

Unwanted People and Desired Citizens

Contemporary Attitudes, Challenges and Perceptions
of Migration and Integration



Edited by

**Cezary Smuniewski, Andrea Zanini,
Cyprian Aleksander Kozera, Błażej Bado**

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Warsaw 2024

The publication was financed by the Interdisciplinary Research Center
of the University of Warsaw “Identity – Dialogue – Security”

The publication is the result of the international research project
“Mikrogranty INOP – 2 Ed.” carried out at the Institute of Political
Science Foundation from 1st November 2020 to 31st October 2022.

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Cover design

Agnieszka Miłaszewicz

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Warsaw 2024

ISBN 978-83-8017-565-5



Published by:

Dom Wydawniczy ELIPSA

ul. Inflancka 15/198, 00-189 Warszawa

tel. 22 635 03 01, e-mail: elipsa@elipsa.pl, www.elipsa.pl

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Taking up Employment by Ukrainians in Poland. Polish Legal Status Before and After the Outbreak of Russia's War Against Ukraine

Abstract

The article presents issues related to foreigners taking up work in Poland, with particular emphasis on Ukrainian citizens. The main objective is to analyze the Polish legal status regarding foreigners taking up work before and after the start of Russia's war on Ukraine. The article also takes into account legal regulations concerning non-citizens of the European Union.

Keywords: foreigner, provision of labor, employment, rights and obligations, labor

1. Introduction

The provision of labor in the Republic of Poland takes place primarily based on the Labor Code. Of course, there are other legal acts regulating this matter in terms of the forms and types of work provided. Nevertheless, the provision of labor carried out by foreigners adheres to the relevant regulations of the Act on foreigners of 12 December 2013 (2013/1650), as well as the Act on employment promotion and labor market institutions of 20 April 2004 (2022/690).

2. Main text – analysis

It should be pointed out that the regulations of the Act on foreigners (2013/1650) do not apply, as included in its Article 2, to members of diplomatic missions and consular offices of foreign countries and other

persons of an equivalent status on the basis of laws, agreements, or commonly established international customs, subject to reciprocity and the possession by these persons of documents confirming their functions entitling them to enter and stay on the territory of the Republic of Poland. In addition, excluded from the regulations of the Act are citizens of European Union Member States, Member States of the European Free Trade Association (EFTA) – parties to the Agreement on the European Economic Area or the Swiss Confederation, and members of their families who join them or stay with them, as well as family members of citizens of the Republic of Poland within the meaning of Article 2(4)(b) of the Act on the entry into, residence in and departure from the territory of the Republic of Poland of citizens of European Union member states and their family members of 14 July 2006 (2021/1697) who join or stay with them. In addition, citizens of the United Kingdom of Great Britain and Northern Ireland referred to in Article 10(1)(b) and (d) of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (2019/C 384 I/01), hereinafter referred to as the “Withdrawal Agreement,” and members of their families, are excluded.

A very important category of persons in this catalog are citizens of European Union member states. As Magdalena Kumela-Romańska (2022) aptly notes, “according to the justification of the government’s draft of the cited law (Sejm paper No. 517 of 21.04.2006, pp. 4–5), introducing a definition of ‘EU citizen’ with a broader scope than that provided for by EU law is justified by the fact that it takes into account the agreements concluded between EFTA member states and between the Communities, their member states, and Switzerland, from which it follows that the free movement of persons applies to a wider circle than just citizens of the Union.”

It is also important to properly define a person as a foreigner. In this aspect, bearing in mind the literal wording of Article 3(2), a foreigner is anyone who does not have Polish citizenship. It should be emphasized that “a person who has Polish citizenship, but at the same time is also a citizen of another state(s), is not a foreigner.” (Jagielski 2016) As aptly noted by Krzysztof Stefański (2017), “foreigners can be divided into two groups: one includes citizens of other states, the other includes stateless persons (persons who do not have any citizenship).”

