



ICLG

The International Comparative Legal Guide to:

Corporate Immigration 2018

5th Edition

A practical cross-border insight into corporate immigration law

Published by Global Legal Group, with contributions from:

Advokatfirmaet Ræder AS

AILA Global Migration Section

Al Hashmi Law

AOV Abogados

BartLAW/Canadian Immigration

BDO Migration Services

Borenus Attorneys Ltd

Christodoulos G. Vassiliades & Co. LLC

CMG LEGAL – Avocats

CS Global Partners

De Luca & Partners

Enrique Arellano Rincón Abogados S. de R. L. de C.V.

EXPATPRO

Gulapa & Quicho

Immigration Law Associates

J Fetting Inc.

Jackson, Etti & Edu

Kingsley Napley LLP

Law firm Šafar & Partners, Ltd

Lenz & Staehelin

Magrath Global

michels.pmks Rechtsanwälte

Partnerschaft mbB

Moyal & Simon

Mynta Law

Nakai Immigration Services LPC

Oberhammer Rechtsanwälte GmbH

PricewaterhouseCoopers Legal Middle East LLP

Ryken and Associates, Barristers and Solicitors

Skau Reipurth & Partnere

Skrine

Wolfsdorf Rosenthal LLP



AMERICAN
IMMIGRATION
LAWYERS
ASSOCIATION

g|g
global legal group



Contributing Editor
Nicolas Rollason,
Kingsley Napley LLP

Sales Director
Florjan Osmani

Account Director
Oliver Smith

Sales Support Manager
Toni Hayward

Sub Editor
Jane Simmons

Senior Editors
Suzie Levy
Caroline Collingwood

CEO
Dror Levy

Group Consulting Editor
Alan Falach

Publisher
Rory Smith

Published by
Global Legal Group Ltd.
59 Tanner Street
London SE1 3PL, UK
Tel: +44 20 7367 0720
Fax: +44 20 7407 5255
Email: info@glgroup.co.uk
URL: www.glgroup.co.uk

GLG Cover Design
F&F Studio Design

GLG Cover Image Source
iStockphoto

Printed by
Stephens & George
Print Group
August 2018

Copyright © 2018
Global Legal Group Ltd.
All rights reserved
No photocopying

ISBN 978-1-912509-27-0
ISSN 2054-7579

Strategic Partners



General Chapters:

1	The Future of the Tier 2 Immigration Cap? Next Question... – Nicolas Rollason & Emma Fowler, Kingsley Napley LLP	1
2	Global Entrepreneurship through Second Citizenship – Micha-Rose Emmett, CS Global Partners	4
3	Not Just Business as Usual in the EU: A Comprehensive Analysis of Immigration and Tax Issues Related to Business Trips in 17 Schengen Countries – Marco Mazzeschi & Clayton E. Cartwright, Jr., AILA Global Migration Section	8

Country Question and Answer Chapters:

4	Australia	BDO Migration Services: Maria Debra Jockel	16
5	Austria	Oberhammer Rechtsanwälte GmbH: Ewald Oberhammer & Petra Pardatscher	25
6	Belgium	Immigration Law Associates: Tanel Feldman	35
7	Canada	BartLAW Canadian Immigration: Jacqueline R. Bart & Carrie A. Wright	43
8	China	Wolfsdorf Rosenthal LLP: Bernard P. Wolfsdorf & Yijie “Eva” Yang	52
9	Cyprus	Christodoulos G. Vassiliades & Co. LLC: Christodoulos G. Vassiliades & Marianna Pavlides	58
10	Denmark	Skau Reipurth & Partnere: Frederik Brocks & Louise Horn Aagesen	65
11	Finland	Borenus Attorneys Ltd: Jani Syrjänen	72
12	France	CMG LEGAL – Avocats: Valerie Maricot & Stephane Coulaux	79
13	Germany	michels.pmks Rechtsanwälte Partnerschaft mbB: Gunther Mävers	86
14	Italy	De Luca & Partners: Vittorio De Luca	96
15	Japan	Nakai Immigration Services LPC: Masahito Nakai	105
16	Luxembourg	Moyal & Simon: Joram Moyal	112
17	Malaysia	Skrine: Selvamalar Alagaratnam & Foo Siew Li	119
18	Mexico	Enrique Arellano Rincón Abogados S. de R. L. de C.V.: Enrique J. Arellano	126
19	Netherlands	Mynta Law: Arend van Rosmalen & Iris Bloemkolk	134
20	New Zealand	Ryken and Associates, Barristers and Solicitors: David Ryken	143
21	Nigeria	Jackson, Etti & Edu: Afolasade Olowe	150
22	Norway	Advokatfirmaet Ræder AS: Nils Kristian Lie & Ole André Oftebro	156
23	Oman	Al Hashmi Law: Omar Al Hashmi & Syed Ahmad Faizy	163
24	Peru	AOV Abogados: Ariel Orrego-Villacorta Icochea & María Gracia De La Piedra Silva	168
25	Philippines	Gulapa & Quicho: Aris L. Gulapa & Phillip Don G. Recentes	176
26	Singapore	Magrath Global: Ruth Wilkins	183
27	Slovenia	Law firm Šafar & Partners, Ltd: Martin Šafar & Polona Boršnak	190
28	South Africa	J Fetting Inc.: Jonty Fetting	197
29	Switzerland	Lenz & Staehelin: Rayan Houdrouge & Dr. Matthias Oertle	207
30	Ukraine	EXPATPRO: Vasyi Cherednichenko & Tetiana Yashchenko	214
31	United Arab Emirates	PricewaterhouseCoopers Legal Middle East LLP: Anirban Chatterji	222
32	United Kingdom	Kingsley Napley LLP: Nicolas Rollason	229
33	USA	Wolfsdorf Rosenthal LLP: Bernard P. Wolfsdorf & Joseph M. Barnett	242

Further copies of this book and others in the series can be ordered from the publisher. Please call +44 20 7367 0720

Disclaimer

This publication is for general information purposes only. It does not purport to provide comprehensive full legal or other advice. Global Legal Group Ltd. and the contributors accept no responsibility for losses that may arise from reliance upon information contained in this publication. This publication is intended to give an indication of legal issues upon which you may need advice. Full legal advice should be taken from a qualified professional when dealing with specific situations.

