

REPUBLIC OF SOUTH AFRICA

IMMIGRATION AMENDMENT BILL

*(As introduced in the National Assembly (proposed section 75); explanatory summary of
Bill published in Government Gazette No. 33478 of 20 August 2010)
(The English text is the official text of the Bill)*

(MINISTER OF HOME AFFAIRS)

[B 32—2010]

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GENERAL EXPLANATORY NOTE:

[] Words in bold type in square brackets indicate omissions from existing enactments.

 Words underlined with a solid line indicate insertions in existing enactments.

BILL

To amend the Immigration Act, 2002, so as to substitute certain words of the Preamble to the Act; to delete, insert or substitute certain definitions; to revise provisions relating to the Immigration Advisory Board; to revise provisions relating to the making of regulations; to provide for the designation of ports of entry; to revise provisions relating to visas for temporary sojourn in the Republic and for the procedures with regard thereto; to provide for the mandatory transmission and use of information on advance passenger processing; to provide for the transmission of passenger name record information; to revise provisions relating to permanent residence; to revise penal provisions; to correct certain important technical aspects in the text of the Act; and to provide for matters connected therewith.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

Amendment of Preamble to Act 13 of 2002, as substituted by section 1 of Act 19 of 2004

1. The Preamble to the Immigration Act, 2002 (Act No. 13 of 2002) (hereinafter referred to as the principal Act), is hereby amended by the substitution for paragraph (c) of the following paragraph:

“(c) interdepartmental coordination and public consultations enrich the **[functions]** management of immigration **[control]**”.

Amendment of section 1 of Act 13 of 2002, as amended by section 2 of Act 19 of 2004 and section 1 of Act 3 of 2007

2. Section 1 of the principal Act is hereby amended—

(a) by the insertion in subsection (1) after the definition of “**admission**” of the following definition:

“**‘advance passenger processing’** means the pre-clearance of persons, in the prescribed manner, prior to boarding conveyances by means of a boarding advice issued to owners or persons in charge of conveyances;”;

- (b) by the substitution in subsection (1) for the definition of “**corporate applicant**” of the following definition:
 “**‘corporate applicant’** means a juristic person established under the laws of the Republic [or of a foreign country which conducts business, not-for-gain, agricultural or commercial activities within the Republic and] which applies for a corporate permit referred to in section 21;” 5
- (c) by the deletion in subsection (1) of the definition of “**customary union**”;
- (d) by the substitution in subsection (1) for the definition of “**immigration officer**” of the following definition:
 “**‘immigration officer’** means an officer appointed [in terms of section 33] by the Director-General to perform the functions of either the permitting office, port of entry or inspectorate as contemplated in this Act;” 10
- (e) by the substitution in subsection (1) for the definition of “**marriage**” of the following definition: 15
 “**‘marriage’** means—
 (a) a marriage concluded in terms of—
 (i) the Marriage Act, 1961 (Act No. 25 of 1961); or
 (ii) the Recognition of Customary Marriages Act, 1998 (Act No. 120 of 1998); [or] 20
 (b) [a legal marriage under the laws of a foreign country] a civil union concluded in terms of the Civil Union Act, 2006 (Act No. 17 of 2006); or
 (c) a marriage concluded in terms of the laws of a foreign country;”;
- (f) by the insertion in subsection (1) after the definition of “**owner**” of the following definition: 25
 “**‘passenger name record’** means the record of the data of a person as contemplated in section 35(3)(a) created by the owner or person in charge of a conveyance or his or her authorised agents for each journey booked by or on behalf of any person;” 30
- (g) by the substitution in subsection (1) for the definition of “**passport**” of the following definition:
 “**‘passport’** means any passport or travel document containing the prescribed information and characteristics issued—
 (a) under the South African Passports and Travel Documents Act, 1994 (Act No. 4 of 1994); 35
 (b) on behalf of a foreign state recognised by the Government of the Republic to a person who is not a South African citizen;
 (c) on behalf of any international organisation as prescribed, including regional or sub-regional organisations, to a person who is not a South African citizen; or 40
 any other document approved by the Minister and issued under special circumstances to a person who cannot obtain a document contemplated in paragraphs (a) to (c);”;
- (h) by the insertion in subsection (1) after the definition of “**permanent residence permit**” of the following definition: 45
 “**‘permit’** means a relative’s permit contemplated in section 18, a work permit contemplated in section 19, a corporate permit contemplated in section 21 or an asylum transit permit contemplated in section 23, whichever is applicable in the circumstances, issued for purposes of temporary sojourn in the Republic;” 50
- (i) by the substitution in subsection (1) for the definition of “**port of entry**” of the following definition:
 “**‘port of entry’** means a place designated as such by the Minister [where all persons have to report before they may enter, sojourn or remain within, or depart from the Republic] in terms of section 9A;” 55
- (j) by the deletion of the definition of “**Republic**”;
- (k) by the substitution in subsection (1) in the definition of “**spouse**” for paragraph (a) of the following paragraph:
 “(a) a marriage [, or a customary union] as defined in this Act; or;” 60

