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The South African Immigration Law 2008

Immigration Amendment Act, in 2004 (No. 19 from 2004)

Immigration Regulations (27th June, 2005)

By

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After thorough revision of the Immigration Amendment Act (Act 19, 2004) and the new Immigration Regulations, the Minister of Home Affairs announced on 1st July 2005, that both have now come into force and effect. The lengthy process of the immigration legislation, it seems, has been concluded, even though an Immigration Amendment Bill containing some minor positive changes, has been tabled, but not signed by the President.

The process began on 7th April 2003, when the then latest Immigration Act with the new Regulations were passed at the Cape Town High Court and the Constitutional Court, following many open discussions and spectacular proceedings at the time. However, since the Act and Regulations had come into force it faced plenty of criticism from the public as well as from politicians. Because of this already in February 2004 a draft version of the improved administrative regulations was created, however, due to the change in government after the elections in 2004, it was never released.

Since April, 2004 the Department of Home Affairs is led by the leading African National Congress (ANC) and minister Mapisa-Nqakula. It was previously was under the Inkatha Freedom Party (IFP), Dr. Mangosuthu Buthelezi. This significant political change clearly affected immigration politics. Some movements of the Buthelezi-Ministry, facilitating more transparency and less discretion within the authority, were revised and changed thereafter. Due to this, after the elections the Immigration Amendment Act, 2004, was created which came into force in October, 2004.

In February, 2005 the new administrative regulations were introduced to the general public.

Within this draft some serious changes were planned, e.g. for the self-employed. Thus being granted a business permit would have almost become impossible. Based on criticism by the public this draft was then reviewed again and finally came into force, on 1st July 2005 concluding the immigration legislation of the Law and Regulations.

Compared to the original immigration Act of 2002, for the business permit as well as the work permits in particular, changes to the conditions have been made; even though all categories for these permits remain the same, several details within these have been changed.

This leaflet shall give an overview of the current Immigration Act and changes to the Regulations, summarizing and explaining important issues, relevant to putting these in practice when applying for visas / permits. It does, however, not replace a thorough individual consultation.

A. TEMPORARY RESIDENCE

1 Residence

The **Visitor's Permit**, which is mostly issued upon entry into South Africa, is normally granted for three month's and is issued for the following purposes:

- tourism
- business
- education and further education (maximum of 3 months), including internships
- medical treatment (maximum three months)
- visiting relatives (maximum three months)
- working activities (maximum three months) conducted in pursuance of an employment contract concluded abroad, remunerated abroad and partially calling for performance abroad.

The extension of this Visitors Permit is possible for a further three months against a fee and a given reason for extension of stay. In this context, a return ticket and/or deposit of funds for such as well as proof of sufficient resources to sustain oneself during this stay are required as before. As proof of sufficient funds the following are accepted: bank statements, cash, traveler's cheques or alternatively an undertaking by the South African host.

Permission to stay in South Africa for a longer period "**extended visitor's permit**" (up to 3 years) can be obtained locally or abroad and can be granted based on the following reasons:

- an academic sabbatical
- voluntary or charitable activities (unpaid)
- research activities for universities and the like

- other prescribed activities, provided that according to the law such activity is not considered as work or requires a different permit

For this permit however, birth-, marriage and divorce certificates, police clearance certificates, medical as well as radiological reports have to be submitted. Compared to previously, where proof of resources of R15 000 per person per month of the intended stay had to be submitted, now the requirement is to submit proof of “sufficient financial means”, whereby no clear definition of the term “sufficient” is given. Practise has shown that R 10 000 per month is seen as sufficient, however, this still remains in the discretion of the department.

IMPORTANT: Applications for extension or for a change of condition/purpose of any temporary permit must be submitted at least 30 days prior to the expiry date!

