



Western Cape  
Government  
**FOR YOU**



# A Practical Guideline for Employing Foreign Nationals



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## Introduction

Individuals migrate for various reasons ranging from political, socio-economic, safety and other reasons. Globally, migration has increased exponentially, and South Africa is far from exempt from these occurrences. In recent years, South Africa has seen a substantial increase in the number of foreign immigrants entering the country from neighbouring countries in search of better economic and potential lifestyle opportunities. According to the Statistics SA 2022 population and housing census released, there was an estimated 2.4 million documented immigrants living in South Africa in 2022, accounting for an estimated 3% of the total population. Accurate and reliable statistics accounting for the amount of undocumented foreign nationals in South Africa is however unavailable.

The focus of this document will attempt to unpack the challenges and rural safety issues attached to the employment of undocumented foreign nationals also referred to as undocumented migrants. Undocumented migrants are non-nationals who entered the country without the necessary authorisation from the Department of Home Affairs. This document furthermore attempts to package the inputs, suggestions and guidelines solicited from key stakeholders to assist and guide potential employers when employing foreign nationals.

## Background

Empirical studies conducted by various institutions and research organisations suggests that immigration is intrinsically linked to South Africa's history and that migrant labour has historically contributed to South Africa's economy. The mining and agriculture sectors are traditionally renowned labour-intensive industries attracting foreign nationals in search of potential economic opportunities. The employment of undocumented foreign nationals have in recent years posed significant economic and safety challenges in the Western Cape, affecting all sectors across the economy and agitating potential labour unrests and protests. This is fuelled by the perception that the employment of foreign nationals jeopardises the economic opportunities of the local labour force and places an added burden on an already suffering economy. Informed by several rural safety incidents, alleged farm attacks, xenophobic attacks, labour unrest and protest actions directly linked to the employment of foreign nationals on farms, the Technical Committee on Rural Safety prioritised the employment of undocumented foreign nationals as a major concern that should be addressed. In response to this, the Western Cape Department of Agriculture has embarked on an extensive consultation process at all levels to understand the magnitude of this challenge, solicit inputs from key stakeholders and facilitate platforms where constructive dialogue is encouraged to collaboratively work towards sustainable and practical solutions to assist employers with authenticating and validating the employment of foreign nationals.

At the dialogue session hosted by the Western Cape Department of Agriculture on 31 May 2023, the South African Police Services (SAPS) confirmed that the employment of foreign nationals whether documented or undocumented, places an added burden on the economy and is a major contributor towards crime in rural and farming areas in particular. Input received from SAPS confirms that not all migrants are absorbed into the labour market, nor do they all return back to places of origin once contracts are terminated. This often results in the illegal occupation of land and stimulates the mushrooming of informal settlements which in itself becomes an incubator for all kinds of social ills.

Organised agriculture, presented the position of many of its members (approximately 3500 in the Western Cape) confirming that foreign nationals are employed on farms because of the shortage of skilled South African employees, further citing the need for employment databases provided by government departments to be updated and synchronised to allow for better absorption and response from South African work seekers. A scenario was sketched where a database of 1069 applicants were approached and only two candidates were suitable and accepted employment opportunities on farms. Organised agriculture furthermore emphasized the need for support relating to the authentication and verification of foreign nationals and support with corporate permit applications.

Despite the challenges and potential threats posed by the employment of undocumented foreign nationals, the United Nations High Commissioner for Refugees (UNHCR), also known as the UN Refugee Agency made it clear that the Constitution of the Republic of South Africa protects the rights of all people in South Africa, including non-nationals. Human rights are applicable to all people, therefore everyone in the country is entitled to human rights by virtue of being human. Section 9 of the Constitution prohibits discrimination against anyone on one or more grounds including amongst others, race, colour, ethnic or social origin and birth. In addition, South Africa is party to international laws and agreements that commit the country to respect and protect the rights of everyone within the country, regardless of where they originally come from.



## **Regulatory Environment**

Ongoing discussions and dialogue sessions highlights the following regulations, acts and policies as key legislative and regulatory guidelines applicable to the employment foreign nationals.

