

# **SOUTH AFRICA'S NEW IMMIGRATION LAW**

**A salvageable instrument  
for economic growth?**

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**THE CENTRE FOR DEVELOPMENT AND ENTERPRISE**

## **EXECUTIVE SUMMARY**

*The passing of the new Immigration Act, which replaces the notoriously defensive Aliens Control Act, should have been greeted with relief. Instead, the response among South Africans concerned with economic growth has been dismay and confusion.*

*Why is this? And how can the situation be rescued?*

*South Africa has two closely linked shortages. One is a shortage of productive skills and practical competencies, and the other is a shortage of people who are employable, self-employable or readily trainable by employers in a modern, knowledge, technology and technique-based economy. There are only two solutions available. One is a dramatic upgrading of our educational and training systems. This is vitally necessary, but the bold reforms required to equip a really large number of South Africans with the skills our economy needs will take years to implement. These are years South Africa cannot afford to waste. The hard reality is that our only short-term policy option is an open door, market-driven immigration policy. (This will itself speed up the process of training South Africans by allowing us to attract foreign teachers and trainers.)*

*CDE emphatically rejects the view that skilled immigrants prevent South Africans from finding jobs. The opposite is true. One qualified immigrant teacher of mathematics, science or bookkeeping can probably "create" scores of jobs without in any way reducing the chances of a South African becoming employed. Even more importantly, it is estimated that every skilled professional, directly or indirectly generates additional jobs. Each new skilled immigrant will create new jobs for South Africans simply by going about their business, buying goods and services and paying tax.*

*Unfortunately, and despite President Mbeki's commitment to review immigration laws to 'enable us to attract skills into our country', the new Immigration Act reflects considerable hesitancy and confusion in the ruling party about the importance of skilled immigration. The parliamentary process that produced the new Act also reflected deep contradictions among our lawmakers and key stakeholders around the legitimacy of business concerns and interests and about the principle of non-racism. The process also demonstrated some barely disguised xenophobia.*

*More specifically, the new Act imposes very onerous responsibilities on the Department of Home Affairs by requiring it to consult extensively with the Departments of Labour and Trade and Industry in the creation of an elaborate set of quota and skills certification requirements and then to enforce these complicated rules. These requirements are supposed to ensure that no South African will lose a job to a skilled immigrant. This is a wasteful task – employers will almost never prefer a skilled immigrant to an equivalently skilled South African since the total cost of employing the South African will invariably be lower. It is also an ill-advised task, given all the evidence that skilled immigrants create jobs for locals and help train locals. Slow and pointless bureaucratic procedures that have prevented foreigners from bringing their knowledge and energy to South Africa in the past will not be alleviated and in some respects are likely to be reinforced.*

### ***Reducing the damage***

*Ultimately, South Africa will need a bold new Immigration Act that really does create an open door for skilled people and entrepreneurs.*

*In the short term, however, regulations to the current Act should go as far as they can to reflect the courage and leadership necessary to go for growth and investment. The Act's reliance on a quota system will not make this easy, and the regulations must, of course, be compatible with the Act. Nevertheless, correctly framed regulations could go a long way to reduce the damage.*

*With this in mind, CDE suggests the following principle to guide the framing of the regulations:*

***The guiding principle of the regulations should be to allow entry to any person whose skills, aptitudes, experience (lifelong learning) and previous occupations show that he or she will be able to earn a living in the private sector, pay taxes and consume commercial goods and services. South Africa may not be short of job seekers but it is short of taxpayers and people who need no support from the state.***

*Exactly how the categories and quotas required by law are developed is much less important than that they should conform to this guiding principle. If this principle is followed, the Immigration Act regulations will serve the national interest in economic growth and job creation. Equally, in the unlikely event that too many people, or the wrong kinds of people, are allowed in, regulations guided by this principle could be rapidly altered to deal with the problem.*

### ***South Africa needs a new Immigration Act***

*What is unknown at this stage is how far the regulations will be able to meet these requirements. If they can reduce the impediments to the entry of valuable skills to a significant extent then they will represent an appropriate interim measure. This remains to be seen when the regulations are made public.*

*In the end, however, we will need new legislation to correct the more fundamental weaknesses of the current Act.*

*South Africa is not short of job seekers but it is desperately short of skilled people and entrepreneurs. Our immigration regulations - and ultimately our legislation - should reflect this reality.*

## **SOUTH AFRICA'S NEW IMMIGRATION LAW**

### **A salvageable instrument for economic growth?**

What does our new legislation on immigration add up to? Everyone agrees that it will not facilitate the unconstrained entry of skills that our economy urgently requires, but is it a step in the right direction? Or is it a “mess”, as an editorial in *Business Day*, a newspaper known for its scrupulously even-handed editorials, summed up the general impression of the long-awaited new legislation?<sup>1</sup>

This new law replaces the notoriously cumbersome and defensive Aliens Control Act that had as its major purpose the discouragement of as much immigration as possible. The demise of that Act, one of the last vestiges of the old siege mentality of the era of white supremacy, should have been greeted with relief, instead of the current dismay and confusion.

Over the past seven years CDE has reacted at length at all stages in the evolution of the new legislation because this issue is of cardinal importance to the economic future of the country. CDE therefore considers it important to take stock of the situation now that the Act has been passed and to communicate its assessment of ‘where we are’ to its stakeholders and the wider public.

What are the issues, what are the current problems and why the confusion? How can the situation be rescued?

#### **1. THE ISSUES**

Firstly, what are the fundamental issues?

##### **Illegal immigration is an undisputed problem.**

CDE agrees with government, organised business and labour that the large number of illegal immigrants within our borders is a serious matter. Quite aside from what the effects of this phenomenon might be on the economy and the society, it is a problem that has to be urgently addressed. No administration claiming to be competent and viable can afford to countenance illegal or extralegal activity on the scale that illegal entry into the country most probably amounts to.

While everyone agrees that the situation has to be brought under control, there is enormous confusion about the scope of the problem. What broad numbers are we speaking of? Could it be that well over 10% of the economically active persons in the country are here without official sanction? What do these people want? Are they temporary informal migrant workers and traders who will return to their home countries of their own accord or do they aspire to permanency?

Clearly we need serious research on this large and complex problem – research that goes well beyond the interesting but restricted case studies and provisional estimation procedures conducted hitherto. As yet there are no guarantees that this research will be launched. The

yet to be established new Immigration Board should take up this research challenge as a matter of urgency.

But this is not the burning issue – virtually everyone agrees that this problem has to be brought under control.

