



THE SOUTH AFRICAN IMMIGRATION LAW 2005

Immigration Amendment Act, in 2004 (No.19 from 2004)
Immigration Regulations (27th June, 2005)

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INTRODUCTION

After revision of the Immigration Amendment Act (Act 19, 2004) and the new Immigration Regulations, the Minister of Home Affairs announced on Friday 1st July 2005, that both the Act and Regulation are now in effect.

The legislative process begun on 7th April 2003 when the previous Immigration Act with the new Regulations were passed at the Cape Town High Court and the Constitutional Court. However, since then the law faced criticism from the public and therefore, already in February 2004 a draft version of the improved administrative regulations was created. Due to the subsequent changes in government because of the 2004 election, it was, however, never released.

Since April 2004 the Department of Home Affairs has been led by the African National Congress (ANC) and minister Mapisa-Nqakula. It was previously led by Dr. Mangosuthu Buthelezi from the IFP. This significant political change clearly affected immigration politics, as some directions of the Buthelezi-Ministry were revised opening up for more transparency and less discretion within the authority. Due to this, the Immigration Amendment Act 2004 was created and came into force in October, 2004.

In February 2005 the new Immigration Regulations were introduced to the general public. Within this draft some serious changes were planned, e.g. for the self-employed with the consequence that a business permit would have become almost impossible to obtain. 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 changes in the conditions to particular the business permit as well as the work permits have been made. Thus, although all categories for these permits remain the same, several details within them have been changed.

This leaflet is to give an overview of some of the amendments made to the previous Act in terms of the current Immigration Act and changes to the Regulations. It does, however, not replace a thorough individual consultation.

A. TEMPORARY RESIDENCE

1. Residence

The **Visitor's Permit**, which is issued upon entry into South Africa, is granted for three months 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

For the extended visitors permit the following documents must be submitted on application, birth-, marriage and divorce certificates, police clearance certificates, medical including yellow fever if the person has traveled through endemic areas as well as radiological reports.

The Department of Home Affairs is currently interpreting "other prescribed activities" as very limited. Only the spouses or life-partners of temporary residence holders are allowed to be granted a 3 year extended visitor permit under "other prescribed activities".

2. Work Permits 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. All vacancies must be advertised according to specifications of the New Act. Additionally, every employer is now obliged to demonstrate in writing who has applied for such position advertised. In addition, the employer has to state the reasons why such applicants were not suitable for the position. Furthermore it is also a requirement, to supply an 'Evaluation Certificate for Foreign Qualifications' of the highest certificate of 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 benchmarking procedure has been introduced, which is to confirm that an applicant's overall salary and conditions of an employment contract is not inferior to that paid to 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. The biggest 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 experience, which are determined by the Minister. Unfortunately, the new Quota categories have not yet been introduced and published. Therefore it is uncertain which industry sectors will be allowed to accept foreign applicants.

The payment to the Department of 2% of the foreigner's taxable remuneration 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 approved by SAQA; and based on this the Department of Home Affairs decides within which category the applicant falls when granting a quota work permit. Following this, the applicant is given 90 days to find employment within such category. According to the recent interpretation by the Department of Home Affairs it has to be emphasized that in case that the applicant will not be able to obtain work during this period, the permit will be deemed to have expired and the applicant must make a new application from his/her country of origin.

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. Companies can also obtain a Corporate Permit after negotiation and agreement with the relevant authorities as prescribed by the Act allowing corporates to employ a certain number of foreigners in agreed vacancies. The application for such permit is not as simple as other work permits, however once all is in place it makes the employment of applicants to that specific company far more affective in respect of turn around times and costs.

3. Business Permit

Investors or entrepreneurs would apply for a **Business permit**. The business permit used to be issued for 24 months at a time. In the new regulations there is no maximum limit to the duration this permit can be issued for. It remains to be seen for what duration a business permit is now issued for each individual case. We expect this permit to be issued for the duration of two years. This permit can be extended for more than once.

