

CHAPTER 6 SECTION 6

BUSINESS APPLICATIONS UNDER THE TURKISH- EC ASSOCIATION AGREEMENT (ECAA)

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1. Background

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The Turkish European Community Association Agreement (ECAA), also referred to as the Ankara Agreement, was signed on 12 September 1963. Article 13 of that Agreement refers to the progressive abolition of restrictions on freedom of establishment and provision of services. A step forward in that process was Article 41 of the Additional Protocol to the Turkish ECAA (signed on 23 November 1970).

Article 41(1) of the Additional Protocol provides that Member States will “refrain from introducing new restrictions on the freedom of establishment and freedom to provide services” for Turkish nationals from the date the ECAA and Additional Protocol came into force for the Member State concerned. The United Kingdom became bound by this Agreement when it joined the then EEC in 1973. This provision is commonly known as “**the standstill clause**”. The European Court of Justice in case C-16/05 *Tum and Dari* (20 September 2007) held that the Ankara Agreement prohibits the introduction, from its entry into force, of any new restrictions on the exercise of the freedom of establishment and freedom to provide services, including those relating to the conditions governing *first admission* to an EU Member State.

The domestic provisions relating to entry for the purpose of freedom of establishment and the provision of services are contained within the Immigration Rules in force on 1 January 1973. HC509 are the Rules for Control On Entry and HC510 are the Rules for Control After Entry. Only the provisions contained in these rules that relate to establishment and providing services and any related provisions are given effect to by the standstill clause. The business provisions are less stringent than the corresponding requirements in the current rules but they must be applied in the context of the objectives of the ECAA, which are to promote genuine and viable cross border business. These business provisions (referred to hereafter as “the 1973 business provisions”) are included at **Annex A & Annex B**.

The right to take the benefit of the standstill clause is subject to one exception, set out below at section 2, regarding persons who are considered to be making an application following fraudulent or abusive conduct. This is consistent with the ECJ's findings in *Tum and Dari*. Where fraud or abuse is established in line with section 2, the standstill clause will not be applied and the merits of the person's business application will *only* be considered under the relevant parts of HC395 (as amended) (“the current rules”). This will normally be the Tier 1 (Entrepreneur) category in paragraphs 245H-245N and / or, where applicable, on general grounds for refusal.

An application assessment checklist is available at **annex H**.

This guidance is concerned only with the handling of applications to self-establish, that is applications from Turkish nationals who wish to set up in business in the UK. Applications made under the worker provisions of the Turkish ECAA are considered separately according to different requirements. Instructions on handling those applications are provided in the Immigration Directorate Instructions at Chapter 5 Section 10.

2. Applicants who cannot take the benefit of the standstill clause

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2.1. Fraudulent / abusive practice

It is a well established principle, in both domestic and Community case law, that Community law (in this case the standstill provisions in the ECAA with Turkey) cannot be relied on for abusive or fraudulent ends. In the context of immigration applications this will normally involve creating the ability to seek leave or having already obtained leave under the 1973 business provisions by breaching UK immigration law. Therefore, persons who have applied to establish in business whilst entering or remaining in the UK by breaching immigration law are normally excluded from taking the benefit of the standstill clause and applications from those persons fall to be assessed under the current rules.

This can include first time or repeat applications based on businesses previously established that are the same or only different by virtue of a superficial change such as a name change or change of status from sole trader to limited company.

However, there may be occasions when an applicant has breached immigration law but their conduct is either not considered sufficiently serious to assert that they are only able to make their business application by virtue of their breach, or that other factors connected to the breach need to be considered. See section 4.2.4 for further guidance.

Fraudulent/abusive activity carries particular meaning in this context and is considered to include, but is not limited to, any of the following conduct:

Applying to establish in business or having already established in business in the UK:

- having entered or having sought to enter the UK illegally;
- having sought or obtained leave by deception (refer to 2.1.1);
- whilst in breach of the conditions of leave to enter or remain (refer to 2.1.2);
- whilst on temporary admission or absconding from temporary admission (refer to 2.1.3);
- having made an asylum claim that is discredited (refer to 2.1.4);
- having made false representations and/or failed to disclose material facts in the application being made.
- in circumstances where there is a material link between the current business proposal and previous fraudulent / abusive conduct (refer to 2.1.5).

2.1.1. Leave sought or obtained by deception

Where it can be shown that an applicant has created the opportunity to apply to establish in business only by virtue of having sought or obtained leave by deception i.e. has made false representations, has presented false documentation or failed to disclose material facts, the applicant is considered to have engaged in abuse. This includes applications to which paragraph 321(i) and 322(2) of the current rules apply e.g. if entry clearance has been obtained by deception, particularly in light of the availability of entry clearance under the On Entry 1973 business provisions.

2.1.2. Breach of the conditions of leave to enter or remain

Subject to a transition period until April 2010, some applicants already in the UK may in limited circumstances be permitted to switch into the businessperson category, namely visitors who meet the requirements of the 1973 business provisions. See section 3.3.

It should also be noted that applications from those who have already established in business but had permission to do so, namely those holding leave that has attached to it unrestricted economic rights (i.e. code 1 leave), may be allowed to switch into the ECAA business category but only if they meet the requirements of the 1973 business provisions. See section 3.3.

However, applicants (including visitors) should not normally be allowed to secure leave on the basis of a business established and operated in breach of conditions of extant or previous leave. Such applicants will normally be expected to obtain leave from outside the UK.

Applicants who breach the conditions of businessperson leave given under the ECAA should only be treated as abusive and denied the benefit of the standstill clause if it can be shown that their original application was abusive e.g. if they never had any intention to establish in business in accordance with the 1973 business provisions. Applicants who nonetheless can show that they have continued to run their business should not be denied the benefit of the standstill clause, although may be penalised in other ways e.g. for working illegally in addition to running their business, or curtailment if the breach of leave indicates that the applicant no longer meets the requirements of the 1973 business provisions if, for example, they are working and relying on this money because the profits of the business are insufficient to support them and any dependants.

Finally there may be some circumstances in which the context of the breach of conditions are not considered sufficiently serious to assert that the applicant is only able to make their business application by virtue of the breach of conditions. In such circumstances the application should be considered on its merits taking account of the breach of conditions as provided for in the 1973 rules where applicable. See section 4.2.4 for further guidance.

2.1.3. Establishing in business whilst on temporary admission

The most generous permission given in relation to economic activity whilst on temporary admission is that to engage in employment. Permission to engage in employment whilst on temporary admission has never extended to permission to establish in business. This includes applicants who fail to comply with the terms of their temporary admission and during that time establish in business.

2.1.4. Asylum/human rights claim that is subject to adverse credibility findings

Claiming protection on the basis of asylum/human rights and having that claim refused is not fraudulent per se. However, applicants who base their application on a business set up whilst in the UK by virtue of claiming asylum/human rights protection on the basis of an account which is discredited on the grounds that false representations have been made should not be allowed to take the benefit of the standstill clause.

An initial decision by the Secretary of State to refuse asylum cannot be used solely as the basis for saying that the claim has been discredited. Only a claim that has been subject to an appeal i.e. that has been scrutinised by an independent Adjudicator / Immigration Judge and has been found to be untrue can

form the basis of a decision to exclude an applicant from the standstill clause. Appeal determinations provide a record of the Adjudicator / Immigration Judge's findings.

It is vitally important to distinguish between an asylum claim where the core account has been substantially or materially discredited and one where it has been accepted, or partly accepted, but not found to meet the criteria for refugee status. Only claims that have been substantially or materially discredited by virtue of clear adverse credibility findings by the Adjudicator/Immigration Judge will exclude the applicant from the benefit of the standstill clause.

In addition, scrutiny of an asylum claim must have been concluded before an applicant is excluded from the standstill clause on this basis i.e. there should be no outstanding appeals in respect of the claim. In this regard it is important to ensure that, if there have been appeal reconsiderations, the final determination is referred to when ascertaining what was the final conclusion on the merits of the claim i.e. if adverse findings are made in an original determination they can only be relied upon as evidence of fraudulent conduct if any subsequent reconsideration(s) uphold the original determination without disturbing the findings in any way.

2.1.5. Previous fraudulent / abusive conduct

Where an applicant is making a new business proposal but it can be shown that previous fraudulent or abusive conduct have allowed the application to be made the benefit of the standstill clause should be denied. For example, a business previously established whilst the applicant was an illegal entrant provides in their current application all their relevant experience or client base or funding (if the business has been sold).

2.2. Liability to deportation

If an applicant is, or becomes, liable to deportation s/he should be handled in accordance with domestic legislation and guidance governing deportation. If not already involved, please refer to Criminal Casework Directorate for further guidance.

2.3. Extant deportation orders

If an extant deportation order against an applicant comes to light the applicant should, if applying for entry clearance overseas, be instructed to apply for the deportation order to be revoked before making any further applications. If the applicant is in UK the case should be referred to Criminal Casework Directorate for further guidance.

2.4. Non-conducive and national security

If an applicant is non-conducive to the public good or raises national security concerns, they cannot take the benefit of the standstill clause and they should be considered under the relevant general ground for refusal under the Current Rules, being one of the following: 320(6), 320(19), 321A(4) 321A(5) or 322(5) of HC395. Further guidance is available in IDIs Chapter 9 and its annexes.

