



## Response to the Immigration Amendment Act of October 2004 and the Draft Immigration Regulations of January 2005

February 2005

## EXECUTIVE SUMMARY

Most of the amendments to the 2002 Act are practical in nature and serve to streamline provisions and procedures. They are generally positive and mainly unproblematic. However the Centre for Development and Enterprise (CDE) does have some concerns – the most crucial of which are discussed below.

In addition greater detail and commentary on issues such as: the omission in the regulations of training fees for employers hiring from abroad, the Immigration Advisory Board, police clearance certificates, permanent residents' permits and retired persons' permits, can be found in the full response attached.

### **How open is the legislation and regulations to the entry of persons whose activities could add value to the economy and society?**

On the basis of the provisions regarding a variety of work permits, one may assume that most people with an interest in working in South Africa, whose skills will be of benefit in our economy, will be able to obtain permission to work, one way or another. However there are likely to be two categories of persons excluded: a) People whose level of employment in a business or organisation would not warrant the employer going to the trouble and expense of submitting the onerous documentation required for a General Work Permit, and b) People with valuable skills not recorded as part of a defined quota of skills tabled annually.

There is no doubt that there will also be a problem of 'mismatch' between how the quotas define the skills we need – and the skills needed by the economy. Some skills are difficult to categorise, particularly where work experience is a major component of the skills.

There are enormous methodological difficulties in defining, classifying and quantifying quota categories and even greater difficulties in keeping abreast of the changing combinations of skills in the newer technologies. Databases which attempt to capture the skills the economy needs are always debatable and seldom exact. In addition it is impossible to predict the demand for various categories of employees by levels of skill and education more than two or three years ahead – therefore predictive precision is doubtful from the outset.

The regulations pertaining to quota work permits very substantially circumscribe the flexibility of our proposed immigration control system. This is of major concern to CDE.

### **Minimum Financial Requirements and other provisions applicable to Business Permits**

The provision allowing for business permits is potentially of very great value to the country in attracting foreign direct investment and the importation of skills and

capacities of direct benefit to growth. However, one has to ask whether the requirements set out do not discourage some of the potential activity that could add economic value.

South Africa is in cutthroat competition with other higher level emerging economies for foreign investment and the acquisition of new technologies and knowledge-based enterprise, and onerous provisions for entry coupled with uncertainty and possible delays cannot possibly be in our economic interest.

For example, most medium-size businesses should have no difficulty with the requirement that business entrants should furnish guarantees of a capital investment of R2,5 million. But combined with the other requirements, the requirements are forbidding and will take time for compliance.

For a knowledge-intensive micro business, in which the real asset is intellectual capital, the financial capital requirement of R2,5 million is redundantly high for a one person enterprise based on marketable intellectual or technological skills. Knowledge-intensive businesses can be established much more cheaply.

In addition an initial requirement that the proposed business will employ five South Africans on a permanent basis will inevitably exclude micro businesses and very small technology-intensive start-ups. Many small/micro businesses start out as family enterprises and only later grow to include non-family members. Why exclude these hard working individuals from our economy and tax base?

For these reasons CDE is strongly convinced that the entry requirements in respect of Business Permits are set at too high a level.

## Conclusion

CDE would like to congratulate the drafters of the regulations for many amendments that quite significantly ease the procedures for entry into the country. However this does not mean that we will have a successful immigration law or policy.

We are concerned that many of the key requirements specified in the regulations, read in the context of capacity and efficiency problems in our public administration, could lead to time-consuming and therefore also costly compliance procedures. We are concerned that a zealous application of the regulations could in the course of time reinforce an image of South Africa's immigration regime as slow moving and overprotective.

Taken together, the regulations about which we have concerns suggest that there is a view in government that certain kinds of immigration are undesirable. Obviously some of it is undesirable, for example criminals and people whose employment will reduce employment opportunities for South Africans without creating employment, adding value through their economic activities or contributing to tax revenue. In the medium to longer term however any person who will find gainful employment, pay taxes and contribute to the overall product of our economy, or bring even modest amounts of money and resources into the country, will be a net gain for our economy.

CDE would not suggest drastic revision, however. All the regulations have utility in principle. Broadly we would simply suggest that more accommodating options be introduced, or existing requirements be specifically widened that will make the regulations more flexible and responsive to the specific circumstances of the applicants. The entire package of the new Act and the associated regulations should send a message that we welcome all people who are likely to add new value to our economy and human resource base.

After a long period of operating under very 'protective' legislation it will be important for the Minister to communicate the importance of immigration to the economy and therefore the well being of all South Africans, to all relevant line officials.

CDE is convinced that the new regulations, with modifications that will introduce greater flexibility and more fully embrace the challenge of attracting the skills we really need, can become one of the cornerstones of a winning nation.

