



The Centre for Development and Enterprise

**SOUTH AFRICA'S SKILLS CRISIS
Is the new Immigration Bill good enough?**

RESPONSE AND SUGGESTED AMENDMENTS TO THE
IMMIGRATION BILL OF 29 JUNE 2001

Prepared by the Centre for Development and Enterprise
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Executive Summary

In his state of the nation speech at the beginning of this year, President Thabo Mbeki committed government to 'improving competitiveness by lowering input costs throughout the economy'. He also said that: 'Immigration laws and procedures will be reviewed urgently to enable us to attract skills into our country.' How well does the Immigration Bill meet the requirements of the economy specified by President Mbeki?

- *The Bill reflects an intention to address the skills needs of the country and in this respect is an advance on existing legislation. It contains core principles that could facilitate the entry of the kind of skills that our economy needs.*
- *However, there are clauses in the bill which could have the effect of contradicting or undermining the sound general principles. What this means is that the Immigration Bill cannot be guaranteed to reduce our skills bottlenecks. More seriously, some of its provisions will actually raise operating costs substantially in areas of operations affected by the skills shortage. CDE has deep concerns that the legislation will not achieve the twin purposes that the President's injunctions from his February 2001 state of the nation speech quoted above imply.*
- *The terms 'skills or qualifications which may be prescribed from time to time', 'prescribed category', 'prescribed quota', 'prescribed requirement' or 'prescribed yearly limits of available permits' (in the case of Permanent Residence) usurp the principle of market demand and replace it with an elaborate system of categories designed in government offices. At issue here is not only the impossibility of anticipating market demand but also the prospect of delays in the processing of applications while calculations are made of the numbers and limits for categories.*
- *The objectives of the new immigration bill are to ensure that 'needed skills' are acquired by the economy. A critical issue is who decides what foreigners are 'needed' and on what basis the discretion is exercised. CDE challenges the assumption that 'needed skills' can be categorised, calculated, predicted or anticipated and would argue that the only proper test of 'needed skills' are the signals of the demands and requirements of the economy itself and its expansion and growth. How long will it take three different departments to agree on South Africa's skills needs? On the basis of which statistics? Furthermore, the bill specifies only that 'businesses may employ foreigners who are needed'. What about the kinds of foreigners that we would like to have as entrepreneurs or self-employed people? The guidelines do not specify the grounds on which the presence of people who will not be employed by others, is needed. The fact of the matter is that South Africa needs skills of all types and forms that cannot be predicted or categorised.*
- *South Africa is very unlike the Switzerlands, Singapores, Japans and Germanys of this world in that: our economic growth is significantly more constrained by skills shortages than theirs; our need for skills runs across almost every sector of the economy not merely one or two highly specialised areas; and instead of hordes of qualified people trying to get in, too many of our skilled people want to get out. There is absolutely no threat that we will be overwhelmed by applications from engineers, IT technicians, doctors, mechanics, accountants, entrepreneurs, teachers, nurses or any other profession. In fact, we will have to struggle to attract them. Why then this inordinate caution on the part of our legislators?*
- *A large corporate employer may be able to absorb the costs of inter alia having to pay the fees of a chartered accountant to provide necessary certification; a ratio of the possibly inflated remuneration for each foreign employee into the Training Fund – in effect an additional tax; but if a small or medium sized business needs to attract foreign skills the costs, or the risk of costs, may be such as to discourage the employer from even trying. This is hardly what President Mbeki committed the government to in his state of the nation speech.*

- *What this Bill does is empower officials to decide what is best for the economy. One is expected to believe that the officials have the best of intentions and that their regulations and prescriptions will honour the commitments of the President. Unless the Bill itself specifies very clearly what the outcomes of its provisions should be it should not be supported. This Bill does not do that and for this reason falls woefully short of what the President promised and what South Africa desperately needs.*
- *The Bill will not provide the basis for a 'rule of law' but could lead to a hegemony of bureaucracy. The goal of attracting desirable immigrants will be neutralised by an opposite objective of limiting any conceivable competition to South Africa's existing labour force.*
- *At every point of consideration, the State will judge the desirability or need for the particular benefits that the foreigner might bring into the country. It amounts to a web of intervention that will tax the government's information systems and the judgement and capacity to process applications beyond the limits of what is possible.*

Recommendations

The bill in its current form cannot be supported. What is required is a process of rapid review and redrafting to remove all the prescriptions and regulations which could contradict the bill's sound principles. What South Africa needs is migration legislation that will result in the large scale flow of skills essential for the economy.

CDE recommends inter alia the following revisions:

- *The legislation must guarantee unambiguously that until such time as South Africa's educational crisis and training deficits are overcome, the entry of all potentially economically productive skills is facilitated. In this regard the drafters should accept that onerous criteria are bound to exclude skills and aptitudes that the economy needs;*
- *the requirement that terms and conditions for employment of foreigners should not be inferior to those prevailing should be scrapped in the case of all skills above the level of, or outside of, those to which industrial council and bargaining council agreements apply;*
- *that the requirement of a special training fee be dropped in the case of employment of foreigners; and*
- *that the legislation provides clear guidelines concerning the minimum investment capital requirement for entrepreneurs and self-employed persons so as to include small and micro-entrepreneurs.*

Note: *This CDE response has been endorsed by*

- * *American Chamber of Commerce*
- * *British Chamber of Business in Southern Africa*
- * *University of the Witwatersrand, Johannesburg*
- * *Potchefstroom University for Christian Higher Education.*

*Centre for Development and Enterprise
 17 August 2001*

SOUTH AFRICA'S SKILLS CRISIS: Is the new Immigration Bill good enough?

CDE Response and suggested amendments to the Immigration Bill of 29 June 2001

Introduction

South Africa's immigration laws are badly in need of revision. The legislation currently in force dates from an earlier period of our history when the apartheid government was highly discriminatory about the racial and ethnic identities of would-be immigrants. Furthermore, for long periods from the sixties to the eighties, South Africa was a reasonably popular destination for people seeking to escape from constraining economic conditions in their own countries. As a result South Africa generally gained significantly more than it lost from the international movement of people. It was also a period before globalisation and the mobility of international capital had increased the need for a free movement of skills and expertise across international boundaries to service capital investment in its new locations.