South Africa

J Fetting Inc.

Jonty Fetting



1 Introduction

1.1 What are the main sources of immigration law in your jurisdiction?

The Immigration Act 13 of 2002 (as amended) (“Immigration Act”), the associated Immigration Regulations (“Regulations”) and other related notices published in the Government Gazette from time to time.

1.2 What authorities administer the corporate immigration system in your jurisdiction?

The immigration system is administered and enforced by the Department of Home Affairs (“DHA”), a South African Government Department. Certain of its immigration and administrative functions, they are performed at the South African Diplomatic Missions around the world and supported by VFS Visa Facilitation Centres (“VAC”) in certain countries and across South Africa.

1.3 Is your jurisdiction part of a multilateral agreement between countries (EU/NAFTA/MERCOSUR) which facilitates the movement of people between countries for employment purposes?

No, whilst South Africa is a member state of the South African Development Community (“SADC”) and the African Union (“AU”), there is no agreement which facilitates the movement of people into South Africa for employment purposes.

2 Business Visitors

2.1 Can business visitors enter your jurisdiction under a relevant visa waiver programme?

Yes, subject to nationality. Certain nationalities are subject to a visa waiver for 30 days, whilst others are for 90 days and do not require a visa or electronic travel authorisation prior to travel. Certain nationalities are not subject to a visa waiver and always require a visa prior to entering South Africa for business or any other purpose.

2.2 What is the maximum period for which business visitors can enter your jurisdiction?

In respect of 30- and 90-day visa exempt/waiver nationals, they may

be issued a Visitor’s Visa at the Port of Entry upon arrival in the country. The visa is valid for no more than the duration of the visa waiver and it is issued free of charge. Both categories may renew their visa for a period not exceeding three months from within the country, subject to, amongst others, being able to sufficiently justify continued business activities for a lengthy period without conducting work. This requires the submission of a formal visa renewal application at the VAC for consideration by the DHA; it is not an automatic entitlement.

2.3 What activities are business visitors able to undertake?

Neither the Immigration Act nor its regulations provides a definition for a business visit and associated permissible activities. A business visitor is not legally allowed to work and the Act has a specific definition for work; thus, in this context, it can be deduced that business activities are those which do not constitute work. Work is defined as conducting any activity normally associated with the running of a specific business, being employed or conducting activities consistent with being employed or consistent with the profession of the person, with or without remuneration or reward, within South Africa. A simplified interpretation for a business visitor is that, as soon as he/she starts actively conducting his/her profession within the country, he/she is deemed to be working. Specific and limited business activities such as, but not limited to, business meetings, attending a conference, seminar, trade show or event as a participant and others which are ancillary to a foreign national’s profession might generally be accepted as business activities.

2.4 Are there any special visitor categories which will enable business visitors to undertake work or provide services for a temporary period?

When a foreign national is only required to conduct short-term specific work in South Africa for a limited period, not exceeding 90 days initially, and he/she does not qualify for any of the three categories of work visa, an employer may defer to Section 11(2) of the Immigration Act to secure permission to conduct work in South Africa on a Visitor’s Visa for up to 90 days. Section 11(2) of the Immigration Act is not a visa category in itself – rather, it refers to an endorsement to allow for work on a Visitor’s Visa. The foreign national must apply for a Port of Entry Visa on this basis at the South African Mission abroad, prior to travel. Upon arrival and presenting the visa, the Immigration Officer will admit him/her on the Visitor’s Visa with the Section 11(2) work authorisation endorsed on it and

valid for the duration specified under the visa conditions, which will not exceed 90 days. After arrival, he/she may apply to renew the visa for a further maximum period of three months. This requires the submission of a formal visa renewal application at the VAC for consideration by the DHA; it is not an automatic entitlement. No adjustment/change of status or further renewal is permissible from within the country.

2.5 Can business visitors receive short-term training?

As the Immigration Act defines work to include, but is not limited to, a foreign national conducting activities consistent with being employed or consistent with his/her profession, in most instances, training falls within ambit of the definition and equates to work. The foreign national then requires a Visitor's Visa with the authorisation to conduct work in terms of Section 11(2) of the Immigration Act.

3 Immigration Compliance and Illegal Working

3.1 Do the national authorities in your jurisdiction operate a system of compliance inspections of employers who regularly employ foreign nationals?

Generally, our opinion is that, currently, immigration compliance inspections at corporate entities by the DHA in the majority of, but not all, incidences tends to be reactive as opposed to structured, predictable and systematic. Inspections do take place and usually attract significant media attention; however, notably the inspections appear to be triggered by tip-offs or complaints which the DHA receives from aggrieved parties on which it acts. Inspections may also be triggered, in instances where applications being submitted by employees of companies contain suspicious statements and give sufficient rise to question the integrity of the sponsoring employer. The DHA has recently indicated that it intends to implement structured random inspections of corporate companies and advised that employers should be familiar with legislative provisions and the duties and obligations placed on them in relation to the employment of foreign nationals.

3.2 What are the rules on the prevention of illegal working?

The Immigration Act places a duty on an employer to make a good-faith effort to ensure that no illegal foreigner is employed by it and to ascertain the status or citizenship of those who it employs. Legally, no person shall employ:

- an illegal foreigner;
- a foreigner whose status does not authorise him or her to be employed by such person; or
- a foreigner on terms, conditions or in a capacity different from those contemplated in the foreigner's status.

A "good-faith effort" is not defined in the Immigration Act; however, an employer should, at the very least, request proof of formal photo identification and, if it is established that the individual is a foreign national, the employer should then seek to establish that person's immigration status and request evidence of such status which must be examined closely to determine potential restrictions.