## CDE FULL RESPONSE TO THE IMMIGRATION AMENDMENT ACT OF OCTOBER 2004 AND THE DRAFT IMMIGRATION REGULATIONS OF JANUARY 2005

### INTRODUCTORY COMMENT

In governance in general, immigration is almost always a love-hate issue. Human beings have a near universal obsession with keeping strangers at a distance and the “stranger” is the universal scapegoat for many ills. Hence most politicians and their followers think that it is an area of public affairs in which maximum control and regulation is justified.

Yet the societies that have built their nations and their economies on the free entry of these dislikeable “aliens” represent the pinnacle of cultural and economic development. The historical “melting pots” of the world – the concentrations of former nomads in the valleys of the Tigris, Euphrates and the Nile, the great city states of the ancient world, modern cosmopolitan cities and the dominant immigrant economies like the USA, Canada, Australia, Europe, Singapore, and Hong Kong – have set the pace in human economic achievement. Throughout history, population movement and new settlement, whether from far countries or even from rural backwaters in a single country, have revealed that people generally turn the lessons and pain of their adjustment into those most productive resources – social capital and determination to succeed. It is ironic that countries so easily forget their historical immigrant roots and try to become fortresses of national purity.

A recent issue of *The Economist* (January 29, 2005) draws attention to this ongoing blindness. It introduces an article on new UK Conservative Party immigration proposals with an illustrative gem from Australia: PM John Howard “was heading for electoral defeat in 2001 when a boat full of Afghans appeared on the horizon ... loudly proclaiming that the nation’s borders must be protected, Mr Howard saw off the refugees and the opposition”, winning the election against the odds. The Conservative Party, terrified by the entry of 160 000 immigrants and refugees per year wants to set annual immigration quotas, suggesting that applicants for work permits be assessed on a point system and that refugee claims should no longer be considered in the UK, in defiance of what are referred to as “outdated” EU agreements on asylum and the European Convention on Human Rights. This party is clearly inclined to emulate the Australian system of a skills list with different skills earning different points, which accumulate to justify entry.

*The Economist* quotes the *Chartered Institute of Personnel and Development* saying that proposals for points-based quotas looks very much like now discredited, indeed laughable, 1970s style “manpower planning”. The most rudimentary economic analyses have shown that all such classificatory and ranking devices applied in the field of manpower have generated uncontrollable distortions in supply and demand for every target that might have been met. How many points would non-graduate Bill Gates have received had he presented himself to the Australian Immigration Board as a young man?

But it is rather unfair to ridicule the British Conservative Party when all over western Europe both right and left of centre parties are clamouring for tighter controls on the entry of “foreigners”. They have all collectively forgotten that only a few decades ago, Europeans of different nationalities were equally obsessed with keeping each other out of their individual national territories.

All this low level and badly informed policy debate in countries in Europe, Australasia and other developed countries is not necessarily of critical significance to their economies. The countries involved are so attractive that they are all “oversubscribed” as destinations – able to cherry-pick the critical skills they need. The fact that their new zeal for controls may turn away valuable potential additions to their stock of human resources is for them a trivial concern, allowing them to talk tough with relative impunity. They may not wish to admit it but they are luxuriating in past accumulations of foreign skills towards which they have contributed nothing at all.

Perhaps one of the more brutal aspects of the global economy is that the wealthy countries exploit the painfully costly educational outputs of the developing world. The entire swathe of non-OECD countries are all to some extent or another desperately trying to pay for the skills needs of their far richer neighbours – skills development that they subsidise only to be creamed off through immigration into the rich countries’ labour markets. Indian taxpayers today are trapped into funding the ready-made skills of the thousands of IT technicians and professionals that India exports to Europe and North America, just as the teachers and nurses whose education South African taxpayers have funded, stream into schools and hospitals in Europe. A skilled immigrant whose credentials have been financed by some other country’s taxes is still the closest thing to the figurative “free lunch” that modern economics can deliver.

One of South Africa’s greatest potential economic threats, disguised up to now by our mediocre levels of economic growth since the late seventies, is a net loss of skills to developed countries. Currently our economy is just beginning to look as if we can raise our levels of growth and correspondingly reduce our greatest national problem – unemployment and under-employment. If and when we begin to achieve sustained levels of growth above 4% per annum we will unmask a crisis as large as any that we are currently trying to solve – a desperate scramble for the skills that an emerging export-oriented global economy requires.

Only then will we fully realise that we have to defend our economy against the ravages of foreign recruitment of our precious skills. How does one do this? By making sure that our country is a very attractive place to live and work for skilled people and by recruiting skills in the international marketplace. In short – make sure we are a competitive society and ‘open our doors’ to skilled foreigners whose skilling has been paid for by some other government.

This potential crisis should focus our minds in good time, which is now. And this brings us face to face with our own immigration policy.

### Skills Shortage a threat to South Africa's potential for growth<sup>1</sup>

In February this year, *Business Report* carried an article entitled "Lack of skilled workers threatens economic growth"<sup>2</sup>. The information in this article is illustrative of South Africa's critical shortage of skills.