- (l) by the substitution in subsection (1) for the definition of “**status**” of the following definition:
 “**status**” means the status of the person as determined by the relevant permit, visa or permanent [or temporary] residence permit granted to a person in terms of this Act;” 5
- (m) by the deletion of the definition of “**temporary residence permit**”; and
- (n) by the substitution in subsection (1) for the definition of “**visa**” of the following definition:
 “**visa**” means the authority—
 (a) to proceed to a port of entry as contemplated in section 10A; or 10
 (b) to temporarily sojourn in the Republic for the purposes of—
 (i) a transit through the Republic as contemplated in section 10B;
 (ii) a visit as contemplated in section 11;
 (iii) study as contemplated in section 13;
 (iv) a treaty as contemplated in section 14; 15
 (v) business as contemplated in section 15;
 (vi) a person being a member of the crew of a conveyance as contemplated in section 16;
 (vii) medical treatment as contemplated in section 17;
 (viii) retirement as contemplated in section 20; or 20
 (ix) an exchange programme as contemplated in section 22,
 whichever is applicable in the circumstances;”.

Amendment of section 4 of Act 13 of 2002, as amended by section 5 of Act 19 of 2004

3. Section 4 of the principal Act is hereby amended—
- (a) by the substitution for subsection (2) of the following subsection: 25
 “(2) (a) The Board shall consist of—
 (i) (aa) the Director-General;
 (bb) the Head of the Immigration Services Branch of the Department;
 (ii) any representative, at least equivalent to the rank of Deputy Director-General, from any department or organ of state, whom the Minister considers relevant; 30
 (iii) a person representing organised business;
 (iv) a person representing organised labour; and
 (v) up to five individual persons appointed by the Minister in the prescribed manner on the basis of their knowledge, experience and involvement pertaining to immigration law, control, adjudication or enforcement. 35
 (b) The Minister shall designate from the members of the Board a Chairperson and Deputy Chairperson of the Board.”; and 40
- (b) by the substitution in subsection (4) for the words preceding paragraph (a) of the following words:
 “A member of the Board referred to in subsection (2)(a) [(iv), (v) and (vi)] (iii), (iv) and (v) shall—”.

Amendment of section 7 of Act 13 of 2002, as substituted by section 8 of Act 19 of 2004 45

4. Section 7 of the principal Act is hereby amended—
- (a) by the substitution in subsection (1) for paragraph (e) of the following paragraph:
 “(e) the permits, the visas and the certificates which may be issued under this Act, the requirements for the issuing of permits, visas and certificates and the conditions to which such permits, visas or certificates may be subjected, and the circumstances under which such permits, visas or certificates may be cancelled or withdrawn;” 50
- (b) by the substitution in subsection (1) for paragraph (g) of the following paragraph:
 “(g) the forms of warrants, permits, visas, certificates or other documents to be issued or used, or of declarations to be made, or of registers to be kept, for the purposes of this Act, and the particulars 55

- to be provided on or inserted in any such document, declaration or register;”;
- (c) by the substitution in subsection (1) for paragraph (i) of the following paragraph: 5
 “(i) the fees that may be charged in respect of the application for and issuing of visas, permits and certificates and other services rendered in terms of this Act, including advance passenger processing and passenger name record information transmission;”;
- (d) by the deletion in subsection (1) of paragraph (k);
- (e) by the substitution in subsection (1) for paragraph (n) of the following paragraph: 10
 “(n) the circumstances whereunder and the manner in which a penalty shall be incurred by and recovered from the owner, agent, charterer or person in **[control]** charge of a conveyance and who conveyed a foreigner contemplated in section 35[(7)](9) to the Republic;”;
- (f) by the substitution for subsection (2) of the following subsection: 15
 “(2) Different regulations may be made under subsection (1)(c) in respect of different ports of entry, and the forms of warrants, permits, visas, certificates, documents, declarations or registers prescribed under subsection (1)(g) may differ in respect of different categories of persons.”. 20

Amendment of section 9 of Act 13 of 2002, as substituted by section 10 of Act 19 of 2004

5. Section 9 of the principal Act is hereby amended—
- (a) by the substitution for subsection (3) of the following subsection: 25
 “(3) No person shall enter or depart from the Republic—
 (a) unless he or she is in possession of a valid passport, and in the case of a minor, has his or her own valid passport;
 (b) except at a port of entry, unless exempted in the prescribed manner by the Minister, which exemption may be withdrawn by the Minister; 30
 (c) unless the entry or departure is recorded by an immigration officer in the prescribed manner; and
 (d) unless his or her relevant admission documents have been examined in the prescribed manner and he or she has been interviewed in the prescribed manner by an immigration officer: Provided that, in the case of a child, such examination and interview shall be conducted in the presence of the parent or relative or, if the minor is not accompanied by the parent or relative, any person of the same gender as the minor.”; and 35 40
- (b) by the substitution for subsection (4) of the following subsection:
 “(4) A foreigner who is not the holder of a permanent residence permit contemplated in section 25 may only enter the Republic as contemplated in this section if—
 (a) his or her passport is valid for **[not less than 30 days after the expiry of the intended stay]** a prescribed period; and 45
 (b) issued with a valid **[temporary residence permit]** visa, as set out in this Act.”. 50

Insertion of section 9A in Act 13 of 2002

6. The following section is hereby inserted after section 9 of the principal Act: 50

“Place of entry or exit

- 9A.** (1) The Minister may, in the prescribed manner, designate any place in the Republic, which complies with the prescribed requirements, where all persons have to report before they may enter, sojourn or remain within, or depart from, the Republic. 55
- (2) The Minister may, on good cause shown, withdraw the designation contemplated in subsection (1) at any time.”.