2.5. Offences committed overseas punishable by imprisonment for 12 or more months if committed in the UK

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If it becomes apparent that an applicant applying for entry clearance has been convicted abroad of an offence which would attract at least a 12 month sentence if convicted in the UK, they should be considered under the relevant general ground for refusal under the Current Rules, being 320 (18) of HC395. Further guidance is available in IDIs Chapter 9 and its annexes.

3. Types of application

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There are several circumstances in which individuals may apply to seek to take the benefit of the standstill clause and have their business applications considered under the 1973 Rules. There may be exceptional circumstances in which it is appropriate to exercise discretion and consider an application under the 1973 Rules notwithstanding fraudulent / abusive conduct. This guidance deals with the handling of applications for entry clearance, leave to enter/remain and indefinite leave.

NB – applicants excluded from taking the benefit of the standstill clause should be assessed under the Tier 1 (Entrepreneur) category and, if appropriate, the general grounds for refusal in the current rules. Refusal in respect of applicants entitled to take the benefit of the standstill clause should clearly set out which of the requirements of the 1973 business criteria have not been met and why or, if appropriate, what general considerations have been taken into account when refusing the application. Example refusal wordings are available at **Annexes E, F & G**

3.1. Entry clearance

That is those who apply for entry clearance to come and establish in business under the On Entry 1973 business provisions.

Successful applicants should be granted entry clearance for 12 months and should receive the endorsement: CAT D ECAA Business Code 2.

There may be circumstances in which an applicant does have a genuine intention to establish in business in accordance with the 1973 business provisions, but the content of their application does not fully support their business proposal. In such cases entry clearance officers may consider issuing entry clearance for a period of 2 months to allow the applicant to establish their business in the UK and finalise their proposal. It is expected that this will occur rarely as the entry clearance officer must be satisfied that the applicant demonstrates a genuine intention to establish in business in accordance with the 1973 business provisions. These cases must be referred to an ECM. Further guidance is available in section 4.6.

Applicants who practice fraud / abuse in the following regard whilst making an entry clearance application will be denied the benefit of the standstill clause and will be assessed under the current rules:

- by the use of deception to the entry clearance officer in the course of applying
- by relying on a business already established in the UK in breach of immigration law
- where there is a material link between the current business proposal and previous fraudulent / abusive conduct.

Unsuccessful applications, either fraudulent / abusive or merits based, should be refused using the refusal wordings at Annex E as a basis.

3.2. Leave to enter

That is those who seek entry to establish in business under the On Entry 1973 business provisions.

3.2.1. Those in possession of Turkish ECAA businessperson entry clearance

Passengers who arrive at port with a businessperson entry clearance issued under the On Entry 1973 business provisions should normally be admitted on the basis of their entry clearance.

Where it becomes apparent that a passenger has obtained their businessperson entry clearance by *deliberately* making false representations, presenting false documents or withholding information this is considered to amount to fraudulent or abusive conduct (refer to 2.1) with the result that the passenger is excluded from taking the benefit of the standstill clause and assessed under the current rules. Their entry clearance should be cancelled under paragraph 321(i) and entry should be refused.

Where it becomes apparent that a passenger in possession of an ECAA businessperson entry clearance has either obtained the entry clearance as the result of false representations or the use of false documentation, but without the passenger's knowledge or where there has been a change in circumstances since the entry clearance was issued the passenger should be assessed under the 1973 On Entry rules and be refused if applicable in accordance with paragraph 12 of HC509.

Refusal wordings are available in annex E and annex F.

3.2.2. Those not in possession of Turkish ECAA businessperson entry clearance

There may be circumstances in which a Turkish national seeks leave to enter as a businessperson under the 1973 business provisions but does not hold entry clearance issued under the On Entry 1973 business provisions e.g. a Turkish national who holds entry clearance in another capacity or who has arrived at port without a visa.

Where such an applicant is seeking to establish in business in fraudulent or abusive circumstances (see section 2) the application should be refused under paragraph 320(5) on the basis that entry clearance as a Tier 1 (Entrepreneur) is not held. This includes reliance on a business already established in the UK in breach of immigration law. Refusal wording is available at annex E.

Where there are no fraudulent or abusive circumstances meaning that the applicant is entitled to take the benefit of the standstill clause the passenger should not automatically be refused for lack of entry clearance. Where the applicant demonstrates a genuine intention to establish in business in accordance with the 1973 On Entry business provisions, but cannot fully support their business proposal, leave to enter may be granted for a period of 2 months to allow the applicant to finalise an application and apply for further leave. These cases must be referred to a CIO. Further guidance is available in section 4.6.

Applicants who do not meet, or who cannot show a likelihood of meeting, the requirements of the On Entry 1973 business provisions should be refused leave to enter using the refusal wordings at Annex F as a basis.

3.3. Leave to remain

The following applicants are permitted to seek an extension of stay under the After Entry 1973 business provisions:

- Applicants who have entered the UK with entry clearance as a businessperson
- Applicants who have been granted leave for 2 months in line with the power of discretion outlined in sections 3.1 and 3.2. This type of application for extension should be assessed with regard to the reasons why leave was initially only granted for 2 months rather than 12 months and the gaps that were felt to exist in that initial application should be fully addressed in the application for extension

- Applicants who have been admitted as visitors. In line with the 1973 provisions visitors who can show a genuine intention to establish in business will be allowed to switch into the business category. In some circumstances other applicants, such as those who have established in business whilst present in the UK holding leave that has attached to it unrestricted economic rights (i.e. code 1 leave), will be permitted to switch.

NB – For a transitional period of 6 months (applications submitted before 31 March 2010) those wishing to switch from other categories apart from visitors will continue to have their applications assessed under the 1973 business requirements.

Successful applicants, including those already granted 2 months leave in the business category, should be granted leave to remain for 12 months from date of decision.

3.4. Further leave to remain

Turkish nationals who have been granted 12 months leave under the After Entry 1973 business provisions are entitled to have their further leave to remain application considered under the After Entry 1973 business provisions.

The After Entry 1973 business provisions provide for an "appropriate extension of stay" to be granted if the provisions are met. If these are not met then the application will usually fall for refusal. If they are met this grant should normally be for 3 years.

However there may be cases which do not merit refusal outright, but where the applicant has been unable to provide all the evidence required to justify a grant of 3 years. For example, a business may have been established but has experienced difficulties during the initial 12 months of operation, such that its on going success is still to be proven. In these cases it may be appropriate to grant an extension of stay for a further 12 months rather than for the full 3 year period. The applicant would then be required to apply again for a further extension at the end of that period.

Applications that do not meet the After Entry 1973 business provisions should be refused using the refusal wordings at Annex G as a basis.

3.5. Indefinite leave to remain

Applications for indefinite leave to remain should be assessed using the criteria at **annex C**.

Applicants who do not meet the settlement requirements should be refused using the refusal wordings at annex F as a basis.

3.6. Dependants

Dependants (including those seeking leave to enter at a UK port), being partners (spouse, civil partner, unmarried or same-sex partner) and children, of applicants who are entitled to take the benefit of the standstill clause are to be assessed using the criteria at **annex D**, with regard to any general considerations and relevant facts (such as failure to observe time limit and conditions of leave, attempted or actual illegal entry, attempted or actual entry by deception). This is compatible with, and more generous than, the dependant provisions in force in 1973 which only made provision for wives and children. Dependants who are only able to apply by virtue of an attempted or actual breach of immigration law will normally be refused.

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Family members seeking leave to remain will only be granted leave if they can show that they have, or were last granted, leave as the family member of a Turkish ECAA businessperson or leave as the family member of a person with leave under another category of the rules who has since been, or is at the same time being, granted leave as a Turkish ECAA businessperson.

Family members applying for indefinite leave to remain will need to do so at the same time as the Turkish ECAA businessperson and must be able to show that they have, or were last granted, leave as the family member of a Turkish ECAA businessperson. Family members applying for ILR in reliance on a Turkish ECAA businessperson who has already obtained ILR should be treated in accordance with paragraphs 277-289 / 295AA – 295O / 296 – 316F of the current rules.

Dependents of applicants who are not allowed to take the benefit of the standstill clause should be assessed under the current rules as family members of PBS migrants and their applications will be considered in line with that of the main applicant and accordingly will need to meet the requirements of 319C or 319E or 319H or 319J.

Any other relatives of businesspersons should be refused leave on the grounds that there is no provision in either the 1973 dependant provisions or in HC395 for other dependants.

Refusals should use the example wordings at annex G as a basis.

4. Consideration under the 1973 Rules

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4.1. Assessing applications against the requirements of the 1973 business provisions

Although the business requirements in the 1973 business provisions are different from the corresponding requirements in the current rules they must be applied in the context of the objectives of the ECAA, which are to promote genuine and viable cross border business. In some circumstances abusive activity means that the applicant cannot take the benefit of the standstill clause (see section 2). Such applications will *only* be considered under the current rules. In all other cases the merits of the business application must be assessed thoroughly in accordance with the following guidance.

All applications will need to meet the minimum requirements which are listed in the 1973 business provisions, instruction on which is available at paragraph 4.4. Failure to meet any of these requirements will lead to the application being refused.

A list of the types of business that may qualify can be found in the legal structures section of the [Business Link website](#) .

4.2. Summary of the consideration process

A summary of the consideration process is available at **annex H** and this should be used to structure the assessment of each application.

4.2.1. *Is there a genuine intention to set up the business?*

See section 4.3 for further guidance.

It may be the case that the business proposal appears on paper to meet the minimum requirements of the 1973 business provisions i.e. the applicant has sufficient funds, a good projected turnover and profit, the proposal has been researched etc, but each case is to be considered on its merits and there may be reason to believe that the applicant does not intend to set up, or is not capable of running, the proposed business.

