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## **POSITIONING DOCUMENT**

**Podgorica, September 2015**

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Podgorica, September 25, 2015

Dear Sirs,

In front of you is a document resulting from joint work of five business associations in Montenegro, related to amendments to the Law on Foreigners. This Law, which has been officially implemented as of April 1, 2015, has caused serious challenges to doing business in Montenegro.

Montenegrin Employers' Federation, Montenegrin Chamber of Economy, Montenegro Business Alliance, Montenegrin Foreign Investors Council and AmCham Montenegro recognized the need for a common reference to certain provisions in this document, in order to present the views of their members, companies operating in this market, in the best possible manner.

Although we support the decision to postpone the application of certain provisions, we believe that the time until these provisions entry into force should be used in such a way that those are reviewed and amended in a manner allowing fair competition in the Montenegrin market.

We are aware of the legislator's intention behind adoption of such a legal document, and business associations support employment of the domestic workforce. Still, it has to be regulated in the manner allowing smooth business operations of Montenegrin companies. In that regard, we particularly emphasize article 64 and the related article 66 and problems the economy faced during the short period of the application thereof. Business associations signing this Positioning Document unanimously claim that the restriction related to issuing temporary residence and work permits has been undoubtedly recognized as business barrier questioning the commitment of Montenegro to being an attractive destination for foreign investors.

Aiming at contributing to amendments to the Law on Foreigners, and thereby improvement of the Montenegrin business environment, we provided recommendations related to amendments of the following Articles, based on everyday experiences of companies operating in Montenegro:

- Article 64, related to limiting issuance of temporary residence and work permit, and in relation to that:
- Article 65 and 66, with special emphasis on the discrepancies in terms of employment of the executive director or representative of the company;
- Article 67, related to time period for issuing temporary residence and work permits;
- Article 73, paragraph 2, related to distribution of quotas per industries and professions.

Hereinafter we provide more detailed explanations of the proposals of five business associations for improvement of the text of the Law on Foreigners. The mentioned solutions reflect joint employers' efforts aimed at improvement of business climate in Montenegro. Therefore we hope that this document will contribute thereto.

Best regards,

Montenegrin Employers' Federation  
Montenegrin Chamber of Economy  
Montenegro Business Alliance  
Montenegrin Foreign Investors Council  
AmCham Montenegro

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### 1. Limiting issuance of temporary residence and work permit

#### a. Article 64

##### **Current formulation:**

“Temporary residence and work permit for the purpose of a foreigner’s employment and seasonal employment can be issued only in case there are no unemployed persons at the Montenegrin Employment Bureau’s records (hereinafter: Employment Bureau) eligible for employment on positions the permit applies to, or the unemployed person from the Employment Bureau’s records rejected employment on such positions.

Exceptionally, the restriction referred to in paragraph 1 of this Article does not apply to employment of CEO of a foreign company registered in Montenegro, i.e. CEO of a foreign company that is founder of a company registered in Montenegro, or to employment of a foreigner with higher educational level at managerial positions in the company, or to a foreign entrepreneur being self - employment, in accordance with separate regulations.”

**Proposal:** To be deleted

##### **Explanation:**

The problems arising in practice concerning the application of this article are well known.

This Article does not allow foreign investors to select and appoint persons to executive positions in their companies at their discretion. According to the Company Law, a foreign company is a company registered abroad. All other companies (registered in Montenegro) are considered to be "local" companies. Even a "part of a foreign company" operates in accordance with Montenegrin legislation and is considered to be "local" company.

In support of the abovementioned, we point out that the part of a foreign company is being regulated by Article 80 paragraph 1 of the Company Law in the following manner: Part of a foreign company is a part of a company established and registered outside of Montenegro, doing business at the territory of Montenegro. The part of a foreign company exists and performs business activity in accordance with this and other Montenegrin laws.

Since Article 7 of the Law on Foreigners prescribes a foreign company is a legal entity or entrepreneur performing business or other activity and has headquarter outside of Montenegro, a logical question is raised: what kind of a foreign company, registered in Montenegro, needs to employ a foreigner in Montenegro, having a headquarter outside of Montenegro, and how realistic is the possibility for implementation of such defined exception?

The inapplicability of such formulated paragraph 2 was indicated by the practise very soon, due to which even the institutions responsible for implementation of this Law reacted and took a position on some "more liberal" interpretation, i.e. on non-application thereof.

Therefore, our concrete proposal would be that the Article 64 is deleted, i.e. that the idea of conditionality of employment of foreigners by current unemployment situation at the Employment Bureau’s records is completely abandoned.

