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WHITE PAPER ON INTERNATIONAL MIGRATION

PRESENTED TO THE MINISTER OF HOME AFFAIRS
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ON BEHALF OF THE TASK TEAM
As modified and approved by Cabinet
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The tenets of a new immigration policy for South Africa

In this White Paper administrative and policy emphasis is shifted from border control to community and workplace inspection with the participation of communities and the cooperation of other branches and spheres of government. Procedures related to the issuance of permits are simplified to shift resources towards enforcement.

An Immigration Service [I.S.] is established with monitoring and investigative capacity at community level. An Immigration Review Board will also be established with certain functions. *Inter alia*, such an I.S. should:

- conduct inspections in schools, workplaces and service providers to ensure compliance with temporary permits;
- detect, track and act against temporary permit violators and other illegal aliens; and
- interface with the proposed immigration courts and border control patrol.

An up to three months with the possibility of a once-off renewal entry permit will be available to non-prohibited persons who hold a visa or upon production of a return ticket or its equivalent in respect of cross border entries or upon financial guarantees as prescribed. This permit will accommodate tourists, short-term students, businessmen, work-seekers, traders, medical treatment recipients and people in transit, thereby eliminating the need for different classifications.

Temporary residence permits will be provided for staying longer than three months as follows:

- Student permit on the basis of documentation issued by places of learning which will remain responsible for keeping the I.S. informed by means of routine reports;
- Work permit on the basis of the need of the employers and upon certification that all labour conditions, including collective agreements, are complied with and that either a prescribed payment is made into a national training fund or special training for citizens, as prescribed, is provided;
- Exceptional skill or extraordinary qualifications permit issued upon a discretionary assessment by the I.S. upon documentation provided by the applicant
- Diplomatic corps and foreign authority permit issued on the basis of documentation of the Department of Foreign Affairs;
- Exchange person permit issued on the basis of documentation of the organ of the State responsible for the exchange programme, which will also monitor the compliance of such persons and inform the I.S.;
- Treaty person permit related to international treaty obligations issued on the basis of documentation of the Department of Foreign Affairs or the organ of the State responsible for the implementation of the treaty, which will monitor the compliance of such persons and inform the I.S.;
- Investor and self employed person permit issued on the basis of certification by an accountant that the prescribed sum invested in the country is part of the business' book value;

- Crewperson permit issued on the basis of documentation provided by the owner of the vessel who will remain responsible for the crewpersons' compliance. This permit may be issued upon acceptance of restriction of the portion of the territory in which the alien may move;
- Relative's permit issued to people within the third step of kinship of a citizen or the second step of kinship of a permanent resident on the basis of financial assurance provided by the citizen or the resident concerned; and
- Medical treatment permit to be issued for long-term treatment on the basis of documentation issued by the relevant medical institution who shall routinely report to the I.S. about its long-term foreign patients.

The foregoing permits extend to the applicant's spouse and children younger than 21.

Corporate work permits may be negotiated between the I.S. and the employer who administers the allocated number of its employees as it sees fit and remains responsible for the compliance and repatriation of aliens. This permit will be available in respect of:

- foreign investors who provide for job opportunities and/or training for citizens;
- seasonal workers;
- industries who cannot find local labour; and
- industries authorized though consultations with the Department of Labour to rely, or continue to rely, on foreign labour.

Permanent residence permits are available for

- spouses of citizens and their children;
- those who have held a temporary work permit for five years;
- those in possession of an offer of permanent employment subject to the requirements set forth by Nedlac and the Department of Labour;
- investors, on the same basis as the granting of temporary permits;
- people of exceptional skills or extraordinary qualifications or business owners if this is in the national interest;
- applicants with an offer of permanent employment on the basis of an independent certification that no citizen is available to fill the job position and within a maximum number determined by Nedlac for each industry sector; and
- children of citizens who do not wish to acquire citizenship.

The foregoing permits extend to the applicant's spouse and children younger than 21.

The enforcement of the migration system will rely on the following aspects provided for in statute or prescribed:

- the status of recipients of public services must be checked by all authorities rendering such services, who must report any illegal alien to the I.S.;
- the I.S. should conduct an awareness campaign in countries of origin and negotiate with foreign governments to secure their cooperation and to investigate smugglers of aliens;
- effective enforcement of stricter sanctions against employers who employ illegal aliens;
- specialized immigration courts;

- specialized investigative and monitoring capacity;
- deportation process based on an entirely judicial process not open to interferences;
- an interdepartmental committee will be established to coordinate law enforcement and community action.
- an additional security service with professional and specialized but limited investigative and enforcement capacity in respect of illegal aliens and border control, possibly including coastal patrol.

The classification of prohibited persons and the discretionary powers of the Minister and the I.S. will be adjusted to reflect present-day needs and circumstances.

The Immigration Selection Boards will be abolished and an Immigration Review Board established. Naturalization is provided for after five years of permanent residence, uninterrupted by absence exceeding two years.

Acknowledgements

The White Paper Task Team on International Migration would like to acknowledge the contribution of :

- the Parliamentary portfolio committee on Home Affairs;
- The Regional Directors of Home Affairs who contributed to the organization of public hearings in each of the provinces;
- all those who have submitted written comments or oral inputs during the public hearings;
- the many officials of the Department of Home Affairs who have often provided inputs on an informal basis;
- the members of the Task Team who drafted the Green Paper on Migration and set the foundations for this White Paper.
- The Government of the United States including the US Immigration and Naturalisation Service, with a special acknowledgement for the personal contribution provided by the INS Johannesburg liaison officer, Ms Phyllis Coven; and
- IDASA for the services of its Executive Director.

Background

1. On May 13, 1997, a draft Green Paper on international migration was published in the Government Gazette by the Department of Home Affairs for general information and comment from interested parties. The Department of Home Affairs received comments from 52 individuals and organizations.

2. The Minister of Home Affairs appointed a Task Team to consider the comments and draft a White Paper. The Task Team was chaired by the Director General of the Department of Home Affairs, Mr AS Mokoena and consisted of Mr D Chetty (NEDLAC), Dr W James (IDASA), Mr D Lewis (NEDLAC), Mrs NW Madikizela-Mandela, MP (ANC), Dr PM Matlou (Home Affairs), Adv. PK O'Malley, MP (IFP), Dr MGR Oriani-Ambrosini (Ministerial Advisor), Mr C Schravesande (Home Affairs), Mr M Tlhomelang (Home Affairs), Mr AF Tredoux (Home Affairs), and Dr SH Buthelezi (ANC).

3. During its first meeting in May 1998 the Task Team was briefed by its Chairperson, on behalf of the Minister of Home Affairs, on its parameters and terms of reference. *Inter alia*, such parameters and terms of reference included

- the Task Team would not be bound by the findings, recommendations and policies set forth in the Green Paper, which could be taken forward, reconsidered or altered on the basis of the comments received or additional different findings made, or opinions reached, by the Task Team;

- the Task Team would not deal with the issue of refugees, which was addressed through another policy formulation exercise leading to a separate White Paper and Bill;

- the White Paper should be inspired by practical considerations rather than by theory alone and should serve as a guideline capable of being immediately translated into the required legislation, if any, and transformed into administrative practices supported by the relevant structures and operating within existing budgetary and logical constraints, including the scarcity of human resources;

- policy formulation is a process conducted by reconciling the following two conflicting considerations. On the one hand policy is a fluid process which must respond to the needs and circumstances of the present which, when they change, determine the change of policies. Therefore, policies should not be the product of speculations on what may happen in the future under ideal circumstances. On the other hand, policies should ensure that any structure of government or legislation set in place in their pursuance are sufficiently durable and long-term in nature so as to justify the financial and administrative cost of establishing, maintaining and implementing such structures or legislation;

- consideration is also to be given to the policy guidelines submitted by Cabinet to the Task Team which drafted the Green Paper; and

- the work of the Task Team should be finalised by the end of October, 1998.

4. Following on the Green Paper's recommendation that a distinction be drawn between refugee protection, regarded as a human rights issue, and immigration, which is the effort to regulate population movement, a separate White Paper on Refugee Protection was published in May 1998 and legislation based thereon was presented to Parliament in November 1998 and adopted in December 1998.

Preliminary considerations

1. South Africa has recently moved away from a history of isolation. In this we have joined countries in Eastern Europe, South America and East Asia in leaving behind an existence sheltered from the growing pressures of globalization, in particular the movement of capital, technology, information and population. Since 1990, and particularly since 1994, South Africa has faced increased tourist traffic, refugee flows, heightened business immigration interests and an increase especially in illegal immigration. These are the features of globalization in the late 20th century, which countries everywhere have difficulty managing and regulating.

2. Ill-prepared by apartheid to grasp and cope with the consequences of globalization, we have been relatively slow in developing policy responses to immigration and international migration. Although some improvements were made to the Aliens Control Act, 1991, we still have immigration policies rooted in the past. The challenge for South Africa is to formulate policy that takes advantage of the positive aspects of globalization, including the unprecedented movement of people with skills, expertise, resources, entrepreneurship and capital, which will support the country's efforts at reconstruction, development and nation-building.

3. This White Paper accepts the spirit of the Green Paper, which is to strike a balance between liberalization of immigration policy and necessary government regulation in the interests of domestic communities. It seeks, therefore, to let people who add value to our society in and to keep those that do not, out. We believe that this can and must be done. The people who can add value to our growth and development are those who invest, are entrepreneurs and promote trade, those who bring new knowledge and experience to our society, and those who have the skills and expertise required to do the things we cannot properly do at this stage. Such openness to the world should be welcomed.

4. At the same time, our history has been disadvantageous to sections of our population, excluding them from participation in the skills and educational market. There should therefore be affirmative action in immigration, in the sense of compelling all employers to search for suitably qualified South Africans first and to invest in their training and development. There is also a hierarchy of interests to be considered. Our obligations are to serve our people first; the people of the region and the member states of the Southern African Development Community (SADC) second; the people of Africa third; and the rest of the world last.

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The existing policy framework

1. In considering its work, the Task Team addressed the preliminary question of the existing relevant policy framework relating to migration within the broader set of policies adopted by the GNU. It was noted in the Green Paper that the policy framework provided for the Government of National Unity by the Reconstruction and Development Programme does not give precise guidance on how to formulate migration policies.

