there is a lot of inaccurate information filtering from the various authorities. If you are able to gather the documents and

start OVIR registration within 5 days from the start of your employment, I would still strongly recommend doing so – just to stay on the safe and proper side of the law.

The OVIR registration will give you a mark on your IM-1 visa that allows you to exit and enter Ukraine as you need. It basically transforms your IM-1 visa into a multiple entry visa. You receive a stamp that is known as a “temporary residency certificate” in your passport to go along with your IM-1 visa (and work permit). The over-ambitious OVIR registration procedure requires that you go through an AIDS test, a tuberculosis test and, in some cases, a narcotics test. You will also need to submit your foreign work permit and (here’s the problematic document) your lease agreement (if you lease premises). Specifically, if you are leasing an apartment, your landlord will need to get a statement from ZHEK and anyone registered in the apartment (spouse, children, etc.) that you have permission to be registered in the apartment on a temporary basis.



Most landlords refuse to go through this process because they don’t want the hassle of going to ZHEK and collecting all signatures from those registered in the apartment. ZHEK will demand to see the lease agreement and the head of the ZHEK department will need to sign and stamp the agreement. In addition, the statement from the other people registered in the apartment must be notarized. Landlords are usually very skeptical about showing a lease agreement that indicates their income, which means taxation if this information is revealed to the tax authorities. I’m sure

most of you pay your rent in cash at the end of each month (or in advance in cash). And I’d bet that this income goes undeclared in most cases.

Moreover, because a new person is registered in the apartment (especially a foreigner) the utility bills will also increase. In the past, registering a foreigner in an apartment meant that the utility bills would increase more than if registering a Ukrainian. I guess foreigners tended to use a lot more water, heat, electricity and other utilities. This is not the case today. Nevertheless, many landlords still worry about this and the possible tax consequences related to their lease agreements.



However, there are alternative lease arrangements that can avoid the receipt of income by the landlord, at least officially (you will still pay your regular lease payments in cash). This is due to the temporary nature of the registration.

Still, because the various authorities are still not in harmony with each other, you should expect delays with your OVIR registration. 5 days at this point is not practically possible, and everyone knows it. But with your IM-1 visa and your OVIR registration, you will get a stamp in your passport that gives you temporary residency and allows you to exit and enter the country as many times as you need for the duration of your work permit. So when your work permit is set to expire, you should extend your work permit at least one month before it expires. This should allow you to prolong your OVIR registration.



It is questionable right now whether your IM-1 visa automatically prolongs when you prolong your work permit and OVIR registration. I have researched the laws and asked numerous questions, but this is something that can't be found in the text of the law nor in any coherent explanation. In fact, this is not yet decided, but it is being discussed by the authorities.

I would imagine that until the authorities bring all of their internal regulations into compliance (and who knows when that will be?) you will most likely need to leave the country to get a new IM-1 visa once you prolong your work permit. This would be analogous to all other types of visas: once your visa is set to expire, you need to leave to get a new one.

What else would you want to be concerned with in having an IM-1 visa? If you are suddenly faced with employment termination for whatever reason, then your work permit is nullified and your IM-1 visa should expire on that date. Whether this will be verifiable in the unified database is impossible to say right now. However, if you are still in the country, you can always stay on the visa-free regime for 90 days, provided that the sojourn rules permit your stay. Or, of course, you can try to find work with another employer. In this case, you would need to get another work permit and leave the country to apply for another IM-1 visa. Most likely you would have to re-register with OVIR on the basis of the new work permit and IM-1 visa.

In terms of the renewal procedure for the work permit, it is the same exact procedure for obtaining the initial work permit. This means that when you go through the first experience of gathering the work permit documents (the diplomas, the statements, the police clearances, etc.), make sure you take notes and remember how it is done because you will be faced with the same issues. Please note that any documents that require an Apostille will need to be certified once again because Apostille stamps are only recognized for 6 months in Ukraine. At least you can do the police clearance certificate while you're still in the country.



The same goes for your dependents. Their OVIR registration ends when your OVIR registration ends. Their registration is based on your work permit dates. Your IM-1 visa is set for the term of your work permit, and when your dependents apply for visas to accompany you, they will get personal/private visas for the same dates. As for your spouse, he or she will get a separate OVIR registration, but children under 16 are automatically registered with their parents and get no special stamps in their passports.

There is also an IM-2 visa, which can also be quite confusing. This is for “*PMZh*” or permanent place of residency. This visa applies to only a few categories of people. The first category is refugees, who are applying for permanent citizenship in Ukraine. They need to be in the country for 3 years before they can apply for permanent residency. The second category is direct relatives with

Ukrainian citizenship (parent, grandparent, brother, etc.). If you have a spouse that is a Ukrainian citizen and you have been married for over 2 years, then you can also apply for an IM-2 visa. The last category is investors or founders. The law states that if a foreign citizen makes an investment “into the economy of Ukraine” in an amount of over 100,000 USD in any foreign currency, and this investment is registered as foreign investment according to the law (there is a specific procedure), then such foreign citizen is able to apply for an IM-2 visa (permanent residency).



The advantages of the IM-2 visa are (i) you don’t need to periodically register with OVIR, (ii) you don’t need to obtain a work permit if you want to work for a Ukrainian company, and (iii) you have the right to enter and exit Ukraine freely. This is almost like a US green card – everything but the right to vote.

With respect to the “investment into the economy”, this can be an investment into the authorized capital of a Ukrainian company. Remember, however, that such investment must be in a foreign currency in an equivalent of 100,000 USD (or more) and registered as foreign investment according to law. You would want to register your foreign investment anyway because it is a state guarantee that your investment will be protected at all times.

With your permission, I'd like to say a few words about representative offices. As Sergei stated, there are no work permits issued to foreign employees of representative offices. In spite of the fact that a foreigner signs an employment contract with a representative office, they are not eligible to receive a work permit. Instead, such foreigners receive an accreditation (service) card from the Ministry of Economy. This service card supposedly allows you to move freely in and out of the country on the basis of your multiple entry visa. However, I was told by the border patrol that this is not true.



What we are seeing now is an attempt by the government to patch up the situation with employees of representative offices. For instance, right now, if someone is coming in on a business visa and working at a representative office, according to the border patrol the business visa is only allowing them to come to Ukraine for 90 days within a 180-day period. How is this person supposed to work full-time at the representative office if the border patrol doesn't care about the service card?