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### b. Article 65 - Conditions for issuing temporary residence and work permit for the purpose of employment and seasonal employment

#### **Current formulation:**

##### **Article 65**

“Temporary residence and work permit for the purpose of employment and seasonal employment is issued to a foreigner fulfilling conditions referred to in article 42 of this Law, while the following is submitted as an evidence of justification for the request:

- 1) written offer of the employer for hiring a foreigner at the specific workplace;
- 2) proof of acquired level of education and qualifications;
- 3) proof of medical ability.”

**Proposal:** To add the paragraph2 reading as follows:

“Notwithstanding the preceding paragraph, a foreigner employed at the following positions:

- chief executive officer of a company or other legal entity
- representative of a part of a foreign company
- self – employed entrepreneur

shall enclose only the decision on registration in the Central Registry of Business Entities.“

**Proposal:** Harmonize the amendment with Article 75 - Working beyond the annual quota (paragraph 1, point 4)

„Permit..... beyond the annual quota can be issued to a foreigner:  
4) referred to in article 65, paragraph 2 of this Law;”

#### **Explanation:**

In accordance with the Company Law, members of the company i.e. founders appoint CEO, i.e. representative of a part of a foreign company. Election and appointment of a director is an obligation and right of the founders. Only after registration at the Central Registry of the Commercial Entities with the person appointed as CEO (director, representative...), an employer is obliged to conclude an employment contract, i.e. to hire that person in accordance with labour legislation.

Therefore, for the purposes of employment, or previously obtaining temporary residence and work permit, it is completely irrelevant whether:

- The employer has made a written offer for the position of CEO (director, representative, entrepreneur) – the act of registration the Central Registry of the Commercial Entities is sufficient proof that a foreign person agrees to be employed as the CEO;
- What it the level of education and qualifications of a CEO, even whether the person is appointed without any professional qualifications. (For the founder is crucial that the CEO’s position is covered by a confident person, while the founder has an inalienable right to select, even to perform the duties of CEO himself). On the other hand, the fact that the temporary residence and work permit does not contain information on a foreigner’s occupation should be kept in mind, so therefore commitment to the recognition of diplomas, even for the primary education level, (the procedure takes months, even though the legal deadline is 30 days) renders the employment of CEOs completely meaningless.

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- Candidate possesses proof of medical ability. For the purposes it has, this evidence should not be related to the residence permit.

Additionally, about the evidence of medical ability, please keep in mind the following observations:

Article 12 of the Rulebook on forms, detailed conditions and manner of issuing temporary residence permit and temporary residence and work permit stipulates that the evidence justifying the request for issuance of a temporary residence permit for employment and seasonal employment is, among other things - a medical certificate issued by competent health institution in Montenegro.

Article 16 of the Labour Law stipulates that the general health capability is one of the general conditions for employment in Montenegro.

Furthermore, Article 65 of the Law on Foreigners stipulates that the proof of health capability is one of the arguments justifying the request for temporary residence and work permit.

The impression is that the aforementioned Rulebook exceeded the law and that the Rulebook, as lower legal act which must be aligned with the law, amended the already existing legal solutions, since the aforementioned Rulebook practically declared invalid all the medical certificates issued in other countries. In this regard, we propose that Article 12 of the Rulebook is amended to read as follows: "a medical certificate issued by a competent medical institution in Montenegro or in the country of origin of a foreigner."

### c. Article 66 - Confirmation of the Employment Bureau

#### **Current formulation:**

##### **Article 66**

"An employer can provide the written offer referred to in Article 65 paragraph 1 point 1 of this Law, after receiving confirmation from the Employment Bureau that there are no unemployed persons at the Employment Bureau's records eligible for employment on positions the permit applies to, or the unemployed person from the Employment Bureau's records rejected employment on such positions.

The confirmation referred to in paragraph 1 of this Article is issued within the 30 days deadline, starting from the day of submission of request for confirmation and is valid 60 days from the date of issue.

Detailed manner of issuing the certificate referred to in paragraph 2 of this Article shall be prescribed by the state administration body in charge of labor relations. "

#### **Proposal: Deletion**

#### **Explanation:**

In this way conceptualized legal solution, introducing restrictions for obtaining a temporary residence and work permit (Article 64), and causing employers to previously obtain a certificate from the Employment Agency (Article 66):

- negates the essence of a unified procedure for issuing residence and work permit for the purpose of employment and seasonal employment and the procedure is again carried out in two phases at two institutions - Employment Bureau and Ministry of Interior Affairs.

