

SOUTH AFRICAN REWARDS ASSOCIATION
(SARA) PRESENTATION

PRESENTED BY: JULIAN POKROY

12 AUGUST 2010

The following items to be covered:

1. Problems encountered by expatriates when wanting to open a bank account (where the problems starts, how to expats get around the ID number requirements, how can these issues be resolved, FNB Expat Accounts)
2. What company should do if an expatriates work permit has elapsed – the do's and don'ts and reference to situations were companies have treated their expat no differently, i.e. let them carry on working, kept them on payroll, and the risks and repercussions thereof.
3. Corporate permits – criteria for qualification, approval rate, abuse thereof and possible implications.
4. Changes to current legislation, introduction of new Acts.

OPENING OF BANK ACCOUNTS BY FOREIGN NATIONALS IN SOUTH AFRICAN ON TEMPORARY RESIDENCE PERMITS:

There is no impediment in terms of our Immigration Laws to a foreign national in South Africa on temporary residence permits to operation of a bank account in South Africa.

Obviously, the FICA Laws have to be complied with and to this end the expat would have to be possessed of, inter alia, the following:

- A valid passport bearing a valid temporary residence or other type of permit;
- Proof of financial resources in the form of existing bank account details;
- Proof of residence in South Africa either by way of a utilities bill or a lease proving residence, coupled to the landlord's utilities bill;
- If employed, proof of employment and recent proof of emoluments.

This obviously would open the door to the expat approaching a bank to open an account and this is inevitably where the crunch will lie.

The IT systems of all banks require, in addition to the personal particularity of an individual, the insertion of their South African citizen or non citizen identity number. Obviously, a temporary residence permit holder will not be possessed of a green barcoded identity document.

This is where proceedings generally come to a halt.

As stated above, there is no impediment to a foreign national, who complies with the FICA Laws, opening a bank account in South Africa. Obviously, exchange control and tax implications have to similarly be dealt with by such expat but the opening of the account should technically not be a problem.

Counter staff at the banks are generally aware of where the block occurs and it is important to deal with someone higher than a teller and preferably with someone at management level in order to break through the impasse.

On an ongoing basis, we are consulted about precisely this problem and whilst we are not promoting any specific financial institution, we have found that pursuant to a meeting between the Law Society of South Africa some years back, together with First National Bank, and Expat Division was created at Bank City in Johannesburg and my recollection is that most of the people that we have recommended to the Expat Division have been dealt with effectively and timeously.

This does not detract from the fact that other banks have been of assistance but generally only when our office has intervened.

My suggestion, therefore, is that to avoid the complications that come with the opening of expat bank accounts, one should make the first appointment with a senior management official in order to avoid the difficulties outlined.

WHAT COMPANY SHOULD DO IF AN EXPATS WORK PERMIT HAS LAPSED:

It is a requirement in terms of the Immigration Regulations promulgated into the Immigration Act 13 of 2002 as Amended, that applications for any extension of existing permits or for first time permits, in instances where this is allowed, or for changes of status or conditions, that they be lodged no later than 30 days prior to the expiry of the existing permits. This applies if the application is indeed lodged in South Africa.

Due to circumstances, the processing of such applications does not always happen within the expiry period of a permit.

The main causes for this would be the following:

- The failure by an applicant or the employer to lodge an application timeously with the relevant office of the Department of Home Affairs;
- An inability of the Department of Home Affairs to finalise an application within the 30 day period.

The reasons for this will be dealt with now.

The Department of Home Affairs recently withdrew its delegations to process applications for all types of visitors permits and temporary residence permits from the Regional Offices of the Department and centralised this at a Zonal Hub processing section which was created at the Department of Home Affairs Head Office in Waltloo, in Pretoria. The passage of an application would now be along the following lines:

- Lodgement of the documentation at the Regional Office within the geographical area jurisdiction of the applicant's workplace.
- Receipt being issued for the administrative fee payable to the Department of Home Affairs and further acknowledging receipt of the application;
- Dispatch by courier of the application to the central processing Zonal Hub at Pretoria;
- Processing of the application;
- Issuing of the actual permit and dispatch thereof together with the file to the Regional Office where the application was lodged of first instance;
- Endorsement of the permit on to the passport by placing the Head Office issued sticker on to passport.

At last count there were seven officials who had been dispatched to the Zonal Hub and it is estimated at this time that there are some 30,000 applications in arrears at that office. The implications of this do not need explaining.

For any of these, or other reasons, an overstay can occur.

Previously, the Department of Home Affairs was issuing a so called "Form 20" which is an administrative extension of an applicant's stay, pending the outcome of an extension application or application of first instance, if indeed the application had been made whilst on a visitors permit. This Form 20 does not confer any status on the expat but does in some way "legalise" them, pending the outcome of their main application.

The implications of travelling on such Form 20 will be discussed hereunder, together with consequences of an overstay.

