

Bad visa decisions put SA on back foot

It would be nice if Home Affairs helped instead of hindered efforts to build a vibrant economy.

By Julian Pokroy

The year 2015, from an immigration law and visa perspective, most certainly must be classified as a low point in the development of post-democracy, immigration and administrative law.

I have written about the effects of the sudden implementation of the 2014 Immigration Amendment Act and some of the consequences that flowed from this. The debacle surrounding unabridged birth certificates is merely one of these and the impact of that blunder is still being felt by the tourism industry, directly impacting not only on the industry but on direct and indirect employment in the tourism industry.

The year was however characterised mainly by incorrect and quite frankly ridiculous decisions being handed down by the adjudication team of the Department of Home Affairs that were neither in line with our immigration laws, Constitution nor administrative law.

The effect that all of this had on investor confidence and skills importation will probably reverberate for some time, possibly even for years.

All of this of course happened whilst there was an enormous amount of flux in the world economy. This was most unfortunate.

The key areas outside of tourism that were affected were predominantly surrounding the importation of much needed and critical skills into the country.

With the quota category of work permit having been excised summarily with the 2014 amendment

and with exceptional skills work visas being done away with, many highly skilled foreigners who qualified in those categories suddenly did not necessarily qualify any longer.

The critical skills visa list which came into operation with the Amendment Act was a great idea in the making but left a massive lacuna in the process of importation of much needed skills into the country.

Provision was made with the amendments for registration by persons listed in the critical skills list to have a professional registration in many industries and professions where there were no professional bodies existing at the time. Whilst that aspect is now stabilising, what has not stabilised is the involvement in general work visas of the Department of Labour. This was similarly imposed without consultation, ostensibly even with the Department of Labour, with the 2014 amendments, but the realities only started kicking in during 2015 of how the Department of Labour would be dealing with applications before them for recommendation.

By way of example, it is required for a general work visa that, unless a waiver is in place, the position being offered to the foreigner must first have been advertised in the national printed media in a specified format and size and that this should have failed to secure the services of a South African citizen or permanent resident.

Details had to be given of South African citizens or permanent residents who applied for the position, giving their identity numbers, contact numbers and copies of their CVs and giving good reason as to why they were not suitable for the position.

If that exercise were done properly then one would think that it would be impossible to get a negative recommendation. However this was not to be.

The Department of Labour has caused a delay in providing such recommendation letters, whether a positive or a negative, by approximately six months. Generally this would mean that the skills would no

longer be required. This is not necessarily providing jobs for South African citizens as most of these positions are for persons who are in skills sets, trades and occupations which are in demand and not available locally.

In addition, the Department of Labour has refused point blank to deal with any "third party representative" and will only communicate an outcome to the embassy of lodgement or Department of Home Affairs Head Office, office locally that is dealing with the matter.

The applicant and their representative therefore have no way of knowing whether there were any queries or the outcome and, when suddenly faced with a refusal, in most instances totally devoid of logic and unreasonable, of the visa application based on the Department of Labour report.

All stakeholders vehemently objected to this aforesaid process when the detail became apparent, but it was nevertheless vigorously implemented.

The net effect of the Department of Labour involvement is that many companies simply abandon the process because it is fraught with so many obstacles and there have been instances of companies relocating their South African operations as a direct result of what they see as an affront against their corporate discretion to employ.

All of the checks and balances are present in the Immigration Act and therefore it really does not make sense to involve the Department of Labour at the level that it is now being involved.

The second area of effect has been that of business visas which require specified investment into the country, provision of jobs for the specified number of South Africans and for that business to be in the "national interest".

However the concept of "national interest" is therefore left up to a Civil Servant, usually not qualified to deal with issues of this complexity, to decide whether a proposed business or business to be acquired is a business in the "national interest".

Again it is reiterated that many potential investors in the South African economy are now starting to look to more visa friendly countries with many looking to Botswana and Mauritius as nearby options.

Thankfully, a review of immigration policy is currently underway and it is hoped that many of these deficiencies will be corrected.

This therefore brings us to some of the positives and to dealing with an outlook for 2016.

Firstly, in the dying days of 2015, the Minister of Home Affairs signed a Ministerial Directive which effectively allows regular bona fide/de facto international businessmen who can provide proof of track records of intensive travel in and out of countries, including South Africa, for business meetings and for business reasons, to obtain a 10-year multiple re-entry visa for business purposes. This welcome step will truly facilitate the movement of businessmen falling into that category.

The intended launch of an advanced biometrics system, which hopefully will take place during this year, will also be a step in the right direction in eliminating, inter alia, fraud, and should also, if theory turns into practice, facilitate the issuance of visas. Hopefully this will also speed up the process.

The year has not started off well regarding continued issuance of really bad decisions on visas with refusals for ungrounded reasons or incorrect reasons being the norm. This has resulted in an influx and overload of appeal and review applications which are currently in backload and which hopefully during the 2016 year will be reduced or see the process refined to provide for more proper and correct adjudication of visa applications.

The Minister of Home Affairs towards the end of 2015 announced that the Immigration Amendment Bill would be tabled in Parliament during 2016 with a view to filling some of the voids that were left with the 2014 amendments and correcting many of the inconsistencies flowing from that Amendment Act. The processes of Parliament are cumbersome and certainly not speedy, but it is certainly hoped that the 2016 Amendment Act will come into place indeed during 2016.

Readers of *HR Future* can be assured that they will be kept updated as to what transpires. ■

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