

Government Gazette

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GENERAL NOTICE

Notice 621 of 2000

The Minister of Home Affairs solicits public comments and inputs on the following draft Bill. The comments and inputs are solicited to enable the Ministry of Home Affairs to complete the drafting of new legislation regulating international migration and matters connected thereto for its submission to Cabinet and subsequent introduction to Parliament. Comments shall be directed to the Office of the Minister of Home Affairs, Private Bag X9102, Cape Town 8000. In order to be considered comments are to be received within 80 days of this publication.

IMMIGRATION BILL

To provide for the regulation of admission of persons to, their residence in, and their departure from the Republic and for matters connected therewith.

Be it enacted by the Parliament of the Republic of South Africa, as follows:

1. Definitions

In this Act, unless the context indicates otherwise,

- i. "**admission**" means to enter the Republic at a port of entry on the basis of the authority to do so validly granted by this Act or by an immigration officer in terms of this Act, and "to admit" or "to be admitted" has a corresponding meaning;
- ii. "**application**" means a request in the prescribed form which complies with the requirements and provides the information and documentation which may be prescribed;
- iii. "**Board**" means the Immigration Board contemplated in section 28 of this Act;
- iv. "**border**" means the national borders of the Republic and includes coastlines and the outer margin of territorial waters;
- v. "**chartered accountant**" means a person referred to in section 1 of the Chartered Accountants Designation (Private) Act no. 67 of 1993;
- vi. "**citizen**" has the meaning defined in the South African Citizenship Act, 1995 and "citizenship" has a corresponding meaning;
- vii. "**corporate applicant**" means a legal person established under the laws of the Republic or of a foreign country which conducts business, charitable, agricultural or commercial activities within the Republic and which applies for a corporate permit referred to in section 16 of this Act;
- viii. "**Court**" means an Immigration Court established in terms of section 40 of this Act;
- ix. "**customary union**" means a conjugal relationship according to indigenous law and customs and which is recognised and documented as prescribed;
- x. "**Department**" means the Department of Home Affairs;
- xi. "**departure**" means to exit the Republic from a port of entry in compliance with this Act and "To depart" has a corresponding meaning;
- xii. "**deportation**" means the action or procedure aimed at causing an illegal foreigner to leave the Republic involuntarily, or under detention in terms of this Act and the verb "Deport" has a corresponding meaning;
- xiii. "**employer**" includes the person contractually bound by the applicable employment contract as an employer or, in the case of a legal person, its chief executive officer or the person to whom such officer has delegated the final responsibility in respect of personnel matters;
- xiv. "**foreign country**" means a country other than the Republic;
- xv. "**foreign state**" means the juristic entity governing a foreign country;
- xvi. "**Foreigner**" means an individual who is not a citizen nor a resident, but is not an illegal foreigner;

- xvii. "**illegal foreigner**" means an foreigner who is in the Republic in contravention of this Act and includes a prohibited person;
- xviii. "**immediate family**" means persons within the third step of kinship, regarding marriage as one of such steps, but not counting any common antecedent;
- xix. "**immigration officer**" means an official of the Service, or another person having the prescribed requirements, appointed as such from time to time by the Service;
- xx. "**Managing Director**" means the Managing Director contemplated in section 27;
- xxi. "**marriage**" means a legally sanctioned conjugal relationship intended to be permanent and concluded under the laws of the Republic, or under the laws of a foreign country as prescribed from time to time, and includes a customary union;
- xxii. "**master**" means the master of a ship and refers to the person who at any given time is in charge or command of a ship;
- xxiii. "**Minister**" means the Minister of Home Affairs;
- xxiv. "**mission**" means an office of the Department of Foreign Affairs outside the Republic;
- xxv. "**officer**" means a person employed in, or contracted by the Service who has been authorised by the Service to exercise certain powers and functions in the name and on behalf of the Service;
- xxvi. "**owner**" means the owner of record and, in the case of a ship, it includes the charterer of the ship and any agent within the Republic of the owner or the charterer;
- xxvii. "**passport**" means any passport or travel document containing the prescribed information and characteristics issued
 - a. under the South African Passport and Travel Document Act, 1994;
 - b. on behalf of a foreign state recognised by the Government of the Republic to a person who is not a citizen;
 - c. on behalf of any international organisation prescribed from time to time, including regional or sub-regional ones, to a person who is not a citizen; and
 - d. any other document approved by the Managing Director after consultation with the Minister and issued under special circumstances to a person who cannot obtain a document referred to in paragraphs [a] to [c];
- xxviii. "**port of entry**" means a place prescribed from time to time where a foreigner has to report before he or she may move, sojourn or remain within, or enter the Republic;
- xxix. "**premises**" means any building, structure or tent together with the land on which it is situated and the adjoining land used in connection with it and includes any land without any building, structure or tent and any vehicle, conveyance, or ship;
- xxx. "**prescribed**" means provided for with regulations and "prescribe" has a corresponding meaning;
- xxxi. "**prohibited person**" means the person referred to in section 23 of this Act;
- xxxii. "**publish**" means publish by notice in the Government Gazette and, to the extent possible and feasible under the circumstances, convey by mail or e-mail to parties or stakeholders who have requested their inclusion or have been included in mailing lists to be maintained by the Service in respect of subject matters in respect of which public input is called for by this Act, prescribed, advisable or expedient;
- xxxiii. "**regulations**" means general rules adopted by the Board in terms of this Act and published;
- xxxiv. "**refugee**" has the meaning defined in the Refugee Act, 1998;
- xxxv. "**Republic**" means the Republic of South Africa and its territory;
- xxxvi. "**resident**" means the holder of a permanent residence permit referred to in section 20 of this Act;
- xxxvii. "**Service**" means the Immigration Service established by section 27 of this Act;
- xxxviii. "**ship**" includes any vessel, boat aircraft or other conveyance' of any kind or type;
- xxxix. "**spouse**" means a person who is party to a marriage, or a customary union, or to a permanent relationship which calls for cohabitation and mutual financial and emotional support, and is proven with a prescribed affidavit substantiated by a notarised contract;
 - xl. "**status**" means the temporary or permanent residence permit issued to a person in terms of this Act and includes the rights and obligation following therefrom, including any term and condition of residence imposed by the Service when issuing any of such permits;
 - xli. "**temporary residence permit**" means a permit referred to in section 3 of this Act;
 - xlii. "**this Act**" means this Act, including its schedules, and includes the regulations made in

pursuance thereof;

- xl.iii. **"training fund"** means the fund referred to in section 29[2][f][i] of this Act;
- xliv. **"undesirable person"** means a person referred to in section 24 of this Act;
- xlv. **"visa"** means the prescribed endorsement issued upon application on the valid passport of a foreigner, granting such foreigner the authority to proceed to the Republic to report for a prescribed examination to an immigration officer at the port of entry to be admitted on a specified temporary residence permit, which at any time before admission may be withdrawn by the Service;
- xlvi. **"work"** means business, commercial or remunerative activities within the Republic, not to include diplomatic work for an embassy on a basis of a permit referred to in section 5, or work for a foreign employer in pursuance of a contract which only partially calls for activities in the Republic, or work as an independent business or profession mainly based outside the Republic but requiring activities within the Republic;

and, when appropriate, the singular includes the plural and vice versa.

2. Admission and departure

[1] Subject to this Act, no person shall enter the Republic at a place other than a port of entry.

[2] Subject to this Act, a citizen or a resident shall be admitted, provided that he or she identifies him or herself as such in the prescribed manner and, in the case of a resident, the immigration officer records his or her entrance.

[3] No person shall leave the Republic

- a. unless in possession of a passport, or a certificate issued by the Service upon application in lieu thereof;
- b. unless, if he or she is a person under the age of 16 years who does not hold a passport, he or she is accompanied by his or her parent who holds a passport in which his or her name was entered in terms of the provisions of the South African Passports and Travel Documents Act, 1994 or on behalf of any government or international organisation recognised by the Government of the Republic; and
- c. except at a port of entry, unless
 - i. in possession of a certificate by the Service granting permission upon application to leave the Republic at a place other than a port of entry within a certain period not exceeding six months at a time, provided that for good cause an immigration officer may withdraw such permission; or
 - ii. exempted by the Minister on recommendation of the Managing Director, which exemption may be withdrawn by the Managing Director at any time; and
- d. unless, in the case of a resident, the departure is recorded by an immigration officer.

[4] A foreigner may only enter the Republic if issued with a valid temporary residence permit and as set forth in this Act and may only depart as set forth in this Act.

TEMPORARY RESIDENCE

3. Temporary residence permits

[1] A foreigner may enter and sojourn in the Republic only if in possession of a temporary residence permit.

[2] Subject to this Act, upon application and upon prescribed examination at the port of entry, one of the temporary residence permits set out in sections 4 to 18 may be issued to a foreigner.

[3] If issued outside the Republic, a temporary residence permit is deemed to be of force and effect only after an admission.

[4] A temporary residence permit is to be issued under the condition that the holder is not or does not become a prohibited or an undesirable person.

[5] For good cause, as prescribed, the Service may attach reasonable individual terms and conditions to a temporary residence permit.

[6] Subject to this Act, a foreigner may change his or her status while in the Republic.