In order to bring all of this nonsense into compliance with the WTO, just to make it logical for representative office employees, there are current government discussions about changing the rules for representative offices. The first issue is allowing representative offices to register with OVIR on the basis of either an IM-1 visa or a service card. Right now, OVIR is refusing to register any foreigner with a business visa – another headache for representative office employees. A representative office employee would only be able to prolong a stay over 90 days, but he or she would need a damned good reason and such prolongation would expire as soon as he or she left

the country. This precludes such employees from freely moving in and out of the country and legitimizing their stays in Ukraine. There are also discussions to exempt representative office employees, who hold valid service cards, from the 90-day/180-day rules.



Robert McNeil and Victoria Grishina of Pulse

A few last words about the visa-free regime. If the border patrol guard is saying that if you have a multiple entry business visa and you can only stay for 90 days within a 180-day period, then what is the use of business visas? The same rules apply under the visa-free regime, except that you pay for a business visa! This just doesn't make sense. Maybe a businessperson will feel more assured of his activity if he or she has a business visa, but with the new work permit categories that cover almost any business activity, it seems the business visa is becoming obsolete. Thus, I would strongly advise anyone undertaking any activity in Ukraine under a business visa to verify with legal professionals whether such activity requires a foreign work permit. If the goal is strict enforcement of the current rules and the database gets all authorities on the same page, that person could be hit with a fine or even deported for breaking immigration rules.



Under the new rules, the database is a means for controlling the presence of foreigners in Ukraine. If working properly, the tax authorities, the labor authorities, the border authorities, etc. will all know why a foreigner is here and how long or for what purpose he can stay here. Are you here too long? These days you may be required to register as a tax resident and pay taxes in Ukraine on your worldwide income.

In conclusion, the new Resolution is theoretically appropriate and the “new-and-improved” immigration rules are something we see in most other countries. The problem is that the authorities should have thought through all of the issues that I’ve been bringing up today - and you probably have other issues – before they allowed the new Resolution to come into legal force. Unfortunately, each authority has its own ideas and interpretations. So, we are looking at a “gray” area over the next few months until they get their acts together.

There is a practical inappropriateness about the new Resolution as well. I don’t think Ukraine bears the same status as all other countries. From my point of view as a professional, Ukraine is trying to attract foreign investment, but by making things more complicated for foreign investors, Ukraine is actually turning away foreign investment. I have spoken with numerous potential clients about these new work permit rules, and they reacted that it might not be a good idea to enter Ukraine right now because it is too difficult. Most of these potential investors thought the rules for foreign investors would be easier. And turning away investment during the times of crisis is not good for Ukraine.



There are other negative consequences. The new rules increase the expenses for foreign companies. The new procedure is more expensive (approximately 330 USD per work permit). And a large number of documents must be gathered, notarized and certified by Apostille. There are also expenses involved in sending these documents by courier.

My advice is to stay in line with the legislation as much as practicable. There are a lot of things companies should be doing to keep the work permits valid and enforceable (accounting issues, reporting issues, etc.). You want to avoid inspections by the authorities, especially the Employment Center. The Employment Center has the power to check whether foreigners are being properly housed (are you registered in the place where you are actually staying?) and whether they have the “proper working conditions” (not very clear what this means).

While foreigners should be treated the same as Ukrainians, I believe that all of you have experience with this, so all of you know that the local authorities always look at foreign employees differently than at Ukrainian employees. So you should avoid violations as much as possible in order to avoid the consequences which may be deportation (a bit embarrassing especially when the expenses are covered by the employer) and fines to both employee and employer.



Well, that’s about all I had to say. We can now begin the question and answer session. Of course, I would not only welcome questions, but your comments, opinions and experiences as well. Thank you.

[thundering applause]

IV. Q&A Session

Alex Frishberg: I would like to offer an optimistic perspective on this new development. Ukraine today is the most democratic nation on Earth – every year there is a big election and people are actually participating. And now, you have a real enforcement of the immigration legislation that has always existed. Americans would call it the “rule of law”. So, finally Ukraine is not only the most democratic nation on Earth, but is also applying the rule of law that all countries have been trying to get it to apply. This is a positive development. With this background in mind, we’d like to open up the floor for questions and a discussion.



Question: When and how was the new law published?

Mr. Brown: The new Resolution was passed on April 8, 2009, and it came into legal force on May 14, 2009. The Resolution was officially published on April 14, 2009 in Uryadoviy Kourier No. 67, and by virtue of its text came into force within 30 days from its date of publication.

Question: Do you know if the Dutch Embassy will be notified?

Mr. Brown: I don’t know if the Embassies get notified, but it is our responsibility as citizens and visitors of Ukraine to know what legal rules are coming into force. I know they don’t notify companies. But, the new Resolution doesn’t really touch upon diplomatic visas.

Question: I have a practical question about representative offices. Do we need a work permit for our representatives from abroad, who work here but do not have a salary and do not receive income in Ukraine? And, after 183 days, do they need to declare their income to the tax inspection?



Rene Verloop, from the Royal Netherlands Embassy, is posing a tricky question to Mr. Brown

Mr. Brown: Very good questions. With respect to the first question – yes. If a foreign employee of a foreign company with a representative office in Ukraine is sent here but will not be paid on the ground, he still needs a work permit under WTO and the new rules. This person will fall under the category of “intra-corporate assignees”. From a strictly legal point of view, this person will need a work permit.

In the past, such foreigners would not apply for a work permit. They would simply enter and exit Ukraine on their business visa and they weren’t checked. At this point in time, it still works the same way because they are not issuing work permits to any foreign employees of representative offices. When and if they start issuing work permits to representative office employees as “intra-corporate assignees” in compliance with the GATS, representative offices will need to obtain work permits for such employees for the duration of their assignments. However, if the foreigner is only here for short durations and only supervises the representative office’s activity, then a business visa should suffice.

With respect to the tax question, under general Ukrainian taxation rules if you are here for over 183 days in a year, then you are deemed a tax resident and you should declare taxes on your worldwide income. If the foreigner has an accreditation card, but doesn't receive salary here and is here for short stays, he or she can pay taxes in his or her home country. By strict letter of the law, if the foreigner is here over 183 days, he or she should register as a tax resident. Of course, 90% of foreigners don't do this because the tax authorities don't have the resources to verify whether foreigners are not paying taxes elsewhere.

Question: So, you are saying that an accreditation (service) card is not enough and foreign employees of representative offices should get work permits?



Messrs. Potabenko and Brown are listening to the questions...

Mr. Brown: Under the new rules, this seems to be the case. However, at this point in time, work permits are not issued to employees of representative offices. Representative offices are treated differently than legal entities, as they are registered through the Ministry of Economy. But, now with the new category of “intra-corporate assignee”, the authorities are addressing this question because the new rules say that work permits should be issued, but there never was a mechanism for issuing work permits to representative office employees.

