IBN BUSINESS & IMMIGRATION SOLUTIONS

Chief Director: Legal Services

Att: Adv Tsietsi Sebelemetja

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Re: Submission for Draft Immigration Regulations, 2014

Dear Sirs,

We wish to submit the following comments to the Draft Immigration Regulations, 2014:

1. Considering the interest of the Chamber, we believe that the new Regulations will not be well received by international investors and therefore will not contribute positively to the growth of the economy. The main reasons are the submission in person and planned changes on the side of the business visa as well as general work visa and the corporate visa. Please refer to the below.
   Although the requirement of a submission in person is in the Act and therefore cannot be changed in the regulations, we feel strongly about pointing out that this requirement does not make any sense and is a step backwards. A CEO or chief engineer does not have time and are too expensive for their employers to sit for a day at a Home Affairs office in order to extend their current work permit or apply for their initial one at a mission. In countries such as USA, Canada, Russia or Australia a personal visit is connected to very long travels with additional costs etc. The previous possibility of a submission via postal services was more modern.

2. It is also very difficult to comment on a draft regulation while crucial information with massive practical implications is not yet published and therefore does not form part of the public comment period. It would have been beneficial for commenting to know what the new minimum investment for a business visa, retired person visa as well as which professions fall into critical skills.

3. Equally alarming is the comprehensive involvement of the Department of Labour. According to our conversations with the Department of Labour as well as the Department of Trade and Industry they have not been informed about their new roles, have not received additional staff or even implemented internal work flow systems to cope with the additional work. No training has been received to implement the regulations. Taking the Department of Labour past record of service delivery into account, we foresee major delays with the issuing of work visa, business visa and corporate visa.

4. Definition of permanent relationships: We feel that the inclusion of the requirement 5 year life partnership for temporary residence is a very high hurdle and is not justified for temporary residence. It is submitted that this new requirement infringes the constitutional right to dignity and will not withstand if tested in court.
   Internationally a lot of people do not marry anymore. Expats who are on an Intra Company Transfer Visa will not be able to take their life partner of 4 years with to SA, if their life partnership is not formally recognized in their country of origin. Is a life partnership of 5 years more serious than the one of only 2 years?
   In addition the intended regulation will hinder South Africans from having their foreign life partners join them in SA. We see the 5 years as too harsh. If the Department fears abuse of this category, they should put checks and balances in place but not hinder real life partners of being together. We therefore suggest to delete the 5 years requirement and continue with the old requirements.

5. Regulation 9 (1) (c): the regulations require a medical and radiological report in respect of any visa referred to in section 11 up to …… That would mean that tourist visiting for 90 day holiday require to bring a medical as well as radiological report. Clearly that cannot be the intention of the legislator? This would be highly impractical and internationally unusual. While it might be a requirement for a Visa restricted country it cannot be a requirement for visa exempt countries.

6. Regulation 9 (2) (a) and (b): The submission in person puts immense pressure on the applicant. As mentioned above in countries such as USA, Australia, Russia the travel to the closest embassy might cause unjustified expenses and loss of time for the applicant.
   We suggest to include a provision in the line of: “if an applicant lives outside a radius of 300 km of the nearest embassy, a submission can by done by postal service.”

   However, (b) is even more surprising and should be changed. If a foreigner comes from a visa restricted country and wishes to visit SA but in his country, like in some African countries, there is not Embassy, this person would have to apply for a Visa to travel to the closest country with an Embassy in order to apply for a Visa for South Africa. The requirement of submission in person has not place in the modern world. The Department has come up with this requirement for wrong reasons and should rectify their mistake.

   It also appears that applicants for a section 11(2) permit might have to apply in person? Is this intended?

7. Regulation 9 (5) (a): The requirement of authentication is too costly and therefore unnecessary harsh on the applicant. A certified copy should be sufficient.
   We suggest to replace authenticated with certified copy.

8. Regulation 11 (4): We do not agree with the part “shall be work conducted for a foreign employer pursuant to a contract which partially requires conducting of certain activities in the Republic” Which teacher at an international school works partially abroad and partially in SA?
   We suggest deleting this part.

9. Regulation 11 (4) (a): There seems to be a numbering problem here. This sub-paragraph makes no sense under (4) (a), it should be put under a separate sub-regulation.

10. Regulation 11 (4) (f): It seems to be open for abuse in this wording. We suggest adding additional criteria to proof to be an artist etc.

11. Regulation 11 (4) (j): There seems to be a wording mistake “to be for and”. We suggest to remove “and”.

12. Regulation 11 (7) (e): the wording is unclear. Does this mean it shall not be extended at all? Or not longer than the initial period?
    We suggest a clearer wording here.

