What happens when a work visa or another visa is **refused?**

Alternative options are needed to secure scarce skills from outside the country.

By Julian Pokroy

One of the most vexing questions facing companies employing or attempting to employ skilled foreign nationals is the high rate of refusals of work visa applications.

At the outset, it is important to acknowledge that sometimes an application which does not bear merit could perhaps be lodged but in the main and especially in the category of general work visas in terms of section 19 of the Immigration Act 13 of 2002, as amended "the Act", this category has been characterised by some really bad adjudication in the category of work visa.

By way of background, it is necessary for an applicant for a general work visa to provide proof that the prospective employer has complied with a Department of Labour recommendation being obtained. The Department of Labour process requires proof of advertisement in the national printed media in an attempt to secure the services of a South African citizen or permanent resident. This advertisement must be in a format, sizing and must have certain specific content.

All of the aforementioned requires a prospective employer to demonstrate documentarily and otherwise that they have literally gone the extra mile to first try and secure the services of a South African citizen or permanent resident for the position before offering that position to a foreign national. Exhaustive processes must be followed in this regard. After the advertisement process has been concluded, any other recruitment process such as employment agencies should also be exhausted.

Then, and only then can the "petition" to the Department of Labour be done. This is where the drama begins.

The Department of Labour refuses to interfere or communicate in any way with the prospective employee and other than a likely Department of Labour inspection at the prospective employer's premises to check that there has been compliance with all of the labour laws. They can refuse to communicate with the prospective employer. The plot thickens with the Department of Labour further failing and/or refusing to interact from the communication prospective with any third party representatives such as an attorney.

The Labour Department "recommendation" is sent directly to the Head Office of the Department of Home Affairs and then only can the application for the general work visa be made. The content of the "recommendation" remains unknown up to the time of adjudication of the general work visa application.

This is where the crunch lies. The Department of Labour recommendation letters have been characterised by a plethora of negative recommendations demonstrating that even where there have been exhaustive steps to try and secure the services of a South African citizen or permanent resident and these have failed, a negative recommendation is often the outcome. A further problem is that this process can take up to six months by which time the application may have very well become irrelevant.

So what does happen when a work visa or another visa is refused?

The balance of this article therefore deals with the post-adjudication process in respect of a general work visa that has been refused.

The general work visa outcome through the adjudication team at the Department of Home Affairs Head Office has been characterised since the new regulations were proclaimed in 2014 by irrational, incorrect and ill-considered refusals. An article in HR Future questioning whether the general work visa category is viable any longer has already appeared.

In terms of the legal process, the first step, once a refusal of a general work visa has taken place is, within 10 working days from the date of receipt of the negative outcome, to apply for a review of the decision taken in terms of section 8(3) with the review being dealt with in terms of section 8(4) of the Act.

This is not a judicial review process but rather an administrative review process in which the department is urged to, "reconsider" the decision on the basis of the content of the review application and this should then result in an outcome, hopefully positive for the applicant. Review processes are taking several months to finalise and this must therefore be factored in on top of all the other delays that have been referred to above.

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In the event of a negative outcome once again from the Director General of Home Affairs, then section 8(6) of the Act provides that an appeal may be made to the Minister of Home Affairs against that decision, setting out solid grounds for such appeal. Please note that the terminologies "appeal" and "review" are loosely interchanged by the Department of Home Affairs.

A Ministerial appeal in terms of section 8(6) can again take several months to finalise and it is only after that process has been exhausted that one can approach our High Court for relief.

Obviously the rules of urgency in Court applications will often dictate that where a matter complies with the urgency requirements of a Motion application in the High Court Rules, that an urgent application could be brought in this regard in order to try and seek the necessary relief for the applicant.

Where the work visa outcome is negative and the employee and employer decide not to further continue the process, the further problem lies where the application was made from within South Africa and the employee's visa has expired. Previously, such individual would be afforded the 10 working days normally allowed for an appeal, to rather exit South Africa should they choose not to continue the appeal process. However, this is no longer the case. If such employee exits South Africa, even within the 10 working days, they will be declared undesirable upon their departure meaning they are then unable to return to South Africa for one to five years as a result (unless an appeal is successfully argued against this declaration).

I have already mentioned in this article that the advertisement and Department of Labour requirements must be met, but it is also necessary to mention that there is an alternative to the advertisement and Department of Labour process and that is to apply for a waiver of those two requirements in a "petition" to the Director General of Home Affairs.

It is important to note that waiver petitions are also taking an inordinate length of time to process and there is no guarantee of always receiving a positive outcome.

On the basis of what has been stated above and in terms of the author's investigation of the outcomes of general work visas it would appear that general work visas under the Immigration Act are ceasing to be a viable option as a category of work visa.

I have stressed that employment of South Africans must always be first prize, but it is believed that the current attitude and policies of the Department of Home Affairs as mirrored in the decisions surrounding general work visas is not acknowledging that sometimes those skills simply do not exist or are simply not available in the country.

I have previously written in *HR Future* about the critical skills work visa category which makes provision for those persons in trades, professions and occupations who are listed in the critical skills visa list. ■

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