2. Indirect guidance could be found in other policy frameworks developed by the GNU, such as its macro-economic plan and the GEAR strategy developed to implement it. However, the input of this policy instrument on the specific issue of migration is not unequivocal. For instance, one could argue that the objectives of GEAR could be best achieved by the maximum possible limitation on the entry of any migrant other than tourists and business persons, so as to reduce the number of people to whom government needs to supply services and for whom the economy needs to provide. Conversely, one could also argue that the GEAR strategy calls for a policy of relaxation of border controls so as to induce as many people as possible to relocate to South Africa who have the skills or the capacity of making a contribution towards the country's economic growth. However, there are some firm elements associated with the macroeconomic policy which have a bearing on migration policy[1]: we should
   - attract foreign investments, especially as fixed capital investments or employment producing enterprises;
   - assist the tourist industry, in respect of which South Africa has a competitive world advantage;
   - facilitate international trade and commerce;
   - recognize the informal sector and allow some controlled cross border movement of traders who benefit it; and
   - attract foreign skills and entrepreneurial energies.

3. Moreover, in their respective policy-making exercises some of the other Government's departments have received the benefits of the guidance of policies entrenched in the Constitution. However, in respect of migration, the Constitution does not spell out any precise duty or mandatory policies but operates as an outer limit on how government may pursue its chosen policy. For instance, the Constitution would not have a bearing on the policy decisions of how many temporary or permanent aliens are to be allowed into the country and the criteria for their selection or qualifications, but it prescribes that once such aliens, however chosen, are in South Africa they must receive certain protections of the law.

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[1] Sections 1.1.2. and 1.2.2 of the Green Paper refer to broader policy parameters which this White Paper tries to translate into their immediate bearing on migration.

4. Furthermore, whilst one acknowledges that the transformation of South Africa from apartheid to democracy is the event with the greatest significance on any process of policy formulation conducted in the past five years, the Task Team could not determine the import or impact of this event on the shaping of the new migration policies. In abstract, the migration policies of the old South Africa could work for the new one once the existing legislation fully complies with the Constitution and the administrative practices developed under it do not unfairly discriminate against certain aliens on the basis of origin, ethnicity or religion.

5. Population control policy also affects migration policy. Countries with an insufficient population basis, such as Canada and New Zealand, have adjusted their respective immigration to attract additional permanent residents, while those with excessive population will discourage additional permanent settlement. In its policies, the Department of Welfare has acknowledged that our present population and its projected growth at the present growth rate are such that one can consider that the South African population cannot be supported by the country's available resources. The Department of Welfare has stopped short of developing a population control policy. Immigration is already a cause of population growth, and one should assume that our migration policy should reflect the notion that further population growth through migration is not desirable.

6. Finally, insufficient guidance could be found for the formulation of migration policies from any other of the government's major policies, such as those striving for the transformation of the state, affirmative action, the redressing of present social and economic imbalances and past social injustices or the so-called black empowerment initiatives.

Therefore, in the absence of a pre existing framework for policy formulation, the Task Team had to face the challenge of determining its own framework.

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The need and parameters for a new policy

1. A simple way of determining the proper framework for a new policy is to assess how and why the existing one is regarded as insufficient, inadequate, erroneous or flawed. Therefore, the Task Team asked itself why the present policies and legislation should be changed and whether the required changes merely require minor amendments to the present legislative or administrative framework or, instead, call for their complete reformulation. This stage of problem identification was assisted by public hearings.

1.1 Furthermore, the Task Team assessed whether some of the inadequacies perceived by the public are the product of faulty legislation and policies rather than inadequate administrative practices or adverse circumstances outside the reach of government's means or control. For instance, in theory, one could reach the conclusion that the lamented excessive number of illegal immigrants in the country is not caused by defective policies or legislation and that the current laws are adequate. In this case the problem would not be solved by merely redrafting the law or restructuring government's functions within the parameters of the existing budgetary and logistical restraints and limitations. In formulating its policies, the Task Team has investigated where it is necessary to intervene to solve the identified problems.

2. The most immediate and somehow simpler level of policy formulation relates to ensuring that the Aliens Control Act [ACA], as amended, complies with the Constitution and the supervening legislative changes. In order to do so, one of the most relevant questions relates to the applicability of the Constitution to people who are neither residents nor citizens of South Africa.

Constitutional review

2.1. A first reading of the Constitution could suggest that the Bill of Rights gives clear guidance, for at times its provisions apply to "any person" and other times to "citizens" only[2]. However, upon further analytical scrutiny, it is clear that one cannot categorically state that all constitutional provisions relating to "any person" apply equally and to the same extent to aliens illegally in the country as they do to residents and citizens. The Task Team felt that it was beyond the scope of its work and expertise to draw the precise line which may differentiate the position of each of such classes of people under the Constitution, which task would need to rely on the evolution of constitutional jurisprudence over time.

2.2 However, this White Paper recognizes that there is no constitutional basis to exclude *in toto* the application of the Bill of Rights because of the status of a person while in South Africa, including illegal immigrants. In fact, even though the Bill of Rights contains a

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[2] See Section 1.3 of the Green Paper for more general policy considerations on the matter.

limitation clause, it has been long established in comparative constitutional jurisprudence --to which the limitation clause makes reference-- that the limitation clause may not be invoked to prevent a class of people, however identified, from enjoying the total use and benefits of a given constitutional right. The limitation clause may not limit the exercise of a given right by certain people identified on the basis of criteria contemplated by the equality clause, but can only limit it on the basis of the circumstances, time, manner and place in which the right finds itself to be exercised. Therefore, in the absence of a justifying circumstantial and factual reason, one could not limit the constitutional rights of, for instance, Muslims, or homosexuals or people of French origin.

2.3 In many constitutional states the rights of aliens are limited. However, the constitutions of such states often do not entrench the rights of aliens but only of their own citizens, especially with reference to the so-called second generation rights, such as the right to health care, the right to education, the right to legal assistance, the right to housing, the right to food and water, the right to social security, and possibly the right to fair labour relations. In many established democracies, such as the United States, aliens are mainly entitled to first generation human rights, usually regarded as "procedural due process".

2.4 In South Africa we will need to determine the extent to which the circumstances of being an alien, either a legal or illegal one, may authorise government to provide them with a lesser degree of constitutional protection. However, even if there is uncertainty on the extent, there is agreement that alienage is one of the circumstances which triggers the application of the limitation clause as a matter of fact which enables government to legitimately deal with aliens on a different footing than it would with its own citizens. It can be noted that the Preamble to the Constitution suggests a special emphasis on citizens ("...every citizen is equally protected by the law" and "... improve the quality of life of all citizens" as opposed to the lesser obligation to "...free the potential of each person").

2.5 In any case, constitutional protection applies only to aliens in the country and does not preclude the absolute right of government to choose who should be allowed into the country. In terms of section 21(3) only citizens have the "right to enter, to remain in and reside anywhere in the Republic". As a sovereign State the Republic has a wide, but not absolute, right to exclude entries of aliens on policy grounds. As far as the rights of aliens are concerned, Government could legitimately choose to prohibit or severely regulate the entry of aliens on the basis of categorisations which Government could not use when dealing with its own citizens. It could, for instance, decide to prohibit entry into the country of anyone who is poor or anyone who is of a certain origin or age or even religion, up to the point where such actions are not found to violate the rights of religion or association of its own citizens.

2.6 Aliens in the country do not have a constitutional right to remain in the country and the Government is not under any constitutional obligation to issue entry visas or permanent residence permits to anyone who is in or outside the Republic, unless its failure to do so may be deemed to hinder the exercise of constitutional rights of citizens, for instance if Government chose not to allow into the country preachers of a certain religion practised by its citizens. Moreover, once in the country, aliens do not seem to be entitled to the protection set forth in section 22 of the Constitution encompassing "the right to choose

their trade, occupation or profession freely". Therefore, the regulation of aliens in the country could legitimately impair their opportunity to work or to develop economic activities in the Republic, provided that their right to administrative justice is respected, *i.e.*, there is no obligation on the side of Government to issue and perhaps renew work permits, but, once issued, work permits could not be withdrawn at will.[3] It follows that, since aliens outside the country have no right or legitimate expectation in respect of their entry, the constitutional protections set forth in section 33 of the Constitution, such as the right to receive a written justification, could be inapplicable. Aliens in the country have the right to leave the Republic (section 21.2).

2.7 There are provisions in the ACA which seem to conflict with the notion that aliens in the country are entitled to the full protection of those sections of the Constitution providing for first generation human rights. For instance, the statutory requirement that a resident may be forced to pursue his occupation only in a certain province may violate his right to freedom of movement.

2.8 This White Paper acknowledges that its scope is limited only to considering the parameters under which Government may regulate the entry and permanence of aliens within the country. In fact, the Constitution has rendered the emigration of citizens from the country on a permanent or temporary basis a matter of right. In this respect, the constitutionality of the presently used "departure forms" could be questioned if one believes that the privacy clause precludes Government from obtaining information in respect of constitutionally protected activities[4].

2.9 In other respects the ACA does not reflect intervening legislation. For instance:

- the reference to the Regional Services Council and Joint Services Board must be updated to refer to Chapter 7 of the Constitution and the Municipal Structures Act of 1998, and
- the power of the Minister to issue warrants and the power to arrest without a

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In addition to those referred to in the text, the other constitutional rights which apply to citizens only are the political rights (section 19), the right to citizenship (section 20) and the right to a passport (section 21.4).

[4] However, after the repeal of section 37 of the ACA, section 35 seems to pass the test of constitutionality as it merely regulates the exercise of the right

warrant infringes constitutional protection and conflicts with other legislation[5].

Identified Problems

3. In considering public inputs and comments received relating to the application of the ACA, the Task Team has identified the following complaints which have formed some of the basis of the policy formulation set forth in this White Paper:

- the ACA has not been effective in preventing the entry of large numbers of illegal immigrants. In fact, the overwhelming concern of the public which emerged during the hearings was about preventing and redressing illegal immigration;
- given the growing number of illegal and legal aliens, it is impossible to police their activities in South Africa because emphasis is placed on border control and the few available immigration officers are too busy with administrative procedures to do field work;

[5] See section 10(5) and 44 of the ACA.