Amendment of section 10 of Act 13 of 2002, as substituted by section 11 of Act 19 of 2004 and section 2 of Act 3 of 2007

7. Section 10 of the principal Act is hereby amended—

(a) by the substitution for the heading of the following heading:

“**[Temporary residence permits] Visas to temporarily sojourn in Republic**”; 5

(b) by the substitution for subsection (2) of the following subsection:

“(2) Subject to this Act, upon application in person and in the prescribed manner and on the prescribed form, a foreigner may be issued— 10

(a) a visa for the purposes of—

- (i) transit through the Republic as contemplated in section 10B;
- (ii) a visit as contemplated in section 11;
- (iii) study as contemplated in section 13;
- (iv) a treaty as contemplated in section 14; 15
- (v) business as contemplated in section 15;
- (vi) being a member of the crew of a conveyance as contemplated in section 16;
- (vii) medical treatment as contemplated in section 17;
- (viii) retirement as contemplated in section 20; or 20
- (ix) an exchange programme as contemplated in section 22; or

(b) permits contemplated in sections 18, 19, 21 or 23.”; and

(c) by the substitution for subsection (6) of the following subsection:

“(6) Subject to this Act, a foreigner may, in exceptional circumstances prescribed by the Minister, apply to the ~~[Director-General]~~ Minister in the prescribed manner and on the prescribed form to change his or her status or the conditions attached to his or her **[temporary residence] permit or visa**, or both such status and conditions, as the case may be, while in the Republic.”. 25

Amendment of section 10A of Act 13 of 2002, as inserted by section 12 of Act 19 of 2004 30

8. Section 10A of the principal Act is hereby amended by the substitution for subsection (2) of the following subsection:

“(2) Any person who holds—

(a) a valid visa for the purposes of— 35

- (i) transit through the Republic as contemplated in section 10B;
- (ii) a visit as contemplated in section 11;
- (iii) study as contemplated in section 13;
- (iv) a treaty as contemplated in section 14;
- (v) business as contemplated in section 15; 40
- (vi) being a member of the crew of a conveyance as contemplated in section 16;
- (vii) medical treatment as contemplated in section 17;
- (viii) retirement as contemplated in section 20; or
- (ix) an exchange programme as contemplated in section 22; or 45

(b) a permit issued in terms of sections 18, 19, 21 or 23 and a permanent residence permit issued in terms of sections 25 to 27, shall, upon his or her entry into the Republic and after having been issued with that permit or visa, be deemed to be in possession of a valid visa for the purposes of this section.”. 50

Substitution of section 13 of Act 13 of 2002, as amended by sections 15 and 47 of Act 19 of 2004

9. The following section is hereby substituted for section 13 of the principal Act:

“Study visa

13. (1) A study visa may be issued, in the prescribed manner, to a 5
foreigner intending to study in the Republic for a period not less than the
period of study, by the Director-General: Provided that such foreigner
complies with the prescribed requirements.

(2) The holder of a study visa may conduct certain work as prescribed.”.

Amendment of section 14 of Act 13 of 2002, as amended by section 16 of Act 19 of 2004

10. Section 14 of the principal Act is hereby amended by the substitution in paragraph (b) of subsection (2) for the words preceding subparagraph (i) of the following words:

“(b) **[the Department of Foreign Affairs]** a department or another organ of state responsible for the implementation of the treaty concerned under a delegation 15
from the Director-General **[, provided]**: Provided that—”.

Amendment of section 15 of Act 13 of 2002, as amended by section 17 of Act 19 of 2004 and section 5 of Act 3 of 2007

11. Section 15 of the principal Act is hereby amended—

(a) by the substitution in subsection (1) for the words preceding paragraph (a) of 20
the following words:

“A business **[permit] visa** may be issued by the Director-General to a
foreigner intending to establish or invest in, or who has established or
invested in a business in the Republic, prescribed to be in the national
interest, in which he or she may be employed, and an appropriate 25
[permit] visa for the duration of the business **[permit] visa** to the
members of such foreigner’s immediate family: Provided that—”; and

(b) by the deletion of subsection (3).