If an employer employs a foreign national who is an illegal foreigner or whose visa status or visa conditions did not allow him/her to be

employed, it will be presumed that the employer knew that this was the case at the time of employment and the burden of proof will be on the employer to prove that it employed the person in good faith and that it made a good-faith effort in the first instance. Stricter compliance is required of any employer who employs more than five employees or who has previously been found guilty of an offence.

If an illegal foreigner is found on any premises where a business is conducted, it is automatically presumed that the foreigner is employed by the person who has control over the premises. It is then the duty of that person to provide sufficient compelling evidence to the contrary.

Employers are legally required to report the termination of the foreign national's employment and/or any breach on the part of the foreign national of his/her visa status/conditions to the DHA. They are also required to keep the undermentioned on record for at least two years after the termination of the foreign national's employment:

- a certified copy of his/her passport bio-data page/s;
- a copy of the relevant visa or other legal authorisation which permits work/employment, permanent residence permit or other status permitting work;
- proof of the capacity/position in which he/she is or was employed; and
- copies of the IRP5 form or certificate of earnings and job description, respectively.

Save for necessary humanitarian assistance, no employer or person shall aid, abet, assist, enable or in any manner help:

- an illegal foreigner; or
- a foreigner in respect of any matter, conduct or transaction which violates his/her status.

When applicable, this includes, amongst others:

- conducting any business or carrying on any profession or occupation in co-operation with him/her; or
- assisting, enabling or in any manner helping him/her to conduct any business or carry on any profession or occupation and doing anything for him/her or on his or her behalf in connection with his or her business or profession or occupation.

In any criminal proceedings, it is no defence to aver that the status of the foreign national concerned, or whether he or she was an illegal foreigner, was unknown to the employer if it is proved that the employer ought reasonably to have known the status of the foreigner, or whether he/she was an illegal foreigner.

3.3 What are the penalties for organisations found to be employing foreign nationals without permission to work?

An employer that is found guilty of an offence relating to failing to comply with one or more of its duties and obligations will be liable on conviction to a fine or to imprisonment not exceeding five years.

An employer who knowingly employs an illegal foreigner or a foreigner in violation of the conditions of his/her visa status (or any other provision of the Immigration Act) will be guilty of an offence and liable on conviction to a fine or to imprisonment not exceeding one year. If the employer is convicted a second time, the offence is punishable by either imprisonment not exceeding two years or a fine and the third or subsequent conviction by imprisonment not exceeding five years without the option of a fine.

When applicable, the amount of the fine imposed is determined by the Court.

4 Corporate Immigration – General

4.1 Is there a system for registration of employers who wish to hire foreign nationals?

Employers are not required to undertake a specific registration process to enable them to hire foreign nationals.

4.2 Do employers who hire foreign nationals have ongoing duties to ensure immigration compliance?

Yes, employers are legally required to report the termination of the foreign national's employment and/or any breach on the part of the foreign national of his/her visa status/conditions to the DHA. They must also notify the DHA when the foreign national is employed in a different capacity or role (General Work Visa holders) and they must ensure that the foreign national's passport remains valid for the duration of his/her employment or temporary work tenure.

4.3 Are employers who hire foreign nationals required to show a commitment to train or up-skill local workers?

One of the primary objectives of the Immigration Act is to ensure that policy connection is maintained between foreign nationals working in South Africa and the training of South African citizens – thus the transfer of skills is certainly one of the DHA's desired objectives. In respect of a foreign national who is temporarily transferred to South Africa on an Intra-Company Transfer Work Visa, employers are required to ensure that a plan is developed for the transfer of skills to a South African citizen or permanent resident. More stringent general requirements might eventually apply across the board in respect of the provisions of the Employment Service Act, which empower the Minister of the Department of Labour to make specific regulations which relate to, amongst others, the preparation of a skills transfer plan by an employer in respect of any position in which a foreign national is employed. However, to date, no such regulations have been promulgated.

4.4 Are employers who hire foreign nationals required to pay government charges and fees which contribute towards the training or up-skilling of local workers?

In terms of the provisions of the Immigration Act, there is no related fee or charge; however, in terms of the Skills Development Levies Act, a Skills Development Levy ("SDL") to encourage learning and development in South Africa and to be used to develop and improve the skills of employees is payable by qualifying employers who are required to register with the South African Revenue Service. The SDL amount is 1% of the total amount of remuneration, paid or payable, or deemed to be paid or payable, by an employer to its employees during any month, as determined in relevant schedules applicable to the Income Tax Act. In the case of a private company, it is required to pay the SDL, unless there are reasonable grounds for believing that the total amount of remuneration, as determined, paid or payable by that employer to all its employees during the following 12-month period, will not exceed R500,000.

4.5 Do the immigration authorities undertake routine inspections of employers who sponsor foreign nationals, to verify immigration compliance?

As noted previously, immigration compliance inspections at corporate entities by the DHA, in the majority of, but not all, cases, tend to be reactive as opposed to structured, predictable and systematic/routine. This may change in time as the DHA applies stricter enforcement.

4.6 Do the immigration authorities maintain a list of skilled occupations which may be filled by foreign nationals?

There is a list of skills or qualifications deemed to be critical for South Africa in relation to an application for a Critical Skills Visa or Permanent Residence Permit. The current list was published by notice in the Government Gazette on June 3, 2014 and has remained unchanged to date. This is generally referred to as the "Critical Skills List".

4.7 Is there a recognition that some occupations may be in short supply and do special exemptions apply to certain sectors and occupations?

The Critical Skills List reflects the professions which are, by their critical nature, in short supply within the South African labour market; as these professions are already deemed critical, there is no requirement to prove that there is no South African citizen or permanent resident who is available, i.e. provide evidence of a labour market search. However, there are no specific general exemptions which apply. A foreign national possessing a defined critical skills set must still pursue a formal application for a Critical Skills Work Visa or Permanent Resident Permit, the approval of which is discretionary rather than an automatic entitlement.

4.8 Are there annual quotas for different types of employment-related work permits or visas?

There are no annual quotas applicable to any of the work visa categories set out in the Immigration Act.