The glossary in Article 3 of the law in question (2013/1650) contains several relevant definitions important to the purpose of this work. For

example, paragraph 4 includes the term “work experience,” which the legislature defines as experience gained through employment, other gainful employment, or business in a given profession. In turn, paragraph 12a indicates the “parent employer,” which is a legal person or an organizational entity that is not a legal person but has legal capacity conferred by law, with its registered office outside the territory of the member states of the European Union, the member states of the European Free Trade Agreement (EFTA) – parties to the Agreement on the European Economic Area, or the Swiss Confederation. The parent employer hires the employee transferred to the host entity before and during the intra-company transfer. In paragraph 23, the legislature defined “performance of work” through a legislative procedure referring to Article 2(1)(40) of the Act on employment promotion and labor market institutions of 20 April 2004 (2022/690). According to this provision, performance of work by a foreigner means employment, performance of other gainful employment, performing functions on the boards of directors of legal entities that have been entered in the register of entrepreneurs under the provisions of the National Court Register or are capital companies in organization, conducting the affairs of a limited partnership or limited joint-stock partnership by a general partner, or acting as a proxy.

In paragraphs 24 and 25 of the provision under review, the legislature interpreted two important definitions. Within the framework of the first, the provision of labor in a highly qualified occupation is defined as the performance of work by a foreigner with competences confirmed by higher professional qualifications, who, regardless of the legal relationship between the parties, performs work for or under the direction of another person for remuneration. Higher professional qualifications, on the other hand, are qualifications obtained as a result of graduation with higher education or at least five years of professional experience at a level comparable to the level of qualifications obtained as a result of graduation from higher education, necessary to perform the work specified in the contract or in a job offer constituting an offer to conclude a contract within the meaning of the provisions of the Act of 23 April 1964 – Civil Code (Journal of Laws 2022, items 1360, 2337, and 2339).

Referring to the Act (2022/690) on employment promotion and labor market institutions of 20 April 2004, its personal scope should be demonstrated. According to Article 1(3)(2), the Act applies to foreigners intending to perform or performing work on the territory of the Republic of Poland. Within this framework, the legislature indicated, among others,

citizens of European Union member states, citizens of countries of the European Economic Area that are not members of the European Union, citizens of countries that are not parties to the Agreement on the European Economic Area but may exercise the freedom of movement of persons under agreements concluded by those countries with the European Communities and its member states, and citizens of the United Kingdom of Great Britain and Northern Ireland. In addition, the provision also applies to foreigners with refugee status in the Republic of Poland, with a permanent residence permit in the Republic of Poland, and with a residence permit for a long-term resident of the European Union in the Republic of Poland.

It is necessary to refer to the view of the judiciary indicated in the Judgment (2010) of the Provincial Administrative Court in Opole, in which the court emphasized that “in light of the provisions of the Act on employment promotion and labor market institutions of 2004, it should be stated that a person who performs gainful employment under a civil law contract is treated as an employed person, and this circumstance excludes the possibility of obtaining the status of an unemployed person.”

Article 87 of the law in question (2013/1650) contains a very important provision. The regulations in this article relate to the conditions for foreigners to take up employment in Poland. The first para enumerates when a foreigner is entitled to work on the territory of the Republic of Poland. Firstly, when they have been granted refugee status in the Republic of Poland. Additionally, the legislature stipulated that being granted subsidiary protection in the Republic of Poland is also a prerequisite. At this point, it is important to highlight the view of the judiciary expressed in the Judgment (2017) of the Provincial Administrative Court in Bydgoszcz, in which the court noted that “there is a certain contradiction in the interpretation of Article 1(2)(2)(d) of the Act on state aid in child rearing of 2016 in the context of Article 87(1)(2) of the Act on employment promotion and labor market institutions of 2004, making it insufficient in this case to apply only linguistic interpretation. This is because the literal interpretation of the indicated provision of the Act on state aid in child rearing alone will result in discrimination and differential treatment of those foreigners under subsidiary protection who, despite having the right to work on the territory of the Republic of Poland guaranteed to them in Article 87(1)(2), do not have an annotation ‘access to the labor market’ in their residence card and are therefore excluded from the beneficiaries of the Family 500+ program under Article 1(2)(2)(d) of the Act on state aid in child rearing.”