The economy grew by 3.7% last year,<sup>3</sup> and as Finance Minister Trevor Manuel mentioned in his recent Budget Speech, the country is expected to grow by 4 to 4.5% over the next three years.<sup>4</sup>

But the question is: do we have the skills to reach this target and the even higher targets we need for a real reduction in unemployment? It appears that the shortage of skills in South Africa will put increasingly severe breaks on the economy's ability to expand.

Iraj Abedian, of Pan African Advisory Services, and former Standard Bank Chief Economist, estimates that the country has approximately 500 000 vacant posts for computer technicians, financial managers, artisans and other professionals<sup>5</sup>.

Sasol cannot find sufficient skilled mechanics, welders and riggers to meet the government's demands that it phase out leaded fuel. The Human Resources Director at Sasol says that the company will have to import about 2000 qualified artisans<sup>6</sup>.

Not only does the shortage of skills put breaks on companies' ability to grow, but increases their costs – particularly wage costs – as companies have to compete for skilled workers. Over the past five years, Sasol's average annual wage costs per employee have apparently more than doubled<sup>7</sup>.

It's not only the private sector that is struggling to find the necessary skills. Minister of Public Administration, Geraldine Fraser-Moleketi, said that local government had a major problem in finding and keeping skills, a situation exacerbated by the fact that they have to compete with the private sector.<sup>8</sup>

The economy's capacity to grow and the public sector's capacity to deliver are crucially dependant on South Africa finding thousands more skilled workers in the near future.

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In the new South Africa, business has been waiting a very long time for the implementation of appropriate immigration legislation. The process of getting rid of the old apartheid siege state legislation started a long time ago, in 1997. The process was driven by considerable idealism but undermined by all manner of contradictory agendas in government and by technical deficiencies, and was complicated by political tensions between the Minister and various factions of opinion within the Portfolio Committees at all stages. Finally in April of 2002, the vexed process yielded the new Act 13. This legislation, however, immediately fell foul of legal challenges, including a successful court challenge to the procedures adopted in approving the regulations. These and other technical difficulties took the process back into much the same political and procedural mire that had delayed the process from its commencement in 1997. It was almost immediately recognised that the 2002 legislation had to be extensively amended.

All the while, immigration control operated under an untidy mix of old and new provisions. All along there has been a widespread perception in business that procedures have been unnecessarily time-consuming and that costs to business, both in terms of the regulatory requirements and the certainty necessary for strategic planning and investor confidence, have been considerable.

Finally a new law, the Immigration Amendment Act of October 2004 was promulgated. The writing of regulations to accompany the Act, however, has proved to be a difficult and according to some accounts, a vexed process within government. A major reason for this may be that at least four departments have contributed substantial inputs to the regulations, requiring a great deal of internal reconciliation aside from the equally complex progress through the Parliamentary Home Affairs Portfolio Committee. It is no secret that there are strongly opposed viewpoints on immigration within the governing party caucus. But now at last the regulations have been tabled for comment and the entire package is open to inspection and public comment.

CDE has devoted considerable attention to immigration policy and has published its views on immigration in general and previous versions of our policies at some length (see list of references)<sup>9</sup>. Therefore CDE would like to add its comments to those of others. In doing so, much time could be spent in comparing the previous versions of legislation (the original legislation and the 2002 Immigration Act) with the current legislation and regulations. This will not be very enlightening at this stage, however. The comparisons are made complex and confusing by the fact that not only substantive policy changes but a host of legal and constitutional technicalities have propelled the changes. Quite frankly by now there is observer and commentator fatigue. Therefore, aside from a few passing references to earlier stipulations, we have preferred to take a fresh look at the new legislation and regulations in the current context, with an eye to our future needs and requirements. We will also not deal with certain technical hitches that we have noted in the regulations, on the assumption that these will be resolved in the final revisions.

## ASSESSING THE LEGISLATION AND REGULATIONS TOGETHER

Most of the amendments to the 2002 Act are practical in nature and serve to streamline provisions and procedures. With exceptions that will be discussed below, they are generally positive, mainly unproblematic and require no further comment.

### The Preamble and objectives

As before, the Preamble to the Act promises to solve all problems simultaneously. We are told that the new law will:

- In the context of the global economy, facilitate the entry of scarce skills, investment and tourism, on temporary and permanent entry permits. The goal is that “the economy may have access at all times to the full measure of needed contributions by foreigners”
- On the basis of simplified procedures that are predictable and reasonable
- Without consuming excessive administrative capacity



- While ensuring that security considerations are fully satisfied
- And effectively and efficiently reduce the pull factors of illegal immigration in cooperation with other departments
- And the push factors in cooperation with other states
- While respecting the highest applicable standards of human rights protection
- And combating xenophobia
- While maintaining a policy connection between the training of citizens and foreigners working in South Africa
- Without adversely impacting on labour standards and the rights and expectations of South African workers.