And, under the new rules, business visas will not be sufficient because they only allow 90 days within each 180 day period. How can a foreigner work full-time in a representative office with only a business visa? For example, if the business visa is for one year, the visa holder can only stay in Ukraine for 90 consecutive days, then they need to leave the country for 90 days before they can come in for an additional 90 days in that same year. Also, OVIR has stopped registering foreigners with business visas – they will only register foreigners with immigration (IM-1) visas.

This is why I believe that over the next few months we will see changes for representative offices – whether it be work permits for foreign employees or OVIR registration on the basis of service cards. The new rules may make it a bit more difficult, but perhaps they will be clearer for representative offices.

Question: Hello, my name is Dave Allen from the American Embassy. To answer the question about whether embassies were notified, we received official notification about one month after the new rules came into effect. We asked about it and we were told that that was the best they could do. I would not depend on us [embassies] being able to tell you any faster than the newspapers.



Mr. Allen provides the U.S. Embassy’s perspective on the current enforcement of old legislation

In terms of your presentation, I would like to say that we largely agree with you regarding the new immigration rules. These rules, when you look at them, are not significantly more difficult in some respect than a US work visa. It is the fact that it seems that every Ukrainian organization has a

different interpretation of what the rules mean. The lack of clarity has us concerned – and we, like all of you, are trying to clarify exactly what the new rules entail.

One question I have is with respect to the “90 days within 180 days rule”. Do you have any clarity about new visas? We have been told that in some respects that if you are here on a business visa and leave the country within 90 days and get a new business visa, then that should in theory reset the 90 day clock. We’ve been told from other sources that in fact a new visa will have no effect on the clock. Do you have any insights about both what should the case be and actually what is happening right now?

Mr. Brown: Theoretically, if you get a business visa, it is usually issued for a year. And, for example, you use up the 180 days in a year (i.e., you come for two blocks of 90 days), then under the new rules if you get a new business visa, the new database should still count the number days you spent in Ukraine that year and indicate that you have used that up for the year. The Ukrainian Consulates are supposed to be connected to the database along with the border patrol and, theoretically, the Ukrainian Consulate should refuse to issue a new business visa. However, many consulates do not really understand the new rules and they can still issue visas the old way. The consulate I visited was surprised that I was requesting an IM-1 visa although I had a valid business visa. This is the fractionalization I was talking about within the various authorities.



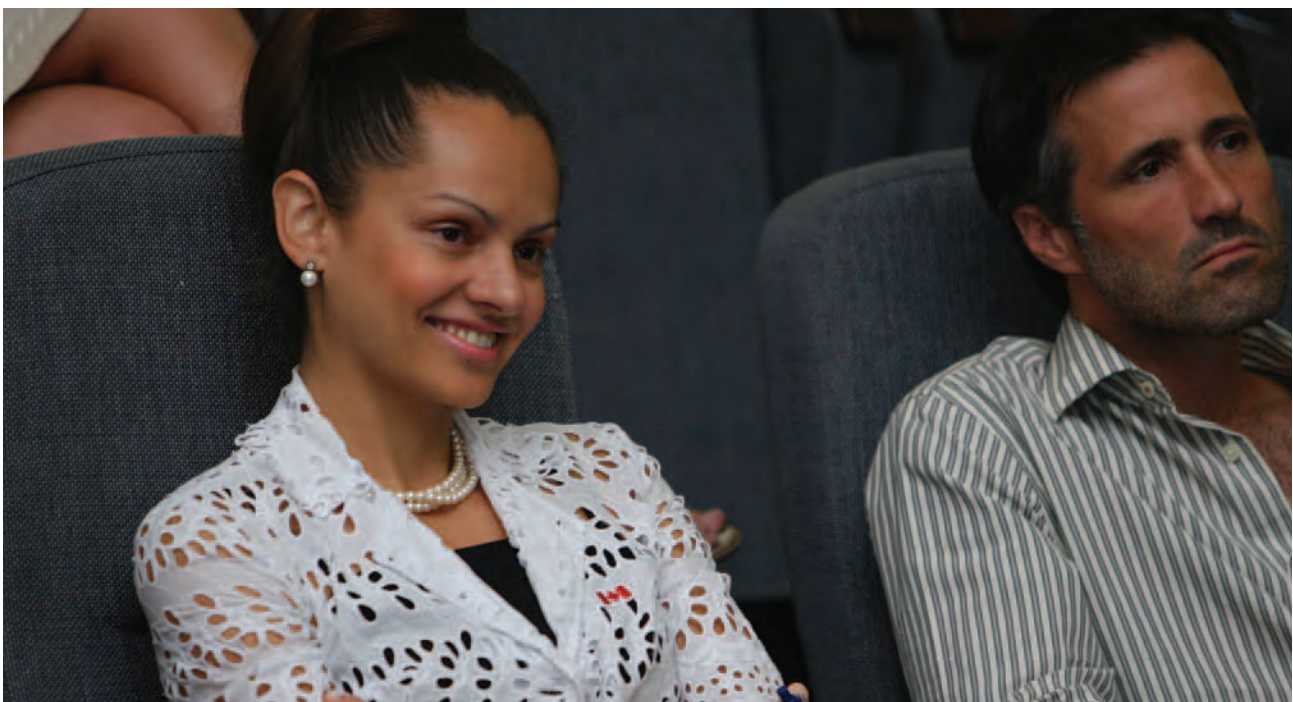
Mr. Brown responds to each question with extraordinary detail (see transcript)

In trying to stay legitimate, it can get confusing and frustrating to get different answers from different authorities. Especially the border patrol, whose attitude is: “we don’t care – our internal rules state this...and if you violate the rules, you will be fined. Good day.”

Question: Hello, I’m Liliya Spasska from Clifford Chance. I am the HR manager, so I have been through this process quite a few times. My first question is very practical. We were applying for temporary residence permits (registration with OVIR), and we provided them with tuberculosis tests and HIV tests. You mentioned that they now require the test for narcotics. From which date did they require this test?

Another situation, which seems really ridiculous to me and to our managers, is: if we assume that the work permit and the temporary residency have expired, say on August 1st, and the foreigner resigns on the 31st of the previous month and wants to leave the country – but afterwards come back to Ukraine on a business trip. I called the state border patrol and they stated that such person would not be allowed to enter Ukraine for the next 90 days – even for a business trip. I don’t have an answer for this and I would like to hear your point of view.