Further prerequisites include possession of a permanent residence permit in the Republic of Poland, as well as possession of a residence permit for a long-term resident of the European Union in the Republic of Poland. In this regard, it is necessary to cite the Judgment (2018) of the Supreme Administrative Court in which the court noted that “the right to receive benefits by a foreigner with a residence card depends not on the legally required note of the authority, but on the possession by the foreigner of the right to perform work on the territory of the Republic of Poland, which may result either from the work permit held or by virtue of regulations exempting the foreigner from the obligation to have a work permit. It is incumbent on the administrative bodies competent in matters of upbringing benefits, in the absence of a relevant annotation on the residence card, to make determinations with regard to the foreigner’s entitlement to work on the territory of Poland.”

Other prerequisites indicated by the legislature are situations in which the foreigner has a residence permit for humanitarian reasons, has a permit for tolerated stay in the Republic of Poland, enjoys temporary protection in the Republic of Poland, or has a certificate issued in case of failure to settle the case in time. Further grounds include circumstances in which the foreigner:

- 1) is a citizen of a European Union member state;
- 2) is a citizen of a country in the European Economic Area that is not a member of the European Union;
- 3) is a citizen of a country that is not a party to the Agreement on the European Economic Area, who may enjoy freedom of movement of persons under an agreement concluded by that country with the European Communities and its member states;
- 4) is a citizen of the United Kingdom of Great Britain and Northern Ireland, as referred to in Article 10(1)(b) and (d) of the Withdrawal Agreement, or a member of his or her family, as referred to in Article 10(1)(e) and (f) of that Agreement (2019/C 384 I/01);
- 5) accompanies, on the territory of the Republic of Poland, a foreigner referred to in paragraphs 7–9, as a family member within the meaning of the Act on the entry into, residence in and departure from the territory of the Republic of Poland of citizens of European Union member states and their family members of 14 July 2006 (2021/1697);
- 6) accompanies, on the territory of the Republic of Poland, a Polish citizen as a family member within the meaning of Article 2(4)(b) of the Act on the entry into, residence in and departure from the territory of the

- Republic of Poland of citizens of European Union member states and their family members of 14 July 2006 (2021/1697);
- 7) is a person referred to in Article 19(2) and (3) of the Act on the entry into, residence in, and departure from the territory of the Republic of Poland of citizens of the Member States of the European Union and their family members of 14 July 2006 (2021/1697);
 - 8) holds a temporary residence permit referred to in Article 114(1) or (1a), Article 126, Article 127, Article 139a(1), Article 139o(1), or Article 142(3) of the Act on foreigners of 12 December 2013 (2013/1650) – under the terms and conditions specified in the permit, unless the law allows them to be modified;
 - 9) is staying on the territory of the Republic of Poland in connection with the use of short-term mobility of a managerial employee, specialist, or trainee within the framework of an intra-company transfer under the conditions set forth in Article 139n(1) of the Act on foreigners of December 12, 2013 (2013/1650);
 - 10) is staying on the territory of the Republic of Poland in connection with the use of short-term mobility of a scientist under the conditions specified in Article 156b(1) of the Act on foreigners of 12 December 2013 (2013/1650);
 - 11) resides on the territory of the Republic of Poland in connection with the exercise of student mobility under the terms of Article 149b(1) of the Act on foreigners of 12 December 2013 (2013/1650);
 - 12) has a work permit and resides on the territory of the Republic of Poland:
 - a) on the basis of a visa, with the exception of a visa issued for the purpose referred to in Article 60(1)(1) or 22 of the Act on foreigners of 12 December 2013 (2013/1650), or
 - b) on the basis of Article 108(1)(2) or Article 206(1)(2) of the Act on foreigners of 12 December 2013 (2013/1650) or on the basis of a stamp imprint placed in the travel document that confirms the submission of an application for a residence permit for a long-term resident of the European Union, if immediately prior to the submission of the application they were authorized to perform work on the territory of the Republic of Poland, or
 - c) on the basis of a temporary residence permit, with the exception of a permit granted in connection with the circumstance referred to in Article 181(1) of the Act on foreigners of 12 December 2013 (2013/1650), or

