

# Business Immigration Law in Germany

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of a residence permit by virtue of this provision (*Such-Chancenkarte*) may, as § 20a(5) sentence 6 Residence Act states, only be issued for a second time if the applicant has previously resided abroad or has been permitted to reside in the federal territory for at least as long as he or she had previously resided in the federal territory on the basis of this title.

As § 9 Residence Act does not apply to the initial award of this residence title (*Such-Chancenkarte*),<sup>268</sup> it is required for the **conversion into a permanent residence title** that the applicant has been able to secure a follow-up residence right under this provision (*Folge-Chancenkarte*) or any other residence title which would allow such. 210

Lastly, § 20a(7) Residence Act provides that to control labour migration, the Federal Government may set an **upper limit to the number of residence rights** awarded to applicants under this provision, whereas any limitation shall be based on labour market and integration policy considerations and the capacities of the authorities involved. 211

## M. Researchers and scientists

A total of four possible immigration pathways are conceivable for researchers and visiting scientists, each of which depend on the intended duration of residence. Firstly, researchers and visiting scientists who intend to work in Germany for merely up to 90 days per timeframe of 180 days within a period of 12 months do not require a residence title for the purpose of gainful employment if they meet certain requirements under genuine national law, which proves to be immensely practical if they may enter Germany visa-free anyway. Furthermore, the REST Directive provides for three mobility options, each concerning short-, medium-, and long-term rights of residence.<sup>269</sup> 212

### I. Visa-free short-term stays for researchers and scientists under national law

As a general rule, § 17(1) Residence Ordinance requires everyone, including researchers and scientists to apply for a residence title for the purpose of gainful activity if they wish to pursue such activities in Germany. By reference to § 17(2) Residence Ordinance, however, individuals may be **exempt** from requiring said residence title if, within the scope of their short-term stay, they engage in activities of a self-employed or non-self-employed nature which, pursuant to § 30 nos. 2 and 3 Employment Ordinance, are not regarded as gainful activity within the meaning of immigration law. As § 30 no. 2 Employment Ordinance states, these activities include those of researchers and scientists pursuant to § 5 Employment Ordinance. The latter provision in turn privileges scientific staff of universities and of research and development institutions as well as visiting scientists at a university or at a research institution under public law or financed predominantly from public funds or managed as a public enterprise in private legal form (cf. § 5 nos. 1 and 2 Employment Ordinance). Consequently, this group of academics may pursue **related activities** for up to 90 days within a timeframe of 12 months without having to obtain a residence title for the purpose of gainful employment, as corresponding activities are not considered 213

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<sup>268</sup> See § 20a(6) Residence Act.

<sup>269</sup> It is worth noting that some other forms of research activities, which do not fall under the scope as laid out in this chapter, may also be covered by § 19c(1) and(2) Residence Act in conjunction with § 5 Employment Ordinance (→ mn.244).

gainful activity within the meaning of the Employment Ordinance. However, it should be noted that the provision does not exempt researchers or scientists from the necessity of an entry visa, as this is determined by general considerations of visa-exempted entry.

## II. Mobility under the REST Directive

214 The REST Directive, as it has been transposed into national German law, provides for short-, medium-, as well as long-term mobility options for researchers and scientists. If the researcher or visiting scientist intends to be employed in Germany for a maximum period of 180 days per timeframe of 360 days per year and holds a residence title of another EU Member State as a researcher under the REST Directive, he or she may, by virtue of § 18e Residence Act, conduct a **short-term stay** in the territory of the Federal Republic of Germany and become **gainfully employed** for the purpose of research without the need to apply for a residence title for such purpose, provided that certain notification requirements are fulfilled. Secondly, § 18f Residence Act offers immigration pathways for all stays that are intended to last more than 180 days but less than one year. Lastly, researchers and visiting scientists who wish to conduct research and/or become gainfully employed in Germany for an even longer period must apply for a residence permit for the purpose of research activity. To lay out necessary groundwork with regard to substantial requirements each of these residence rights need to comply with, general requirements will be laid out below.