### **Skilled legal immigration is the contentious issue**

The burning issue is skilled immigration and what government's approach to it should be. It is this issue that underlies all the controversy and confusion at the moment. And underlying this are some fundamental questions. How badly does our economy require the additional skills that immigration could bring? How should "skill" be defined – is a formally unskilled person with vocational experience and a track record of productive output not effectively "skilled"? What are the benefits for society of the legal immigration of people with skills, qualifications and experience, and what are the consequences of failing to attract them? What is South Africa's likely trajectory over the next ten years if we continue to be burdened by a serious skills shortage? How much better will South Africa do over the foreseeable future if this constraint is loosened? Should race be a factor? What are the implications of the answers to these questions for policy and legislation?

CDE has attempted to answer all these questions at some length in previous publications and responses to the legislative process.<sup>2</sup> It is unnecessary to repeat the evidence already presented, but it is necessary to sum up the keynote conclusions.

### **CDE's conclusions on the need for new skills from abroad**

1. *South Africa has a very serious deficit of productive skills.* As the new global "knowledge" economy deepens its impact and extends its inter-penetration with our own, this deficit will deepen. All major analyses of our competitiveness point to our human resource base as the most serious drag on our likely future growth. The output of our education system, both in absolute terms and relative to changing demands on it, has weakened in recent years and is not likely to turn around for the next few years. While there has been some improvement in matric pass rates, our output of university level maths and science passes is still declining in absolute terms.<sup>3</sup> South Africa is probably the only modern economy in the world in which this is happening. If our average economic growth rate improves to even half the rate we need to reduce unemployment it will run into serious human resource constraints. The most recent survey among its members by the Southern African German Chamber of Commerce and Industry shows some improvements in business confidence in the country, but 52% of the 127 companies responding are pessimistic about the likelihood of our educational system improving enough to support increased productivity.<sup>4</sup> South Africa cannot develop a successful economy that creates large numbers of new jobs without an injection of new skills. The much-needed turn-around in the education system will take time to deliver enough home-grown skilled people to make a real difference to our economic prospects. The only short to medium term solution is to source new skills from abroad through immigration. (See box: South Africa's need for foreign skills)

### **SOUTH AFRICA'S NEED FOR FOREIGN SKILLS**

Organised business and the professional organisations are unanimous in identifying a major shortage of skills in South Africa. Many of these groups have been calling for an 'open door' to skilled immigrants:

'Business is convinced that the immigration policy we need should constitute a progressive, modern approach which would help to integrate South Africa with the rest of the world and ensure that necessary skills are made available from all sources to promote economic growth and development. The reality is that, at the present pace, we will never catch up with the exponentially accelerating knowledge economy of the developed world, because we simply cannot create skills quickly enough, nor do we have instructors to impart them, unless we look outside our borders. -- **Business South Africa, 15 May 2002**<sup>5</sup>

"Liberalisation of immigration requirements [is needed] in order to reduce our skills deficit and enhance risk-taking in the economy." - **Kevin Wakeford, CEO, South African Chamber of Business, November 2001**<sup>6</sup>

"A shortage of skilled workers is a deterrent to foreign companies considering investing in South Africa." -- **Wolfgang Thomas, chief economist, Wesgro, 20 March 2002**<sup>7</sup>

"The general lack of skills, in particular financial management skills, in South Africa presents a serious challenge.... This is illustrated best by the small number of Chartered Accountants relative to the population and is compounded by the so-called 'brain drain.'" - **Abel Dlamini, chair, Public Sector Committee, South African Institute of Chartered Accountants, April 2002**<sup>8</sup>

"It is a crisis. We are losing white and black engineers to other countries. Our immigration policies stop us from bringing skilled people in." -- **Stuart Melaia, telecoms placement consultant, 15 September 2000**<sup>9</sup>

"More than a quarter of all South African doctors who graduated between 1990 and 1997 are currently working abroad." -- **South African Medical Association, 9 July 2001**<sup>10</sup>

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2. The skills of new immigrants come with some value-adding bonuses to boot. They bring skills and educational qualifications that have been funded by the taxpayers of other countries and which are therefore very cheap additions to South Africa's assets. Furthermore the types of people who migrate to new countries have demonstrated universally that they are more often than not energetic, risk-taking individuals who work extra hard to establish themselves in their new homes. Aside possibly from some Far Eastern countries, *there are few successful economies that do not owe a large measure of their economic progress to immigration.*
3. The immigrants who have been most useful are of three kinds – people with high academic, scientific and technical qualifications, people with special craft skills and vocational experience (e.g. the wine-makers who came to South Africa with the

Huguenots), and people who may not have had particular qualifications but who have excelled in starting small businesses that have grown into large industries. The contributions of the last category are unpredictable – they cannot be identified in advance – *but entrepreneurs (starting from very humble beginnings) are the type of immigrant whose contributions have been most economically valuable.*

4. *South Africa itself is testimony to the benefits that immigration of able people can bring.* Here CDE refers not only to immigrants from the western nations but to the enrichment of South African society and its storehouse of talent throughout recorded history. People of Malay extraction, people from India and Pakistan, from Eastern Europe, the Middle East (Lebanon) and the Far East have all made major contributions to South Africa's skills base. Most recently we have benefited from the immigration of people from African countries to our North. Our universities in particular have benefited significantly by the appointment of academics from a variety of African countries, some of them having rapidly become familiar public figures.
5. Yet all over the world, immigration is an emotional political issue. Popular sentiment tends to over-ride reason. People fear immigration (except in North America where the general population seems to realise how much the contributions of immigrants have supercharged the economy). For instance, Europe is now going through a significant new wave of xenophobia. But it is important to remember the facts: the immigrants who are feared are not South African nurses and teachers, Indian computer scientists and technicians, Chinese restaurant owners, North African chefs, Asian entrepreneurs or Latin American musicians. The people who arouse resentment and fear are unskilled refugees or illegal immigrants, as is the case here. *No one in South Africa can seriously object to Cuban doctors, to Asian small factory owners or to East and West African academics.*
6. Immigration is feared most where unemployment is highest, which is another reason why North America, with typically low levels of unemployment, is so tolerant of immigration. Western European critics of immigration seldom stop to consider that their relatively high rates of unemployment are caused much more by all the laws, regulations and agreements in the marketplace protecting their own employees than by the new immigrants, who generally make their way without such cushions of security.
7. Our own shockingly high and rising rates of unemployment, among the highest recorded rates in the world, are largely due to the fact that huge proportions of our school-leavers, chronically unemployed and retrenched workers simply do not have the basic levels of literacy and numerical abilities to be employable, self-employable, or easily trainable. The *Mesebetsi Labour Force Survey* (2001) conducted by FAFO for the Department of Labour has shown once again that unemployment rates among people with any kind of post-school qualification are less than one third of the average, and among people with technical, vocational, mathematical, science-based and commercial qualifications unemployment is even lower.<sup>11</sup> The vital implication of this is that *one qualified immigrant teacher of mathematics, science or bookkeeping can probably*