- **The Draft Labour Migration Policy**

The first comprehensive national policy on labour migration in South Africa, covering the management of labour migration into South Africa and from South Africa. It seeks to achieve a “brain gain” (through skills entering the country) and to counter a “brain drain” (through skills leaving the country).

- **The Employment Services Amendment Bill**

The Bill strongly restricts employers from employing foreign nationals in South Africa if the foreign national does not have a work visa, is not an asylum seeker with a right to work here, or is not allowed to work in South Africa in terms of any other law.

- **The Immigrations Act 13 of 2002**

The Immigration Act 13 of 2002 regulates lawful admission into and out of South Africa. It repealed the Aliens Control Amendment Act 76 of 1995. From then onwards, it was the main legislation controlling South Africa’s immigration system.

Its sections cover the:

- Objectives and Structures of Immigration Control
- Admission and Departure
- Temporary Residence
- Permanent Residence
- Exclusions and Exemptions
- Enforcement and Monitoring
- Immigration Courts
- Duties and Obligations
- Offences
- Transitional Provisions

- **The Refugee Act, 13 of 1998**

The law that governs the documentation of refugees and assylum seekers in South Africa.



## Duties and Obligations

- Extensive consultation at various levels coupled with desktop research confirms that, under no circumstances is the employment of an illegal foreigner permitted.
- The responsibility to authenticate and validate documents relating to the employment of foreign nationals rests with the employer.
- Should an illegal employee be found at a premises where business is conducted, it is presumed that such foreigner was employed by the person who has control over such premises, unless prima facie evidence to the contrary is adduced.
- When employing a foreigner, the employer must for two years after the termination of such a foreigner's employment, keep the prescribed records relating thereto.
- The employer should furthermore inform the Department of Home Affairs when the employment of a foreigner is terminated as well as any breach on the side of the foreigner of his or her status.

## Potential repercussions when contravening the law

Section 49(3) of the Immigration Act provides that anyone who knowingly employs an illegal foreigner or a foreigner in violation of the Immigration Act shall be guilty of an offence and liable to a fine or a period of imprisonment not exceeding one year for a first offence: Provided that such a person's second conviction of such an offence shall be punishable by a imprisonment not exceeding two years or a fine and the third or subsequent convictions of such offences by imprisonment not exceeding five (5) years without the option of a fine.



## CONTRAVENTIONS IN TERMS OF THE IMMIGRATION ACT, ACT NO. 13 OF 2002 AS AMENDED 2014

Section 38 of the Immigration Act, 2002 prescribes that it is the responsibility of the employer to ensure that persons within their employ has the correct VISA to be employed and o to conduct wok related activity.	Work visa 18. (1) An applicant for a general work visa, critical skills work visa or intra-company transfer work visa shall submit- (a) a written undertaking by the employer accepting responsibility for the costs related to the deportation of the applicant and his or her dependent family members, should it become necessary;
Section 43 of The Immigration Act, 2002  OBLIGATIONS OF FOREIGNERS	Section 43 of the principal Act is hereby amended by the substitution (lr paragraph (a) of the following paragraph: “(a) abide by the terms and conditions of his or her status. including any terms and conditions attached to the relevant visa or permanent residence permit, as the case may be, by the Director-General upon its issuance, extension or renewal, and that status shall expire upon the violation of those terms and conditions; and
FORM 23 (Notice to report to an Immigration Officer)  [Section 7(1)(g) read with Section 33(4)(c); Regulation 32(3)]	Notice issued to foreign nationals pending an investigation whose status is under investigation. This does not mean that the foreign national has a lawful status (VISA) to remain in the republic enabling them to receive any studies or conduct work related activity. It is a mechanism to ensure that the (foreign) national is not arrested when detected under other circumstances.
Section 49 (1)(a) read with Section 43 of the Immigration Act, 2002	Section 49 (1)(a): Anyone who enters or remains in,or departs from the Republic in contravention of this Act, shall be guilty of an offence and liable on conviction to a fine or to imprisonment not exceeding two years.



## **A practical guideline for employing foreigner nationals in South Africa**

The content that follows provides practical guidance relating to the employment of foreign nationals.