Amendment of section 19 of Act 13 of 2002, as amended by section 21 of Act 19 of 2004 and section 6 of Act 3 of 2007 30

12. Section 19 of the principal Act is hereby amended—

(a) by the deletion of subsection (1);

(b) by the substitution for subsection (2) of the following subsection:

“(2) A general work permit may be issued by the Director-General to
a foreigner not falling within a category **[or class]** contemplated in 35
subsection **[1] (4) [if the prospective employer—**

(a) **satisfies the Director-General in the manner prescribed that
despite diligent search he or she has been unable to employ a
person in the Republic with qualifications or skills and
experience equivalent to those of the applicant;** 40

(b) **satisfies the Director-General in the prescribed manner that the
terms and conditions under which he or she intends to employ
that foreigner, including salary and benefits, are not inferior to
those prevailing in the relevant market segment for citizens,
taking into account applicable collective bargaining agreements
and other applicable standards;** 45

(c) **has agreed in writing to notify the Director-General when such
foreigner is no longer employed or is employed in a different
capacity or role] and who complies with the prescribed require-
ments.**”;

(c) by the deletion of subsection (3); and

(d) by the substitution for subsections (4) and (5) of the following subsections:

“(4) Subject to any prescribed requirements, **[an exceptional] a**
critical skills work permit may be issued by the Director-General to an 50

individual possessing **[exceptional]** such skills or qualifications determined to be critical for the Republic from time to time by the Minister by notice in the *Gazette* and to those members of his or her immediate family determined by the Director-General under the circumstances or as may be prescribed. 5

(5) An intra-company transfer work permit may be issued by the Director-General 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 two years, provided that—** 10

(a) **the employer undertakes that it will take prescribed measures to ensure that such foreigner will at all times comply with the provisions of this Act, and will immediately notify the Director-General if it has reason to believe otherwise; and** 15

(b) **the employer furnishes 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]** complies with the prescribed requirements.” 20

Amendment of section 21 of Act 13 of 2002, as amended by section 22 of Act 19 of 2004

13. Section 21 of the principal Act is hereby amended—

(a) by the substitution for subsection (1) of the following subsection:

“(1) A corporate permit may be issued by the Director-General to a corporate applicant, who conducts business in the sectors published from time to time in the *Gazette*, to employ foreigners who may conduct work for such corporate applicant.” 25

(b) by the substitution in subsection (2) for the words preceding paragraph (a) of the following words:

“**[After consultation with the Departments of Labour and Trade and Industry, the]** The Director-General shall determine, in consultation with the prescribed departments, the maximum number of foreigners to be employed in terms of a corporate permit by a corporate applicant, after having considered—” 30

(c) by the deletion of subsection (5); and 35

(d) by the addition of the following subsection:

“(6) A foreigner employed in terms of a corporate permit shall work for the holder of that corporate permit.” 40

Amendment of section 22 of Act 13 of 2002, as amended by sections 23 and 47 of Act 19 of 2004 40

14. Section 22 of the principal Act is hereby amended by the deletion of paragraph (b).

Substitution of section 23 of Act 13 of 2002, as amended by section 24 of Act 19 of 2004

15. The following section is hereby substituted for section 23 of the principal Act:

“Asylum transit permit 45

23. (1) The Director-General may, subject to any terms and conditions, issue an asylum transit permit, valid for a period not exceeding five days, to a person who at a port of entry claims to be an asylum seeker, after having established in the prescribed manner that such person qualifies to apply for asylum, to travel to the nearest Refugee Reception Office in order to apply for asylum. 50

(2) Despite anything contained in any other law, when the permit contemplated in subsection (1) expires before the holder reports in person at a Refugee Reception Office in order to apply for asylum in terms of section 21 of the Refugees Act, 1998 (Act No. 130 of 1998), the holder of 55

that permit shall become an illegal foreigner and be dealt with in accordance with this Act.”.

Repeal of section 24 of Act 13 of 2002, as amended by section 25 of Act 19 of 2004

16. Section 24 of the principal Act is hereby repealed.

Amendment of section 26 of Act 13 of 2002, as amended by section 27 of Act 19 of 2004 5

17. Section 26 of the principal Act is hereby amended by the substitution for the words preceding paragraph (a) of the following words:

“Subject to section 25 and any prescribed requirements, the Director-General may issue a permanent residence permit to a foreigner who—”. 10

Amendment of section 27 of Act 13 of 2002, as amended by section 28 of Act 19 of 2004 and section 8 of Act 3 of 2007

18. Section 27 of the principal Act is hereby amended—

(a) by the substitution for the words preceding paragraph (a) of the following words: 15

“The Director-General may, subject to any prescribed requirements, issue a permanent residence permit to a foreigner of good and sound character who—”; and

(b) by the substitution in paragraph (c) for the words preceding subparagraph (i) of the following words: 20

“(c) intends to establish or has established a business in the Republic, prescribed to be in the national interest, and investing in it or in an established business, prescribed to be in the national interest, the prescribed financial contribution to be part of the intended book value, and to the members of such foreigner’s immediate family[, **provided**]; Provided that—”. 25

Amendment of section 29 of Act 13 of 2002, as amended by section 30 of Act 19 of 2004

19. Section 29 of the principal Act is hereby amended—

(a) by the substitution in subsection (1) for paragraph (b) of the following paragraph: 30