*“create” scores of jobs without in any way reducing the chances of a South African becoming employed.*

8. *We are also losing skills through emigration.* This is not unusual in emerging markets but South Africa is not replenishing these skills through immigration. In 2001, official figures (which are generally accepted to underestimate emigration by well over 50%) show that we lost nearly six times more professionals and technicians than we gained. A recent University of South Africa study estimates that 1,6 million South Africans are already living abroad and that in 1999 alone no fewer than 39 000 more joined them. Some 20% of South African skills have been lost through emigration. Worse still, it estimates that around 70% of skilled South Africans consider emigrating. The study quotes the fact that some 35% of doctors who graduate from the Wits Medical School have left the country.<sup>12</sup> The fewer than 4000 legal immigrants that enter the country each year are an insignificant compensation for the loss.<sup>13</sup>
9. All these figures take no account of the fact that, not only will our unskilled labour force be decimated by the *Aids pandemic* in years to come, but our skilled and professional labour will also be gravely affected.

### **Wider benefits of skilled immigration**

The arrival of new skills would also have important wider benefits, quickly reaching beyond the companies that employ them or that they create, or the students they teach.

South Africa has a problem of relatively low fixed investor confidence. This problem has multiple causes and by no means all of them can be laid at the door of policy. Happily many of the problems affecting investor confidence can be addressed and with the underpinning of sound macroeconomic policy the government is well positioned to correct the factors discouraging fixed investment in the short to medium term. However, there are some constraints in our economy that are directly or indirectly linked to investment and capital availability that are impossible to change in the short to medium term if only our internal options and resources are considered. One of these is our low savings rate, another is the low proportion of economically active people who pay income tax, a third is our relative shortage of viable medium scale entrepreneurs – what the IMF has called our “missing middle.” *In each respect productive immigrants provide the probability of short-term alleviation of the constraint.*

Productive immigrants pay tax, not least because the conditions of their work permits would make it very unwise for them to evade tax. Immigrants tend to save a great deal because they have to rebuild their security in a new country. A very large proportion of the medium size factories, building contractors, and specialised commercial ventures in South Africa have been started by immigrants. The UNISA study referred to above estimates that every skilled professional, directly or indirectly generates 10 unskilled jobs.<sup>14</sup>

For these reasons, South Africa's need for skilled immigrants is far larger than only the demand created by employers' need for imported skills. We should go beyond satisfying particular employers' immediate skilled labour shortages. Rather, we should aim to expand

the pool of skills and entrepreneurial energy in the economy as a whole. It is, after all, a generous supply of entrepreneurial energy that gives an economy real drive.

### **CDE advocates an open door policy**

It is for all these reasons, and others, that CDE has in its submissions in respect of immigration policy argued for an open door approach to foreign skills. CDE has gone further than most of the other advocates of a liberalisation of immigration policy by promoting the case for the unfettered entry of all people who have been offered employment AND those who will independently be able to find productive employment or employ themselves. We have been criticised for this position on the grounds that the inflow of people could crowd out opportunities for South Africans.

CDE, however, is totally unconvinced by this kind of criticism.

South Africa is not a very popular destination for would be immigrants. In fact the opposite is true – South Africa will always struggle to compete for skilled immigrants with the huge skills-hungry economies of Europe and North America. As South Africa knows to its cost, these countries actively 'shop' for skills in South Africa and elsewhere in the developing world.

Even if we reach the happy stage of attracting more skilled people than we lose, the inflows are likely to be very modest indeed. And this open door approach need not be a permanent condition but can in fact be narrowed at some time in the future if it is assessed that the country is training enough of its own skills to grow the economy, create millions of new jobs and compete successfully.

To sum up, South Africa has four closely linked shortages:

- A shortage of recognised formal skills and professional, technical, commercial and other vocational competencies,
- A deficit of people at a level of basic education in maths, science, commerce and other numerate disciplines that would allow them to be deployed or trained in the myriad and diffuse tasks in a modern, knowledge, technology and technique-based economy,
- A shortage of people with managerial and project management abilities, relevant not only in the private sector but also in a variety of development roles in the public, semi-state and NGO sectors, and
- Far too few people with focused entrepreneurial aptitudes and motivations, whether accompanied by formal skills or not, who are self-employable and likely to add value in an economy with relatively weakly developed middle ranges of competitive business activity.

There are only two solutions available. One is a dramatic upgrading of our educational and training systems and the other is sourcing the skills and competencies abroad. The former is the most vital strategy and a range of relevant reforms and policies are being pursued. However, it will be years, if not decades, before current educational reform and training initiatives bear results on scale, and these very initiatives are constrained by a lack of skilled educators, trainers and mentors.

Therefore the only short-term alternative is the latter – an open door and market-driven immigration policy. It bears repeating that this approach is an essential ingredient in the success of the longer-term education and training option that will create home-grown skills, as we desperately need foreign teachers in our universities, schools, and other training institutions.

## 2. THE IMMIGRATION DEBATE AND THE RECENT LEGISLATIVE DEBACLE

South Africa's skills crisis is well understood by the President and key Cabinet members. The critical need for skilled migration was fully acknowledged by President Mbeki in his State of the Nation speech in February 2001 when he committed government to 'improving competitiveness by lowering input costs throughout the economy' and to reviewing 'immigration laws and procedures to attract skills into our country'.<sup>15</sup> (See box: Senior politicians on the skills crisis)

### SENIOR POLITICIANS ON THE SKILLS CRISIS

South Africa's most senior politicians have identified our nation's shortage of skills and knowledge as a major obstacle to rapid economic growth and job creation, as these comments show:

"... much more needs to be done to improve our skills base....Immigration laws and procedures will be reviewed urgently to enable us to attract skills into our country." - **President Thabo Mbeki, 9 February 2001**<sup>16</sup>

"The South African economy is not one of growth without jobs.... it is in need of specific kinds of skills.... We need to expedite programmes dealing with skills development." -- **President Thabo Mbeki, 25 July 2002**<sup>17</sup>

"... our economy has restructured and is becoming more services oriented which requires new skills.... the skills that are abundantly available in the economy are those that are not required by the economy." - **Deputy President Jacob Zuma, 11 June 2002**<sup>18</sup>

"... we need to open up the country to the skills our economy needs, as stated by the President in his State of the Nation Address last year." - **Minister Mangosuthu Buthelezi, 19 March 2002**<sup>19</sup>