Mr. Brown: Yes, the border patrol follows its own guidelines and they look only at their own guidelines – not very helpful. According to the border patrol, they count your days and it doesn’t matter if your status has changed from immigration to business. They are under the impression that you can only be here for a certain amount of time regardless of status. Most likely the consulates don’t yet have the connection to the unified database – and this is a problem because they could issue a business visa, but the poor foreigner may arrive and be turned away by the border patrol. Who calls the border patrol before taking your flight when you have a valid visa issued by the Ukrainian Consulate abroad?



As you can see, one of the major needs is working with the border patrol so that they know the various statuses that a foreigner may have. In my opinion, if I have an IM-1 visa that has expired, I should be able to come back on a business visa because my immigration status has changed, and I'm now present in the country for completely different reasons. Unfortunately, the border patrol is very strict in its interpretation of the rules.

Comment: Yes, the answer I received was “No way! He or she will be turned back”.

Mr. Brown: So you were actually able to reach them on the hotline? I tried for a long time, but there was no answer. Or they gave me another number and no one picked up. It was a painstaking process!

To answer about the narcotics test – it says it in some internal (specific) procedures; however, we have been able to do OVIR registration without such test. In the Kyiv Oblast OVIR they don't ask for it, but I have seen it in other OVIR requirements. It is questionable and should be checked on a case-by-case basis.



Comment: There is no specific list of documents required for temporary residency certificates available in the legal database. Therefore, you cannot check it. And, about the visa, it is not exactly

true that the person can not come again to Ukraine on a business visa because the 90 days only applies to people who are based here on registration with only the border patrol stamp. Basically, if the person is based here on a temporary residency permit, the 90 days should not be counted until the temporary residency permit expires.

Mr. Brown: So they don’t count the days on your temporary residency? But, as I stated, the border patrol counts – and they have the final say.

Comment: We’ve had cases and this scenario was successful business visa immediately after temporary residency expires. And, on June 22, all of the authorities met and they agreed that they will introduce changes. But, they didn’t provide any timeframes. We can expect these changes, but we don’t know when.



Ms. Tamara Lakhovich, also from the U.S. Embassy, has several questions

Question: Hello, my name is Tamara Lakhovich from the Consular Section of the American Embassy. I have several questions and one of them is “registration” versus “extension of stay”. Are these two different things that OVIR grants? My understanding from today’s meeting is that “registration” plus visa gives the foreigner a permit to leave and enter Ukraine on multiple occasions.

Although an “extension of stay” on a business visa does not allow the person to leave and re-enter the country. Is that correct?

Mr. Brown: Yes, that is correct. There are two different procedures: (i) the immigration-registration procedure with OVIR and (ii) the registration procedure if you overstay 90 days (not planned but extraneous situation – medical or other substantiated reason). In the second case, you can go to OVIR to ask for an extension of your stay beyond 90 days so that when you cross the border, the border patrol will see that you have been to OVIR and have permission from the immigration authorities to overstay 90 days. Once you leave, that registration is cancelled (i.e., you cannot come back in on the basis of this type of registration).



Question: Are these two different stamps in the passport that show specifically what they are?

Mr. Brown: Yes.

Question: The other question is registration at the place of residence – where the foreigner lives here – is this the burden of the owner of the flat or of the foreigner? Will the foreigner be fined for lack of registration?

Mr. Brown: The foreigner will be fined if he or she tries to leave after 90 days have expired and they have not registered with OVIR. Or, if there is an inspection by the labor authorities and they find out that a foreigner is working without OVIR registration, then both the employer and the employee can be fined. Thus, registration with OVIR is a combination of burdens – the foreigner (and his or her employer) is obligated to register with OVIR, but the foreigner’s landlord has the burden of getting permission from ZHEK to have a foreigner registered temporarily in his or her apartment – this is also required for OVIR registration.

In other words, for purposes of registration with OVIR, the landlord must show to ZHEK the lease agreement with the foreigner and receive a permission stamp from ZHEK to temporarily house the foreigner. This also includes the landlord’s responsibility to get permission from anyone else registered in the apartment to allow the foreigner’s temporary registration (this also includes a notarized document for which the foreigner usually covers the expenses).

Question: Does this mean that people that are here on business visas for less than 90 days do not need to register with ZHEK or OVIR?



Mr. Brown: You are correct.

Question: Hello Scott. Just a quick question – you mentioned that the authorities would need about 2 to 3 months to bring this together. By that do you mean for the legislation to trickle down to the various organs so that they can all understand that they are on the same page? Or, do you mean to amend the legislation that they have found to be a blunder?

Mr. Brown: What I really meant by that was 2-3 months for the local authorities to get their acts together and begin working on a unified basis to bring their internal regulations into correspondence with each other so that they may work in a smooth manner. Knowing how this system works, I think that 2-3 months is very generous, but I also believe that they will actually be working on this, as this issue has now come to the forefront. This is very important for Ukraine’s continued push to bring their rules and regulations into closer compliance with the EU, WTO, etc.



The Frishberg & Partners legal team listens carefully to the questions before answering

I also think there will be more changes to the legislation itself. In terms of making the legislation better and more transparent, I believe it would be best to simplify the OVIR registration – one of my ideas would be to exclude ZHEK altogether and accept a simple lease agreement with the landlord.

In terms of work permits, I feel that the major issue that needs fixing is the rule that a newly-registered company needs to be active 1 to 2 months before it can apply for foreign work permits.

Currently, a company needs to show that it has no debts before the various authorities before it can apply for a foreign work permit. A new company would need to be active at least one month in such case. Thus, a Ukrainian citizen must initially be registered as the director until a work permit can be obtained for a foreign director.



*Practical questions become increasingly narrower
with each passing minute due to the experts sitting in the audience*

Foreign companies entering Ukraine usually want to put in place a foreign director immediately to make sure operations start up smoothly and to train Ukrainian staff in corporate policies. So, I think they should make at least one exemption for the director position and allow a company to apply for a foreign work permit during registration or immediately upon registration. As it works now, the company needs to be registered, then it can apply for a work permit (which takes 30 calendar days), but before it can apply for the work permit it needs to show clean activity for at least one month. As a result, in most cases, at least 2 months of activity pass without anyone being able to put a foreign director into place.

Question: Assuming the authorities realize that this is a big deterrent to foreign investment, how long do you think it will take for them to change the legislation again?