- creates unfavourable business environment, especially for foreign investors, endangering freedom and right of an employer to hire people of the desired profile and conditioning human resource policy, leading thereby to certain restrictions at the labour market;

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-introduces bureaucratic, “compulsory” recruitment of local labour force and further “suffocates” already insufficiently liberalized labor market;

-creates uncertainty and insecurity in practise, entering relatively long procedure for an employer (Employer awaits the Employment Bureau’s response - within 30 days’ deadline, after which further waiting follows to schedule interviews with potential candidates is, interviewing candidates, the obligation to submit the explanation to the Employment Bureau about the reasons why the candidate(s) is(are) not appropriate for the required position, in practice employers encounter the “insistence” of the Employment Bureau to “try” to employ candidates, except that we should not ignore the fact that the Employment Bureau’s selection is based solely on the desired level and type of education candidates, disregarding other conditions that the candidate should possess -in terms experience, special skills and knowledge etc.);

Restrictions for obtaining a temporary residence and work permit for the purpose of employment and seasonal employment must be exclusively related to the defined annual quota by which needs of the domestic market for foreign skilled workers are projected.

## 2. Deadline for extension of the temporary residence and work permit (Article 67 related to article 82)

### **Current formulation:**

#### **Article 67**

Temporary residence and work permit for the purpose of employment and seasonal employment of a foreigner is issued for up to one year validity period.

**The permit referred to in paragraph 1 of this Article may be extended up to two years.**

The employer shall, within eight days from the date of issuance of the temporary residence and work permit for the purpose of employment, conclude a labor contract with a foreigner and sign him/her up for the compulsory social insurance, in accordance with labor regulations.

In case a foreigner does not start working within the period referred to in paragraph 3 of this Article, the employer shall, within the three days' deadline at the latest, inform the Ministry thereon for the purpose of annulment of residence and work permit.

**Proposal:** Deletion of paragraph 2 of the Article 67.

#### **Article 82 paragraph 2**

A permanent residence permit may be issued to a foreigner who, prior to submitting the application for a permit, had legally resided in Montenegro **for five years continuously on the basis of the approved temporary residence** or approved additional protection according to the law governing asylum.

**Proposal:** Amendment of paragraph 2 of the Article 82 in the way that paragraph 2 reads as follows:

A permanent residence permit may be issued to a foreigner who, prior to submitting the application for a permit, had legally resided in Montenegro for five years continuously on the basis of the approved temporary residence **or temporary residence and work permit**, or approved additional protection according to the law governing asylum.

### **Explanation:**

Article 67 prescribes that temporary residence and work permit for the purpose of employment of a foreigner is issued with **up to one year** validity period, while paragraph 2 prescribes that the permit referred to in paragraph 1 of this Article, **may be extended up to two years**.

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The legal solution allowing that the temporary residence and work permit for the purpose of employment may be extended up to two years, practically means the following:

- Primarily, a foreigner may apply for a new permit after the expiry of the currently valid one. Otherwise, the responsible officials of the Ministry of Interior Affairs refuse to receive the request.
- According to Article 77 paragraph 2 the request for issuance of a temporary residence and work permit is decided on within 20 days of the filing of the proper request.
- In order to ensure the proper request, it is necessary to submit the proof of timely notified residence. In order to provide this evidence the foreigner is forced to leave the territory of Montenegro (even if it is only about crossing the border and then returning to the country).
- According to Article 61 paragraph 1 a foreigner can work in Montenegro based on temporary residence and work permit or certificate of work registration, unless this Law does not prescribe otherwise.
- In practise, the Ministry of Interior Affairs, on expiry of the 20th day, issues the permit by which a temporary residence and work permit is granted as from the date of issuance - and not from the date of the request submission. This practically means that for 20 days (which is for how long a foreigner pending decision on the request) cannot work in Montenegro, since the previous permit expired, according to the point 1.
- An employer cannot extend the work contract with a foreigner who does not possess a temporary residence and work permit and will be obliged to submit the request for unsubscription of the foreigner with compulsory social insurance with the Tax Administration.
- Also, due to the abovementioned termination in labour relation, the company shall be obliged, in case it is about the CEO or other person authorized to represent the company, to report change of the data to the Central Registry of the Commercial Subjects, according to provisions of the Company Law.
- Furthermore, this company shall be obliged to appoint another CEO, within the Ministry's deadline for deciding on the request for temporary residence and work permit, since article 34 paragraph 5 of the Company Law prescribes the following: "CEO and Company Secretary shall be obligatorily elected in each joint stock company."

An alternative includes a "grey zone" within which foreigners employed as CEOs (director, representative) of a company, or are entrepreneurs, do not have to be unsubscribed with the Tax Administration in which case a legal vacuum is created: a foreigner - CEO, after 3 years of residence based on the employment, has to terminate the residence, so the employer has to accordingly terminate the work contract with him, however, a foreigner still remains at the director's (representative's) position and Tax Administration still keeps the data in the records on him as an employee, and therefore the employer shall be obliged to pay certain appropriate salary and accompanying taxes and contributions;

In this way the labor relation of Executive Directors is threatened, which is contrary to the Labour Law and the Company Law;

Practically, in all relevant institutions a foreigner is registered as a director (representative) of the company, and the employer is obliged to settle all obligations related to him arising from employment, while at the same the foreigner is not granted residency, i.e. must reside outside of Montenegro in order to be allowed to re-apply for the temporary residence and work permit.