"In every sector of our economy, highly skilled labour is in high demand and vacancies cannot be filled." - **Minister Alec Erwin, 21 May 2002**<sup>20</sup>

"The defining line for economic competitiveness of nations is today drawn between those nations that are knowledge rich and those that are knowledge poor." - **Minister Kader Asmal, 14 June 2002**<sup>21</sup>

"It is not correct to assume that every job occupied by a non-South African means one job less for a South African. We need managed immigration that can contribute to stimulation of economic growth, development and create jobs for South Africans." - **Mpho Scott, Chairperson of the Home Affairs Portfolio Committee, 17 May 2002**<sup>22</sup>

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The President has recently been struck by the large number of positions advertised in the press, reflecting vacancies that the South Africa Chamber of Business estimates at no fewer than 500 000.<sup>23</sup> The weakness of our educational system is also fully recognised at cabinet level. For example, the Minister of Education has recently bemoaned the fact that South Africa has a low graduation rate and that only some 15% of its 600 000 tertiary level students succeed in obtaining the qualifications that they enrolled for.<sup>24</sup> One would expect, therefore, that the need for skilled immigration would be an issue of common agreement among opinion leaders and stakeholders. If the recent parliamentary process surrounding the new Immigration Act is anything to go by, however, South Africa is at war with itself over the issue of immigration. (See box: Race and immigration).

The legislative process, including the hearings by the Parliamentary Committee on Home Affairs, was muddied to put it mildly, reflecting a confusing interplay of political interests and hostilities, near-xenophobic sentiment, issues of racial transformation and above all a failure on the part of Cabinet to exercise leadership. The tortuous process that has finally led to the enactment of the new immigration legislation in the final minutes of the 11<sup>th</sup> hour to meet a constitutional deadline, has disappointed all people whose over-riding commitment is to economic growth. It has also yielded rich but not particularly inspiring insights about a lack of focus and judgement in our politics. For example it has revealed that government appointed office bearers are not always the right people for the job, as seen in the ineffective performance of the earlier chairperson of the portfolio committee, who was replaced too late for his successor to produce the best results. It has not, however, resulted in the kind of legislation that South Africa needs and that was promised by President Mbeki in his State of the Nation speech in February 2001. CDE considers that it is necessary to record some key elements in the whole process.

### **The draft legislation**

After intensive and expansive debate around the White Paper, the Minister and Department of Home Affairs initially produced draft legislation that, technical difficulties notwithstanding, was a huge improvement on the Aliens Control Act. The new draft legislation was basically intended to be market friendly and to support growth and investment. CDE recognised that the draft was a large step in the right direction but on the basis of its commitment to economic growth and the ultimate prosperity of all South Africans, we also emphasised the negative implications of the draft for the country's skills base.

From the vantage point of its own interests, the reactions of business were mixed. Organised business appreciated the provision for corporate permits, allowing large businesses to act as agents in issuing work permits subject to certain prescriptions. They also accepted that the outsourcing of certification to Chartered Accountants would speed up applications and avoid less-efficient departmental procedures, with reservations about the affordability of CA's for smaller businesses.

### RACE AND IMMIGRATION

It is hard to avoid the suspicion that at least some opposition to skilled immigration is fuelled by short-sighted feelings of hostility towards foreigners, and particularly non-African foreigners. (Of course, when unskilled immigration is discussed, these negative perceptions are often extended to foreign Africans.) For example:

"It is said of the current legislation [the Aliens Control Act, since replaced by the Immigration Act] that it stems from the apartheid era and is racist and should therefore be removed from our statutes. It must be realised that this legislation and its basic principles stem from 1913, shortly after the unification. The reason for this legislation is however, extremely interesting. It was to keep undesirable, fortune-hunting citizens (whites) from Europe, America and Canada from pouring into the country....

The experience of the enforcement officers of the Department in their daily contact with and assistance to other South African security institutions has taught us one serious lesson. Approximately 90% of foreign persons, who are in the RSA with fraudulent documents... are involved in other crimes as well.... There are a large percentage of undocumented illegal migrants who... are affecting our normal citizens on grassroots level seriously. I refer to the unemployment problem. I am not an expert on labour but from the figures quoted in the media it appears that unemployment is never adjudged to be less than 10% and very often higher.... 10% or more the population are illegal aliens. The equals most of the quoted unemployment figures." – **Billy Masethla, (then) Director-General of Home Affairs, 15 April 2002**<sup>25</sup>

"The Bill gives more priority and preference to those who have capital to come to South Africa with no hindrance. It discriminates against those without capital, specifically Africans....Limits should be set on the extent of the foreign ownership of land in South Africa.... The sad truth of the matter regarding unrestricted foreign ownership of the land, is that we may find that due to land hunger among the majority of South Africans, the government may be forced to buy back the very land that it is currently making available to foreign owners at exceedingly inflated prices." – **Dr Sehlare Magetlaneng, Senior Research Specialist, Africa Institute, 23 April 2002**<sup>26</sup>

"The broad thrust of the Bill places considerable emphasis on highly skilled foreign workers....

We are concerned about the impact that the overemphasis on highly skilled workers will have on national programmes prioritising the development of local skills.... We believe that the Bill should emphasise the importance of immigration policy in facilitating regional socio-economic development generally.... The Bill's failure to do this, combined with its emphasis on highly skilled and qualified individuals, will have the indirect effect of discriminating against black foreigners, particularly from within the Southern African region...." -- **COSATU, NACTU and FEDUSA, 18 April 2002**<sup>27</sup>

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Either in anticipation of or as a result of reactions by other Departments and stakeholders consulted, some qualifiers to the general tendency of the Bill towards market friendliness were incorporated in the Department of Home Affairs' draft. These alarmed business.

The proposal in the White Paper for an independent Immigration Board with the power to formulate and define implementation policy, was dropped and replaced with a Board with advisory functions. This was perhaps not surprising. Only very confident governments are happy to devolve their powers.

The qualifications to the principle of market friendly migration policy included provisions for:

- a levy based on the remuneration of foreign employers to be paid into the National Training Fund,
- certification that the terms and conditions of the employment of immigrants would not be lower than that prevailing for local employees, any inflation due to scarcity of skills notwithstanding,
- surveillance of such certification by the Department of Labour,
- the establishment of the principle of regulation by skills quotas, although such provisions were according to the Department of Home Affairs intended to be limited to exceptional cases. (There were alternative provisions that could have accommodated most applicants for work permits)
- and, above all, general wording that *could* have allowed huge scope of discretion by officials, in particular the use of the term “may” instead of “shall” in defining the obligations of the Department of Home Affairs to issue permits to foreigners.