### **» When can I employ a foreigner?**

You can only employ a foreigner who is in possession of a valid work visa. In the case of a general work visa, however, you must extend a job offer to enable the prospective employee to apply for the visa. The foreign national may only start working once he or she has received their work visa.

### **» What are my responsibilities as an employer?**

Your main responsibility is to comply with South African immigration legislation. This means you do not:

- Employ illegal foreigners.
- Employ a foreigner in any position or allow a foreigner to perform a work function not allowed by his or her visa or permit.

### **» What are the main differences between the different South African work visas?**

There are three main visas specifically for the purpose of working in South Africa.

- General work visa – Job offers first
- Critical skills work visa – No job offer required
- Intra-company transfer work visa – Transfer from an overseas entity to a branch, affiliate or subsidiary in South Africa

#### **» General work visa – Job offer first**

You must extend a valid offer of employment to enable a foreigner to apply for a general work visa. You'll also have to prove that you advertised the position and could not find a suitable South African to fill the role.

#### **» Critical skills work visa – No job offer required**

The critical skills visa does not require the employer to make a job offer because the applicant is seen as a worker whose skills and experience is needed in South Africa. There is thus no difference in an application from a foreign candidate on a critical skills visa and one from a South African.

#### **» Intra-company transfer work visa – Transfer from an overseas entity to a branch, affiliate or subsidiary in South Africa**

The intra-company transfer visa is used by companies who want to transfer



employees from an international company to a branch, affiliate or subsidiary in South Africa. The main purpose of this visa is the transfer of skills and knowledge from the overseas employee to South African employees. As such, this visa is considered a temporary arrangement and only valid for up to 4 years.

» **What are the other visas that allow a foreign national to work in South Africa?**

Foreign nationals can also work in South Africa on spouse or life partner permits, work exchange visas or short-term work visas.

\* **Spouse or life partner permits:** A work endorsement can be added into the respective visa if there is a job offer. You won't need to advertise the position neither prove why a South African local was not employed.

\* **Work exchange visa:** This visa enables a South African employer to employ foreign nationals under the age of 25 for 12 months. Unfortunately, the visa holder cannot renew this visa. If you'd like to have the person continue working for you, he or she would have to apply for one of the other work visas.

\* **Short term work visa:** This is known as the Section 11(2) visa. It's a visitor's visa with authorisation to conduct short term work assignments in South Africa for a period of 90 days. This can be extended for a further 90 days within South Africa if there is sufficient motivation. Please note that this visa is issued for a maximum of 180 days in an annual cycle.





\* **Corporate permit:** This permit enables South African employers to employ a large number of foreign workers for a set period of time. Once you receive your permit, the foreign national employees can apply for their individual corporate workers visas.

Corporate permit **Section 21.**

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

2. After consultation with the Departments of Labour and of Trade and Industry, the Department shall determine the maximum number of foreigners to be employed in terms of a corporate permit by a *corporate applicant* after having considered -

- the certification prepared by a chartered accountant on the basis of the relevant prescription or information of the Department of Labour and Employment, if any, that at any given time the relevant foreigners are employed on 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;

- the undertaking by the corporate applicant that it will -

- 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

- immediately notify the Department if it has reason to believe that such foreigner is no longer in compliance with subparagraph (1) above;

- 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

- 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. The Department may withdraw or modify the corporate permit for good and reasonable cause.

4. In consultation with the Minister of Trade and Industry or Minerals and Energy or Agriculture as the case may be, the Minister of Labour may designate certain industries, or segments thereof, in respect of which the Government may -

- a. reduce or waive the requirements of subsection (2) (d); 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

d. waive or reduce the requirement of subsection (2)(c) under special conditions. 10 countries; and

5. The holder of a corporate permit may also employ foreigners in terms of section.

#### » **How long does it take to get a work visa?**

The time frames differ significantly from one work visa to the other. Just how long a visa takes depends on the processes involved and where the applicant submits their application. For instance, the critical skills visa could take up to 16 months to finalise because the application process includes SAQA and professional body registration. The professional body registration alone could take up to 12 months. The general work visa, on the other hand, could take up to 10 months from start to finish. It also includes SAQA registration of which the Department of Labour and Employment must also complete an evaluation process before the application can go to the Department of Home Affairs. In stark contrast to both these are the work exchange visa and endorsements on spousal and life partner visas. When submitting from an embassy abroad, it only takes 4 to 8 weeks to get an outcome. If the application happens in South Africa, the outcome is available in 8 to 12 weeks.

