



IMMIGRATION LAW GUIDELINE: Q&A



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Thinking of working in South Africa or Kenya?

Here is what you need to know about work visas.

What are the different types of work visas available in South Africa and Kenya?

South Africa

General work visa; critical skills work visa; intra-company transfer (ICT); corporate visa; and business visa.

Kenya

There are various categories of permits and passes depending on what the applicant wants to do in Kenya. Individuals who wish to work in Kenya can apply for the Class D permit which relates to employment and which is issued to a person who is: offered specific employment by a specific employer, the Government of Kenya or any other person or authority under the control of the Government, or an approved technical aid scheme under the United Nations or some other approved agency; who is in possession of skills or qualifications that are not available in Kenya; and whose engagement in that employment will be of benefit to Kenya.

What constitutes 'critical skills'? Does this only apply to specific industries?

South Africa

The South African Government regards certain skills as being critical and/or exceptional. A person who has such skills or qualifications can apply for a critical skills visa. The list of skills deemed critical or exceptional are gazetted and published by the South African Government. A current and revised list was published by the Minister of Home Affairs on 2 August 2022.

Kenya

An applicant for a work permit in Kenya will need to demonstrate that they are in possession of skills or qualifications that are not available in Kenya and that their engagement in the respective employment will be of benefit to Kenya, irrespective of the industry.

What is the validity of the various work visas? May they be extended and on what grounds?

South Africa

- **General work visa:** Valid for a period not exceeding five years and the holder is required to provide proof to the Director-General of Home Affairs (Director-General) that they are still employed on the terms and conditions listed in the application. This visa may be extended.
- **Critical skills visa:** Valid for a period of five years and this visa may be extended.
- **Intra-company transfer (ICT) visa:** Valid for a period of four years and not, as a general rule, extendable. However, the Department of Home Affairs (DHA) will permit the extension of this visa in certain instances.
- **Corporate visa:** Valid for a period not exceeding three years and, as a general rule, it is not extendable. However, the DHA will permit the extension of this visa in certain instances.
- **Business visa:** Valid for a period not exceeding five years and the duration will depend on the motivation listed in the application. As a general rule, it is not extendable, however, the DHA will permit the extension of this visa in certain instances.

Kenya

The validity period of a permit is determined by the Director of Immigration and may be renewed for further periods on the payment of the renewal fee. The Immigration Rules provide that no permit shall be issued or renewed under the Kenya Citizenship and Immigration Act (No. 12 of 2011 for a period exceeding five years from the date of issue or renewal.

Is a person who is working remotely from their home country also required to apply for a work permit where they are employed by the South African or Kenyan branch of a company?

South Africa

If the applicant will be transferred temporarily to the branch or affiliate and will be reporting directly to, and be on the payroll of, the local branch, then the applicant will be required to apply for a work permit, even if they are working remotely from their home country.

Kenya

A person who is working remotely for a Kenyan entity is not required to obtain a work permit or a special pass.

What liability, if any, would an employer incur where an employee is found to be in possession of a fraudulent permit?

South Africa

Section 38 of the Immigration Act 19 of 2004 (Act) prohibits employers from employing illegal foreigners and section 49 of the Act contains the different offences and, an employer may upon conviction be liable to pay a fine or to imprisonment not exceeding 18 months.

Kenya

A permit or a pass that is obtained by or was issued as a result of fraud or misrepresentation or the concealment or nondisclosure of any material fact is deemed always to have been void and of no effect.

Can an employer be fined for employing 'illegal foreigners'?

South Africa

Section 49 of the Act contains the different offences and prescribed punishment, including any fines that an employer may be liable to pay upon conviction.

Kenya

A person who employs a person who is illegally in Kenya commits an offence and is liable, upon conviction, to a fine not exceeding KES 500,000 or to imprisonment for a term not exceeding three years, or both.

Are the family members of a person who is in possession of a work visa eligible to apply for a visa? Will this visa make the family members also eligible to work in the host country?

South Africa

As a general rule, family members of a person who is in possession of a valid work visa will not be eligible to apply for the same work visa. However, the family members can apply for a different visa, provided that they meet the requirements for the visa that they have applied for.

Kenya

Family members of a person who holds a work permit are eligible to apply for a dependant pass. The dependant pass only allows the family member to live in Kenya, but not to work. If the dependant secures employment in Kenya they must obtain their own work permit.

Can a person hold multiple visas simultaneously?

South Africa

As a general rule, applicants may not simultaneously be in possession of multiple work visas. It is, however, possible to apply for permanent residence on the basis of holding a work visa.

Kenya

A person is not allowed to hold several work permits simultaneously. The law obliges an employer to immediately notify the Director of Immigration where the employment of a work permit holder has ceased, leading to cancellation of the work permit. In the event a holder of a work permit secures employment with a different employer, the current employer must ensure that the current permit is cancelled. The employee will not be able to obtain a work permit for the new job unless the initial permit is cancelled and an official notice is issued to that effect.