- c*) on the basis of a document referred to in Article 61 of the Act on foreigners of 12 December 2013 (2013/1650), specifying the status of a family member of a member of a diplomatic mission or consular post of a foreign state or another person of an equivalent status on the basis of laws, agreements, or commonly established international customs, remaining with that person in a domestic community, if an agreement or international agreement has been concluded between the Republic of Poland and a foreign state or an international organization on the exercise of gainful activity by family members of staff members of diplomatic missions or consular posts, or
 - d) on the basis of a visa issued by another Schengen country, or
 - e) on the basis of a residence permit issued by another Schengen country, or
 - f) under the visa-free regime;
- 13) resides on the territory of the Republic of Poland pursuant to Article 108(1) of the Act on foreigners of 12 December 2013 (2013/1650) and:
- a) immediately before applying for a subsequent temporary residence permit referred to in Article 139a(1) or Article 139o(1) of the Act on foreigners of 12 December 2013 (2013/1650), stayed in this territory on the basis of this permit and continues to perform the work to which they were entitled under this permit,
 - b) performs work as a managerial employee, specialist, or trainee employee in the framework of an intra-enterprise transfer referred to in Article 3(13b) of the Act on foreigners of 12 December 2013 (2013/1650), for a host entity that has submitted an application for a temporary residence permit referred to in Article 139o(1) of this Act, under the conditions specified in the application,
 - c) conducts scientific research or development work in a scientific unit based on the territory of the Republic of Poland approved by the minister in charge of internal affairs pursuant to the provisions of Article 151(4)–(5) of the Act on foreigners of 12 December 2013 (2013/1650) and has applied for a temporary residence permit referred to in Article 151b(1) of that Act, under the conditions specified in the agreement referred to in Article 151b(1)(2) of that Act.

The legislature, in Article 88 of the law in question (2013/1650), also specified the circumstances under which a work permit is fully required. In this case, a foreigner must have a permit if they perform work on the

territory of the Republic of Poland on the basis of a contract with an entity whose registered office, place of residence, branch, plant, or other form of organized activity is located on the territory of the Republic of Poland. In addition, a permit is required in connection with performing a function on the management board of a legal person entered in the register of entrepreneurs, being a capital company in organization, managing the affairs of a limited partnership or a limited joint-stock partnership as a general partner, or in connection with granting them a power of attorney if they stay on the territory of the Republic of Poland for a period exceeding a total of 6 months in any consecutive 12-month period.

The Act provides for the obligation to have a permit if a foreigner performs work for a foreign employer and is posted on the territory of the Republic of Poland for a period exceeding 30 days in a calendar year to a branch or plant of a foreign entity or an affiliated entity and performs work for a foreign employer who does not have a branch, plant, or other form of organized activity on the territory of the Republic of Poland and is posted on the territory of the Republic of Poland to perform a service of a temporary and occasional nature. Finally, a permit is necessary in the situation of performing work for a foreign employer and being simultaneously delegated to the territory of the Republic of Poland for a period exceeding 30 days within any consecutive 6 months for a purpose other than those indicated above.

It should be noted that according to Article 88a of the act in question (2013/1650), a work permit is issued at the request of the entity hiring the foreigner; in turn, the permit is extended upon the written request of the entity entrusting the foreigner with work, submitted no earlier than 90 days and no later than 30 days before the expiration of the permit.

According to the wording of Article 88b of the law under review (2013/1650), a work permit is issued by the voivode. However, in the case of a change in the jurisdiction of a voivode due to a change in the headquarters or place of residence of the hiring entity, the headquarters of the entity to which the foreigner is posted, or the main place of work, the jurisdiction of the voivode to conduct proceedings for the renewal of the permit is determined as of the date of the application. In a situation where the specific nature of the work performed by the foreigner does not allow the indication of the main place of work, the permit is issued by the Mazovian voivode.