For example, there may be a lack of relevant qualifications or experience, depending on the nature of the business the applicant's age may suggest he/she is unable to run the business or the applicant's conduct may suggest that the application does not represent a genuine intention to establish.

4.2.2. *Is it a business of the kind covered by the 1973 business provisions?*

See section 4.4 for further guidance.

The minimum requirements of the 1973 business provisions are that the applicant has sufficient funds proportional to his interest in the business which he intends to invest in the business, is able to show that s/he can bear his/her share of any liabilities that the business may incur, can show that the business profits will be sufficient to support him/her and any dependants and that the business proposal does not

amount to disguised employment. In addition to these requirements an applicant who is joining an existing business will need to provide the business accounts for previous years, a statement of the terms on which s/he will be joining the business, evidence that s/he will be actively concerned with the running of the business and evidence that there is a genuine need for his/her services and investment.

The intention behind the 1973 business provisions was to provide a basis for applying for leave for those who wish to establish a business of the kind that involves genuine financial investment and risk on the part of the applicant. If an application is based on a business that is unable to meet the minimum requirements of the 1973 business provisions because it does not represent genuine investment and risk, even if the proposal itself is genuine, the application should be refused.

4.2.3. Does the proposed business amount to disguised employment?

In some circumstances it may be apparent that the nature of the work being proposed is actually employment. Disguised employment in the context of the 1973 business provisions means a proactive attempt to present employment as self-establishment. For example, a claimed investment that amounts only to a transfer of money to the business owner and the applicant in practice is managing the business on behalf of the owner may amount to disguised employment. When disguised employment is identified the application should be refused.

If some or all of the following criteria apply, this indicates employment:

Applicant;

- works a set amount of hours;
- is paid by the hour, week, or month;
- will receive overtime pay or bonus payments;
- is "part & parcel" of an organisation i.e. is an integral part of an organisation; receives employee-type benefits from an organisation e.g. pension, access to grievance procedures etc;
- can at any time be told what to do e.g. where to carry out work or when and how to do work and can be moved from task to task.

The fact that an individual provides services for more than one person does not automatically mean that they are not employed. If the above indicators apply to each service being provided then the individual is may still be an employee but with multiple employers rather than established in business.

When an applicant is found to be seeking or actually in employment it does not necessarily mean that the applicant is guilty of disguised employment: the applicant may genuinely believe that what they are doing represents running their own business. However, it does mean that the application will fail.

Further information on employment status is available on the HMRC website:

<http://www.hmrc.gov.uk/employment-status/index.htm>

4.2.4. Are there any general considerations?

There are a number of circumstances in which adverse immigration status will prevent the applicant from taking the benefit of the standstill clause – see section 2.

However, there may be occasions when an applicant's conduct does not amount to fraud / abuse such that they should be excluded from the standstill clause but their conduct nevertheless is penalised under the terms of the 1973 rules, which state that applications should be considered on merits taking account

of any general considerations and relevant facts. This includes but is not limited to, any failure to observe time limit and conditions of leave. Only in exceptional circumstances will an applicant who has breached immigration law, but who is allowed to take the benefit of the standstill clause, be allowed to succeed under the 1973 business provisions.

Where it is decided to grant leave in such cases reasons for doing so despite the applicant breaching immigration law should be given in the grant letter.

Specific guidance on overstayers is available below at section 4.3.1.1. Specific guidance on entry clearance and leave to enter applications is available below at 4.3.1.2.

4.2.4.1. Overstayers

Applicants who have overstayed but are also guilty of fraud / abuse in other regards such as having already established a business in breach of the conditions or having obtained their previous leave by deception, should be denied the benefit of the standstill clause on these other grounds. See section 2 for further guidance.

Applicants who overstay by less than 28 days should be considered under the 1973 After Entry business provisions on the merits of their business.

Applicants who overstay by more than 28 days and then make an application to establish in business should be considered under the 1973 After Entry business provisions (paragraph 4 and 21 of HC510) and normally be refused leave to remain in accordance with paragraph 4 of HC510 on the basis that they have only been able to apply to establish in business by breaching immigration law. Applications should be referred to a senior caseworker where it is felt that an overstayer of more than 28 days should nonetheless be considered on the merits of their business.

When applicants who have already lawfully established a business which meets the requirements of the 1973 business provisions e.g. whilst holding ECAA business leave or leave that has attached to it unrestricted economic rights (i.e. code 1 leave), overstay by more than 28 days, account should be taken of the reasons for and length of overstaying. The application should normally be considered on merits. Refusal on paragraph 4 grounds (see criteria at annex A) should only occur where the applicant's continuing ability to meet the business requirements is entirely dependent on the period for which they have overstayed.

4.2.4.2. Entry clearance and leave to enter applications

In 1973 persons who breached immigration law, including overstayers, were removed by way of a deportation order and would only have been allowed to apply for entry once that deportation order had been revoked (paragraphs 43 and 52 of HC510 and paragraph 68 of HC509 available at annex B and annex A). Therefore applications for entry clearance and leave to enter from those who already set up their business in the UK having breached immigration law but who are nevertheless allowed to benefit from the standstill clause, e.g. overstayers of more than 28 days, should be considered in light of their breach of immigration law in accordance with the 1973 rules.

Applications for leave to enter should normally be refused in light of paragraph 68 of HC509. See annex A.

Applications for entry clearance should be considered in light of the fact that in 1973 revocation of deportation orders were applied for overseas and that decision makers were guided by paragraph 67 of HC510. See annex B.

4.3. Assessing the intention to self-establish

The 1973 business provisions refer to those who have a wish to establish in business and state that applications to establish in business are to be considered on their merits. In order to complete a full assessment of an application decision makers must therefore be satisfied that the applicant has a genuine intention to self-establish. In other words, there is scope to apply reasoned judgment when assessing applications. If, because of the nature of the business or the applicant's involvement in it, decision makers feel that other factors, beyond the minimum requirements in paragraph 4.4, must be taken into account in deciding whether or not the applicant is establishing in business then further relevant evidence can be requested and refusal wordings outside the minimum requirements can be used.

The following are of relevance to assessing intention to establish and should always be considered.

4.3.1. *Applicant's conduct*

There may be cases where an applicant's conduct suggests that the application is an attempt to secure leave rather than reflective of a genuine intention to establish in business. This *may* be the case in, though is not limited to, the following circumstances.

- Applicant has made one or more recent unsuccessful application(s) on the basis of a different business
- Applicant has been refused permission to work for the company who s/he is now claiming to provide services for as a businessperson.
- Application submitted after removal directions have been set
- Application that seeks to rely on a business that has already formed the basis of an unsuccessful application.

4.3.2. *Realistic business proposal*

A business plan or clear statement of intention setting out the business proposal and what the applicant will actually be doing is essential. This should include the following:

- An executive summary of the business proposal
- Outline of marketing and sales strategy
- Outline of operations – business premises to be used, any production facilities, IT systems etc
- Timetable for establishment
- Financial forecasts including;
 - detailed breakdown of set-up costs of the intended business
 - proper understanding of practical and financial requirements for establishment in the UK
 - projections regarding performance over the first 12 months of operation which takes account of all potential expenses (such as overheads, administration, and marketing) and which convincingly demonstrates a reasonable chance that profits will be sufficient to maintain the applicant and any dependants over that time.

It is important that if required any applicant is able convincingly to demonstrate an understanding of any written evidence submitted on his behalf and be able to justify the projected figures given above.

When, for example, it is apparent that the individual does not match up to the profile suggested by a pro forma business plan which may have been prepared by another party, it would be appropriate to discount such a plan in the overall assessment of the application. An inability to demonstrate understanding of the plan would cast doubt on whether the applicant could be expected in practice to put it into place. However it would not be impossible to demonstrate compliance with the rules when an application is prepared in conjunction with another party and contains similarities to other plans previously or simultaneously submitted.

4.3.3. Appropriate documentation

The provision, or not, of appropriate documentation may be indicative of the applicant's intention to establish.

The only documentation formally required in the 1973 business provisions is in relation to joining an established business and is for accounts and a written statement of the terms of entry into the business but further documents will obviously need to be provided in support of all applications.

Documentation must only be assessed in the context of whether or not, in light of the proposed business, it shows that the application meets the requirements of the 1973 business provisions i.e. the documents required in support of an application should be determined by the nature of the proposed business.

For example, there is no formal requirement in the 1973 business provisions for applicants to provide a business plan, to provide a lease for their business premises or to provide relevant qualifications but the lack of one or more of these documents may undermine the applicant's claim that they have a genuine intention to self-establish.

Relevant documentation could include one or more of the documents listed below but decision makers should always remember that applicants are required to show a genuine intention to be establishing in business, or that they are continuing to operate their business, not to simply provide a bundle of predetermined documents.

- Bank statements
- Accounts
- Educational and vocational qualifications
- Legal documents such as leasehold for business premises
- Partnership agreement
- Insurance documents
- Invoices
- Reference letters
- Utility bills
- Required Licences ie Premises Licence/Personal Licence for liquor sales

It is essential to always explain how and why the lack of any document leads to a refusal under the 1973 business provisions.

4.3.3.1. Bank statements showing investment funds.

A genuine intention to establish in business must be supported by a genuine ability and intention on the part of the applicant to invest their own money in the business. It is reasonable to expect bank statements to be provided with all applications. See section 4.4.1 for further guidance.