- To determine if the envisaged stay suffices the prerequisite of constituting valid research activity according to the REST-Directive, recourse must be drawn to § 38a Residence Ordinance. In particular, the term **research** as defined in § 38a(1) sentence 2 Residence Ordinance covers any creative and legally permissible activity systematically pursued with the aim of advancing the current state of knowledge in any field of academia, including humanities, cultural studies and sociology. Thus, private research institutions – such as those privately run by corporations – may also be covered, provided that the conditions for recognition are met.
- As far as the **host institution admission agreement** is concerned, various conditions must be met in accordance with § 38f Residence Ordinance. Firstly, pursuant to § 38f(1) Residence Ordinance, the hosting agreement (or a corresponding contract) must include the researcher's written commitment to dutifully complete the envisaged research project.<sup>270</sup> The receiving institution must provide written commitment to accept the researcher to carry out the envisaged research project<sup>271</sup> and provide details of the essential content of the legal relationship to be established between the research institution and the researcher if he or she is granted a residence title by virtue of § 18d or § 18e Residence Act or is granted short-term mobility for researchers under § 18e Residence Act, including details about the scope of the foreigner's activities and remuneration.<sup>272</sup> This document must also contain a provision which specifies the applicable timeframes and according to which the host agreement or the corresponding contract will become invalid if the researcher is neither consecutively granted a residence permit pursuant to § 18d or § 18e Residence Act nor falls under the scope of short-term mobility under the REST Directive pursuant to § 18e Residence Act.<sup>273</sup> Applicants must

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<sup>270</sup> See § 38f(1) no. 1 Residence Ordinance.

<sup>271</sup> See § 38f(1) no. 2 Residence Ordinance.

<sup>272</sup> See § 38f(1) no. 3 Residence Ordinance.

<sup>273</sup> See § 38f(1) no. 4 Residence Ordinance.

also disclose the intended start and finishing date of their research activity<sup>274</sup> and, if applicable, any information on intended research stays in other EU Member States within the scope of the REST Directive, in so far as this intention already exists at the time of application.<sup>275</sup> It follows from § 38f(2) no. 1 Residence Ordinance that a research institution may only validly conclude a host agreement (or a corresponding contract) if it is established that the research project will be carried out and if a final decision on its implementation has been made by the competent bodies within the research institution after reviewing its purpose, duration and funding. Prospective researchers must also be suitable and qualified for the envisaged project and must have obtained a university degree adequate for this purpose, in particular allowing access to doctoral programs.<sup>276</sup> Lastly, financial sustenance of the researcher must be assured.<sup>277</sup>

- As a general rule, **applications** for each of the aforementioned residence permits as laid out below will be decided upon within 60 days. Its issuance entitles the holder to take up research activities at the research institution as designated in the hosting agreement and to take up teaching activities. Any changes within the course of the research project do not lead to a lapse of this entitlement.

### 1. Short-term mobility for researchers and scientists (90 to 180 days per year)

§ 18e Residence Act provides a special legal ground for researchers and scientists who hold a residence permit from another EU Member State to benefit from short-term mobility within the EU. Pursuant to Art. 3 no. 2 REST Directive, a **researcher** is considered as any third-country national who holds a doctoral degree or an appropriate university degree giving that third-country national access to doctoral programs and who is selected by a research institution and admitted to the territory of a Member State to pursue a research activity for which such a degree is normally required. 215

If its requirements are met, § 18e(1) Residence Act **waives** the necessity for a residence permit including gainful activity for research-related stays not exceeding 180 days within a period of 360 days. Instead, it suffices for both entry and residence to follow a **prior notification procedure** to be initiated by the receiving research institution itself. The institution must inform the Federal Office for Migration and Refugees (*Bundesamt für Migration und Flüchtlinge*) and the competent authority of the country of origin that the foreigner intends to carry out part of his or her research activities in Germany. 216

In addition, the receiving research institution must provide the Federal Office for Migration and Refugees with **proof that the foreigner holds a valid residence permit** issued by said Member State in accordance with the REST Directive 2016/801 for the purpose of research. 217

It is also required to submit a **hosting agreement** or the corresponding contract concluded with the receiving research institution, as well as a copy of a recognised and valid **passport** or passport substitute of the foreigner and proof that the foreigner's **livelihood** is or will be secured in accordance with general livelihood standards as set out in this chapter. 218

The receiving research institution shall make its **formal notification** at the time when the researcher/scientist applies for short-term mobility pursuant to the REST Directive 2016/801 in the Member State from which he or she obtained a valid visa, thus prior to 219

<sup>274</sup> See § 38f(1) no. 5 Residence Ordinance.

