



The Centre for Development and Enterprise

**SUGGESTED AMENDMENTS TO THE DRAFT
IMMIGRATION BILL OF 2 FEBRUARY 2000**

Prepared by the Centre for Development and Enterprise

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The suggestions which follow are based on CDE's comments on the White Paper on immigration, which have already been made public. As CDE's comments and concerns have been fully outlined in the comments on the White Paper, the reasons for the changes to the Bill which are suggested below need be only very briefly stated.

The Bill reflects broad principles that are consonant with 'best practice' international thinking and the lessons of international experience in respect of immigration policy. The stated objectives of the legislation also reflect a commitment to economic growth and to efficient, cost-effective administration of the complex phenomena of immigration.

These objectives and principles as well as the lengths to which the Ministry has gone to obtain feedback and comment on the preceding White Paper, are highly commendable. CDE congratulates the Minister and his departmental personnel on their interactive approach and their grasp of wider economic issues.

At the same time, however, the White Paper and the Bill under discussion contain important elements that very seriously contradict the very sound judgements reflected in the principles which are claimed to have guided the proposed new legislation. These contradictions undermine the capacity of the proposed legislation to meaningfully address an emerging crisis in South Africa, one that ranks with HIV/Aids, corruption, crime and our low savings rate in its capacity to destroy prospects for the dynamic economic growth which our country needs.

Here CDE refers to the mounting shortage of skilled, managerial and entrepreneurial personnel in our economy. South Africa's economy is showing exciting signs of buoyant recovery after years of economic stagnation. The greatest disaster which could befall the people of South Africa and their hopes for sustained job creation and relief from poverty would occur if the current economic recovery is constrained or reversed by lagging fixed capital investment and shortages of skilled, entrepreneurial and competitive managerial personnel. The statistics on all these resources for growth are anything but encouraging.

In the light of this potential crisis, CDE has described the White Paper and this proposed legislation as one of the most important policy initiatives in the economic sphere since GEAR. A mounting shortage of skills, management quality and competitive entrepreneurship as the economy recovers will not only place a ceiling on the recovery in a direct form, but it will also inhibit the willingness of investors to commit capital to production, which in the global economy is increasingly driven by skills, innovation and managerial excellence.

It is these priorities which the proposed legislation fails to address, due mainly to deviations from the sound principles on which much of the White Paper has been based.

The failure of the proposed Bill to target the critical priorities for growth is seen in the following features of the proposed legislation: (these are summarised briefly below but fully discussed in CDE's comments on the White Paper):

- The implication contained in certain clauses that the country's needs for specific skills can be determined and calculated by state agencies. This is simply not possible in the current global economy in which skills needs are fluid and subject to rapid change. Hence, the injunctions in the Bill for consultation with other departments and official

agencies in order to set quotas and targets in respect of skills are bound to distort market forces;

- The provisions which will penalise employers by imposing a training levy as a proportion of the remuneration of foreigners. The employers will already be paying a premium for expensive and scarce skills, hence the training levy will constitute a double burden;
- A lack of transparency in decisions taken in respect of applications for work permits. The Bill makes no provision for reasons for such decisions to be furnished;
- The lack of specific provision for participation by the business sector on the Immigration Board; and
- Most importantly provisions which will impose tight controls and significant administrative and professional costs in respect of the employment of foreigners.

CDE accepts that each of these elements has probably been introduced as a result of a genuine concern that limitations have to be placed on the free flow of immigrant skills in order to maximise job opportunities for South Africans. The sincerity of the Task Team in this regard is not doubted:

CDE would argue, however, that this qualified approach, while understandable and possibly even supported by similarly protectionist legislation elsewhere in the world, is only in the strictly short term interests of some South Africans. By acting as a brake on economic growth it will most certainly operate to the medium and longer run disadvantage of all South Africans in the labour market.

South Africa may be a magnet for unskilled would-be immigrants, but it is hardly the most attractive destination for more highly skilled personnel and successful entrepreneurs and managers from abroad or from the rest of Africa. There is no danger whatsoever that South Africa will be 'swamped' by the kind of people its economy so desperately needs. While giving the appearance of sensible restraints and checks on the inflow of skilled immigrants, the limitations are in fact a tax on the economy

In this respect CDE has to insist that skills which add value to the economy are similar to fixed capital investment. It is virtually impossible to have an oversupply of skills in the vocational, entrepreneurial or managerial fields. Even if such people are unable to find salaried work, they tend to create their own employment, which adds to the output of the economy

AMENDMENTS

It is on the basis of these considerations that CDE would propose the following additions and amendments to the proposed legislation. A suggestion is also made for a PREAMBLE to the Bill. This is based on the consideration that in the event of legal dispute, it is helpful if the legislation sets out the elements of the spirit behind the legislation in the form of a PREAMBLE.