4. General entry permit

[1] A general entry permit may be issued by the Service in respect of a foreigner who

- a. holds a visa; or
- b. is a citizen of a foreign state prescribed from time to time; and/or
- c. provides the financial or other guarantees prescribed from time to time in respect of his or her departure,

provided that such permit cannot exceed three months and upon motivated application may be renewed by the Service only once.

[2] The holders of a general entry permit may not conduct work.

[3] An illegal foreigner receiving a general entry permit shall comply with any terms and conditions which may be prescribed from time to time and provide the prescribed deposit to be forfeited to the Service in case of his or her non-compliance with this Act.

[4] Unless otherwise specified therein, a general entry permit does not allow its bearer to be admitted more than once, provided that it may be prescribed that absent such specification such permit may authorise multiple admissions from prescribed countries.

[5] Special financial and other guarantees may be prescribed in respect of the issuance of a general entry permit to an illegal foreigner or to certain classes of foreigners prescribed from time to time.

5. Diplomatic permit

[1] A diplomatic permit may be issued by the Service, or by a mission in the prescribed manner and form and as directed by the Service, to

- a. an ambassador, a minister of a foreign state, a career diplomatic or consular office accredited by a foreign government recognised *de jure* by the South African Government, who is accepted by the Minister of Foreign Affairs, and the members of such foreigner's immediate family;
- b. upon a basis of reciprocity, other officials and employees accredited by a foreign government recognised *de jure* by the South African Government who are accepted by the Minister of Foreign Affairs, their spouses and children under the age of 21; and
- c. upon a basis of reciprocity, attendants, servants and personal employees of the foreigners referred to in [a] and [b] above.

[2] The holder of a diplomatic permit may not conduct work.

6. Student permit

[1] A student permit may be issued to a foreigner intending to study in the Republic for longer than three months by

- a. the registrar office of an institution of learning where the foreigner intends to study, provided that such institution

- i. has been approved by and is registered in good standing with the Service;
- ii. issues such permit upon application;
- iii. certifies that it has received guarantees to its satisfaction that such foreigner's tuition fees will be paid;
- iv. has received the prescribed guarantees that such foreigner will have sufficient means to support him or herself while in the Republic;
- v. in the case of a minor, provides the name of the person in South Africa acting as the foreigner's guardian or who has accepted to act as such;
- vi. undertakes to provide a prescribed periodic certification that such foreigner is satisfactorily performing his or her curriculum of study; and
- vii. undertakes to notify the Service when such foreigner has completed his or her studies, or is no longer performing them satisfactorily, or

b. the Service.

[2] After consultation with the Department of Education, the Service shall determine an ad hoc fee for the issuance of student permits in respect of institutions publically funded or subsidised, to be paid into the National Treasury Fund.

[3] A student permit does not entitle the holder to conduct work, provided that the Service may authorise the holder of a student permit to conduct work as practical training in a field related to that of his or her studies following his or her duly and timely completed studies, or during studies, not to exceed the prescribed period.

7. Treaty permit

[1] A treaty permit may be issued to a foreigner conducting activities in the Republic in terms of an international agreement to which the Republic is a party.

[2] The treaty permit may be issued by

- a. the Service; or
- b. the Department of Foreign Affairs or any other organ of the State responsible for the implementation of the treaty concerned, provided that
 - i. information relating to the failure of such foreigner to comply with the terms and conditions of the permit and to depart when required is conveyed to the Service; and
 - ii. the organ of the State concerned satisfies the Service that, under the circumstances, it has the capacity to perform this function.

8. Investor and self-employed person's permit

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

- a. such foreigner invests the prescribed financial contribution in such business;
- b. the financial contribution referred to in [a] be part of the intended book value of such business; and
- c. a chartered accountant certifies compliance with the provisions of this Act.

[2] The holder of an investor permit may conduct work.

[3] The Service may reduce or waive the capitalisation requirements referred to in subsection [1][a] for businesses which are prescribed from time to time to be in the national interest or when so requested by the Department of Trade and Industry.

[4] The holder of an investor permit must cause the certification referred to in subsection [1][c] to be

renewed within 18 months of the issuance of the permit, and within every two years thereafter.

9. Crewman permit

[1] A crewman permit may be issued for a crewman by

- a. the Service; or
- b. the owner of the vessel carrying such crewman, provided that such owner
 - i. is registered in good standing with the Service;
 - ii. has provided the prescribed financial guarantees to the Service to ensure compliance of such foreigner with the provisions of this Act; and
 - iii. accepts to be responsible for a prescribed fine, should the foreigner fail to honour the terms of such permit.

[2] A crewman permit may be issued under the condition that the holder accepts to avoid moving beyond a predetermined area.

[3] The holder of a crewman permit may not conduct work.

10. Medical treatment permit

[1] A medical treatment permit may be issued to a foreigner intending to receive medical treatment in the Republic for longer than three months by

- a. the registrar office of an institution where the foreigner intends to receive treatment, provided that such institution
 - i. has been approved by and is registered in good standing with the Service;
 - ii. issues such permit upon application;
 - iii. certifies that it has received guarantees to its satisfaction that such foreigner's treatment costs will be paid;
 - iv. in the case of a minor, provides the name of the person in South Africa acting as the foreigner's guardian or has accepted to act as such;
 - v. undertakes to provide a prescribed periodic certification that such foreigner is under treatment; and
 - vi. undertakes to notify the Service when such foreigner has completed his or her treatment, or
- b. the Service, upon application.

[2] After consultation with the Department of Health, the Service shall determine an ad hoc fee for the issuance of medical treatment permits in respect of institutions publicly funded or subsidised, to be paid into the National Treasury Fund.

[3] A medical treatment permit does not entitle the holder to conduct work.

11. Relatives permit

[1] A relatives permit may be issued by the Service to a foreigner of the immediate family of a citizen or a resident, provided that such citizen or resident provides the prescribed financial assurance, certified by a chartered accountant, that he or she has the means available to support such foreigner for the duration of such permit.

[2] The holder of a relatives permit may not conduct work.

12. Work permit

[1] A work permit may be issued by the Service to a foreigner intending to conduct work, when his

or her prospective employer has

- a. received certification from the Department of Labour that the terms and conditions under which he or she intends to employ such foreigner, including salary and benefits, are not inferior to those prevailing in the relevant market segment for citizens and residents, taking into account applicable collective bargaining agreements and other applicable standards, if any;
- b. committed to
 - i. pay into the training fund an amount prescribed from time to time as a ratio of such foreigner's remuneration; and
 - ii. notify the Service when such foreigner is no longer employed or is employed in a different capacity or role; and
- c. submitted a certification from a chartered accountant of the job description and that the position exists and is intended to be filled by such foreigner.

[2] A work permit shall lapse if, within six months of its issuance, and within every year thereafter, its holder fails to submit to the Service certification from his or her employer's chartered accountant that he or she is still employed, of the terms and conditions of his or her employment, including job description, and that such employer has made the payments referred to in subsection 11 [b] [i].

[3] Any increase of the payments referred to in subsection [1] [b] [i] shall be effective in respect of an existing work permit only after five years and six months from when such permit was first issued, provided that subsequent work permits issued to the same foreigner shall be deemed as one for purposes of this subsection.

[4] The Service may reduce or waive the payment referred to in subsection [1] [b] [i]

- a. after consultation with the Departments of Labour and Trade and Industry, if and for as long as it is satisfied that the employer concerned has in place an adequate training programme for citizens and residents; or
- b. when so requested by the Department of Trade and Industry in respect of foreign investments.

[5] Notwithstanding the requirements of this section, the Service may issue a work permit to a foreigner who has certain skills or qualifications which may be prescribed from time to time in consultation with the Departments of Labour and Trade and Industry, provided that the annual number of work permits so issued for each so prescribed category may not exceed the so prescribed quota.

13. Retired person permit

[1] A retired person permit may be issued for a period exceeding three months to a foreigner who is older than 60 years of age and intends to retire in the Republic, provided that a chartered accountant acting on behalf of such foreigner certifies that such foreigner

- a. has the right to a pension or an irrevocable annuity or retirement account which will make to such foreigner a prescribed minimum payment for the rest of his or her life; and
- b. has a minimum prescribed net worth.

[2] The Service may authorize the holder of a retired person permit to conduct work under terms and conditions as the Service may deem fit to determine under the circumstances.

[3] A retired person permit

- a. may allow its holder to sojourn in the Republic on a seasonal or continuous basis; and
- b. may not exceed a four years period, at the expiry of which it may be renewed one or more times, subject to subsection [1].

14. Exceptional skills or qualifications permit

[1] Taking into account any prescribed requirement, a permit may be issued by the Service to an individual of exceptional skills or qualifications and to those members of his or her immediate family determined by the Service under the circumstances or through regulations.

[2] The permit referred in subsection [1] shall be issued under terms and conditions to be determined by the Service or prescribed.