<sup>275</sup> See § 38f(1) no. 6 Residence Ordinance.

<sup>276</sup> See § 38f(2) no. 2 Residence Ordinance.

<sup>277</sup> § 38f(2) no. 3 Residence Ordinance.

entry. If the receiving research institution is not yet aware of the foreigner's intention to conduct part of the research activity in the territory of the Federal Republic of Germany at this point in time, it shall make the notification at the point in time at which it becomes aware of the intention.

- 220 If said residence permit from another state is issued by a state that is **not a Schengen state** and when the foreigner enters the country via a state that is not a Schengen state, the foreigner must carry a copy of the notification and present it to the competent authorities at their request.
- 221 Provided that short-term mobility under the REST Directive is not refused on the basis of failed notification procedure to the Federal Employment Agency, the researcher acquires the right under § 18e(2) Residence Act to enter Germany at any time within the period of validity of his or her foreign residence title and to **reside in Germany for the purpose of research**. Researchers and scientists complying with the above-mentioned requirements are entitled to take up research activities and teaching activities at the host research institution, also in exchange for remuneration.
- 222 Furthermore, according to paragraph 5, if no grounds for refusal of short-term mobility apply, the foreigner will be issued a **certificate** by the Federal Office for Migration and Refugees confirming the right to enter and stay for the purpose of research within the framework of short-term mobility under the REST Directive.

## 2. Medium-term mobility for researchers and scientists (180 and more days per year)

- 223 If the research stay in Germany is intended to exceed 180 days per year, the above-mentioned simplified notification procedure for entry according to § 18e Residence Act does not apply. Instead, immigrating researchers and scientists are referred to the **application for a conventional residence title** pursuant to § 18f Residence Act, according to which a foreigner will be issued a residence permit without need for approval of the Federal Employment Agency if he or she possesses a residence title of another EU Member State which remains valid for the duration of the procedure and has been issued in accordance with the REST Directive 2016/801. Furthermore, applicants must submit a copy of a recognised and valid **passport** or passport substitute and the **hosting agreement**, or the corresponding contract concluded with the hosting research institution in the federal territory.
- If the **application** for a residence permit is submitted at least 30 days before the beginning of the research stay in the federal territory and the residence title of the other Member State is still valid, entry, stay and gainful activity shall be deemed permitted for up to 180 days within a timeframe of 360 days until a final decision is made on the pending application by visa authorities. Thus, researchers are entitled to commence research activities and take up teaching activities in the host research institution either from the date of issuance of the residence permit, or, as laid out above, if a final decision is still pending but the aforementioned deadline requirements are fulfilled. Pursuant to paragraph 4, the foreigner and the receiving research institution are both obliged to notify the Foreigners Authority of any changes with regard to the above-mentioned prerequisites.
  - Applications will be **rejected** which have been submitted in addition to a notification according to § 18e Residence Act, as both mechanisms may not apply in parallel. An application will also be rejected if it was submitted to follow a current stay pursuant to § 18e(1) Residence Act but failed to meet a deadline of at least 30 days before the expiry of this stay. Thus, if researchers plan to extend their stay under § 18e(1) Residence Act, they are well advised to submit the application to local visa authorities in good time.

- By virtue of § 20(1) sentence 1 no. 2 Residence Act, researchers and scientists who concluded residence under this provision may be granted a **follow-up residence permit** for the purpose of seeking employment, which will be awarded for no less than 18 months.