4.9 Are there restrictions on the number of foreign workers an employer may sponsor, in relation to a maximum percentage of foreign workers in the employer's workforce?

In terms of the three available work visa categories, namely General Work Visas, Critical Skills Work Visas and Intra-Company Transfer Work Visas, there is no legislated maximum percentage of foreign workers in the employer's work force. However, a corporate entity that is issued a Corporate Visa to facilitate the employment of a predetermined number of foreign nationals must, at the time of application and at any time for the duration of the visa, be in a position to prove that at least 60% of its total staff complement employed in the operations of business are South African citizens, or permanent residents employed in various positions. This applies equally to an employer who is the holder of a Business Visa (which

is issued to a foreign national to establish or invest in a business in South Africa). Thus, the ratio of foreign nationals employed in the case of Corporate Visa and Business Visa holders may not exceed 40% of the formal staff complement.

4.10 Are employees who are sponsored to work in your jurisdiction required to demonstrate language proficiency?

There are no language proficiency requirements set out in the Immigration Act.

4.11 Are employees who are sponsored to work in your jurisdiction required to undergo medical examinations before being admitted?

Yes, in support of any long-term visa applications, a foreign national is required to undergo both a medical and radiological examination. The medical examination constitutes a report by a registered medical practitioner with regard to the foreign national's general state of health, detailing any medical condition from which he/she suffers. The radiological examination constitutes a report by a registered radiologist certifying that the applicant has been examined and that no signs of active pulmonary tuberculosis could be detected. Foreign nationals resident in or travelling from or through Yellow Fever Endemic countries must be in possession of valid Yellow Fever Vaccinations Certificates.

4.12 Are employees who are sponsored to work in your jurisdiction required to have medical insurance or are they entitled to any free public medical services?

Employers are not required by law to provide medical aid/insurance cover to foreign or local employees; however, South Africa's public health system is currently in a less-than-desirable state – thus, private medical aid is strongly recommended and considered a necessity by most who can afford it. Many employers contract to private medical aid providers and, as part of their employee benefit structure, contribute towards the premiums for their employees. Notwithstanding the poor state of public healthcare in South Africa, whilst foreign nationals resident in South Africa, i.e. work visa holders and permanent residents, are entitled to access the public healthcare system, it is not completely free. It may be subsidised to a greater or lesser degree depending on their income and certain exceptions might apply.

4.13 Does the work permit system allow employees who hold work permits to be seconded to a client site?

This scenario is not expressly provided for in the Immigration Act; however, in our opinion, an employee in possession of a work visa endorsed to allow for employment/an intra-company transfer ("employment") with an employer may be temporarily seconded to a client site to conduct work, provided that he/she is doing so pursuant to his/her primary employment with his/her employer as an inherent requirement of the position which he/she occupies within the company personnel structure. The work must be pursuant to a broader agreement between the client company and the employer and not pursuant to any form of direct contractual agreement

between the foreign national and the client company which might be construed as creating an employment relationship. The foreign national must continue to receive his/her remuneration and benefits from his/her employer, as opposed to rendering services and being remunerated by the client company in his/her personal capacity. The foreign national may be issued with a secondment agreement by his/her employer outlining the terms and conditions of his/her temporary secondment; however, it must be clearly noted that he/she is not relinquishing his/her position with the company and that the secondment is of a temporary nature to fulfil a scope of work required by the employer at its client.

5 Highly Skilled Visas

5.1 Is there an immigration category which covers highly skilled individuals?

A Critical Skills Work Visa may be issued to a foreign national possessing skills or qualifications determined to be critical for South Africa. The prevailing critical skills list was published on June 3, 2014. In order to make an application in this category, a foreign national will have to prove that his/her qualification/s and/or skills and post-qualification experience fall within the parameters of one of the critical skills categories.

6 Investment or Establishment Work Permits

6.1 Is there an immigration category which permits employees to be authorised to work based on investment into your jurisdiction?

A Business Visa may be issued by the DHA for up to three years at a time to a foreigner intending to establish or invest in, or who has established or invested in, a business in South Africa in which he/she will be employed. In summary, in respect of a first application relating to the establishment of a new business, the foreign national must be in a position to invest a minimum of R5,000,000 in cash, or in cash and a capital contribution which will form part of the intended book value of the business. This must be confirmed by a registered South African Chartered Accountant. The capital contribution may be reduced or waived in respect of certain types of business which are deemed to be in the national interests of South Africa. There are also certain categories of business which are listed as undesirable and in respect of which a Business Visa may not be issued.

The application must be supported by a letter of recommendation from the Department of Trade & Industry ("DTI") regarding the feasibility of the business and the contribution to the national interest of the South Africa. This requires a prior submission and assessment by the DTI.

The foreign national must provide an undertaking by the applicant that at least 60% of the total staff complement to be employed in the operations of the business will be South African citizens or permanent residents employed permanently in various positions and proof of compliance with this undertaking must be submitted within 12 months of the issuance of the visa.

Further undertakings regarding registration with various South African statutory bodies including, but not limited to, the South African Revenue Service and the Companies & Intellectual Properties Commission are also required.

The holder of a Business Visa may not conduct work other than work related to the business in respect of which the visa has been issued and must submit proof to the satisfaction of the DHA that he/she has fulfilled the capital contribution requirement within 24 months of the issuance of the visa and within every two years thereafter.

Similar requirements apply to a foreign national investing in a business which is already established in South Africa; however, considering the business is already established, registered and operational, they will differ slightly.

7 Temporary Work Permits

7.1 Is there an immigration category permitting the hiring of temporary workers for exchanges, career development, internships or other non-economic purposes?

The Exchange Visa category is split into two sub-categories. The first category provides for the visa to be issued for a foreign national participating in a programme of cultural, economic or social exchange, organised or administered by an organ of state or a learning institution, in conjunction with a learning institution or an organ of a foreign state. The second provides for a foreign national under the age of 25 years to be employed by an employer in South Africa employed for a maximum period of up to 12 months, provided the employer, amongst other requirements, provides specific undertakings. There is no need for any labour market test or minimum qualification requirement, etc. The latter is ideal for internships and career development for a limited period.