At this point, it is necessary to point to the Judgment (2021) of the Supreme Administrative Court regarding seasonal work. According to

the thesis of the ruling in question, “the provision of seasonal work is a factual and legal circumstance. The factual aspect of this concept boils down to the activity of packing fruits and vegetables by hand. The legal element, on the other hand, is contained in the qualification of this activity, performed, at a specific job, with a specific employer, with reference to Article 88(2) of the Act on employment promotion and labor market institutions of 2004.”

According to Article 88c, a work permit is issued for a specified period of time, not exceeding 3 years, and may be renewed. However, if the foreigner holds a position on the board of directors of a legal entity that employs more than 25 people as of the date of the application, the governor may issue a work permit for a period not exceeding 5 years. It should be noted that a work permit specifies the entity entrusting the foreigner with work, the position or type of work to be performed by the foreigner, the foreigner’s lowest monthly salary for the position, the length of working time or the number of working hours per week or month, the type of contract on which the work is based, and the period of validity of the permit.

According to the view of the judiciary expressed in the Judgment (2009) of the Provincial Administrative Court in Warsaw, “in the case of work permits for foreigners, the most important thing is that the foreigner who has received the relevant permit (or promise thereof) performs only the work that is specified in the permit (or promise thereof). Otherwise, the work that the foreigner undertakes is performed by him illegally.” The authority competent to issue a seasonal work permit is the head of a county (*starosta*).

Very important are the regulations contained in the Act on assistance to citizens of Ukraine in connection with the armed conflict in that country of 12 March 2022 (2022/583), which facilitates the ability of Ukrainian citizens to take up work in the Republic of Poland. According to Article 22 of the analyzed law, a Ukrainian citizen is entitled to work on the territory of the Republic of Poland during the period of stay in accordance with the applicable legislation, if their stay on the territory of the Republic of Poland is considered legal and they are a Ukrainian citizen legally residing on the territory of the Republic of Poland. It is essential that the hiring entity notify the district labor office within 14 days from the date a Ukrainian citizen begins work. The notification should be sent to the labor office competent for the seat or place of residence of the entity. The work engaged must match the dimension of working time or the number of hours indicated in the notification. Additionally, the remuneration must be at least the amount

specified in the notification and should be proportionally increased if the working time or the number of hours of work is increased.

In the notification, the entity hiring a Ukrainian citizen shall provide information on the entity hiring a Ukrainian citizen, the personal data of the Ukrainian citizen, the type of contract between the hiring entity and the Ukrainian citizen, the position or type of work performed, the place of work performed, the monthly or hourly rate of remuneration, the working hours or the number of working hours per week or per month, and the number of all persons performing work under an employment contract and under civil law contracts as of 23 February 2022, and as of the date of submission of the notification.

Pursuant to Article 23 of the law under review (2022/583), Ukrainian citizens whose stay on the territory of the Republic of Poland is considered legal may undertake and carry out business activities on the territory of the Republic of Poland on the same terms as Polish citizens, provided that the Ukrainian citizen obtains a PESEL number. If the stay of an entrepreneur – a Ukrainian citizen – on the territory of the Republic of Poland ceases to be legal on the basis of this Act (2022/583) or the Act on foreigners of 12 December 2013 (2013/1650), the entrepreneur is subject to deletion from the Central Registration and Information on Business. At the same time, it should be noted that the law has also significantly facilitated the possibility of employing Ukrainian citizens in local government units and government offices.

3. Conclusions

In conclusion, it should be stated that the Act on foreigners of 12 December 2013 (2013/1650) and the Act on employment promotion and labor market institutions of 20 April 2004 (2022/690) fully guarantee the necessary solutions for taking up employment in Poland by foreigners, including citizens of Ukraine. Nevertheless, the situation caused by Russia's brutal invasion of Ukraine required the enactment of a special act regulating the employment of Ukrainian citizens in Poland. This was primarily related to the size and number of people fleeing the war and settling or temporarily remaining on the territory of the Republic of Poland. In this situation, the solutions provided by the Act on foreigners and the Act on employment promotion and labor market institutions seemed inadequate to the circumstances.

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