

## The employment of foreign nationals

- Employment of foreign nationals is governed by the Immigrations Act, 10 of 2002, Immigration Regulations issued on 22 May 2014 and the Employment Services Act, 4 of 2014.

[Immigrations Act 2002](#)

[Immigration Regulations, 2014](#)

[Employment Services Act 2014](#)

- An employer may not employ a foreign national whose status does not allow him/her to be employed, or on terms and conditions, or in a capacity, that differs from those associated with his/her status.
- The employer bears the obligation to determine the status or citizenship of the person. In terms of legislation, the employer will commit an offence if a foreigner is employed in contravention of the Immigration Act, which crime is punishable with a fine or imprisonment.
- The employer must ensure that a skills plan is drafted and implemented to ensure the skills are transferred from the foreigner to a SA citizen or permanent resident.
- The Employment Services Act, 2014, in section 8(4) determines that a foreign national who is employed without the required work visa can still enforce any claim he/she may have in terms of the law or his/her employment relationship, against his employer.
- The foreign national, irrespective of his/her legal status, is therefore afforded the protection of the South African labour legislation, through the Department of Employment and Labour and the various dispute resolution forums like the CCMA, Bargaining Councils, the Labour Court, and Labour Appeal Court. This is based on the principle that even if the contract of employment is invalid, the foreign “worker/employee” (which encompass a broader interpretation not necessarily connected to the validity of the employment contract) will satisfy the description of an “employee” as defined in statutes, and thus worthy of its protection.
- The Immigration Act makes provision for various types of work visas:
  - **General Work Visa** is valid for up to 5 years and may only be applied for by a foreign national who is already in possession of a job offer in SA. There is, however, an obligation on the employer to demonstrate that the position in question was offered to citizens of SA and despite its diligent search the skills and qualifications could not be found.
  - A **Critical Skills Visa** can be issued for up to 5 years with the possibility of an extension. The foreign national who applies for the visa must have a job offer when applying for work visa. The foreign national's occupation must be listed on The Critical Skills List, as published by the Department of Home Affairs and he/she must register with a SAQA registered Professional Council within which his exceptional skill is required or utilized.
  - An **Intra Company Transfer Visa** may be issued to a foreigner to work on secondment in the SA operation of his/her company for a period up to 4 years and this work visa is not renewable. This is deemed as a secondment and the foreign national will not be employed in SA.



- A **Corporate Visa** may be issued to a company enabling it to employ a number of foreign nationals who hold certain skills for a specific period of time. This visa may be issued on recommendation of the Department of Trade and Industry.
- The following visas do not allow employment in SA:
  - Relative visas
  - Spousal/life partner visas in the absence of a specific accommodation
  - A retired person visas
  - A medical treatment visas
  - Volunteer visas for all foreign nationals (unless same specifies work activities)
- The Immigration Act provides for foreign nationals to enjoy all the right, privileges, duties and obligation of a SA citizen, with the exclusion of specific rights, privileges and duties explicitly ascribed to SA citizen, e.g., the Employment Equity Act's definition of a designated group meaning black people, women and people with disabilities who are citizens of the Republic of SA by birth or decent or became citizens by naturalization before 27 April 1994 or after 26 April 1994 and who would have been entitled to acquire citizenship by naturalisation prior to that date, but who were precluded by apartheid policies.