The following, then, are the CDE suggestions and proposed amendments. Suggested changes are given in *italics and underlined*

1 SUGGESTED PREAMBLE

The terms of this Act are to be read as a basis for protecting and promoting South Africa's national interest both by strengthening the capacity of government to combat illegal immigration, and by promoting economic growth and socio-economic progress for all within the country. The latter objective will be achieved through facilitating the absorption of valuable immigrant skills and relevant vocational experience. The clauses which make

provision for a relatively unrestricted entry of immigrants who are able to add value to the economy, and for a delegation of administrative responsibilities in this respect to employers, are to be understood as means to release scarce state resources for curbing illegal entry into the country as well as providing an avenue for combating the scarcity of formal and experience-based skills which is a constraint on economic growth and job creation. Thus, the concept of enlightened national self-interest should guide the interpretation of the terms of this legislation.

2. Clause 4 **General entry permit**

[2] The holders of a general entry permit may not conduct work, but may apply for a work permit while in the country on a general entry permit.

3. Clause 8 **Investor and self-employed person's permit**

A clause should be added to point [1] which should then read as follows:

[1] An investor permit may be issued by the Service to a foreigner intending to establish a business in the Republic in which he or she may be employed, and to the members of such foreigner's immediate family provided that

[a] such foreigner invests the prescribed financial contribution in such business;

[b] the financial contribution referred to in [a] be part of the intended book value of such business; or

[c] such foreigner has sufficient working capital for six months for his/her business of choice;
and

Current point [1] [c] then becomes [d]

[d] a chartered accountant certifies compliance with the provisions of this Act.

4. Clause 12 **Work permits**

This entire clause is problematic: it imposes both an additional tax on employers and additional administrative and professional costs of compliance. It should therefore be deleted. It should be replaced with the following amendment:

[1] [a] A work permit should be issued by the Service to a foreigner wanting to work in South Africa who has a qualification equivalent to or better than:

- a South African first degree; or
- a technikon three year diploma; or
- that of a fully qualified artisan.
- In determining the equivalence of qualifications, in-company training should be taken into account.

[b] A work permit should be issued by the Service, if the prospective employer is able to specify and itemise reasons for requiring the special attributes of the foreigner, to the satisfaction of the Immigration Service.

5. Clause 15 **Intra-company transfer permit**

This entire clause should be deleted, since it imposes additional administrative and professional costs on employers.

6. Clause 21 **Direct residence**

Points [1] [a] and [1] [b] should be deleted and replaced with the following:

[1] Subject to Section 20, the Service shall issue a permanent resident permit to a foreigner who has been the holder of a work permit in terms of this Act for five years.

7 Clause 28 The Immigration Board

Point [1] A representative from the Department of Finance has been omitted and should be included in the list of representatives.

Point [1] [f] should be amended to read as follows:

[f] up to six persons from bodies requested by the Minister to nominate a representative. This must include at least 3 representatives nominated by the generally-recognised national employer organisations.

8. Clause 29 Objectives and functions of the Service

Point [1] [j] [ii] should be amended to read as follows:

encourage the training of citizens and residents by employers.

Point [2] [f] [i] should be deleted.

Point [2] [j] should be amended to read as follows: be empowered to contract with private persons to exercise under its control any of its functions, including but not limited to detaining and escorting illegal foreigners for deportation purposes and manning ports of entry with due regard to [1] [a] {ie: [1] In the administration of this Act, the Service shall pursue the following objectives [a] promote a human-rights based culture in both government and civil society in respect of migration control.}

9 Clause 34 Adjudication and review procedures

This should be amended as follows:

[1] Before making a determination adversely affecting a person, the Service shall notify the contemplated decision and related motivation and provide reasons for the decision to such affected person and give such person at least 10 days to make representations after which such decision shall become effective, subject to subsection [2].

[2] With 20 days of its notification, the person aggrieved by an effective decision of the Service may appeal it

[a] to the Managing Director who may reverse or modify it within 10 days and provide reasons for this, failing which the decision shall be deemed to have been confirmed.

[4] Any person adversely affected by a decision of the Service shall be notified in writing of his or her rights under this section and other prescribed matters, and may not be deported before the relevant decision is final. Reasons for the decision will be provided to such affected person.

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