When will a temporary visa holder be eligible for permanent residence?

South Africa

In terms of section 26 of the Act, the Director-General may issue permanent residence to a temporary visa holder if they have been the holder of a general work visa for five years and have received a permanent offer of employment; if they have been the spouse of a permanent resident for five years; or if they are a child of a citizen or permanent resident, and under the age of 21.

Kenya

A person is eligible to apply for permanent residence in Kenya if they have held work permits for at least seven years and have been continuously resident in Kenya for the three years immediately preceding the application.



Do holders of work visas enjoy protection under labour laws of their host country?

South Africa

Holders of work visas will benefit from the protection of South African labour law, provided that they fall within the definition of an employee, as defined in the Labour Relations Act 66 of 1995.

Kenya

Holders of valid work permits in Kenya enjoy the protection of the country's labour laws.

Are holders of work visas eligible for vaccination in their host country?

South Africa

All foreign nationals over 18 are eligible to be vaccinated in South Africa, provided that they have some form of identification, which identification would include a work visa.

Kenya

Holders of a Foreign National Certificate (Alien Card), which it is mandatory to apply for after being issued with a work permit, are eligible to apply for the COVID-19 vaccine at a vaccination centre of their choice.

Can a holder of a work visa refuse to be vaccinated in their host country? Does this constitute a valid ground for their dismissal and the termination of their visa?

South Africa

The South African Government has not taken a mandatory position on COVID-19 vaccinations, and has maintained that vaccinations are voluntary. Notwithstanding this, the employer of a work visa holder may implement a mandatory vaccination policy at its workplace, subject to the guidelines set out in the Consolidated Direction on Occupational Health and Safety Measures in Certain Workplaces that was published by the Minister of Employment and Labour on 11 June 2021. In terms of this directive, all employees have the right to object to being vaccinated on medical or constitutional grounds, and to be reasonably accommodated, if possible, if their objections are found to be valid. If the work visa holder's objection is found to be invalid, they may be dismissed. Whether this refusal constitutes a valid ground for their dismissal and the subsequent termination of their visa will be determined on a case-by-case basis, depending on the individual circumstances.

Kenya

It is not mandatory to get a COVID-19 vaccine in Kenya, but the Government urges all those eligible to get vaccinated.

Who qualifies for a spousal visa with authorisation to work?

South Africa

Only the spouse of a South African citizen or permanent residence holder may obtain a visitor's visa in terms of section 11(6)(b) of the Act, which would allow them to work in South Africa. As of 1 February 2023, spouses that are party to a spousal visa application must be present on the day of the application at the visa application centre.

Kenya

Holders of dependant passes in Kenya are not allowed to work. A dependant pass holder who wishes to work in Kenya must obtain a valid work permit and have their dependant pass cancelled.

Who qualifies for a spousal visa with no authorisation to work?

South Africa

In terms of section 11(1)(b)(iv), read with Regulation 11, of the Act, a spousal visa with no authorisation to work is ordinarily issued to a foreign national for the same period for which their spouse obtained a work visa.

Foreign nationals who are spouses of South African citizens or permanent resident holders may also obtain a spousal visa with no authorisation to work, in circumstances where their spouse is unemployed. As of 1 February 2023, spouses that are party to a spousal visa application must be present on the day of the application at the visa application centre.

Kenya

Please see the response to Question 13.

How long does it take to obtain a work visa/permit?

South Africa

As these applications are assessed on an individual basis, their processing times may vary. The process may, however, take between two to three months, depending on the visa adjudicator.

Kenya

Each work permit or special pass is processed on its own merit. Generally, it takes about three to four months to obtain a work permit and about two weeks to obtain a special pass.

In the event that a work visa is denied, can one appeal that decision?

South Africa

Yes. An aggrieved person may make an application, in the prescribed manner, to the Director-General within 10 working days from receipt of the decision that their visa has been denied.

Kenya

Yes. An applicant whose work permit application is rejected may apply for a review of the Cabinet Secretary's decision within 90 days from the date of receipt of the notification and may appeal the Cabinet Secretary's decision to the High Court.

What is the government fee for obtaining a work visa?

South Africa

There is no fixed amount; it depends what kind of visa the individual is applying for. There is a fee for the Visa Facilitation Service Centres (VFS) and the DHA.

Kenya

The government fees for obtaining a work permit are KES 200,000 for each year the permit is approved and KES 10,000 for the work permit application fees. An application for a special pass is free but once approved, KES 15,000 is payable each month the pass is approved.

Are there exceptions for work permits for nationals of certain countries?

South Africa

No. Every individual from another country needs to have a permit for work purposes, although the type of permit may vary depending on the work to be done.

Kenya

No. Every foreign national who wishes to work in Kenya must obtain a work permit. Work permits for East African nationals are issued gratis.

What are the consequences of being caught in possession of a fraudulent visa?