4.3.3.2. Registering to make tax and national insurance contributions as a self-employed person.

Documentation showing registration to make tax and national insurance contributions as a self-employed person is not a requirement of the 1973 business provisions. Neither does registration as self-employed with HMRC indicate that the individual has self-established. Self-establishment must be assessed on the basis of the activities being proposed or undertaken.

4.3.3.3. Provision of accounts when buying a business

Although the 1973 business provisions only require accounts from applicants who are joining an already established business, it is also reasonable to expect them from an applicant who is buying an already established business to run in their own name. Accounts will show whether or not the applicant is buying a legitimate business that is likely to be able to support him/her and any dependents. It also allows the decision maker to decide whether or not the applicant has sufficient funds and ability to buy and run the business and is able to bear the liabilities associated with the business.

Accounts should, at a minimum, relate to the 2 years immediately prior to the business being purchased and be produced in accordance with the Companies Act 1985 (as amended) and the Companies Act 2006. Further guidance is available in the Business Law section on the BIS website at: <http://www.bis.gov.uk/whatwedo/businesslaw/index.html>

4.3.3.4. Handling falsified documents

Documents submitted in support of an application, including passports and ID cards, that are suspected of being falsified should be referred to local forgery experts for further action. If falsification is confirmed consideration should be given to excluding the applicant from the benefit of the standstill clause – see section 2.

4.3.4. Relevant experience / qualifications

Evidence of this will show the applicant's ability and therefore intention to establish / run their business. Experience and qualifications should be examined in the context of the proposed business. It is possible to demonstrate an ability to establish without prior experience in some circumstances; equally it is clear that success in others would require considerable experience and/or formal qualifications. Any such qualifications would need to be recognised in the UK and be acceptable for the purposes for which it is proposed that they are to be used.

An assessment of relevant experience should take account of the fact that self-establishing requires hard work and commitment as well as at least some basic understanding of cash-flow planning and financial management.

4.3.5. Consideration and verification procedures

Intention can be assessed by verifying key aspects of the application wherever practicable, through the checking of references and documents, and confirmation of any relevant agreements and business activities.

In some cases it may not be possible to establish, solely on the basis of the documents available to the decision maker, the true nature of the circumstances surrounding the application with sufficient confidence to allow an informed and reasonable judgement to be made. This may be due to doubts about the authenticity of documents, apparent inconsistencies in the evidence submitted, or significant omissions which seem unlikely merely to be a result of oversights in the preparation of the application. In these cases, consideration should be given to interviewing the applicant in person. There may also be cases where the application has been submitted by a third party and it would be helpful to test the credibility of the claims being made on their behalf through a face to face interview with the applicant. This may especially be so if a number of similar applications have been made by the same representative on behalf of different clients.

4.3.6. Proficiency in English

Fluency in English cannot be an absolute test for the application, but it is reasonable for the level of proficiency to be taken into account as part of the assessment. If it is apparent that the applicant has little or no English, this should be looked at in the context of the proposed business. It should be borne in mind that an inability to speak good English might not necessarily be an insurmountable barrier to successful establishment in some circumstances. However, in others it would clearly present severe difficulties.

The level of proficiency would also be of relevance when considering aspects such as the timetable for establishment and the rate of growth of the proposed business.

Where an application would normally be assessed on paper only but it is felt that the level of English is of particular relevance to the application consideration should be given to interviewing the applicant. Alternatively, the applicant may be asked to provide written evidence of their ability to speak English, such as an educational qualification in English.

4.4. Assessing against the minimum requirements of the 1973 business provisions

All applications will need to meet the following minimum requirements which are listed in the 1973 business provisions. Failure to meet any of these requirements will lead to the application being refused. Relevant extracts of the 1973 business provisions are available at **Annex A** and **Annex B** of this section.

4.4.1. Evidence of sufficient funds / assets to be devoted to the business

If an applicant is not devoting any funds / assets at all to the business then the application is not one that will meet the business requirements of the 1973 business provisions.

It is also important to ascertain that the money will be invested in the business rather than just transferred to the bank account of the current business owner. Money to be invested in the business would normally be used to expand the business with the aim of increasing profit and there should be evidence to show how this will or has happened.

4.4.1.1 Level of financial investment

The applicant's level of financial investment must be proportional to his role in the business and he must have either a controlling or equal interest in the business i.e. he should have more than a 50% interest or be one of a number of partners or directors with equal interest. A person who has a majority or equal financial interest in a business but who nevertheless clearly has no major say in running the business or

setting its policy will not have an interest in the business proportional to his investment, or a person holding a 5% share in a firm in which the other directors each held 20% or more would not have an equal or controlling interest in the business.

Unlike the current rules, the 1973 business provisions do not require a minimum level of investment but do require *proportional* investment in a business that will generate sufficient funds to support the applicant and any dependants. Level of investment will therefore need to be assessed on a case-by-case basis and take account of the actual or projected net profit of the business, the applicant's share of that profit and whether that share will be derived from a proportionate investment in the business.

For example, a £2,000 investment in a business worth £1,000,000 from which an applicant takes a 50% share of a net profit of £50,000 on the basis of an agreement with the business owner is not a proportional investment of the applicant's money. Equally, an inflated investment in a small company which does not require such an investment is not proportional and may indicate that the investment is an attempt to give the impression of investment. The source and continuing use of the funds will be of relevance in these circumstances.

4.4.1.2 Source of funds

Applicants must be able to show that the money they will be investing in the business is their own money, solely under their control and is capable of being invested in the business on a long term basis.

Applicants must be able to provide evidence that the origin of their funds is legitimate and representative of their own assets. Bank statements for the last 6 months (less is acceptable if the source of the funds can be satisfactorily established) should be provided and any irregular or unusual deposits must be explained (and backed up with evidence).

A gift of money would be acceptable only where that gift is genuine and the money is at the applicant's unfettered disposition. A gift, for example, from a business associate or other person who has a commercial relationship with the applicant would not be acceptable since it could not be considered as devoting assets to the business, as the money has come from the business in the first place. Such a gift may also amount to disguised employment. A gift from sources close to the applicant, such as family members, must be supported by evidence that the loaner is financially able to make the gift without the possibility of needing to recall the money.

A loan, either a business bank loan or from another source such as a family member, made for the purpose of setting up the business in question, may form part of initial funding but a loan is not considered to be an asset belonging to the applicant. Applicants need to show that the majority of funds to be invested are their own. If relying in part on a loan the applicant would need to show that their business has a realistic chance of succeeding and being able to generate sufficient profits in the future, including an ability to repay the loan as well as to support the applicant and any dependants. A loan from sources close to the applicant, such as family members, must be supported by evidence that the loaner is financially able to make the gift without the possibility of needing to recall the money at short notice.

A loan, whatever its source, is not an acceptable source of funding when it is of such a short term nature as to undermine the ability of the applicant to establish their business i.e. it will need paying back before the applicant's business is generating sufficient profit to pay off the loan as well as support him and any dependants, or when it forms the sole basis of investment in which case the applicant is not devoting assets of his/her own to the business.

4.4.2. Evidence that the applicant can bear his/her share of liabilities

This requirement is for the applicant to have enough assets and/or capital or appropriate insurance cover to meet the cost of any liabilities that the business may incur. A liability may be, for example, the risk of the business going into debt or being subject to a major damages claim. Alternatively, any debt that a business has at the time an applicant buys or joins it represents a liability.

Liability will also be linked to the level of financial risk that the applicant takes by setting up and investing in the business. Individuals who risk their own money by, for example, buying assets needed for the job and bearing the running costs and paying for overheads and large quantities of materials, are deemed to be taking a financial risk. Liability arises from the possibility that these investments will not be matched by the level of profit made. Financial risk could also take the form of quoting a fixed price for a job, with the consequent liability of bearing the additional costs if the job overruns.

Of relevance to being able to bear liabilities will be the value of the business's fixed assets, the amount of money invested in the business and its expected/actual turnover and profit, other funds available to the applicant and the level of business insurance cover that the applicant has in place.

Whilst debt represents a liability it is not always necessary for an applicant to be able to show that he can meet this debt instantaneously, particularly if the debt is a relatively small amount in the context of the business. It would be acceptable for the applicant to show that his/her business is likely to eradicate the debt from profits of the business in proceeding years.

4.4.3. Evidence of sufficient profits to support applicant and any dependents

The income required for an applicant to realistically maintain and accommodate themselves and any dependants without recourse to employment should be assessed on a case by case basis, taking any relevant factors into account, and bearing in mind that income derived from other sources, including benefits (see section 4.4.3.1), should not be included. This includes anything earned by dependants of the primary applicant.

Applicants need not have generated the level of profit required to maintain and accommodate themselves solely from the business throughout the first two years of their stay, while the business was being set up (although they must be able to demonstrate how, in the absence of such profits, they have maintained themselves in that time without recourse to employment), but the decision maker must be satisfied that a sufficient level can be generated consistently in the future in order for further leave to be granted.

For those seeking indefinite leave to remain, the applicant should provide evidence that such profits have been generated for the full three years of further leave to remain following their initial 12 months leave.

The level of income from the business should be demonstrated through professional audited accounts, together with business bank statements, invoices, evidence of work undertaken and any other evidence submitted by the applicant. Accounts and/or business bank statements should also show expenditure on items crucial to the running of the business for the whole of the period in which it has been operative, such as essential equipment and travel costs. Accounts should be produced in accordance with the Companies Act 1985 (as amended) and the Companies Act 2006. Further guidance is available in the Business Law section on the BIS website at: <http://www.bis.gov.uk/whatwedo/businesslaw/index.html>

Evidence of personal expenditure should be provided through personal bank statements and documents relevant to significant expenditure such as tenancy agreements, utility bills, and council tax.