2 Work Permit for Employees

2.1 The current **Work Permit** will continue to exist in a similar form. However, the requirement of a Chartered Accountant to verify and confirm certain conditions has fallen away. Further, there is unfortunately **no longer an exemption for certain categories of workers from the requirement to advertise** the position offered to a foreigner. This means, that under new regulations all positions, including positions for key personnel on management level, qualified chefs, medical doctor’s qualified practitioners as well as those in the film industry must be advertised in a national paper; previously, the positions stated above were exempt from having to be advertised. Additionally, every employer is now obliged to submit a detailed list of job candidates which have applied for the position advertised explaining why none of them is as suitable for the position as the foreigner. In a letter the employer has furthermore to motivate why no South African citizens or permanent residents are available for such position.

Further, it is now required to supply an ‘Evaluation Certificate for Foreign Qualifications’ of the highest certificate of level education of an applicant. Such a certificate is issued by SAQA (The South African Qualifications Authority) and is to help to compare foreign qualifications with South African qualifications.

Additionally, a new benchmarking procedure has been introduced, which is to confirm that an applicant's salary and conditions of an employment contract is not inferior to that of employees in South Africa within the same market segment. A separate certificate confirming the above is now required by every applicant, and can be issued by either the Department of Labour or registered organizations offering benchmarking services. Both of these new conditions lead to a considerable amount of additional administrative work.

2.2 Most changes have been made to the **Quota Work Permit**. This permit is granted to a limited number of applicants per year who qualify in certain industry sectors with proven specified knowledge, qualifications and work experience, which are determined by the Minister. When applying for this permit, the new regulations require no proof that no South African citizen or resident is there to fill the position and **the 2% of the taxable remuneration** paid to the foreigner, which was payable to the Department as a training fee **has fallen away** as well as the requirement of having to supply an employment contract at submission of an application. The applicant's qualifications must be evaluated by SAQA; and based on this the Department of Home Affairs decides within which category the applicant falls when granting a quota work permit. Having been granted the quota work permit, the applicant is given 90 days after entering South Africa to find employment within such category.

2.3. Persons with **exceptional skills or qualifications** (independent of the work categories) may obtain a Work Permit based solely on such abilities and qualifications, without any proof of an employment offer.

2.4. Additionally the Department will grant Work Permits on the grounds of **secondment or intra-company transfers of employees**.

2.5. An often underrated permit is the Corporate Permit. This permit give Companies the option to apply for the authorization to employ a certain contingent of foreigners of specific skills and training. The company needs to justify the necessity for such foreign employees. The Department of Home Affairs consults with the Department of Labor as well as the Department of Trade and Industry to decide on the number of employees that will be permitted to be employed by such company. The permission for the actual workers employed with a corporate permit is attainable without great effort for the employer.

3 Entrepreneurial Activities

Investors or entrepreneurs mostly apply for a so-called "**business permit**". The business permit (also previously known as "own business permit") used to be issued for 24 months at a time where as in the new regulations there is no maximum limit to the duration is stated. It remains in the discretion of the Department (investment, number of employees etc), but business permits for up to 6 years will now be possible. This permit can be extended unrestrictedly.

Regarding the requirements for business permits considerable changes have been made. Where a Chartered Accountant was previously required to confirm two out of seven possible categories, under the new regulations only proof of the available funds to be invested is required to be supplied.

A Chartered Accountant is now required to certify the following:

- The availability of an investment of R 2,5 million into the book value of the business

OR

- The availability of material assets as investment to the value of R 2,5 million into the book value of the business,

OR

- The availability of a cash investment of R 2 million as well as material assets to the value of R 500.000

The amount to be invested is not required to be invested on submission of such application, however, it must be invested within 24 months and proof of this must be presented to the Department of Home Affairs.

It is possible to decrease or waive the minimum amount of financial or capital investment.

Required for this is a **letter of recommendation by the Ministry of Economics** or alternatively, it must be shown that business, whether planned or already existing, is allocated within a **sector of industry** which is in the **national interest**. These sectors of industry are: information and communication technology, textiles industry, chemicals and Bio-technology, automobile industry, processing of agricultural goods, automobile industry, raw materials and mine sector, tourism and crafts.