Today South Africa's needs in respect of immigration have changed quite dramatically. No longer is it readily able to attract skilled immigrants and since 1994 the outflow of skills has been greater than the inflow – our so-called brain drain. The official statistics are not an accurate representation of the situation and, as we detail below, one may safely assume that South Africa's ratio of losses to gains of skilled persons and their dependants average around five to one.

To its credit the government has devoted considerable effort and resources to developing a new immigration policy and associated legislation over the past five years. Recently the critical need for skilled immigration has also been given new urgency by the President. In his February 2001 state of the nation address, President Mbeki emphasised the need to focus on micro-economic issues that constrain investment despite successes at the macro-economic level.¹ He committed government to:

- *'improving competitiveness by lowering input costs throughout the economy' (p4); and promised that*
- *'immigration laws and procedures will be reviewed urgently to enable us to attract skills into our country' (p8).*

1. Migration and economic growth

CDE's comments on the Immigration Bill of 29 June 2001 are the product of considerable comparative and domestic research on international migration and South Africa's policy in this field. This work is captured in the following publications:

- CDE Research No. 6: *People on the move: Lessons from international migration policies* June 1997;
- CDE Research No. 7: *People on the move: A new approach to cross-border migration in South Africa* June 1997;
- *CDE Response to the Draft Green Paper on International Migration* June 1997;
- *Migration and refugee policies: An overview* a CDE book edited by Ann Bernstein and Myron Weiner, published by Pinter Press, London, 1999;
- *Becoming the 'world's most promising emerging market': Is government's White Paper on International Migration good enough?* CDE's response to the government's White Paper, February 2000; and
- *Suggested amendments to the draft Immigration Bill of 2 February 2000*, March 2000.

Our conclusions from this extensive body of work can be summarised briefly.

- CDE is in favour of migration as a phenomenon. Many migrants are the risk-takers of their communities, people with the drive and need to work hard. South Africa will not become a successful world competitor as a closed, protectionist, narrow society.
- If South Africa wants to become a competitive economy in the global system, consideration must be given to the relationship between opening our borders to trade, industry, culture, communications and capital, and the movement of people which must inevitably follow. The value of attracting skilled immigrants has long been understood by developed countries that often send expeditions to 'poach' desirable individuals from other nations.
- In the global economy today, economic growth and competitiveness is increasingly determined by high level skills inputs: the value added by innovations in management, production systems and technological innovation and by the levels of entrepreneurship and new risk ventures.
- *Against this background, government's migration policy becomes a test case of the coherence of government thinking on economic development.*
- This does not mean that an open invitation should be issued to everyone to migrate to Africa's southern tip. States have a right to secure their borders and keep out criminals and to do this effectively. A clear distinction needs to be made between crime control and migration issues. Strict crime control measures should not be used as tools of migration management and nor can migration control be used as a strategy against crime.
- CDE accepts that the country faces a problem of large scale illegal migration across its borders and that we need effective border controls and equally effective but humane measures to deal with illegal immigrants inside the country. We have long argued that resources have to be freed up to improve controls over illicit cross-border movement of people and goods.
- Accordingly CDE considers that laws, regulations and procedures in respect of desirable entry of people need to be simple, unambiguous and capable of being implemented speedily in each individual case.
- *Government's immigration policy must be more effectively positioned as a facilitator of national economic growth.*

- CDE advocates a two-tiered approach to migration policy – for skilled and unskilled migrants and argues that a crucial distinction must be maintained between these two categories. However, we will not deal with unskilled migrants here – our detailed policy approach can be found in CDE Research No. 7 *People on the move: A new approach to cross-border migration in South Africa* June 1997.
- CDE is in favour of the immediate lifting of all restrictions on skilled people from anywhere in the world moving to South Africa. Skills and experience that have been acquired at a cost to governments elsewhere in the world are a most important form of foreign direct investment, even more valuable than its monetary equivalents. Economic growth requires as many skills as we can grow, hire or import.
- Such a new immigration policy will impose a great burden on leadership but leadership is one resource with which South Africa is well endowed.

2. South Africa's skills crisis

The country's focus on illegal, generally unskilled migrants has drawn attention away from the real crisis issue – the enormous and growing shortage of professional and managerial skills which undermine prospects for sustained economic growth. The definition of 'skilled persons' should be expanded to include not only the traditional professional, technical, managerial and investor categories but also entrepreneurs of all kinds who have some demonstrated skills in the creation and management of either formal or informal enterprises.

South Africa must recognise that the country has a skills crisis that is deeply prejudicing economic growth and confidence. Not only is our own educational system currently failing to produce the amount of high-level skills that economic competitiveness requires but we are losing skills dramatically with disastrous consequences. Evidence recorded by the *South Africa Survey – 2000-2001*ⁱⁱ shows that:

- from 1994 to 1999 we gained 29 000 legal immigrants, most of them skilled;
- but the official statistics record a loss of 54 000 similarly qualified people to emigration;
- it is freely acknowledged that our emigration records are incomplete. The project *South African Network of Skills Abroad*, based at the University of Cape Town, has revealed that almost three times as many people emigrate as are recorded in our official statistics. The official statistics themselves show an excess of emigrants over immigrants, but if we take account of the unofficial emigrants as well, it seems clear that we are losing around five people for every one legal immigrant;
- an international survey conducted by a Swiss business school found that the likelihood of well-educated people remaining in their country of birth was lower for South Africa than for any other country in the world except Russia;ⁱⁱⁱ

