

Foreign nationals must **confirm employment**

There is a conundrum regarding obtaining proof of employment confirmations from the Department of Home Affairs.

By **Julian Pokroy**

There are several instances in the Immigration Act 13 of 2002 (as amended) that require either an employer or foreign employee on a temporary residence or work permit to provide “proof of employment” or “continued employment” to the Department of Home Affairs in order to prevent harming or voiding their current permits.

The technicalities of this are dealt with here under. It may appear to be a simple task but it has certainly been complicated for many reasons.

Some of the sections in the Act or Regulations require reporting and confirmations and there are practical problems that beset each of these categories.

Section 19(1) of the Act allows for the issue of a quota work permit, which is a very specific type of work permit, in brief, allowing certain selected traits, professions or occupations that fall within the annual list determined by the Minister of Home Affairs in consultation with the ministers of Labour and Trade and Industry in various categories.

By way of an example, engineers of all types are in short supply in South Africa and, accordingly, engineers figure prominently on the list. What is required in terms of qualifying for a quota work permit is that the individual foreign national applying for such skills permit must be able to provide proof that they not only hold the qualification as approved and evaluated by SAQA, but also belong

to a professional body for that trade profession or occupation and have at least five years’ post-qualification experience.

This is one of the only work permits empowered in terms of the Act which does not require either a job offer of a formal nature or advertisement in the national printed media in an effort to try to secure a South African citizen or resident.

The failure to file a confirmation of employment within the time limit specified will render the work permit null and void.

All that is required is that the foreign national applying should qualify in that skills category, possess the qualifications, experience and professional registrations and also fall within the numerical quotas prescribed in the Gazette.

What is special about this type of work permit is that it allows that skilled foreigner to come into the country and seek employment only once they’re in the country.

This is balanced by Regulation 16 to the Act which requires that, within 90 days of arrival in South Africa, the holder of a quota work permit must provide proof to the Director-General of Home Affairs that they have secured employment within the category of trade, profession and occupation specified in Section 19(1) of the Act and the quota list published pursuant thereto, of where they have secured employment. This has to be repeated every

12 months thereafter.

The Act does not prescribe, neither do the Regulations, as to how this proof of employment must be filed and in what format.

A failure to file such confirmations will render the permit void.

The next category of work permit that requires proof and/or confirmation of employment is that of a general work permit which is dealt with in Section 19(2). Section 19(3) specifically requires that a general work permit shall lapse if within six months of its issuance, and then every year thereafter, the holder of such general work permit fails to submit satisfactory proof to the Director-General that he/she is still employed and of the terms and conditions of his/her employment, including the job description.

Once again, neither the Immigration Act nor the Regulations are specific on the format and/or method of filing such compliance letter.

Again, also in the case of general work permits and as set out in Section 19(3) of the Act, the failure to file a confirmation of employment within the time limit specified will render the work permit null and void. The only other permit requiring a confirmation of any sort is the business permit which resorts under Section 15 of the Act.

This is the permit previously known, perhaps more appropriately, as the “own business/self-employment” permit.

Once a foreign national has qualified for such permit and obtains such permit, it is incumbent on them in terms of Section 15(4) of the Act to submit proof to the satisfaction of the Director-General of Home Affairs that he/she has fulfilled the requirements for this type of permit within 24 months of the issuance of the permit and within every two years thereafter.

You are potentially damned if you don’t do the confirmation of employment and you are sometimes ultimately damned if you do.

The requirements referred to are amplified in Regulation 12 and encompass a chartered accountant certificate that the investment of at least R2.5 million in cash (about \$250,000) was made, alternatively a capital contribution of at least R2.5 million or at least R2 million (about \$200,000) in

cash and a capital contribution of at least R500 000 (about \$50,000), originating from abroad has been complied with and has been invested into the business.

Proof also has to be submitted with the first confirmation that at least five citizens or permanent residents have been employed in the business and that all statutory compliances such as SARS have been fulfilled as well as proof of registration with any body, board or council requiring registration. Again, no specific method of filing such compliance has been specified either in the Act or the Regulations.

Conundrum

Succinctly, you are potentially damned if you don’t do the confirmation of employment/continued employment and you are sometimes ultimately damned if you do.

A simple process such as a proof of confirmation of employment or continued employment has been complicated by red tape and bureaucracy.

There was a time where one could simply proceed to a regional office of the Department of Home Affairs and lodge a letter confirming employment or continuation of employment, receive a date stamp on their copy of the document and thereby complete and fulfil the requirements for confirmations and continuations of their employment.

Then came a time where this could only be done at Head Office of the Department of Home Affairs as this functionality moved to a centralised point at the Department of Home Affairs head office, then in Waitloo, in Pretoria. During this period, acceptable modes of delivery of such documentation were either direct physical lodgement of the document at Head Office of the department or faxing or proof of registered mailing to the Department of Home Affairs head office. However access to head office of the Department of Home Affairs at Waitloo was restricted and when this office moved to the CBD of Pretoria it was further restricted thereby preventing members of the public, applicants or their representatives from actually attending to an individual at that office without a prior appointment. The telephone systems have proved to be unmanageable at Head Office and it is almost impossible to secure such an appointment. Further complicating the matter is that most of if not all of the fax numbers at the Department of Home Affairs head office have been either non functional or non operational for some time.

The option of emailing to the relevant officials has also proved to be a fruitless exercise as one either does not get a response or the matter gets referred to another official who doesn’t respond.

Accordingly, it has become incredibly difficult to do a simple confirmation of employment. The consequences of non compliance have been spelled

out. Not only is there the potential of a permit becoming void or being cancelled automatically due to “non compliance” but there also is the possibility that, when such foreign national applies for permanent residence, they will be unable to comply with the requirements in terms of the Immigration Act permanent residence provisions by being able to prove that they have five years of continued employment in the case of a direct residence permit or be able to prove that they have confirmed their employment or compliance with the business permit requirements as required in terms of the Act.