Unfortunately, by legislation the requirement **to create at least 5 permanent positions** for either South African citizens or holders of a permanent residence permit, still exists and is obligatory. On submission of an application, however, an undertaking to fulfil this requirements will suffice. The creation of the positions and the identity of the 5 permanent employees has to be proven after 24 months.

Furthermore, to submit **comprehensive business plans** it is requirement for all applicants.

All investors and/or entrepreneurs, who are looking to invest in an already existing business are additionally required to submit at least the last annual financial statement; and if applicable the articles of association.

4 Retired Persons Permit

Whereas pensioners and retired persons could under the old law only obtain a Permanent Residence Permit, the legislation since 2003 includes a temporary residence permit for retired persons.

The Retired Persons Permit can be issued for a period of up to 4 years and can be further extended for 4 years at a time. The holder of such permit may reside in South Africa permanently or seasonally. A minimum stay within South Africa of 183 days per year does therefore not apply.

The holder of a Retired Persons Permit may be permitted to work if he/she can prove that no South African citizen or permanent resident is prepared, willing or able to fill the position.

The applicant must provide proof of the following financial resources:

- A pension, retirement annuity or retirement account with a minimum value of R 20 000 (previously R 25 000)

OR

- Assets, regardless of the value, which generate a monthly income of R 20 000

Unfortunately, the Department of Home Affairs does currently **not** apply the above-mentioned funds as income/assets for both partners together. Thus each partner has to meet the financial threshold individually.

IMPORTANT: Extension / Change of Conditions of Temporary Residence Permits must be submitted at least 30 days prior to the expiry of such permit!

B. PERMANENT RESIDENCE

1 Direct Permanent Residence

1.1 Permanent Residence shall be granted to an applicant who has been a holder of a Work Permit in terms of the new Immigration Act for a period of at least 5 years and has been offered permanent employment. This permit is extended to the spouse or life partner and children under the age of 21 years.

1.2 A direct permanent residence permit will equally be granted to the spouses or life partners of South African citizens or holders of permanent residence permits if and when their spousal **relationship** has existed for a minimum of five years. Proof of a life partnership will have to be provided by means of an affidavit and proof of cohabitation as well as sharing of financial responsibilities.

A life partnership is only recognised by the Immigration Law if it is either a relationship between a South African Citizen or Permanent Residence Holder and a Foreigner. Alternatively, if the relationship is between two foreigners, if the relationship was concluded within the Republic or is officially recognized in the foreigners' home country.

A life partnership is recognized for both, homosexual as well as heterosexual couples.

1.3 Children of South Africans and of permanent residence permits holders qualify for permanent residence directly as long as they are under 21 years.

2 Permanent Residence on other grounds

2.1 Generally, the requirements for obtaining temporary residence permit are the same ones for permanent residence. In the following you will therefore only find a brief introduction as the conditions are explained in more detail within the relevant temporary residence paragraph.

2.2 To an applicant with **extraordinary abilities or skills** (as stipulated under Temporary Residence Permits) a permanent residence permit will be granted.

2.3 An applicant,

- planning to **establish a business**
- who is holder of a temporary business permit, or
- wishing to invest in an existing business

may be granted permanent residence provided a minimum of R2,5 Million is invested into the book value of the business. The minimum investment amount may be reduced by the Department on recommendation of the Ministry of Economics or may be reduced or even be waived if it is allocated within a sector of industry which is in the national interest. This amount can be produced in form of financial investment as well as material assets.

2.4 An applicant wishing to retire in South Africa may be granted permanent residence upon residence upon proof of the following financial resources:

- A pension, retirement annuity or retirement account with a minimum value of R 20 000

OR

- Assets, regardless of the value, which generate a monthly income of R 20 000

2.5 An applicant, providing proof of **personal assets** worth a minimum of R 7.5 million and paying a once-off fee R 75 000 to the Department of Home Affairs may be granted a permanent residence.