- the ACA does not provide clear criteria to determine who may become a permanent resident leaving the decision to immigration selection boards operating with great discretion. This system was originally conceived to conceal discriminatory practices aimed at advantaging potential immigrants from German and Dutch countries[6], and now seems irrational, unaccountable, non-transparent and costly. An attempt has been made to obviate this problem by means of sub-sections 25(1) and (15) of the ACA which give the Director General the powers to prescribe required information and forms and to create categories of applicants for permanent residence. This process has identified several categories, such as investors, holders of permanent job offers, *et cetera*, which have been embodied in a policy document approved by Cabinet. However, none of these categories appears in the regulations, nor do they comply with the statutory requirement to be prescribed by regulation, and their legal basis seems questionable;
- it seems unfair that through the TEBA arrangement only mining houses can utilise foreign labour which could for instance also benefit farmers; and
- the abuse of section 41 permits issued to many illegal immigrants merely for the purpose of keeping track of them has been noted. Moreover, it has not been possible to determine how the holders of section 41 permits have in fact conducted themselves while in South Africa.

3.1 It has been noted that illegal aliens have the following negative impact on the provision of services and on our society:

- they compete for scarce resources with millions of South Africans living in poverty and below the breadline;
- they compete for scarce public services, such as schools and medical care, infrastructures and land, housing and informal trading opportunities;
- they compete with residents and citizens for our insufficient job opportunities, and offer their labour at conditions below those prescribed by law or the applicable collective bargaining agreements;
- a considerable percentage of illegal aliens has been involved in criminal activities; and
- they weaken the state and its institutions by corrupting officials, fraudulently acquiring documents and undeserved rights and tarnishing our image locally and abroad.

Formulation of a new Policy

4.1 During the public hearings the most often voiced complaint was about the incapacity of Government to regulate the influx of illegal immigrants. The pressing demand from public inputs was for creating a system which can effectively deter and prevent people from illegally immigrating into South Africa. These comments have confirmed the policy

[6] See sections 2.2 of the Green Paper

viewpoint adopted in the Green Paper that policy and legislative instruments in the field of migration should aim at providing the government with the necessary tools to retain control over who may enter the country and the conditions and length of their stay[7]. Therefore this White Paper has accepted the following as one of its main policy parameters: *the migration system should enable Government to retain control on who may enter the country and the conditions and length of his or her stay*

4.2 The Green Paper classified the reasons causing illegal immigration under the labels of "pull factors" and "push factors", the former being the reasons that attract people into South Africa and the latter being the reasons that force or induce them to leave their country of origin.

4.2.1. To prevent illegal immigration, in theory Government could work on

- reducing "pull" factors
- reducing "push" factors and/or
- securing its land and sea borders in such an effective manner, and/or take other internal policing actions, so that, in spite of the strength of "pull" or "push" factors, illegal aliens could be prevented from entering the country, or, if in the country, could effectively be removed.

4.2.2. The Green Paper suggested that the solution to the problem of illegal immigration must rely on all the foregoing techniques and that policy emphasis should also be placed on dealing with the root causes of migration, thus diminishing the reasons for some people leaving their countries of origins. However, given the fact that most illegal immigrants are coming from the rest of the African continent, it would be naive to structure an immigration system for South Africa that relies on the possibility of remedying the "push" factors at work in the rest of the continent.

4.2.3. Persistent economic disparity, poverty and political and social turmoil are likely to continue to force or induce people to migrate from the rest of the continent towards South Africa. If and when such circumstances change, one may reconsider the existing immigration system, but for as long as they persist the South African immigration system should take account of them. The suggestion set out in the Green Paper that migration issues should be tabled in international (bilateral and multilateral) discussions should be accepted and the route of international cooperation on migration matters should be pursued as far as possible, but in the short and medium terms one should not count on its outcome to solve present-day problems. Therefore, this White Paper has accepted the following additional main policy parameter: u*nder present circumstances it is not possible for South Africa to deal with the "push" factors acting in the rest of the continent nor build a migration system predicated on the improvements of these factors.*

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[7] See sections 2.2 of the Green Paper

4.3.1 Members of the Task Team visited the United States to determine ways and means of securing land borders. The long land border shared between the US and Mexico is crossed by a large number of illegal immigrants. In order to secure small segments of such an extended border, the US has invested resources and personnel far beyond what is available to the SA Government in the short and medium terms, and has not yet won its war against illegal immigrants. Billions of US dollars have been spent on the construction of roads and the provision of illumination, patrol vehicles, sensors and other resources to secure a mere thirty-seven mile segment of the US-Mexican border. Such technology appears to be what is objectively required to prevent and detect illegal entries in a humane form. South Africa does not have the resources necessary to secure its 7,000 km of land border in such a fashion. Moreover, South Africa has no effective coastal patrol, even though our coastal borders are not yet under pressure of illegal migration. Therefore, this White Paper has accepted the following additional policy parameter: *the migration system must not heavily rely for its success on actions taken to secure the country's land and sea borders from people willing to cross them illegally.*

4.3.2. With regard to the suggestion that improved deportation procedures may be part of the solution to the problem, this White Paper has taken cognisance of the present reality. According to the HSRC, in 1997 there were an estimated three to five million illegal immigrants in South Africa. Presently, the Department is deporting about 160,000 aliens per year. If, for argument's sake, the Department were to succeed in the impossible task of sealing off the borders so that no-one were to enter illegally, at the present rate it would take between twenty five to thirty years to repatriate the estimated number of existing illegal aliens, provided that such number does not increase through normal population growth. It follows that a long-term successful migration policy must include efforts to encourage voluntary repatriation of illegal aliens because they no longer find South Africa attractive. It also follows that given the "pull" and "push" factors and the difficulty of securing the borders policy emphasis on deportation will not significantly improve the situation. Furthermore, deportation is the end of a process which first requires law enforcement, monitoring, investigations, detention and adjudication, all of which should receive priority policy attention in order to allow deportation to play its important role in the migration system.

4.3.3 This White Paper has accepted the hard fact of the matter: an immigration system for South Africa cannot rely heavily on effective border control. Once it is painfully accepted that the country cannot succeed in preventing people from crossing its borders and may not rely only on deporting them, many important policy conclusions follow. Under the present circumstances people will continue to take enormous risks and endure personal anguish to enter South Africa illegally because of the attraction of the "pull" factors. Therefore, policy emphasis should be given to reducing the "pull" factors which make South Africa attractive to them.

4.4.1 The analysis of what can be done to reduce the attractiveness of "pull" factors is complex and it lends itself to policy and legislative intervention only with some difficulties. Simply put, under present circumstances it is difficult to legislate the elimination of "pull" factors.

However, it is possible to promote a different management of migration issues which makes a community responsible for cooperating with internal policing actions to ensure that illegal immigrants are not attracted to South Africa.

4.4.2 In a country with a unified economic system, the simplest way to build a migration system would be to rely on market forces through the full enforcement of labour laws. If labour laws were completely and fully enforced migration could be more easily regulated. If (illegal) aliens were subject to exactly the same tax withholdings, basic conditions of employment, collective bargaining agreements and safety regulations, any of them employed in South Africa would by definition be needed for the country's economic growth and should be allowed to remain. In fact, for as long as it is marginally more administratively inconvenient or costly or troublesome to hire a foreigner rather than a South African citizen or resident, if all labour laws were fully and equally enforced, it would follow that any alien so employed does not take away job opportunities from South Africans and makes a valuable contribution to the economy. Therefore, this White Paper has accepted the following additional main policy parameter: *the development of a migration system is closely interrelated to the management and regulation of labour dynamics and requires an interface with labour institutions.*

4.4.3 This White Paper is aware of the Government's commitment to preserve, if not to promote, the informal sector. However, this White Paper recognises that a migration system must address the perception, or the reality, that vast job opportunities are made available to foreigners at worse workplace conditions than those at which such jobs are available for South African nationals.

4.4.4 It might be necessary to render employers, communities and trade unions co-responsible in ensuring that labour laws are fully implemented and enforced. It might be necessary to impose stricter sanctions on employers who hire illegal immigrants and on communities who harbour them. In order to be effective, sanctions against employers should not be capable of being easily monetized. For instance, we should reinforce the imposition of fines on employers who have committed the offence of hiring unauthorized foreign workers, and the fine should be of an amount in excess of what they have saved through failing to hire someone in full compliance of applicable laws and collective agreements. This fine could be paid into a special fund to promote training of South African workers. Jail sentences should be made applicable for repeated offenders.

4.4.5 It has been convincingly argued that from a macroeconomic viewpoint there are benefits to be gained from illegal aliens working below the standard and criteria set forth by existing labour legislation. It is argued that such labour supply serves to calm rising social demands and reintroduces an element of flexibility into an increasingly rigid labour market. It is also argued that the labour of illegal workers may promote economic growth by maintaining the viability of enterprises which would otherwise become extra-marginal because of current labour cost and, therefore, meets a segment of the labour demand which is not currently supplied from within the South African market. While recognising the possible economic accuracy of these arguments, this White Paper cannot endorse them as a matter of policy as they are tantamount to affirming that present legality should be undermined because it is not completely satisfactory. However, this White Paper

recognises that any government is likely to fail if it attempts to counter market forces moved by the invisible hand of economic fundamentals.

4.4.6 Cognisance is also taken of the fact that mining, one of the country's main industries, relies heavily on migrant foreign labour, whose financial remittances benefit Mozambique and Lesotho, Swaziland and Botswana through compulsory or voluntary deferred pay[8] . The Chamber of Mines has submitted that the conditions of employment of alien miners do not differ from those of South Africans, but it has conceded that mines cannot find sufficient South Africans willing to work under such conditions. The end result is that these aliens work in conditions which are inferior to those that would most likely emerge through collective bargaining if only South Africans were employed in the mines. Nonetheless, foreign labour supplies an under-supplied segment of the labour market, and acts to calm social demands.