Understandably in a high tax regime, business was resolute in opposing the training fund levy and the requirements in respect of training contributions by holders of corporate permits. The levy would have added to business costs and would have amounted to an effective increase in taxes.

### **The parliamentary process**

It is noteworthy that the amended versions of the draft legislation represent the first time that parliament itself has framed legislation. In one sense this is a valuable departure from the rubber-stamping that has characterised the passage of other legislation. While it is clear that the Portfolio Committee applied itself energetically in the final stages of the process, the earlier stages were less than impressive.

Although earlier salvos were fired, it has been in the deliberations and presentations made to the Parliamentary Committee for Home Affairs, chaired by the ANC, that the quite fundamental contradictions between the requirements for growth and investment and the inclinations of political decision-makers and key stakeholders become evident.

**HOW NOT TO DEAL WITH IMPORTANT LEGISLATION**

The following table summarises the parliamentary processing of the Immigration Bill from late October 2001 to May 2002. This process unfortunately combined lengthy delays and confusion in its first phase with extreme hurry and other forms of confusion in its final phase. It further combined painstaking consultation until mid-May 2002 with a nearly unprecedented display of ruthless majoritarianism thereafter. It illuminates the complexities of the relationship between the IFP and the ANC, but does so, regrettably, by providing South Africa with a textbook example of how not to make a law.

|                 |   |
|-----------------|---|
| 1997-2001       | 5-year consultative process on immigration policy; including Green Paper on international migration, 1997; White Paper on international migration, 1999; draft Immigration Bill, February 2000; international consultative conference, July 2000; extensive inter-departmental and public consultation, NEDLAC input and Cabinet processing, including a full-day Cabinet workshop, 2000; further Cabinet deliberations, 2001/2 |
| 24 October 2001 | The Chair of the Home Affairs Portfolio Committee, Aubrey Mokoena, MP, rules that the Bill is to be 'read aloud line by line, in order for the Committee members to know it backwards and forwards, as the Cabinet does.'   |
| 13 March 2002   | Mokoena is called before the Parliamentary Rules Committee and instructed to expedite the processing of the Bill in order not to miss the Constitutional Court deadline of 2 June 2002 to amend the Aliens Control Act.   |
| 19 March 2002   | The Minister of Home Affairs, Mangosuthu Buthelezi, introduces the Bill to the Portfolio Committee and emphasises that it has received Cabinet approval.  |
| 6 May 2002      | Mpho Scott, MP, replaces Mokoena as Chair of the Portfolio Committee on Home Affairs.   |
| 9 May 2002      | The ANC majority on the Committee introduces major changes to the version of the Bill approved by Cabinet.  |
| 15 May 2002     | ANC and IFP complete inconclusive negotiations on the changes to the Bill.  |
| 16 May 2002     | The ANC majority on the Committee, ignoring the emphatic objections of the Department of Home Affairs, votes through a significantly different version of the Bill based on a quota system for skilled immigration.   |
| 17 May 2002     | Minister Buthelezi introduces the amended Bill to the National Assembly. He emphasises his disapproval of the Committee's amendments, and points out that these were made against the advice of the Department of Home Affairs concerning its capacity. He argues that the amendments subvert government economic policy by reflecting a 'command economy philosophy'. The Bill is passed by the NA and referred to the NCOP.   |
| 21 May 2002     | The Minister of Trade and Industry, Alec Erwin, attempts to have the quota provisions removed from the Bill in the National Council of Provinces.   |
| 22 May 2002     | Minister Erwin's intervention fails because of the need for the Bill to be passed into law in time to meet the Constitutional Court deadline of 2 June 2002.  |
| 23 May 2002     | The National Council of Provinces passes the Bill. The Chair of the Social Services Select Committee in the NCOP, recognising the deficiencies of the Bill, calls upon the Minister to 'come back to Parliament with an amendment Bill' as soon as possible. Minister Buthelezi points out that substantive amendments cannot be made without proper consultation.  |
| 29 May 2002     | In response to a Parliamentary question, President Mbeki comments that the Immigration Act 'may not address all the matters that we wanted.'  |
| 30 May 2002     | President Mbeki signs the Immigration Bill into law.  |

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From CDE's examination of reports of the proceedings of the Committee between March and May 2002 by the Parliamentary Monitoring Group, by the media and on the basis of selected interviews, a picture of general incoherence around the requirements of growth-friendly policy emerges.<sup>28</sup> Less generous speculation has been that it was all part of a plot to embarrass the Minister of Home Affairs.

### **Economic interests**

Concessions to business or the accommodation of economic interests were controversial. For example the provision for a proportion of an immigrant's remuneration to be paid into the National Training Fund was opposed and eventually scrapped. At least in part, this was because organized labour feared that business would be able to "buy" the work permits that they needed and that through this mechanism state control of immigration would be lessened. Concessions to large employers of migrant labour were also opposed

It verges on the shameful that NEDLAC, the primary forum for the reconciliation of business and labour interests, played almost no part in the process. This appears to have been the result of a procedural dispute in NEDLAC and misunderstandings about what had to be done. Whatever the circumstances, the absence of formative inputs by NEDLAC amounts to an almost farcical dereliction of a key responsibility.

Despite emphatic presentations by BSA, foreign business chambers and CDE to the effect that bureaucratically determined skills quotas could not accommodate the needs of business and the larger economy in a rapidly changing world, the role of quotas in the Bill was vastly expanded in the Committee stage. Encouraged by the trade unions (and the Department of Labour?), the Committee re-wrote the Bill so that quotas became a central part of the final Act rather than the exceptional mechanism that Home Affairs had envisaged in its version of the Bill. (See box: Getting a work permit)

The provision for outsourcing to Chartered Accountants of the required certification of applications was also opposed by the labour lobby on the grounds that it would introduce a pro-business bias in the process. In general, the labour inputs were aimed at reducing market-friendly flexibility and enhancing state control of immigration.

To his credit the Minister of Trade and Industry attempted to have the provisions for occupational quotas removed but his intervention came too late to be incorporated.

### ***Race and black empowerment***

Another theme in the debates of the parliamentary committee was the role of race and black empowerment. The labour lobby view was that preferences should be given to black immigrants from the SADC region. They were also concerned that any emphasis on high-level skills would favour immigrants from the northern countries ie non-African countries. These arguments give the game away as far as employment equity is concerned. While it is supposed to be a strategy for empowering formerly disadvantaged people in South Africa, the extension of the principle to immigration is essentially racist. One is not helping formerly

disadvantaged employees in South Africa any more by attracting black immigrants than by attracting white immigrants, unless of course the concern is with racial status as much as it is with compensating for previous disadvantage. In fact it is poorer South Africans (predominantly black) who are hit hardest by any curbs to South Africa's ability to attract skilled immigrants who want to come here.