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.

A Chartered Accountant is now required to certify the following:

- The availability of an investment of R2,5 million cash into the book value of the business
- OR**
- The availability of a capital contribution of at least R2,5 million as investment into the book value of the business,
- OR**
- The availability of a cash investment of R 2 million as well as a capital contribution 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. However, it is possible to decrease or apply for a waiver in terms of the capitalisation of the business. However it is at the discretion of the DG to allow for acceptance of such waiver.

Requirement 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.

By legislation the requirement **to create at least 5 positions** for either South African citizens or holders of a permanent residence permit, still exists and is obligatory.

On submission of an application, however, only a written confirmation of this obligation must be supplied. Employment of the 5 local workers is to take place within the first 24 months of the business operating.

Furthermore a **comprehensive business plan is also an integral requirement for all business permits**.

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

4. Retired Persons Permit

The Retired Persons Permit can be issued for a period of up to 4 years and can be 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 applicant must provide proof of the following financial resources:

- A pension, retirement annuity or retirement account with a minimum value of R 20 000 per month
- OR**
- Assets, regardless of the value, which generate a monthly income of at least R 20 000 per month

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 more than 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 liabilities.

It is important to note that a life partnership is only recognised according to the law if such partnership is concluded between a South African and a foreign party or in the case of both parties being foreigners that it was commenced in South Africa. Furthermore, for couples who have met abroad it is only possible to qualify for such partnership if it was officially recognized in the applicant's home country.

A life partnership is considered as such both for homosexual as well as heterosexual couples.

- 1.3 Children of South African citizens and of permanent residence permits holders qualify for permanent residency. The latter only if they are under 21 years.

2. Permanent Residence on other grounds

2.1. Generally, most reasons for obtaining a temporary residence permit also equally apply for permanent residence permits. Therefore, following is a very brief introduction to opportunities of such as the conditions are explained in more detail within the paragraph amplifying temporary residence permits.

2.2. An applicant who has been offered permanent employment may receive permanent residence upon proof of the following:

- Proof that the position applied for was advertised in national press
- Written documentation, must be submitted by the employer of who has applied for the position advertised as well as why no suitable South African citizen or permanent residence permit holder could be found to fill such position
- It is required to supply an 'Evaluation Certificate for Foreign Qualifications' of the certificate of highest level education of an applicant, which is issued by SAQA (The South African Qualifications Authority)
- Confirmation by the Department of Labour/ or a registered benchmarking company of the contractual conditions and salary not being inferior to those prevailing in the relevant market segment for a South African Citizen or permanent residence.
- The applications need to fall within the yearly limits of available permits within the relevant sector.

2.3. To an applicant with **extraordinary abilities or skills** a permanent residence permit could be granted.

2.4. An applicant, planning to **establish a business** or 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 or may be reduced or even be waived if it is allocated within a sector of industry which is in the national interest.

2.5. 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 per month

OR

- Assets, regardless of the value, which generate a monthly income of R 20 000 per month
- 2.6. An applicant, providing proof of **personal assets** worth a minimum of R 7.5million and paying a once-off fee R75 000 to the Department of Home Affairs may be granted a permanent residence.

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.

D. POSITIVES ASPECTS

It shows 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 in consequences 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 remains to contain a regulated review 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 get 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.

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 discrimination against any persons.

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 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 to be seen. Generally the actual challenge is to find the suitable permit in South Africa.

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 for example 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 and possible repatriation deposits.

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 contact IBN at your convenience.

Specialists on immigration in our firm are Charia Waterman, Andreas Krensel and Dirk Meissner.

Our 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 plans
- Obtaining recommendations by the Department of Trade and Industry
- Reaching consensus with future employer
- Drafting the relevant correspondence
- Efficient follow-up of the application procedure
- Dialog with authorities
- SAQA interventions
- Benchmarking interventions

A comprehensive list of other services offered by IBN is to be found on our website:
www.ibn.co.za

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