Cognisance is also taken of the fact that farmers wish to employ seasonal workers during harvesting and planting season, often illegally or in terms of section 41 exemptions[9]. There is no shortage of available workers for such purpose, but it is argued that migrant farm workers are needed because local labour markets may not be able to supply workers with the urgency required by the narrow time frames to seed and harvest and that migrants are preferable to top up ordinary farm staffing because they depart at the end of the season. In compliance with both immigration and labour laws, these migrant farm workers could be accommodated under the corporate work permit discussed *infra.*

4.4.7. It is not the role of the migration system to adjudicate these controversial matters, but provision must be made to meet such labour requirements when there is agreement on how to proceed. Therefore, this White Paper suggests that the labour demand for workers whose conditions of employment do not comply with the prevailing conditions be satisfied through a legal and regulated system rather than ignored and fulfilled through illegal means. It is recommended that the negotiation among social partners could provide for quotas of workers who could be sponsored by employers who are responsible for them and under specific programmes in respect of which general conditions of employment do not apply and are regulated by special conditions agreed upon by the social partners in Nedlac. These agreements could be conducted on a sector by sector basis or on the basis of an additional national bargaining council established for this purpose under the Labour Relations Act or an amendment thereto.

5. The shifting of policy emphasis onto effective enforcement and implementation offers the opportunity of building a migration system starting from the tail end of service delivery, tracing it back to a statement of general policy. This White Paper has focussed on a

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[8] See section 2.4.4.1 *et seq.* of the Green Paper

[9] See section 24.4.5 of the Green Paper

bottom-up approach highlighting what is required at community level in respect of migration policies and has projected it into a general formulation of a national policy. Analysing community needs, this White Paper has identified the following priorities:

- ensuring that illegal aliens do not take available job opportunities away from community members and do not compete with them for scarce public services;
- ensuring that illegal aliens do not become public charges or become involved in criminal activities;
- ensuring that education is provided at community level to avoid any form of xenophobia by making communities understand the tragedy of illegal immigration while cooperating with law enforcement authorities;
- ensuring the resettlement of refugees and ensuring that they are not confused with illegal immigrants;
- ensuring that communities, industries or businesses who need to acquire the skills or contribution of foreign workers can do so without administrative delays or problems; and
- ensuring a community based production of data and information necessary to determine the need for and quotas of foreign labour.

5.1 The present Chief Directorate (Migration) should be restructured as an Immigration Service [I.S.] operating at community or regional level. The I.S. does not need to be a department, but could be a separate portfolio under the same Minister of Home Affairs, to comply with the recommendations of the Presidential Review Commission. However, the Immigration Service should have its own organisational autonomy under a separate functional head, possibly a Deputy Director General[10]. It should have the power to adopt regulations and should be a "regulatory" agency. The regulations should be adopted on the basis of procedures set forth in the immigration law and requiring prior public notice of the intention to regulate and the participation of the public, with the possibility of commenting on draft regulation and the requirement that the final regulations motivate how comments have been regarded, accepted or rejected. Those who request it, should be put on the I.S. mailing list and notified about any new proposed regulation.

5.2 The I.S. will be run by its separate functional head, which could be a Deputy Director General, under the political supervision of the Minister of Home Affairs and the administrative oversight of the Director General. An Immigration Review Board should be established to monitor and advise the I.S., especially in respect of rule making. The Board, appointed by the Minister and ratified by the relevant parliamentary portfolio committee, should have a broadly representative composition, including a representative of the national association of local government, the three components of Nedlac and expert businessmen and social workers. The approval of the Board will be required for specific aspects of rule making in which the I.S. may find itself in a conflict of interests , such as the setting of fines, application fees or payments which are retained by the I.S.,

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[10] Given the fact that the statute would give specific executive powers to a separate functional head who is not in a fiduciary relation with Parliament, it is necessary that his or her position be construed as an agency of the Minister and that he or she should serve, and his/her employment be terminated at Minister's will.

or when more-than-ordinary discretion needs to be exercised, such as in the determination of national interest, for instance in respect of desirable businesses and waivers of requirements. The Board will not directly adjudicate any application or appeal, but new, uncertain or policy-determinative matters may be deferred to it for adjudication by the I.S.. Thus the Board cannot be used as a delay mechanism in deportation procedures.

5.3 The I.S. should enforce immigration laws within each community and cooperate with police structures and community interests to ensure that illegal aliens are not harboured within the community and that the community does not perpetrate crimes against aliens or display xenophobic behaviour. By checking, in cooperation with the community, whether illegal aliens are receiving services from banks, hospitals, schools, and providers of water supply or electricity, they should contribute to creating the perception that South Africa is not a good receptacle of illegal immigration, thereby reducing the "pull" factors. As suggested in the Green Paper, this programme should be advertised in foreign countries to create, at the point of origin, the perception that South Africa does not offer the answers that foreigners are looking for when they immigrate illegally.

6. The community based approach also offers some of the answers to other fundamental questions relating to the formulation of an immigration system, namely; who should be allowed to enter, under what conditions and on the basis of what criteria.

7. The restructuring of the migration section of the Department of Home Affairs into an Immigration Service should be accompanied by the creation of an additional professional security service that complies with the Constitution. This security service should be an intermediary one as compared to the defence and police services. Its members would not have general police investigative capacity or law enforcement authority beyond immigration, border control and the protection of buildings and structures. Their jurisdiction would be unambiguously separate from ordinary criminal policing. However, they would be especially trained to conduct investigations and monitoring at community level in respect of this subject matter. As specifically trained persons, they could not be recruited automatically from the ranks of the police or the defence force. Their equipment would be lighter than that which is available to the defence forces but may include some of the defence force's heavier surplus equipment for border control. This security service would be under the control of the I.S. and would be trained in community work and the protection of immigrants and refugees, and could work in cooperation with the other social and welfare services at community level for which police training is inappropriate or unnecessary.

7.1 This additional professional security service could act on the basis of agency or delegated powers from the Department of Finance to perform custom and border control and some aspects of custom investigation. It could be supplied with portions of the existing oversupply of human resources and equipment of the defence forces, provided that both are reconditioned to fit the substantially different requirements. Its officials would be trained to present cases in the immigration courts. A suggestion has been made that this security service may have its own intelligence unit to deal with specific aspects of large scale criminal phenomena associated with alien control (see *infra* Section 7 paragraph 2.1 *et seq.*).

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Criteria for admission

A general framework for admission

1. One of the purposes of a migration policy is to determine which foreigners can become part of the community of people of South Africa either on a temporary or on a permanent basis. In doing so, the migration policy shapes the future composition of the South African population. Theoretically, the migration policy could choose to shape the future composition of the South African population by giving preference to certain types of individuals who are deemed to be more desirable as members of our national community than others. In this respect, for instance, the migration policy could choose to give preference to professionals or people with skills or higher education or, alternatively, could choose to prefer people from certain geographical areas, for instance, the sub-Saharan African continent or South West Asia. Migration policy could also accommodate the consideration of specific geographic areas as preferred ones. Alternatively, the migration policy could choose not to discriminate against anyone wishing to become a member of South African society either temporarily or permanently, and could limit itself to set maximum numbers or quotas of aliens who at any given time could be allowed into South Africa. The purpose of the migration policy is that of choosing among these several options without leaving the choice to discretionary processes.

2. The structure of the ACA should be reformulated to reflect a more systematic and objective approach which reduces the system of administrative discretion previously employed to disguise racially discriminatory immigration policies and practices. It is also necessary that the bulk of immigration policies be embodied in legislation rather than being left to regulations. This White Paper believes that the migration system should identify clear criteria to determine the class of prohibited people, those who may enter on a temporary basis and those who may permanently reside in South Africa. It is suggested that these provisions be made in legislation, rather than being left to regulations. However, flexibility could be introduced in legislation by providing for the power of the I.S. to make motivated exceptions to be reported to the Immigration Review Board.

3. The Task Team drafting the White Paper has received suggestions that the entire classification of temporary residents could be left to regulations rather than being entrenched in legislation. Similarly, it has been suggested that regulations could determine criteria to be utilised to assess the need for foreign labour. This White Paper recognises that some flexibility is required in these two areas since there are certain categories of temporary entries into the country which are the product of the evolving and changing needs of society. For instance, only recently the differentiation between the category of students and that of tourists has faded away in the specific case of edu-tourism, which are tourist activities centred around language and other courses provided together with traditional tourist activities. Similarly, criteria to determine labour requirements are bound to change with the rapidly changing parameters defining the economic context. For instance, in the past it was simpler to differentiate between professionals and non-professionals on the basis of received formal education, while nowadays highly skilled professionals such as computer operators and programmers do not always have the benefit of immediately verifiable and relevant academic qualifications.

4. The need to promote the tourist industry of South Africa has been identified as an important consideration impacting upon migration policy. In order to support tourism the migration policy should facilitate the entry of tourists and register the fact that our country's range of tourist attractions is rapidly evolving and broadening. In addition to the traditional forms of tourists there is now a new type of tourist and new forms of tourism, in which the tourist engages in activities within the country rather than remaining a passive consumer of services. For instance, in some forms of eco-tourism, tourists participate in nature conservation and environmental management. There is charity-tourism in which tourists work to assist people in need and join voluntary services or religious groups. Moreover, there are several centres in the country which provide edu-tourism which offers foreigners the opportunity of coming to South Africa to combine study with entertainment. Trimestral or semestral courses of English language instruction associated with recreational activities is a typical form of edu-tourism. It also may include different types of educational activities ranging from scuba diving training to anthropological studies. As the "pull" factors of tourism evolve, a migration policy committed to encouraging tourism should avoid rigid classifications.

4.1 Rigid classifications are also becoming impractical in separating tourists from business persons and business persons from traders. Business permits should be subsumed under the general class of people who may freely enter the country if they meet requirements indicating that they plan to live in the country for a short period of time. This class would include tourists, traders, short-term students, business persons, people receiving medical treatment in South Africa, and anyone else who has reason and the means to stay in South Africa for longer than the prescribed period. It is suggested that the prescribed period be for up to three months[11], which could be extended by application to the Immigration Service upon proof of means by means of which the applicant can sustain him- or herself and an explanation of the activities that he or she intends to perform. This three month period could be renewed only once to six months. This length of stay will also accommodate job seekers. Student, tourist, medical treatment and business permits will be available upon application for any stay longer than six months.

