

# Transferring Professionals Across the Pond

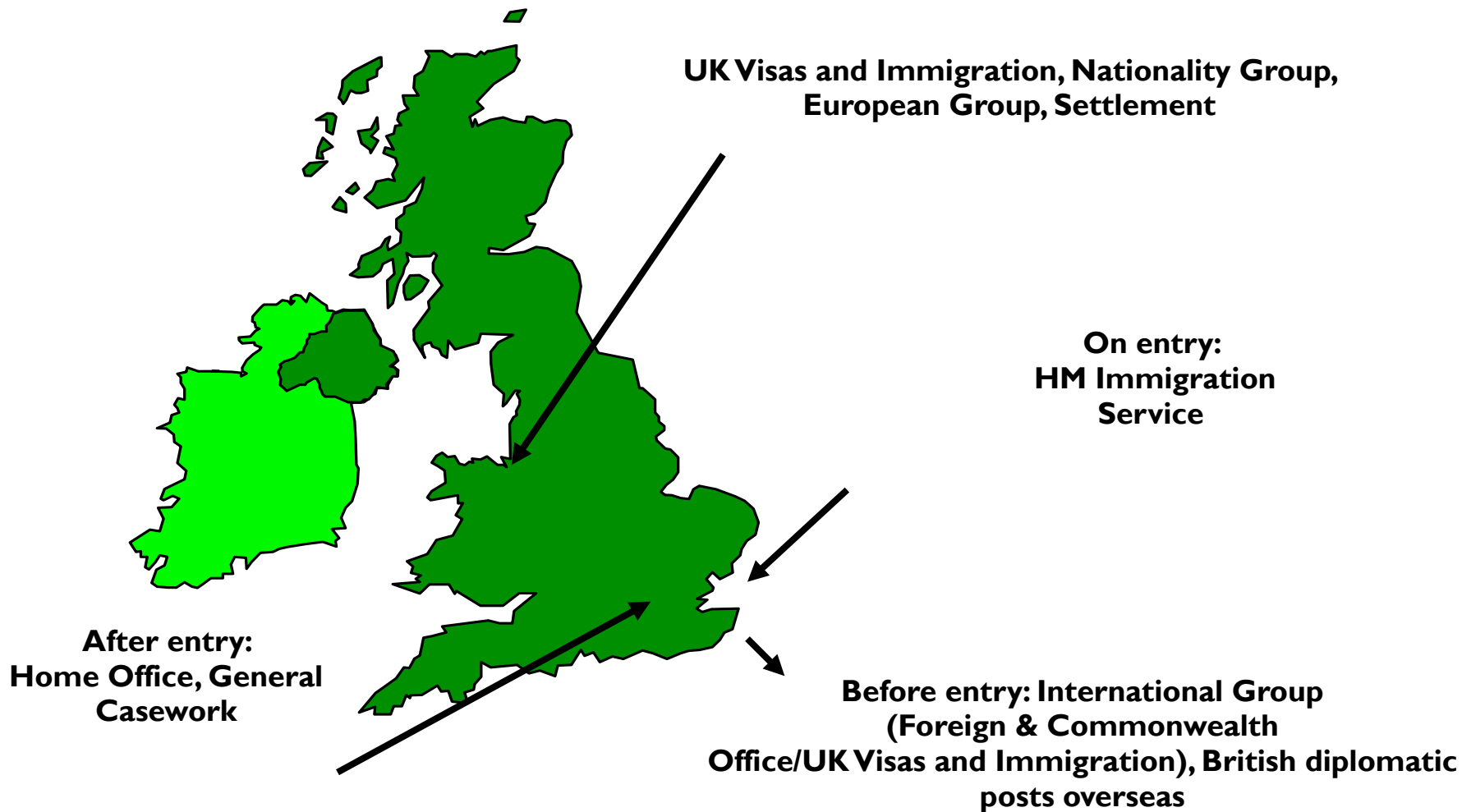
**A discussion of the UK's Immigration Rules covering Tier 1 (Investors) and (Entrepreneurs) and Tier 2 (Intra-Company Transfers) and perspectives on managing the client experience.**