### 3. Long-term residence permits for researchers and scientists

§ 18d Residence Act governs the issuance of long-term residence permit for researchers, 224 provided that none of the case scenarios outlined above apply. By virtue of § 18d(1),(4) Residence Act, researchers and scientists are legally entitled to be granted a residence permit valid for at least one year, provided that they have concluded a **binding host agreement** (or a corresponding contract) for the implementation of a research project with a research institution recognised in the federal territory or who have concluded a binding host agreement (or a corresponding contract) with a research institution which generallyly conducts research.

In addition, the receiving research institution must have made a **written commitment to assume any costs** that may be incurred by the public authorities for up to six months 225 after termination of the hosting agreement due to securing the researcher's livelihood during an unauthorised stay or possible deportation. General requirements for the issuance of a residence title pursuant to § 5 Residence Act must also be fulfilled. According to § 18d(2) Residence Act, the requirement to bear any costs incurred may be **waived** if the research institution's activities are predominantly financed from public funds. There is however no absolute entitlement to waive this requirement even in this case. It may be expected to be waived if special public interests favour the respective research project.

It follows from § 20(1) sentence 1 no. 2 Residence Act that researchers and scientists 226 who hold residence permits under this provision may be granted a **follow-up residence permit** for the purpose of seeking employment, which will be awarded for eighteen months.

DIE FACHBUCHHANDLUNG

## N. Specific occupations

As outlined above, being classified as a skilled worker – or at least possessing a viable 227 prospect to achieve this status – constitutes the central gateway for most mid- to long-term residence rights for the purpose of gainful employment in German immigration law. § 19c(1) Residence Act however effectively waives this necessity for certain occupational groups that do not require the aforementioned qualifications as laid out in the residence titles discussed above. This provision thus aims at applicants who possess a university degree which is not recognised or do not possess any formal qualification at all yet prove **sufficient professional experience** to compensate for this deficit. § 19c(1) Residence Act refers to corresponding provisions of the Employment Ordinance or an intergovernmental agreement, according to which applicants may be granted a residence permit to pursue employment irrespective of their qualification as a skilled worker, subject to the condition that the provision referred to stipulates that the applicant may be admitted to such.<sup>278</sup>

It follows from § 19c(2) Residence Act that the applicant must demonstrate at least 228 distinct **practical professional knowledge**. As § 19c(1) Residence Act requires that the envisaged employment must be authorised by an accompanying provision of the Employment Ordinance, in the following, all relevant occupations will be laid out for which the

<sup>278</sup> → mn. 106 et seq. for guidance on how to determine if an occupation will be considered as qualified.

Employment Ordinance provides such corresponding authorisations and thus possibly allows the granting of a visa for the purpose of specific forms of gainful employment in Germany, either for skilled or non-skilled workers within the meaning of the Residence Act. Residence titles via this pathway are awarded on a discretionary basis and may or may not be subject to formal consent of the Federal Employment Agency, which will be highlighted for each of the specific occupations laid out below.

229 All residence permits awarded under this base are subject to compliance with shared general requirements:

- By virtue of § 18(2) nos. 1–4 Residence Act, the following list of residence permits for certain occupational groups still require applicants to secure a binding employment offer, to obtain any required professional practice permit, if necessary for the envisaged occupation, and, if necessary, to conclude the formal recognition procedure of their respective academic or vocational education (yet without the need to achieve the status as a skilled worker, as this necessity is waived through § 19c(1) Residence Act).
- § 18(2) no. 4a Residence Act requires that both the foreigner and the employer must affirm that the prospective employment is actually to be exercised.
- General requirements for the issuance of a residence title pursuant to § 5 Residence Act must be adhered to (→ mn. 34 et seq.).
- First-time applicants older than 45 years, for a skilled worker residence permit, must be remunerated with a salary that corresponds to at least 55 per cent of the annual contribution assessment ceiling of the German pension insurance pursuant to § 18(2) no. 5 Residence Act. As forecasted at the date of this publication, the ceiling will be set to EUR 90,600 in 2024,<sup>279</sup> consequently the required remuneration amounts to EUR 49,830 unless the applicant provides proof of adequate pension funds by other means.<sup>280</sup> In special cases, in particular if there is a public, regional, economic or labour market policy interest, or if the remuneration threshold is only slightly undercut or the age limit is only slightly exceeded, this requirement may however be waived.<sup>281</sup>