Decision makers should ensure that all income and expenditure is taken into account when assessing the ability to support, including repayment of loans and interest, any commitments to support family members abroad and utility bills relating to both the applicant's commercial and domestic obligations.

4.4.3.1. Claiming benefits

Turkish nationals entitled to benefits access (see IDIs Chapter 1 Section 7 paragraph 5.1.2) are not permitted to "top up" their business profits with benefits in order to show that his/her business is making sufficient profits. An applicant still needs to be able to show that the profits of his/her business alone can support them.

4.4.4. No disguised employment / need for work permit employment

See paragraph 4.2.4.

In addition to the requirements in section 4.4.1 to 4.4.5 above, if the applicant is intending to *join an existing business* the following will additionally need to be provided:

4.4.5. Accounts of the business for previous years

This requirement amounts to the applicant being able to show that they will be joining a legitimate business that is likely to be able to support them and any dependents. It also allows the case worker to decide whether or not the applicant has sufficient funds and ability to join the business and is able to bear the liabilities associated with the business.

Accounts should, at a minimum, relate to the 2 years immediately prior to the business being purchased and be produced in accordance with the Companies Act 1985 (as amended) and the Companies Act 2006. Further guidance is available in the Business Law section on the BIS website at: <http://www.bis.gov.uk/whatwedo/businesslaw/index.html>

4.4.6. Written statement of the terms on which the applicant is to enter the business

This should take the form of a binding agreement between the applicant and the current owner of the business. It will deal with the financial aspects of the partnership.

The partnership agreement should be substantiated by evidence in support of the proceeding requirement for the applicant to show that he will be or is actively concerned with the running of the business. The partnership agreement should commit the applicant to financial investment in the business, show their share of the profits, show their share of the business liabilities and set out what their role in the business will be, which should involve, in conjunction with any other business partners, an involvement in any strategic decision making and long term operational decisions.

The result of the applicant's involvement in the business should be that the profit and goodwill of the business will grow. The applicant should be economically and practically active in the business and involvement should take up the majority of his/her working time.

4.4.7. Evidence that applicant will be or is actively concerned with the running of the business

This requirement is to ensure that the applicant is to be economically active as a businessman and not using his investment as a means of establishing himself in the United Kingdom for some other purpose. Evidence should be provided to show that the terms of the partnership agreement outlined in the requirement above should have a realistic chance of, or actually are being, fulfilled.

An applicant who does not wish to work full-time but has a large sum of money to invest in the United Kingdom should apply for leave as an investor under the current immigration rules.

4.4.8. Evidence that there is a genuine need for the applicant's services and investment

It may be indicative that this requirement is not met if, for example, the applicant is buying into an already successful business without any indication of how the applicant's involvement will grow the business or buying into a business by virtue of a financial transaction that is not backed up by any evidence of further integration such as inclusion on any of the business's legal documents, taking a significant share of profits or having a clearly defined involvement in the business.

4.5. Examples of successful and unsuccessful applications

These are examples only, intended as a guide. Each application should be assessed on its merits using the preceding instruction.

Business	Successful	Unsuccessful
Fast Food outlet / shop	Owns all or a significant amount of the business by virtue of investment of own funds, is the legally-registered owner, has final say on opening times, recruiting employees, sources of supplies, etc	Has paid money to the business owner but business was already operating successfully, no evidence of origin of funds, applicant has no controlling influence over the day to day running of the business
Cleaning	Has invested in equipment, premises, transportation, has employees, simultaneously provides services for different clients	Pays tax as a self-employed person but has bought only a small amount of equipment, works for one client at a time, is paid by the hour/week
Business/IT consultancy	Has bought and uses own equipment, work consists of single projects at set prices for a variety of clients, evidence that applicant is looking to expand his business	Is well qualified but works for one client on a long term contract, is based in the client's office, uses client's equipment, work is determined by the day to day demands of the business
Travel agency	Owns/rents business premises, meets all costs of running office from profits of business, organises travel directly with travel providers, has employees	Claims to work specialising in certain types of client on a self-employed basis as part of a larger agency, works from the agency's office, uses their equipment and relies on their marketing etc, has no previous experience

		in the industry
Hairdressing	Owns/rents premises, has employees, making good profit	Rents chair in hairdressers, pays tax on own takings but has no say over use of business premises and day to day running of the business

4.6. Discretion for entry clearance and leave to enter applications

Where an application appears credible but is not comprehensive, applications for entry clearance or leave to enter may be eligible for a grant of leave for 2 months. A grant of 2 months' leave gives borderline applicants the opportunity to demonstrate their ability to establish a credible business. During this 2 month period an application for leave to remain should be submitted which includes material addressing the gaps identified in the initial application.

Decision makers should always be satisfied that there is a genuine intention to establish in business and there should be no need for applicants to enter the UK in order to complete the evidencing of their intention. Rather, this discretion exists to allow decision makers to be pragmatic when they are not completely satisfied, based on the evidence submitted at time of application, that an applicant is in a position to establish and commence operating their business immediately on arrival in the UK.

The following are examples of when it may be appropriate to exercise such discretion. The list is not exhaustive, nor is 2 months leave automatically guaranteed when one of the following applies. Each case will need to be assessed on its merits, and in the context of the other documentation provided and the nature of the business:

- Equipment required for the operation of the business is yet to be purchased, particularly if it is unrealistic to buy the equipment and transport it to the UK.
- Public liability insurance has been applied for but not yet been approved.
- Advertising is essential to the success of the business but this cannot realistically be instigated before arrival in the locality of the business.
- Accounts for a business that is being taken over or joined are available for previous years and show a healthy turnover and profit, but the most recent year's are still being prepared.

5. Appeals

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Refused applications will be appealable if the decision attracts a right of appeal under Part V of the Nationality, Immigration and Asylum Act 2002 (as amended).

Appeal rights can be summarised as follows. Appeals need to be brought on the one of the grounds listed in section 84.

- **Entry clearance**

If assessed under the 1973 business provisions – full out of country right of appeal, unless section 88 applies.

If assessed under the current rules i.e. is excluded from the standstill clause - limited right of appeal by virtue of section 88A.

- **Leave to enter**

If in possession of Turkish ECAA business entry clearance – full out of country right of appeal, unless section 88 applies.

All other cases – limited right of appeal by virtue of section 89.

- **Leave to remain / indefinite leave to remain**

If in time – full in country right of appeal by virtue of section 92, unless section 88 applies.

If out of time – limited right of appeal

Annex A – On Entry 1973 business provisions

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Businessmen admitted to the United Kingdom as visitors are free to transact business during their visit.
(Paragraph 29 of HC509)

Passengers who have obtained entry clearances for the purpose of establishing themselves in the United Kingdom in business, whether a new or existing business, should be admitted for a period not exceeding 12 months with a condition restricting their freedom to take employment. Passengers who are unable to present such a clearance but nevertheless seem likely to be able to satisfy the requirements of one of the next 2 paragraphs should be admitted for a period of not more than 2 months, with a prohibition on employment, and advised to present their case to the Home Office.
(Paragraph 30 of HC509)

For an applicant to obtain an entry clearance for this purpose he will need to show, if joining an established business, that he will be bringing money of his own to put into the business; that he will be able to bear his share of the liabilities; that his share of the profits will be sufficient to support him and his dependants; that he will be actively concerned in the running of the business; and that there is a genuine need for his services and investment. The accounts of the business for previous years will require to be produced, in order to establish the precise financial position. An entry clearance will not be issued where it appears that the proposed partnership or directorship amounts to disguised employment or where it seems likely that, to obtain a livelihood, the applicant will have to supplement his business activities by employment for which a work permit is required.
(Paragraph 31 of HC509)

If the applicant wishes to establish a business in the United Kingdom on his own account, he will need to show that he will be bringing into the country sufficient funds to establish a business that can realistically be expected to support him and any dependants without recourse to employment for which a work permit is required.
(Paragraph 32 of HC509)

Visas, entry certificates and Home Office letters of consent (described in the Act by the generic term "entry clearance") are issued in accordance with the rules contained in this statement. A passenger who holds an entry clearance which was duly issued to him and is still current is not to be refused leave to enter unless the Immigration Officer is satisfied that:

- (a) false representations were employed or material facts were concealed, whether or not to the holder's knowledge for the purpose of obtaining the clearance, or
- (b) a change of circumstances since it was issued has removed the basis of the holder's claim to admission.

But an Immigration Officer is not precluded from refusing leave to enter on grounds of restricted returnability, on medical grounds, on grounds of criminal record, because the passenger is the subject of a deportation order or because exclusion would be conducive to the public good. The scope of the power to refuse leave to enter on these grounds is set out in *paragraphs 14 and 65-69*.
(Paragraph 12 of HC509)

Any passenger who is currently subject to a deportation order is to be refused leave to enter. If he wishes to make representations, he should be advised that on return to his own country it will be open to him to

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apply for revocation of the order and, where appropriate, that he will have a right of appeal if revocation is refused.