WHISTLING IN THE WIND

- In June 2001 health minister Manto Tshabalala-Msimang said, ‘we want to state quite clearly that, although we recognise migration as a normal phenomenon in any free country, we will continue to object vigorously whenever developed countries plunder the meagre skills resources of developing countries in organised recruitment raids, countries that systematically under-produce skilled workers because it is cheaper to poach them from poorer countries are guilty of exploitation. This is simply colonialism in a new guise --- and, in the context of knowledge-based economies, it is as destructive to our national interests as the rape of our natural resources was in the past.’^{iv}
- Transport MEC in KwaZulu-Natal, S’bu Ndebele, reportedly suggested that government should take legislative action to prevent skilled people from leaving.^v
- Deputy President Jacob Zuma is reported to have said that SA had to ensure that doctors trained here showed sufficient patriotism to stay.^{vi} According to Zuma, ‘The question we need to ask ourselves again is: what are we doing to ensure that the recruits we bring into our system are ones that are most likely to stay in the country and serve the people? ... We have the choice to continue to spend valuable resources training doctors to benefit foreign nations or to develop strategies to ensure that we train doctors for our own nation.’^{vii}
- In June 2001, the UK government reportedly ‘bowed to pressure from SA by agreeing to tighten its policy on the recruitment of doctors, nurses and teachers from the country’. UK National Health Services employment policy head, David Amos, apparently said that the UK government was the only country in the world to adopt such a stance, indicating its commitment to ‘ethical’ recruitment and to helping developing countries in tackling their problems. ‘We got a clear message from the SA government not to poach staff,’ said Amos.^{viii}

Migration is a reality that cannot be stopped. People presently leaving the country are following precisely the same forces that caused millions of black South Africans to defy the apartheid legislation of influx control – and for the same reason – to improve their lives. Legislation and policing failed to sustain influx control. There is no evidence that they will work now. Does the government really grasp the magnitude of this global phenomenon?

It is not surprising that Canada’s provincial premiers rebuffed a formal plea to stop recruiting SA’s doctors and other health professionals. Only Nova Scotia, one of Canada’s poorest provinces, responded positively, stating that it did not on principle recruit from developing countries, but, according to an envoy. ‘The rest effectively told me to get lost.’^{ix}

International mobility is increasing, governments will all pursue their own interests. Rather than special pleading, SA should be entering the global market place, competing for skills and trying to attract them to SA.

- the people we are losing are very largely highly skilled persons and their dependants. Some 77% of South Africans emigrating to the US, for example, have tertiary qualifications and a leading US credit rating agency, Tomson Financial Bankwatch, estimated in 2000 that up to one-sixth of South Africans with tertiary education were living abroad;^x and
- as a consequence of these trends and our mediocre educational output, *PE Corporate Services*, a consultancy with an established reputation for manpower surveys, has estimated that we have a shortage of between 350 000 and 500 000 employees in the managerial and technical sectors. (See box: *South Africa's Skills Crisis*, page 6)

The critical need for a skills-flow into the country may not be very visible in our present phase of sluggish growth, but when the next economic upswing occurs, our critical shortage of technical, managerial and professional skills will be exposed as an abrupt artificial ceiling on growth.

Numerous other countries target our skilled professionals and technicians for recruitment. The government frequently complains about this and has made representations at the highest diplomatic levels. (See box 'Whistling in the wind' on page 4) But up to now we have done little to attract skills from abroad and the existing legislation has been aimed at keeping them out. South Africa's complaints about the recruitment of our skilled personnel reflect a failure to appreciate the realities of the competitive global economy and increased opportunities and incentives for greater personal mobility.

3. Dangerous mistake

It is a fallacy to think that there is a contradiction between equal opportunities for all South Africans irrespective of colour and the active participation of employers in the global marketplace for skilled personnel, in light of the following facts:

- the entry of skills will increase the capacity of the South African economy to expand and provide more job opportunities for all residents;
- the entry of skills is necessary to expand the capacity of the country to train and educate all its citizens to world class standards; even the substantially underestimated official statistics on emigration after 1994 show an average net loss of over 4 000 largely skilled persons per annum; and
- more skilled people at the middle levels of skill will play a part in lowering the income gap between highly skilled and unskilled in the country.

Migration controls do not protect uncompetitive local labour for very long. The real answer to labour vulnerability is to train local workers and job seekers rather than keeping out competition. For this reason, it is essential that:

- South Africa recruit skills abroad as a matter of urgency;
- policy makers understand the beneficial economic effects of dramatically expanding the pool of skilled labour in this economy;
- 'skills' are defined very broadly;

SOUTH AFRICA'S SKILLS CRISIS

Nobody should be under any illusions. South Africa is experiencing a deep and growing skills crisis:

- in the words of one commentator, 'Last year was the seventh in a row in which South Africa suffered a net loss of people. While the country gained 3 053 immigrants, the number quitting our shores was more than three times as high at 10 140. The upshot was a net loss of 7 087. Not only was this the seventh net annual loss in a row, it was also the highest figure since 1940... Our gain of 3 053 is obviously better than nothing, but it is the smallest inflow of people since the Second World War;',^{xi} and
- it is widely accepted that official figures are near worthless. The magnitude of South Africa's 'brain drain' is disguised by serious data deficiencies.

The profile of those leaving is worrying, it shows a disproportionate number of highly skilled people whom SA cannot afford to lose. In 2000:

- the ratio of emigrants to immigrants in the top two occupational categories (professional and technical, managerial, executive, and administrative) was nearly 6 to 1;^{xii}
- South Africa imported 20 'engineers and related technologists', while 358 departed – which means that for every one we gained we lost 18;^{xiii}
- in the category 'accountant and related accounting occupations', we imported 14 and lost 358 – a ratio of 1 to nearly 26.^{xiv}
- figures provided by the South African Medical Association for example show that at least 26% of doctors who graduated between 1990 and 1997 (approximately one in four) have left the country;^{xv}

Our ability to replenish these losses is deteriorating rapidly:

- according to the minister of education 'there is a crisis at every level of the education system';^{xvi}
- 'enrolments in public universities and technikons are dropping – by 11% last year and 10% the year before. The output of public tertiary institutions is also dropping: between 1996 and 1998 (the latest available figures) there was a 5% drop in the number of degrees, diplomas and certificates awarded';^{xvii}
- the number of school-leavers with university-level matric passes is way below target: 68 626 last year against 157 000 initially envisaged^{xviii};
- ING Barings estimates that 12,1% of highly skilled workers, 21% of skilled workers and 29,4% of semi- and unskilled workers in SA will be HIV positive by 2005.^{xix} Their report points out, 'the cost of supporting and replacing a highly skilled worker with HIV/Aids will be substantially above those for semi- and unskilled workers'.^{xx}
- It is reported from Swaziland for example, that there are 3-4 Aids deaths a week among teachers.^{xxi}

- companies, universities, cities, government departments, parastatals and any other employers are enabled to buy in talent as and when they deem fit;
- government engage with the sectors of the population who are emigrating and try as much as possible to retain these skilled people in the country; and
- that an effective education and training system is one of the top priorities of government.