#### » **How do I ensure success with visa applications?**

It is unfortunately impossible to guarantee success when applying for a visa. However, you can increase your chances of success by:

- Working with an immigration expert; and
- Ensuring the applicant starts the process with an immigration eligibility assessment.

An eligibility assessment will determine whether the applicant meets the requirements of the work visa for which he or she wants to apply. If not, other visa options should be explored.

#### » **Does the company keep any documents for the foreigner?**

Yes. Immigration legislation requires that South African employers with foreign national employees keep the following documents on record:

- Certified copies of passports, reflecting personal particulars.
- Copies of each work visa.
- Proof of the capacity in which each foreigner is or was employed.
- Copies of IRP5 forms or certificates of earning and job descriptions.



Your responsibilities do not end when the foreign employee has left the company. You must keep records of the following for two years after a foreigner has left:

- The termination of the foreigner's employment.
- Any breach by the foreigner of his or her status according to the Immigration Act/Regulations.



## Practical guidelines to verify and validate foreign nationals

**Employment of undocumented foreign nationals:** An employer shall make a good faith effort to ascertain that no illegal foreigner is employed by him or her or to ascertain the status or citizenship of those whom he or she employs (refer to Section 38, Regulation 35 of the Immigration Act).

Employers must contact the Immigration Officer in their region. (See the List of Contacts table below).

Foreign nationals should be taken to the nearest Department of Home Affairs (DHA) Immigration office, with relevant documentation for verification where appropriate. Alternatively, arrangements should be made with DHA to confirm who should be present at the relevant offices and who can be authenticated and validated electronically.

Agricultural employers may email relevant officials at DHA branches for assistance with authentication/validation. It's best to obtain information from the offices



instead of taking all relevant employees there. DHA officials can utilise internal systems and advise employers which employees should come in.

## **Compliance with legislation**

Prospective employees must comply with Section 38, Regulation 35 of the Immigration Act before employment commences and submit the required documents to the relevant statutory body or statutory authority.

A checklist should be prepared by the employer setting out the required information and documents. This should be used as guideline by the interviewer outlining the necessary information and documentation. All documents should be valid (validated and authenticated by the respective Departments) for the employment term.

Passports, visas, and permits should be checked and verified for expiration dates (by the respective Department). All documents should be valid for the employment term.

All permits and visas presented by prospective employers must be scrutinised for irregularities and to ensure it's not false. Employees must sign a written contract of employment, including an undertaking that the documents presented are true and official.

Records obtained must be stored in a database with strict access control.

Periodic reviews of employees' visas/work permits should be conducted. DHA should be notified if there is reason to believe that a foreigner no longer complies with the Act.





# Dialogue - Employment of Undocumented Foreigners



The table below lists relevant contacts who can assist with the employment process and with the validation and authentication of documents.

DEPARTMENT OF EMPLOYMENT AND LABOUR			
OFFICIAL			CONTACT DETAILS
Marius Marray			Marius.Marray@labour.gov.za Cell: 072 029 8930
Tembisile Cetywayo			Tembisile.Cetywayo@labour.gov.za Cell: 082 092 0751
DEPARTMENT OF HOME AFFAIRS			
DISTRICT	AREA	OFFICIAL	CONTACT DETAILS
Cape Winelands	Paarl	Annelize van Dyk	Annelize.Vdyk@dha.gov.za Cell: 067 415 8051
	Stellenbosch	Themba Mabena	Themba.Mabena@dha.gov.za Cell: 060 527 8349
	Worcester	Lungi Adonis	Lungi.Adonis@dha.gov.za Cell: 067 415 8062
West Coast	West Coast	Themba Mabena	themba.mabena@dha.gov.za Cell: 060 527 8349
	Malmesbury	Jomarck Fredericks	Jomarck.Fredericks@dha.gov.za Cell: 067 415 8034
	Vredendal	Brenton Faro	Brenton.Faro@dha.gov.za Cell: 063 404 8481
Garden Route	George	Mmeli Coko 076 411 3494 / 044- 805 4124	Mmeli.Coko@dha.gov.za Cell: 080 808 2778
	Oudtshoorn	Mmeli Coko 076 411 3494 / 044- 805 4124	Mmeli.Coko@dha.gov.za Cell: 066 290 3221
Central Karoo	Beaufort West	Mmeli Coko 076 411 3494 / 044- 805 4124	Mmeli.Coko@dha.gov.za Cell: 066 290 2944