4.1.1 The GNU has expressed its commitment to sustain the informal sector and the public hearings have provided the Task Team with an indication that foreign traders are beneficial to the informal sector. The three month permission to stay will be applicable to traders and will force them to register as they cross the border rather than continuing

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[11] This should not be regarded as a blanket three month period and could be lessened to adjust to individual conditions. It is up to the alien to request the length of stay and the migration officer at the point of entry must ask questions relating to available means.

to cross outside of check points. It might be necessary for the I.S. to issue such traders, and other people who are not in possession of documents, with a South African internal travel document carrying the applicant's fingerprints and photograph. In this way I.S. officers should monitor informal trading sites to ensure that any alien informal trader is legally in the country. This approach will make it possible even for municipalities to inspect trading areas under their jurisdiction and report illegal or undocumented traders to the I.S..

4.1.2 The present administration of temporary residence permits also create anomalies in respect of the differentiations between work and business permits. Usually, business permits are issued in respect of those who enter South Africa to conduct a short-term work activity, either as self employed persons, or more often, as employees of a foreign employer in pursuance of foreign employment relations (i.e.: lawyers, marketing experts, business executives, *et cetera)*. Work permits are issued in respect of people who will be employed in South Africa by a South African employer. However, this distinction is often not respected. For instance, in respect of the entry of foreign artists, producers, photographers and actors who wish to make films and commercials or take pictures in South Africa a cumbersome and controversial system is in place. This system, which has no basis in law or regulations, enables a "Consultative Committee" to charge a fee to applicants and to enable them to receive a work permit, even though they should more properly receive a business permit. During *apartheid* this screening mechanism enabled the Government to keep out people hostile to it, while at present it enables the Consultative Committee to force the applicants to hire South African contractors, technicians and employees. The Consultative Committee consists of a certain trade union and representatives of certain segments of the industry which stand to gain from this arrangement. This situation seems to hinder the choice of South Africa as a desirable place to shoot movies, thereby reducing the considerable potential revenues as the relevant foreigners could hire substantial numbers of South Africans and help the tourist industry by portraying South Africa abroad

4.2 Therefore, it is suggested that a general classification be adopted for all those who come into South Africa for a short period of tourism, business, trade, study or other activities not requiring work[12]. In order to facilitate their entry, they should not be required to have a visa if they provide proof at the port of entry of a return ticket to countries specified in the regulations. Those who enter across the land border should have a one-time visa or travel document to South Africa issued upon application by a South African diplomatic mission. This visa should carry digitized pictures. Alternatively, at all points of entry, people may enter on the basis of a credit card procedure. The I.S. official will swipe any major credit card to request authorization for a certain prescribed amount which will be debited or automatically refunded once the visitor exits the country and his or her entry permit is scanned: this amount will be equal to the per unit overall cost to find and deport an illegal alien. Otherwise, the person wishing to enter may pay a non-refundable much

[12] This classification will include commuter migrants who live in a neighbouring state and commute regularly to work in our country, in respect of whom border passes may be issued if and when they have working permits

smaller prescribed entry fee to be actuarially calculated from the overall cost of finding and deporting an illegal alien divided by the estimated percentage of stays which become overstays requiring deportation. The two latter procedures are entirely run by computers and require no major human or administrative resources. In conclusion, anyone wishing to enter for three months or less may either apply for a visa at any of our diplomatic missions or hold a return ticket or deposit a prescribed amount by credit card to be refunded as s/he leaves or pay a small entry fee.

4.2.1 Those admitted under these circumstances are not permitted to work as employees or be self employed, and cannot obtain any of the relative documentation or government assistance, such as employer or employee tax registration numbers.

4.2.2 The lack of visa requirements should be constructed as an exception to be granted or confirmed by the I.S. for a number of countries. In fact, if from a statutory viewpoint we scrap the visa requirement, we may abdicate on the principle of reciprocity and lose the possibility of requiring visas from countries which are particularly problematic. The I.S. should retain the prerogative of withdrawing visa exemptions in respect of certain countries or classes of people. Nevertheless, this system would increase the risk of "back door" immigration where aliens keep exiting and re-entering. However, if the shift of emphasis on community enforcement is successful, the cost of their presence in South Africa would be limited.

4.2.3 This greater latitude in respect of the entry of broadly defined tourists, traders and businessmen should be accompanied, as proposed in this White Paper, by more stringent controls at administrative and community level to ensure that any person so admitted does not exceed her/his stay or engage in non-permitted work activities. Simply put, if the administrative and enforcement side is effective in preventing people from overstaying or acquiring illegal employment, it becomes less pressing to adopt cumbersome screening procedures in the issuing of visas or permits at ports of entry such as airports.

4.3 The formulation of a policy which is more flexible in respect of controlling the entry of people but more stringent in respect of enforcing the conditions of their stay within the country also reflects the international trends to which South Africa has subscribed[13]. The SADC protocol currently under consideration would call for the free movement of people, goods and capital. This protocol is far from being finalised and could not be taken into account by this White Paper as a binding policy parameter. However, we must assume that creating mobility of people within the SADC remains a policy consideration of the GNU, for it otherwise would not entertain the consideration of the SADC protocol, while the policy discussions emerging at international level around its negotiation suggest that SADC countries are moving towards a freer movement of people within the region. The migration policy must register this trend while protecting the interests of South Africa. Once again, it is believed that the only likelihood of reconciling these seemingly conflicting interests lies within the possibility of developing administrative capacity at community level to enforce the conditions of stay of foreigners within South Africa to ensure that they do not work illegally, become public charges, or engage in illegal activities.

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[13] See section 1.4 of the Green Paper.

5. Consistent with the constitutional rights of aliens within the country, it is suggested that the general provision be made for the judicially reviewed power of the Minister to expel with cause any undesirable temporary residents or to revoke the permanent residence permits of those who have committed crimes within a specified period. In order to maintain consistency with the Constitution, the granting of temporary and permanent residence permits should be made contingent upon the acceptance on the side of the applicant of such power. Permanent residence permits should be contingent upon a period of good conduct and the applicant must accept that if s/he is found guilty of certain criminal activities her/his residence permit may be revoked. This condition and limitation would be part of the granting of residency and therefore would not infringe upon vested rights even though it would be subject to judicial review to ensure that the grounds specified in the law do indeed subsist.

Admitting those contributing to our growth and prosperity

6. Another fundamental policy expressed by the GNU since its commencement is that of encouraging foreign investment. Foreign investments often consist of capital, technology, innovation, human resources and other means of production. The policy of promoting foreign investments has a bearing on migration policies. Migration policy may facilitate the settlement in South Africa of the human resource component of a foreign investment. Several techniques are available to facilitate such settlement.

6.1 Provision should be made for investors' residence permits, both temporary and permanent. Regulations should determine the financial threshold required to be invested in South Africa in order to qualify for such a permit. The simpler way of handling this process would be to determine that an amount prescribed by regulation entitles a given investor to a permit for a certain period while a greater amount entitles him or her to a permanent residence permit. Provision should be made to accommodate self employed people. The amount of money that they bring into the country should exceed what is required for them to live on and should be sufficient to constitute the basis for a business capable of participating in economic growth and producing job opportunities.

6.2. It is suggested that only the monetary coefficient should be utilised, rather than combining it with the consideration of employment creation. A labour intensive business would pass the minimum required investment, for labour is a relevant cost to be financed: a labour intensive business requires capital. However, a capital intensive business, which does not necessarily require labour, should not be discouraged merely on the grounds that it does not directly increase job opportunities, for any capital input in the country indirectly creates additional job opportunities in other sectors. Moreover, dealing exclusively with a monetary coefficient simplifies administrative procedures.

6.2.1 However, the Immigration Service should be allowed to give permits upon application for special businesses which, even if they do not meet the capitalisation requirements, are nonetheless likely to create a prescribed number of job opportunities or are in the national interest. For instance certain hi-tech businesses could be regarded from time to time as

being in the national interest. The I.S. may negotiate conditions which may be imposed for businesses in the national interest, for instance the possible requirement to serve rural areas in the case of medical practices. The permit would exist for as long as the declaration of national interest and the business exist.

6.3 It is important that either the law or the regulations specify the nature of the investment to avoid a mere temporary transfer of money from a foreign country into South Africa to enable aliens to obtain visas when in fact the funding does not become a productive part of our national economy, *i.e.* the purchase of a residence. It should be required that such funds be employed in the establishment of a business venture and that the funds become part of its *book value*. Also in this respect, it is difficult for Government to verify the good faith of business transactions or vet a business plan. Money could be imported into the country and then utilized for personal purposes under some corporate facade without substantially benefiting economic growth. In this case, even though there would still be a marginal benefit for the country, the full benefit of the foreign investment would not be realised.

Moreover, it is difficult to verify that once funding has come into the country it is not transferred abroad, especially in light of the policy announced by the GNU of relaxing existing foreign exchange regulations in the future[14]. The simpler way of handling this issue, reducing Government's duty to mingle in business matters with which it is not *au fait*, is to request any applicant to provide a certification from a reputable certified South African accountant that the applicant has employed the required amount in a business concern in the country. In order to maintain the permit so received, the applicant will need to provide a similar certification within two years indicating that the amount invested in the business venture has not been dis-invested or taken out of the business. This approach simplifies the application process and related time frame. Usually business concerns are audited for various purposes and this additional requirement would not be considered burdensome by applicants. This approach would also reduce administrative costs and Government's responsibilities. Enforcement would be facilitated and could be performed through inspections in conjunction with the tax authorities. The South African accountant who provides the certification would also be responsible and, in cases of fraud, could become the object of prosecution by the I. S..

6.4 The proposal that migration policy may from time to time identify areas of investment to be preferred to others for immigration purposes is problematic. Government is in no better position than an investor to determine in which area a business may be viable. If, as a matter of public policy, Government wishes to attract investments in a given field, it should use usual economic incentives for domestic or foreign investors, which will be factored into the consideration of foreign investors, leaving the matter beyond the scope of a migration policy.

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[14] The problem of "floating deposits" has been noted, where a South African assists an alien by depositing an amount in his bank account and as soon as the paperwork is completed, he or she withdraws the money to use it for the next alien. With the relaxation of currency controls this fraud could not be prevented by merely requesting that the funds come from a foreign bank.