The economic expansion that foreign talent will help South Africa to create and sustain will in turn help to create the resources necessary to train and educate more and more South Africans. Those who argue against opening our doors to as many skilled people we can attract are denying South Africans without jobs or skills all the new opportunities that will inevitably arise from a new wave of skilled immigrants across our borders.

It is from this perspective on migration and its relationship to economic growth that CDE has looked at the new Immigration Bill.

4. How well does the Immigration Bill meet the requirements of the economy specified by President Mbeki?

It is without doubt a mark of progress that the title of the Immigration Bill emphasises entry rather than the exclusion suggested by the title of the existing ‘Aliens Control Act’, and it lists among the *Objectives and functions of migration control (Section 29)*:

‘to promote economic growth by

(aa) ensuring that businesses in the Republic may employ foreigners who are needed;

(bb) facilitating foreign investments, tourism and industries in the Republic which are reliant on international exchanges of people and personnel;

(cc) enabling exceptionally skilled or qualified people to sojourn in the Republic;

(dd) increasing the skilled human resources in the Republic.^{xvii}

Thus the Immigration Bill signals all the right intentions but do its specific provisions and delegations, live up to the expectations that these objectives create?

After long preparation and delays in the final stages of reaching agreement within government, the new Immigration Bill is now available for comment. CDE has made its views known on all aspects of the numerous documents provided at earlier stages in the genesis of the Bill. In the brief assessment that follows, CDE feels compelled to leave aside technical legal issues and focus on the key economic implications of the legislation. The comments that follow, therefore, are only about the provisions for skilled immigration and the impact of these provisions on business and economic growth.

5. Broad assessment: Good principles, but uncertain outcomes of delegation

The Immigration Bill reflects an intention to address the skills needs of the country and in this respect is an advance on existing legislation. It contains core principles that could facilitate the entry of the kind of skills that our economy needs. These principles are seen in the stated objectives and functions of migration control, already referred to above, as well as in the following provisions:

- that foreigners may change the status of their entry permits while in the country (and not have to return home in order to reapply for a new entry permit) (Section 3);
- that learning institutions will be allowed to grant study permits (Section 6);
- that foreigners will be able to enter the country as ‘investors or self-employed persons’, subject to various requirements (see below) (Section 8);
- that work permits may be issued on individual application, subject to certain requirements (see below) (Section 12);
- that persons with exceptional skills and qualifications will be allowed entry subject to certain requirements (see below) (Section 14);
- that corporations can be appointed as agents of the Department of Home Affairs and subject to certain requirements (see below) will be able to issue work permits (Section 16); and
- that spouses in ‘good faith’ relationships will be able to enter with or join their partners (Section 21).

But it is discouraging to note that almost all these principles are drafted so as to find expression in regulations and prescriptions, the formulation of which are delegated to the Minister and his officials, sometimes in consultation with other departments.

CDE accepts that legislation pertaining to criteria that can or have to vary over time requires delegation. It also accepts that delegation for purposes of regulation can theoretically provide for a flexibility of provisions that cannot be accommodated in the legislation itself.

This notwithstanding, CDE has deep concerns that the legislation will not achieve the twin purposes that the President’s injunctions from his February 2001 state of the nation speech (quoted above) imply, namely that the entry of all skills that will support economic growth will be facilitated and that operating costs of business will be trimmed:

- in respect of ease of entry of skills CDE is deeply concerned that the extent of delegation make it easy for bureaucratic criteria to be formulated that will unduly circumscribe the skills that our economy requires and contradict the sound intentions of the legislation; and
- in respect of operating costs of business CDE is firmly convinced that the legislation will achieve the opposite effect and substantially increase the costs of business reliant on scarce skills or foreign contract labour.

We will explain our concerns in greater detail below.

6. A hegemony of regulation as opposed to the rule of law?

The veritable forest of provisions for prescribed criteria means that the real test of this legislation will not lie in its statutory clauses, but in the regulations, the limits, the categories of skills and the capital amounts that will be formulated after the legislation has passed into law. The regime of prescription, therefore, will have features and characteristics that cannot be predicted from the legislation itself.

The delegation of statutory authority to a Minister and his officials for the purposes of regulations can be acceptable if the delegated authority is not of a plenary nature (see *Western Cape* at 1995 (4) SA 877 (CC) (para 51). In other words the delegation should not allow the delegated authority to define substantial outcomes that are the proper purpose of the legislation itself. Whether or not this displacement of plenary content can occur, or the extent to which this may occur, depends on the nature and precision of the guidelines for such delegation contained in the primary legislation (see *Dawood* 2000 (8) BCLR 837 (CC), paras 52-56, and 54 n74, and *Janse van Rensburg* 2000 (11) BCLR 1235 (CC) para 25).

In respect of CDE's concerns relating to the ease of entry of skills, the delegation will be guided largely by Section 29, the *Objectives and functions of migration control*. The most critical provision is that the Department shall pursue, inter alia, the following objectives: '*regulate the influx of foreigners and residents in the Republic to (1) promote economic growth by (aa) ensuring that businesses ... may employ foreigners who are needed*'. It is on the basis of this guideline that regulations may be tested or challenged in the courts.