The table below lists organizations and relevant role players involved in the employment of foreign nationals working on farms.

DEPARTMENT / ORGANISATION	CONTACT PERSON
United Nations High Commissioner for Refugees (UNHCR)	Ms Kiran Kaur Cell: 067 617 4634 Email: kaurk@unhcr.org  UNHCR Helpline Cell: 0800 100 030
International Organization for Migration (IOM)	Ms Lily Sanya Tel: 012 342 2789 ext. 202 Direct : 012 423 9603 Email: Lsanya@iom.int

DEPARTMENT / ORGANISATION	CONTACT PERSON
International Labour Organization (ILO)	Ms Resh Mehta Cell: 072 566 6766 Email: mehtaR@ilo.org
United Nations Office of the High Commissioner for Human Rights (OCHR)	OHCHR Regional Office for Southern Africa, Pretoria Tel: 012-345-8684 Email : ohchr-rosa@un.org
Department of Home Affairs (DHA)	RC Valentine Assistant Director: Immigration Services, Cape Winelands and West Coast Cell: 066 305 8826 Email: Rencia.Valentine@dha.gov.za  Mmeli Coko Immigration Officer Immigration: Garden Route and Central Karoo Cell: 076 411 3494 Email: mmeli.coko@dha.gov.za
Department of Employment and Labour (DEL)	David Esau Provincial Chief Inspector Cell: 082 791 4485 Email: David.Esau@labour.gov.za
Western Cape Department of Agriculture	Jacqueline Pandaram Chief Director: Rural Development Tel: 021 808 5362 Email : Jacqueline.Pandaram@westerncape.gov.za
South African Police Service (SAPS)	Colonel Cloete Tel: 021 417 7144 Email: CloeteM@saps.gov.za  Captain van Der Walt Cell: 082 576 2785 Email: wc.partnership@saps.gov.za
Agri Western Cape (AWC)	Jannie Strydom Chief Executive Officer: Tel: 021 860 3803 Email : jannie@awk.co.za  Louis Wessels Manager: Legal Services and Administration Tel: 021 860 3805 Email: louis@awk.co.za
Western Cape Prestige Agri Workers Forum (WCPAWF)	Wimpie Pause Chairperson of the WCPAWF Cell: 073 827 8775 Email: wimpie@graaff-fruit.com

## Conclusion

The Western Cape Department of Agriculture via its Rural Development team has spearheaded inclusive consultation and engagement processes in the Western Cape in an attempt to gain a better understanding of the challenges and threats attached to the employment of undocumented foreign nationals. The enforcement of the correct recruitment processes is beyond the mandate of the Department but has worked and continues to work with key stakeholders to mitigate against potential threats as far as possible. The Department strives to create an enabling environment where farmers/ employers are aware of the correct processes to follow and have reliable information at hand to enable responsible and appropriate decision making.

The employment of undocumented foreign nationals is prohibited and a serious offence. The Western Cape Department of Agriculture does not support the employment of undocumented foreign nationals and therefore encourages farmers and producers to ensure that the documentation of foreign agri workers is validated and authenticated by the respective Departments. The Department supports the notion of empowering and upskilling the local labour force so that South Africans are able to adequately participate in the entire value chain of the agricultural sector. In the event where foreign nationals are employed, then due process must be followed in adherence to legislation and prescripts.





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