15. Intra-company transfer permit

[1] An intra-company transfer permit may be issued to a foreigner who is employed abroad by a business operating in the Republic in a branch, subsidiary or affiliate relationship and who by reason of his or her employment is required to conduct work in the Republic for a period not exceeding nine months, provided that

- a. a chartered accountant acting on behalf of the employer of such foreigner certifies that the employer needs to employ such foreigner within the Republic and such foreigner's job descriptions;
- b. the employer undertakes that it will take adequate or prescribed measures to ensure that such foreigner will at any time comply with the provisions of this Act, and will immediately notify the Service if it has reason to believe otherwise; and
- c. the employer posts the prescribed financial guarantees to defray deportation and other costs should such foreigner fail to depart when no longer allowed to sojourn in the Republic.

[2] The holder of an intra-company transfer permit may conduct work only for the employer referred to in subsection [1] and in accordance with the job description and other elements contemplated in the certification referred to in subsection [1] or set out in his or her permit.

16. Corporate permit

[1] A corporate permit may be issued by the Service to a corporate applicant to employ foreigners who may conduct work for such corporate applicant.

[2] After consultation with the Departments of Labour and Trade and Industry, the Service shall determine the maximum number of foreigners to be employed by a corporate applicant after having considered

- a. the training programme provided by the corporate applicant for citizens and residents and/or the financial contribution offered by the corporate applicant towards the training fund;
- b. the certification prepared by a chartered accountant on the basis of the relevant prescription or information of the Department of Labour, if any, that at any given time the relevant foreigners are employed at terms and conditions not inferior to those offered to citizens and residents or prevailing in the relevant market segment, taking into account collective bargaining agreements and other standards, if any;
- c. the undertaking by the corporate applicant that it will
 - i. take adequate or prescribed measures to ensure that any foreigner employed in terms of the corporate permit will at any time comply with the provisions of this Act and the corporate permit; and
 - ii. immediately notify the Service if it has reason to believe that such foreigner is no longer in compliance with paragraph [i] above;
- d. the financial guarantees posted in the prescribed amount and form by the corporate applicant to defray deportation and other costs should the corporate permit be withdrawn, or certain foreigners fail to leave the Republic when no longer subject to the corporate permit; and
- e. corroborated representations made by the corporate applicant in respect of the need to employ foreigners, their job descriptions, the number of citizens or residents employed and their

positions, and other prescribed matters.

[3] In the prescribed form, the holder of a corporate permit may issue authorisations to the foreigners referred to in subsection [1] to be admitted, subject to such foreigners agreeing to the terms and conditions of the corporate permit.

[4] The Service may withdraw or modify the corporate permit for good and reasonable cause, *mutatis mutandis* subject to section 12[3]

[5] In consultation with the Minister of Trade and Industry or Energy or Agriculture, as the case may be, the Minister of Labour may designate certain industries in respect of which the Service may

- a. reduce or waive the requirements of subsection [2][b] and [e]; and/or
- b. enter into agreements with one or more foreign states and set as a condition of a corporate permit that its holder
 - i. employs foreigners partially, mainly or wholly from such foreign countries; and
 - ii. remits a portion of the salaries of such foreigners to such foreign countries;
- c. apply this subsection in respect of foreigners required for seasonal or temporary peak period employment; or
- d. waive or reduce the requirement of subsection [2][d] under special conditions

[6] The Service may reduce or waive the payment referred to in subsection [2][a] when so requested by the Department of Trade and Industry in respect of foreign investments

17. Exchange permit

An exchange permit may be issued by the Service to a foreigner

[1] participating in a programme of cultural, economic or social exchange, organised or administered by an organ of the State in conjunction with an organ of a foreign state, provided that

- a. the Board may delegate the authority to issue such permits to such organ of the State if such organ of the State has satisfied the Board that it can ensure the compliance of such foreigner with this Act and report to the Service on the stages and the completion of the relevant program together with other prescribed information;
- b. it may be prescribed that, in respect of certain programmes, upon expiration of such permit such foreigner may not qualify for a status until he or she has complied with the requirement of a prescribed period of physical presence in his or her foreign country or of domicile outside the Republic;

[2] who is under 25 years of age and has received an offer to conduct work for no longer than one year provided that

- a. the prospective employer certifies that the position exists, and has committed him or herself to
 - i. pay such foreigner remuneration which complies with applicable legal requirements;
 - ii. provide for the welfare and the needs of such foreigner while in the Republic under the aforesaid permit; and
 - iii. report to the Service the failure of the foreigner to comply with the terms of his or her permit or to depart when so required;
- b. such foreigner may not conduct work other than work for which the permit is issued; and
- c. such foreigner may not qualify for a temporary or permanent residence permit until he or she has spent two years outside the Republic, which requirement may be waived by the Service in extraordinary circumstances.

18, Asylum

The Service may issue an asylum permit to a refugee subject to the Refugee Act, 1998 and any prescribed term and condition.

19. Cross-border and transit passes

[1] The Service may issue a cross border pass with the same effect as a multiple admission general entry permit to a foreigner who is a citizen of a prescribed foreign country with which the Republic shares a border and who does not hold a passport but has received a prescribed identity document by the Service and is registered with the Service.

[2] The Service may issue a transit visa authorising a foreigner travelling to a foreign country to make use of the transit facilities at a port of entry.

PERMANENT RESIDENCE

20. Permanent residence

[1] The holder of a permanent residence permit has all the rights, privileges, duties and obligations of a citizen, save for those rights, privileges, duties and obligations which a law or the Constitution explicitly ascribes to citizenship.

[2] Subject to this Act, upon application, one of the permanent residence permits set out in sections 21 and 22 may be issued to a foreigner.

[3] A permanent residence permit is to be issued under the condition that the holder is not a prohibited person, and subject to section 26 of this Act.

[4] For good cause, as prescribed, the Service may attach reasonable individual terms and conditions to a permanent residence permit.

21. Direct residence

Subject to section 20, the Service shall issue a permanent residence permit to a foreigner who

[1] has been the holder of a work permit in terms of this Act for five years and has received an offer for permanent employment, provided that

- a. such foreigner submitted a certification from his or her prospective permanent employer's chartered accountant of the job description and that the position exists and is intended to be filled by such foreigner; and
- b. the Department of Labour certifies that the terms and conditions of such offer, including salary and benefits, are not inferior to those prevailing in the relevant market segment for citizens and residents, taking into account applicable collective bargaining agreements and other standards;

[2] is the spouse of a citizen or resident, provided that

- a. the Service is satisfied that a good faith spousal relationship exists; and
- b. such permit is issued under the condition that it shall lapse if at any time within three years from its issuance a good faith spousal relationship no longer subsists, save for the case of death;

[3] is a child of a citizen or resident under the age of 21, provided that such permit shall lapse if such foreigner does not submit an application for its confirmation within two years of his or her having fumed 21 years of age; or

[4] is a child of a citizen.

22. Grounds for residence

The Service may issue a permanent residence permit to a foreigner of good and sound character who

[1] has received an offer for permanent employment, provided that

- a. such foreigner submitted a certification from a chartered accountant acting on behalf of such foreigner's prospective permanent employer that the position exists and that the position and related job description was advertised in the prescribed form and no suitably qualified citizen or resident was available to fill it;
- b. the Department of Labour certifies that the terms and conditions of such offer, including salary and benefits, are not inferior to those prevailing in the relevant market segment for citizens or residents, taking into account applicable collective bargaining agreements and other standards, if any;
- c. the application falls within the yearly limits of available permits prescribed from time to time for each sector of industry, trade and commerce, after consultation with the Department of Trade and Industry, the Department of Labour and Nedlac; and
- d. the permit may be extended to such foreigner's spouse and children younger than 21 years of age;

[2] taking into account any prescribed requirement, has demonstrated to the satisfaction of the Service extraordinary skills or qualifications, and to those members of such foreigner's immediate family determined by the Service under the circumstances or through regulations;

[3] intends to establish a business in the Republic investing in it the prescribed financial contribution to be part of the intended book value as certified by a chartered accountant, and to the members of such foreigner's immediate family, provided that

- a. the Service may waive or reduce such capitalisation requirements for businesses prescribed from time to time to be in the national interest or when so requested by the Department of Trade and Industry; and
- b. the permit shall lapse if the holder fails to renew such certification within two years of the issuance of the permit, and three years thereafter;

[4] is a refugee referred to in section 27[c] of the Refugee Act, 1998, subject to any prescribed requirement;

[5] is older than 60 years of age and intends to retire in the Republic, provided that a chartered accountant acting on behalf of such foreigner certifies that such foreigner

- a. has the right to a pension or an irrevocable annuity or retirement account which will make to such foreigner a prescribed minimum payment for the rest of his or her life; and
- b. has a minimum prescribed net worth;

[6] has provided a certification by a chartered accountant that he or she has a prescribed minimum net worth and has paid a prescribed amount to the Service; or

[7] is the relative of a citizen or resident within the first step of kingship.

EXCLUSIONS AND EXEMPTIONS

23. Prohibited persons .

[1] The following foreigners do not qualify for a temporary nor a permanent residence permit

- a. those infected with infectious diseases as prescribed from time to time;

- b. anyone against whom a warrant has been issued or a conviction secured in the Republic or a foreign country with which the Republic has regular diplomatic relations in respect of genocide, terrorism, murder, drug trafficking or money laundering;
- c. citizens of certain foreign countries prescribed from time to time;
- d. anyone previously deported and not rehabilitated by the Service;
- e. a member of or adherent to an association or organisation advocating the practice of racial hatred or social violence; and
- f. anyone who is or has been a member of or adherent to an organisation or association utilising crime or terrorism to pursue its ends.

