Work **visa woes**

It would be helpful if the Departments of Home Affairs and Labour recognised certain realities.

By Tarryn Pokroy Rietveld

It sounds like a play on words but it is actually a burden on South African employers. I have written regarding issues relating to work visas on a number of occasions already. What needs further discussion is the application process to the Department of Labour required for a General Work Visa application.

General Work Visas are governed under s19(2) of the Immigration Act 13 of 2002, as amended. The Department of Labour requirement is contained in the Immigration Regulation which were published on 22 May 2014. Regulation 18(3) requires the following:

A certificate from the Department of Labour confirming that:

- despite a diligent search, the prospective employer has been unable to find a suitable citizen or permanent resident with qualifications or skills and experience equivalent to those of the applicant;
- the applicant has qualifications or proven skills and experience in line with the job offer;
- the salary and benefits of the applicant are not inferior to the average salary and benefits of citizens or permanent residents occupying similar positions in the Republic; and
- the contract of employment stipulating the conditions of employment and signed by both the employer and the applicant is in line with the labour standards in the Republic and is made conditional upon the general work visa being approved.

The process that needs to be undertaken by the prospective South African employer upon identifying a foreign national applicant to fill the position is to firstly advertise the position in the national printed media, in accordance with specific requirement, and undergo a recruitment process to find a suitable South African citizen or permanent resident to fill the position. Any local candidates need to be given serious consideration over any foreign candidates.

If the recruitment process results in the foreign national still being the most suitable candidate for the position then the Department of Labour must be approached. They will assess the recruitment process undertaken by the employer and also undertake their own recruitment process. It may be that they put candidates forward themselves that may be suited to the position or refer the employer to a recruitment agency to assist with suitable local candidates for the position.

Again, any candidates put forward need to be given serious consideration. If the candidates are still found to be unsuitable the process with the Department of Labour continues.

The Department of Labour will then conduct a site inspection at the premises of the employer to confirm their compliance with Labour Law standards. The outcome of this inspection is included in their report.

A report is compiled by the Department of Labour regional office and then sent onto Head Office. Head Office will ultimately issue the final report as to whether the appointment of the foreign national applicant should be recommended favourably or not.

This is where the transgression of the Promotion of Access to Information Act 2 of 2000, as well as the Promotion of Administrative Justice Act 3 of 2000 occurs. The Department of Labour issues their report detailing their findings not to the applicant, not to the employer, not to the legal representative, but only to the Department of Home Affairs Head Office.

The employer/legal representative is issued with a letter from the Department of Labour to confirm the report has been finalised and the foreign national applicant may proceed to the appropriate Embassy or VFS office to make the application for their work visa. One would assume that such notification would mean the Department of Labour process has been successful and that being advised to now proceed with the Work Visa process is confirmation of that fact.

This process through the Department of Labour can take anything from two months upwards to complete as from date of submission. Processing time is often dependent upon the office of the Department of Labour. Which office is required to be utilised is dependent upon where the employer is based.

It is on the basis of the above mentioned letter that the applicant now proceeds with collation of all final documentation required for the work visa, some of which involve expensive processes such as procuring police clearances and undergoing medical and radiological checks. The application for the work visa is then submitted.

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If the application is lodged abroad, as is required the majority of the time for a first time work visa application, the South African Embassy then has to obtain the Department of Labour report from the Department of Home Affairs Head Office. While certain Embassies are reasonably quick to obtain the same this part of the process can result in delays in the work visa application processing for upwards from one month. An unnecessary delay that often requires intervention with Home Affairs to ensure the same is eventually received by the Embassy.

Many employers and applicants are dismally despondent to sometimes receive a refusal of the work visa application based on the Department of Labour report issued to Home Affairs having been negative. If a negative report has been issued, why allow the applicant to still proceed with the work visa application. Surely the process should cease there. This is not the case as regardless of whether the Department of Labour report is positive or negative this outcome is still not advised to anyone apart from the Department of Home Affairs.

The process is illogical. If an employer makes the application for the Department of Labour report, surely they are entitled to the outcome. Instead the outcome is only issued to the Department of Home Affairs who was not even a party to the initial application made. The Department of Home Affairs also takes the outcome from the Department of Labour over and above any documentation that may prove contrary that was submitted with the final work visa application. The tendency seems to have arisen to rely solely upon the outcome of the Department of Labour report regardless of it actually being a true reflection of the proposed work situation or not.

The Department of Labour process is then not appealable as at no stage is the applicant or employer provided with the outcome of the report even if the work visa application is refused. As such, there is no decision to appeal against. An appeal can be made to the Department of Home Affairs against the refusal of the work visa but this then begins a vicious cycle as Home Affairs decision is most likely directly dependent upon the Department of Labour report and thus it is necessary to seriously consider the grounds of motivation for an appeal to Home Affairs. Where the appeal is directly based on the Labour report then surely the appeal should be to the Department of Labour to reconsider their decision. The Department of Home Affairs is only provided the outcome of the Department of Labour's findings not the documentation that they considered in processing the application or detail about how they came to their findings.

Prior to the 2014 amendments, the Immigration Act made provision for the advert as a requirement and then to apply for a report from the Department of Labour (which involved a salary benchmarking process rather that a recruitment process and site inspection). Alternatively the prior Act allowed for a registered salary benchmarking organisation which could be approached for a salary benchmarking to confirm the foreign national was not to be remunerated any less favourably than a South African citizen in that position would be remunerated.

The process involved prior to the amendment was clear, straight forward, processed in a reasonable time and involved the discretion lying with the Department of Home Affairs as to whether the application should be approved or denied and not the Department of Labour.

While I fully support employment of South African citizens wherever possible, especially due to the high unemployment rates prevalent in South Africa, there are always situations where the skills are simply not available locally. In such a situation, the employer often has no choice but to revert to foreign national applicants who can satisfy the role. This situation should be recognised as such by the Department of Home Affairs and Labour. ■

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