The critical issue here, however, is who decides what foreigners are 'needed' and on what basis the discretion is exercised. As we will point out below there will or might be the assumption that the discretion can be exercised on the basis of formulae developed within the Department or within those departments with which the Department of Home Affairs is enjoined to consult. CDE challenges the assumption that 'needed skills' can be categorised, calculated, predicted or anticipated and would argue that the only proper test of 'needed skills' are the signals of the demands and requirements of the economy itself and its expansion and growth. (*See Box: The problem with 'needed' or 'approved' skills, p 10*)

Hence the guideline of 'needed skills' is not sufficiently precise to prevent the invalid assumption by officials that they can determine how the primary purpose of the legislation should be achieved, and hence shape the effects of the legislation conclusively. The guidelines in the legislation should specify how and in terms of what criteria it will be decided what skills are 'needed'. This not being the case CDE has to question whether the legislation will guarantee that the economy gets the flow of skills that growth requires.

Furthermore the clause quoted above specifies only that '*businesses may employ foreigners who are needed*'. What about the kind of foreigners that we would like to have as entrepreneurs or self-employed people? There are specific provisions in the legislation for this (see later) but the guidelines in Section 29 do not specify the

grounds on which the presence of people who will not be employed by others is 'needed'.

Laws should prescribe what officials may or may not do and the limits of such discretion be clearly set out in specific guidelines. In this Bill the essential principle of retaining plenary authority within the legislation itself (and not delegating it to a secondary agency) is not sufficiently clearly secured. The intentions of the legislation may be usurped in that the law does not set the basis for the criteria for delegation but empowers officials to design the limits. Given the fact that the proposed Immigration Board is also not an independent body, there is a critical weakness in the entire package.

THE PROBLEM WITH 'NEEDED' OR 'APPROVED' SKILLS

The Immigration Bill lists among the objectives and functions of migration control: 'to promote economic growth by ensuring that businesses in the Republic may employ foreigners who are needed'. Similarly, government's Human Resource Development Strategy released in April 2001 and statements by the director-general of labour talk of recruiting only 'approved scarce skills'.^{xxiii}

The implication that the country's needs for specific skills can be determined and calculated by state agencies is demonstrably false and bound to distort market forces:

- in the current global economy, skills needs are fluid and subject to rapid change;
- such assessments will at best be based on the needs of existing formal employers and not on the needs for the kind of small businesses and entrepreneurs the country requires.
- there is no longer any effective method of classifying qualifications and skills in a way that would meet the needs of the economy. Skills-boundaries have become too blurred and far too many valuable skills are informal in nature for any classificatory system to provide the 'intelligence' needed for the establishment of guidelines for immigration.
- in the modern global economy it is impossible to know exactly what skills a society needs or to predict exactly what graduates will end up doing.

There is absolutely no danger that South Africa will be 'swamped' by the kind of people its economy so desperately needs. South Africa should simply open its doors to any skilled, entrepreneurial and honest person who would like to work here. If the legislation imposes bureaucratic controls on what skills South Africa 'needs', we will end up harming the country, regardless of the good intentions of the Bill. In the context of South Africa's deepening skills crisis the market is the only reliable indicator of the kind and distribution of skills that we need.

In other words, as its specific clauses are written, the Bill will not provide the basis for a 'rule of law' but could lead to a hegemony of bureaucracy. The goal of attracting desirable immigrants will be neutralised by an opposite objective of limiting any conceivable competition to South Africa's existing labour force, and this objective could be pursued on the stated or covert grounds that the economy does not 'need' skills that compete with the existing labour force. In a competitive market economy this assumption will hamper economic growth, and will in fact harm the people it is intended to protect in the longer run.

The government departments that have made their contributions to the legislation will no doubt deny any contradictory intentions, and insist that the delegated tasks will be performed in such a way as to honour the intentions in Section 29. But there are very important aspects of the legislation itself that reveal the underlying protectionist intentions. Therefore CDE offers the following examples of the ways in which the legislation could be self-defeating, both in its substantive content and in its delegations.

7. Work permits and the micro-economics of business

The Immigration Bill proposes that an employer wishing to secure a work permit for a foreign recruit has to provide certification by a chartered accountant that the terms and conditions of such employment, including salaries and benefits, will not be inferior to those prevailing for citizens and residents, taking into account collective bargaining agreements and other applicable standards. (Section 12) In addition the employer will be required to pay into the National Training Fund a prescribed ratio of the earnings of the recruit, unless the employer is adjudged to have a satisfactory training programme in place for local labour or the amount is reduced or waived on request by the Department of Trade and Industry. The specific ratios to be paid are not specified in the Bill and will be prescribed in the form of regulations issued after the Bill has become law.

These qualifications also apply in the case of Corporate Permits (Section 16).

The certification provided by the employer's accountant will lapse if the Department of Labour, for unspecified reasons, but 'good cause', objects to the certification within 15 calendar days.

Now let us consider what the effects of these provisions might be in the likely situation of an increasing shortage of skills in our economy. The shortage of skills will mean that factors of supply and demand will raise the prevailing wages and salaries of such skilled persons – indeed one of the ways in which skill shortages constrain economic growth is by raising labour costs. The entry of immigrants could theoretically normalise the situation and bring remuneration down from such artificially inflated levels.

But the qualifying provisions in the Immigration Bill will ensure that '*prevailing*' levels of remuneration and benefits will be protected, irrespective of the fact that they may be artificially inflated by the very shortages of skills that the importation of skilled persons is trying to alleviate.

Furthermore, employers paying artificially protected wages and salaries will have the double burden of having to pay or possibly having to pay:

- the fees of chartered accountants to provide necessary certification;
- a ratio of the possibly inflated remuneration of each foreign employee into the Training Fund – in effect an additional tax. If skills shortages have inflated salary levels then this tax will also be a tax on this inflation;

- the further fees of chartered accountants to provide revised certification if the Department of Labour for unspecified reasons but ‘good cause’ chooses to reject the initial certification; and possibly
- legal costs if the employer chooses to contest a possible objection by the Department of Labour; objections that are facilitated by the inclusion of unspecified criteria for objection even if the time allowed for objection is limited.

A large corporate employer may be able to absorb these costs, but if a small or medium sized business needs to attract foreign skills the costs, or the risk of costs, may be such as to discourage the employer from even trying. This is hardly what President Mbeki committed the government to in his state of the nation speech.