“(b) anyone against whom a warrant is outstanding or a conviction has been secured in the Republic or a foreign country in respect of genocide, terrorism, human smuggling, trafficking in persons, murder, torture, drug-related charges, money laundering or kidnapping;” and 35

(b) by the substitution in subsection (1) for paragraph (f) of the following paragraph:

“(f) anyone found in possession of a fraudulent [**residence**] permit, visa, passport, permanent residence permit or identification document.”. 40

Amendment of section 30 of Act 13 of 2002, as amended by section 31 of Act 19 of 2004

20. Section 30 of the principal Act is hereby amended—

(a) by the substitution in subsection (1) for the words preceding paragraph (a) of the following words: 45

“The following foreigners may be declared undesirable by the Director-General, as prescribed, and after such declaration, do not qualify for a permit, visa, admission into the Republic [**, a temporary**] or a permanent residence permit.”;

(b) by the substitution in subsection (1) for paragraphs (f) and (g) of the following paragraphs: 50

“(f) anyone who is a fugitive from justice; [**and**]

- (g) 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 [.]and”; and
- (c) by the addition of the following paragraph:
 “(h) any person who has overstayed the prescribed number of times.” 5

Substitution of section 35 of Act 13 of 2002, as amended by section 36 of Act 19 of 2004

21. The following section is hereby substituted for section 35 of the principal Act:

“Duties with regard to conveyances

35. (1) Save for exceptional circumstances necessitating otherwise, no person in charge of a conveyance shall cause that conveyance to enter the Republic at any place other than at a port of entry. 10

(2) (a) The owner or person in charge of a prescribed conveyance entering into, departing from or in transit through the Republic shall comply with the provisions of this section by enabling electronic transmission and receipt of the prescribed information to the Director-General in the prescribed manner. 15

(b) The owner or person in charge of a conveyance entering into, departing from or in transit through the Republic shall within the prescribed period prior to boarding persons onto his or her conveyance, electronically transmit the prescribed information to the Director-General in respect of each person. 20

(c) The owner or person in charge of a conveyance shall act in accordance with a boarding advice issued by the Director-General in respect of each person contemplated in paragraph (b). 25

(3) (a) The owner or person in charge of a conveyance entering into, departing from or in transit through the Republic by air or conveying persons on domestic flights within the Republic shall comply with the provisions of this section by enabling electronic transmission of the prescribed passenger name record information in respect of all persons booked to travel on his or her conveyance to the Director-General in the prescribed manner. 30

(b) The owner or person contemplated in paragraph (a) shall, within the prescribed period prior to the scheduled time of departure of his or her conveyance, electronically transmit the prescribed passenger name record information to the Director-General in the prescribed manner. 35

(c) The information contemplated in paragraph (a) shall be used by the Director-General for the better achievement of the objectives of this Act and the Director-General shall adopt prescribed measures to safeguard the protection of that information in accordance with legislation governing the protection of personal information. 40

(4) An immigration officer or other authorised person employed by the Director-General may—

(a) board any conveyance which is entering or has entered into any port of entry and on good cause shown prohibit or regulate disembarkation from, or the offloading of, such conveyance in order to ascertain the status or citizenship of its passengers; and 45

(b) request the person in control of a port of entry or any person acting under his or her authority to order the person in charge of a conveyance to park, moor or anchor that conveyance in such port of entry at such distance from the shore or landing place or in such position as such immigration officer or other authorised person employed by the Director-General may direct. 50

(5) The person in charge of a conveyance entering or prior to entering a port of entry shall upon demand deliver to an immigration officer— 55

(a) a list stating—

(i) the names of all passengers on board of that conveyance, classified according to their respective destinations; and

(ii) such other details as may be prescribed;

- (b) a list of stowaways, if any have been found;
- (c) a list of the crew and all other persons, other than passengers and stowaways, employed, carried or present on the conveyance; and
- (d) a return, under the hand of the medical officer of that conveyance or, if there is no such medical officer, under the hand of the person in charge of a conveyance himself or herself, 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 suffered or are suffering from such disease;
 - (iii) details of any birth or death which occurred upon the voyage between such port of entry and a previous port; and
 - (iv) any other prescribed matter or event:
- Provided that such immigration officer may—
- (aa) exempt from the requirements of this subsection 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
 - (bb) if satisfied that a name should be added to or deleted from any such lists, authorise such addition or deletion.
- (6) If a conveyance arrives at a port of entry with a passenger on board bound for a destination outside the Republic and that passenger is not on board when the conveyance leaves such port of entry and has not been admitted, the person in charge or the owner of that conveyance shall forfeit a sum fixed by the immigration officer within a prescribed limit.
- (7) An immigration officer may require the person in charge of a conveyance to muster the crew of such conveyance on the arrival of such conveyance in any port of entry and again before it leaves such port of entry.
- (8) The competent officer of customs at any port of entry may refuse to give to the person in charge of a conveyance clearance papers to leave that port of entry, unless he or she has complied with this Act and produced a certificate issued by an immigration officer to that effect.
- (9) A person in charge of a conveyance shall ensure that any foreigner conveyed to a port of entry, for purposes of travelling to a foreign country, holds a valid passport and transit visa or visa, if required.
- (10) A person in charge of a conveyance shall be responsible for the detention and removal of a person conveyed if such person is refused admission in the prescribed manner, as well as for any costs related to such detention and removal incurred by the Department.”.