7.2 Are there sector-specific temporary work permit categories which enable foreign workers to perform temporary work?

From a corporate immigration perspective, there are no sector-specific temporary work visa categories to allow for temporary work.

8 Group or Intra-Company Transfer Work Permits

8.1 Does a specific immigration category exist for inter-company transfers within international groups of companies?

Yes, the Intra-Company Transfer Work Visa category.

8.2 What conditions must an employing company or organisation fulfil in order to qualify as part of a group of companies?

The foreign company and the South African company must operate in a branch, subsidiary or affiliate relationship. Affiliate means an associate member of a company or organisation.

8.3 What conditions must the employer fulfil in order to obtain a work permit for an intra-company group employee?

The Intra-Company Transfer Work Visa (“ICT”) category specifically provides for the temporary transfer of a foreign national who is employed abroad by a foreign company operating in a branch, subsidiary or affiliate relationship with a company/business/organisation (“company”) in South Africa. This visa category is restricted to a maximum period of four years, is not renewable and only allows the foreign national to work in the role in which he/she was transferred.

The foreign national must be employed by the foreign company for at least six months prior to the date of application for the ICT Work Visa and a copy of his/her employment contract must be included in the application. He/she may not take up direct permanent employment with the South African company under the auspices of his/her ICT Work Visa. The foreign national must maintain his/her employment with the sending company for the duration of the transfer, even if that employment is suspended. The foreign national may be issued with a fixed-term local contract of employment with the South African entity pursuant to his/her assignment; however, his/her employment with the sending entity must not be terminated.

The South African company will need to undertake to ensure that a plan is developed for the transfer of skills to a South African citizen or permanent resident during the period of the transfer and evidence of such a plan must be readily available, as it might be requested by the South African Mission.

Regarding remuneration and benefits, the Immigration Act does not expressly prescribe where or how the foreign national may receive his or her remuneration or benefits during his/her transfer to South Africa; thus he/she may either receive them from the foreign company and/or the South African branch, subsidiary or affiliate company, or a portion from both, for the duration of his/her transfer. Furthermore, there is no legal requirement for the foreign national to maintain any benefits pursuant to his/her employment with the foreign company for the duration of his/her transfer to South Africa, unless compelled to do so in terms of any applicable legislation in that country.

8.4 What is the process for obtaining a work permit for an intra-company group employee?

There is no prior approval required from the DHA by the South African company before proceeding with the ICT Work Visa application. The South African company must provide a supporting letter with the necessary legal undertakings in respect of the foreign national, including undertaking that a plan will be developed for the transfer of skills to a South African citizen(s) or permanent resident. It is general practice for it to also provide evidence of the skills transfer plan for inclusion in the application. The sending company must also provide a supporting letter confirming the transfer of the foreign national, as well as his/her permanent contract of employment with it. These documents are provided to the foreign national for inclusion in his/her ICT Work Visa application.

8.5 What is the process for the employee to obtain a visa under the intra-company group transfer category?

The foreign national gathers all legally required personal supporting documents for inclusion in the application; these include, but are not

limited to, a medical report, a radiological report, Police Clearance Certificates from all countries in which he/she has resided for 12 months or more since his/her 18th birthday, where applicable, Marriage Certificate, Divorce Decree, Death Certificate of late spouse, passport photographs, etc. These are annexed to the required government application for a Temporary Residence Visa, along with all supporting documents from the foreign and South African companies. He/she then proceeds to submit the application to the South African Mission or its appointed Visa Application Centre (“VAC”) in his/her country of citizenship or ordinary residence (which includes long-term temporary or permanent residence) and pay the required Government fee and, where applicable, VAC fee. A personal appearance is mandatory for the submission of the application. Certain South African Missions insist on retaining the passport and others do not. The practices of the South African Missions vary considerably. The passport might, however, be returned by post or courier if the foreign national provides the necessary pre-paid courier/postage envelope.

Once the work visa is issued, it is endorsed in the foreign national’s passport. The work visa constitutes both a work and residence visa. The foreign national may then travel to South Africa immediately. The work visa will become active upon his/her admission to South Africa once the Immigration Officer has affixed an entry stamp.

8.6 How long does the process of obtaining the work permit and initial visa take?

There is no legislated processing/adjudication time for a work visa application. The processing times of the South African Missions vary substantially – some missions take as little as one to two weeks, others take up to over four weeks and others in high-volume countries such as India and China can take as long as eight to twelve weeks.

8.7 How long are visas under the “initial” category valid for, and can they be extended?

The maximum duration for which the ICT Work Visa may be issued is up to four years; however, if the foreign national is not being transferred for a full four-year period, then it may be issued for any lesser period in line with the intended duration of the transfer. The work visa is not renewable beyond a period of the maximum four-year duration for which it may be issued. If it is issued for less than four years in the first instance, it may be renewed for the remaining period of the four years.

8.8 Can employees coming under the intra-company transfer route apply for permanent residence?

The ICT Work Visa category does not create a direct avenue to apply for a Permanent Residence Permit.

8.9 What are the main government fees associated with this type of visa?

The government application fee is ZAR1,520, the equivalent of which is paid in local currency in the country in which the foreign national is submitting his/her work visa application. In countries where VACs are operational, additional service fees apply.

9 New Hire Work Permits

9.1 What is the main immigration category used for employers who wish to obtain work permits for new hires?

There are only two work visa categories which can facilitate a foreign national taking up permanent employment with a South African company – these are the Critical Skills Work Visa (“CSWV”) and General Work Visa (“GWV”) categories.

A CSWV may be issued to a foreign national possessing skills or qualifications determined to be critical for South Africa. The prevailing critical skills list was published on June 3, 2014. To make an application in this category, a foreign national will need to prove that his/her qualification/s and/or skills and post-qualification experience fall within the parameters of one of the critical skills categories by providing:

1. confirmation, in writing, from the professional body, council or board recognised by the South African Qualifications Authority (“SAQA”) or any relevant Government Department confirming his/her skills or qualifications and appropriate post-qualification experience;
2. if required by law, proof of application for a certificate of registration with the professional body, council or board recognised by SAQA; and
3. proof of evaluation of his/her foreign qualifications by SAQA and translated by a sworn translator (if applicable) into one of the official languages of South Africa.