24. Undesirable persons

[1] The following persons may be declared undesirable by the Service as prescribed

- a. anyone who is or is likely to become a public charge;
- b. anyone identified as such by the Board, or in the case of urgency, by the Minister, subject to subsequent ratification of the Board;
- c. anyone who has been judicially declared incompetent;
- d. an un-rehabilitated insolvent;
- e. anyone who has been ordered to depart in terms of this Act;
- f. anyone who is fugitive of justice;
- g. anyone likely to be or become a public charge; and
- h. anyone with previous criminal convictions without the option of a fine for conduct which would be an offence in the Republic, with the exclusion of certain prescribed offences.

[2] Upon application from the affected person, the Service may waive any of the grounds of undesirability provided that it reports such decisions to the Board, with a motivation.

25. Exemptions

[1] The following persons or categories of persons are not illegal foreigners

- a. a member of a military force of a country which has been granted consent by the Government to enter the Republic, while such consent subsists; and
- b. the officers and crew of a public ship of a foreign state, while such ship is in port.

[2] Upon application, the Minister, after consultation with the Board, may under terms and conditions determined by him or her

- a. allow a distinguished visitor and certain members of his or her immediate family and members in his employ or of his or her household to be admitted and sojourn in the Republic for a period not exceeding six months, provided that such foreigners do not intend to reside in the Republic permanently;
- b. grant a foreigner or a category of foreigners the rights of permanent residence for a specified or unspecified period when special circumstances exist which justify such a decision; provided that the Minister may
 - i. exclude one or more identified foreigners from such categories; and
 - ii. for good cause, withdraw such right from a foreigner or a category thereof;
- c. authorise any person or category of persons to enter the Republic at a place other than a port of entry, in which case the Service shall issue to such person[s] the prescribed written permission or passport endorsement, provided that such authorisation may be withdrawn at any time by the Minister or the Managing Director; and
- d. for good cause, waive any prescribed requirement or form, provided that if such consultation requirement would unduly delay an urgent action the Minister may report after the fact to the Board any action taken under this subsection and the reasons for the urgency.

26. Withdrawal of permanent residence

The Service may withdraw a permanent residence permit if its holder

[1] within three years of the issuance of such permit, has been convicted of any of the offences listed in Schedule 1;

[2] has been convicted three times of any of the offences listed in Schedule 2; or

[3] has been absent from the Republic for more than 3 years, provided that

- a. upon showing of good cause and upon prior application the Service may extend this period in specific cases;
- b. the time when such holder

- i. was residing abroad while in the service of the State;
- ii. was residing abroad while a representative or employee of a person or association of persons resident or established in the Republic;
- iii. was residing abroad while in the service of an international organisation of which the State is a member;
- iv. in the case of the spouse or dependent child of a person referred to in paragraph [i], [ii] or [iii], such spouse or child was residing with such person; or
- v. in the case of the spouse or dependent child of a person who is a South African citizen, such spouse or child was residing with such person;

shall not be computed within such period;

- c. the Minister on recommendation of the Managing Director may grant an exemption from the requirement of residence in respect of certain residents or class of residents;
- d. the period of absence may only be interrupted by an admission and sojourn in the Republic; and
- e. the requirement of residence in the Republic shall not affect any foreigner to whom exemption has been granted under section 25[2][b] as a member of a category of persons, unless such foreigner previously entered the Republic or sojourned therein for the purpose of permanent residence under the authority of such exemption; and

[4] has not taken up residence in the Republic within one year of the issuance of such permit.

THE IMMIGRATION SERVICE

27. The Immigration Service

[1] An Immigration Service is hereby established as a juristic person capable of suing and being sued in its name.

[2] The Service shall be directed by the Board and headed and administered by a Managing Director.

[3] The Minister shall represent and be responsible for the Service before Cabinet and in Parliament.

[4] The Managing Director shall be an official with the ranking in the Public Service of a Deputy Director-General to be selected and appointed by the Minister on the basis of a fiduciary relationship with the Minister.

[5] The Minister may delegate his power and functions in terms of this Act to the Managing Director.

28. The Immigration Board

[1] The Immigration Board shall be chaired by the Minister or his or her designee and consist of

- a. one representative of the Department of Trade and Industry;

- b. one representative of the Department of Labour;
- c. one representative of the Department of Tourism
- d. one representative of the Department of Safety and Security;
- e. the Managing Director;
- f. up to five persons from bodies requested by the Minister to nominate a representative; and
- g. four individuals appointed by the Minister on grounds of their expertise in administration, regulatory matters or migration law, control, adjudication or enforcement,

provided that the nominations contemplated in paragraphs [f] and [g] shall be received by the relevant portfolio committee of the National Assembly which shall make its recommendation to the Minister.

[2] The Board shall meet when called by the Minister or the Managing Director, provided that it

- a. shall meet regularly;
- b. may determine its procedures at meetings;
- c. may invite officers employed by the Service to attend or participate in its meetings; and
- d. may appoint committees from its members to assist in the performance of its functions.

[3] A member of the Board referred to in subsection [1][f] and [g]

- a. shall serve for a three year term, at the expiry of which they shall be eligible for one or more re-appointments, provided that the Minister may elect to fill any vacancy which may occur by appointing a person for the unexpired portion of the term of the member in whose place such person is appointed;
- b. shall at no time
 - i. be or become an un-rehabilitated insolvent;
 - ii. be or have been judicially declared of unsound mind;
 - iii. suffer an infirmity of mind or body preventing him or her from the proper discharge of the duties of his or her office;
 - iv. be convicted by final conviction or sentence of an offence without the option of a fine;
 - v. be or becomes a political office bearer; or
 - vi. be or have been removed from an office of trust on account of misconduct involving theft or fraud;
- c. shall cease to be a Member
 - i. on resignation;
 - ii. if requested by the Minister to resign for good cause;
 - iii. if he or she fails to attend two consecutive meetings of the Board; or
 - iv. if he or she becomes disqualified in terms of this Act, and
- d. shall be remunerated and be entitled to such benefits and allowances as determined from time to time by the Minister after consultation with the Managing Director.

[4] The Board may request the Service to provide to it the necessary administrative capacity and assistance.

[5] The Board may establish and operate through committees to carry out its functions.

[6] The Minister may disestablish the Board on such terms and conditions as he or she sees fit.

29. Objectives and functions of the Service

[1] In the administration of this Act. the Service shall pursue the following objectives

- a. promote a human-rights based culture in both government and civil society in respect of

- migration control;
- b. facilitate and simplify the issuance of permanent and temporary residence permits to those who are entitled to them, and concentrate resources and efforts in enforcing this Act at community level and discouraging illegal foreigners;
- c. detect and deport illegal foreigners;
- d. create a climate of co-operation with other organs of the State in all spheres of government to encourage them to take responsibility in implementing this Act within the ambit of their respective powers and functions;
- e. prevent and deter xenophobia within the Service, any sphere of government or organ of the State and at community level;
- f. create a climate of co-operation with communities and organs of civil society, including trade unions, to encourage them to co-operate with the Service to implement this Act;
- g. promote a climate within the Republic which encourages illegal foreigners to depart voluntarily;
- h. control the borders;
- i. administer the ports of entry;
- j. regulate the influx of foreigners and residents in the Republic to
 - i. 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; and
 - dd. increasing skilled human resources in the Republic;
 - ii. encourage the training of citizen and residents by employers and raise revenues for training programmes funded or subsidised by the State;
 - iii. enable family reunification;
- k. administer the prescribed fees, fines and other payments it exacts or receives in such a fashion as to defray the overall cost of its operations;
- l. administer refugee protection and related legislation;
- m. administer citizenship by naturalisation and incidents thereof.

[2] In order to achieve the objectives set out in subsection [1], the Service shall

- a. inspect workplaces to ensure that no illegal foreigner is employed and that foreigners, if any, are employed in the job description and at the terms and conditions set out in their temporary residence permit, and that the relevant fees, if any, are paid;
- b. inspect institutions of learning to ensure that illegal foreigners are not enrolled therein;
- c. liaise with the South Africa Police Service to
 - i. ensure that the identity of people who are arrested, detained or convicted is checked for purposes of this Act; and
 - ii. educate and instruct law enforcing agencies to detect illegal foreigners and report them to the Service;
- d. educate communities and organs of civil society on the rights of foreigners, illegal foreigners and refugees, and conduct other activities to prevent xenophobia;
- e. in co-operation with the Department of Foreign Affairs
 - i. promote programmes in foreign countries with the aim of deterring people from becoming illegal foreigners; and
 - ii. table the need for co-operation in preventing migration towards the Republic on the agenda of relations with foreign states, negotiating appropriate measures and

agreements with such foreign states;

- f. maintain separate accounts to hold funds received or collected
 - i. under this Act from employers for training purposes or fines, which funds are to be made available to the Minister of State whom from time to time may be designated by the President of the Republic to receive them, as prescribed;
 - ii. from foreign states to defray the cost of repatriating illegal foreigners originating from their country, as determined through international relations and agreements;
 - iii. from donors or other sources;
 - iv. from fees and fines imposed or exacted by the Service in terms of this Act a ratio of which as prescribed from time to time is to be made available to the Minister of Justice for the funding of the Courts, as prescribed; and
 - v. the proceeds of letting or selling an asset, or investing monies of the Service
- g. monitor and exact compliance from any person or entity exercising responsibilities or bearing duties or obligations in terms of this Act;
- h. deport illegal foreigners who are unwilling to leave the Republic voluntarily;
- i. train its investigative unit to detect illegal foreigners, monitor compliance with the terms and conditions of permits, control borders, and exercise any other function under this Act or which may be delegated to it;
- j. be empowered to contract with private persons to exercise under its control any of its functions, including but not limited to detaining and escorting illegal foreigners for deportation purposes and manning ports of entry; and
- k. conduct any other activity called for by this Act or necessary for or conducive to its implementation.