7. A more effective procedure can be adopted in respect of larger domestic or foreign investors. Upon application to the I.S., a domestic or a foreign business intending to relocate human resources to South Africa could receive permission to import a certain number of people. Such a business would be handling the visas as well as the work permits directly on the basis of delegation from the I. S.. For instance, if given the nature of the business, the applicant needs to import a fixed maximum number of foreign employees, it could issue such number of residence permits administering them internally with the possibility of returning one person to the country of origin to substitute him or her with another one, without having to involve the I. S.. The applicant will need to declare that its employees are not prohibited persons. This approach also makes it unnecessary to differentiate between permanent and temporary residence permits, provided that any holder of such a permit is eligible to apply for a regular permanent work permit if s/he meets the relevant requirements. The administration of this delegated power to issue visas and permits by a corporation would be monitored by the I.S. and the corporate applicant would be required to file periodic reports on its activities and the list of visas and permits issued. The number of permanent or temporary permits which could be issued in this fashion would be the result of negotiations with the I.S. under parameters prescribed by the Immigration Review Board.

7.1 At any given time, the corporate applicant could not issue a number of visas or permits greater than that permitted by the I.S. and would be responsible for ensuring that people to whom the permit are issued leave the country upon termination of their employment or permitted period of stay. The I.S. would monitor compliance. In case of an irregularity, abuse or fraud being detected, the corporation would lose its privilege, which could have disastrous consequences on its business, and it would be subject to fines. The corporation would need to produce a statement from a certified accountant which indicates the number of people required in the applicant's business and their qualifications and brief job descriptions. These statements would be vetted by the Department of Labour. The I.S. would negotiate with the applicant the ratio between the number of people which the applicant can import from abroad and the number of people that the applicant must hire from within South Africa. By doing so the Immigration Service would ensure that foreign investments would also create additional job opportunities for South Africans. The regulations or the statutes should require that special attention be given to the training of South African nationals. Each of the aliens so employed will need to comply with the requirements set forth for temporary work permits.

7.2. This corporate work permit should be available not only to foreign investors but also to domestic corporations as authorized by the I.S. after consultation with the Department of Labour. This arrangement would cater for the needs of mining houses which have traditionally been especially dependent upon foreign labour. Through negotiations between the I.S. and the mining houses, it should become possible to begin reducing such dependency so that more South African nationals could take up mining jobs. The same approach could be used for farmers, enabling them to apply once for the entire life of their farming activity, subject to periodic review. In administering these corporate work permits, the IS should act after consultation with the Department of Labour and in terms

of its regulations which, in this respect, should be approved by the Immigration Review Board, whose composition includes Nedlac's social partners.

8. The most important aspect of the migration policy set forth in this White Paper centres around the role of the restructured Immigration Service [I.S.] in respect of illegal immigrants within the country which has greater emphasis on the monitoring and enforcement side of the equation. This reviewed role immediately affects the proposals made in this White Paper in respect of one of the most contentious and difficult issues that needs to be settled: the determination of criteria to be used to qualify potential immigrants for permanent or temporary work permits. There is recognition that we need to attract qualified people in South Africa to offset the brain drain and to promote economic growth. However, the question remains as to how many of them are required, what their qualifications should be, and whether the nature of their employment should be temporary or permanent. Who determines how many plumbers we need and what qualifications we require of them?

8.1 It is difficult for Government to determine what type of skills are required within South Africa, and who the people are who can contribute such skills to our economic growth. Some skills may be documented through and by virtue of academic qualifications, such as school certificates, diplomas and university degrees. However, in the rapidly evolving realities of present day economy, these academic qualifications often have only a limited relevance in determining whether someone has the skills required for our economic growth. Some skills in fields such as information technology, marketing and business development do not easily lend themselves to on-paper certification. Furthermore, there may be a need for skills which are required for a trade or profession which do not appear from the curriculum of academic training, such as those which a plumber, a sound technician or an electrician may possess.

8.2 There are suggestions that Government should develop a comprehensive data base located in the Department of Labour to determine who the country needs, what skills they should have and how many aliens at a time should be allowed in[15]. This type of economic planning has often proven to be ineffective. Usually the data thus collected is a reflection of the immediate past, and only through a subjective extrapolation can future needs be identified. It is also secondary data, for the need arises within the industry and such data will only be as accurate as the degree of cooperation received from the industry. In the final analysis, only the industry can tell who the industry needs, why and for how long. Government would need to receive this information from the industry and liaise with it. Nonetheless, such information is necessary to develop a so-called "point system" to determine who should be allowed to work in South Africa. The Task Team drafting this White Paper has noted the many reservations about the point system raised in the countries which make use of it, in spite of such countries having a vast information infrastructure already in place.

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[15] See sections 1.5.2, 2.1.3 and 2.5 of the Green Paper

8.3 Conceptually, it would be simpler if the industry by itself could determine what it needs to grow and prosper and were able to satisfy these needs from the world labour market. As indicated earlier, at least in theory, if the labour legislation, conditions of employment and collective bargaining agreements were always as fully implemented and enforced in respect of foreign workers as they are in respect of nationals, by definition any alien employed in South Africa would not be taking a position capable of being filled by a South African. In fact, for as long as employing a foreigner is marginally and substantially more expensive and inconvenient for an employer than employing a South African, any alien employed in South Africa would by definition fill a position for which a qualified South African is not available. This approach does not counter the consideration that even though a foreigner so employed might not take a job opportunity away from a South African, s/he nevertheless diminishes the employer's incentive to train a South African to take that position. There is a legitimate concern that if qualified foreigners are easily available, employers might choose to hire them rather than training South Africans for the jobs.

8.4 In the light of the foregoing considerations, it is suggested that the I. S. focuses its policy and administrative attention in a cooperative effort with the Department of Labour, and the I.S.'s inspectors monitor businesses to ensure that no unauthorised foreigners are employed and that authorized foreigners work on the same terms and conditions as their South African colleagues. The joint effort of the Department of Labour and the I.S. should ensure that aliens are employed in South Africa in full compliance, not only with the law and the regulations, but also with the applicable collective bargaining agreements. Once the administrative and enforcement capacity is strengthened to police the labour market, a new approach should be adopted in respect of the issuance of work permits.

8.5 Any employer seeking to obtain the services of a foreign worker should receive a certification from the Department of Labour that the conditions under which he or she intends to hire the identified foreigner, including salary and benefits, are not below the applicable collective bargaining agreement or other standards regulating the labour conditions in respect of South African workers. The employer will also need to certify that when in terms of law or collective agreement the tasks or services performed by the foreigner would require a qualification if they were to be performed by a South African, the South African Qualification Authority has found the qualification of such foreigner to be equivalent to those that would be required of a South African.

8.5.1 Having obtained these labour certifications, without any further requirement or waiting period, the employer could hire such an alien, provided that in addition to the remuneration paid to him or her, the employer pays into a *national training fund* a ratio of the salary, as prescribed by regulation. This contribution will go towards the training of South Africans. In this system, employers will be hiring foreigners at a higher cost than that at which they could hire equally trained South Africans and will be contributing towards the training of their compatriots. In this system any foreigner so employed will be needed and will be employed only for as long as a South African is not available for that position, as then a financial incentive exists for the employer to shift from a foreigner to a South African, as the latter would be cheaper. In fact, the employer would not need to pay the prescribed contribution towards this special training fund when employing a South African.

8.6 This approach eliminates the need on the side of Government to determine for how long a temporary work permit should be issued. It also allows the I.S. to retain a tool of policy manoeuver to increase or reduce the number of foreign workers by raising or decreasing the prescribed contribution towards the training fund. This power should be exercised after consultation with the social partners in Nedlac because of the possible impact of foreign labour on domestic labour-market conditions. In respect of holders of temporary permits, any increase in the required contribution should take effect only after a period equal to five years minus the period for which the alien has held such permit, in order to avoid infringing upon the alien's expectation to seek permanent residency as set out *infra*. The work permit should be issued or renewed for as long as the employer wishes to pay for the alien because, for as long as s/he pays the extra costs for the alien's employment, that foreigner is by definition needed for our economic growth, as having skills of some nature not otherwise easily available. In this way, required labour would be available to employers without delay, undue hassle and cumbersome procedures.

8.6.1 This system requires an effective Immigration Service which inspects businesses after the issuance of the working permit to ensure that foreigners perform the functions for which they were hired, rather than performing different and potentially more highly compensated tasks. Employers hiring foreigners will be required to file a periodic certification and should notify the I.S. when the alien is no longer employed or is employed in a different capacity. The employer needs to certify several elements provided for by regulations, including that the alien has been subject to tax withholding and his or her conditions of employment have complied with applicable standards and collective contractual provisions. The regulations may require this certification to be performed by certified public accountants.

8.6.2 On recommendations formulated by the Department of Labour, the I.S. could waive the employer's training contribution upon proof that the business concerned has undertaken an internal programme of training of South Africans.

9. There is recognition of the fact that it is difficult to obtain the services of qualified and skilled foreigners for an extensive period of time if they cannot obtain permanent residency. It is the purpose of the migration system to attract qualified, useful or needed people to become a permanent component of South African society, thereby constantly improving on its ever-evolving overall composition. It is difficult for foreigners to work in South Africa for extensive periods of time if they do not have the security of living permanently in the country if they so wish. Lack of permanent residency is a disincentive to buying houses, importing foreign capital and settling down with some form of permanence which binds the skilled foreigner to the job opportunity s/he has found in South Africa. Therefore, it must be recognised that a permanent residence permit should be available to people who are required in South Africa for a protracted period of time.

9.1 It is suggested that after five years of temporary legal employment in the country any temporary worker may by right become a permanent resident. Those applying for

permanent residence on this ground will have worked in South Africa for five years. So to speak, they will work their way into permanent residence and will have the assurance of achieving it. It is legitimate to think that these people are a desirable asset to our society. For five years their services were so needed that their employer was willing to pay a higher price for them and for five years their employer has paid into a special fund to train South Africans. Moreover, permanent residency would require an offer of permanent employment. This system gives certainty to both the employer and the alien that permanent residence can be acquired by the lapse of time and contributions towards the growth of South Africa.

9.2 The proposed system also expedites the administrative procedures reducing the burden on government and enabling the I.S. to utilize its resources towards inspections, monitoring and community activities. This ground for residency would mean that South Africa accepts any foreigner willing to work hard to obtain it. In addition to this automatic route to obtaining permanent residency, provisions should be made for a discretionary process in which future labour needs and other circumstances may be taken into account. Permanent residence could be obtained by application on the basis of a permanent offer of employment but without the requirement of five years of prior temporary work within the country. In this case, the Immigration Service should review each of these applications on its merits. The granting of such applications will be limited by a quota determined each year by Nedlac on a sector-by-sector basis. The application would be lodged by the employer on behalf of the alien and would need to be supported by evidence that the position was advertised on the basis of the minimum conditions of employment determined by the Department of Labour and no South African citizen or permanent resident was ready, willing or qualified to take it.