13. Regulation 12 (1) (f): We strongly disagree with the requirement that the medical insurance needs to be registered in terms of the Medical Schemes Act. There are very comprehensive global medical covers, which surpass the medical cover of all local medical aids. Do they not qualify? A lot of expatriates have international medical aid cover. It is just not realistic to demand local registration.
    We suggest to delete this requirement and replace it with “appropriate medical cover for longer than 1 year” or similar.

14. Regulation 12 (3): We do not agree with the new wording. This will limit students to work 20 hours per week even during the University holidays.

15. Regulation 14 (1) (a): What will the amount be? 2.5 million Rand, 5 or even 10? We of the Chamber are of the opinion that also smaller investments create, over time, massive employment. We do know for a fact from conversations with the DTI that in general there seems to be a perception that only big investments create employment. We strongly disagree.

16. Regulation 14 (1) (e): While the inclusion of the Department of Trade and Industry for all business visa applications can be understood, since they might be in a better position to assess the feasibility of the business, again the practical implementation needs to be questioned. No training is done within the DTI in order to cope with the increase in workload. The internal department who was in charge of the waivers for the business permit did not know about this requirement until last week. Therefore a lack of capacity and thus delays with the recommendation letters will be the result.

17. Regulation 16 (1) (a) (iii): Why would the Department have to know if the disease is curable or not? How must a medical practitioner know what to confirm, if it is curable in general or in this specific case of the applicant?
    We see no purpose in this.

18. Regulation 17 (1) (d): Proof of paternity. We strongly disagree with this section. Firstly it is a very costly test and most of the applicants will not have the financial means to comply. We also doubt that this provision will withstand a constitutional test. This regulation deprives a father access from his child if they do not do the paternity test.
    We suggest to delete this provision.

19. Regulation 18 (3) (a): The inclusion of the Department of Labour is of great concern. This will cause additional delays. According to the information we were provided with by the Department of Labour (locally) they were not informed about this new task. If, one month before the intended start date of the Act and Regulations the DoL has not even heard about their new duties, it is fair to assume that delays will be caused and that for a period of 1 to 3 months the immigration possibility of a work visa will be practically stalled.
    In addition, the role of the Department of Labour must be clear. According to the

wording of the draft regulations it appears that Labour only has to tick a checklist and issue a letter confirming this.
However, judging from past experience with the Department, they might interpret their role differently and expect that in order to confirm a diligent search in terms of regulation 18 (3) (a) (i), the position needs to be put onto their labour database. This would infringe international practice for leading positions in multinational companies who in general do not advertise their highest positions but rather use headhunting.
We suggest to clearly define the role of the Department of Labour.

20. Regulation 18 (3) (a) (v): We suggest to re-word this regulation and make it more explicit when precisely SAQA is needed and when not. We agree that not in all cases, such as massive practical experience, but no formal degree, SAQA should not be a requirement.

21. Regulation 18 (7): This regulation contradicts section 11 (1) (b) and regulation 11 (4). How long can a spouse of a holder of a critical skills work visa accompany him or her? 3 or 5 years?

22. Regulation 18 (8): It seems that an applicant who is employed in a subsidiary in, for instance, Kenya and who is supposed to be transferred to the company's headquarter in South Africa cannot apply for an Intra Company Transfer Visa. Is this intended?
This would very seriously impact on all major South African companies embarking on their expansion strategies in South Africa who wish to train foreign staff in South Africa for a certain period. This cannot be intended.

23. Regulation 20: We do not agree with the intention to limit the corporate visa to 3 years. We do not see any real sense it in. If all the involved Departments have agreed to the corporate visa, then why would the time limit be so short. 3 years for a serious investment is not long enough.
We are of the opinion that while you might want to limit the duration of the corporate worker, you should not limit, or at least not under 5 years, limit the duration of the corporate visa.

24. Regulation 23 (5): it seems PR based on 5 years work permit and offer of permanent employment requires continuous employment now. The old Act required 5 years work permit under this Act. We feel the word continuous should be rephrased. If a foreigner applied for a renewal of a work permit, but the Department does not decide about the renewal in time and therefore this foreigner might have 2 or 5 months of no work permit in SA while waiting for renewal or an appeal for instance, then it would be very harsh if this person could not qualify for PR.
We therefore suggest to "…, for an aggregate of 5 years over 7 years."

25. Regulation 24 (5): The requirements for PR based on own business seem to be less onerous than the requirements for TR based on own business. In terms of regulation 24 (5) only a business plan is needed, not a letter of recommendation of the DTI.

26. Regulation 27 (3): the envisaged penalties for someone who overstays his stay for 1 day are not justified. While we can support the general intention to increase the penalties for overstay, we suggest to have a 7 day grace period and therefore suggest to amend the wording to: "in the case of a person who overstayed for more than 7 days up to 30 days, declared undesirable for a period of two years;"

Andreas Krensel, Managing Director