30. Powers of the Service

Subject to this Act, an officer may

- a. enter workplaces and inspect employment records for the purposes of this Act;
- b. enter and inspect any place open to the public for purposes of this Act;
- c. exercise any powers relevant to the functions set out in section 29[2];
- d. request any sphere of government or organ of the State to
 - i. take actions or adopt procedures to ensure that the recipients of their services are identified as citizens and residents or foreigners; and
 - ii. request that prescribed services, or licenses, or concessions or other actions be subject to proof of status or citizenship;

provided that such requirements shall not prevent the rendering of such services to illegal foreigners when so required by the Constitution or a law;

- e. request anyone in the Republic to identify him or herself as a citizen or resident, or as a foreigner;
- f. organise and participate in community fore or other community based organisation to involve the citizenry in the application and implementation of this Act, and educate the citizenry in migration issues;
- g. apprehend, detain and deport any illegal foreigner;
- h. represent the State in any proceeding in a Court;
- i. prosecute any offence under this Act;
- j. enter into an agreement with any person, including any department of State, in terms of which the Service will be authorised to make use of any of the facilities, equipment or personnel belonging to or under the control or in the employment of such person or department; and
- k. conduct any other activity or exercise any other power called for by this Act or necessary for or conducive to its implementation.

31. Structure of the Service

[1] The Service shall be structured in regions to be determined by the Board and presided over by a Director.

[2] A Director shall

- a. carry the primary responsibility of administering and applying this Act in respect of cases and applications, and may delegate his or her functions to other officials as prescribed;
- b. subject to this Act, express the decision-making power of the Service in respect of cases and applications, and, in this respect, in his or her capacity sue and be sued in the name and on behalf of the Service;
- c. through his or her appointed officials, motivate a decision of the Service before the Board; and
- d. through his or her appointed officials, represent the Service before a Court.

[3] The Managing Director shall

- a. ensure the uniform application of this Act;
- b. ensure the efficient and effective operation of the Service;
- c. liaise or interface with organs of foreign states or international institutions dealing with migration or law enforcement, especially, but not exclusively, to fight terrorism, arms and drug trafficking, foreigner smuggling, contraband and organised crime; and
- d. perform the other powers and functions set out in this Act.

[4] The Service may have officers in missions to exercise the functions of the Service.

32. Powers and functions of the Board

[1] The Board shall

- a. adopt regulations in terms of this Act or other legislation or conducive to this Act's implementation;
- b. formulate the policies of the Service;
- c. monitor the conduct of the Service and instruct its Managing Director when necessary or expedient;
- d. review a decision of the Service in terms of section 34; and
- e. exercise the other powers and functions ascribed to the Board by this Act or other legislation.

[2] Subject to this Act, the Board shall operate and meet as prescribed.

33. Rule-making

[1] In adopting regulations in terms of this Act, the Board shall

- a. publish its intention of adopting regulations specifying their subject matter and soliciting public comments during a period not shorter than 21 days;
- b. having considered public inputs received, publish draft regulations soliciting public comments during a period not shorter than 21 days; and
- c. publish the final regulations together with a summary of comments which have not been accommodated and the reasons for their rejection.

[2] Only subsection [1][b] and [c] shall apply in respect of any regulations which this Act requires to be prescribed from time to time.

[3] Regulations shall not violate this Act or be arbitrary or capricious.

34. Adjudication and review procedures

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

subsection [2].

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

- a. to the Managing Director who may reverse or modify it within 10 days, failing which the decision shall be deemed to have been confirmed; or
- b. within 20 days of modification or confirmation by the Managing Director, if any, to the Board, which may reverse or modify it within 20 days, failing which the decision shall be deemed to have been confirmed, and be final, provided that in exceptional circumstances or when such person stands to be deported as consequence of such decision
 - i. the Board may extend such deadline; and
 - ii. at the request of the Service, the Board may request such person to post a bond to defray his or her deportation costs, if applicable; or
- c. within 20 days of modification or confirmation by the Board, if any, to a Court which may suspend, reverse or modify it in accordance with its rules.

[3] If not appealed in terms of subsection [2], a decision of the Service is final.

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

ENFORCEMENT AND MONITORING

35. Illegal foreigners

[1] illegal foreigners shall depart, unless authorised by the Service to remain in the Republic, pending his or her application for a status. Any illegal foreigner shall be deported .

36. Investigations

[1] The investigative unit of the Service shall consist of such persons, including one or more commissioners, as may be determined by the Board.

[2] The Managing Director shall appoint a commissioner as the head of the investigative unit.

[3] The investigative unit shall investigate any matter falling within the scope of the Service's powers, functions and duties, subject to the directions of the Board, and shall in the performance of its functions follow such procedure as may be prescribed.

[4] The Service may for the purposes of this Act

- a. at any time before the commencement or in the course of an investigation conduct an inspection *in loco*;
- b. by notice in writing call upon any person who is in possession of or has the custody of or control over any thing which in the opinion of the Service is relevant to the investigation to produce such thing, and the Service may inspect and retain any thing so produced for a reasonable time; and
- c. by notice in writing call upon any person to appear before the Service and to give evidence or to answer questions relevant to the subject matter of the investigation;

provided that any of such notices shall specify the time when and the place where the person to whom it is directed shall appear, be signed by a commissioner, be served by an officer or by a sheriff, by delivering a copy thereof to the person concerned or by leaving it at such person's last known place of residence or business, and shall specify the reason why the article is to be produced or the evidence is to be given.

[5] In the pursuance of this Act, the Service may obtain a warrant to

- a. enter or search any premises for a person or thing or to make inquiries, including the power to
 - i. examine any thing found in or upon such premises;
 - ii. request from the person who is in control of such premises or in whose possession or under whose control any thing is when it is found, or who is upon reasonable grounds believed to have information with regard to such thing, an explanation or information; and
 - iii. make copies of or extracts from any such thing found upon or in such premises;
- b. apprehend an illegal foreigner, subject to section 37[1]; or
- c. after having issued a receipt in respect thereof, seize and remove documentation or any other thing which
 - i. is concerned with or is upon reasonable grounds suspected to be concerned with any matter which is the subject of any investigation in terms of this Act; or
 - ii. contains, or is on reasonable grounds suspected to contain, information with regard to any such matter,

provided that

 - iii. any thing so seized shall be returned in good order as soon as possible after the purpose of its seizure has been accomplished; and
 - iv. a person from whom a book or document has been taken shall be allowed reasonable access, including the right to make copies at his or her expense.

[6] A warrant referred to in subsection [5] shall be issued by a judge of a Court who has jurisdiction in the area where the premises in question are situated, and only if it appears to the judge from information on oath that there are reasonable grounds for believing that a thing mentioned in subsection [5] is upon or in such premises, and shall specify which of the acts mentioned in subsection [5] may be performed thereunder by the person to whom it is issued.

[7] A warrant issued in terms of this section shall be executed by day unless the judge who issues the warrant authorises its execution by night at times which shall be reasonable, and any entry upon or search of any premises in terms of this section shall be conducted with strict regard to decency and order, including

- a. a person's right to, respect for and the protection of his or her dignity;
- b. the right of a person to freedom and security; and
- c. the right of a person to his or her personal privacy.

[8] A person executing a warrant in terms of this section shall immediately before commencing with the execution

- a. identify him or herself to the person in control of the premises, if such person is present, and hand to such person a copy of the warrant or, if such person is not present, affix such copy to a prominent place on the premises; and
- b. supply such person at his or her request with particulars regarding his or her authority to execute such a warrant.

[9] [a] A commissioner or an officer may, without a warrant, enter upon any premises, other than a private dwelling, and exercise the powers referred to in subsections [5][a] and [c]

- i. if the person who is competent to do so consents to such entry, search, seizure and removal; or
- ii. if he or she upon reasonable grounds believes that
 - aa. the required warrant will be issued to him or her in terms of

subsection [5] if he or she were to apply for such warrant; and
bb. the delay caused by the obtaining of any such warrant would defeat the object of the entry, search, seizure and removal; and

b. any entry and search in terms of paragraph [a] shall be executed by day, unless the execution thereof by night is justifiable and necessary.