10. Another aspect which may impact on the development of a migration policy is the unfortunate consideration pointed out in the Green Paper that South Africa is losing a number of qualified people because of emigration. A migration policy should try to compensate the 'brain-drain' with 'brain-gain' and 'brain-train'. 'Brain-train' can be achieved by requiring that foreign investors who seek permission to reside in South Africa undertake to train a certain number of people as indicated *supra*. 'Brain-gain' could be promoted by creating a special class of permanent or temporary permits, as exists in countries such as the United States. These permits will be available for people of exceptional skills or extraordinary qualifications. The I.S. will issue regulations to determine applicable flexible criteria, and each application will be reviewed individually on its merits.

11. A last type of work permit will be for working vacations which could be pegged at a certain age limit. This permit may accommodate the needs of the tourism and hospitality industry where foreigners enjoy the assistance of compatriots and many cater for au pair domestic employment. These permits would not require labour certification or payment into the national training fund, but would require proof of available financial resources on the side of the employee, including any payment received while in South Africa. This permit should be beneficial to our tourism industry, for usually young working visitors come back as adult industries, possibly with their families.

12. Within the proposed policy it is no longer necessary to require foreigners to apply for work or other temporary or residence permits from within their country. This requirement has proven to be very cumbersome both for foreigners as well as for Government and employers. This requirement was designed to discourage people from applying for a different status once their permit in South Africa had expired and they sought an opportunity to overstay. This requirement --which has given rise to wide criticisms-- would conflict with the logic of this White Paper, as it prevents the extension of a three month study permit or medical treatment stay and does not accommodate those job seekers who have found a job, possibly through the corporate work permit.

Other classes of temporary and permanent residence permits

13. Student permits should be issued for stays longer than three months. This permit will be issued by the admission office of the place of learning where the student intends to study on the basis of forms supplied by the I.S., as is the case in the United States. The paperwork and the relevant certification will be provided by the school and endorsed by the Immigration Service. The place of learning should indicate to the I.S. that it has received financial guarantees that the student can provide for the tuition fees and for him- or herself while in the country, and in the case of minors should identify who in South Africa acts as the guardian. The school will be responsible for providing a certification every six months that a student is satisfactorily performing his or her curriculum of study and shall notify the I.S. when the studies have been completed or the student is no longer performing as required. A study permit would not be a ground for acquiring permanent residency, but could be followed by temporary work permit in the same field of study, to be regarded as practical training. In this case for a prescribed period the employer will not need to make the contribution to the national training fund, and the length of this exemption will be determined by I.S. depending on the practical training in the field of activity concerned, for instance in the case of legal studies for the period of articles.

14. Family reunification should become an important element of a migration policy. Spouses of South African citizens should be entitled to receive permanent residence permits. It must be noted that artificial colonial boundary lines and forced migration have disrupted many family units. Even though there is provision in the ACA for resident's permits for spouses, the administrative practice developed by the immigration selection boards has often discriminated between male and female spouses. While female spouses are more easily granted permanent residency, when the applicant is a male, he is often required to prove available financial means to sustain himself and his family.

14.1 Provision should be made for fraudulent marriages. In addition to information to be provided at the time of the application, provision should be made for the verification of such a marriage after three years. The residency provided on the ground of marriage should be a conditional one to be confirmed after three years if a *bona fide* marriage still subsists, or should the South African spouse have died. Even though one is aware of the possible practical difficulties involved, both civil as well as customary marriages should be accommodated under this provision, even though customary marriages are potentially polygamous or polyandrous. Section 15 of the Constitution requires the recognition of

all types of marriages and the ACA[16] as well as the Marriage Act of 1998 have registered this imperative providing for equal recognition of civil and customary law marriages. If one were to discriminate between the two for purpose of immigration law, the constitutional right of the South African spouse would be adversely affected. Different types of marriages entered into under the laws of foreign jurisdiction, such as common law marriages, should be recognized under the regulations of the I.S. or the Immigration Review Board.

14.2 Given the phrasing of the equality clause in the Constitution, the subject of homosexual permanent relationships should also be addressed. It is suggested that the statute contains a provision enabling but not requiring the Immigration Service to regard as spouses for the purpose of the granting of permanent residence permits, two people of the same sex who provide a certain type of commitment about their relationship in a form prescribed by regulations. As suggested by the National Association of Gays and Lesbians, this could include an affidavit that their relationship has a character of permanence and is based on a firm contractual arrangement to share life together in a stable emotional and financial partnership involving cohabitation.

14.3 Family relations would also become the ground for a temporary residence permit for relatives. This permit should be issued by the I.S. to people within the third step of kinship of a citizen or the second step of kinship of a permanent resident. These permits would apply for stays longer than three or six months. Therefore, it would be appropriate to require the citizen who applies for his or her family member(s) to stay in South Africa to provide financial assurance they s/he has the means available to support them in the form of a certification of an auditor, as prescribed by the I.S. Holders of this permit may not work.

15. Medical treatment permits will be issued by the I.S. for treatments requiring a duration of more than three months. These permits will be issued on the basis of documents produced by the treating medical institution which will need to indicate that the patient is bearing her/his own cost directly or through medical insurance. The medical institution will need to notify the I.S. when the patient is discharged and will specify the recovery period envisaged under the circumstances. This can be a routine report done twice a year along with other labour compliance work which should not place any undue burden on medical institutions. One may assume that the medical institution may be the best judge in determining these matters as it has a vested interest in ensuring that the applicants have sufficient means to provide for treatment. If the medical institution provides treatment

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[16]. See section 1(1)(iii) and (ix) and (2) of the ACA. It is suggested that the regulatory effort referred to therein is limited to foreign marriages and tries to identify broad classifications of unions rather than relying on information which must be processed on an individual basis.

to the patient, there is a lesser need for government to be concerned about financial assurance.

15.1 The application fees in respect of student and medical treatment permits issued in respect of public institutions should be somewhat higher so as to partially recover the State subsidy to these institutions.

16. The same approach employed for the foregoing classes of permanent and temporary permits is envisaged for other permits which should similarly be issued in a system which minimises the administrative requirement placed upon the I.S..

17. Diplomatic corps and foreign authority permits should be issued on the basis of documentation produced by the Department of Foreign Affairs which should deal with it during the course of its function, including the accreditation of the relevant aliens. These permits would be of two classes, one for those who are part of the diplomatic corps and one to be issued in respect of those working in foreign diplomatic missions and official residences. The relevant list of such people detailing the duration and conditions of their stay should be kept by the Department of Foreign Affairs.

17.1 Persons receiving permits under government-to-government exchange programmes should be admitted and should receive permits on the basis of documentation produced by the organ of the state responsible for the exchange programmes. Such organ of the state should report to the I.S. about all the visas and permits so issued and should ensure compliance on the side of the aliens, reporting when they have completed the programme and providing all the relevant information. The same shall apply for people admitted in fulfilment of international treaties who could be permitted to stay in the country on the basis of documentation issued by the Department of Foreign Affairs or any other organ of the state responsible for the implementation of the treaty concerned.

18. Specific permits should be issued for crewpersons on the basis of documentation provided by the owner of the vessel who shall periodically report on all those to whom such permits have been issued and shall inform the I.S. if any of them has not left the country as required. The owner, who is responsible, may delegate this power to the master of a ship[17]. These permits may circumscribe the area in which crewpersons may move to obviate the incidents lamented during public hearings associated with crewpersons disembarking from ships in the three major ports. Crewpersons are otherwise eligible for the standard entry permits and are subject to its requirements.

19. In the administration of these functions, all the entities acting on the basis of delegated powers from the I.S. will be required to post their reports with the I.S. in an electronic form prescribed by the I.S. through the world-wide-web network so that it can be downloaded by the I.S. on its own mainframe without having to give outsiders immediate access to it.

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[17] See section 14 *et seq.* of the ACA

Conclusion

20. The foregoing system will be administered on the basis of objective criteria or through administrative discretion exercised by the I. S. which would be subject to the review of a court of law. Under these conditions there is no longer space nor justification for immigration selection boards which should be abolished as suggested in the Green Paper.

20.1 In conclusion, it is suggested that the statute should provide for free entry of any person who is not a prohibited person for a period of three months, renewable upon an application which specifies reasons for the person to stay longer. The following temporary permits will be available for periods exceeding three months: students, businessmen, workers, diplomats and foreign authorities, exchange and treaty persons, crewpersons, patients, investors, persons with extraordinary skills, person of extraordinary qualifications, and family members. The following permits will be available for permanent residence: spouses, permanent workers, investors, persons with extraordinary skills, and person of extraordinary qualifications.

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Prohibited persons[18]

1. The immigration law should contemplate classes of people who cannot enter the country under any condition, or who can enter the country but cannot be granted a permanent residence permit. Upon entering the country each person should certify that to the best of her or his knowledge s/he does not belong to any of such classes. Any member of such classes may not receive any temporary or permanent permit. Upon detection within five years of any permit being erroneously or unlawfully issued to a prohibited person, the permit should be rescinded.

1.1_ Temporary residence permits should also be rescinded upon one conviction for one significant crime. Permanent residence permits should be rescinded upon one conviction for a significant crime within three years from issuance, or three convictions at any time thereafter. In order to comply with the constitutional requirements related to the protection of vested rights, these crimes must be identifiable in the statute governing migration.

