

GMS Flash Alert

Immigration Edition

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Germany – Shedding More Light on the Non-Visa National Privilege

Certain third-country¹ migrants to Germany may be in Germany for a period of time without a long-term residence title, but may believe that by invoking the “national privilege” principle, they can freely travel out of Germany to another Schengen Area country while German authorities process their residence title application. Since a residence title at the local immigration offices cannot be obtained immediately –because of appointment requirements, etc. – these foreign individuals will be in Germany without a residence title for some time.

In response to an enquiry from KPMG Law in Germany, the Federal Ministry of the Interior confirmed that during the period of time in question, travelling to other Schengen Area countries is not permissible.²

WHY THIS MATTERS

If third-country nationals are in possession of a National D Visa, they will be allowed to travel within the Schengen Area for cumulatively 90 days within a rolling period of 180 days. This is regulated in Art. 21 (2a) of the Convention Implementing the Schengen Agreement (CISA).

However, nationals without a visa who refer to the aforementioned non-visa national privilege might need to travel within the Schengen Area for business purposes or for private purposes (for example, vacations).

Nationals of every country listed in German statutes Sec. 41 (1) and (2) AufenthV³ are – from a Schengen regulations perspective – exempt from obtaining a Schengen Visa for short-term trips of up to 90 days within a rolling period of 180 days.⁴ Therefore, a lot of migrants are under the impression that they are likewise exempt while in Germany for a long-term stay and waiting for their residence titles.

KPMG Law had opined – and with its opinion now confirmed by the authorities – the general exemption from the Schengen Visa requirement does not apply to migrants after they have entered the Schengen Area and claimed national privilege before their residence title is available or a document having comparable effects has been granted.

Against this background, companies and their international staff should consider refraining from use of the non-visa national privilege.

Background

Third-country nationals are usually required to apply for a National D Visa before entering Germany, whereas nationals of countries listed in the regulations⁵ are exempt from this requirement – these exemptions are commonly known as “non-visa national privilege.” If making use of the privilege, such individuals will be required to enter Germany directly from a non-Schengen country.⁶

According to Sec. 41 (1) and Sec. 41 (2) AufenthV, nationals of the following countries may choose not to apply for a National D Visa before entering Germany and directly apply for a residence title (for example, a residence permit or EU Blue Card) in-country:

Regulation	Sec. 41 (1) AufenthV	Sec. 41 (2) AufenthV
Purpose	Every purpose including working in Germany, whereas applications for ICT Cards pursuant to Sec. 19a (1), (2) or (3) AufenthG ⁷ based on the ICT Directive are excluded. If an assignment falls under the ICT Card regulation of Sec. 19b AufenthG, the concerned assignee must apply for a National D Visa (see Sec. 41 (4) AufenthV).	Every purpose excluding working in Germany.
Countries	- Australia; - Canada; - Israel; - Japan; - New Zealand; - Republic of Korea (South Korea); - USA.	-Andorra; - Brazil; - El Salvador; - Honduras; - Monaco; - San Marino,

However, Sec. 41 (1) and (2) AufenthV are German regulations which do not derive from EU laws or apply in every EU member state or Schengen member state.

Any intended stay of *more than 90 days* at a time leads to the application of Art. 18 and 19 CISA; only for intended stays of *up to 90 days* within a rolling period of 180 days does Regulation (EU) No. 2016/399 remain applicable, and nationals of countries listed in Art. 1 (2) in conjunction with Annex II of Regulation (EC) No. 539/2001 can enter Germany and other Schengen Area countries without a Schengen Visa.