Other aspects of government policy are aimed at facilitating the success of small, medium and micro enterprises (SMMEs) and here we have legislation that will contradict such aims in cases where the SMMEs are of the type that are increasingly reliant on scarce skills.

Even in the case of large corporate employers, however, the additional costs could be substantial. For example those who have foreign contract labour, in terms of agreements between the South African government and neighbouring states, will be heavily penalised by the levies proposed.

The provision for the payment of levies as a ratio of ‘*remuneration*’ does not specify whether the levy should be calculated on the basis of total packages or only on the basis of wages and salaries. Obviously the cost implications are significant and it creates uncertainty that is undesirable in any legislation.

The legislation as it stands imposes on the employer the burden of responsibility that the conditions for the issue of a work permit in terms of section 12 (1-4) are all met on an ongoing basis. This obviously adds to the burden of managerial responsibility and could be a disincentive in employing foreigners where the employers seek the work permits. It also contradicts the need for flexibility of deployment of skills which has become increasingly important in the modern economy.

8. The fallacy of predetermined quotas of skills for individual work permits

The drafters of the legislation may argue that there is a way around the difficulties outlined immediately above and that this is provided for in section 12 (5). This clause states that notwithstanding the requirements above the Department of Home Affairs ‘*may issue a work permit to a foreigner who has certain skills or qualifications which may be prescribed from time to time after consultation with the Departments of Labour and Trade and Industry, provided that the annual number ... may not exceed the so prescribed quotas*’.

This clause is vitally important because it is the clause in terms of which most of the individual applications for work permits will be made. This kind of provision sounds reasonable to those who might believe in the capacity of state bureaucrats (in any country) to be able to anticipate market demand and the skills-needs of an economy.

Let us remind ourselves that there is overwhelming consensus in the world today that regulated economies have failed not because of any lack of good intentions by interventionist governments, but substantially because bureaucrats are not able to predict market demand. They seldom if ever have the up-to-date information required even in countries that have excellent national statistics. In South Africa where we appear to no longer have the benefit of industrial censuses (and even if we did have them their results would take a long time to appear) the notion of bureaucrats predicting demand for specific skills as a basis for 'quotas' is either hugely optimistic or dangerously naïve.

There is another problem. The era in which formal qualifications could be linked to specified occupations is passing. This pattern still applies to the registered professions but in private industry and commerce formal qualifications are losing their critical relevance and are also increasingly interchangeable. Recruitment into the IT industry is one example of where a language teacher, an architect or an engineering draughtsman can end up designing websites or running information systems. A former consultant of CDE on local government is now an expert on internet search engines. More and more occupations are following the pattern of the advertising industry in which copywriters and executives are drawn from a bewildering diversity of training backgrounds. The contemporary CV today almost mentions formal qualifications as an afterthought.

An employer at the competitive edge today wants the right person, selected on the basis of individual aptitudes and personality characteristics, and not on the basis of any prescribed qualification. How on earth are bureaucrats supposed to categorise or anticipate these needs? And how are bureaucrats supposed to know and anticipate the needs of the small scale economy and growing service sector of the economy (ie those too small to register or be reflected in national statistics) for skills and for entrepreneurs? (*See box, The problem with 'needed' or 'approved' skills, page 10*)

CDE is equally concerned about the time and cost of futile attempts within the administration to formulate the valid and reliable criteria for the prescriptions which the legislation delegates. How long will it take for three different departments to agree on South Africa's skill needs? On the basis of which statistics? At best from the year before. So South Africa will then have a quota of skill needs for the following year based on statistics (at very best) of two years previously. How will this make the country competitive?

9. Restrictions in respect of other permits

The limiting provisions of delegated criteria in the form of prescribed requirements or skills and or quotas and annual limits applies to other key provisions of the Immigration Bill, namely:

- Exceptional skills and qualifications permits (Section 14)
- Corporate permits (Section 16)
- Certain categories of application for Permanent Residence (Section 22)

All the reservations expressed above concerning the ability of administrative machinery to formulate these delegated tasks applies in these cases as well. They also suffer from the major weakness that the general guidelines in section 29 are not sufficiently precise to ensure that the stated intentions of the legislation are met.

The Exceptional skills and qualifications permits should be redundant if the other sections of the legislation meet the objectives of the bill to promote economic growth. The fact that it is included as a separate section may be interpreted to indicate that the prescriptions in terms of other sections will be restrictive rather than enabling. CDE has no objection to it, however, save for the more general problem relating to delegated criteria without precise guidelines in the legislation itself.

In the case of **Corporate Permits** the Bill specifies that after consultation with the Departments of Labour and Trade and Industry, the Department of Home Affairs ‘shall determine the maximum number of foreigners to be employed ... by a corporate applicant’. Why should a maximum be imposed? A corporation is hardly likely to want to employ more foreigners than it needs. Part of the rationale for this may lie in one of the criteria that will be considered in determining this maximum, namely ‘the financial contribution offered by the corporate applicant to be shown in the training fund’ (p15). This provision makes it sound as if a corporation could have to ‘buy’ its maximum limit in the form of enforced additional taxation. If this is the case it comes close to extortion, and is morally as well as functionally unacceptable.

In the case of a application for **Permanent Residence** by a foreigner who has been offered a permanent job, a chartered accountant has to certify that no suitably qualified citizen or resident is available to fill the post. If this qualification is rigidly applied it can mean that it is almost impossible to attract a particular person who might not have exclusive formal skills or qualifications but who has aptitudes, experience and characteristics that the employer wants.

In the case of **Investor or Self-employed Persons permits**, the applicant has to invest a prescribed amount of capital, unless waived under certain circumstances. The levels of capital to be prescribed are not specified in the Immigration Bill. It goes without saying that if the lower limits for capital to be invested are set at a high level, it will effectively exclude smaller entrepreneurs who might wish to supplement capital with family labour, sweat equity or might want to start from small beginnings. These days competitive micro-businesses, particularly in the service sectors, are an important value-adding resource in an economy. The Bill provides no guarantees that such activity by foreigners will be welcomed.