Mr. Brown: Well, when I was saying 2 to 3 months, I forgot that next month is August when the entire country goes on vacation. But I think they are really working on this issue hard due to lobbying efforts from organizations such as the European Business Association, spear-headed by Anna Derevyanko. I think these lobbying efforts have really brought these issues out into the open. It would be nice to have periodical roundtables with all of the authorities involved, just to see how things are progressing. In any case, the issues are clearly out in the open since the new Resolution came into force on May 14th and even before, when the first wave of panic started in April upon publication of the new Resolution. So, 2, 3 or maybe 4 months is actually realistic in terms of seeing changes to the legislation. Or not...



Question: Kyiv Post here and I have a number of questions, but I will limit them to two questions. We have encountered these problems in our office, and for example the diploma problem. First of all, the Apostille requirement is complex. For example, if you get diploma for an English major, but you have substantial experience in other fields. I have spoken to people who were refused work permits just because their diplomas did not correspond to their working positions. Their working experience was not taken into consideration by the Employment Center and they have substantial working experience. How does one deal with this?



Ms. Grushenko, of the Kiev Post, poses a question to Mr. Brown

Mr. Brown: Because the diploma is one of the principal documents to be submitted in order to obtain a work permit, the Employment Center focuses more on that than work experience. In fact, work experience is not required in the work permit application. Although in the application there is a line for substantiation and qualification, unfortunately the internal rules of the Employment Center are not very flexible. The Employment Center takes a look at the diploma and the availability in, for example, Kiev of Ukrainian citizens with the same type of diploma. They also consider whether a Ukrainian citizen could occupy the applied for position just as well as a foreigner. The Employment Center does not take into consideration other experience and qualifications as much as they should, but again, this is something within the Employment Center's discretion and you need to use the

appeal process. There are no publically available rules as to how the Employment Center weighs diplomas versus qualifications versus substantiation, etc.

We work with the Employment Center for many years on behalf of our clients, and there are people that we can contact there with questions. It is good to have some contacts available before you submit your work permit applications so that you can field any potentially problematic questions. This is vital because if a work permit application is refused for a certain reason, then you may have to wait up to several months before you can submit another application in order to first remove the violation and re-submit the application. And, consequently, you can't apply for an IM-1 visa.



In practice, when an employer receives a refusal to issue a work permit, it receives an explanation as to why the application was refused. The employer can remove such violations immediately, if possible, and immediately re-submit the work permit application. Other violations take time to remedy. If a work permit is annulled for any reason, then the foreigner cannot apply for another work permit until one year passes. Also, if the IM-1 visa is refused for some reason (after the work permit was issued), then the foreigner will have to wait one year before it can apply for another work permit and IM-1 visa. The foreigner is faced with the only choice of entering on a business visa or the visa-free regime. Thus, work permit applications should be prepared with the utmost care.



Comment: I was told that law firms here already charge between 500 to 1,500 Euros for handling these matters. This is a good opportunity to earn money! My question is that in our office we have heard that there are other ways you can do this. For example, you can register as a private entrepreneur and, therefore, you won't need a work permit and can avoid the difficult process. Is there another way you can stay in Ukraine on a legitimate basis and avoid the work permit?



Everyone seems to share the same intellectual curiosity (and growing frustration) about the policies beneath the “new-and-improved rules”

Mr. Brown: First of all, a foreigner may register as a private entrepreneur or register a private firm. However, this is separate from and has no influence on the immigration rules. For instance, the foreigner would still be subject to the “90 days within 180 days” rule. Unless the foreigner is going to invest 100,000 USD into the capital of this private venture, which is very rare, they will still need visas and still be subject to the sojourn and residency rules. Or the foreigner could get married, but he or she would need to be married at least 2 years before he or she could apply for permanent residency.



Question: But, couldn't you apply for a different type of visa and register as a private entrepreneur and not be required to leave every 90 days? You cannot apply for an IM-1 visa if you are a private entrepreneur? Are there any secret ways to stay in Ukraine without applying for a work permit?



And questions continue to flow for quite a while

Mr. Brown: There are only IM-1 visas and business visas for entrepreneurs (or, in some cases, private visas). A private entrepreneur cannot apply for an IM-1 visa on the basis of his or her registration because he or she is not a legal entity. Although a foreigner can open a private company and apply for a work permit for himself, but this doesn't answer your question. To put it simply, no, unfortunately there are no “secret” ways to avoid the work permit procedure that are permissible by law.



I have heard that some companies have been able to register their foreign employees with OVIR without an IM-1 visa (just on the basis of their business visas), but we cannot recommend this because this does not comply with the letter of the law. Another authority may later question such OVIR registration (for example, the border patrol or tax inspection) and you may face problems.

Question: I have been on a business visa for years – 5 year multiple entry visas. Somehow OVIR keeps extending my registration. They are not supposed to be doing that? I have a lot of connections here, as I have been doing business for over 15 years in Ukraine (wife, kids, dogs, pigs...).



Mr. Perry (of Perry Construction) starts off the discussion by posing a serious question about OVIR

Mr. Brown: Well, OVIR is not supposed to be doing that, but maybe there is a different reason for why they are extending your registration? Do you own an apartment and you are registered there? You don't have to answer, but that is a possibility. Or maybe you fall under the category that OVIR is so accustomed to seeing you that they are simply happy to see you and therefore extend your registration because you are such a good guy? Seriously, it is possible that you have never had a break in your OVIR registration and it is just easier for them to re-register you than to have to go through the bureaucracy of cancelling, giving you instructions, providing definitive answers, etc. It may be in connection with property, but the text of the law says "no" in most cases. Strictly speaking, unless you have an IM-1 visa, you shouldn't be registered with OVIR – only if you are extending a stay of over 90 days for a valid reason. But, I'm sure that you have left the country over those 15 years! No? You haven't? Well then, you deserve a medal.

Question: My follow up question is quite simple - the IM-2 visa, is that what is referred to as “permanent residency” or “vid na zhitelstvo”?



Mr. Perry clarifies Mr. Brown's response

Mr. Brown: Yes, “PMZh” – permanent place of residency.

Comment: OK, I'm going to get one of those next week! Thanks!



Mr. Perry appears to be satisfied

Comment: I have been doing the same thing that this gentleman has been doing, and this week my OVIR said they won't do this anymore. Not even for money!!!

Comment: You didn't mention the disadvantages of getting permanent residence. When people think about getting permanent residence, whether they are married or spending a lot of time here, you should know that if you become a permanent resident, all NBU regulations are applicable to you – no bank accounts abroad without licenses, other currency regulations, etc. This can be a big disadvantage.

Mr. Brown: Now I have a practical question for you! Your point is well taken, but how much ability does the NBU have to check on whether foreigners with permanent residency are abiding by the NBU rules? Do they actually check on foreigners? I know that they should, but do they have the resources?