Previous Law on employment and work of foreigners in this regard clearly separated the status of a foreign representative of the company (directors) from the status of other foreign employees.

Current legal solution means that after a temporary stay of 3 years **without interruption** a foreigner should make a break in employment (lasting at least 20 days), and the same break in the temporary stay of at least 20 days, since the Ministry of Interior Affairs issues request for a

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temporary stay not as of the date of submission of the application, but on the 20th day of submitting the application. In this way, a foreigner in Montenegro, temporarily residing for employment purposes will never be able to acquire the right of permanent residence (since the permanent residence permit may be issued to a foreigner who had legally resided in Montenegro **for five consecutive years** on the basis of the approved temporary residence before submitting the application for a permit).

In addition, we point out that it is not recommendable (and not healthy for the market at which we stimulate foreign investments) to force foreign investors and members of their management, after the expiry of 3 years of legal work and stay in Montenegro, to leave the country, to make a break in the employment relationship and then re-expose them to the administrative steps with regards to residence and work permit, in order to prevent them from applying for permanent residence.

In addition, we remind that Article 82, paragraph 2, defining permanent residence completely prevents the above - described category of foreigners from applying for permanent residence since a foreigner may apply for permanent residence only if he had legally resided in Montenegro for five consecutive years of on the basis of the approved temporary stay – but not on the basis of a temporary residence and work permit.

Finally, we conclude that the purpose of such legislation is unclear, where - if this is really the intention of the State - foreign investors should be promptly informed that they were invited to invest in Montenegro, but that they and members of their management who are foreigners can not stay and work in Montenegro longer than three years without interruption.

### **Deletion of distribution of quotas distribution of quotas per industries and professions (Article 73 par.2)**

#### **Current formulation:**

##### **Article 73 paragraph 2**

The annual quota defines industries and occupations in which foreigners could be, i.e. provide contracted services.

**Proposal:** Deletion of paragraph 2 of the Article 73.

#### **Explanation:**

Article 73 paragraph 2 of the Law on Foreigners prescribes that industries and professions in which foreigners could be, i.e. provide contracted services, are defined by annual quota. Such distribution, to be applicable as of January 1, 2016, is inapplicable in the Montenegrin legal and business environment, for many reasons:

-Complexity of the implementation of the Law on Classification of Industries, which clasifyies the industries at four levels: sector, area, branch and group, and for such Law, from the perspective of the Company Law's and registration in Central Registry of the Commercial Entities's, the dominant industry is relevant . For example, only sector G, titled "Wholesale and retail trade; repair of motor vehicles and motorcycles " recognizes 2 areas, 21 branches and 92 groups of industries.

- Standard Classification of Occupations, showing exceptional abundance, recognizes more than thousand occupations, classified also at four levels (family, class, subclass and groups).

As far as we know, not even the state institutions registered as users of the Standard Classification of Professions have not completed the so-called translation of professions in their bases.

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-Over 70% of foreign work force was registered as unskilled, which will be an aggravating factor for the comparative analysis of previous years. We believe that the essential reason for this phenomenon also lies in the fact that jobs are not being accompanied (conditioned) by their formal education, especially when it comes to crafts business, because that circumstance is irrelevant for employers compared to the good performance of its duties and tasks, as well as satisfied customers. Consequently, in such situations, "booking" a quota will not be possible, since one of the conditions for the issuance of a temporary residence and work permit and formal proof of the acquired level of education. At the same time, the Examination Center of Montenegro performs checks for only 20 occupations, which is insufficient, since (as already mentioned) the Standard Classification recognizes more than a thousand occupations. In addition to questioning the correspondence of the Law on National Professional Qualifications and the Law on Foreigners, this also confirms commonly known fact that informal education, i.e. certification of skills and knowledge acquired through informal education has not began to „live“ in Montenegro in the full extent.

- Also, the legislator recognizes, as an additional, another parallel division: for employment, seasonal employment and the provision of contracted services. Besides opening the dilemma of why opted for both divisions, the fact some countries recognize only the number of permits per year (ie. the annual quota), without establishing further divisions, should be kept in mind.

- Since, according to estimates of experts, accurate assessment of the extent and structure of employment by occupation, is very difficult, even for domestic labor force, it is impossible to expect the same thing as when it comes to the employment of foreigners.