

Immigration law update

Country bleeds while Department demands information it already has.

By Julian Pokroy

Do the new “innovations” with Department of Labour involvement on work permits and extensions thereof do more harm than help?

I have written in recent previous editions of *HR Future* about the new Immigration Regulations which came into operation rather suddenly on 26 May 2014.

The Immigration Amendment Act 13 of 2011 also came into effect on that date and brought about certain technical amendments.

In respect of the general work permit category of visa as envisaged in Section 19(2) of the amended Act, read together with Regulation 18(2) of the new Regulations, it has now become a requirement for applicants for general work visas to provide a certificate from the Department of Labour confirming that:

- despite a diligent search, the prospective employer has been unable to find a suitable citizen or permanent resident with qualifications or skills and experience equivalent to those of the applicant;
- the applicant has qualifications or proven skills and experience in line with the job offer;
- the salary and benefits of the applicant are not inferior to the average salary and benefits of citizens or permanent residents occupying similar positions in the Republic; and
- the contract of employment stipulating the

conditions of employment and signed by both the employer and the applicant is in line with the Labour standards in the Republic and is made conditional upon the general work visa being approved.

Much of the aforementioned was contained in the prior regulations in force up to 26 May 2014, in that the employer had the option to either approach the Department of Labour for a recommendation in this regard or to comply with such requirements themselves.

In other words, to place the advertisement for the position in the national printed media, to interview applicants and evaluate their skills, qualifications and experience and suitability for the position and to contract the services of an accredited benchmarking organisation to certify that the remuneration which would be paid to the foreign national, if successful with their work permit application, would not be less favourable than that which would have been paid to a South African citizen or permanent resident in the position.

The requirements further dictated that, from a practical perspective, the prospective employer of such foreign national applicant would have to provide details of all candidates who applied for the position, giving all their contact details and a copy of their South African identity documents and full reasons as to why they were not suitable for the position.

This process was relatively straightforward as most of the applications are for fairly technical people in areas of shortage of skills in the current skills vacuum that the country is suffering.

As a result of the snail's pace at which the Department of Labour has historically always moved on these recommendations, most employers elected to go the route of avoiding the Department of Labour, rather than getting bogged down in bureaucratic delays.

The amendment regulations however took this

“privatised” option of a salary benchmarking away from the employer by now regulating the only option as specified in Regulation 18, to approach the Department of Labour in this regard.

Needless to say, at the time of the rather sudden appearance and coming into operation of the new Immigration Regulations, the Department of Labour was relatively in the dark, by their own admission, as to the fact that implementation was not only imminent but had already happened. For this reason, almost a month passed by without any clarity being given by the Department of Labour on how they wished to approach the project of doing the recommendations and the procedures, and requirements for lodgement continue to change as a result of uncertainty surrounding what the Department of Home Affairs decides it wants as it continually shifts the goalposts.

It is very important to note that any applicant who had not lodged an application for a general work permit or any other type of visa prior to 26 May when the new regulations came into operation, no longer qualified under the prior requirements and now had to drastically amend their stance to include these new requirements.

A media briefing was held by the Department of Labour during August in which the position became muddier rather than clearer.

It appears that the Department of Labour now sees itself as a “recruitment agency” tasked with ferreting out possible South African citizens or permanent residents, whether they qualify or not, for the job advertised, and/or referring the prospective employer to employment agencies in their geographical region to try and secure the skills. The process is in no way time or urgency sensitive and major delays in this step of the process are occurring.

By way of background, the prospective employer would have already gone through all of the hoops in terms of recruitment, through specialised recruitment agencies where necessary, advertised as is required, interviewed applicants and been unable to secure a South African citizen or permanent resident for the position, before embarking on a general work visa application in the first instance.

Confusion further reigned as to whether an application for a Department of Labour recommendation had to be lodged at the Department of Labour head office in Pretoria or whether this had to go through one of its provincial regional offices. No clarity could be obtained on this aspect for almost another month and it is safe to say that some of the confusion regarding geographical

jurisdiction in this regard still remains.

It is very important to also note that until the Department of Labour recommendation has been obtained, the application for the general work visa cannot be lodged with the Department of Home Affairs.

Yet the Department of Labour is refusing to forward the application to the employer company or their representatives and is quite insistent on forwarding this to the Department of Home Affairs where generally such documentation cannot be tracked down and sometimes disappears into the quagmire in Civitas Building in Pretoria.

An unreasonable request that has been made is to require the prospective employer also to provide proof of compliance with the employment equity legislation, skills development legislation, proof of payment of skills levies and a host of other requirements. The problem with this specific aspect is that all of this is available on the Department of Labour's own system and easily accessible to officials within the Department of Labour. Surely it should be a principle that if a document is readily available on the Department's own system that a full further investigation in this regard would be unnecessary, time consuming and irrelevant?

All of this is happening whilst the country is bleeding from a shortage of skills in many of the technical categories.