### GETTING A WORK PERMIT

How does the Department of Home Affairs decide whether or not to issue a work permit to a foreigner?

**Under the repealed Aliens Control Act** (which remains in force until regulations under the new Act have been gazetted), work permits were issued on the basis of 'skills certification.' The applicant and his or her employer had to show that they had made a through search for a South African or permanent resident with the necessary skills and that none could be found. Only if the Department of Home Affairs were satisfied that this was the case would a work permit be issued. This has proved to be a very slow and expensive process, often with an unpredictable or unsatisfactory outcome from the point of view of the applicant and the prospective employer.

**Under the Minister's draft Immigration Bill**, the main mechanism for granting work permits to foreigners was intended to be:

- certification that the foreign worker would be paid no less than an equivalently skilled South African
- payment by the foreigner's employer of an annual fee (set by the Minister as a proportion of the foreigner's salary) into the National Training Fund.

This system was intended to ensure that a foreign worker would always be somewhat more expensive to employ than an equivalently skilled South African, in this way encouraging employers to hire South Africans whenever possible. On the other hand, if the employer were prepared to pay a premium for a foreign skilled worker, there would be no major additional bureaucratic obstacles to doing so.

**The new Immigration Act** sets up a system involving both quotas and skills certification. The Department of Home Affairs in consultation with the Department of Trade and Industry and the Department of Labour is obliged to create annual numerical quotas based on skills and/or qualifications. Foreigners may apply for work permits under these quotas. The Department will assess whether each individual applicant fits a quota description. If not, or if the annual quota applicable to that foreigner has been exhausted, skills certification, as under the Aliens Control Act, may be applied for.

*CDE 2002*

### ***Capacity constraints ignored***

A further feature of the process was the extent to which submissions by the Department of Home Affairs in respect of its capacity constraints were ignored or sidelined. This is part of a much more general problem besetting governance in South Africa, where new policies and laws are regularly formulated that are beyond the capacity of the available state machinery to implement. (See box: Differing assessments of state capacity: the case of skills quotas)

#### **DIFFERING ASSESSMENTS OF STATE CAPACITY: THE CASE OF SKILLS QUOTAS**

The joint trade union movement submission on the Immigration Bill recommended that work permits should be issued under a system of annual skills quotas. The submission suggests that in setting up annual skills quotas, the Department of Home Affairs should have to consult with the National Skills Authority, the Department of Trade and Industry and the Department of Labour.<sup>29</sup>

The Department of Labour did not respond to these suggestions. The attitude of the Department of Trade and Industry is probably reflected in Minister Erwin's unsuccessful attempt to have the quota system removed from the Bill entirely.<sup>30</sup> According to the Minister of Home Affairs, "government is ill-equipped to determine the skills our country needs... in the modern labour markets assessing immigration applications on the basis of skills is extremely difficult and demands massive administrative capacity."<sup>31</sup>

The position of the Department of Home Affairs itself was also very clear:

"Quota systems were contemplated by the DHA between 1995 and 1998 and after long study they were disregarded because they do not meet South African needs, they require an enormous amount of administrative capacity to administer.... Moving to a system in which quotas are established to cover the entire field of human activities will require... monumental data gathering and processing capacity... government would need to employ a great deal of capacity which the DHA does not have.... One cannot even begin identifying how the system... would eventually work...."<sup>32</sup>

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### **A problematic outcome**

In the end, the draft bill that was passed by the committee contained a number of changes to the draft submitted by the minister (and which had been discussed and agreed to in the cabinet). Some of these changes are very problematic.

The following are the most significant differences between the legislation enacted and the draft prior to the committee's amendments:

1. The corporate permit loses a key clause, namely the provision that the holder of such a permit may issue authorisations to foreigners to be admitted provided they work for the

- holder of the permit (earlier clause 16 (3)). As the Department of Home Affairs noted in its final comments on the Bill as re-drafted by the committee, without this clause, it is not clear whether the quotas or needs tests provided for with respect to work permits in general will apply to corporate permits.<sup>33</sup> The corporate permit may become simply a means of issuing work permits in bulk. *If this is so, a key aspect of the policy designed to be market and employment-friendly is subverted. Devolution will be replaced by centralised criteria.*
2. The Act as amended by the committee changes the status of skills quotas. Whereas they were originally intended for limited application in exceptional circumstances in the original draft, and would not have required a full development of quota specifications for all types of applications, the new provision for applications to be within the limits of annually predetermined quotas of all different types of skills has now become the primary criterion in terms of which applications will be approved. This could mean that comprehensive skills categories, with associated criteria and specifications, would have to be developed to cover the entire range of possible applications. *This is a huge and impossible task*
  3. There may, however, be an alternative to quotas in the Act. Clause 19(1) provides that a general work permit may be issued to a foreigner not falling within a category of a skills quota, provided that the Department can be satisfied that no local applicant is available with qualifications equivalent to those of the foreigner. On the face of it this might offer the flexibility that the unconstrained entry of needed skills requires, but it creates procedural problems. Unless the Department takes employer claims at their word (unlikely in any administrative system anxious to avoid malpractice by applicants) it will have to verify the claims by employers that no local person is available. In the words of the Department of Home Affairs: "... it sends the DHA back to where we are. The DHA does not have the capacity to determine whether nationals are in fact available to fill the relevant positions ... to verify the accuracy of the procedures ... and the efforts made to employ nationals. Usually these efforts become a lengthy, costly and delaying perfunctory exercise ..." <sup>34</sup> (The DHA goes on to explain additional difficulties.) In other words the DHA warns us that the alternative to quotas may be accompanied by all the delays and uncertainty for applicants and employers that characterise the system at present.
  4. Another huge issue of capacity is created by the amendment (clause 1(2)) that certifications by a chartered accountant can be avoided if the applicants elect to use someone else (of unspecified professional status) to supply the required facts, provided that the DHA then verifies all the claimed facts itself. In other words, the amendment creates apparent flexibility but will in all likelihood create further delays instead.

While some of the positive features of the original Bill are retained, for example, the provisions for exceptional skills permits and business permits (subject to prescribed capital requirements based on regulations) it is clear from the legislation *that a passion for centralised bureaucratic controls and prescriptions and a distaste for devolution of functions and outsourcing pervade the amendments approved by a majority on the committee.*

### 3. THE LESSONS OF THE LEGISLATIVE PROCESS

What do we learn from this messy process?