Needless to say, the simultaneous and smooth achievement of all these diverse goals would be miraculous in any country. Nevertheless the preamble and the whole approach in the legislation suggest a sincere intention, at the level of policy at any rate, to produce a balance between all these potentially contradictory objectives. Certainly the wording of the objectives suggests that the Minister is sincere in wishing to ensure that South Africa is able to attract the skills it needs.

### **No more Training Fees**

At the outset we should also note that one particularly troublesome provision in the earlier legislation is omitted, namely the requirement that employers of foreigners pay fees calculated as a percentage of remuneration into a Training Fund. The requirement of fees was found to be constitutionally problematic because non-financial legislation cannot impose taxes or fees outside of the proper budgeting processes in the Department of Finance. Whether it reflects a change in principle remains to be seen.

Some commentators feel that the omission of the fee requirement has removed one source of reassurance to investors and employers, this being the hope that they could get what they needed at a price, a condition which operators in a market economy find familiar. A broader view, however, was that the fees would have contributed substantially to the accumulation of regulatory costs and that the fees would in effect have been a tax on growth.

### **The Immigration Advisory Board**

The Board could be a useful institution if it is able to monitor the impact of the legislation and regulations on the country, point to administrative inefficiencies and provide an ongoing source of advice aimed at streamlining or improving the effects of immigration control. One should not, however, expect any bold action or initiatives from the Board because its composition is dominated by officials, in the ratio of 13 state officials to one business representative, one labour representative and up to five individual persons with experience and expert knowledge in the field. Its decisions have to be taken by consensus, potentially allowing vetoes by particular departments. Its effectiveness will depend

heavily on the quality of the Chairperson and therefore its impact could vary between passivity and a more dynamic input. Given that it is formally merely an advisory body without independent review functions, its role cannot be predicted from the legislation. It will add to the quality of decision-making at least marginally but in all probability it will essentially be an adjunct to the departmental machinery. It is unlikely that the Board will have the confidence to take a tough stand on some of the more predictable problems that can be expected to arise, some of them discussed below.

Aside from the money that it will cost, however, the Board will probably do no harm and might add a certain amount of depth to reviews of progress within the Department.

### **How open is the legislation and regulations to the entry of persons whose activities could add value to the economy and society?**

One should not consider provisions in isolation because there are often alternative bases of application and entry, and a particular person, if well advised, could make an application on a basis most appropriate for his or her circumstances. Therefore we take a broader view of the relevant clauses in combination.

Work Permits: a person may be considered for a work permit on the following alternative grounds:

- Quota Work Permits: possession of skills conforming to the quotas of skills to be published annually in the Government Gazette, subject to the evaluation of the skills in question in terms of the framework of the National Qualifications Authority
- An Exceptional Skills Permit, where such skills are testified to by an academic, cultural, business organisation or organ of state, substantiated by a CV, other documentation, testimonials and other proof that the applicant will contribute value to society
- A General Work Permit, issued where an employer wishes to employ an identified foreigner, requiring proof of qualifications and experience based skills, proof that the prospective employer has attempted through a formal advertising process to obtain the services of a suitable South African, and proof that the proposed salary is commensurate with the average salary for similar positions or skills.
- There is a general provision that an applicant for entry can apply to alter his or her entry status while in the country. This will make it possible for persons legally in South Africa on a visitors permit to identify an employer and apply to change their status to that of say a General Work Permit or a Quota Work Permit.

On the basis of these provisions one may assume that most people with an interest in working in South Africa, whose skills will be of benefit in our economy, will be able to obtain permission to work, one way or another. But at the same time, one must ask who is likely to be excluded. There are likely to be two categories of persons:

1. People whose level of employment in a business or organisation would not warrant the employer going to the trouble and expense of submitting the onerous documentation required for a General Work Permit

2. Persons with valuable skills not recorded as part of a defined quota of skills tabled annually. Perhaps an example will be useful. Graduate Arts and Language qualifications are generally assumed to be in oversupply in South Africa and many holders of such qualifications cannot find work. However most of the people newly graduated with BAs cannot write a coherent letter, let alone a complex memorandum or report, however, to say nothing of their stylistic finesse or lack of it. Many commercial research and service organisations are quite desperate to find recruits who can write reports and memoranda, or who can recast clumsy documents in more elegant prose. They are unlikely to be identified in quotas. Furthermore, their levels of employment are not likely to be such as to warrant the elaborate motivations required for a General Work Permit and they will be too young or lowly in seniority to qualify for an Exceptional Skills Permit.

One could argue that the tertiary training institutions have to improve their methods and standards, but this will take years. Therefore many employers will either struggle to make do with semi-literate staff or will simply outsource the kind of work in question, at higher cost.

In the meantime, however, the OECD countries will continue to have an advantage over South Africa because of a higher and more sophisticated level of communications and reporting. The same would apply to lower level project managers who are in critically short supply in South Africa but whose qualifications are too diffuse, or experience-based to be categorised in quotas.