(Paragraph 68 of HC509)

Annex B – After Entry 1973 business provisions

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People admitted as visitors may apply for the consent of the Secretary of State to their establishing themselves here for the purpose of setting up in business, whether on their own account or as partners in a new or existing business. Any such application is to be considered on merits. Permission will depend on a number of factors, including evidence that the applicant will be devoting assets of his own to the business, proportional to his interest in it, that he will be able to bear his share of any liabilities the business may incur, and that his share of its profits will be sufficient to support him and any dependants. The applicant's part in the business must not amount to disguised employment, and it must be clear that he will not have to supplement his business activities by employment for which a work permit is required. Where the applicant intends to join an existing business, accounts should be produced to establish its financial position, together with a written statement of the terms on which he is to enter into it; evidence should be sought that he will be actively concerned with its running and that there is a genuine need for his services and investment. Where the application is granted the applicant's stay may be extended for a period of up to 12 months, on a condition restricting his freedom to take employment. A person admitted as a businessman in the first instance may be granted an appropriate extension of stay if the conditions set out above are still satisfied at the end of the period for which he was admitted initially.

(Paragraph 21 of HC510)

In deciding these matters account is to be taken of all the relevant facts; the fact that the applicant satisfies the formal requirements of these rules for stay, or further stay, in the proposed capacity is not conclusive in his favour. It will, for example, be relevant whether the person has observed the time limit and conditions subject to which he was admitted; whether in the light of his character, conduct or associations it is undesirable to permit him to remain; whether he represents a danger to national security; or whether, if allowed to remain for the period for which he wishes to stay, he might not be returnable to another country.

(Paragraph 4 of HC510)

Under sections 3(5) – (6) and 5 (1) – (4) of the Immigration Act 1971 the Secretary of State may, if he thinks fit, make a deportation order requiring a person who is not *patria*; to leave and to remain thereafter out of the United Kingdom:

- (i) if the person has failed to comply with a condition attached to his leave to enter or remains beyond the authorised time;
- (ii) if the Secretary of State deems the person's deportation to be conducive to the public good;
- (iii) if the person is the wife or the child under 18 of a person ordered to be deported;
- (iv) if the person, after reaching the age of 17, is convicted of an offence for which he is punishable with imprisonment and the court recommends deportation.

(Paragraph 43 of HC510)

Deportation will normally be the proper course of action where the person has persistently contravened or failed to comply with a condition or has remained without authorisation. (So also where he has been recommended for deportation on conviction of entering the United Kingdom unlawfully.) But full account is to be taken of all relevant circumstances before a decision is reached.

(Paragraph 52 of HC510)

Applications for the revocation of a deportation order will be carefully considered in the light of the grounds on which the order was made and of the case made in support of the application. The interests of the community, including the maintenance of an effective immigration control, are to be balanced against the interests of the applicant, including any circumstances of a compassionate nature. In the case

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of an applicant with a serious criminal record continued exclusion, for a long number of years, will normally be the proper course. In other cases revocation of the order will not normally be authorised unless the situation has been materially altered either by a change of circumstances since the order was made or by fresh information coming to light which was not before the court that made the recommendation or the appellate authorities or the Secretary of State. The passage of time since the person was deported may also, in itself, amount to such a change of circumstances as to warrant revocation of the order. Since so much depends on other relevant circumstances, it is not practicable to specify periods as appropriate in relation to particular grounds of deportation. All applications for revocation will be carefully considered when made, but the Secretary of State does not himself initiate the review of deportation orders, with a view to deciding whether they need to be maintained, until they have been in force for at least 3 years.
(Paragraph 67 of HC510)

Annex C – Requirements: Indefinite leave to remain

1. To qualify for indefinite leave to remain as a Turkish ECAA businessperson, an applicant must meet the requirements listed below. If the applicant meets these requirements, indefinite leave to remain will be granted. If the applicant does not meet these requirements, the application will be refused.

2. Requirements:

(a) The applicant must not fall for refusal under the general grounds for refusal, and must not be an illegal entrant.

(b) The applicant must be engaged in business activity at the time of his application and the applicant must provide evidence to show this.

(c) The applicant must have spent a continuous period of 4 years lawfully in the UK, of which the most recent period must have been spent with leave as a Turkish ECAA businessperson, and the rest may be made up of leave:

(i) as a Turkish ECAA businessperson

(ii) as a Tier 1 (Entrepreneur) Migrant,

(iii) as a Businessperson,

(iv) as an Innovator.

Annex D – Requirements: Dependants (when the standstill clause applies)

1. Categories of dependants of Turkish ECAA businesspersons have been broadened from the provisions in the 1973 Rules and now cover partners (spouses, civil partners, unmarried and same sex partners) and children. Dependants must be the family member of a person who has been granted leave, or is at the same time being granted leave, as a Turkish ECAA businessperson under the 1973 business provisions. In order to qualify for leave dependants must be able to meet the relevant requirements listed in paragraphs 2 – 10 below and, if applying for leave to remain, be lawfully present in the UK. Dependants of persons who are denied the benefit of the standstill clause will need to meet the PBS family member requirements in order to qualify for leave.

- **Partners (spouses and civil, unmarried and same-sex partners)**

2. This route is for the spouse, civil partner, unmarried or same-sex partner of a *Turkish ECAA businessperson*. Paragraphs 277 to 280 of the Immigration Rules (HC395) apply to spouses or civil partners of a *Turkish ECAA businessperson*; paragraph 277 of the Immigration Rules applies to civil partners of a *Turkish ECAA businessperson*; and paragraph 295AA of the Immigration Rules applies to unmarried and same-sex partners of a *Turkish ECAA businessperson*.

Entry clearance, leave to enter or leave to remain

3. To qualify for entry clearance, leave to enter or leave to remain as the Partner of a *Turkish ECAA businessperson*, an applicant must meet the requirements listed below. If the applicant meets these requirements, notwithstanding any general considerations or relevant facts that weigh against the applicant e.g. breach of immigration law, entry clearance, leave to enter or leave to remain will be granted. If the applicant does not meet these requirements, the application will be refused.

4. Requirements:

(a) The applicant must not fall for refusal under the general grounds for refusal, and if applying for leave to remain, must not be an illegal entrant.

(b) The applicant must be the spouse or civil partner, unmarried or same-sex partner of a person who:

(i) has valid leave to enter or remain as a *Turkish ECAA businessperson*, or

(ii) is, at the same time, being granted entry clearance, leave to enter or leave to remain as a *Turkish ECAA businessperson*

(c) An applicant who is the unmarried or same-sex partner of a *Turkish ECAA businessperson* must also meet the following requirements:

(i) any previous marriage or civil partnership or similar relationship by the applicant or the *Turkish ECAA businessperson* with another person must have permanently broken down,

(ii) the applicant and the *Turkish ECAA businessperson* must not be so closely related that they would be prohibited from marrying each other in the UK, and

(iii) the applicant and the *Turkish ECAA businessperson* must have been living together in a relationship similar to marriage or civil partnership for a period of at least 2 years.

(d) The marriage or civil partnership, or relationship similar to marriage or civil partnership, must be subsisting at the time the application is made.

(e) The applicant and the *Turkish ECAA businessperson* must intend to live with the other as their spouse or civil partner, unmarried or same-sex partner throughout the applicants stay in the UK.

(f) The applicant must not intend to stay in the UK beyond any period of leave granted to the *Turkish ECAA businessperson*.

(g) The business must be generating sufficient profits to support the applicant and any other dependants

(h) An applicant who is applying for leave to remain, must have, or have last been granted, leave:

(i) as the Partner of a *Turkish ECAA businessperson*, or

(ii) as the spouse or civil partner, unmarried or same-sex partner of a person with leave under another category of these Rules who has since been granted, or is, at the same time, being granted leave to remain as a *Turkish ECAA businessperson*.

Indefinite leave to remain

5. To qualify for indefinite leave to remain as the Partner of a *Turkish ECAA businessperson*, an applicant must meet the requirements listed below. If the applicant meets these requirements, notwithstanding any general considerations or relevant facts that weigh against the applicant e.g. breach of immigration law, indefinite leave to remain will be granted. If the applicant does not meet these requirements, the application will be refused.

6. Requirements:

(a) The applicant must not fall for refusal under the general grounds for refusal, and must not be an illegal entrant.

(b) The applicant must be the spouse or civil partner, unmarried or same-sex partner of a person who is, at the same time, being granted indefinite leave to remain as a *Turkish ECAA businessperson*.

(c) The applicant must have, or have last been granted, leave as the Partner of the *Turkish ECAA businessperson* who is being granted indefinite leave to remain.

(d) The applicant and the *Turkish ECAA businessperson* must have been living together in the UK in marriage or civil partnership, or in a relationship similar to marriage or civil partnership, for a period of at least 2 years.

(e) The marriage or civil partnership, or relationship similar to marriage or civil partnership, must be subsisting at the time the application is made.

(f) The applicant and the *Turkish ECAA businessperson* must intend to live permanently with the other as their spouse or civil partner, unmarried or same-sex partner.

- **Children**

Entry clearance, leave to enter or leave to remain

7. To qualify for entry clearance, leave to enter or leave to remain under this route, an applicant must meet the requirements listed below. If the applicant meets these requirements, notwithstanding any general considerations or relevant facts that weigh against the applicant e.g. breach of immigration law, entry clearance, leave to enter or leave to remain will be granted. If the applicant does not meet these requirements, the application will be refused.

8. Requirements:

(a) The applicant must not fall for refusal under the general grounds for refusal, and if applying for leave to remain, must not be an illegal entrant.