**Anushka Sinha**

**IWP New York Meeting  
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- **UK immigration system**
- **Employers' liability**
- **European free movement**
- **Immigration categories permitting employment**
- **Tier 1 (Investor)**
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- **Tier 2 sponsorship**

# UK immigration system



# Employers' liability

## Section 8 Immigration and Asylum Act 1996

- 27 January 1997 to 28 February 2008
- criminal offence to employ person aged 16+ subject to immigration control who does not have correct permission to work in UK
- statutory defence if prescribed checks carried out prior to employment
- no defence for knowingly employing
- £5,000 max penalty for each illegal employee on summary conviction/unlimited fine in Crown Court

# Employers' liability

## Sections 15 and 21 Immigration Asylum & Nationality Act 2006

- employment on or after 29 February 2008
- s21 - criminal offence of knowingly employing person without permission to work. No statutory defence. Max 2 years imprisonment or fine or both
- s15 - civil penalty. Strict liability. Statutory defence available. Max £10,000 fine per illegal employee
  - failure to carry out prescribed checks may result in paying a civil penalty if employ an illegal worker
- interplay with sponsorship and ongoing duties

# Employers' liability

## Right to work checks - establishing defence

- before start work
  - visual check for identity
  - view original document(s) from prescribed lists
  - retain copy in permitted format
- repeat every 12 months if time limited permission (List B)
- retain documents for 2 years after employment ceases
- no excuse *knowingly* employing an illegal worker

# European free movement

## EEA members

- Austria
- Belgium
- Bulgaria\*\*
- Croatia\*\*\*
- Cyprus
- Czech Republic\*
- Denmark
- Estonia\*
- Finland
- France
- Germany
- Greece
- Hungary\*
- Iceland
- Republic of Ireland
- Italy
- Latvia\*
- Lichtenstein
- Lithuania\*
- Luxembourg
- Malta
- Netherlands
- Norway
- Poland\*
- Portugal
- Romania\*\*
- Slovakia\*
- Slovenia\*
- Spain
- Sweden
- Switzerland\*\*\*\*
- UK

\* A8 countries – no restrictions since 1 May 2011

\*\* A2 countries – accession worker card required for employment. Restrictions to be lifted on 1 Jan 2014

\*\*\* joined EU 1 July 2013 - accession worker card required for employment.

\*\*\*\*not EEA member but similar free movement rights to EEA nationals

# Immigration categories permitting employment

- Tier 1 (Post Study Work)
- Tier 1 (General/HSMP)
- Tier 2 (Sponsorship)-replaced work permit scheme
- Tier 4 (Student) – restricted
- Tier 5 (Youth Mobility Scheme)
- certain non-PBS categories eg UK ancestry, settled persons
- dependants of specific PBS migrants including: Tier 1, 2, 4 (if student has leave for 12 months or more and following course of degree level or above)
- dependants of specific non-PBS migrants eg UK ancestry, settled persons

**List is not exhaustive but a selection**

**Read the conditions on the immigration endorsement/Biometric Residence Permit check with LDA if unsure**



# Tier I Investors

# Tier 1 Investor

## Advantages

- no English language requirement (but NB ILR!)
- no maintenance requirement
- permitted to take any work (whether employed or self-employed) or study in the UK but not obliged to do so
- no 'main home' requirement (unlike previous Investor category)
- generous absence provisions for ILR
- potential accelerated ILR

# Tier I Investor - initial - attributes

Either

- £1 million
- own money \*
- under his control \*
- held in regulated financial institution (FCA/ PRA or overseas home regulator) and
- disposable in UK (75) Prudential Regulatory Authority

Or

- owns £2 million net personal assets (taking into account liabilities on them)
- and £1 million, under his control, held in a regulated financial institution and disposable in UK, loaned by a UK FCA/PRA regulated financial institution (75)