Amendment of section 43 of Act 13 of 2002, as amended by section 41 of Act 19 of 2004

22. Section 43 of the principal Act is hereby amended by the substitution for 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 permit, 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”.

Repeal of section 46 of Act 13 of 2002, as amended by section 47 of Act 19 of 2004

23. Section 46 of the principal Act is hereby repealed.

Amendment of section 49 of Act 13 of 2002, as amended by section 45 of Act 19 of 2004

24. Section 49 of the principal Act is hereby amended by the substitution for subsections (1), (2), (3), (5), (6), (7), (8), (9), (10), (11), (13), (14), (15) and (16) of the following subsections, respectively:

“(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 **[three months]** five years.

(b) Any illegal foreigner who fails to depart when so ordered by the Director-General, shall be guilty of an offence and liable on conviction to a fine or to imprisonment not exceeding **[nine months]** seven years.

(2) Anyone who knowingly assists a person to enter or remain in, or depart 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 **[one year]** eight years.

(3) Anyone who knowingly employs an illegal foreigner or a foreigner in violation of this Act shall be guilty of an offence and liable on conviction to a fine or to imprisonment not exceeding one year, provided that such person’s second conviction of such an offence shall be punishable by imprisonment not exceeding two years or a fine, and the third or subsequent convictions of such offences by imprisonment not exceeding **[three]** 12 years without the option of a fine.

(5) Any **[civil]** public 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 and liable on conviction to **[a fine or to]** imprisonment not exceeding **[two]** 10 years without the option of a fine **[, provided]:** Provided that if such [civil] public servant is employed by the Department, such offence shall be punishable by imprisonment not exceeding **[three]** 15 years without the option of a fine.

(6) Anyone failing to comply with one of the duties or obligations set out under sections 38 to 46, shall be guilty of an offence and liable on conviction to a fine or to imprisonment not exceeding **[18 months]** nine years.

(7) Anyone participating in a conspiracy of two or more persons to conduct an activity intended to contravene this Act, shall be guilty of an offence and liable on conviction to a fine or to imprisonment not exceeding **[four]** 10 years **[, provided]:** 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]** 15 years without the option of a fine.

(8) Anyone who wilfully or through gross negligence produces a false certification contemplated by this Act, shall be guilty of an offence and liable on conviction to a fine or to imprisonment not exceeding **[one year]** eight years.

(9) Anyone, other than a duly authorised **[civil]** public servant, who manufactures or provides or causes the manufacturing or provision of a document purporting to be a document issued or administered by the Department, shall be guilty of an offence and liable on conviction to **[a fine or to]** imprisonment not exceeding **[two]** 20 years.

(10) Anyone who through offers of financial or other consideration or threats, compels or induces an officer to contravene this Act or to breach such officer’s duties shall be guilty of an offence and liable on conviction—

(a) to a fine or to imprisonment not exceeding **[18 months]** nine years; or

(b) if subsequently such officer in fact contravenes this Act or breaches his or her duties, to **[a fine or to]** imprisonment not exceeding **[three]** 12 years without the option of a fine.

(11) Anyone guilty of the offence contemplated in section 34(10) shall be liable on conviction to a fine or to imprisonment not exceeding six **[months]** years.

(13) Any person who pretends to be, or impersonates, an immigration officer shall be guilty of an offence and liable on conviction to a fine or to imprisonment not exceeding **[four]** 15 years.

(14) Any person who for the purpose of entering or remaining in, or departing from, or of facilitating or assisting the entrance into, residence in or departure from, the Republic, whether in contravention of this Act or not, commits any fraudulent act or makes any false representation by conduct, statement or otherwise, shall be

guilty of an offence and liable on conviction to a fine or to imprisonment not exceeding **[four]** 15 years.

(15) Any natural or juristic person, or a partnership, who—

- (a) for the purpose of entering the Republic, or of remaining therein, in contravention of this Act, or departing from the Republic, or of assisting any other person so as to enter or so to remain or so to depart, utters, uses or attempts to use— 5
- (i) any permit, visa, certificate, written authority or other document which has been issued by lawful authority, or which, though issued by lawful authority, he, **[or]** she or it is not entitled to use; or 10
- (ii) any fabricated or falsified permit, visa, certificate, written authority or other document; or
- (b) without sufficient cause has in his, **[or]** her or its possession—
- (i) any stamp or other instrument which is used or capable of being used for purposes of fabricating or falsifying or unlawfully recording on any document any endorsement under this Act or required to be submitted in terms of this Act; 15
- (ii) any form officially printed for purposes of issuing any permit, visa, certificate, written authority or other document under this Act or required to be submitted in terms of this Act, or any reproduction or imitation of any such form; 20
- (iii) any passport, travel document, identity document or other document used for the facilitation of movement across borders, which is blank or reflects particulars other than those of the person in whose possession it is found; or 25
- (iv) any fabricated or falsified passport, travel document, identity document or other document used for the facilitation of movement across borders, shall be guilty of an offence and liable on conviction to **[a fine or to]** imprisonment for a period not exceeding **[four]** 20 years without the option of a fine.

