

IMMIGRATION

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PRESIDENT OF RSA ANNOUNCES COMMENCEMENT DATE FOR NEW IMMIGRATION AMENDMENT ACT AND REGULATIONS UNDER THAT ACT

The long-awaited commencement date for the amendments to South Africa's immigration law has been announced.

On 22 May 2014, the President of the Republic of South Africa announced 26 May 2014 as the commencement date for the Immigration Amendment Act, No 13 of 2011 (Immigration Amendment Act).

As reported in our previous Alert dated 19 February 2014, the Immigration Amendment Act was published in as early as August 2011. However, it did not come into effect due to delays in finalising the regulations.

The new regulations came into effect together with the Immigration Amendment Act on 26 May 2014 (new immigration legislation). The new regulations represent the practical machinery that enables the Immigration Amendment Act to operate and deals with issues such as the requirements for the different types of visas and the compulsory statutory forms to be used in respect of the different visa applications.

In a recent media publication, the Minister of Home Affairs is quoted as saying that the "new immigration regulations are in line with our objective of managing immigration efficiently and effectively while protecting the integrity of our borders and the sovereignty of our country."

The new immigration legislation is set to have a major impact upon the requirements for the different kinds of work visas and the application processes associated with those work visas.

General provisions

The Immigration Amendment Act now refers to 'visas' as opposed to 'permits' used under the previous Immigration Act, No 13 of 2002. The only 'permit' that a foreigner can obtain is the permanent residence permit. Therefore, the new immigration legislation now makes a clear distinction between temporary visas and long-stay permits.

Any applicant for any visa or permit that is required to provide 'proof of sufficient financial means' will need to prove cash available in the amount of ZAR 3,000.

Submission of visa or permit applications

The use of agents or immigration practitioners to submit applications to the Department of Home Affairs (DHA) has been repealed and all applicants will now need to submit their applications in person.

The DHA has partnered with Visa Facilitation Services Global (VFS), a company that has been appointed to receive and manage visa and permit applications in South Africa. VFS will operate as an administrative arm of the DHA and will not be equipped to provide advice to applicants on the immigration laws. VFS will be solely responsible for taking in applications and logging those applications on a system. The DHA hopes that the introduction of the services of VFS will see an improvement in efficiencies and turnaround time in relation to applications.

Importantly, the decision as to whether a visa will be granted or refused will remain within the discretion of the DHA. VFS is in the process of establishing Visa Facilitation Offices (VFOs) in all of South Africa's nine provinces.

The VFOs in South Africa will only accept applications for the renewal or extension of existing visas and applications for a change of conditions or terms and conditions in respect of existing visas. Therefore, first-time applicants for any kind of visa will need to submit their application, in person, at the relevant Mission (Embassy/Consulate) in their country of origin or country in which they permanently reside.

Applicants who seek the renewal or extension or change of conditions of their existing visas will need to ensure that their application is submitted to the relevant VFO at least 60 days prior to expiry of their existing visas.

VFOs will accept applications between 08h00 and 16h00, Monday to Friday. Applications made in South Africa will attract a service fee of ZAR 1,350. Prior to submission at the VFS Global office, applicants will need to fill out a mandatory online application form and apply for a mandatory appointment at their closest VFS Global office. Applications will need to be made in person for the purposes of obtaining biometric information (fingerprints and photographs) from the respective applicants.

Waiver Applications

The DHA has also introduced a new procedure for the submission of Waiver Applications. Applicants who seek a waiver of certain prescribed requirements under the new immigration legislation will need to lodge a formal application with the relevant VFO.

At this stage, it is necessary to consider the changes to the different types of visas.

Visitor's visas

An application for a visitor's visa not exceeding 3 months will need to be accompanied by the following documents:

- a statement of documentation detailing the purpose and duration of the visit;
- a valid return air flight ticket or proof of reservation thereof;
- proof of sufficient financial means.

The new regulations have introduced a visitor's visa for a period exceeding 3 months provided that the applicant includes a police clearance certificate.

However, a visitor's visa for longer than 3 months will only be granted to an applicant who falls within one of the following categories listed in regulation 11(4), the applicant is:

- a spouse or dependant of the holder of an existing visa;
- a teacher at an international school;
- a person involved in the production of a film or advertisement in the Republic;
- a foreign journalist on secondment;
- a visiting professor or lecturer;
- an artist;
- a person involved in the entertainment industry who is travelling to the Republic to perform;
- a tour leader or host of a tour; and
- a foreigner who is required to stay in the Republic in order to testify as a state witness in a criminal court case.

Business visas

An application for a business visa by a foreigner who intends on establishing a business or investing in a business that is not yet established within South Africa will, at the outset, need to obtain a certificate from an accredited chartered accountant which verifies that an amount prescribed by the Minister of Home Affairs (Minister) is available. This amount has not been published by the Minister as yet.

Further, under the new regulations, no business visa will be issued or renewed to a foreigner who intends to establish or invest in a business that is listed as an undesirable business undertaking. The Minister is yet to publish a list of such business undertakings that are considered to be 'undesirable'.

Applicants who are successful in obtaining a business visa will need to ensure that they employ or prove that at least 60% of the business' total staff compliment are South African citizens or permanent residents.