The main point being made is that the country will not necessarily notice what it is missing. Perhaps with persistence such categories of persons will be able to find some basis of entry, but the point is that they are generally persons who have options of other countries to go to. Will they take the additional trouble to come to South Africa? The fact is that any casual conversation with child minders, waiters and waitresses, taxi drivers and people who do ad hoc work for care hire companies for example, in places such as London, Sidney, Paris, Zurich, Amsterdam and other world cities – reveals a rich back-up to local skills among foreigners, adding depth to their human resource base.

Johannesburg, Cape Town, Rio de Janeiro, Buenos Aires, Kuala Lumpur are midway on this kind of resource scale. Its value is never calculated but in the modern global economy, is invaluable. Only by allowing these kinds of people into the country will we be able to keep abreast of the other leading emerging economies in certain critical but often unnoticed fields.

There may be routes of entry that are alternatives to Quota Work Permits but the Quota Work Permit would apply particularly to curious and venturesome, possibly entrepreneurial individuals in search of opportunities in a new country. *Therefore the regulations pertaining to quota work permits very substantially circumscribe the flexibility of our proposed immigration control system.* This is of major concern to CDE.

Furthermore, there are enormous methodological difficulties in defining, classifying and quantifying quota categories and even greater difficulties in keeping abreast of the changing combinations of skills in the newer technologies. These days training is increasingly offered in smaller private training courses and commercial modules rather

than longer more basic university degrees and technical diplomas. This complexity will have to be reconciled with annual quotas in standard NQF categories, and here we see two more difficulties.

One difficulty will be the problem of mismatches between how the quotas define the skills we need – and the skills needed by the economy. Some skills are difficult to categorise, particularly where work experience is a major component of the skills.

The second will be the problem of the quality of the databases on which the estimates are based. We are aware that empirical research is undertaken by the Department of Labour but the methodologies – any methodologies – in this field are thoroughly debateable. Methodologies that inter-relate indexes based on market forces with empirical enquiries are best, but each component requires extensive and hence very costly sample coverage to yield insights for smaller but critically important categories of skills. To the end users, the employers and the would be immigrants, the final output (the quotas or the NQF) is often a “black box”, as is the case with many kinds of government statistics, some of which do not enjoy a reputation for precision and reliability.

We would suggest, therefore, that the quotas that are to be used should be used with great caution and flexibility. Unfortunately the tendency is always for an official statistic to be reified – given a false status as a measure of reality and used inflexibly simply because it is easier to do that than to exercise judgement.

Quota-based human resource planning is ultimately as suspect as the post war “manpower planning” methodologies that brought discredit upon themselves. As Szmirai<sup>10</sup> puts it, “Manpower planning tries to determine the social need for employees with different levels of education ... In theory this is a valuable approach. In practice, however, the experiences with manpower planning have been very disappointing, both in developing and in more developed countries.” Both he and other authors, for example Gilles et al<sup>11</sup> (1992) point to the impossibility of predicting the demand for various categories of employees by levels of skill and education more than two or three years ahead, and if the predictive power of these techniques has such limited time horizons, then one may assume that their predictive precision is doubtful from the outset.

If “manpower planning” is passé, then so are any hopes placed on educational or skills quotas in immigration control. They set a trap of contradictions and the fact that other countries make the same mistake is scant comfort. In the end they produce distortions in supply and demand and for this reason as well, should be used with great caution.

### **Crime control and police clearance certificates**

Another keynote feature of the regulations is the capturing of the immigration control system to serve the interests of crime control. There are various requirements for police clearance certificates from all countries of previous residence since the age of 18 years. This requirement is specified for Quota Work Permits, Study Permits, Treaty Permits, Business Permits, Relatives Permits, Retired Persons Permits, Corporate Permits (excepting seasonal workers), Exchange Permits and Permanent Residence Permits. This

is directly paralleled by the FICA legislation in which all manner of financial activity has been “commandeered” by costly and onerous requirements to combat money laundering.

It is always tempting for governments to encroach on non-related bureaucratic regulations to solve problems of control or surveillance. However, one can think of many ways in which serious criminals, drug dealers and money launderers will circumvent new nets of control, leaving in their wake additional regulatory costs, complexity and time losses without necessarily curbing the activity targeted.

Given that such Police Clearance Certificates have to be submitted for every country in which the applicant has resided since the age of 18 years, the requirements are not only onerous but could result in extended delays. Is it appropriate that the Safety and Security Authorities should co-opt immigration regulations for tasks of surveillance that are not normally the responsibility of civilian authorities?

### **Minimum Financial Requirements and other provisions applicable to Business Permits**

The provision allowing for business permits is potentially of very great value to the country in attracting foreign direct investment and the importation of skills and capacities of directly benefit to growth. Given this, however, one has to ask whether the requirements set out do not discourage some of the potential activity that could add economic value. Have the drafters of the legislation and regulations given serious thought to the potential importance of high value-added and knowledge-intensive very small and micro businesses?

