

Need a work permit? Good Luck!

What it's like to apply for a work permit after 26 May – the date of the new immigration regulations coming into operation.

By Julian Pokroy

In February 2014, the then Minister of Home Affairs published Draft Immigration Regulations for public comment. The time given for such stakeholder comment was rather short and encompassed some “long weekend” time. Nevertheless, a fairly comprehensive input was given from one of the principal stakeholders of the Law Society of South Africa on various technical issues in the Draft Immigration Regulations, some of which eluded to the possibility of unconstitutionality and other aspects relating to administrative law issues. In addition, input was given on practical aspects surrounding the ultimate implementation.

No indication was given by the Minister of Home Affairs at the time as to when implementation would take place. Shortly thereafter, the Minister called for invited tenderers to submit tenders for the outsourcing of some of the administrative processors relating to visas, the lodgement thereof, collection thereof and, ultimately, the placing of visa stickers onto passports.

The tender was granted to Visa Facilitation Services (VFS).

Still nothing was said about a possible implementation date either for the Amendment Act and Regulations or for the start up date for VFS.

On 24 May this year, we were suddenly confronted, rather late in the day, with the new Regulations that had been gazetted and would come into operation on Monday, 26 May, some four days later, which time included a weekend.

We were also advised that from Monday, 26 May, no further applications would be entertained, nor would the public or foreign national applicants be allowed into the regional offices of the Department of

Home Affairs to lodge applications.

What was once probably the most bustling and busiest office at the Department of Home Affairs at regional office level, the Johannesburg regional office became a “ghost town” on Monday, 26 May.

To put this in some perspective, I could point out that very often applicants or their representatives had to queue up in the dark in the early morning for several hours just to gain access to the building and now suddenly the halls are empty.

The reality is that from Monday, 26 May, VFS was supposed to be operational and ready to take on applications on behalf of the Department of Home Affairs. It was only the Pretoria, George and Port Elizabeth offices that indeed opened their doors. The rest of the regional offices opened only some two to three weeks later.

The harsh reality is that applications that were not yet lodged at the time of the coming into operation of the new Regulations now would stand to be adjudicated under criteria which appear in the new Regulations. This meant that many applicants, who would have qualified but whose applications were not ready for lodgement prior to 26 May, potentially now no longer qualified.

To say that confusion reigned would be an understatement. Employers on the brink of employing skilled foreign nationals who complied with the “old” Regulations requirements now could only use the qualifying documents in support of a newly introduced requirement that the Department of Labour make recommendations in respect of allocating that position to a foreign national.

The Department of Labour was certainly caught unawares and it is ex post facto possible that they were not fully consulted on these issues.

What did however happen is that a new range of requirements imposed by the Department of Labour kicked into place and the bottom line is that it is difficult to predict, despite promises by the Department of Labour to the contrary, as to how long it will take to get a Labour Department recommendation. The accent by the Department of Labour is to attempt to recruit in essence a South African skilled individual to fill the position

and to make efforts in this regard. This is despite the advertisements by the employer and all of the efforts made by the prospective employer to secure the services of a South African national before applying their mind to a foreign national. It is an acknowledged principle that “local is lekker” and that first prize must always be the employment of skilled South African citizens or residents.

The importation of the skilled foreigner should only be seen as an interim measure until such time as South Africans have been trained in that specific discipline, skill or qualification.

The involvement of the Department of Labour definitely caused delays in the importation of skills.

A further, possible unintended consequence, in the critical skills visas, is that the professional bodies councils or statutory bodies or Government departments which have to certify that a skilled foreigner whose particularity appears on the Critical Skills Visa List has the requisite qualifications and experience in that category has become problematic. Whilst it is abundantly clear that SAQA evaluates the qualifications of all foreign nationals in order to determine their parallel qualification value in South Africa, they do not comment on experience in post qualification skills. The crunch comes with the professional bodies that can register such skilled, qualifying foreign national but cannot either give any recommendation or certification regarding their skills and experience. This creates a catch 22 situation for the critical skilled visa applicant and, at the time of writing, I have led a delegation of the Law Society of South Africa's Immigration and Refugee Law Committee in proactive engagement with SAQA in trying to deal with the conundrum.

People were now unable to interface at personal level with Home Affairs officials. These are clients of the Department of Home Affairs.

The reason for mentioning this is that a foreign national applying for any visa, or his/her representative, now has to interface with a VFS official, by prior appointment and at a cost of R1 350.00 per applicant, who is neither geared nor enabled in terms of the legislation to give advice of any nature.

The norm of operations for VFS officials is a checklist of documents with a mandate to ensure that all the boxes have been ticked.

Their further function is to receive the money and issue a receipt and also issue a receipt for the actual application.

The application is then forwarded electronically, by VFS, to the central adjudication hub of the Department of Home Affairs at its Head Office,

where the application is then dealt with extensively within the parameters of the Immigration Act, as amended, and its Regulations.

Enquiries through the VFS website will only confirm that the matter has been despatched to Head Office and nothing more. The applicant must then sit back, be patient and wait!

Instead of queries being raised, refusals have become the order of the day if there has been a technical non compliance.

It is understood that, if a person doesn't qualify, a rejection notice would be justifiable. However, because of regional differences in opinions as to what is actually required for an application, it is conceivable that there might be a slight technical fault in the application which could be easily remedied by an e-mail or a telephone call to the applicant or their representative. In essence, this is not being done and applicants who apparently do not comply as in this latter example will be faced with a rejection.

A rejection of a visa now forces the applicant to apply for a review or an appeal of that decision. This would necessitate the preparation of an appeal, again via an appointment with VFS to lodge the appeal and a further payment to VFS of R1 350.00 per applicant.

All of the above charges are also followed by the usual Department of Home Affairs fees for the processing.

You be the judge as to how fair this is.

One has to ask the question: how is all of this going to facilitate the importation of highly skilled foreigners whose skills are not available in the country, into the country? Stumbling blocks are certainly not the way to achieve this.

Over the next few months, I will be dealing with various aspects of the technicalities of the various visas and indeed one has already been covered on General Work Permits in the July 2014 edition of *HR Future*. ■

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