"Own business" visas

A new perspective on "own business" visas.

By Julian Pokroy

At the outset, I wish to state that the word "permit" and "visa" are used interchangeably. The reasons behind this is that the international best practice terminology is that of the use of the word "visa" whereas the Immigration Act 13 of 2002 which came into operation on 7 April 2003 "the Act" as amended refers to "temporary residence permits" and "visitors permits".

For the purpose of the article, I will refer to all permits as "visas" on the basis of the international acceptability.

Section 15 of the Act prescribes a temporary residence permit known as a business permit. Under prior legislation this permit was referred to as a "self-employment/own business" permit. This was perhaps a more suitable nomenclature.

This section allows for a foreigner intending to establish or invest in a business in the Republic of South Africa in which he/she may be employed and also makes provision for accompanying family members of the principle applicant to have visas attached to the principle applicant's visa and for the same duration.

As I have already written on business visas in prior editions it is not his intention to recap and re-embroider on these principles but rather to focus on another aspect, which will become more apparent.

To sum up, however, an applicant for a business visa would have to provide proof that they qualify in respect of the capital and/or financial contribution into the business, provide proof that the contribution will form part of the intended book value of the business and this would have to be accompanied by an undertaking by the applicant to comply with all of the laws and registration requirements of the South African Revenue Service and labour laws of the country.

It is a specific requirement of the section that the holder of a business visa must provide proof within 24 months that they have indeed invested into the business the capital and/or financial contribution referred to in the initial application and that it has been utilised for the purpose for which it has been brought into the country.

There are provisions in the section which allow for fixed equipment and machinery to be included into the calculation at valuation thereof.

It is a further requirement in terms of the regulations to the Act that an undertaking must be given at the time of the application and is a condition for the application to employ at least five South African citizens or residents into the business and proof would have to be submitted thereof within the 24 month period referred to above.

There are numerous other requirements but the this article will deal with other aspects.

It has always been a requirement that the Department of Trade and Industry (DTI) through its investment facilitation division must be approached in order to furnish a recommendation that not only confirms compliance with all of the statutory requirements and the investment and in specific that the investment appears adequate for the purpose for which it is being invested, but also, for the DTI to be stating that the business will be to the benefit of the South African economy.

The holder of a business visa must **provide proof within 24 months** that they have indeed invested into the business the capital and/or financial contribution referred to in the initial application.

Over the period of the last twenty years, there has been a very strong movement to encourage investment, and by this I mean meaningful investment, into the country which creates job opportunities for South African citizens and is to the advantage of the economy.

From time to time, certain industries have been earmarked in this regard and lists appeared from time to time. Most of these related to agriculture, agro-processing, various technical industries and manufacturing through or all spectra.

However, of late, the DTI has been taking an attitude that, in addition to this, the proposed business or existing business must also be in the "national interest". Whilst this is understood and indeed it is going to be embodied in the Amendment Act which will come into operation during the course of this year and the new regulations, the concept of "national interest" has neither been defined at this time nor is it defined in the Amendment Act yet to come into operation. The new regulations are apparently in process but no sight has been had of them but it would have to embody this principle of "national interest".

Against this background, the Department of Trade and Industry has of late been declining to give positive recommendations to many applications on the basis that the businesses concerned would not be in the national interest. The DTI also requires the business to be something that can set itself apart from businesses in South Africa already in the specific realm.

Whilst this is understandable as it would have the effect of exposing many business visa applications that are not legitimate, it has also been having a negative effect.

What is however much more concerning is the tendency over the last while to involve the Department of Labour and calling upon them to report on issues surrounding the job creation aspects of the specific visa application.

The Department of Labour is notorious for its dilatory attitude towards dealing with applications for recommendations for all types of visas. In addition, the Department wears blinkers in terms of some of the harsh realities of job creation within the South African context. Specifically in the highly technical areas of manufacture and sometimes highly technical areas of the material property, a failure to understand these realities results in negative reporting by the Department of Labour.

The overall effect is that many potential investors who are looking legitimately to invest in South Africa are looking to areas where the immigration law regime and labour laws are less onerous.

I cannot presuppose what will be contained in the regulations but will certainly update this aspect once the new regulations have been finalised. ■

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