The requirements in the regulations are that a business entrant should not only furnish guarantees of a capital investment of R2,5 million (or its equivalent) to be part of the book value of the business, with details certified by a Chartered Accountant, but in addition should submit all of the following: a business plan, proof of entrepreneurial skills, proof that the business will contribute to the geographical spread of activity in the country, that it will employ at least 5 South Africans on a permanent basis, a demonstration of export potential if relevant, and police clearance certificates.

Most medium-size businesses should have no difficulty with these requirements (R2,5 million is not a great deal of money) but combined with the other requirements (which are not alternatives except in the case of export potential) the requirements are forbidding and will take time for compliance. In the case of very small and micro-businesses, however, the requirements are discouraging to say the least, as will be argued below.

It is possible for an applicant to be exempted from these requirements if the business is in the national interest or, presumably, in a growth sector. It may therefore be argued that deserving cases will always be considered but the effort and uncertainty will discourage some applicants from the outset. One does not know how restrictive the judgements of officials will be in considering applications under the exemption clause, and predictability is a key factor in attracting investors. Here we must remember that South Africa is in cutthroat competition with other higher level emerging economies for foreign investment and the acquisition of new technologies and knowledge-based enterprise, and onerous

provisions for entry coupled with uncertainty and possible delays cannot possibly be in our economic interest.

CDE also considers that the time period for the validity of Business Permits to be too short – 24 months at a time. A period of 36 months would be more reasonable given the almost inevitable difficulties and setbacks in business start-ups and the need for legal/residential security in approaching banks, customers and suppliers. A period of 36 months would also mean only one further application before the businessman/woman could apply for a permanent residence permit.

CDE's main problem here, however, is with the kind of businesses/investments that the provisions will exclude or discourage:

- First, for a knowledge-intensive micro business, in which the real asset is intellectual capital, the financial capital requirement of R2,5 million is too high – indeed redundantly high for a one person enterprise based on marketable intellectual or technological skills. If such skills can be confirmed there seems to be no reason why the micro-enterprise should not be approved on the basis of more moderate capital requirements. For example, a potential immigrant wishing to establish a business, say, in the field of business development services, or a commercial training programme based on new software or techniques he or she has acquired abroad, would certainly not need R2,5 million rand. Knowledge-intensive businesses can be established much more cheaply. One wonders whether or not the drafters of the regulations carefully assessed the kinds of enterprises that the minimum requirements would exclude if they could not gain exemptions. Given the global evidence that many thriving and innovative businesses start small, some even on an informal basis, these requirements would seem to be counter-productive.
- Second, people investing in a new country are least likely to want to establish themselves in decentralised locations in which communications infrastructure and backward and forward linkages are likely to be inferior. We should have learned from the old apartheid decentralisation policies that many if not most of the businesses established in remoter decentralised locations did not remain there once their heavy subsidies were terminated. In very recent speeches following the opening of parliament, both the President and the Minister of Housing seem to have indicated that they accept that South Africa is a rapidly urbanising country. This reality should be mirrored in economic development strategy.
- Third, an initial requirement that the proposed business will employ five South Africans on a permanent basis will inevitably exclude micro businesses and very small technology-intensive start-ups. If the initial staff is composed of people with scarce skills relevant to the kind of business envisaged it may very well be necessary and a good thing of the initial staff are also attracted from abroad. In addition many small/micro businesses start out as family enterprises and only later grow to include non-family members. Why exclude these hard working individuals from our economy and tax base?

The successive *Global Entrepreneurship Monitors* have concluded on the basis of empirical research that South Africa has a deficit of entrepreneurs relative to the situation

in comparable emerging economies. This deficit includes humble entrepreneurs starting businesses on the basis of artisan and craft skills. Would such people be able to convince a Chartered Accountant that their proposed operations are potentially viable? They certainly would struggle to meet the other requirements.

For these reasons CDE is strongly convinced that the entry requirements in respect of Business Permits are set at too high a level, both in terms of financial assets and the level and complexity required in the supporting documentation. For an economy with a proven shortage of cutting edge skills and very small but high value-added technology-based businesses, the requirements for Business Permits taken together amount to a very serious half-measure.

### **Retired persons' permits**

The requirement that a person wishing to retire in South Africa has to prove net worth that will realise R20 000 per month is reasonable on the face of it. A pension of less than this would not allow the person to live in middle class housing and have money to spend – one of the attractions of retired immigrants is that they bring a regular flow of foreign exchange and spending power with them. There would be cases, however, where a retired person with less net worth could live more cheaply (say in a small town) or in a boarding house or garden flat and still spend money and pay taxes. One would have liked to see more flexible provisions to cover this kind of case.

### **Permanent Resident Permits**

Once again notwithstanding the fact that various alternative grounds for the granting of Permanent Resident's Permits are possible, the amended levels of net worth and fees specified as an optional basis for application are somewhat high. Our reactions in this regard are essentially the same as those we have outlined in the case of Business Permits and Retired Person's Permits. What is the purpose of such high thresholds? The thresholds are in excess of what such persons would need to live a life that is in no way dependant on South African welfare or any other state support. Here again we must ask whether the intention was to send a discouraging message to prospective applicants.