(b) The applicant must be the child of a parent who:

(i) has valid leave to enter, leave to enter or remain as a *Turkish ECAA businessperson*, or

(ii) is, at the same time, being granted entry clearance, leave to enter or leave to remain as a *Turkish ECAA businessperson*.

(c) The applicant must be under the age of 18 on the date the application is made, or if over 18 and applying for leave to remain, must have, or have last been granted, leave as the child of a *Turkish ECAA businessperson* or as the child of the parent who had leave under another category of the Immigration Rules and who has since been granted, or, is at the same time being granted, leave to remain as a *Turkish ECAA businessperson*.

(d) The applicant must not be married or in a civil partnership, must not have formed an independent family unit, and must not be leading an independent life.

(e) The applicant must not intend to stay in the UK beyond any period of leave granted to the *Turkish ECAA businessperson* parent.

(f) Both of the applicant's parents must either be lawfully present in the UK, or being granted entry clearance or leave to remain at the same time as the applicant, unless:

(i) the *Turkish ECAA businessperson* is the applicant's sole surviving parent, or

(ii) the *Turkish ECAA businessperson* parent has and has had sole responsibility for the applicant's upbringing, or

(iii) there are most exceptional serious or compelling family or other considerations which would make it desirable not to refuse the application and suitable arrangements have been made in the UK for the applicant's care.

(g) The business must be generating sufficient profits to support the applicant and any other dependants

(h) An applicant who is applying for leave to remain must have, or have last been granted leave:

(i) as the child of a *Turkish ECAA businessperson*, or

(ii) as the child of a parent who had leave under another category of the Immigration Rules and who has since been granted, or is, at the same time, being granted leave to remain as a *Turkish ECAA businessperson*.

Indefinite leave to remain

9. To qualify for indefinite leave to remain under this route, an applicant must meet the requirements listed below. If the applicant meets these requirements, notwithstanding any general considerations or relevant facts that weigh against the applicant e.g. breach of immigration law, indefinite leave to remain will be granted. If the applicant does not meet these requirements, the application will be refused.

10. Requirements:

(a) The applicant must not fall for refusal under the general grounds for refusal, and must not be an illegal entrant.

(b) The applicant must be the child of a parent who is, at the same time, being granted indefinite leave to remain as a *Turkish ECAA businessperson*.

(c) The applicant must have, or have last been granted, leave as the child of the *Turkish ECAA businessperson* who is being granted indefinite leave to remain.

(d) The applicant must not be married or in a civil partnership, must not have formed an independent family unit, and must not be leading an independent life.

(e) Both of an applicant's parents must either be lawfully present in the UK, or being granted entry clearance, limited leave to remain, or indefinite leave to remain at the same time as the applicant, unless:

(i) the *Turkish ECAA businessperson* is the applicant's sole surviving parent, or

(ii) the *Turkish ECAA businessperson* parent has and has had sole responsibility for the applicant's upbringing, or

(iii) there are serious or compelling family or other considerations which would make it desirable not to refuse the application and suitable arrangements have been made for the applicant's care.

Annex E – Refusal wordings: Excluded from the standstill clause

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These refusal wordings are given as examples as a basis for refusal decisions and should always be expanded to ensure that the wordings are relevant and specific to the circumstances of the refusal in question. Words in square brackets denote alternative options, one of which must be selected.

Option 2 includes holders of entry clearance, including Turkish ECAA businessperson entry clearance, where 320(i) of HC395 applies. Option 8 refers to deception employed in the course of making the business application that is subject to refusal.

You have applied for [entry clearance] [leave to enter] [leave to remain] to establish yourself in business in the UK under the Turkey – European Community Association Agreement. This contains a 'standstill clause' which means that the UK may not impose conditions for business applicants less favourable than were in force when the Agreement came into force for the UK in 1973. However, European Community and UK domestic caselaw has established that an applicant forfeits the right to take the benefit of the standstill clause if the application can only be made as a result of fraudulent and/or abusive activity in relation to the applicant's immigration status. You [established your business on dd/mm/yyyy] [have applied to establish in business]

Option 1 – having entered or sought to enter the UK in breach of immigration law. [IS151A issued on dd/mm/yyyy refers];

Option 2 – having sought leave by deception as a [category] in the following regard: [give details of deception used];

Option 3 - whilst you were in the UK with leave as a [category] which was obtained by deception in the following regard: [give details of deception used];

Option 4 - in breach of the conditions of your previous leave to [enter] [remain] as a [category] which did not permit you to engage in business;

Option 5- in breach of the conditions of your temporary admission whilst in the UK which did not permit you to engage in business [and having absconded whilst on temporary admission]. IS96 issued on dd/mm/yyyy refers;

Option 6 - having sought to gain refugee status by making an asylum claim that was refused and upheld on appeal and which was subject to an adverse credibility finding by the Immigration Judge / Adjudicator. Paragraphs X to X of the appeal determination promulgated on dd/mm/yyyy refers

Option 7 – and in the course of making this application you have [made false representations] [failed to disclose material facts] in the following regard: [give details of deception].

Option 8 – but there is a material link between your current business proposal and previous fraudulent / abusive conduct in the following regard: [give details of previous conduct].

As you employed fraudulent / abusive activity in order to [establish your business] [make your application to establish in business], and taking all the circumstances of your case into account, it has been decided to exclude you from taking the benefit of the standstill clause contained in the ECAA which gives effect to these provisions.

Entry clearance

In order to qualify for entry clearance you need to meet the business requirements of HC395, the current Immigration Rules. Your application is refused in accordance with paragraph 245J because based on the information that you have provided you have failed to score sufficient points to qualify for entry clearance in this category [and with 320 – *give relevant sub clause and reasons for refusal*]

Leave to enter

Your application for leave to enter has therefore been considered under HC395, the current Immigration Rules, and has been refused in accordance with [paragraph 320(5) because you do not have valid entry clearance for entry as a businessperson] [paragraph 321(i)].

Leave to remain

In order to qualify for leave to remain you need to meet the business requirements of HC395, the current Immigration Rules. Your application is refused in accordance with paragraph 245L because based on the information that you have provided you have failed to score sufficient points to qualify for leave to remain in this category [and you are not present in the UK in one of the categories listed in sub clause (e)] [and with 322 – *give relevant sub clause and reason for refusal*].

Annex F - Refusal wordings: Can take the benefit of the standstill clause

These refusal wordings set out the specific requirements of the 1973 business provisions that have not been met (in bold italics), followed by possible reasons for refusal.

The example reasons for refusal form a basis only and should always be expanded to ensure that the wordings are relevant and specific to the case in question. Words in square brackets denote alternative options, one of which must be selected. It may also be the case that none of the examples are relevant to the circumstances of the refusal in question. If so, an alternative wording should be drafted, clearly setting out which requirements have not been met and why they have not been met. Alternative wordings should be cleared by an Entry Clearance Manager / Chief Immigration Officer / Senior Caseworker.

As the 1973 business provisions do not contain explicit provision for further leave to remain in the same way that the current rules do, the wordings in brackets underneath each requirement are provided and should be used for FLR refusals.

- ***Merits based***

You have applied for [entry clearance] [leave to enter] [leave to remain in] in order to [establish yourself in] [continue operating your] business under the Turkey – European Community Association Agreement. This contains a 'standstill clause' which means that the UK may not impose conditions for business applicants less favourable than were in force when the Agreement came into force for the UK in 1973. I have therefore assessed [your application in accordance with the [On Entry] [After Entry]] [*leave to enter only* - the likelihood of your ability to meet the On Entry] business provisions in force in 1973. However, your application is refused because I am not satisfied that

1) you genuinely wish to establish in business as proposed (you have genuinely established in business)

You are not named on the partnership agreement.

The partnership agreement does not satisfactorily outline what your level of involvement in the business will be as it does not show...

The documentation does not include X. This documentation is considered to be essential evidence to show that you can run a business of this nature because...

You claim to be establishing in business as X but you have not shown that you have the relevant [qualifications] [experience] which are considered essential to running such a business

Your level of English is not sufficient to allow you to run your business with a realistic chance of success because...

The documentation you have submitted does not reflect a business proposal with a realistic chance of success because...

2) you will be bringing into the country money of your own to establish in business

Your business proposal does not require any investment

You have not shown that you have sufficient funds to invest in the business

You have not shown that you have invested any money in the business

You have not shown that your money has been invested in the business in a way that will grow the profit and goodwill of the business because...

You have shown that money has been invested in the business but this money does not represent your own assets because...

You have devoted assets of your own to the business but you do not have a controlling or equal interest in the business because...

3) you can bear your share of any liabilities that the business may incur

Your business carries with it the following liabilities... However, you have not shown that you are able to bear these liabilities because...

**4) your share of the profits will be sufficient to support you and any dependents
(your share of the profits are sufficient to support you and any dependents)**

You claim that your annual living costs will be £XXXX but the profits of the business are only £XXXX and you have not shown that you have any other money to support you [and your dependents]

You claim that your annual living costs will be £XXXX and that the profits of the business will be £XXXX. However, the business profits do not take account of X (e.g. loan payments, living costs etc) and with this additional expenditure the business will not make sufficient profit to support you [and your dependents]

**5) your part in the business will not amount to disguised employment
(your part of the business does not amount to disguised employment)**

You claim to have established in business but on the basis of your proposed day to day involvement in the business, which amounts to [detail of applicant's involvement] you will be an employee of the business

6) you do not need to supplement your business activities by employment for which a work permit is required

You have not shown that your business will generate sufficient profits to support you [and your dependents] and therefore that you will not need to take up employment to generate sufficient financial support for you [and your dependents]

ONLY USE IF APPLICANT IS CLAIMING TO BE JOINING AN EXISTING BUSINESS:

7) you have provided accounts that establish the financial position of the business that you will be joining

The accounts you have provided relate to financial year[s] 200X-XX and so do not establish the current financial position of the business

The accounts you have provide are incomplete because they do not take account of [*give item(s) of expenditure*] referred to elsewhere in your application and so do not establish the current financial position of the business

The accounts you have provide are incomplete because they do not include the following expenses...