A GWV may be issued to a foreign national who does not qualify for a CSWV; therefore, the point of departure is to determine whether the foreign national qualifies for a CSWV. As a pre-requisite for applying for a GWV, the prospective employer must first approach the South African Department of Labour (“DOL”) for a certification confirming that:

- despite a diligent search, they have been unable to find a suitable South African citizen or permanent resident with qualifications or skills and experience equivalent to those of the foreign national;
- the foreign national has qualifications or proven skills and experience in line with the job offer;
- the salary and benefits offered to the foreign national are not inferior to the average salary and benefits of South African citizens and permanent residents occupying the same or similar positions in South Africa; and
- the contract of employment stipulating the conditions of employment signed by both the employer and the foreign national are in line with labour standards in South Africa and made conditional upon the GWV being approved.

Proof of evaluation of the foreign national’s qualifications by SAQA and translated by a sworn translator (if applicable) into one of the official languages of South Africa are also required to support a GWV application.

9.2 Is there a requirement for labour market testing, to demonstrate that there are no suitable resident workers, before a work permit can be issued to new hires?

No labour market testing is required in respect of a CSWV application; however, a labour market test is required for a GWV application and proof thereof is included as part of the submission to the DOL.

9.3 Are there any exemptions to carrying out a resident labour market test?

A foreign national, in conjunction with an employer, may apply to the DHA Minister for a waiver to request to be exempted from the requirement to obtain the certificate from the DOL. This requires the submission of a formal waiver request to the DHA for adjudication. If favourably considered, a waiver letter is issued and the employer is exempted from the requirement (which includes the labour market test).

9.4 What is the process for obtaining a work permit for a new hire?

CSWV: The foreign national's foreign qualifications are evaluated by SAQA to determine local equivalency, pursuant to which a Certificate of Evaluation is issued. He/she approaches the relevant SAQA accredited professional body, board or council and obtains written confirmation of his/her qualifications or skills and appropriate post-qualification experience in relation to the critical skills category in which he/she wishes to apply for the work visa. Some professional bodies are voluntary – thus membership is not legally mandatory; however, it is generally necessary to obtain the written confirmation required. Registration with a statutory body, board or council is required by law for certain professions and proof of application for registration or registration, as opposed to written confirmation, is deemed sufficient by the DHA in terms of a current policy Directive it has in place. If the foreign national is required by law to register with any professional body, board or council, then he/she must provide proof of his/her application for registration.

GWV: The foreign national's foreign qualifications are evaluated by SAQA, pursuant to which a Certificate of Evaluation is issued. This prospective South African employer conducts the labour market search and combines evidence thereof with other mandatory requirements in a submission to the DOL. The DOL adjudicates the submission and, in terms of its processes, amongst others, conducts an onsite inspection at the employer's premises to evaluate its compliance to applicable labour legislation. Once the DOL has finalised its evaluation of the submission, it will send a notification to the employer and it will send its certificate directly to the DHA. It will also provide an indication as to whether or not the certificate supports the issuance of the GWV. If not, whilst it is still possible to attempt the application, it is generally futile to do so, as the DHA will almost certainly reject the application. If it is, then the foreign national may apply for the GWV, including the DOL confirmation which is sent directly to the employer, and the receiving South African Mission will retrieve the DOL certificate from the DHA when it adjudicates the application.

9.5 What is the process for the employee to obtain a visa as a new hire?

For both the CSWV and GWV applications, in addition to the aforementioned, the foreign national gathers all legally-required personal supporting documents for inclusion in the application; these include, but are not limited to, a Medical Report, a Radiological Report, Police Clearance Certificates from all countries in which he/she has resided for 12 months or more since his/her 18th birthday, where applicable, Marriage Certificate, Divorce Decree, Death Certificate of late spouse, passport photographs, etc. These are annexed to the required government application for a Temporary Residence Visa, along with all supporting documents from the South African employer, where applicable.

He/she then proceeds to submit the application to the South African Mission or its appointed Visa Application Centre ("VAC") in his/her country of citizenship or ordinary residence (which includes long-term temporary or permanent residence) and pay the required Government fee and, where applicable, VAC fee. A personal appearance is mandatory for the submission of the application. Certain South African Missions insist on retaining the passport and others do not. The practices of the South African Missions vary considerably. The passport might, however, be returned by post or courier if the foreign national provides the necessary pre-paid courier/postage envelope.

Once the work visa is issued, it is endorsed in the foreign national's passport. The work visa constitutes both a work and residence visa. The foreign national may then travel to South Africa immediately. The work visa will become active upon his/her admission to South Africa once the Immigration Officer has affixed an entry stamp.

9.6 How long does the process of obtaining the work permit and initial visa for a new hire take?

CSWV: An average lead time of 1.5 to over three months is required to complete the SAQA qualifications evaluation process and the membership or registration with the professional accredited professional body, board or council and obtaining the written confirmation, where possible. In the case of certain statutory professional bodies, boards or councils, this might take substantially longer.

GWV: The employer should allow for up to one month for it to conduct the labour market search and prepare the DOL submission and for the foreign national's qualifications to be evaluated by SAQA. The DOL takes an average of up to 60+ business days to complete its evaluation of the submission – at times longer. Thus, an overall leave time of three to over four months should be anticipated.

As with an ICT Work Visa application, there is no legislated processing/adjudication time for a work visa application once it has been submitted to a South African Mission. The processing times of the South African Missions vary substantially; some missions take as little as one to two weeks – others take up to four weeks and others in high-volume countries such as India and China can take as long as eight to twelve weeks.