## DIE FACHBUCHHANDLUNG

### I. Executive personnel

230 By virtue of § 19c(1) Residence Act in conjunction with § 3 no. 1 Employment Ordinance, a residence title may be granted to executive personnel (*Leitende Angestellte*) who do not qualify as skilled workers. To determine if the applicant will be considered as an executive employee, recourse must be drawn to the legal **definition** as laid down in § 5(3) Works Constitution Act (*Betriebsverfassungsgesetz*),<sup>282</sup> which provides conceptual guidelines to the determination of such. Two alternatives come into consideration here.

- Firstly, an applicant may be treated as an executive employee if he or she is entitled to **independently recruit and dismiss employees** working in the enterprise or in the operating department.<sup>283</sup> This includes executive personnel with **unlimited power of attorney or statutory procuration** (*Prokura*), which is not deemed to be insignificant in relation to the employer and is also intended to be factually exercised.<sup>284</sup>

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<sup>279</sup> See [https://www.deutsche-rentenversicherung.de/Rheinland/DE/Presse/Pressemitteilungen/pressemitteilungen\\_node.html](https://www.deutsche-rentenversicherung.de/Rheinland/DE/Presse/Pressemitteilungen/pressemitteilungen_node.html) for the latest determination of each calendar year.

<sup>280</sup> See § 18(2) no. 5 sentence 1 Residence Act.

<sup>281</sup> See § 18(2) no. 5 sentence 2 Residence Act.

<sup>282</sup> See BT-Drs. 110/20 mn. 22.

<sup>283</sup> See § 5(3) no. 1 Employment Ordinance.

<sup>284</sup> See § 5(3) sentence 2 Employment Ordinance.

- Secondly, the definition also applies to employees who regularly perform **tasks that are important for the existence and development of the enterprise** or business and the fulfilment of which requires special experience and knowledge, i.e. if decisions are either made essentially free of instructions or are at least significantly influenced by the executive employee. This also applies in the case of existing specifications, in particular due to legal provisions, plans or guidelines, as well as in the case of managerial cooperation with other executive employees.<sup>285</sup> If, according to the aforementioned principles, there is any remaining doubt about classification as executive employee, § 5(4) Employment Ordinance may be consulted, according to which further differentiations are made with regard to the position within the company (e.g. membership of the executive/managerial hierarchy and remuneration corresponding to executives).<sup>286</sup>

Pursuant to § 39(3) Residence Act, **approval** of the Federal Employment Agency is required for the granting of this residence permit. The Federal Employment Agency is however not obliged to conduct a priority check with regard to domestic workforce which would need to be prioritised. As stipulated in § 39(3) no. 1 Residence Act, the envisaged contractual agreement must not exhibit working conditions which are less favourable than for domestic employees. In reviewing this, the Federal Employment Agency is especially guided by standard remuneration for domestic executives in a similar position.<sup>287</sup> 231

## II. Specialised professionals

Persons who are not intended to hold a managerial position, but who nevertheless possess distinct professional expertise within the corporate enterprise (*Spezialisten*) may apply for a residence title in accordance with § 19c(1) Residence Act in conjunction with § 3 no. 3 Employment Ordinance even if they do not qualify as skilled workers. Consequently, this requires that the applicant possesses **specialist knowledge** that is essential for the envisaged position at the future employer.<sup>288</sup> Such expertise must be demonstrated by distinct, company-specific sector knowledge and a distinct professional qualification in congruence to the former. 232

As an additional requirement, the envisaged activity must be of **particular economic importance** for the future employer, as it regularly will be for internal product development or external sales of products.<sup>289</sup> 233

The **application** for a residence permit based on § 19c(1) Residence Act in conjunction with § 3 no. 3 Employment Ordinance merely requires, in addition of an employment contract with a company being duly established or independently branched in Germany, the submission of a detailed curriculum vitae demonstrating that the applicant fulfils the aforementioned requirements, irrespective of German language proficiency.<sup>290</sup> 234

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<sup>285</sup> See § 5(3) no. 3 Employment Ordinance.