2.6 Permanent Residence may furthermore be granted to foreigners when they are the relative of a citizen or permanent resident within the first step of kinship.

All above listed Residence Permits will be extended to the applicant's spouse or life partner and children under the age of 21 years, i.e. abovementioned amounts apply to the family unit as a *whole*.

C. EXSISTING PERMITS

All **Permanent Residence Permits** issued under the previous legislation shall remain valid and be deemed to have been issued in terms of the new act.

All **other permits** issued under the previous legislation shall continue in force and effect. However, they can only be renewed in terms of the new legislation. The Department of Home Affairs may waive the requirements to submit a new application, or for good cause authorize the application to be considered under the previous Act.

D. POSITIVES ASPECTS

It seems that the new version of the law has been better thought through and is therefore also a lot more concise. Almost all previous contradictions or inconsequence have been completely abolished and administrative regulations in particular, have visibly been reduced; thus leading to a transparent and concise law, which is essentially more user friendly than it was before. It furthermore contains a regulated appeal procedure, entitling the applicant to apply for review of any decision in up to four consecutive instances. Further to the above, before declining an

application, the applicant will have to be informed and be given 10 days to make representations.

The immigration authorities are to endeavor to process and finalize applications for any kind of permit within 30 days of receipt, provided the application documentation is complete. With temporary permits, in most cases this can be achieved if no complications occur and applications can be granted within 4-6 weeks.

The new laws will allow for close family members of South African citizens or permanent residence to obtain a permit more easily, provided they do not intend to work.

E. COMMENTS

It is to be noted that the majority of immigrants to South Africa are from neighboring countries as well as the whole African continent, and that South Africa with its relatively healthy economy and well established government represents a political and economical paradise. Due to this, South Africa can record a huge amount of illegal immigrants, with the result of manifold corruption and fraud. This problem has to be addressed and taken into account in the legislations without discriminating in respect of origin or colour.

The intention of the immigration law is aimed at the principle to open doors for legal immigrants to generate funds to oppose illegal immigration. The fact that, under the new regulations, spouses or life partners of South African citizens or holders of permanent residence permits will only be granted permanent residency if and when their spousal relationship has existed a minimum of five years, is certainly to be seen as part of the above intention.

Consequently there is a legal way for each European to stay and work in South Africa. Certainly, the new requirement for the business permit of having to employ at least five South African citizens within two years, might be rather obstructive for some investors; however, the high unemployment rate must be taken into consideration, and whether this conditions remains is still to be seen. Generally the actual challenge is to find the suitable permit.

However, stricter controls will be implemented to prevent violation or evasion of laws and regulations. An overdrawn permit can cost, depending on the period, between R1000 and R3000. Employers of immigrants and landlords with foreign tenants have to ascertain that these individuals are legally in South Africa.

Although the immigration authorities encourage immigrants to apply for their permits in the country of their origin, the law makes provision for applications or changes of applications to be submitted in South Africa, which in most cases is the more uncomplicated way of procedure. This means that foreigners who enter the country with a visitors visa, can locally apply for a temporary or permanent residence permit. It is however to be noted, that a return ticket (or proof of the funds for such) will be requested upon entry.

F. SERVICES RENDERED BY IBN

For any further assistance and advice regarding your type of permit to be applied for, assistance with application documentation, submission of the application or the follow-up procedure of the application, dialog with the authorities and practical guidance, please feel free to contact IBN at your convenience.

Specialists on immigration in our firm can be contacted in our offices in Cape Town, Johannesburg and Stellenbosch. Services we render are not limited to, but include the following:

- Consultation in respect of appropriate permit type
- Professional guidance in respect of the necessary documentation and information
- Tight control of time frames and deadlines
- Completion of application forms
- Co-ordination of translations and certifications of documents
- Drafting of business plan if needed
- Obtaining recommendations by the Department of Trade and Industry
- Reaching consensus with future employer
- Co-ordination of placements of newspaper adverts

- Drafting the relevant correspondence
- Efficient follow-up of the application procedure
- Dialog with authorities

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