- **We learn firstly that our top leaders are not always consequential in their actions and choices.** Mr Mbeki promised in February 2001 that the immigration law would lower business input costs and attract skills to the country. This Act has not done so. What happened? The Cabinet approved the original draft for submission to parliament, and surely Mr. Mbeki must have become aware that his own party's caucus members on the committee were challenging the very principles that he and his Cabinet colleagues had approved as a basis for meeting the commitment he had made. One explanation is that he is not aware of the implications of the committee's amendments. His own words (in parliament on May 30 2002) suggest this as a possibility: "The Immigration Bill may not address all these matters that we wanted. It may very well be that [the amendments made in committee] are not sufficient."<sup>35</sup> Did Mr. Mbeki's own staff and colleagues create the impression that they struggled manfully to improve the Bill as an instrument for economic progress? It is odd that in a parliament in which there has been discomfort about the excessive imposition of executive authority, we here have a case in which an ANC majority on a committee has acted with zeal in going against a Bill approved for submission to Parliament by its own leaders. Was it because a Minister from another party had prepared the legislation, or was the executive simply lax? Whatever the case there has been a failure of leadership, or at the very least a lack of consistency.

Furthermore, if the temptation to "get at" Minister Buthelezi seems to have been so great that it rode roughshod over other considerations, then the ANC and the IFP should simply not be in coalition with one another.

- A similar lesson is that **information flow in the higher reaches of government is not as effective as it should be.** How else does one explain the fact that the Minister of Trade and Industry, whose department will have to participate in the development of quotas, realised too late that quotas were being enthusiastically promoted by members of his own party on the committee? There must be serious concerns about the quality of co-ordination functions in government.
- Another insight is that **the labour lobby, which is regularly rebuffed on issues of macro-economic policy, compensates enthusiastically on issues that appear to be regarded as less crucial,** and seems to be allowed to exercise enormous influence. Obviously one would expect some trade-offs of this kind in the case of an alliance partner. The problem is that our need for human capital from abroad is at least as important as our need for a sound macro-economic policy and for foreign investment. Concessions to the labour movement make no more sense here than they would in respect of tariff policy or fiscal discipline. At best we have yet another example of inconsistency.
- This experience with an Act of such importance to business raises the critical question of the **effectiveness of South African business in the practical politics of policy influence and parliamentary lobbying.**

- A further lesson in all this is that **many people in the ANC alliance, with the exception of committee chairperson Mpho Scott, still tend to have a “fixed cake” attitude to immigration**, even skilled immigration, rather than the more valid view that skilled immigrants help to expand the cake of opportunity and in due course create employment for South Africans. Only a fixed cake mentality can explain the urge to use quotas to prescribe who may enter the country and then only after having made certain that no South Africans are available. This fear is common in Europe as well, but it is aroused mainly by less skilled immigration, not the type that the Bill envisages.
- Another insight emerging is that **parliamentarians have still not fully confronted the fact that government capacity and access to information are huge impediments to good governance and development**. *Examples of system breakdown abound, and yet the members of the committee were resolute in piling new tasks and responsibilities onto a Department that has given consistent evidence of lack of capacity to process applications expeditiously. Both the DHA's and the minister's statements to this effect in parliament are in fact remarkably honest.* (See box: Differing assessments of state capacity: the case of skills quotas.) Here again the government is inconsistent. It is overcautious about capacity in respect of treatment of HIV-positive mothers and their offspring but cavalier in other fields, like the imposition of large new responsibilities on wobbly local authorities and now the implementation of hugely complex quota controls on immigration. Perhaps they are aware of capacity problems but some forms of “command administration” are simply too tempting to resist.
- Most importantly, however, it would seem that **parliament simply does not have a critical sense of urgency about the need for general economic growth**. When it comes to the immediate opportunities for black empowerment (as in the newly enacted Minerals and Energy Bill) or even to remotely possible short-term threats to skilled job opportunities for blacks, the requirements of growth and investor confidence and, therefore inevitably new job creation take second place.

#### **4. CDE RECOMMENDATIONS**

In this final section we will summarise the overall CDE position and put forward some recommendations on the way forward in the current less than desirable situation.

##### **CDE's position should not be misunderstood**

In arguing for an open door to skilled immigration, CDE does not speak for any particular sectional interest. For instance, we advocate an 'open door' to far more entrepreneurial immigrants than existing large corporations would find necessary to meet their immediate skills needs.

CDE agrees with business, labour and government that the large number of illegal immigrants in South Africa poses serious problems that must be addressed urgently.

CDE is acutely aware that South Africa must take bold and rapid steps to improve our own skills base.<sup>36</sup> But it is a reality that these vital reforms will take several years, if not a decade or more, to produce really significant numbers of new skilled South Africans. These are years South Africa cannot afford to waste in an increasingly competitive and increasingly skills-based world economy. Encouraging skilled immigration is, therefore, an essential response to our skills crisis. And, because we should aim to attract teachers and trainers (amongst others), skilled immigration will contribute directly to the faster growth of our own skills pool.

CDE is convinced that few South African based business will deliberately employ a foreigner unless there is a sound business reason for doing so. Business in South Africa has a profound interest in the dramatic improvement of the supply of skilled and qualified local people. Employing foreigners will always be more expensive (in time and money) than utilising domestic talent.

CDE has followed the evolution of South Africa's immigration policy for nearly a decade. Throughout this time, we have consistently aimed to make recommendations that would align South Africa's immigration policy with the overall national interest in more rapid economic growth, sustained job creation and the dramatic expansion of economic and educational opportunities for poorer South Africans.

With the same aim in view, we now offer our recommendations on the new Immigration Act.

### **Reducing the damage**

Unless some of its weaknesses can be corrected by carefully framed regulations, the new Act will burden the capacity of the DHA as much as it has been burdened under the old legislation, or perhaps even more. Hence, the major complaint of employers about delays and cumbersome procedures in obtaining work permits might perhaps actually intensify. This negative situation was hinted at by the Minister of Home Affairs in his parliamentary speech introducing, with reluctance, the proposed new Act and has also been predicted by an experienced immigration law practitioner in a meeting with CDE.<sup>37</sup>

The key question therefore is: What must the regulations to the Act achieve if they are to support the economy in general and create the predictability and speed of administration that business confidence requires?

CDE are not skilled legal drafters. But we are clear about what the regulations should achieve. Nevertheless, before venturing to make specific suggestions one has to recognise the legal obligation of the Department of Home Affairs and the Immigration Board to frame regulations that are consistent with the Immigration Act and that do not seek to subvert provisions of the Act. CDE has obtained senior legal opinion in respect of the degree of flexibility in the framing of regulations that these requirements would allow.<sup>38</sup>

Categories of quota work permits and the size of such quotas are unavoidably required to be determined and published by notice in the *Government Gazette*. The Act does allow the

Minister to define the categories with a degree of generality that will permit some flexibility - but the categories may not be so wide as to be incoherent. The Minister's notices in terms of the Act must also specify the maximum size of each quota.