8) you have provided a written statement of the terms on which you will enter the business

You have provided a [partnership agreement] [statement of the terms on which you will be joining the business] but its content does not show that you will be establishing in business by virtue of legitimate involvement in this business because...

9) you have shown that you will be actively concerned in the running of the business (you have shown that you are actively concerned with the running of the business)

You have provided no evidence in support of the business activities that you claim to be undertaking

The evidence you have provided does not support the level of involvement in the business that you claim you will have and the actual involvement that you appear to have does not amount to establishment in business because...

10) you have shown that there is a genuine need for your services and investment

You are joining a business which is already operating with a good profit and there is no evidence to show that your involvement will grow the business.

The nature of the business in question does not require the involvement of any more business partners because...

- **Leave to enter – paragraph 12 of HC509**

You have applied for leave to enter the United Kingdom in order to establish a business under the Turkey – European Community Association Agreement. This contains a 'standstill clause' which means that the UK may not impose conditions for business applicants less favourable than were in force when the Agreement came into force for the UK in 1973. I have therefore assessed your application in accordance with the On Entry business provisions in force in 1973. However, your application is refused in accordance with [paragraph 12(a) of HC509 because your entry clearance issued on *dd/mm/yyyy* was obtained on the basis of false representations and / or false documentation] [paragraph 12(b) of HC509 because there has been a change in circumstances since the issue of your entry clearance on *dd/mm/yyyy* that has removed the basis of your claim to admission to the United Kingdom] in the following regard: [*give details of false reps / change in circs*].

- **Entry clearance and leave to enter – general considerations**

You have applied for [entry clearance] [leave to enter] as a businessperson under the Turkey – European Community Association Agreement. This contains a 'standstill clause' which means that the UK may not impose conditions for business applicants less favourable than were in force when the Agreement came into force for the UK in 1973. I have therefore assessed your application in accordance with the On Entry business provisions in HC509 and also the provisions in paragraphs 43 and 52 of HC510 and paragraph 68 of HC509 for handling applicants who have breached immigration law. The business upon which you are basing your application was previously established by you having breached immigration law in the following regard and it has been decided, taking all the circumstances of your case into account, that you

should not be allowed to benefit from your breach of immigration law: [*give details of breach e.g. you established your business having overstayed your previous leave by x months*]. I do not consider that this breach of immigration law should be disregarded in line with the principles set out in paragraph 67 of HC510.

- ***Leave to remain – general considerations***

You have applied for leave to remain in the United Kingdom in order to establish a business under the Turkey – European Community Association Agreement. This contains a 'standstill clause' which means that the UK may not impose conditions for business applicants less favourable than were in force when the Agreement came into force for the UK in 1973. I have therefore assessed your application in accordance with the After Entry business provisions in force in 1973. However, further to paragraph 4 of HC510 your application is refused because you have breached immigration law in the following regard and it has been decided, taking all the circumstances of your case into account, that you should not be allowed to benefit from your breach of immigration law: [*give details of breach e.g. you have made your application having overstayed your previous leave by x months*]

- ***Leave to remain - no switching***

You have applied for leave to remain to establish yourself in business in the UK under the Turkey – European Community Association Agreement. This contains a 'standstill clause' which means that the UK may not impose conditions for business applicants less favourable than were in force when the Agreement came into force for the UK in 1973. I have therefore assessed your application in accordance with the After Entry business provisions in force in 1973. However, taking all the circumstances of your case into account, your application is refused as you entered the UK as a [*give category*] and these provisions do not permit you to switch into the businessperson category.

- ***Indefinite leave to remain***

You have applied for indefinite leave to remain in the UK as a businessperson under the Turkey – European Community Association Agreement. However, I am not satisfied that

you are still engaged in business in accordance with the requirements of the 1973 business provisions because...

you have spent a continuous period of 4 years as a Turkish ECAA businessperson (including time spent as a Tier 1 (Entrepreneur), a businessperson or as an investor) because...

NB – see annex C for requirements.

Annex G – Refusal wordings: Dependants

Partners & children

- **Excluded from the benefit of the standstill clause**

You have applied for [entry clearance] [leave to remain] as the dependant of a Turkish ECAA businessperson. However, the person on whom you are seeking to be dependant is excluded from taking the benefit of the standstill clause contained in the ECAA. Your application has therefore been considered under HC395, the current Immigration Rules, and has been refused in accordance with paragraph [partners - 319C] [children - 319H] of HC395 as you are not the [spouse] [civil partner] [unmarried partner] [same-sex partner] [child] of a Relevant Points Based System Migrant.

You have applied for leave to enter as the dependant of a Turkish ECAA businessperson. However, the person on whom you are seeking to be dependant is excluded from taking the benefit of the standstill clause contained in the ECAA. Your application has therefore been considered under HC395, the current Immigration Rules, and has been refused in accordance with paragraph 320(5) because you do not have valid entry clearance for entry as the dependant of a businessperson.

- **Can take the benefit of the standstill clause**

You have applied for [entry clearance] [leave to enter] [leave to remain] as the dependant of a Turkish ECAA businessperson. Your application is refused because... [give reasons in line with requirements set out in annex D]

You have applied for [leave to enter] [leave to remain] as the dependant of a Turkish ECAA businessperson. However, the 1973 rules allow for general considerations and relevant facts to be taken into account when assessing applications. Your application is refused because you have breached immigration law in the following regard and it has been decided, taking all the circumstances of your case into account, that you should not be allowed to benefit from your breach of immigration law: [give details of breach]

Indefinite leave to remain

You have applied for indefinite leave to remain as the dependant of a Turkish ECAA businessperson. Your application is refused because... [give reasons in line with requirements set out in annex D]

Other relatives

You have applied for [entry clearance] [leave to enter] as the dependant of a Turkish ECAA businessperson. Your application is refused in accordance with paragraph 320(1) of HC395 because you are the [nature of relationship] of [main applicant's name] and there is no provision in HC395 nor in the business provisions in force in 1973 for dependants of businesspersons other than partners (being spouses, civil partners, unmarried and same-sex partners) and children.

You have applied for [leave to remain] [indefinite leave to remain] as the dependant of a Turkish ECAA businessperson. Your application is refused in accordance with paragraph 322(1) of HC395 because you are the [nature of relationship] of [main applicant's name] and there is no provision in HC395 nor in the

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business provisions in force in 1973 for dependants of businesspersons other than partners (being spouses, civil partners, unmarried and same-sex partners) and children.

Annex H – Consideration checklist

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The following should be used to structure the assessment of all applications but should always be used in conjunction with the detailed guidance in **section 2** and **section 4** of this guidance.

1. Has the applicant been able to apply to establish in business or already establish in business in the UK by virtue of fraudulent or abusive activity?

Supplementary questions:

Did the applicant set up in business;

- having entered or having sought to enter the UK illegally;
- having sought or obtained leave by deception (refer to 2.1.1);
- whilst in breach of the conditions of leave to enter or remain (refer to 2.1.2);
- whilst on temporary admission or absconding from temporary admission (refer to 2.1.3);
- having made an asylum claim that is discredited (refer to 2.1.4);
- having made false representations and/or failed to disclose material facts in the application being made.
- in circumstances where there is a material link between the current business proposal and previous fraudulent / abusive conduct (refer to 2.1.5).

2. If no to question 1, are there any general considerations to take into account?

Supplementary questions:

- Has the applicant been able to apply only by virtue of overstaying by more than 28 days?
- Has the applicant otherwise breached immigration law such that the standstill clause should not be denied but that the application should not be permitted to succeed under the 1973 business provisions?

3. If no to question 2, does it appear that the applicant has a genuine intention to establish in business?

Supplementary questions:

- Is there anything about the applicant's conduct in relation to their application or in the circumstances in which the application is being made to suggest that the application should not be permitted to succeed under the 1973 business provisions?
- Has a realistic and justifiable business proposal been made?
- Has documentation, relevant to the business in question, been provided to show that the application meets the requirements of the 1973 business provisions?
- Does the applicant have the relevant experience and /or qualifications to run the business?

- Could anything more be done to verify the authenticity of the statements / documents submitted?
- Does the applicant speak English to a level that will enable them to conduct their business?

4. If yes to 3 does the applicant meet the relevant minimum requirements of the 1973 business provisions?

Supplementary questions:

- Has the applicant shown that he/she will invest, or has invested, in the business?
- Do the funds belong to the applicant?
- Is the investment proportionate to the applicant's interest in the business?
- Is the applicant risking financial loss through investing in and conducting the business?
- Is the applicant able to meet his/her financial obligations if the business goes wrong?
- Does the business make sufficient profits, or have a realistic chance of making sufficient profits, to support the applicant and any dependents?

If joining an established business:

- Have properly prepared accounts been provided?
- Is there a written statement committing the applicant to legitimate involvement in the business?
- Is there evidence to support the above statement?
- How will the business benefit from the applicant's investment and involvement?