## Tier I Investor - funds

- £1m must be freely transferable to UK and convertible to pounds sterling
- Funds not held in UK, applicant must provide letter from financial institution stating funds can be transferred
- Institution must be regulated by home regulator (the official regulatory body of country in which institution operates)
- If held in foreign currency, [www.oanda.com](http://www.oanda.com) exchange rate on date of application applies

## Tier I Investor - funds

- May be held overseas or in foreign currency at time of application
- May already be in UK (within last 12 mths if invested)
- May be owned jointly with or solely by husband, wife, civil partner, unmarried partner or same sex partner ('Partner') - unrestricted right to transfer / dispose of funds and have permission from Partner (additional evidence)
- excludes money that a loan has been secured against, where another party would have a claim on the money if loan repayments were not met (unless made application before 13 December 2012)

# Tier I Investor - procedure

- Entry clearance
- Leave to remain (NB no overstay beyond 28 days)
  - Tier I - General, Investor, Entrepreneur, PSW (*not* ET or GE)
  - HSMP, Investor, Businessperson, Innovator, Writer composer artist
  - Tier 2
  - Work permit holder
  - Tier 4, Student, Student Nurse, Student Re-Sitting an Exam or student writing up thesis

# Tier 1 Investor - periods and conditions

- Initial - 3 yrs 4 mths LTE, 3 yrs LTR
- Extension - 2 yrs (3 if previously investor)
- ILR - 5 yrs (3 or 2 if accelerated, or at any time once held minimum specified investment for specified period whilst held leave as Investor/ Tier 1 Investor))
- No recourse to public funds
- Registration with the police (if applicable under para 326)
- No employment as a Dr/Dentist in training (unless primary degree in medicine/ dentistry, bachelors+ level, from UK institution which is recognised/listed body or has T4 licence) (and also for LTR if last grant does not prohibit that employment and has been so employed)
- No employment as professional sportsperson including coach

## Tier 1 Investor - extension - attributes

- £1 million own funds, under his control, in UK OR £2 million net personal assets and £1 million under his control in UK, loaned by UKRFI (30)
- At least £750,000 invested in UK Government bonds or share/loan capital in active and trading UK registered companies (NB restrictions) AND balance to £1 million in permitted assets/on deposit in UK (30)
- Investment made within 3 mths of entry/grant of leave and maintained since, OR investment not more than 12 months before date of initial application OR last grant of leave as pre-PBS investor (15)



## Tier 1 Investor - investment required

- Bring minimum £1m into UK
- £750,000 of which invested in UK by way of:
  - UK Government bonds; or
  - share capital or loan capital in active and trading companies registered in UK
- Investment in share/loan capital can be held in foreign currencies
- Investment must be made within 3 mths of specified date
- Investment value fluctuations must be made up by next reporting period

# Tier I Investor - balance of funds

- Unmortgaged portion of own home
- Assets in UK held for investment purposes (not personal possessions)
- Other investments in UK (eg. property companies) & excluded investments
- Cash on deposit

# Tier I Investor extension - evidence

£750,000+ minimum investment in:

- portfolio of investments certified by UKRFI
- if old rules investor and unable provide above as self-managed or overseas managed
  - certified copy bond documents
  - share documents
  - audited annual accounts/accountant's certificate