<sup>286</sup> TUMK Ausländische Mitarbeiter/Timmermann III mn. 753.

<sup>287</sup> Technical Instructions of the Federal Employment Agency on the Residence Act and the Employment Ordinance (*Fachliche Weisungen der Bundesagentur für Arbeit zum Aufenthaltsgesetz und der Beschäftigungsverordnung*) of June 2021 mn. 19c.3.2.

<sup>288</sup> TUMK Ausländische Mitarbeiter/Timmermann III mn. 758.

<sup>289</sup> Technical Instructions of the Federal Employment Agency on the Residence Act and the Employment Ordinance (*Fachliche Weisungen der Bundesagentur für Arbeit zum Aufenthaltsgesetz und der Beschäftigungsverordnung*) of June 2021 mn. 19.c.3.4.

<sup>290</sup> TUMK Ausländische Mitarbeiter/Timmermann III mn. 759.



- 235 In assessing whether the position envisaged constitutes a position as a specialised professional, the Federal Employment Agency is also guided by **contractual remuneration**, which in turn depends on the sector in which the employer's company is situated.<sup>291</sup>
- 236 By virtue of § 39(3) Residence Act, **formal approval** of the Federal Employment Agency is also required, whereas a priority check with regard to domestic workforce is waived.

### III. Managing directors and board members

- 237 § 19c(1) Residence Act, in conjunction with § 3 no. 2 Employment Ordinance provides legal grounds for the issuance of a residence title to members of an enterprise who are entitled to act as legal representatives regardless of whether they qualify as skilled workers. This primarily concerns managing directors and board members of a corporation and inevitably entails overlaps with **founders and sole business owners** whose activities may be classified as self-employment.
- 238 For a visa for managing directors and board members under § 19c(1) Residence Act in conjunction with § 3 no. 2 Employment Ordinance, it is therefore necessary that the applicant maintains a **conventional employment relationship subject to social security contributions** to not be classified as self-employment, which would be covered by § 21 Residence Act.<sup>292</sup> The distinction between these two visa types must be clarified in advance, as different requirements apply.

The visa under § 19c(1) Residence Act in conjunction with § 3 no. 2 Employment Ordinance proves to be more advantageous in a direct comparison, as it is tied to fewer requirements.

- 239 Members of the executive board of a **stock corporation** (*Aktiengesellschaft*) are predominantly regarded as employees subject to social security contributions, with the consequence that the requirements of a visa according to § 19c(1) Residence Act in conjunction with § 3 no. 2 Employment Ordinance must be consulted.<sup>293</sup> Contrary, shareholders in a **commercial partnership** (such as an *offene Handelsgesellschaft*) are generally regarded as self-employed and therefore are covered by § 21 Residence Act. Managing directors of a **limited liability corporation** (*Gesellschaft mit beschränkter Haftung*) will be considered employees subject to social security contributions if they possess less than 50 per cent of the share capital and may not block decisions of other shareholders on the basis of a corresponding clause in the shareholders' agreement.<sup>294</sup>
- 240 If surpassing this threshold, managing directors are assessed as **self-employed** and are accordingly subject to § 21 Residence Act.
- 241 Personally liable partners of a **corporation** (*Kapitalgesellschaft*) or board members of an **association** (*Verein*) or a **charitable foundation** (*Stiftung*) generally fall under § 19c(1) Residence Act in conjunction with § 3 no. 2 Employment Ordinance, unless their position within the respective institution gives rise to the presumption that it constitutes self-employed activity.

<sup>291</sup> Technical Instructions of the Federal Employment Agency on the Residence Act and the Employment Ordinance (*Fachliche Weisungen der Bundesagentur für Arbeit zum Aufenthaltsgesetz und der Beschäftigungsverordnung*) of June 2021 mn. 19.c.3.4.

<sup>292</sup> TUMK Ausländische Mitarbeiter/Timmermann III mn. 761.

<sup>293</sup> ErfK/Rolfs SGB IV § 7 mn. 23.

<sup>294</sup> See BSG 14.3.2018 – B 12 KR 13/17 R, NJW 2018, 662.