South Africa

In terms of the Act, individuals caught in possession of fraudulent visas are deemed to be prohibited persons and, as such, they are banned from entering South Africa. They are placed on the V-list or No Entry List.

Kenya

Please see the response to Question 5.

What does it mean to be an 'undesirable' person?

South Africa

A person who stays after the expiry of their visa will be declared undesirable. The period of the declaration is determined by examining the foreign national's period of overstay in the country. A declaration of undesirability results in a ban of between one to five years.

Kenya

An undesirable immigrant means a person who:

- is not a citizen of Kenya and who has not received a pardon;
- has been convicted in Kenya or any country of an offence created under a statute for which the sentence of imprisonment is a minimum term of three years;
- has been acquitted by a court of any offence and who at the time of acquittal has no valid immigration status;
- has committed or is suspected of having committed an offence provided for under international treaties and conventions ratified by Kenya;
- is engaged in human trafficking, human smuggling, sexual exploitation or sex crimes;
- procures or attempts engaging in trafficking or smuggling into and out of Kenya any person for the purpose of engaging in sexual offenses;
- is reasonably suspected to be engaged in or facilitates the trafficking of narcotics, prohibited, controlled or banned substances;

- there is reasonable cause to believe is engaged in or facilitates trafficking in persons;
- is present in or whose entry into Kenya is unlawful under any written law;
- has an order made or deemed to be made in force against them directing that they must be removed from and remain out of Kenya;
- is reasonably believed to be, or there is cause to believe that they are, engaged in or facilitate any activity detrimental to the security of Kenya or any other state;
- is reasonably believed to be, or there is cause to believe that they are, engaged in, facilitate or are sympathetic to acts of terrorism or terrorist activities directed against Kenya or detrimental to the security of Kenya or any other state;
- is involved in or is reasonably suspected to be engaged in money laundering;

- is convicted of war crimes or crimes against humanity, genocide, murder, torture, kidnapping or in respect of whom there are reasonable grounds for believing they have financed or facilitated any such acts;
- is engaged in or suspected to be engaged in illicit arms trading;
- is engaged in or suspected to be engaged in illegal human body organs trade;
- is involved in or is reasonably suspected to be involved in crimes related to patents, copyrights, intellectual property rights, cyber-crimes and related crimes;
- is involved in or is reasonably suspected to be involved in piracy or has been convicted of piracy and served their sentence;
- is or has been at any time a member of group or adherent or advocate of an association or organisation advocating the practice of racial, ethnic, regional hatred or social violence or any form of violation of fundamental rights;
- offends public morality with their conduct;
- knowingly or for profit aids, encourages or procures other persons who are not citizens to enter into Kenya illegally;

- is seeking to enter Kenya illegally;
- is a fugitive from justice;
- has had their refugee status in Kenya revoked under the Refugee Act 13 of 2006;
- is declared a prohibited immigrant by the order of the Cabinet Secretary, subject to the approval of Parliament, or who was, immediately before the commencement of this Kenya Citizenship and Immigration Act (No. 12 of 2011), a prohibited immigrant within the meaning of the Immigration Act (now repealed); or
- has been repatriated and or removed from Kenya under any lawful order.

Can the status of being classified as an 'undesirable' be removed?

South Africa

An undesirable person can appeal to the Director-General of Home Affairs to overturn the decision declaring them undesirable on the basis of good cause shown.

Kenya

Yes, the Cabinet Secretary is authorised by law to review the status of prohibited immigrants and inadmissible persons, subject to the advice of the relevant committee.

What does it mean to be a 'prohibited person'?

South Africa

A prohibited person gets an indefinite ban from entering South Africa.

Kenya

Please see the response to Question 21.

Can the status of being classified as a 'prohibited person' be removed?

South Africa

A prohibited person can appeal to the Director-General of Home Affairs to overturn the decision declaring them a prohibited person on the basis of good cause shown.

Kenya

The Kenya Citizenship and Immigration Act 12 of 2012 provides that a person aggrieved by a decision of a public officer made under the act may apply to the High Court for a review of the decision.

Have there been any changes in the exemptions granted to Zimbabwean nationals in South Africa?

South Africa

The Minister of Home Affairs granted Zimbabwean nationals exemption in terms of section 31(2)(b) of the Act. The extension of the Zimbabwean nationals' permit is valid until 30 June 2023.

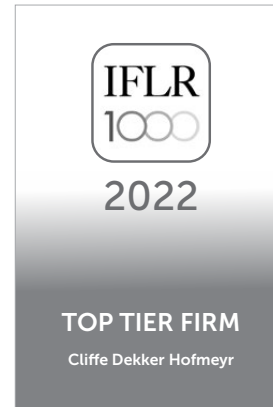
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The way we support and interact with our clients attracts significant external recognition.

Chambers Global 2020–2023 ranked **Gillian Lumb** in Band 3 for employment. *The Legal 500 EMEA 2020–2023* recommended her for employment.



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Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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