9.7 How long are initial visas for new hires granted for and can they be extended?

Both the CSWV and GWV may be issued for a maximum period of five years at a time and they are renewable, subject to meeting renewal application requirements and legislative provisions at the time of renewal, as these might have changed. A renewal application must be submitted less than 60 days prior to the expiry of the work visa.

9.8 Is labour market testing required when the employee extends their residence?

As with the first GWV application, prior to renewing a GWV, it is necessary for the employer to make another submission to the DOL in order for it to issue a certificate to the DHA confirming that, amongst others, the foreign national continues to be employed in line with labour standards. Whilst the law does not expressly require that a labour market search be conducted again, it is currently a requirement of the DOL.

9.9 Can employees coming as new hires apply for permanent residence?

Yes, foreign nationals may apply for Permanent Residence Permits, if they qualify in one of the available categories.

9.10 What are the main government fees associated with this type of visa?

The government application fee is ZAR1,520, the equivalent of which is paid in local currency in the country in which the foreign national is submitting his/her work visa application. In countries where VACs are operational, additional service fees apply. Additional fees are charged by SAQA and the accredited professionals bodies, boards and councils, and these vary.

10 Conditions of Stay for Work Permit Holders

10.1 What are the conditions of stay of those who obtain work permits and are resident on this basis?

Work visas are issued with conditions denoted on the visa label. The conditions vary, but typically include the name of the employer, the occupation/capacity in which the foreign national is authorised to work and the period for which the visa is valid. The foreign national is restricted to only working for the employer specified in the occupation/capacity specified for the duration of the visa. He/she has a legal duty to abide by the terms and conditions of the work visa, as any violation of the terms or conditions causes the work visa to expire. He/she is required to depart from South Africa upon the expiry of the visa. It is possible for a foreign national to apply to change the conditions attached to the work visa, subject to meeting relevant application requirements and the approval of the application by the DHA.

10.2 Are work permit holders required to register with municipal authorities or the police after their arrival?

No, no additional registration requirements apply.

11 Dependants

11.1 Who qualifies as a dependant of a person coming to work on a sponsored basis?

Dependants are limited to spouses and dependent children. Parties to a legal marriage or civil union concluded in terms of the laws of South Africa or a foreign country, a customary union concluded in terms of the South African Recognition of Customary Marriages Act, or a permanent heterosexual or homosexual spousal relationship may be recognised as spouses.

11.2 Do civil/unmarried or same-sex partners qualify as family members?

Yes, unmarried same-sex/opposite-sex partners who are parties to a permanent spousal relationship qualify for recognition as spouses, provided that neither party is still party to a legal marriage or any other legally-recognised union/spousal relationship and provided

their relationship has existed for at least two years prior to the date of the application for the visa.

11.3 Do spouses and partners have access to the labour market when they are admitted as dependants?

Spouses and partners of work visa holders do not have an automatic entitlement to pursue employment in South Africa. They may, however, apply for a CSWV or GWV in their own right from within the country, subject to meeting application requirements.

11.4 Do children have access to the labour market?

No, they do not.

12 Permanent Residence

12.1 What are the conditions for obtaining permanent residence?

There are 11 categories in which a Permanent Residence Permit (“PRP”) may be applied for; however, from a corporate employment perspective, possibly the two most relevant options are as follows:

On the basis of the foreign national having held a work visa for a period of five or more years and who has received a permanent offer of employment. This is a direct residence PRP application category which is contemplated in Section 26(a) of the Immigration Act. The work visa holder will be the main applicant and the application does not extend to included immediate family members; they may only apply for their PRPs once the main applicant has been granted same.

On the basis of extraordinary skills or qualifications, which is subject to the foreign national qualifying in one of the critical skills categories provided for on the Critical Skills List and providing at least five years’ post-qualification experience. This constitutes an application on other grounds (as opposed to direct residence), which is contemplated in terms of Section 27(b) of the Immigration Act. The category corresponds with the CSWV category. The application can extend to include the immediate family members of the work visa holder/main applicant.

Whilst there is a category for a PRP to be issued to a foreign national who has received a permanent offer of employment provided for in Section 27(a) of the Immigration Act, which does not require him/her to have held a work visa for five or more years, the application must, amongst others, fall within annual limits to be determined by the DHA Minister, after consultation with the Minister of Trade & Industry, Labour, Basic and Higher Education & Training and these limits have not been published; thus, applying in this PRP category is, in our opinion, currently not viable.

Other categories are available for spouses, children and relatives (within the first step of kinship) of a South African citizen or PRP holder (correlates with the Relative’s Visa category), establishing or having established a business in South Africa (correlates with the Business Visa category), retirement (correlates with the Retired Persons Visa category), refugee status and based on minimum net worth.

Permanent residence is not an automatic entitlement – rather, a formal application including all legally-required supporting documents must be submitted to the DHA at the relevant provincial Visa Application Centre and it can take eight to 12+ months to be adjudicated.

12.2 Is it possible to switch from a temporary work visa to a work visa which leads to permanent residence?

A foreign national in possession of a CSWV or GWV who qualifies to apply for a PRP may do so directly without having to adjust his/her status. The application may be submitted from within South Africa while he/she is working. He/she must, however, maintain his/her work visa status while the PRP application is being adjudicated, as the submission of the application alone does not afford him/her any relief or provisional entitlement to the benefit of the PRP status (including working beyond the expiry date of his/her work visa), unless and until it is issued to him/her. Once the PRP is issued, subject to approval of the application, it supersedes the foreign national's temporary residence work visa status and he/she can allow it to expire. Whilst the Immigration Act does not expressly prohibit the holder of an ICT Work Visa from applying for a PRP, if he/she qualifies, the DHA, in terms of its interpretation of the law and current practices, imposes certain restrictions and does not favour such applications from within South Africa.

13 Bars to Admission

13.1 What are the main bars to admission for work?

There are many challenges in the sphere of South African immigration. Whilst, in principle, the Immigration Act is a robust piece of legislation which, if administered optimally in line with its provisions, would be highly effective in ensuring that companies and the South African economy at large have swift access to the needed valuable contribution of foreign nationals, as well as facilitating much-needed foreign investment, there are a number of administrative challenges which hamper the efficiency of the system.