Comment: Actually, tax legislation and immigration legislation are very poorly linked. Each person has their own circumstances. Therefore, there is no clear answer for everyone. I would advise you to analyze your own personal circumstances.

Mr. Frishberg: As an observation, all of the foreigners here that live here for over a half a year have always been classified as residents. Notwithstanding any prohibitions, a lot of these people have offshore bank accounts, and the strict letter of the law was rarely enforced. In my opinion, this kind of caution about having permanent residency is purely theoretical. But, of course, you should be aware of the risks.

Question: Hello, I’m from Pechersk School International. I have a question about spouses and children. Unfortunately, Ukraine does not have a dependent visa. Before the new rules, our parents and teachers came here with IM-1 visas or business visas, and the spouses and children came with business visas. Once we tried to receive private visas, P-1, and it turned out to be a problem because P-1 visas are only issued on the basis of invitations issued by Ukrainian citizens. P-1 also turned out to be a single-entry visa. So, the spouses were unable to travel back and forth, and this became a real nightmare. What does the future hold?



Mr. Brown: That is one of the purposes of the new rules. In the past, even if one had a work permit, no one asked whether they had an IM-1 visa. Most foreigners came on the basis of business visas (or tourist visas). With the strict requirement for IM-1 visas and registration as temporary residents, this means that IM-1 visa holders (as “residents”) can invite their spouses and children to come and live in the same apartment that the IM-1 visa holders are legally registered and living in. In the past, not very many people requested P-1 visas – they would simply request business or tourist visas.



Ambassador Berstad provides his invaluable opinion on the current state of the immigration rules from the diplomatic viewpoint

Again, the Consulates abroad are not yet fully up to speed with the new rules and they may not be sure how to work with it, but they should already be starting to issue private visas to dependents of work permit holders. So now the personal or private visas will become much more important and, perhaps, the business visas will become less important because the visa-free regime grants almost the same privileges. Needless to say, the IM-1 visa is now absolutely essential. The Consulates' websites do not yet reflect all of the changes, but the Consulates are pretty flexible and do not refuse visas unless there is a significant reason.

Ambassador Berstad: Thank you, I am from the Norwegian Embassy. There was an earlier question about notification of the embassies. I am not quite sure of the dates, but we received two notices - one in November or December of last year, when we were informed that the border guards would begin to count dates in the database. There were three categories mentioned, including the WTO category of 180 days within one calendar year. I thought that this was very good and there was no reason for concern. Then maybe three weeks to a month after the introduction of the new rules, we received a new notice where they removed the WTO category, if I'm not mistaken. From my point of view, there is no pretext to criticize the Ukrainian authorities for not having notified the foreign embassies.

When I read these notices (and, of course, there were many references to illegal migration and labor), my inclination was to interpret this within the tax framework, linking taxation with immigration. Of course, we would enforce this in Norway very strictly. If a foreigner is in Norway for over six months, then such foreigner is tax liable in Norway. My instinct was to interpret this in this way, and maybe the next step would be a development in Ukraine to make a stronger link between immigration and taxation rules. The rules don't look very different from the rules we have in many of our countries, and this may also be a matter of harmonization with European or global rules. I completely agree with the term “rule of law” or enforcement of existing law. So, we didn't see any big changes there except in the implementation of the rules.



I have question about OVIR and the ZHEK certificates. Would one need a ZHEK certificate even if one lives in a residence that is not served by ZHEK? What is the role of ZHEK is such cases?

Mr. Brown: I know this one from personal experience. What happens when you live in a private house, for example, is you do not need to go to ZHEK. In such cases, the owner of the house needs to go to the “Gorsovyet” or city council and receive a certificate, which confirms the family status of the owner of the house. If there are other people registered in the house, they would need to confirm their consent to having a foreigner temporarily registered in the house before a notary. The owner

would also have to get the signature of the head of the city council on the lease agreement. In my experience, this procedure was much quicker than dealing with ZHEK.



It's interesting that you brought up the issue about the "180 days within one calendar year" rule. I still don't understand what the correct rule should be. I know that the new Resolution has purportedly cancelled this WTO commitment, but it still exists within the framework of the GATS. According to Ukrainian law, international treaties to which Ukraine is a party take precedence over national legislation. So, one could really argue that the border patrol's interpretation is not correct and, in fact, violates Ukraine's obligations under the GATS.

Question: I am Elena Kovalenko of the Norwegian Embassy. I just wanted to share with you the experience of one of our Norwegian businessmen that travelled to Ukraine on a valid business visa. He was denied entry into Ukraine due to the expiration of a 180 day period of stay. He travelled back and forth, and on the third or fourth trip he was denied entry. I made an inquiry with the state border authorities and I was explained that, yes, the business visa works within the "180 days within one calendar year" rule. I was told that it is only when you exceed 180 days you are denied entry.

Mr. Brown: Interesting, the border patrol explained that if you are from a WTO member state and you hold a business visa, then the rule of "180 days within a calendar year" applies?

Not 90 days within a 180-day period? It is interesting to hear this interpretation because the border patrol explained it differently to me. But, to be clear, if you are in Ukraine for over 90 consecutive days, you would still need to extend your stay with OVIR before leaving. There is no exemption for this sojourn rule.



Comment: My name is Dohyon Kim; I am from the Consulate of the Republic of Korea. I would like to make a comment from a diplomatic point of view. Despite the fact that Ukraine’s attempt to toughen the rules on immigration has been very stressful, as Korean citizens, we do not need visas to come to this country. When I met with many Ukrainian officers of the Ministry of Internal Affairs (I personally looked after the visit of Lutsenko to Korea), they feel that they have lost out because they opened the door to Ukraine for foreigners, but Ukraine is not afforded a similar treatment when it comes to their citizens’ visits abroad.



Our obligation is to reciprocate their special treatment. In the Korean Embassy, if you need an invitation, it is perfectly fine to send by fax or e-mail and I can issue the visa. We can change the rules on issuing visas, and this is just one small part of bringing the world closer. This would make Ukrainians feel that they are treated on an equal basis. I think we need to find a solution to this concern. It is not worth talking about something that we cannot change. So, we need to be very practical in finding this solution. The foreign embassies can work together to offer a compromise or other suggestions with a common position. I think this is something we need to do to change the mindset. Thank you.