A “practice” is now evolved at some regional offices where the applicants are not only being required to provide documentary proof of continued employment or confirmation of employment but also being required to complete a form BI-1739 which is the form used for applications for extension of existing permits.

In addition it is required that the contract must specify the position within the quota category confirming that the applicant continues in the same professional category, trade or occupation. A certificate of current registration with the relevant

There was a time where one could simply proceed to a regional office of the Department of Home Affairs and lodge a letter confirming employment or continuation of employment, then came a time where this could only be done at Head Office of the Department of Home Affairs.

professional body must be provided as well as a copy of the SAQA evaluation of qualification including diplomas and other certificates proving qualifications. The applicant’s curriculum vitae and testimonials proving at least five years’ experience must also be provided in the quota category of work permit and a copy of the applicant’s passport with first entry date and most current permits.

In respect of confirmations after 12 months, the following documentation must be provided:

- A letter from the employer on company letterhead confirming continued employment;
- Copy of the contract for the position occupied which must correspond with the quota category of the individual concerned and be signed by both parties;
- Latest SAQA evaluation and registration with professional body must be provided;
- Testimonials again in proof of five years of relevant post-qualification experience together with a CV of the applicant; and
- A copy of the applicant’s passport with first entry dates and current permits must be provided as well as proof of the address and telephone number of the applicant.

In the case of a change of employment, the following must be provided in order to ensure compliance:

- A release letter from the previous employer;
- The old employment contract;
- The new contract with the position corresponding with the quota category and signed by all parties;
- Registration with professional body and SAQA evaluation of qualifications together with diplomas and other certifications;
- Testimonials indicating five years’ post-qualification experience together with a comprehensive CV; and
- The telephone number and address of the applicant together with a copy of their passport bearing first entry date and current permits.

In the event of a confirmation of employment not having been done, a good reason must be given, but the risks outlined above certainly do apply.

This latter procedure is not provided for in the Act or the Regulations. However, one simply has to make a judgement call as to whether to abide by the letter of what is required or to adhere to the “practice” that has developed. Hopefully this matter will clarify itself shortly. ■

Julian Pokroy is an immigration specialist Attorney, www.immigration.org.za, and currently heads the Law Society of South Africa’s Immigration and Refugee Law Specialist Committee and the Immigration, Nationality and Refugee Law Committee of the Law Society of the Northern Provinces. He was recently appointed onto the South African Law Reform Commission Committee dealing with a review of all legislation administered by the Department of Home Affairs.

Listen, love and lift

3 poignant lessons from Madiba. *By Yusuf Mahomed*

Contrary to popular belief, the greatest challenges in the 21st century are not access to capital, natural resources or technology. At the click of a mouse, capital flows from one market to the next. With skilful planning, it is possible to create win-win arrangements for natural resources. Access to technology is no longer confined to a select group. While these matters are important, they pale in comparison to the glaring lack of leadership. Globally, there is a crisis in leadership, from elected officials in government to nominated captains of industry. Today’s leaders come to the table with larger than life egos. Their quest to amass a personal fortune has increased from hundreds of thousands to tens of millions. Talk about double digit inflation. When backed into a corner, these leaders refuse to bow out of their office. Instead, they stubbornly cling to power and eliminate their opponents.

In this context, it should not be a surprise that the passing of Nelson Mandela was met with unprecedented levels of mourning and tributes. The most famous freedom fighter, “terrorist”, and leader of the past century had quietly departed from our lives. There was a deep sense of loss, partly because we have zero confidence in the current leaders.

While many volumes will still be written about his contribution, he left behind three poignant lessons for HR professionals:

1 Listen, listen, listen

We forget how many times our country was on the brink of civil war. Yet Mandela managed to pull off the seemingly impossible, simply by listening to the other side. One of my favourite Madiba quotes is, “As a leader... I have always endeavoured to listen to what each and every person in a discussion had to say before venturing my own opinion”. Often times, my own opinion will simply represent a consensus of what I heard in the discussion.

Unfortunately in many organisations, nobody is

truly listening to anybody. We are so occupied with our own response that we don’t even remember what the other person said. Before sending your staff on another course, train them in the art of listening. Develop their listening skills to the point where it is part of the way you naturally work and do business. In the absence of any other changes, listening effectively could be the best way to increase your bottom line this year.

2 Love and hatred

Mandela said, “People must learn to hate, and if they can learn to hate, they can be taught to love, for love comes more naturally to the human heart than its opposite ... Man’s goodness is a flame that can be hidden but never explained.”

Twenty years into our democracy, hatred has not yet left the workplace. The dividing lines of race, gender and pay are still strong. Ignoring racial tensions won’t help performance. Side stepping gender representation only serves to alienate women further. Combine race or gender with pay inequities and people will carry around their hatred for a long time. We need to heal the wounds of the past and make amends, where necessary. It opens up the space for love to flow freely.

3 Resilience

Throughout his life, Mandela experienced a number of setbacks in politics and his relationships, yet he remained resilient, noting, “The greatest glory in living lies not in never falling, but in rising every time we fall.”

Initially dismissed as a fad, resilience has shown staying power and there is growing literature about its potency in the boardroom. I suggest you dedicate more time to understanding what resilience means in your business and whether you have the right people in the right positions to lead in future.

Although Mandela has left us, his legacy remains and it is up to us to listen more, embrace love over hatred, and bounce back from failure. ■

Yusuf Mahomed (CA(SA), AdvTax) is the founder of Worksucks, www.worksucks.co.za, and a reward consultant.