

# Intra company transfers

An attempt to clear up the confusion around intra company transfers.

By Tarryn Pokroy Rietveld

Section 19(5) of the Immigration Act 13 of 2002, as amended, has always made provision for an intra company transfer work visa. Apart from making provision for an intra company transfer work visa, the Act also provides that “the holder of an intra company transfer work visa may conduct work only for the employer referred to ... and in accordance with the requirements set out in his or her visa”.

The Immigration Regulations, which were brought into operation in May 2014 further deals with intra company transfer work visas by listing that this category of work visa must include proof that the foreign national has been employed with the company abroad for at least six months. Furthermore, letters are required from the company abroad confirming the transfer and from the local company accepting the transfer of the foreign national applicant.

An intra company transfer work visa is only allowed in respect of a situation where a foreign and local company have a subsidiary, branch or affiliate relationships. It is necessary to be able to prove this relationship in order to be able to utilise this category of work visa.

One of the further additions in terms of the new Regulations was that a plan be developed by the local employer to transfer skills to a South African citizen or permanent resident.

By its very nature, an intra company transfer work visa is technically a secondment which means that the individual is not intending to take up permanent employment in South Africa in competition with South African citizens in the marketplace. The purpose of this category of visa is generally to fill a gap in the market which a local citizen would be unable to fulfil at time of utilising this process. However, skills transfer does become a vital element in respect of any intra company transfer work visa process since the visa only allows the foreign national to be able to work

for the local company for a specified duration thus necessitating the transfer of skills by that individual to local citizens or permanent residents so that they can continue on that foreign nationals work once they complete their secondment.

Prior to the Regulations being amended, an intra company transfer work visa was allowed for a maximum duration of two years. In terms of the Amendments, it is now possible to apply for a four year intra company transfer work visa but this four year work visa is not extendable beyond that.

The confusion started in respect of the four year visa when the Regulations came into operation as to whether this category of visa could be applied for from within South Africa, specifically in respect of individuals already in South Africa on intra company transfer work visas that were granted for the shorter two year duration, or whether it was required for this category of visa to be applied for through our South African Missions abroad.

The Department of Home Affairs seemed to be reluctant to provide answers as to whether an intra company transfer work visa application could be made in South Africa by way of a change of status and whether a renewal of the previous two year visa was a possibility. Visa Facilitation Services, that have been appointed to attend to receipt of all applications on the part of the Department of Home Affairs in respect of visa processing, were accepting applications in respect of changes of status from an intra company transfer work visa to a different category of work visa or even in respect of a renewal of an intra company transfer work visa which were only granted for the two year duration.

However, outcomes on these applications resulted in refusals from the Department of Home Affairs, for the most part, requiring such individuals to make their applications through the relevant South African Mission abroad.

At this point there were two issues that needed to be addressed by the Department of Home Affairs. The first issue was whether a two year intra company transfer work visa that was issued under the previous legal dispensation was possible to be renewed. The second issue was whether such application could be made from within South Africa or not.

These issues were finally addressed on 27 October 2014 by way of Immigration Directive 19 of 2014

issued by the Department of Home Affairs. This confirmed that the holder of an intra company transfer work visa who wished to continue their assignment in South Africa could apply for a new intra company transfer work visa. This, however, specifically stipulated that the application had to be submitted through the relevant South African Mission in the applicant's country of origin or usual residence. The maximum four year visa would then be granted.

In respect of individuals already in South Africa on intra company transfer work visas granted for the two year duration having to return to their countries of origin or usual residence seemed nonsensical. Where the relevant local company required the individual to remain on in South Africa for a further duration on the intra company transfer work visa this was certainly a case of merely renewing the visa but to then have to exit South Africa and make the application abroad would mean that the individuals would have to submit their applications in person at the relevant South African Mission abroad and await the outcome. Applications made abroad are currently taking anywhere between one to two months to finalise as from date of lodgement. There were many complaints on this.

On 08 December 2014, a further document was issued by the Department of Home Affairs dealing with the errata of the Immigration Directive 19 of 2014. This document then confirmed that in respect of individuals in South Africa on a two year intra company transfer work visa issued under our previous dispensation, such individual was entitled to submit an application for a new intra company transfer work visa at a Visa Facilitation Service Centre in South Africa or at the South African Mission in the applicants country of origin or usual residence.

This certainly rectified one of the further mistakes made by the Department of Home Affairs in respect of the intra company transfer work visa process.

To sum up, the position at this time is that an application for an intra company transfer work visa being made for the first time needs to be made by the foreign national applicant through the South African Mission abroad. If an individual is already in South Africa on a two year intra company transfer work visa as granted under our previous legal dispensation, they are entitled to apply for a further intra company transfer work visa of a maximum of four years either from within South Africa or through the relevant South African Mission abroad. If a further duration on an intra company transfer is required beyond the four years granted in terms of our current legal dispensation such individual must return to their country of origin or usual residence and make a further application for a new intra company transfer work visa there. A certain amount of discretion will indeed be held by the relevant Officials abroad as to whether to grant a further intra company transfer work visa based on the circumstances of each case.

What is currently unclear at this time is whether the Department of Home Affairs will be willing to consider changes of status from an intra company transfer work visa to a different category of work visa from within South Africa through our Visa Facilitation Service Centres. There is nothing in the Immigration Act or its Regulations that preclude a change of status from an intra company transfer work visa but there are currently a number of reviews pending against the Department of Home Affairs in respect of applications that have been refused for just this reason. ■

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