In applying the Schengen rules, any person on a long-term stay in Germany who travels to and enters another Schengen Area country requires a National D Visa or must be in possession of a national residence title under the terms of Art. 2 No. 16 lit. a of Regulation (EU) No. 2016/399. Alternatively, each Schengen Area member state may present other pertinent documents (other than residence titles) for the individual which should be deemed as documents with comparable effect.⁸

When a third-country national has entered the Schengen Area for a long-term stay, his or her ability to travel is regulated by Sec. 21 (1) and (2a) CISA. According to these two regulations, a third-country national in Germany who will be travelling to another Schengen Area country requires alternatively one of the following:

- a German National D Visa;
- a German residence title in terms of Sec. 2 No. 16 lit. a of Regulation (EU) No. 2016/399 (for example, a residence permit or EU Blue Card); or
- a German document notified to the Commission of the EU under Sec. 2 No. 16 lit. b of Regulation (EU) No. 2016/399.

The most relevant document with regard to the latter option is the so-called “Fiktionsbescheinigung” issued pursuant to Sec. 81 (4) AufenthG in the format of Annex D3 to the AufenthV. This can be issued if a German National D Visa or long-term residence title existed and the application for a new residence title was filed before the expiry of the previous National D Visa or long-term residence title. The same applies for the renewal of a long-term residence title, for example an EU Blue Card.

Fiktionsbescheinigungen can also be granted pursuant to Sec. 81 (3) AufenthG, but these are not “notified documents” and cannot serve as travel documents.

The difference between both versions is that in case of Sec. 81 (3) AufenthG, the foreigner entered Germany legally, but does not possess a German National D Visa or residence title. This is exactly the situation when one invokes the non-visa national privilege.

Therefore, travelling to other Schengen Area countries without any of these documents is considered an illegal stay, which can lead to sanctions being imposed by each of the countries. This might also jeopardize the application for a residence title in Germany, because an individual with a record of criminal sanctions in other countries could see his or her application rejected.⁹

KPMG NOTE

In order to remain compliant and to preclude jeopardizing an ongoing immigration process in Germany, third-country nationals will need to remain in Germany and not travel within the Schengen Area. Leaving and re-entering will only be possible if the trip’s destination country is a non-Schengen Area country and the return to Germany happens from a non-Schengen Area country as well.

Companies should discuss this limitation with their international staff assigned to Germany and monitor their short-term travel closely.

Due to the long lead-times for appointments at the local immigration offices, it is recommended that non-visa nationals apply for a National D Visa. A National D Visa includes a temporary work authorization during its period of validity and holders of such Visa may start working immediately upon arrival. The travel limitations and the delays in the ability to work in Germany while waiting for an appointment at the immigration office are strong arguments for obtaining National D Visas, even if the national privilege of Sec. 41 (1) and (2) AufenthV applies.

FOOTNOTES:

- 1 Foreigners who are not citizens of a European Union (EU) or European Economic Area (EEA) member state.
- 2 Response from Section M2, Federal Ministry of the Interior (*Bundesministerium des Innern*) on August 30, 2017.
- 3 For AufenthV (only in German) on the Web site for Das Bundesministerium der Justiz und für Verbraucherschutz, [click here](#).
- 4 See: Art. 6 of Regulation (EU) No. 2016/399 and Art. 1 (2) in conjunction with Annex II of Regulation (EC) No. 539/2001.
- 5 As noted earlier, regulated in Sec. 41 (1) and Sec. 41 (2) AufenthV. The exemption in Sec. 41 (1) does not apply for applications for so-called "ICT Cards" to be issued under Sec. 19b AufenthG. The ICT Card is a specific type of German residence title in terms of Sec. 4 (1) AufenthG based on the Directive (EU) No. 2014/66 (ICT Directive).
- 6 This was confirmed to KPMG Law in Germany on the occasion of an e-mail exchange with the Federal Ministry of the Interior on April 1, 2015.
- 7 For AufenthG (only in German) on the Web site for Das Bundesministerium der Justiz und für Verbraucherschutz, [click here](#).
- 8 This is regulated in Art. 2 No. 16 lit. b of Regulation (EU) No. 2016/399.
- 9 See Sec. 54 (2) No. 9 AufenthG in conjunction with Sec. 5 (1) No. 2 AufenthG.

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