[10] [a] Any person who may on the authority of a warrant issued in terms of subsection [5], or under the provisions of subsection [9], enter upon and search any premises, may use such force as may be reasonably necessary to overcome resistance to such entry or search; and

b. no person may enter upon or search any premises unless he or she has audibly demanded access to the premises and has notified the purpose of his or her entry, unless such person is upon reasonable grounds of the opinion that any thing may be destroyed or person put at risk of bodily harm if such access is first demanded and such purpose is first notified.

[11] If during the execution of a warrant or the conducting of a search in terms of this section, a person claims that a thing found on or in the premises concerned contains privileged information and refuses its inspection or removal, the person executing the warrant or conducting the search shall, if he or she is of the opinion that the thing contains information which is relevant to the investigation and that such information is necessary for the investigation, request the registrar of a Court which has jurisdiction, or his or her delegate, to seize and remove that thing for safe custody until a Court has made a ruling on the question whether the information concerned is privileged or not.

[12] A warrant issued in terms of this section may be issued on any day and shall be of force until

- a. it is executed; or
- b. it is cancelled by the person who issued it or, if such person is not available, by a person with like authority; or
- c. the expiry of one month from the day of its issue, or
- d. the purpose for the issuing of the warrant has lapsed,

whichever may occur first.

In consultation with the Minister and through diplomatic channels, the Service may obtain permission

[13] from the relevant authority of a foreign country to receive evidence or gather information in or from that country.

37. Deportation and detention of illegal foreigners

[1] Without need for a warrant, an officer may arrest an illegal foreigner or cause him or her to be arrested, and shall, irrespective of whether such foreigner is arrested, deport him or her or cause him or her to be deported and may, pending his or her deportation, detain him or her or cause him or her to be detained in a manner and at the place determined by the Managing Director, provided that the foreigner concerned

- a. must be notified in writing of the decision to deport him or her and of his or her right to appeal such decision in terms of this Act;
- b. may at any time request any officer to him or her that his or her detention for purpose of deportation be confirmed by warrant of a Court, which if not issued within 48 hours of such request shall cause the immediate release of such foreigner;
- c. must be informed upon arrest or immediately thereafter of the rights set out in the preceding two paragraphs in a language that he or she understands; and
- d. may not be held in detention for longer than 30 days without a warrant of a Court which on good and reasonable grounds may extend such detention for an adequate period not exceeding 90 days.

[2] The detention of a person in terms of this Act elsewhere than on a ship and for purposes other than his or her deportation shall not exceed 48 hours from his or her arrest or the time on which such person was taken into custody for examination or other purposes, provided that if such period expires on a non-working day it shall be extended to four p.m. of the first following working day.

[3] The Service may order a foreigner subject to deportation to deposit a sum sufficient to cover the expenses related to his or her deportation, detention, maintenance and custody and an officer may in the prescribed manner enforce payment of such deposit.

[4] Any person who fails to comply with an order made in terms of subsection 3 shall be guilty of an offence and liable on conviction to a fine or to imprisonment not exceeding 12 months.

[5] Any person other than a citizen or a resident who

- a. having been removed from the Republic or while being subject to an order issued under a law to leave the Republic, returns thereto without lawful authority or fails to comply with such order; or
- b. having been refused admission, whether before or after the commencement of this Act, has entered the Republic;

shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding 12 months and may, if not already in detention, be arrested without warrant and deported under a warrant issued by a Court and, pending his or her removal, be detained in the manner and at the place determined by the Managing Director.

[6] Any illegal foreigner convicted and sentenced under this Act may be deported before the expiration of his or her sentence and his or her imprisonment shall terminate at that time.

[7] On the basis of a warrant for the removal or release of a detained illegal foreigner, the person in charge of the prison concerned shall deliver such foreigner to that officer or police officer bearing such warrant, and if such foreigner is not released he or she shall be deemed to be in lawful custody while in the custody of the officer or police officer bearing such warrant.

[8] A person at a port of entry who has been notified by an immigration officer that he or she is an illegal foreigner or in respect of whom the immigration officer has made a declaration to the master of the ship on which such foreigner arrived that such person is an illegal foreigner shall be detained by the master on such ship and, unless such master is informed by an immigration officer that such person has been found not to be an illegal foreigner, such master shall remove such person from the Republic, provided that an immigration officer may cause such person to be detained elsewhere than on such ship, or be removed in custody from such ship and detain him or her or cause him or her to be detained in the manner and at a place determined by the Managing Director.

[9] The person referred to in the preceding subsection shall, pending removal and while detained as contemplated in that subsection, be deemed to be in the custody of the master of such ship and not of the immigration officer or the Service, and such master shall be liable to pay the costs of the detention and maintenance of such person while so detained if the master knew or should reasonably have known that such person was an illegal foreigner, provided that

- a. if such master fails to comply with the provisions of that subsection, or if required to pay such costs, such master or the owner of such ship shall forfeit in respect of every person concerned a sum fixed by the immigration officer, not exceeding an amount prescribed from time to time; and
- b. the immigration officer may, before such person is removed from such ship require the master or the owner of such ship to deposit a sum sufficient cover any expenses that may be incurred by the Department in connection with the deportation, detention, maintenance and custody of such person, if there are grounds to believe that the master knew or should reasonably have known that such person was an illegal foreigner;
- c. if such person is not removed from the Republic on the ship on which he or she was

conveyed to the Republic, except by reason of not being an illegal foreigner, and if the master knew or should have known that such person was an illegal foreigner, the owner of that ship shall at the request of an immigration officer convey that person, or have him or her conveyed, free of charge to the State to a place outside the Republic, and any person, other than an officer, charged by the Service with the duty of escorting that person to such place, shall be deemed to be an officer while performing such duty; and

- d. if the owner of such ship fails to comply with the provisions of this section he or she shall forfeit in respect of each such person a sum fixed by the immigration officer, not exceeding an amount prescribed from time to time.

[10] A person who escapes or attempts to escape from detention imposed under this Act shall be guilty of an offence and may be arrested without a warrant.

38. Ships

[1] Save for extraordinary circumstances necessitating otherwise, no master shall cause his or her ship to land or shore at any place other than a port of entry.

[2] An immigration officer or other authorised person employed by the Service may

- a. board any ship which is entering or has entered into any port and for good cause prohibit or regulate disembarkation from, or the offloading of such ship in order to ascertain the status or citizenship of its passengers; and
- b. request the person in control of a port of entry or any person acting under his or her authority to order the master to moor or anchor his or her ship in such port at such distance from the shore or landing place or in such position as he or she may direct.

[3] The master of a ship entering a port of entry upon demand shall deliver to an immigration officer

- a. a list stating
 - i. the names of all passengers on board the ship, classified according to their respective destinations; and
 - ii. such other details prescribed from time to time;
- a. a list of stowaways, if any have been found;
- b. a list of the crew and all other persons, other than passengers and stowaways, employed or carried on the ship or present on the ship; and
- c. a return, under the hand of the medical officer of that ship or, if there is no such medical officer, under the hand of the master himself, stating
 - i. any cases of disease, whether infectious or otherwise, which have occurred or are suspected to have occurred upon the voyage;
 - ii. the names of the persons who have suffered or are suffering from such disease;
 - iii. details of any birth or death which occurred upon the voyage between such port and a previous port; and
 - iv. any other prescribed matter or event,

provided that such immigration officer may

- e. exempt the master of a ship destined for any other port in the Republic, subject to compliance with the duty to deliver such lists or return at such port and with any directive such immigration officer may issue to the master; and
- f. if satisfied that a name should be added to or deleted from any of such lists, authorise such addition or deletion.

[4] If a ship arrives at a port of entry with a passenger on board bound for a destination outside the Republic who is not on board when the ship leaves such port and has not been admitted, the master or the owner of that ship shall forfeit a sum fixed by the immigration officer within a proscribed

limit.

[5] An immigration officer may require the master of a ship to muster the crew of such ship on the arrival of such ship in any port of entry and again before it leaves such port.

[6] The competent officer at any harbour may refuse to give to the master of any ship clearance papers to leave that harbour unless he has complied with the provisions of this Act and produced a certificate of an immigration officer to that effect.

[7] A master shall ensure that any foreigner conveyed to a port of entry for purpose of travel to a foreign country hold a transit visa.

39. Border control

[1] The Service shall control the borders to ensure compliance with this Act.

[2] The Service may receive a delegation from the Department of Safety and Security, the Department of Defence or the Department of Finance enabling and mandating it to exercise powers or functions exercised under any law by any of such Departments relating to the control of movement of people or goods across the borders.

[3] By proclamation, the President may order that certain assets and human resources of the Services dedicated to border control be placed under the control of the Minister of Defence to be deployed as determined by the President in terms of section 201 of the Constitution.

IMMIGRATION COURTS

40. Immigration Courts

[1] For purposes of this section "Minister" shall mean the Minister of Justice.

[2] Immigration Courts are hereby established with exclusive original jurisdiction on any matter following from the application of this Act, including but not limited to

- a. the review of decisions of the Service;
- b. the validity of regulations;
- c. actions against the Service for any cause, including damages; and
- d. matters of status,

provided that there shall be no judicial review in respect of the following actions

- e. the granting of the exemption contemplated in section 2[3][c][ii] or its withdrawal, and
- f. a waiver or exemption contemplated in section 25[2][a] and [c].