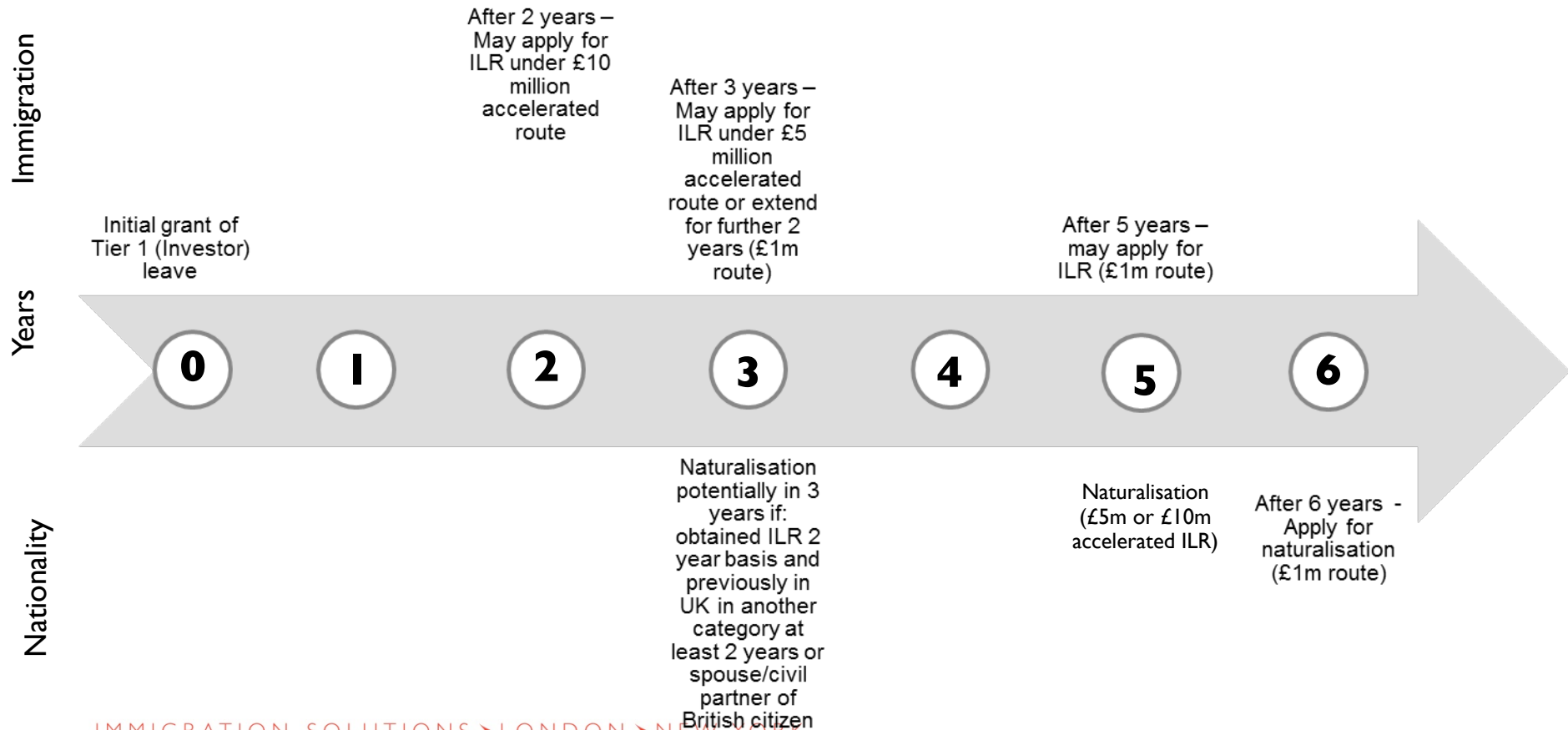
Balance to £1 million

- documents confirming purchase/valuation
- bank statements/letter

# Tier 1 Investor - ILR

- Must not fall under general grounds for refusal
- Not in breach except overstay 28 days/less
- Life in UK test – NB **English language** will be tested
- Introduction of new ESOL requirement into KOL test from October 2013

# Overview of routes to settlement Tier 1 Investor (principal)



# Tier I Entrepreneurs

# Tier I Entrepreneur

- Must not fall for general grounds of refusal
- Appendix A - attributes - 75 points
- Appendix B - English - 10 points
- Appendix C - maintenance - 10 points
- Genuine entrepreneur test (initial applications only – not apply where has had LTE/R as Tier I (Entrepreneur) migrant, businessperson or innovator during 12 mths prior to application.
- Must not be in breach except overstay 28 days/less
- Must comply any request to attend interview (unless reasonable explanation)