What is abundantly clear, however, is that an overstayer or a person on a Form 20 "legalisation" cannot continue employment if they were on a work permit. Alternatively, they cannot commence employment until their work permit is issued.

The consequences of in fact working are quite dire and would result in deportation of an individual who is found to be contravening the Immigration Act in this regard, with rather severe penalties laid out in Section 49 of the Immigration Act for employers. This includes fines with the option of imprisonment leading up to imprisonment with no options for repetitive offenders.

“Work” is defined simplistically as the “conducting of any activity consistent with the trade, profession or occupation of a foreign national, with or without remuneration”.

There are thus considerable risks involved in allowing an expat to continue working and by implication, therefore, keeping them on the payroll, without an appropriate work permit in place.

CORPORATE PERMITS:

The criteria for qualification, approval rate, abuse thereof and possible implications.

Section 21 of the Immigration Act, empowers the Director General of Home Affairs to employ foreigners in large numbers under the umbrella of a corporate work permit in instances where the categories of expats being sought to be employed is in need and not readily available in the country and where satisfactory undertakings are given that such foreign nationals will not be remunerated less favourably than South Africans would be in such situations.

In terms of Regulation 18 to the Act, proof will have to be furnished to the satisfaction of the Director General of the need to employ the requested number of foreigners, setting out the job descriptions and proposed remuneration in respect of each foreigner to be employed.

Undertakings also have to be given in respect of the repatriation or deportation, where necessary, for such individual corporate applicant.

The Department of Labour must be approached for a recommendation in this regard, which recommendation would then form part of the application to the Director General of Home Affairs.

The Department of Trade & Industry similarly has to be approached for their recommendation and it is only once this has also been obtained that an application for a corporate work permit can be brought to the Director General of Home Affairs.

Once a corporate work permit, referred to by me as an "umbrella" corporate permit, then in effect it becomes a "license" to employ that number of foreigners for the period specified in the umbrella corporate work permit.

The next phase would be where an individual corporate worker is identified and where such person fits into the job category or specification and within the numerical parameters of the umbrella corporate work permit.

At this time, an application is then made for an individual corporate worker authorisation certificate at the nearest Embassy, High Commission or Consular Commission of the South African government. In certain circumstances, such application may be brought to the Department of Home Affairs Regional Office in the geographical area of jurisdiction of the employer's location.

The normal documentation which would accompany a work permit would have to be appended to the corporate worker authorisation certificate.

Based on the aforesaid documentation, the Embassy, High Commission or Consular Commission or Regional Office of the Department of Home Affairs would issue a work permit in terms of Section 19 of the Act.

The main advantage to this type of work permit would be that the employer has certainty knowing that the number he had motivated will in fact be allowed, subject to compliance with the administrative requirements of such permit.

Unfortunately, in recent times, there has been a tremendous amount of abuse by non attorney practitioners specifically of the corporate work permit option. For this reason, the Department of Labour is currently refusing to issue any Labour Department certifications or recommendations. Effectively, this is bringing the corporate work permit option to a grinding halt.

Whilst individual corporate worker authorisation certificates are still being issued against existing corporate work permits, the situation is affecting permits currently in progress and the contemplation of permits to be lodged.

CHANGED TO CURRENT LEGISLATION, POTENTIAL AMENDMENTS TO THE LEGISLATION AND POSSIBLE NEW PRINCIPLE LEGISLATION:

At this time the Immigration Amendment Act of 2008, by the then president, Thabo Mbeki. The regulations which were to have been empowered by the aforesaid Amendment Act have, however, not been finalised and thereby the implementation of the Amendment Act has been thwarted.

This impacts mainly on intra company transferees whose permits were limited in the 2005 Amendment to the Act to 2 years, non extendable.

The Amendment Act provides for an increasing of this to a 4 year non extendable permit.

One of the principle reasons for the Immigration Regulations not being finalised has been that the tenure of the Immigration Advisory Board to the Minister of Home Affairs expired and after the then Minister of Home Affairs Mrs Nkosazana Dlamini-Zuma has crippled the Board, no new Board was appointed until June 2010. A new Board has now been appointed by Minister Nkosazana Dlamini-Zuma and hopefully will resolve the impasse shortly.

Whilst this is happening the Department of Home Affairs has introduced a further Immigration Amendment Bill which is in its final drafting stages at this time, on to the Parliamentary Agenda.

It is anticipated that this Bill will be published in draft format shortly and that stakeholders will be given an opportunity to make input in this regard.

At the time of writing this, it is not known what the future holds in terms of this proposed Amendment as the Department is holding its cards very close to their chests.

At this time the Citizenship Amendment Bill and Registration of Births & Deaths Amendment Bill are in the pipeline, with public hearings occurring in the next 2 weeks. These may impact into some work process of the abolition of Late Registrations of Birth and various other processes which were also being abused by unscrupulous individuals in the Late Registration of Birth process.

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