### **A finer legal point**

The Immigration Amendment Act, like the base legislation of 2002, makes general use of the word “may” in specifying the roles and duties of the Minister and the Department. This is a frequent practice and it is probable that courts will interpret the word as indicating an obligation. In other words in legal practice the word “may” might well be a synonym for “shall” or “will”.

CDE has taken legal advice on this issue, however, and it would seem that the term “may” could very possibly be interpreted by a court to mean that the Minister and officials have an element of choice and hence leeway to deviate from the provisions of the legislation, thereby setting a more generally applicable legal precedent. CDE accepts that the leeway would not be exercised in such a way as to go against the spirit of the legislation, but the

mere fact of “legal variability” will obviously introduce serious uncertainty in the application process. CDE would suggest, therefore, that this matter should be referred for careful legal opinion and reconsidered.

### **Welcome aspects**

There are welcome aspects in the regulations. We have already referred to the withdrawal of the requirement that training fees be paid by employers of immigrants (a mixed blessing as we have noted) but we also note that provision is made for prompt appeals to the Director General in the case of applications refused and that persons legally in the country on temporary permits can apply to change their status. Many applicants for Business Permits will also welcome the fact that a familiar procedure acceptable to most businesses of using Chartered Accountants to submit verifications of their financial arrangements and business plans, is re-introduced in the regulations, having been omitted from the amended legislation.

### **GENERAL ASSESSMENT**

On balance none of the provisions are draconian or abnormal in the world of immigration law and our new laws are more reasonable than many. The intentions are balanced and sincere (if the word is appropriate) and given the purposes stated and the problems that are targeted, the requirements would appear to be reasonable.

CDE would like to congratulate the drafters of the regulations for many amendments that quite significantly ease the procedures for entry into the country. With the exception of provisions in respect of Business Permits and the matter of Police Clearance certificates, the regulations do not add any constraints on the immigration of skills, and in many places they alert officials implementing the legislation to the need for flexibility of judgement.

The regulations also reinforce a useful feature of the Act, namely that if one route of admittance to the country is closed, then other routes of application for entry permits are possible.

This does not mean that we will have a successful immigration law or policy, however. We are concerned that many of the key requirements specified in the regulations, read in the context of capacity and efficiency problems in our public administration, could lead to time-consuming and therefore also costly compliance procedures. We are concerned that a zealous application of the regulations could in the course of time reinforce an image of South Africa’s immigration regime as slow moving and overprotective.

We are also concerned about criteria applied by the regulations. Some of the criteria will be controversial and raise serious questions about the validity and effectiveness of the criteria. In particular we are concerned about:

- Possible over-reliance on the National Qualifications Framework, which is difficult to apply to new innovations in training and the shorter commercial courses that are now part of the global culture of human resource development. There is ongoing and rapidly moving elaboration and adaptation in skills production.



- The appropriateness of any system of skills quotas that attempt to serve as an index of real life labour market needs and demand for skills. We are aware that government undertakes extensive empirical work based on surveys among businesses, but we are also aware of the huge costs of such surveys and the fact that it is very difficult to extract high quality data from busy and reluctant entrepreneurs. As we have argued the general international experience is that attempts to quantify emerging skills needs for the purposes of quotas have almost always failed.
- The possibility of an inflexible application of minimum financial requirements for applicants in situations in which fairness and benefits for South Africa would seem to require that the specific circumstances and intentions of applicants be carefully judged on merit
- The procedural problems that will be raised by the requirement of Police Clearance certificates for many categories of applicants. We are equally concerned about the principle of using the regulations of a law intended for a specific purpose to facilitate surveillance in another context altogether. The combating of cross-border crime and financial malpractice is an important issue but it should remain a task for the law-enforcement agencies.
- There is also the very real possibility that the use of the immigration regulations to serve a law-enforcement function will influence the culture of service and administration, making it unnecessarily defensive in respect of immigration itself.

Each requirement intended to exclude undesirable movement into the country will have unintended costs and consequences, some of them not yet apparent. Will the benefits outweigh the costs? This after all is the key question that is raised by bureaucratic controls in at all levels in all spheres, and ultimately the answer to this question will indicate whether we have a good or bad new law. Above all, however, undesirable persons are specialised in evading controls and as they adapt to the new controls, the costs of the control provisions relative to their benefits will rise.

CDE's argument is also more general. Taken together, the regulations about which we have concerns suggest that there is a view in government that certain kinds of immigration are undesirable. Obviously some of it is undesirable and the categories are easy to enumerate: criminals and drug dealers, money launderers, persons who stand a good chance of being a burden on South African taxpayers, persons whose attempts to find employment will reduce employment opportunities for South Africans and permanent residents without creating employment, adding value through their economic activities or contributing to tax revenue. Quite rightly, these categories of persons are targeted in the regulations and the Act itself for exclusion.