# Tier 1 Entrepreneur - genuine entrepreneur test

- Genuinely intends and is able to establish, take over or become director of one/more businesses in UK within next 6 mths
- Genuinely intends to invest money referred to in Table 4 in the business(es)
- Money genuinely available to applicant(s) and will remain so available until such time as spent by business(es) (see funds slide for definition of 'available' and 'spent')
- Applicant(s) must not intend to take employment in UK other than working for business(es) applicant has established/joined/taken over
- No points if decision-maker not satisfied with genuineness in relation to points-scoring requirements



# Tier I Entrepreneur - initial attributes

## Attributes (Table 4) (75)

- access to at least £200,000; or
- access to at least £50,000:
  - from designated organisation - FCA regulated venture capitalist (VC) firm, UKTI listed seed funding competition or government department; (if LTR and last leave as Tier 4, Student, Student Nurse, Student Re-sitting Exam, Student Writing up Thesis must qualify on this basis); or
  - has/last granted leave as a Tier I Graduate Entrepreneur and applying for LTR;
  - has/last granted leave as Tier I Post Study Worker, applying for LTR, registered as self-employed/director and engaged in business activity other than that necessary to administrator business in an NQF4 SOC code occupation (25)
- held in regulated financial institution (25)
- disposable in UK (25)

## Tier I Entrepreneur - funds

Applicant will only be considered to have access to funds if

- specified documents show cash funds
- specified documents show applicant has permission to use money to invest in business in UK
- money disposable in UK if either held in UK regulated financial institution or transferrable to the UK and convertible to GBP; and
- no points if funds held in institution listed in Appendix P.

## Tier I Entrepreneur - funds

- Money must remain available to applicant until spent in establishment/running of business(es)
- ‘Spent’ excludes spending on applicant’s own remuneration
- ‘Available’ means funds are in own possession/in financial accounts of UK incorporated business of which is director/available from a third party(ies) named in application

# Tier I Entrepreneur - funds

Entrepreneurial pair (team)

- two applicants may claim points for same funds, investment and business activity
- must have equal control over funds and/or business/es
- must both be shown by name in each other's applications and specified documents
- restrictions where same funds relied on in previous application

## Tier I – Entrepreneur - English

- National of specified country
- Bachelor's degree in specified country
- Bachelor's degree undertaken in English (UK NARIC)
- Completion of Council of Europe Common European Framework for Language learning B1 (previously C)

# Tier I – Entrepreneur - English

## Home Office list of English speaking countries – nationality/ degree

- Antigua & Barbuda
- Australia
- The Bahamas
- Barbados
- Belize
- Canada\*
- Dominica
- Grenada
- Guyana
- Ireland\*\*
- Jamaica
- New Zealand
- St Kitts & Nevis
- St Lucia
- St Vincent & the Grenadines
- Trinidad & Tobago
- UK\*\*
- USA

\*Nationality only

\*\*Degree only

## Tier 1 – Entrepreneur - maintenance

	<b>Overseas</b>	<b>In UK under 12 mths</b>	<b>In UK at least 12 mths</b>
Main applicant	£3,100	£900	£900
Each dependant	£1,800	£1,800	£600
Example totals, family of 4	£8,500	£6,300	£2,700

## Tier I – Entrepreneur - maintenance

- Minimum balance, every day of 90 day consecutive period ending not more than 31 days prior to date of application
- Held in applicant's own name (including joint names) NOT a third party
- In addition to the £200,000 / £50,000
- Cash accounts only (no financial instruments, shares, bonds etc)
- Prescribed documents



# Tier I Entrepreneur - conditions

- No recourse to public funds
- Registration with police (if required)
- No employment other than working for the business(es) the applicant has established/joined/taken over (any self-employment permitted)
- No employment as professional sports person (including coach)