Question: Hello, my name is Julia and I am from Horizon Capital Advisors. I have experience in Russia in getting a permanent residency permit, and I can say that the Ukrainian rules are just copied from Russian legislation. When all of these rules actually come into force in practice, then there will be even more issues. First of all, just following the list of documents, there is the medical certificate. In Moscow, there are only four places where you can get the medical certificate, while in Saint-Petersburg there is only one place. This means you are faced with a large queue and 100 Euros to get the certificate. If you are from other countries, you would only need to go to one building, which is renovated and has the latest technology. But, if you are from CIS, you need to go to a different building. Foreigners are not treated equally with citizens of the CIS.



All of the attending guests had something substantive to say, including Julia from Horizon Capital

The second issue is the ZHEK certificate, and I believe that it is the same in Ukraine as it is in Russia. If you are registered with a relative or a friend, you really don't need the lease agreement. You may not have to pay rent. If the landlord doesn't want to show rent payments, he can tell ZHEK that you are staying for free. So, I believe that producing the lease agreement is negotiable. I also believe that there are no lease agreements registered in Ukraine.

With respect to other people registered in the apartment in question (at least in Russia), you should bring all of them to ZHEK and they should sign the waiver in front of the ZHEK official. In other words, they all must be physically present, and this can be a problem for those that are located outside the country. In Russia, this is a separate document.



Further, in Russia, medical insurance is obligatory for everyone. If you don't have a residence permit, you cannot get state medical insurance – you have to get commercial insurance. This means that a few places will earn a lot of money due to the new rules.¹

Lastly, if a person has a type “C” visa (service visa), which is not a diplomatic visa, and such person has an accreditation (service) card, I was told by USAID that such person only needs the accreditation card. So my question to you Scott is this: we have a person that will stay for over 90 or 180 days, and if such person becomes a tax resident, does he need to register his income here? He has a type “C” visa and an accreditation card.

Mr. Brown: I am under the impression that with type “C” visas, the visa holder is subject to special rules, as they are located in Ukraine in association with special projects. I think that these visa holders are subject to different registration rules via their embassies and the state-funded projects themselves. I also think that international reciprocity rules also come into play here. With respect to taxation,

¹ It is also a requirement to have mandatory medical insurance in Ukraine for purposes of OVIR registration. And you can only get it from the state-run insurance company.

they are subject to the same immunity as diplomatic staff and they are not required to register as tax residents within the framework of their projects.

Comment: My name is Yuri Verpinsky and I would like to give my view of the situation. It looks to me to be a bit awkward. It is my understanding that it is the responsibility of embassies to provide detailed information regarding visa concerns to their own citizens. Moreover, embassies deal daily with the Ministry of Foreign Affairs. This is just hypothetical; so, there is no need for an answer, but why wouldn't the embassies place inquiries to provide details on visa applications so that all embassies provide such materials and information to their citizens? In the current situation, we see representatives of embassies asking questions to your panel. I am a bit puzzled by this. Thank you.



Mr. Verpinsky, a self-made man, is posing a “purely hypothetical situation” for the rest of the audience to ponder over

Mr. Frishberg: Actually, that is a very good point that you are making because we tried to invite representatives of the government to join us, including OVIR, border authorities, etc. Unfortunately, these representatives declined our invitation. Apparently, there is an instruction from the Cabinet of Ministers (if I'm not mistaken) prohibiting them from talking to anyone in the press. I believe that only the Minister is allowed to speak.

Question: I have a question about spouses and family members. The person from Pechersk School brought up very good questions about spouses and children. For example, if only one spouse is working and the other spouse and children follow him or her to Ukraine, does the 90 days apply to them? Do they need to leave the country and return? How about children at school? Do they also need to leave?



Many guests were worried about their families

Mr. Brown: No. With respect to the spouses and the dependents, they receive a personal/private visa on the basis of the employees work permit and IM-1 visa. They should get a personal visa for the same duration as the IM-1 visa. The principal (employee), on the basis of his or her IM-1 visa, is able to register with OVIR. Thus, the dependents are also able to register with OVIR “on the tail of” the IM-1 visa. If the children are under 16 years of age, then they are automatically registered with the parent. The spouse usually has to go through a separate registration, but will refer to the other spouse’s employment status, work permit and IM-1 visa for registration purposes. With OVIR registration, the spouse and the dependents are now allowed to move in and out of the country on the basis of their temporary residency.



And personal experience is the basis for the above wisdom

Comment: From my experience in talking to the state employment agencies and those representatives responsible for these issues, they are pretty happy with the rules and they don't wish to change them. They are also very happy about the new sources of payments that they are receiving. This is my impression. Thank you.

Question: Do these new rules apply to foreigners who don't require visas to enter Ukraine? For example, do they apply to European citizens? Can they stay more than 90 days?

Mr. Brown: No, if they are in Ukraine for over 90 consecutive days, they will need to apply to extend their allowable stay in Ukraine with OVIR. These rules apply to any foreigner. Importantly, under the visa-free regime, you cannot register with OVIR for temporary residency. You can only prolong your stay for over 90 days for a valid reason (i.e., temporary illness, inability to travel, etc.).

Question: But during a term of 180 days, a foreigner can only stay in Ukraine 90 days?

Mr. Brown: That is correct.

Question: And if they need to stay more?

Mr. Brown: They need to apply for prolongation of their 90 day permissible stay. This is quite difficult and OVIR does not prolong foreigners' stays without a justified reason. Otherwise, their view is that you should have applied for the appropriate visa and registered with OVIR for temporary residency. One should not stay in Ukraine on an endless basis by simply applying to extend the 90-day stay and never leaving.

This 90-day stay or sojourn rule applies to any foreigner – even if they have a visa. This rule applies to Russian citizens and other CIS citizens – if they are in Ukraine for over 90 days, they must register with OVIR to prolong their stay. Otherwise, they can also face problems at the border. However, Russian citizens, for example, are not subject to the 90-day within 180-day rule – they simply need to leave every 90 days and re-enter. Yes, I have heard of situations when the border authorities tell a Russian citizen to register with OVIR instead of leaving every 90 days, but there is nothing much the border authorities can do if the Russian citizen doesn't violate the 90-day rule. This being said, however, Russian citizens are subject to the work permit rules (and Ukrainians are subject to work permit rules in the Russian Federation).



Question: One practical issue – an accredited person from a representative office was proposed to obtain the position of financial director in a Ukrainian LLC. The question is whether such person will

need to obtain a work permit? And, is there any difference if such person will be employed full-time or part-time?