A further note is that, where a person is at the highest skills level and qualifies for a critical skills visa in terms of Section 19(4) of the Act (as amended), they can apply for such critical skills visa and avoid having to deal with the Department of Labour in this process as it is not a requirement in terms of that category of work permit.

However there are levels of artisans and skilled persons who simply do not fall into the critical skills visa list as published by the Minister of Home Affairs and accordingly are unable to apply for that category of visa.

All of this begs the question: where is all of this taking our economy in respect of the necessary importation of skills?

In order to answer this question, one needs to look at the old adage, “time is of the essence”.

At the time of writing this, I did a round robin of colleagues practising immigration law and instances of Department of Labour recommendations having been finalised by the Department of Labour were the extreme exception rather than the rule.

Remembering that applications for the actual work permit cannot be processed by the Department of Home Affairs until such time as the recommendation

letter has been issued by the Department of Labour, then it cannot proceed further with the Department of Home Affairs. This is causing immeasurable delays.

A further factor that must be brought into the equation are the unreasonable and long delays in

All of this is happening whilst the country is **bleeding** from a shortage of skills.

the Department of Home Affairs itself in dealing with work permits once received. One would be talking in terms of months rather than weeks.

This again begs the question: quo vadis?

A final point which requires mention is that the Immigration Act in all its prior formats has always allowed for an extension of an existing work permit of any description based on compliance with the documentary requirements for extension of such visas.

The twist however now comes in that the Department of Labour is insistent, and it appears also the Department of Home Affairs that, even with an extension of an existing visa, the whole recruitment process and all work there about

has to be done once again. This of course means that advertising must take place again, recruitment processes must take place again and ultimately a fresh and brand new Department of Labour recommendation letter would have to be obtained from the Department of Labour.

The officials of the Department of Labour are taking an attitude that an extension is like a "new" application and are asking questions along the lines of what programmes the incumbent holder of the work visa which is sought to be extended has been involved in terms of transfer of their skills to South African citizens or permanent residents and this appears to be the new train of thought and trend.

All of this does not bode well for a company seeking an urgent highly skilled foreign national in an area or skill set where such skills are simply not available or will take years to produce. This was never a requirement of the Immigration Act and appears to have been introduced of late. ■

Julian Pokroy is one of South Africa's leading immigration specialist Attorneys, 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 is a member of the South African Law Reform Commission Committee.

In the public eye

When it comes to your earnings, get well soon.

By Yusuf Mahomed

The year 2014 may be remembered for high expectations and disappointing results. We expected the economy to finally turn the corner. We expected stability after the elections. We expected better service delivery.

With the exception of stocks on the JSE reaching new heights, we don't have results worth mentioning. Our pedestrian growth forecast of 2.7% (February) was slashed to around 1.4% (October). Ongoing strike action and infighting in the COSATU/NUMSA saga created undue tension. Over the years, there has been a sharp increase in service delivery protests, and I'm sure that when the numbers come in, 2014 will be the same or worse.

In this context, we are starting the marathon this year with our hands behind our back and our legs tied. We can't easily untie or wiggle out of it. Nor can we stay at the starting line. Rather we have to start running, and do our best not to fall down in the months ahead. To survive, it is critical that HR engages the most important player – government! Here's why you should pay attention to what government is doing or not doing in 2015:

National Development Plan

If the objectives of the National Development Plan are achieved, South Africa will be a much stronger country in 2030. The plan is about access to opportunities, realising one's potential and building our capabilities. It is exactly what HR has been calling for years, without anyone giving an attentive ear.

The NDP seeks to eliminate income poverty and slash inequality (the Gini coefficient) and various developments will start coming through. For example, pay inequality has moved up the agenda due to the "Draft Code of good practice on equal pay for work of equal value". In essence, where employees are doing the same work or work of equal value, it would be unfair to discriminate

between their remuneration, unless there are justifiable grounds. In some organisations, HR and management will have to address past practices that have created pay inequities. This will require candid discussions about the salary bill, job grades and performance management.

State owned entities

Our unofficial national pastime is whining about state owned entities. There is a lot to talk about at social functions, from board resignations and bailouts to dodgy appointments to tariff increases. Government has to rethink about what it will take to transform Eskom, SAA, SABC, the Post Office and others into sustainable, high performing entities. I wonder how long government will resist partially privatising these entities for the sake of national interests.

Besides keeping abreast of developments and the impact on your operations, don't overlook staff in these entities. When searching for top talent, include those employed in state owned entities. They have many skilled, competent employees who are waiting for an opportunity to truly shine.

Taxation

After years of tax relief, we should get ready to tighten our belts in February. The Davis Tax Committee has reviewed the tax framework and their recommendations are likely to be adopted in the budget next month. I have little doubt that the tax changes will adversely affect middle and higher income earners. Depending on the form that it takes, it may lead to demands for higher remuneration in the months ahead.

Without having to necessarily increase their pay, the least that HR can do is equip staff to properly manage their money this year. Invest in a financial wellness programme so that employees are confident about tightening their belts and still running comfortably.

Until next month ... Will 2015 be a year of low expectations and excellent results? I will meet you at the finish line in December! ■

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