(16) Any person who— 30

- (a) contravenes or fails to comply with any provision of this Act, if such contravention or failure is not elsewhere declared an offence, or if no penalty is prescribed in respect of an offence; or
- (b) commits any other offence under this Act in respect of which no penalty is elsewhere prescribed, 35
- shall be guilty of an offence and liable on conviction to a fine or to imprisonment not exceeding **[two]** 10 years.”.

Amendment of section 50 of Act 13 of 2002, as amended by sections 46 and 47 of Act 19 of 2004

25. Section 50 of the principal Act is hereby amended— 40

- (a) by the substitution for subsection (1) of the following subsection: 45
- “(1) Any foreigner who leaves the Republic after the expiry of his or her permit or visa shall be **[liable to an administrative fine of a prescribed amount not exceeding R3000, which fine shall be imposed by the Director-General on detection of the overstay and exacted when such foreigner is admitted or makes an application with the Director-General]** dealt with in terms of section 30(1)(h).”;
- (b) by the substitution for subsection (3) of the following subsection: 50
- “(3) Any owner or person in charge of a conveyance who through negligence contravenes the provisions of section 35(7)(9), shall be liable to an administrative fine of a prescribed amount **[not exceeding R10 000]**, which fine shall be imposed by the Director-General”; and
- (c) by the addition of the following subsection: 55
- “(4) Any owner or person in charge of a conveyance who—
- (a) fails to comply with the provisions of section 35(2)(a), (b) or (c) or (3)(a); or
- (b) transmits inaccurate information contemplated in section 35(2)(b) or (3)(b),
- shall be liable to an administrative fine of a prescribed amount, which fine shall be imposed by the Director-General.”. 60

Substitution of words

26. The principal Act is hereby amended—

- (a) by the substitution for the word “permit” or “permits”, wherever it occurs in the Act, of the word “visa” or “visas”, as the case may be, except in cases where—
- (i) reference is made to either a relative’s permit, work permit, corporate permit or an asylum transit permit;
 - (ii) reference is made to a permanent residence permit; and
 - (iii) there is no amendment effected by any of the sections of this Act, excluding this section;
- (b) by the substitution for the words “temporary residence permit” or “temporary residence permits”, wherever they occur in the Act, of the word “visa” or “visas”, as the case may be; and
- (c) by the substitution for the words “21 years”, wherever they occur in the Act, of the words “18 years”.

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Short title and commencement

27. This Act is called the Immigration Amendment Act, 2010, and comes into operation on a date determined by the President by proclamation in the *Gazette*.

MEMORANDUM ON THE OBJECTS OF THE IMMIGRATION AMENDMENT BILL, 2010

1. BACKGROUND

1.1 The Immigration Amendment Bill (“the Bill”) seeks to rationalise the permitting system by changing certain categories of temporary residence permits to visas. The Bill also seeks to provide that the change in conditions and status must only be made in exceptional circumstances and must be approved by the Minister.

1.2 Furthermore, the Bill seeks to revise the types of work permits being issued and to create a new category of permit, being the critical skills work permit. It also revises the requirements for a business visa to provide that in the event where a business may be established or invested in it must be in the national interest as prescribed.

2. OBJECTS OF BILL

The main objects of the Bill are to amend the Immigration Act, 2002 (Act No. 13 of 2002) (“the Act”), so as to substitute certain words of the Preamble to the Act, to substitute, insert or delete certain definitions, to provide for the designation of ports of entry, to revise the provisions relating to the Immigration Advisory Board, to revise provisions relating to the making of regulations, to revise provisions relating to visas for temporary sojourn in the Republic and for the procedures with regard thereto, to provide for the mandatory transmission and use of information on advance passenger processing, to provide for the transmission of passenger name record information, to revise provisions relating to permanent residence, to revise penal provisions and to correct certain important technical aspects in the text of the Act.

3. DISCUSSION

The Bill introduces the amendments as follows:

3.1 Clause 1 amends paragraph (c) of the Preamble to the Act in order to substitute the words “functions of immigration control” for the words “management of immigration”.

3.2 Clause 2 substitutes, inserts and deletes certain definitions in the Act.

3.3 Clause 3 amends section 4 of the Act by substituting the provisions of subsections (2) and (4) in order to refine the provisions relating to the composition of the Immigration Advisory Board.

3.4 Clause 4 amends section 7 of the Act in order to effect consequential amendments regarding the change of certain permits to visas. The clause provides for charging of fees for advance passenger processing and passenger name record. The clause further deletes subsection (1)(k), which relates to the making of regulations regarding terms and conditions pertaining to immigration practitioners.