There is, however, a category of persons who may be excluded by the same regulations who are unlikely to constitute a burden or a net deficit in terms of South African interests. In this category we would include people with skills and experience whose credentials and/or assets and earning ability do not match the specifications in the regulatory requirements. Such persons will be very likely to find a niche and be a useful employee or a viable small businessperson despite their fields of activity not being covered by skills quotas or categories deemed to be in the "national interest". Such a person may even in

the very short term “compete” with South Africans for jobs but many of our other policies recognise that competition is good for an economy. Our problem is not too much competition but too many people whose skills are so limited that they are less and less likely to be able to even compete to enter the labour force and pay taxes. In the medium to longer term, any person who will find gainful employment, pay taxes and contribute to the overall product of our economy, or bring even modest amounts of money and resources into the country, will be a net gain for our economy. One cannot possibly damage the interests of South Africa by allowing in more taxpayers. We are concerned that the regulations send a message that this kind of person is no more desirable than a jobless refugee or a shady character. In other words we are concerned that the regulations, although plausible and apparently reasonable, are overprotective and to that extent counter-productive.

CDE would not suggest drastic revision, however. All the regulations have utility in principle. Broadly we would simply suggest that:

- More accommodating options be introduced, or existing requirements be specifically widened that will make the regulations more flexible and responsive to the specific circumstances of the applicants.
- That the requirements be so formulated and phrased as to take full account of the fact that many if not most economic activities crucial to the growth of an economy today start small and expand over time. In general, therefore, the financial requirements set for various permits can be lowered or made more flexible. And the other requirements such as where a new business is to be located and whether or not it employs South Africans should be removed.
- The skills criteria applicable to certain permits be based not only on annual quotas or NQF requirements but allow generous flexibility in order to accommodate new and unexpected skills and qualifications on their merits, and the value of experience.
- That requirements additional to the core purposes of the legislation be reconsidered, such as the *automatic* requirement of Police Clearance certificates, or that applicants for business permits locate in decentralised areas and immediately employ five South Africans. Even if these provisions can be justified in a context beyond the specific purview of immigration laws and regulations, their likely effects in causing time delays or excluding otherwise valuable human resources make them problematic in the specific context of immigration law.

The world over, immigration authorities tend to be restrictive rather than accommodating in the way regulations are interpreted in their offices. It is a natural consequence of the fact that most countries develop an anti-immigration spirit, based almost always on exceptional rather than typical cases and experience. South Africa cannot afford this kind of unduly protective approach. To judge from very recent State of the Nation addresses and assessments by Ministers in their Portfolio reviews, the reality of a looming skills crisis as the economy moves to higher levels of growth is fully acknowledged by government, from the President down.

For this reason CDE would earnestly recommend that the commitment to the entry of valuable skills be reflected in more than the preamble to the new immigration legislation but also in the flexibility that can be introduced into the regulations. The entire package of the new Act and the associated regulations should send a message that we welcome all people who are likely to add new value to our economy and human resource base.

After a long history of operating under very “protective” legislation it would also be a very good idea if the department were to hold workshops for all line personnel in order to spread the spirit of the new legislation and the importance of immigration to the economy and therefore the well being of all South Africans.

CDE is convinced that the new regulations, with modifications that will introduce greater flexibility and more fully embrace the challenge of attracting the skills we really need, can become one of the cornerstones of a winning nation.

Centre for Development and Enterprise  
February 2005

## Endnotes

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- <sup>1</sup> This box is largely based on, M Cohen, Lack of skilled workers threatens economic growth, Business Report, 21 February 2005.
- <sup>2</sup> M Cohen, Lack of skilled workers threatens economic growth, Business Report, 21 February 2005
- <sup>3</sup> M Cohen, Lack of skilled workers threatens economic growth, Business Report, 21 February 2005
- <sup>4</sup> T Manuel, Budget Speech 2005, National Treasury, 23 February 2005.
- <sup>5</sup> M Cohen, Lack of skilled workers threatens economic growth, Business Report, 21 February 2005
- <sup>6</sup> M Cohen, Lack of skilled workers threatens economic growth, Business Report, 21 February 2005
- <sup>7</sup> M Cohen, Lack of skilled workers threatens economic growth, Business Report, 21 February 2005
- <sup>8</sup> M Cohen, Lack of skilled workers threatens economic growth, Business Report, 21 February 2005
- <sup>9</sup> People on the Move: Lessons from international Migration Policies, CDE Migration Series, June 1997.  
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South Africa’s New Immigration Law: a Salvageable Instrument for Economic Growth, CDE Responses to Government, October 2002.  
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Should South Africa Open its Doors to Skilled Foreigners? CDE Debate, October 1997.
- <sup>10</sup> Adam Szirmai, *Economic and Social Development*, London. Prentice Hall, 1997, p177.
- <sup>11</sup> M Gillis, D Perkins, M Roemer and D Snodgrass, *Economics of Development*, New York. Norton, 1992.