At virtually every point of consideration, therefore, the state will judge the desirability or need for the particular benefits that the foreigner might bring into the country. It amounts to a web of intervention that will tax the government’s information systems and the judgement and the capacity to process applications beyond the limits of what is possible.

CDE would like to make its position quite clear. We accept that it is possible to formally define some categories of skills or qualifications that are needed – we need more maths and science teachers for example. The point that CDE is making is that over and above these relatively straightforward criteria the country needs skills of all

types and forms that cannot be predicted or categorised. Furthermore we need innovative entrepreneurs who will explore new market niches and use their contacts abroad to open up new avenues of trade or tourism. The sheer impossibility of subjecting these needs to prescribed requirements means that what the Bill should be saying is that any foreigner with any skills or experience above a certain level should be welcome. *In the history of migration it has more often than not been the smaller entrepreneurs and family businesses that have made the most vital contribution to their host economies.*

10. The Immigration Advisory Board

To an extent that cannot be predicted from the Immigration Bill, at least some of these regulations and prescriptions could be influenced by the Immigration Advisory Board. As its name suggests, however, its recommendations will not be binding on the government. Nor will it necessarily have any influence whatsoever on the Departments of Labour and Trade and Industry, that will function as gatekeepers on the strength of the provisions that they will be consulted on in many aspects and in others will actually determine criteria to be applied, waivers and exemptions.

In any event, the composition of this Board, as specified in the legislation, will ensure that nine out of twenty-one of the members will be state employees, and business representation and labour representation together is likely to be limited to a maximum of eight of the twenty-one members. Although it should be noted that there is no guarantee that business will be represented on this Board. CDE has no doubt that it could be a useful sounding board but it cannot guarantee that the needs of the economy will be accommodated.

In the case of legislation that requires decisions to be taken on the basis of independent assessments of needs and that cannot be captured, defined and categorised in advance, the principle of an independent board is well-established. Such a board was intended at an earlier point in the development of this legislation. The fact that the Board as provided for in the Immigration Bill has been down-graded to an advisory function within the administration is a serious problem, made more serious by the fact that the largest single category of representation will be the administration itself.

In the absence of precise guidelines in the legislation in respect of the criteria to which delegated tasks should conform, an independent Board would have provided much-needed reassurance that the objectives of the legislation are carried through to the regulations and prescriptions. This is no longer the case and the board as it exists cannot serve the purpose of providing independent criteria for delegated authority.

Finally it is important to note that the “Minister may disestablish the Board on such terms and conditions as he or she sees fit.” This provision in Section 28 further undermines the authority and influence of the Board. Surely the terms and conditions under which the Minister could remove the Board need to be clearly and transparently spelled out.

11. Summing up: A regime of prescriptions and qualifying or exclusionary conditions

The terms '*skills or qualifications which may be prescribed from time to time*', '*prescribed category*', '*prescribed quota*', '*prescribed requirement*' or '*prescribed yearly limits of available permits*'(in the case of Permanent Residence) usurp the principle of market demand and replace it with an elaborate system of categories to be designed in government offices. At issue here is not only the impossibility of anticipating market demand but also the prospects of delays in the processing of applications while calculations are made of the numbers and limits for categories.

Immigration policy seems to bring out the worst in most governments and the South African government is not alone in its defensiveness and protectionist leanings. We are, however, very unlike the Switzerlands, Singapores, Japans and Germanys of this world in that our growth is hugely more constrained by skills shortages than theirs; our need for skills runs across almost every sector of the economy not merely one or two highly specialised areas; and instead of hordes of qualified people trying to get in, too many of our skilled people want to get out. There is absolutely no threat that we will be overwhelmed by applications from engineers, IT technicians, doctors, mechanics, accountants, entrepreneurs, teachers, nurses or any other profession from Asia, Eastern Europe or Latin America. In fact we are going to have to struggle to attract them. Why then this inordinate caution on the part of our legislators?

It may be that the drafters of the Bill are concerned to empower as many South Africans as possible and fear the competition from immigrants. CDE would point out that international research does not support this attitude. In fact quite the reverse is the case. *Skilled immigrants will create additional training capacity and economic activity that will increase skills, jobs and empowerment opportunities for many more South Africans than can be protected by legislation.*

Furthermore, our society needs rapid growth much more than the other countries with which we may want to compare ourselves. We have quoted the President in this regard. The Minister of Finance too, in his 2001 budget speech, acknowledged that the progress the country has made in macro-economic policy has not been sufficient to ensure a rise in economic confidence such as to bring increased fixed investment and higher rates of growth. He identified 'micro-economic' constraints, including the operating costs of business, as problems yet to be addressed.^{xxiv}

This Immigration Bill, its sound basic principles notwithstanding, cannot be guaranteed to reduce our skills bottlenecks, but even more seriously, some of its provisions will actually raise operating costs substantially in areas of operations affected by the skills shortage. One is tempted to ask whether the Ministers who agreed around the Immigration Bill actually listened to and understood the Minister of Finance on Budget Day just a few months ago.

But they could hardly have missed or misunderstood the state of the nation address by the President in February, when he specifically and unambiguously promised immigration legislation that would facilitate the entry of skills. This Bill does not honour that promise.

What this Bill does is to empower officials to decide what is best for the economy. One is expected to believe that the officials will have the best of intentions and that their regulations and prescriptions will honour the commitments of the President, and be forward-looking and courageous. But officials come and go and if experience is anything to go by, they will tend to become cautious and conservative. Unless the Bills itself specifies very clearly what the outcomes of its provisions should be it should not be supported. This Bill does not do that and for this reason falls woefully short of what the President promised and what South Africa desperately needs.