A factor to be borne in mind, however, is that the notice must be determined in consultation with the Ministers of Labour and Trade and Industry. This requirement of compromise between three Ministries may make it difficult to reassess the category definitions and quota sizes on an ongoing basis. Therefore the flexibility required of the initial notice should not be underestimated if a situation is to be avoided in which categories become exhausted.

The way the regulations are framed could enhance the simplicity and speed of procedures, up to a point. The procedures for the checking of applications for compliance with the provisions of the Act will inevitably absorb significant time. The legal opinion is that it is unlikely that such compliance can be established by way of sample checks. A minimum check of the submissions of each application will probably be necessary. It must be assumed, therefore, that some administrative delays in the issuing of permits will occur.

### **Guiding principles for the regulations**

Given these legal requirements, the following approach to the framing of regulations is indicated:

**The guiding principle of the regulations should be to allow entry to any person whose skills, aptitudes, experience (lifelong learning) and previous occupations show that he or she will be able to earn a living in the private sector, pay taxes and consume commercial goods and services. *South Africa may not be short of job seekers but it is short of taxpayers and people who need no support from the state.***

Exactly how the categories and quotas required by law are developed is much less important than that they should conform to this guiding principle. But certain **more specific sub-principles** will need to be observed if the Immigration Act regulations are to serve the national interest in economic growth and job creation.

These are:

1. Given that quotas are required by the Act, **the regulations should NOT attempt to re-introduce the alternative mechanism of a training levy in addition to the quotas.** Only a point of view of extreme xenophobia or a perverse desire to weaken the economy would require both a quota and a levy system.
2. Regulatory procedures should be established that would allow the Board and the Department to **readily expand the range of skills provided for in the quotas as need arises.** These procedures will have to facilitate the necessary consultations with business, labour, civil society representatives and other Ministries by introducing efficient ongoing consultative machinery. Speed and efficiency are particularly necessary here because it is impossible to predict in advance the nature and extent of labour demands that might arise under conditions of future growth. Historical facts are

a hopelessly inadequate basis for predicting the needs of modern economies in which demands for new specialisation and subcategories of skills are always developing.

3. The regulations should wherever possible **reduce the administrative burden on the DHA and all the departments involved**. Although, unfortunately, the use of sample checks would probably not pass legal muster as an effective control mechanism to prevent corruption or malpractice, the outsourcing of some control functions to external auditors would have to be considered.
4. The regulations must **NOT require that every skilled immigrant be obliged to engage in 'skills transfer'**. It is important not to confuse importing skills in general with importing training skills. Those who 'can' are not always effective or willing teachers. A requirement that all skilled immigrants agree to transfer their skills to South Africans will either involve a meaningless rote agreement to this provision or could be a major disincentive to many foreign skilled people thinking of coming to South Africa. (Why would engineers for example come to South Africa where they would be required to be both an engineer and a trainer when they could go to another country and simply get on with their jobs?) Such a requirement would also unnecessarily increase costs to South African companies needing imported skills. Skilled trainers and training is required therefore we should encourage skilled trainers to come to South Africa.
5. In defining the criteria to be applied in the adjudication of "qualifications" it is vital that prior demonstration of ability to be self-employed, at a formal level, be added. **South African needs able entrepreneurs as much as it needs certified skills**.
6. Capital requirements for business permits should reflect the reality that **entrepreneurs come in many sizes, and that all are valuable to South Africa in their own way**. While major, multi-million Rand investors may be required to conform to detailed requirements, the entry of smaller entrepreneurs should not be held up by complex red tape of the kind that stifles small enterprise. The regulations should be appropriate to the size of the proposed investment. **The regulations should make provision for three different types of entrepreneurs**: large multi-million Rand investors; small and medium sized investors (which is probably anything over about R500,000); and micro investors. For instance, the smallest entrepreneurs (those, say, intending to start a family-run restaurant) should simply be required to show that they have proven capacity to run a business of the relevant sort, and that they are likely to be able to augment their own capital through business loans.

### **Open the door very wide in the first instance**

It is in the nature of dynamic, modern economies that it is virtually impossible to know for certain the exact volume of South Africa's skills shortage. We could therefore see the next few years as an opportunity to test the level of demand by and for skilled foreigners to come into South Africa. The facts gathered in the process of establishing and monitoring the annual quotas and enforcing other rules could go a long way towards finally settling debates about the exact scale and nature of South Africa's skills shortage, and about the overall effect

on the country of skilled immigration. Very large quotas will help the country to assess the scale of demand and give us some information about the skills shortage that the country has never had before. It would therefore be highly desirable to open the door very wide in the first instance thus enabling the country's decision-makers to achieve progressive certainty about the actual scale of demand in the South African economy.

In the unlikely event that this system allows in too many people, or people who do not assist South Africa's social and economic progress, the regulations could be rapidly altered to deal with the problem.

The regulations need not 'jam the door open permanently.' Rather, the information that their implementation will provide, will enable all concerned South Africans to make informed contributions to deciding just how wide open the door to skilled immigration should be.

### **Ultimately South Africa needs a new Immigration Act**

What is unknown at this stage is how far the regulations will be able to meet these requirements. If they can reduce the impediments to the entry of valuable skills to a significant extent then they will represent an appropriate interim measure. This remains to be seen when the regulations are made public.

In the end, however, we will need new legislation to correct more fundamental weaknesses of the current Act. For instance, some lawyers believe that the Act contains no provision allowing South Africa (or a particular industry or region of the country) to compete with developed world 'skills shoppers' by forming public-private partnerships that can actively recruit desperately needed foreign skills.

Perhaps, though, amendments should not be introduced too quickly, in order to give the new system time to settle down and to start producing the detailed information about the demand for skilled immigration that it is capable of generating. It is also necessary that parliament take the time to resolve the contradictions in its current thinking between economic growth, transformation and empowerment and state control. A resolution of these contradictions will benefit not only immigration policy, but also the economy in general.

In the meantime, subject to the less-than-ideal legal framework created by the Act, the immigration regulations should go as far as possible to create the conditions necessary for growth and investment through a very large inflow of skilled and entrepreneurial migrants.

## ENDNOTES

CDE gratefully acknowledges the expert legal input provided by Prof David Underhalter, SC, director of the Mandela Institute, School of Law, University of the Witwatersrand.

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- <sup>3</sup> See C Simkins, 'The Jagged Tear. Human capital, education and AIDS in South Africa, 2002-2010,' CDE Focus no 7, March 2002
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