[3] A Court shall be established in the area of jurisdiction of a Magistrate's Court as determined by the Minister of Justice after consultation with the Service.

[4] A Court shall be presided over by a judge to be assisted by one or more assistants as determined by the Minister, who may select such assistants from within or outside the Public Service, or by such judge, provided that he or she selects them from qualified officials of the Service.

[5] On application in the prescribed manner of

- a. a Court assistant;
- b. a person likely to be adversely affected by an order of the Court or his or her legal representative; or
- c. the person instituting or responding to the relevant proceedings the clerk of the Court or registrar must subpoena any witness to give evidence or produce a document in any form or any other information at the relevant proceedings of the Court, provided that

- d. such subpoena shall be served on the witness concerned in terms of sections 188 and 189 of the Criminal Procedure Act, 1977 [Act No. 51 of 1977]; and
- e. the Court on the application of a witness may direct that such witness be paid such allowance as may be paid to a witness for an accused person in criminal proceedings.

[6] Subject in this Act, the provisions of the Magistrates' Courts Act, 1944 [Act No. 32 of 1944] and of the rules made thereunder, apply *mutatis mutandis* to the Courts in so far as they relate to

- a. the appointment and functions of officers;
- b. the issue and service of process;
- c. the conduct of proceedings;
- d. the execution of judgements or orders; and
- e. [e] the imposition of penalties for non-compliance with orders of court, for obstruction of execution of judgements or orders, and for contempt of court;

and in so far as no other provision has been prescribed.

[7] All proceedings before the court must be conducted in open court, except in so far as the court may direct otherwise in a special case.

[8] Any person aggrieved by any order made by a Court may, within the prescribed period and manner, appeal against such order to the High Court having jurisdiction, which, on appeal, may make such order in the matter as it may see fit.

DUTIES AND OBLIGATIONS

41. Employers

[1] No person shall employ

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

[2] An employer shall make a good faith effort to ascertain that no illegal foreigner is employed by him or her and to ascertain the status or citizenship of those whom he or she employs.

[3] If it is proven, other than by means of the presumption referred to in subsection [5], that a person was employed in violation of subsection [1], it shall be presumed that the employer knew at the time of the employment that such person was among those referred to in subsection [1], unless such employer proves

- a. that he or she employed such person in good faith; and
- b. that he complied with subsection [2], provided that a stricter compliance shall be required of any employer who employs more than five employees or has been found guilty of a prior offence under this Act related to this section.

[4] An employer employing a foreigner shall

- a. for two years after the termination of such foreigner's employment keep the prescribed records relating thereto; and
- b. report to the Service
 - i. the termination of such foreigner's employment; and
 - ii. any breach on the side of the foreigner of his or her status.

[5] If an illegal foreigner is found on any premises where a business is conducted, it shall be presumed that such foreigner was employed by the person who has control over such premises,

unless the contrary is proven.

42. Learning institutions

[1] No person employed by or associated with any type of learning institution shall provide training or lull instruction to

- a. an illegal foreigner;
- b. a foreigner whose status does not authorise him or her to receive such training or instruction by such person; or
- c. a foreigner at terms, conditions or in a capacity different to those contemplated in such foreigner's status.

[2] If an illegal foreigner is found on any premises where instruction or training is provided, it shall be presumed that such foreigner was receiving instruction or training from, or allowed to receive instruction or training by, the person who has control over such premises, unless the contrary is proven.

43. Overnight accommodation

[1] Any business offering overnight accommodation shall make a good faith effort to identify its customers as citizens or status holders and shall report in the prescribed form to the Service any failure to effect such identification.

[2] When subsection [1] is not complied with and an illegal foreigner is found on any premises referred to in such subsection, it shall be presumed that such illegal foreigner was harboured by the person who has control over such premises, unless the contrary is proven.

44. Identification

[1] Any person shall identify him- or herself as a citizen or resident, or as a foreigner when so requested by an officer or a police officer, and if on reasonable grounds such officer is not satisfied that such person is entitled to be in the Republic, such officer may take such person into custody without a warrant and if necessary detain him or her in a prescribed manner and place until such person's *prima facie* status or citizenship is ascertained.

45. Aiding and abetting illegal foreigners

Subject to this Act, no person shall knowingly aid, abet, assist, enable or in any manner help

- a. an illegal foreigner; or
- b. a foreigner in respect of any matter, conduct or transaction which violate such foreigner's status, when applicable;

including but not limited to:

- c. providing instruction or training to, or allowing him or her to receive instruction or training;
- d. issuing to him or her a licence or other authorisation to conduct any business or to carry on any profession or occupation;
- e. entering into an agreement with him or her for the conduct of any business or the carrying on of any profession or occupation;
- f. conducting any business or carrying on any profession or occupation in co-operation with him or her;
- g. assisting, enabling or in any manner helping him or her to conduct any business or carry on any profession or occupation;
- h. obtaining a licence or other authority for or on his or her behalf to conduct any business or to carry on any profession or occupation;
- i. doing anything for or on his or her behalf in connection with his business or profession or occupation;

- j. harbouring him or her, which includes providing overnight accommodation; or
- k. letting or selling or in any manner making available any immoveable property in the Republic to him or her.

46. Obligation of foreigners

A foreigner shall

- a. abide by the terms and conditions of his or her status, including any terms and conditions attached to the relevant permit by the Service upon its issuance, extension or renewal; and
- b. depart upon expiry of his or her status.

47. Organs of the State

When possible, any organ of the State in any sphere of government shall endeavour to ascertain the status or citizenship of the persons receiving its services and shall report to the Service any illegal foreigner, or any person whose status or citizenship could not be ascertained, advising through public notices or directly the person concerned of such reporting practice, provided that such requirement shall not prevent the rendering of services to which illegal foreigners and foreigners are entitled under the Constitution or any law, including the law of contract.

48. Other institutions

Prescribed institutions or persons other than organs of the State may be required by regulations to endeavour to ascertain the status or citizenship of the persons with whom they enter into commercial transactions, as prescribed, and shall report to the Service any illegal foreigner, or any person whose status or citizenship could not be ascertained, provided that such requirement shall not prevent the rendering of services or performance to which illegal foreigners and foreigners are entitled under the Constitution or any law, including the law of contract.

MISCELLANEOUS

49. Agents

Subject to prescribed qualifications and criteria for good standing, the Service shall maintain a list of agents, other than attorneys, who are authorised on behalf of, or represent, other persons in respect of its procedures.

50. Internal auditing

[1] The Service shall set up an internal anti-corruption unit charged with the task of preventing, deterring, detecting and exposing any instance of corruption, abuse of power, xenophobia and dereliction of duty by a person employed in the Service, provided that such unit shall

- a. not oust the jurisdiction or the investigative authority of any other organ of the State; and
- b. comprise of specialised members seconded from time to time and on a rotating basis by the Minister of Safety and Security.

[2] The Managing Director shall report to the Board annually on

- a. measures and proposals aimed at increasing the efficacy, efficiency and cost effectiveness of the Service; and
- b. statistical data relating to the implementation of this Act and the Service.

[3] The Board shall utilise the information referred to in subsection [2] in its annual report to Parliament.

51. Foreigners erroneously allowed to enter the Republic

No illegal foreigner shall be exempt from a provision of this Act or be allowed to sojourn in the Republic on the grounds that he or she was not informed that he or she could not enter or sojourn in the Republic or that he or she was admitted or allowed to remain in the Republic through error or misrepresentation, or because his or her being an illegal foreigner was undiscovered.

OFFENCES

52. Offences

[1] Any illegal foreigner shall be guilty of an offence punishable by imprisonment not exceeding three months or a fine not exceeding R5,000, and if he or she fails to depart when so ordered by the Service shall be guilty of an offence punishable by imprisonment non exceeding nine months or a fine not exceeding R15,000.

[2] Anyone who knowingly assists a person to enter the Republic in contravention of this Act shall be guilty of an offence punishable by imprisonment non exceeding one year and/or a fine not exceeding R20,000.

[3] Anyone who knowingly employs an illegal foreigner or a foreigner in violation of this Act shall be guilty of an offence punishable by imprisonment not exceeding one year or a fine not exceeding R30,000, provided that

- a. such person's second offence shall be punishable by imprisonment non exceeding two years or a fine not exceeding R100,000, and on the third or subsequent offences by imprisonment not exceeding three years without the option of a fine; and
- b. a prescribed ratio of the fines collected in terms of this section shall be paid into the training fund.

[4] Anyone who intentionally facilitates an illegal foreigner to receive public services to which such illegal foreigner is not entitled shall be guilty of an offence punishable by a fine not exceeding R25,000.

[5] Any civil servant who provides false or intentionally inaccurate or unauthorised documentation or benefit to an illegal foreigner, or otherwise facilitates such illegal foreigner to disguise his or her identity or status, or accepts any undue financial or other consideration to perform an act or to exercise his or her discretion in terms of this Act, shall be guilty of an offence punishable by imprisonment not exceeding two years or a fine not exceeding R75,000, provided that if such civil servant is employed by the Service such offence shall be punishable by imprisonment non exceeding three years without the option of a fine.

[6] Anyone failing to comply with one of the duties or obligations set out under sections 42 to 46 of this Act shall be guilty of an offence punishable by imprisonment not exceeding eighteen months or a fine not exceeding R75,000.