Mr. Brown: No, there is no difference whether he is employed full-time or part-time, if the foreigner will be employed by a Ukrainian legal entity, then he or she will need to apply for a work permit. As such, the accreditation card will only apply to his or her position in the representative office and, even if he or she is working part-time with the LLC, he or she will need to apply for a work permit. This becomes difficult because it is doubtful that the Employment Center will issue a work permit for a part-time foreign employee. The reasoning most likely would be that a Ukrainian citizen could occupy a position that only requires part-time labor.

Question: My name is Uliana from Honda Ukraine, and I have one more question related to family members. In case a foreigner is staying here for 90 days and then applies for OVIR registration, may the family members come in and out of Ukraine within the 180 days? Or just leave Ukraine and not come back because of the "90 days within 180 days rule"?



Mr. Brown: Please allow me to clarify. There are two different types of OVIR registrations. The first type is if a foreigner will be here for more than 90 consecutive days and for some reason such foreigner cannot leave within 90 days, then the foreigner will have to register to

prolong his or her stay. This procedure is pretty simple provided that there is a substantiated reason to prolong the stay.

The second type of OVIR registration is registration for temporary residency, which is related to work permits and IM-1 visas. For example, I work for a Ukrainian LLC and I want my wife and children to stay with me. I would need to get my work permit and apply for an IM-1 visa. Then, I can apply for temporary residency with OVIR and receive a stamp in my passport that allows me to exit and re-enter Ukraine as many times as I need/wish for the duration of my work permit. Thus, the single-entry IM-1 visa becomes a multiple entry visa with OVIR registration. My wife would register on the basis of our marital status, confirmed by the relevant documents. She would also get the same type of temporary residency status for the same duration as me. If my children are under 16, then they will automatically be registered under my and my wife's passports. If they are over 16, then they will also need to be registered on the basis of their identification documents. Thus, my family members will also be able to move in and out of the country on the basis of their OVIR registrations for the duration of my work permit.



Question: Does this mean that OVIR will register the family members on the basis of private (P-1) visas?

Mr. Brown: This is how the new rules should work. As long as the private visa holder can prove his or her relations with the IM-1 visa holder, then they should be able to register as dependents with OVIR. If a private visa holder simply goes to OVIR to register as a temporary residence, there will be no legal grounds for OVIR to register such person. There must be a connection to residency such as an IM-1 visa, work permit or other grounds.

Question: Should the packet of documents be the same for the principals and the dependents?



Mr. Brown: They are basically the same. However, the spouse wouldn't have to produce the work permit and IM-1 visa. The spouse would produce his or her own visa and documents confirming marital relations, etc. If the spouse eventually found a job in Ukraine and he or she needs to obtain a work permit, they could go through the work permit process (if all documents are available in Ukraine), leave Ukraine upon receipt in order to obtain an IM-1 visa, and go through the OVIR steps as a holder of a separate work permit.

Question: What happens if a family member receives a multiple entry "B" visa (business visa)?

Mr. Brown: I think that OVIR may not register the family member on the basis of a business visa because the dependents are supposed to get private visas, as they will be in Ukraine for private

reasons and not for business reasons. There is no business reason to accompany a spouse to Ukraine for his or her employment. The private visas can be “tied” to the IM-1 visa, but a business visa will most likely not “tie” to the IM-1 visa for OVIR purposes.

Question: If the person is a citizen of the EU, should she get a private visa?



Mr. Brown: Yes, because apparently OVIR will not register a family member without the private visa. If an EU or US citizen comes in on the visa-free regime, he or she will not be able to register with OVIR. The visa-free regime does not apply to the OVIR procedure.

Question: So, this person should cancel the “B” visa and get a “P” visa?

Mr. Brown: According to the new rules – yes.

Mr. Olaf Berstad, the Norwegian Ambassador: I have a comment to the gentleman who spoke regarding the role of embassies of foreign countries in Ukraine. As an example, we do get a lot of questions regarding immigration and visa rules in Ukraine. As a matter of principle, however, we do not engage in the interpretation of Ukrainian laws and regulations. We point such questions in the direction of Ukrainian embassies and consulates abroad or to law firms in Ukraine. We can have our

own views of the effectiveness and practicality of Ukrainian immigration and visa rules. However, we do not offer any particular advice.



On the other hand, this is, of course, a very important subject. This is a major issue in all countries. We've increased immigration and tourism in our countries, and I think that many of the questions posed today are questions that are posed everyday through our hotline to the Embassy. It turns out that every case is special. From the point of view of the lawmakers and the authorities, it is an enormous task to develop and implement an effective system. My message to professionals dealing in the field is that we sympathize with you – this is a complex issue and we are dealing with it in the Embassy everyday. Everyone believes that their case is special. Thank you.

Mr. Brown: This is a very true comment in terms of how lawyers deal with these issues. Every client has their own case and special circumstances. Sometimes they have twenty five foreigners coming to Ukraine with twenty five different circumstances. If you simply read to them what is written in the law – this is simply not enough most of the time. Professionals also need to be able to apply to the local authorities to get some practical advice as well. I am hoping that every year the local authorities are becoming more flexible toward this. They are getting better and they are absolutely essential because they know the practicalities. I'd like to see a network within these local authorities to work with because laws can be interpreted in many different ways – especially vaguely written laws.

Question: I have a short question. I'd like to know the situation with people that have two passports. I am a French citizen and I have heard that it is possible to apply for two passports – one personal and one for business. Can people with two passports somehow “play” with the situation?



Mr. Brown: It is possible to have two passports in some countries and we have seen cases when our clients have two passports. I know in the US you can get two passports, but the second passport is only for a short period and is used in case your first passport is involved in registration procedures. So, yes, in some cases, you can have two passports and work with that. I don't know the specific rules for each country.

Mr. Verpinsky: I would like to thank Ambassador Berstad for his comment on the role of embassies. I would like to stress that I was not and I am not expecting from representatives of embassies to interpret Ukrainian laws. I do, however, expect that embassy representatives clarify certain visa matters. That's all, thank you.



At last, the presentation comes to an end, with a reception to follow

Mr. Frishberg: And now, with your permission, I bring our show towards its logical conclusion. From what we’ve heard today, you can see that life for foreigners in Ukraine in the good-old days were quite easy. And now, all of a sudden, we have the “rule of law”. The rule of law comes at a certain price: the price of personal freedom and mass confusion. Right now we are going through both of these stages until the dust settles. During this stressful time you may have many questions. For that reason, we have prepared small forms that you can fill out with your specific questions. Also, if you’d like to make any comments or suggestions about future seminars that Frishberg & Partners should hold, we’d love to hear from you anytime. Thank you for coming, and now, please enjoy the excellent wines and tasty treats provided by Kiev’s best catering company, the “Shooters” team.