There are positive aspects to the immigration system within South Africa, as can be seen from the implementation of privately-owned VACs nationwide and in many locations worldwide that accept applications on behalf of the DHA, thus improving the integrity of the application submission and initial administration process and the overall user experience. The DHA is also progressively seeking to improve its use of technology to enhance the functions of immigration control.

Whilst it cannot be disputed that the immigration systems within any country are subject to numerous unscrupulous applications and many other challenges faced by authorities, particularly when there are ever-increasing strong economic push factors from certain countries where hardships are rife, this should not be to the detriment of legitimate applications from highly-skilled and qualified immigrants, a balance between strong enforcement and a reasonable and fair administration in line with legislative provisions must be struck. Although many applications are successful, a substantial number of legitimate and legally-compliant applications for skilled

and qualified corporate professionals, including those in professions that are deemed critical to South Africa, are unnecessarily refused without valid legal reasons.

Whilst foreign nationals have the legal right to two appeal or review processes in relation to any administrative decision which materially and adversely affects their rights, these processes can take excessive periods of time, with no guarantee of success and during which foreign nationals and employers are left in a state of limbo. In many instances, those who are present in South Africa are no longer able to work and derive an income and companies and foreign nationals alike are at times eventually forced to abandon the visa/permit application processes and make alternative arrangements.

Many foreign nationals do not have the financial resources to litigate against the DHA and many companies do not wish to litigate against it over concerns of the negative sentiment it might create. Even in those cases where they do intend to do so, the appeal/review internal remedies must have been exhausted first which can take so long that it eventually reaches the point where it is no longer viable to do so.

South Africa is generally viewed as a difficult jurisdiction by companies when it comes to immigration application processes.

13.2 Are criminal convictions a bar to obtaining work permission or a visa?

This depends on the nature of the criminal conviction and the sentence imposed by the Court of Law. Any foreign national in respect of whom a warrant is outstanding or a conviction has been secured in South Africa or a foreign country in respect of genocide, terrorism, human smuggling, trafficking in persons, murder, torture, drug-related charges, money laundering or kidnapping is by automatic statutory operation deemed a Prohibited Person and does not qualify for a port of entry visa, admission into South Africa, a visa or a permanent residence permit. However, it is possible to apply to the Director General of the DHA to have a foreign national to be declared not to be a prohibited person, provided a compelling case can be presented. This requires a formal submission to the DHA for consideration, which is entirely discretionary. If the submission is favourably considered, the foreign national will receive a written confirmation and he/she may proceed to apply for the visa.

A foreign national with previous criminal convictions without the option of a fine for conduct which would be an offence in South Africa may be declared an Undesirable Person by the DHA and, once declared as such, he/she will not qualify for a port of entry visa, admission into South Africa, a visa or a permanent residence permit. The emphasis here is that the declaration is discretionary. Should the DHA declare a foreign national undesirable, it is possible for the foreign national to apply to the Minister of the DHA to have the declaration of undesirability waived, provided sufficient good cause can be presented. This also requires a formal submission to the DHA for consideration, which is entirely discretionary. If the submission is favourably considered, the foreign national will receive a written confirmation and he/she may proceed to apply for the visa.



Jonty Fetting

J Fetting Inc.
8th Floor, Tarquin House
81 Loop Street
Cape Town
South Africa

Tel: +27 21 422 0570
Email: jonty.fetting@jfettinginc.com
URL: www.jfettinginc.com

Jonty Fetting is corporate immigration compliance specialist with a wealth of knowledge and experience in South African immigration legal compliance, advisory and process solutions gained through over 18 years of experience at a high level in the industry. Having commenced his career at Andersen (previously Arthur Andersen) in 1999, he went on to work in Senior Consulting roles within the Tax & Legal Service Lines of KPMG and Deloitte. In 2004, Jonty established his own practice. Jonty is fluent in the language of immigration and compliance in the sphere of corporate immigration. He studied law at the University of South Africa and he has a proven track record of successful management of large corporate engagements spanning all major industries. He has long-standing relationships with many of the world's largest global immigration laws firms and international immigration, relocation and destination service providers serving as their South African immigration partner of choice.



J Fetting Inc.

you're welcome.

J Fetting Inc. a dynamic, solution-orientated market leader in providing fully-outsourced corporate immigration service solutions, document procurement and legalisation service for South Africa. We are proud to represent local and multi-national companies and many of the world's largest global immigration law firms, global immigration service providers and international relocation and destination service providers delivering world-class, compliant immigration services and solutions. We are more than just a service provider to our clients; we are a dedicated partner – as committed to enhancing their reputation and assisting their business growth as we are to our own.

Other titles in the ICLG series include:

- Alternative Investment Funds
- Anti-Money Laundering
- Aviation Law
- Business Crime
- Cartels & Leniency
- Class & Group Actions
- Competition Litigation
- Construction & Engineering Law
- Copyright
- Corporate Governance
- Corporate Investigations
- Corporate Recovery & Insolvency
- Corporate Tax
- Cybersecurity
- Data Protection
- Employment & Labour Law
- Enforcement of Foreign Judgments
- Environment & Climate Change Law
- Family Law
- Fintech
- Franchise
- Gambling
- Insurance & Reinsurance
- International Arbitration
- Investor-State Arbitration
- Lending & Secured Finance
- Litigation & Dispute Resolution
- Merger Control
- Mergers & Acquisitions
- Mining Law
- Oil & Gas Regulation
- Outsourcing
- Patents
- Pharmaceutical Advertising
- Private Client
- Private Equity
- Product Liability
- Project Finance
- Public Investment Funds
- Public Procurement
- Real Estate
- Securitisation
- Shipping Law
- Telecoms, Media & Internet
- Trade Marks
- Vertical Agreements and Dominant Firms



59 Tanner Street, London SE1 3PL, United Kingdom
Tel: +44 20 7367 0720 / Fax: +44 20 7407 5255
Email: info@glgroup.co.uk

www.iclg.com