[7] Anyone participating in a conspiracy of two or more persons to conduct an activity intended to violate this Act repeatedly shall be guilty of an offence punishable by imprisonment not exceeding four years or a fine not exceeding R150,000, provided that if part of such activity is conducted or intended to be conducted in a foreign country the offence shall be punishable by imprisonment not exceeding four years without the option of a fine.

[8] Anyone who willfully or through gross negligence produces a false certification contemplated by this Act shall be guilty of an offence punishable by imprisonment not exceeding one year or a fine not exceeding R50,000, and shall be suspended from the relevant professional association for a period not exceeding two years.

[9] Anyone, other than a civil servants, who produces a documents purporting to be a document issued or administered by the Service shall be shall be guilty of an offence punishable by imprisonment not exceeding three or a fine not exceeding R75,000.

[10] Anyone who through offers of financial or other consideration or threats, compels or induces an officer to contravene this Act or such officer's duties shall be guilty of an offence punishable by imprisonment not exceeding eighteen months or a fine not exceeding R50,000, which shall be increased up to twice such length of imprisonment or fine if consequently such officer in fact contravenes this Act or his or her duties.

[11] A Court may order that certain assets

- a. within the Republic belonging to an illegal foreigner referred to in subclause 37[3],
- b. employed to contravene section 45 and belonging to the person contravening such section,
- c. employed to convey into the Republic a foreigner without the required transit visa; or
- d. employed to perpetrate the offences contemplated in subsection [5][7], [8] and [10]

be forfeited to the Service to the extent necessary to defray the costs referred to in subsection 37[3] in respect of the foreigners concerned and the costs incurred by the Service to secure such a forfeiture.

53. Administrative offences

[1] Any foreigner who leaves the Republic after the expiry of his or her permit shall be guilty of an offence punishable by an administrative fine of a prescribed amount not to exceed R3,000 which fine shall be imposed by the Service on detection of the overstay and exacted when such foreigner is admitted or makes an application with the Service.

[2] Anyone who through negligence produces an incorrect certification contemplated by this Act shall be guilty of an offence punishable by an administrative fine of a prescribed amount not to exceed R8,000, which fine shall be imposed by the Service.

[3] Any owner or master of a ship who through negligence contravenes the provisions of section 38 shall be guilty of an offence punishable by an administrative fine of a prescribed amount not to exceed R10,000, which fine shall be imposed by the Service.

TRANSITIONAL PROVISIONS

54. Definitions

In respect of the transitional provisions set forth in sections 55 to 59 the following additional or different definitions shall apply, unless the context requires otherwise:

- i. "Department" means the Department of Home Affairs;
- ii. "Director-General" means the Director-General of the Department;
- iii. "previous Act" means the Aliens Control Act of 1991; and
- iv. "prescribe" means to provide through regulation adopted by the Director-General, and "prescribed" has a correspondent meaning.

55. Restructuring of the Department

[1] Notwithstanding any other law, within nine months of the commencement of this Act the Director General shall prescribe that certain individuals employed in the Department become *ipso facto* employed in the Service, redefining their respective conditions of service and job descriptions, provided that their remuneration and other benefits shall not be diminished nor worsen.

[2] In exercising the function set out under subsection [1], the Director-General shall take into account

- a. the need to transfer the entire migration section of the Department to the Service;
- b. the need to restructure the Department to enable the Service to operate as set forth in this Act; and
- c. the need to provide the Service with necessary ancillary and support services and functions.

56. Functions of the Service and the Board

[1] Until the Board is duly constituted and operational, any regulation required in terms of this Act shall be prescribed.

[2] Subject to this Act, any regulation adopted under the previous Act shall remain in force and effect until repealed or amended.

57. Courts

[1] Pending their establishment, the jurisdiction of the Courts shall be exercised by the competent Magistrate's Court designated by the Minister of Justice, provided that the establishment of the Courts may take place at different times in different areas of the Republic as determined by the Minister of Justice for reasons of expediency and good judicial administration.

[2] In establishing the Courts and when applicable thereafter, the Minister of Justice shall

- a. after consultation with the Magistrate's Commission or the Judicial Service Commission, designate certain magistrates, additional magistrates, assistant magistrates or judges to be judges in the Courts in the areas in respect of which they exercise their respective functions;
- b. take reasonable steps within the available resources of the Department of Justice to implement this Act and provide the Courts with the required administrative capacity; and
- c. after consultation with the Service or the Minister, provide an opportunity for the persons referred to in paragraph [a] to receive training in the implementation of this Act.

58. Existing Permits

[1] Any permanent residence permit validly issued in terms of the previous Act shall be deemed to be issued in terms of, and in compliance with, this Act.

[2] Any permit issued in terms of the previous Act for a determined period shall continue in force and effect in accordance with the terms and conditions under which it was issued, but may only be renewed in terms of this Act, provided that

- i. the Service may waive the requirement to submit a new application, and
- ii. for good cause the Service may authorise a permit to be renewed in terms of the previous Act .

[3] Any exemptions for an undetermined period granted in terms of section 28[2] of the previous Act shall be deemed a permanent residence permit for the purposes of this Act, and any exemption granted for a determined period shall continue in force and effect in accordance with the terms and conditions under which it was issued.

[4] Permits issued under section 41 of the previous Act shall continue in force and effect in accordance with the terms and conditions under which they were issued, but may not be renewed.

59. Border control

Notwithstanding any other law, in order to enable the Service to exercise the functions set out in section 39[1] and any delegated function referred to in section 39[2], within 24 months of the commencement of this Act, in consultation with the Managing Director or the Director-General, the Director-General of the Department of Defence and the Director-General of the Department of Safety and Security shall determine through regulations that

[1] certain individuals employed in their respective Departments become ipso facto employed in the Service, redefining their respective conditions of service and job descriptions as determined by the Director-General, provided that

- a. their remuneration and other benefits shall not be diminished nor worsen; and
- b. provision be made for them to be appropriately trained or reconditioned to perform the

functions contemplated in this Act, and

[2] certain equipment held by their respective departments be transferred to the Service.

60. Repeal of laws

[1] The laws mentioned in Schedule 3 are hereby repealed or amended to the extent set out in its third column.

[2] Anything done under the provisions of a law repealed by subsection [1] and which could have been done under this Act shall be deemed to have been done under this Act.

61. Short title and commencement

[1] This Act shall be referred to as the Immigration Act, 2000 and shall come into force and effect on a date determined by the President by proclamation in the Government Gazette.

[2] Different dates may be determined under subsection [1] in respect of different provisions of this Act.

SCHEDULES

Schedule 1

Offences referred to in section 2611] of the Act

Treason
Murder
Rape
Indecent Assault
Robbery
Kidnapping
Child-stealing
Assault when a dangerous wound is inflicted
Arson
Any conspiracy, incitement or attempt to commit an offence referred to in this schedule

Schedule 2

Offences referred to in section 26[2] Of the Act

Sedition
Public violence
Culpable Homicide
Bestiality
Malicious injury to property
Breaking and entering any premises
Theft
Receiving stolen property knowing it to have been stolen
Fraud
Forgery or uttering a forged document knowing it to have been forged
Offences relating to coinage
Any offence the punishment whereof may be period of imprisonment exceeding six months without the option of a fine
Any offence relating to the illicit possession, conveyance or supply of dependence-producing drugs
Any conspiracy, incitement or attempt to commit an offence referred to in this schedule

Schedule 3

Laws repealed or amended

No and year of the law	Short Title	Extent of the repeal or amendment
Act No. 96 of 1991	Aliens Control Act, 1991	the whole repealed
Act No. 75 of 1995	Aliens Control Amendment Act, 1995	the whole repealed
Act No. 88 of 1995	South African Citizenship Act, 1995 [as amended]	<p>1. Amendment of Definitions Section 1 of the South African Citizenship Act, 1995 [hereinafter the principal Act] is hereby amended by the addition of the following definitions: "- "Service" has the meaning set forth in Immigration Act of 2000; - "prescribed" as used in section 5 of this Act has the meaning set forth in Immigration Act of 2000;"</p> <p>2. Amendment of section 5 Section 5 of the Act is hereby amended by: [a] the substitution of the word "Minister" with word "Service" where such word occurs; [b] the substitution of the words "him or her" with word "it" where such words occur in subsection [7]; [c] the substitution of the words this or her with word "its" in subsection [8].</p> <p>3. Conflicts The following</p>

MEMORANDUM

This draft Bill implements the White Paper on International Migration approved by Cabinet on March 31, 1999 and published on the Government Gazette of April 1, 1999. The White Paper followed from a process of study, consultation public comments and hearings held in respect of the Green Paper on International Migration published on the Government Gazette of May 30, 1997. In preparing this draft Bill, the following bodies and entities were consulted or provided input

Anglo-American

Corporation Centre for Development and Enterprise

Department of Arts, Culture, Science & Technology

Department of Justice

Department of Provincial Affairs and Local Government

Department of Trade and Industry

Eisenberg & Associates

Georgetown University Law Center

Investments South Africa

South African Chamber of Commerce

South African Chamber of Mines

State Legal Advisor

United States Immigration and Naturalization Service