Intra-Company Transfer Visas

Intra-Company Transfer Visas (ICT visas) can be granted for a maximum period of up to 4 years.

ICT Visa Applicants will need to ensure that they include proof of employment with the foreign company for a period of at least 6 months.

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Further, the relevant employer will need to provide an undertaking to ensure that a plan is developed for the transfer of skills to a South African citizen or permanent resident. Alternatively if the relevant employer has such a plan in place, this will need to be included in the ICT Visa Application.

General Work Visas

The requirements for General Work Visas have largely remained unchanged.

However, the new regulations introduce a requirement in that the applicant must include, in their application, a certificate from the Department of Labour (DOL). The certificate will, *inter alia*, confirm the following:

- the respective employer was not able to find a suitable South African citizen or permanent resident for the position;
- the applicant has the required skills and expertise;
- the salary and benefits of the applicant are not inferior to South African citizens and/or permanent residents who occupy similar positions in the Republic; and
- the signed contract of employment between the foreign national and the company is in line with the Labour standards prevailing in the Republic and is made conditional upon the visa being approved.

At this stage, the procedure and requirements for obtaining this certificate are uncertain. The DHA and DOL is still to provide clarity on this issue.

Critical Skills Visas

Quota Work Permits and Exceptional Skills Work Permits have been amalgamated into the 'Critical Skills' Work Visa. In order to qualify for this kind of visa, an applicant will have to demonstrate that they falls within a critical skills category.

The list of critical skills was been published on 3 June 2014 and earmarks a number of occupation/critical skills that can be considered as 'critical' for purposes of an application for a Critical Skills Work Visa.

It is important to note that each of the sectors have their own particular requirements with regard to evaluation by the South African Qualifications Authority (SAQA), registration with a SAQA-accredited professional body, council or board and/or past work experience.

Spousal Visas

The definition of 'spouse' has remained unchanged. 'Spouse' means a person who is party to a marriage, customary union or permanent heterosexual/homosexual relationship.

An applicant for a spousal visa that is party to a marriage will need to include the marriage certificate in their application. Alternatively, in the case of a marriage concluded between two foreigners in a foreign country, an official recognition of the marriage will need to be included in the application.

An applicant for a spousal visa who asserts that they are a spouse that is in a permanent heterosexual/homosexual relationship, must include the following documents in his/her application:

- a notarial agreement signed by both parties confirming that the permanent or heterosexual relationship has existed for at least 2 (two) years before date of the application; and
- an affidavit confirming the continued existence of the relationship.

In terms of foreign national parents who are travelling with children, we draw your attention to regulation 12 which stipulates that if the child is travelling with both parents, such parents must produce an unabridged birth certificate for that child that reflects his or her particulars. In the case of the child travelling with one parent, that parent will need to produce an unabridged birth certificate of that child and the following documents:

- an affidavit of consent from the other parent authorising the child to enter the Republic;
- a court order authorising the child to enter the Republic; or
- a death certificate of the other parent.

The requirement for an unabridged birth certificate has been suspended until 31 September 2014 to allow foreign national parents to take the necessary steps to obtain these certificates from the relevant authorities.

Permanent Residence Permits

An applicant for a permanent residence permit will still have to show employment in the Republic (on valid work visas) for a continuous period of 5 years in order to qualify for permanent residence.

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However, s27(f) of the Immigration Amendment Act introduces a new category of permanent residence permit in that an applicant will qualify for permanent residence if they are able to:

- prove a prescribed net-worth (currently set at ZAR 12,000,000) to the Director-General; and
- pay a prescribed amount (currently set at ZAR 120,000) over to the Director-General as an administration fee.

Penalties

The Immigration Amendment Act has also removed the imposition of fines for foreign nationals who remain in the Republic on expired permits. Foreign nationals who overstay in the Republic for a period not exceeding 30 days will be declared as 'undesirable' for a period of 12 months. Foreign nationals who overstay for period exceeding 30 days will be declared as 'undesirable' for a period of 5 years. The period of overstay is calculated from the date of expiry of the foreign national's last valid visa.

Employment records

An employer who employs a foreign national for a period exceeding 2 years will need to ensure

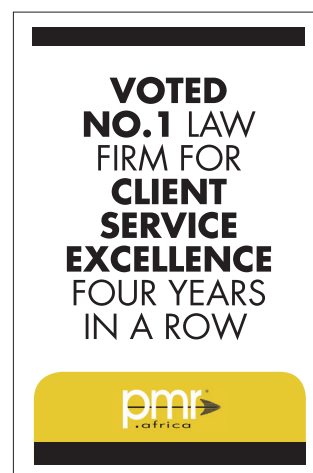
that they keep, on record, the following documents pertaining to the foreign national:

- a certified copy of the foreign national's passport;
- a copy of the relevant visa or permanent resident permit;
- proof of the capacity in which the foreigner is or was employed (such as the employment contract); and
- a copy of the foreign national's IRP5 form or certificate of earnings and job description.

Conclusion

In light of the new immigration legislation, we encourage and implore employers who regularly expatriate employees to conduct a close reading of the Immigration Amendment Act and the new regulations in order to consider its impact on their current recruitment and employment practices.

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