## Tier I Entrepreneur - period of leave

- Initial - 3 yrs 4 mths LTE, 3 yrs LTR
- Extension - 2 yrs (3 if previously business person)
- Indefinite leave to remain – after 5 yrs (or 3 if accelerated) - may only amalgamate Tier I (Entrepreneur) with Business person and Innovator

# Tier I Entrepreneur – curtailment

- May curtail if have failed within 6 mths of specified date to:
  - register new business in which director or
  - register as director of existing business or
  - register with HMRC as self-employed
- May curtail if funds referred to in relevant parts of Appendix A cease to be available to him (except where spent in running of business(es))
- Does not apply if previous leave to current leave was as Tier I (Entrepreneur), Businessperson or Innovator
- Supplementary to 323 (mandatory and discretionary)

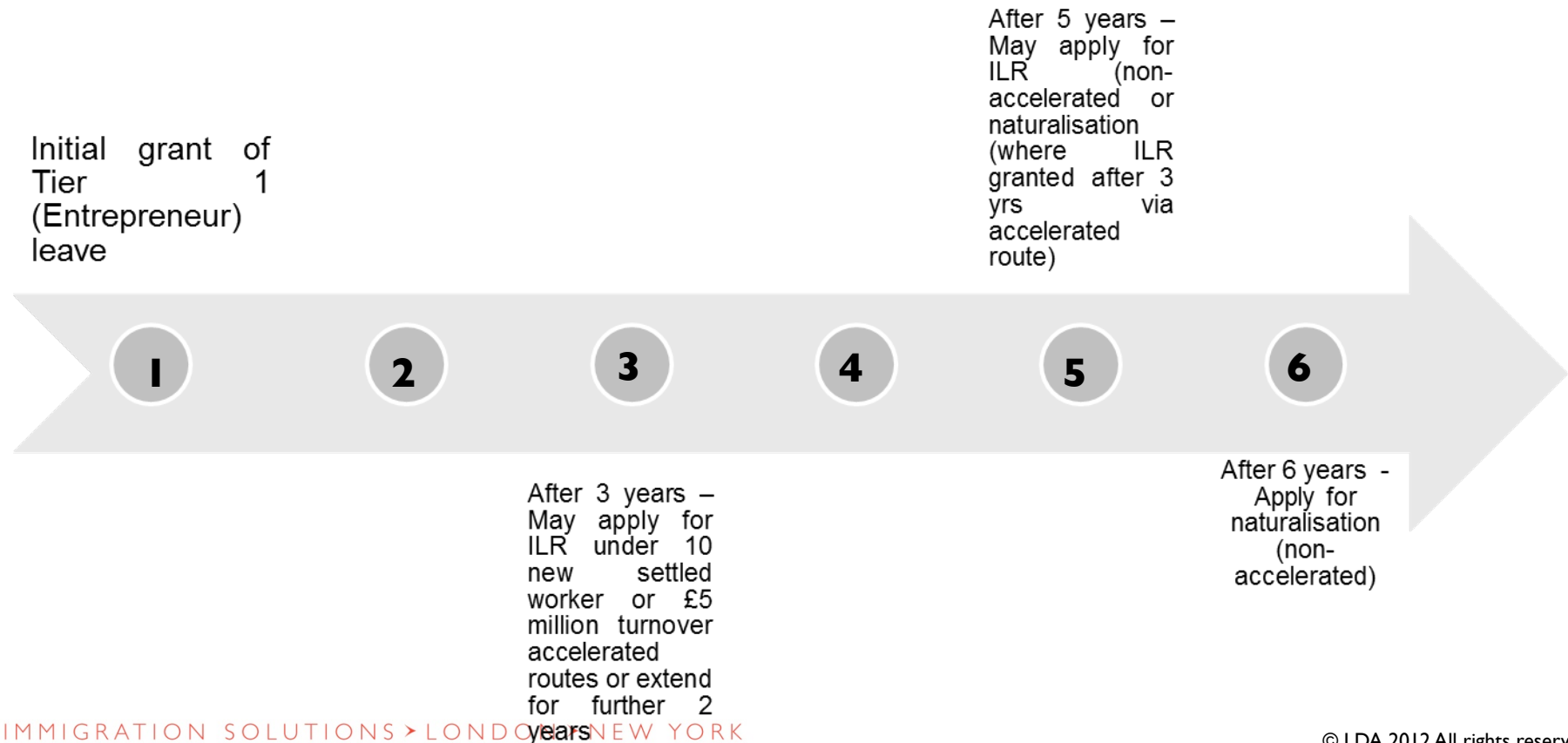
# Tier I Entrepreneur - extension

- Attributes (Table 5) (75)
  - has invested/had invested on his behalf at least £200,000 (£50,000) cash directly in one or more UK businesses (20)
  - within 6 mths of entry as part of leave (unless business person/innovator), registered new business in which director or registered as director of existing business or as self-employed (20)
  - engaged in business activity at time of application - on a date no more than 3 mths before date of application still registered as above (15)
  - created equivalent of at least 2 new full-time jobs for settled workers, for at least 12 mths (unless business person/innovator) (20)
- English (10)
- Maintenance (10)

# Tier 1 Entrepreneur - ILR

- Must not fall under general grounds for refusal (NB criminality)
  - Not in breach, except overstay 28 days/less
  - Life in UK test
  - Attributes (Table 6) (75)
    - still registered as director/self-employed within last 3 mths prior to application (20)
    - 2 full-time employees for 12 mths (equivalent) (20)
    - continuous lawful period as Tier 1 Entrepreneur/business person/innovator without absences over 180 days in any 12 mths during:
      - 5 yrs
      - 3 yrs if: 10 jobs /12 mths equivalent; or £5 million income / net increase income over 3 yrs, whilst holding leave as a Tier 1 Entrepreneur (35)
