



New developments from Home Affairs

A few important changes have taken place and perhaps some policy shifts?

By Julian Pokroy

I have previously written about some of the irrationalities, illogical and perhaps even some unconstitutional changes in the amendment to the Immigration Act and new regulations which came into force on 26 May last year.

Objections from civil society, which went unheeded or were simply ignored are now coming home to roost.

This is evidenced by certain shifts and changes that emanated from a series of Directives issued by the Director General of Home Affairs in recent weeks.

First of these is related to a “prohibition” in the new regulations which stated that the holder of a Corporate Work Visa in terms of section 20(11) of the Act could not change status from within the borders of South Africa and would indeed have to leave the country prior to expiry of their Corporate

Work Visa, return to their country of usual residence and apply for a fresh new visa from that country and await the outcome of that visa application in that country.

Given the fact that the rationale and underlying purpose of the Corporate Work Visa in the first instance was to facilitate the movement of large numbers of highly skilled and critical skilled foreigners, this type of visa was an “expedited” type of visa, recognised the need for the importation of those skills, and made it relatively easier to obtain such visa. By contrast, the requirements outlined in the new regulations provided for the involvement of the Department of Labour in making recommendations on skilled foreigners who applied for General Work Visas, and that in itself became an impediment, and in fact remains an impediment in this regard. The only category of skilled foreigner who escaped the net of having to get embroiled in the quagmire of Department of Labour recommendations was that of the Critical Skills Visa. This category covered certain specified professions, trades and occupations which are listed in a schedule to the Immigration Regulations and which, subject to the conditions of those visas, did not require any advertisement for the position nor any Department of Labour recommendation.

Unfortunately this process, given the many infrastructural projects that are on the go within South Africa, became an impediment to many of the highly skilled and critical skilled foreign nationals who are needed on those projects, many of them relating to power generation, and they had to come into to the country on the Corporate-Visa Scheme.

On 21 April 2015, the Minister of Home Affairs in essence acknowledged indirectly that this had become an impediment and issued a Directive relating to “retention of critical skilled foreign workers who are on a corporate visa” which made provision for any holder of a corporate work visa who also fell into one of the professions, skills, trades or occupations listed in the Critical Skills Visa list in order to allow them to apply for a change of status to that of a Corporate Work Visa from within the country.

This move is to be welcomed, not only because it is a good move, conducive to a better mechanism for importation for critical skills, but also because it has indeed restored the *status quo ante* which was much more skills importation friendly.

It is important to further note that the holder of a corporate work visa who does not qualify in one of the critical skills visa professions, trades or occupations will still have to return “home” and have to apply for any new visa from that country and await the outcome there.

The Department of Home Affairs has also, as of May 2015, issued a brand new Directive which in essence does away with the requirement for the holder of any type of work visa and who wishes to study part time at a tertiary educational institution from having applied for a change in their status and conditions and for a “Hybrid” type of endorsement onto their visa allowing them to take up part time studies.

With effect from the date of issue of the relevant Departmental Directive, any foreigner on a work visa in any category or a business visa, which is valid and current, may take up part time studies with a tertiary educational institution without having to first apply for such change of status or conditions to be attached to their work visa.

The primary requirement is that the relevant tertiary education institution must be registered and accredited with the Department of Higher Education.

In specific, the categories of visa holders who can take advantage of this situation are the following:

- General work visa holders;
- Critical skills work visa holders;
- Intra-company transfer work visa holders; and
- Business visa holders.

A very important point to note, however, is that the dispensation allowing for this part time study visa whilst on a work visa would be for the duration period not exceeding the expiry date of the work of business visa.

This too is a welcome development and a departure from some of the restrictive conditions imposed by the May 26 regulations in 2015.

There are many more inconsistencies and, as indicated above, possible unconstitutionality and certain provisions which are bad in law and which would hopefully either be addressed by the Minister of Home Affairs or Director General of Home Affairs in further Departmental Directives and in some instances there is litigation pending by our High Courts. ■

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.