The point is often made that South African business has not done enough to train local skills and that this legislation has to balance the immigration of skills with provisions that will encourage training of citizens and residents. CDE accepts fully that not enough training has been done and believes that training in general has to be significantly intensified in South Africa. CDE cannot accept, however, that leverage for training should be built into this Bill, for the following reasons:

- the country has a shortage of trainers and only if we import such people will we acquire the critical mass of skills to support a serious expansion of technical and professional training;
- the limitations may not result in training taking place, and hence the economy will be constrained by shortages of skills without local employees deriving any benefit. In fact they could be doubly penalised by lack of training and slower economic growth; and
- because skilled immigrants are a form of direct investment of resources in the economy (their training and education has been paid for by other countries) a training fee or levy for the employment of skilled foreigners is simply a tax on growth.

Since 1996, South Africa in macro-economic terms, has been positioned for growth and increasing competitiveness, but time and again the advantages of Gear have been neutralised by contradictory or unsupportive policies in other areas of governance. Sluggish growth and mediocre levels of investment have been the consequence.

In the new Immigration legislation we have an opportunity to promote growth with strong, confident and realistic policies. We should open the door wide to the skills that we know we need and to the skills that we do not yet know we will need. We need these skills in place when the world economy and our own recover from their present downturns. Speed is of the essence, therefore.

12. CDE RECOMMENDATIONS

The bill in its current form cannot be supported. What is required is a process of rapid review and redrafting to remove all the prescriptions and regulations which could contradict the bill's sound principles. What South Africa needs is migration legislation that will result in the large scale flow of skills essential for the economy.

CDE CONSULTATIVE MEETING, 3 August 2001

List of participants

Wilna Barnard	Manager, Trade and Investment SA
Ann Bernstein	Executive director, CDE
Elisabeth Bradley	Wesco Investments, chairman CDE Board
Victoria Bronstein	Lecturer, School of Law, University of the Witwatersrand
Neil Campbell	Executive director, South African Dental Association
William Chang	Assistant director, Taipei Liaison Office
Marianne Combrink	Facilitation officer, Trade and Investment SA
A Daly	Deputy-director Human Resources, University of the Witwatersrand
Vic Esselaar	Industrial Relations manager, Chamber of Mines
J P Fegbeutel	Corporate and legal services director, BMW (SA)
P Griessel	General Secretary, Building and Industries Federation of South Africa
Neville Goldin	Human Resources manager, Afrox
Luanne Grant	Executive director, American Chamber of Commerce
Mandy Haemen	Secretary general, Italian Chamber of Commerce
Judi Hudson	Senior research co-ordinator, CDE
Sitwana Imenda	Executive director, University of the North
Jon Klaaren	Associate professor, School of law, University of the Witwatersrand
Kobus Kleynhans	Chief director, AgriSA
S Krippendorf	International Office, Potchefstroom University for Christian Higher Education
T S Kuan	Assistant director, Taipei Liaison Office
Philip Machanick	Associate Professor, Computer Science, University of the Witwatersrand
M Manley	Head, Group Human Resources, Board of Executives
Soto Ndukwana	Executive Director, Makana Investments, deputy chair CDE Board
Kamilla Rasmussen	Economist, Delegation of the European Commission
Karen Redelinghuys	Human Resources manager, Technikon Pretoria
Khan Saadata	Consular Assistant, SA Consulate in Jeddah
Lawrence Schlemmer	Senior consultant, CDE
Eddie Skeen	Technical advisor, Institute for Commercial and Financial Accountants
Bob Tucker	Chief Executive Officer, Banking Council
J van der Elst	Head, International Office, Potchefstroom University for Christian Higher Education
J C van Wyk	Legal advisor, Technikon SA
Sandra von Lingen	Chief Executive Officer, British Chamber of Business

CDE, on the basis of its wide consultations in the time available, (*See box: CDE Consultative Meeting, page 18*) has to recommend that the following revisions be made to all applicable sections as a matter of urgency:

(1) **The legislation must guarantee unambiguously that until such time as South Africa's educational crisis and training deficits are overcome, the entry of all potentially economically productive skills is facilitated.** It should therefore be specified very clearly that

a) a 'needed skill' is

- grade 12 with university entrance level of maths and/or science, technical, commercial or vocationally relevant subjects (eg health services at matric level);
- any skill which equals Grade 12 plus a further or higher qualification.
- demonstrated entrepreneurial ability starting at very low levels appropriate to a developing country; and
- essentially any skill that makes an applicant readily employable and/or will allow such an applicant to become self-employed at a level at which income and or company taxes are paid.

b) Anyone with such skills **will** (not 'may') be welcome in South Africa. (The only proviso being that they do not have a criminal record).

Any more stringent or onerous criteria are bound to exclude skills and aptitudes that the economy needs.

(2) That the terminology '**shall**' will replace '**may**' in the consideration of applications for permits. The terms 'the Department *may issue*' that are used in all provisions relating to entry permits while the term '*shall*' is used in the case of restrictive clauses (see 12 (2), for example). The term '*may*' has discretionary connotations that should be unnecessary given the qualifications contained in the legislation. There is no reason why the term used should not be '*shall*' in all cases.

(3) That the requirement that terms and conditions for employment should not be inferior to those prevailing be scrapped in the case of all skills above the level of, or outside the limits of, those to which industrial council and bargaining council agreements apply.

(4) That the requirements for Permanent Residence exclude the requirement that the applicant should have a minimum net worth (which is redundant in the light of other requirements).

(5) That yearly limits on any numbers of permanent residents should not apply

- (6) That objections to the certification by chartered accountants in the case of applications for work permits be referred directly to the immigration court, since, as the Immigration Bill stands, no follow-up procedure is specified
- (7) That the legislation provides clear guidelines concerning the minimum investment capital requirement for entrepreneurs and self employed persons so as to include small and micro-entrepreneurs.
- (8) That all accountants registered by recognised statutory bodies be enabled to provide certification. CDE does not see a reason why chartered accountants should be the only providers of the certification required. Other accountants registered with recognised statutory bodies should also be accepted for this purpose.
- (9) And that no training fee additional to the existing skills levy be required in the case of employment of foreigners.

Business, in its reaction to these recommendations, must ask itself whether the time has not come to be more emphatic in response to contradictory policy. The way in which the Immigration Bill can contradict or neutralise its own economic rationale is an opportunity for just such an emphatic response.

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