- **NB accelerates ILR not citizenship!**

# Overview of routes to settlement Tier 1 Entrepreneur (principal)



# Tier 2 Sponsorship

# Tier 2 General & ICT sub-categories

## General

- resident labour market test (RLMT)
- shortage occupations
- post study work/Tier 4 switch
- salary over £152,100

## Intra-company transfer (ICT)

- short term staff
- long term staff
- graduate trainee
- skills transfer



# Restricted v Unrestricted

- onus on employer to correctly identify whether job/migrant falls to restricted/unrestricted CoS – will revoke licence if unrestricted CoS used for restricted job
- restricted (subject to cap) and applied for each migrant on case by case monthly basis
  - general - outside UK and under £152,100 salary
- unrestricted (not subject to cap) within allocation
  - ICT
  - general - salary £152,100+
  - general - already in UK in switching category

# Tier 2 - Resident Labour Market Test (RLMT)

## Advertising mediums

- UJM (Universal Job Match) AND
  - as specified in sector Codes of Practice
    - national newspapers, professional journal
    - internet ad (inc sponsor website if over 250 UK employees or a multi-global organisation)
    - milk round (min of 3 UK universities visited (codes also state interns and graduate positions only, if applicable at all))
- **do not need to advertise on UJM if salary will be £71,000+**

# Tier 2 General - RLMT

## Content of advertisement

- job title
- main duties/responsibilities
- location
- indication of salary package/range/terms
- skills/qualifications/experience required
- closing date (unless rolling)

# Tier 2 General - RLMT exceptions

## No RLMT required if

- salary package will be £152,100 gross
- shortage occupation role (from Home Office list)
- current permission as Tier 1(PSW)/IGS/SEGS/FTWISS migrant
- current permission as Tier 2 migrant with a different UK sponsor
- current permission as Tier 4 migrant/Student and passed/will be awarded
  - UK recognised bachelors/postgraduate degree/PGCE or
  - completed minimum 12mths study in UK towards UK PhD