3.5 Clause 5 amends section 9(3)(a) of the Act in order to make it a requirement that a child must possess his or her own passport, and further deletes paragraph (b), which makes provision for entering the name of the person under the age of 16 years in the passport of an adult person related to that person.

3.6 Clause 6 inserts section 9A in the Act in order to make provision for the designation of place of entry or exit by the Minister.

3.7 Clause 7 amends section 10(2) and (6) of the Act in order to revise provisions relating to visas and permits for temporary sojourn in the Republic, and further to provide for the change of conditions and status attached to a person’s permit or visa to be made in exceptional circumstances and to be approved by the Minister.

3.8 Clause 8 amends section 10A to effect consequential amendments following the change of certain temporary residence permits to visas for temporary sojourn in the Republic.

3.9 Clause 9 substitutes section 13 of the Act to make provision for prescribing requirements for the issuing of a study visa.

3.10 Clause 10 amends section 14(2)(b) of the Act to effect consequential amendments following the change of names of Government Departments that constitute the Immigration Advisory Board.

3.11 Clause 11 amends section 15 of the Act to make provision for the issuing of a business visa to a foreigner who intends to establish or invest in a business that is prescribed to be in the national interest.

3.12 Clause 12 amends section 19 of the Act in order to delete subsection (1), which makes provision for the issuing of a quota work permit. It also revises the provisions of section 19(2) of the Act and deletes section 19(3) of the Act in order to prescribe requirements for issuing a general work permit. Furthermore, it substitutes the provisions of section 19(4) of the Act in order to make provision for the issuing of a critical skills work permit to individuals possessing such skills and qualifications that are identified as critical to the Republic. Furthermore, this clause substitutes section 19(5) of the Act in order to prescribe requirements for issuing an intra-company transfer work permit.

3.13 Clause 13 substitutes section 21(1) of the Act to make provision for the issuing of a corporate permit to a corporate applicant who conducts business in the sectors that are published in the *Gazette*. It also substitutes section 21(2) of the Act in order to make it a requirement for consultation (i.e. “in consultation with”) with the prescribed Departments when determining the maximum number of persons to be employed under a corporate permit.

3.14 Clause 14 deletes section 22(b) of the Act, which deals with an exchange visa for persons under the age of 25 years of age who have received an offer to conduct work for a period no longer than one year.

3.15 Clause 15 substitutes section 23(1) of the Act to revise the validity period of an asylum seeker for travelling to the nearest Refugee Reception Centre to apply for asylum. This clause further makes provision for the establishment of a process to assess whether or not a person qualifies to apply for asylum before issuing an asylum transit permit.

3.16 Clause 16 repeals section 24 of the Act, which deals with cross-border and transit permits.

3.17 Clause 17 amends section 26 of the Act to prescribe the requirements for the issuing of a permanent residence permit.

3.18 Clause 18 amends section 27 of the Act to prescribe the requirements for the issuing of a permanent residence permit. This clause further substitutes section 27(c) of the Act to provide that where a person intends to establish or has established a business in the Republic, the activities of such business must be in the national interest.

3.19 Clause 19 substitutes section 29(1)(b) and (f) of the Act to add the crimes of human smuggling and trafficking in persons to a list of crimes which forms the basis on which a person may be a prohibited person in the Republic if he or she has a warrant outstanding or a conviction against him or her.

3.20 Clause 20 substitutes section 30(1)(f) and (g) of the Act to effect technical corrections following the addition of paragraph (h), which provides for the declaration as undesirable of persons who overstay in the Republic for a prescribed number of times.

3.21 Clause 21 substitutes section 35 of the Act to make provision for mandatory advance passenger processing and submission of passenger name record information by owners or persons in charge of conveyances.

3.22 Clause 22 amends section 43 of the Act to effect consequential amendments regarding the change of certain permits to visa.

3.23 Clause 23 repeals section 46 of the Act, which deals with immigration practitioners.

3.24 Clause 24 amends section 49 of the Act to revise penal provisions.

3.25 Clause 25 amends section 50(1) and (3) of the Act in order to revise provisions relating to administrative penalties, and further adds subsection (4) to provide for an administrative fine for non-compliance with provisions relating to advance passenger processing and passenger name record information.

3.26 Clause 26 amends the Act by substituting certain words wherever they occur in the Act.

3.27 Clause 27 deals with the short title and commencement.

4. INSTITUTIONS CONSULTED

None.

5. FINANCIAL IMPLICATIONS FOR STATE

None.

6. PARLIAMENTARY PROCEDURE

6.1 The State Law Advisers and the Department of Home Affairs are of the opinion that the Bill must be dealt with in accordance with the procedure established by section 75 of the Constitution since it contains no provision to which the procedure set out in sections 74 or 76 of the Constitution applies.

6.2 The State Law Advisers are of the opinion that it is not necessary to refer this Bill to the National House of Traditional Leaders in terms of section 18(1)(a) of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), since it does not contain provisions pertaining to customary law or customs of traditional communities.