

# Waiver: Do exceptional circumstances exist?

Understand when a prescribed requirement can be waived.

By **Tarryn Pokroy Rietveld**

Section 31(2)(c) of the Immigration Act 13 of 2002, as amended, provides as follows: “upon application, the Minister may under terms and conditions determined by him or her ... for good cause, waive any prescribed requirement or form”.

Accordingly, the power is available to the Minister to waive any prescribed requirement.

Specifically since the coming into operation of the Immigration Amendment Act 13 of 2011, which came into operation in May 2014, the waiver process has become much more of a necessity.

Specifically where this process is being utilised in respect of the general work visa process where, in terms of the Amendments, it is now required for the employer to advertise the position and prove that they could not find a suitable South African to fill the position and for this recruitment process to then be reviewed by the Department of Labour. The Department of Labour also conducts its own recruitment process to determine the availability of South African citizens or South African permanent residents for the position. Furthermore, the Department of Labour conducts a site inspection at the premises of the employer in order to confirm compliance with South African Labour Law standards.

While all of this certainly still seems to be understandable for purposes of employment of a foreign national, specifically when we have such a high unemployment rate in South Africa, the complications with this kind of application process come in light of the fact that the Department of Labour does not then issue their report to the prospective employee or prospective employer. The report is only provided directly to the

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Department of Home Affairs. On this basis, the prospective employee still then needs to prepare all documentation, often at quite an expense, to submit the application at the relevant South African Embassy or High Commission or local VFS office. Ultimately, the Department of Home Affairs lays the majority of its discretion upon the report issued to

them by the Department of Labour. If this report is negative it is most likely that the outcome of the work visa will also be negative.

However, certainly the Department of Home Affairs officials still have discretion, based upon the documentation for the work visa submitted as to whether or not to grant the work visa despite the recommendation issued by the Department of Labour.

If this Department of Labour report were issued to the prospective employee or employer from the outset, this would save much time, effort and expense.

It is for this very reason that a waiver is often utilised here in order to bypass this Department of Labour requirement.

However, for a waiver to be successful, the applicant, in this scenario, being both the employee and employer need to be able to motivate that exceptional circumstances exist why a suitable South African citizen or permanent resident could not be found to fill the position that is being offered to the foreign national.

The aim of the Immigration Act and its Regulations is “to promote economic growth through the employment of needed foreign labour which does not adversely impact on existing Labour standards and rights and expectations of South African workers.”

On this basis, documentary proof needs to be submitted that a diligent search has been undertaken and that the employer has been unable to employ a local candidate with qualifications or skills and experience equivalent to those of the foreign national applicant.

Ultimately, this does offer the employer two possible options in respect of moving forward with the work visa process – either follow the waiver process or follow the process of advertisement and the Department of Labour application.

The biggest problem here comes when the prospective employee has not worked for the local company before or perhaps has qualifications and skills that differ from those of the position that he is being offered. What needs to be seriously considered in respect of following this waiver process is that the

Department of Home Affairs can be assured that the employer has undertaken every possible step to try and locate a local candidate to fill the position and been unsuccessful. Due to the high unemployment rate in South Africa, especially with certain positions, it is impossible to be able to prove this. Waiver applications are more generally granted where the individual has already been in the employment of the company for some time and wishes to apply for an extension of a work visa. However, on a first time work visa application serious consideration needs to be given as to whether such waiver process would be successful or not. The discretion will lie with the Department of Home Affairs as to whether to grant the same or not.

It is for this reason that we put forward the concept of exceptional circumstances existing before moving forward with the waiver application. This applies in respect of the waiver of any requirement in terms of the Immigration Act or its Regulations.

It is also important to note that if the foreign national is based outside South Africa the waiver application must be submitted through the South African Embassy or High Commission in that individual’s country of origin

or usual residence and the outcome awaited there. It is then only once the waiver has been granted that an application can then be made for the appropriate visa category.

If the individual is already in South Africa with status of something more than a mere tourist or visitor’s visa, the waiver application can be made from within South Africa through the appropriate Visa Facilitation Centre. This requires the applicant’s attendance in person at the relevant Visa Facilitation office for purposes of submission and to then await the outcome of the application, once again, before the appropriate visa application can be made.

At present, the waiver application can take a minimum of two to four months to complete as from date of submission of the application. ■

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