# Tier 2 General

## Exclusion period

- 12 months from date departure from UK if able to evidence otherwise date of leave expiry (cannot re-enter as a Tier 2 migrant)
- not applicable where salary £152,100+ but still have to leave the UK after maximum six year period

## Tier 2 ICT sub - categories

- established staff - long term staff (LTS)
  - established staff - short term staff (STS)
  - graduate trainee
  - skills transfer
- 
- **common ownership/control (is overseas entity on the licence?)**
  - **no settlement (unless established staff under rules pre 6 April 2010) – may prefer General route?**
  - **no switching**

## Tier 2 - ICT

### LTS

- 12 months qualifying employment within group
- graduate level role SOC code
- minimum salary £40,600 (plus applicable SOC code)
- up to 3 years initially, can extend in 2 year instalment but maximum 5/9 years
- 12 months exclusion period

### STS

- 12 months qualifying employment within group
  - graduate level role SOC code
  - minimum salary £24,300 (plus applicable SOC code)
  - up to 12 months – no extension
  - 12 months exclusion period unless re-entering as T2 (ICT LTS) migrant
- **graduate level, salary threshold and limit on duration not apply if extending pre 6 April 2011 leave as ICT WP/T2**

## Tier 2 ICT

### Graduate trainee

- 3 months qualifying employment within group
- maximum 12 months
- max 5 per year per sponsor
- accelerated promotion schemes only - graduate level role SOC code
- minimum salary £24,300 (plus applicable SOC code)
- 12 months exclusion period unless re-entering as T2 (ICT LTS) migrant

### Skills transfer

- no minimum period of employment
- maximum 6 months
- propose to acquire skills/knowledge to take back overseas or to impart to UK - graduate level role SOC code
- supernumerary
- minimum salary £24,300 (plus applicable SOC code)
- 12 months exclusion period unless re-entering as T2 (ICT LTS) migrant



# Tier 2 ICT

## Exclusion period

- 12 months from date departure from UK if able to evidence otherwise date of leave expiry
- LTS not subject to exclusion if last grant of leave as STS, GT or ST ICT, but is following previous LTS leave
- LTS allows up to 5 years – but leave granted for lesser period (if not extended) triggers exclusion

# Tier 2 General v Tier 2 ICT

## General

- no minimum period of service
- UCoS v RCoS?
- RLMT – gross salary?
- maximum stay 6yrs
- time spent counts towards ILR

## ICT

- minimum period of service
- gross annual salary package - £24,300/  
£40,600
- maximum stay 12 mths/ 5yrs/ 9yrs
- no ILR/ British citizenship

## Tier 2 – assigning a CoS

### Sponsor is confirming

- job at or above min skill level or higher
- market rate salary
- migrant able and intends to do job
- genuine vacancy
- to best of knowledge, migrant meets rules and likely to comply with their conditions
- requirements for assigning CoS under ICT, RLMT, Tier 4/PSW switch or SOL are met

## Tier 2 points

<b>A. Attributes points – minimum 50 required</b>	
<b>Certificate of sponsorship (all categories)</b>	<b>Salary compliant with Code of Practice</b>
<b>30 points</b>	<b>20 points</b>
<b>B. English – 10 points (mandatory – but not for ICT)</b>	
<b>C. Maintenance – 10 points (mandatory)</b>	

## Tier 2 - English language requirement

- Degree taught in English
- English language test
- English speaking country - nationality/degree
- **Home Office approved lists of institutions/countries**
- **Tier 2 ICT migrants no longer need to satisfy requirement**

## Tier 2 – maintenance requirement

- main applicant - £900
- dependants - £600 per dependant
- own funds, every day last 90 consecutive days; or
- sponsor undertaking on CoS (A rated only)

## Tier 2 - sponsor duties/risks

- Record keeping duties
- Reporting duties
- Downgrading of licence
- Revocation of licence

# Risk management strategies

- be informed and keep up to date
- ensure all key personnel are trained
- implement systems to catch potential non-compliance
- do not rely on third parties for right to work checks
- audits



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