2. The following people should be regarded as prohibited persons:
   - those with infectious disease identified by regulation:
   - those with a record of prior criminal offences;
   - citizens of certain countries identified by executive order of the Immigration Review Board adopted in terms of I.S.'s regulations;
   - anyone against whom an arrest warrant has been issued by the Government of any country with which South Africa entertains diplomatic relations in respect of genocide, murder, terrorism, drug trafficking or money laundering;
   - those who have been judicially declared incompetent;
   - those who were previously deported from South Africa and, upon application, have not been rehabilitated by the I.S.;
   - members of criminal or terrorist associations, as identified by the I.S.'s regulations; and
   - members of associations which encourage the practice of racial hatred or social violence, as identified by the I.S.'s regulations

2.1 The classification set forth in section 39(2) of the ACA is problematic and possibly unconstitutional in some respect. For instance a blind person could not enter the country and someone could become a prohibited person merely on the basis of information which make him or her an undesirable person. While "undesirables" can be denied entry, once in South Africa they are entitled to the guarantees of natural justice and could not be so classified merely on the basis of information received. It is suggested that a conviction or at least an arrest warrant be required.

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[18] As used in this White Paper the term "prohibited person" is not used as it is in Chapter 5 of the ACA. The latter regards illegal aliens as 'prohibited persons'.

3. The foregoing classification and provisions should aim at discouraging foreign criminals and criminal cartels to identify South Africa as a convenient place to relocate.

4. It is suggested that the I.S., in consultation with the police and intelligence services, may waive any of the foregoing exclusions, but will need to report periodically to the Immigration Review Board on any of such waivers granted.

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Naturalization

This White Paper has not tackled the issue of naturalization in its specific detail as it mainly affects the citizenship law and is not presently regulated in the ACA. For the purposes of this White Paper, it is suggested that the present framework for naturalization could be maintained. Permanent residency should be a prerequisite to the acquisition of citizenship through naturalization. However, exceptions could be made for lineal descendants of citizens or in special cases. Citizenship should not be granted when the same circumstances occur which would cause the loss of permanent residency or disqualify one from obtaining it, such as having committed certain crimes. A greater threshold of integrity and loyalty to South Africa would also be prescribed.

It is advisable that naturalization be administered through the I.S. as it is a natural continuation of its line function.

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Waivers and Discretionary Powers

1. There is recognition that the Minister should have some discretionary powers to provide for unforeseen circumstances or to meet special needs of the State or in respect of the national interest. Therefore, these powers must be exercised with sufficient discretion. In order to maintain the tenets of political and administrative accountability and transparency, it is necessary to balance this discretion with sufficient checks.

2. In addition to the powers and functions mentioned in other parts of this White Paper, it is suggested that the Minister be given the power to shorten the time required to naturalize a permanent resident.

3. In other parts of this White Paper, mention is made of the power to waive specific requirements and it suggested it be exercised by the I.S. However, there might be need for a more general power, which is now provided for in several sections of the ACA, including sections 10, 28, 36, 40(2) and 41. The exercise of this power should be monitored by the Immigration Review Board.

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Enforcement

1. The best way of achieving the voluntary repatriation of foreigners who have come to South Africa on a temporary basis and whose reason to stay in South Africa has expired, is to ensure that they cannot be employed illegally. Similarly, the best way to prevent further illegal immigration is to create in South Africa an environment which does not offer them the opportunities of employment and free available public services which they cannot find in their countries of origin.

2. The Immigration Service should liaise on a constant basis with police structures at community level. Conversely, police should also be trained to detect illegal immigrants and to verify nationality and residency upon arrest of suspects or during other aspects of its interaction with the public and report to the I.S. The police should be obliged to refer any illegal immigrant thus identified, to the I.S..

2.1 The I.S. should have the training and educational capacity to explain immigration issues to police and local government authorities. Training and education of broad segments of the public service and of the public is essential to the success of the migration policy.

2.1.1 This education must also involve the avoidance of xenophobia and compassion for the human tragedy of migration. Xenophobia must also be fought within the institutional culture of the immigration officials, as it may colour their judgement and objectivity leading to illegal arrest and detention, verbal abuse, excessive physical force, disregard for aliens' property, disregard for aliens' privacy and dignity, and even corruption. These matters should redressed by adequate training of the officials and internal policing.

2.1.2 Special provision should be made for a rigorously sanctioned offence in respect of granting of or allowing for unfair and illegal advantages to persons for financial consideration. The I.S. will be issuing documentation and permits which have economic value and, therefore, the risk for corruption exists. The I.S. should have an internal investigative unit which constantly monitors, tests and upgrades the internal systems, conducts internal investigations and prosecutes frauds. This unit should not oust the jurisdiction of other organs of the state with law enforcement responsibilities, so as to avoid that such unit becomes a mechanism to keep in-house and cover up, rather than expose, cases of corruption.

2.1.3 Internal training of I.S. officials should also involve international exchange programmes with foreign governments to coordinate the enforcement of migration laws with the fight against crimes associated with the international movement of people such as drugs and arms trafficking, terrorism and organized international crime.

3. The I.S. inspectors should inspect workplaces and ensure that work permit holders work in their prescribed places and that no illegal aliens are employed. In addition to the powers listed in section 54 of the ACA, they should also have the same access to

workplaces as labour inspectors. They should verify that holders of student permits do indeed study and comply with other conditions of their stay.

4. The I.S. needs to cooperate with all spheres of government and make provincial and local governments responsible for part of their enforcement activities. When providing public services, provincial and local government and public utilities should require the ID number of the recipient in case of South African nationals or entry permit numbers in the case of aliens. If such applicant or recipient of services does not have the required identification number, s/he should be advised that s/he has been reported to the I.S. Any such cases should be reported to the I.S. but no service should be withheld, as it would be unconstitutional to withhold essential or constitutionally mandated public services. In this fashion it will become easy to detect any overstay or illegal entries and it will cause illegal aliens to operate in a hostile environment in which it becomes increasingly difficult for them to find employment opportunities, receive public services or conduct a regular life. Schools should also verify the nationality or residency of pupils through their ID numbers[19]. We should develop a culture of verifying ID numbers in respect of services provided by the local, provincial and national spheres of government[20].

4.1 In an ideal world one would prefer not to take some of the measures recommended in this White Paper, such as developing a culture in which South Africans are required to identify themselves to public authorities. Nonetheless, given the lack of available resources and the magnitude of the lamented problem of illegal immigration, if South Africans wish their government to succeed in this policy they must make a daily small personal contribution to this end. However, it is important that a culture of social control should not become entrenched in our country and must be considered an extraordinary feature of our social life. Accordingly, it is suggested that all the legislative provisions relating to the verification of identify and nationality be subject to a ten years sunset clause and shall automatically lapse unless re-confirmed by Parliament.

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[19] Section 33 of the ACA already sets forth an obligation on employers and schools to verify the nationality of employees and students respectively, but only at the request of the Director General.

[20] Section 34 of the ACA requires lodgers and hotel keepers to keep a ledger with the identities of all its customers, including South Africans. It has been argued that this provision violates the constitutional right to privacy. It could be substituted with a simpler requirement to check the nationality of the customers, registering and reporting to the IS only those who cannot prove that they are legally in South Africa.

4.2 The statutory and regulatory enforcement framework must be supported by concurrent efforts on the side of other branches and spheres of government to educate communities. For instance it will be useful to promote a campaign to dispel people's fear of being identified and to promote pride in identifying oneself as a South African citizen or resident to the police or the I.S. In fact, the effort of identifying illegal aliens is going to be frustrated if there is no willingness on the side of South Africans to be identified. The fact that the Department of Home Affairs has eased and expedited procedures to become part of the population registry and to obtain original or replacement IDs should not make such a campaign an onerous one

5. By strengthening the enforcement and administrative capacity of the I.S. it will be possible to follow up and investigate overstays. Presently it is possible to print out a list of all those who have overstayed but there are no resources available to locate them and request them to leave the country. Furthermore, the present computerised system allows for the detection of those who have overstayed once they try again to re-enter South Africa. Overstaying should be regarded as an offence punishable by a fine and when somebody who overstayed re-enters South Africa, s/he should only be admitted upon payment of such a fine.

6. The I.S. will need to publicize the actions it takes to deter illegal immigration at community level through the South African diplomatic missions in the countries of origin of illegal immigrants. The statute should give the I.S. direct authority to conduct these programmes abroad and to request the cooperation and assistance of the Department of Foreign Affairs. A concern has been expressed that if these programmes were run under the auspices of Foreign Affairs or with the approval of the Department of Foreign Affairs they could be weakened because of concurrent or conflicting reasons of diplomacy, comity and foreign relations. This approach will also enable the I. S. to participate in its own capacity in bilateral discussions with the governments of the countries of origin of substantial numbers of illegal aliens. The US experience has shown how the cooperation of the governments of countries of origin is very valuable in promoting the awareness that the recipient country is not as attractive as it may appear to potential illegal immigrants and to take measures to prevent migration towards it . Moreover, an I.S. presence in the country of origin is often required to deter criminal phenomena associated with illegal immigration, such as cartels which smuggle aliens.

6.1 Bilateral agreements should require foreign countries to bear some of the costs of repatriating their nationals who are deported from South Africa.

7. The I.S. should partially become a revenue generating agency. In addition to possible contributions towards deportation received from foreign countries, it should retain within its budget application fees, fines levied against employers and other offenders, a portion of the contributions made by employers of foreign labour towards the national training fund mentioned *supra,* and in respect of the application for corporate visas, the entry fees

for three months or less, and other fines and payments.[21]

8. Minimum mandatory sanctions should be enforced against employers who hire illegal aliens as well as those who assist them[22]. Criminal prosecutions should be mandatory when the investigation reveals sufficient evidence, and any failure or difficulty in prosecuting because of inadequate resources should be referred to the inter-ministerial committee referred to *infra*. Fines should be provided for in respect of first offences, while a jail sentence should be imposed for repeated offenders.

8.1 Employers with more than five employees should be responsible for ascertaining the nationality or residence of their employees failing which they shall be guilty of an offence. Employers with less than five employees would be deemed to have committed an offence only if they knew or should have known under the circumstances that the employee was not a South African national[23]. As a deterrent, it is suggested that offenders be reported for auditing to the Receiver of Revenue to verify whether they paid over tax withholdings.

9. There should be stricter sanctions to punish those who assist illegal aliens, by falsifying documentation and rendering false information to the I.S., and in respect of public officials who participate in any such frauds.

9.1 The I.S. should interact with a specialised immigration court. The immigration court will have subject matter jurisdiction and may dispose of matters other than immigration only if they are necessary or incidental to the application of immigration laws, i.e. an issue of personal status or in respect of the ownership of an investor's business. The establishment of the immigration court does not represent a duplication of judicial services, nor does it increase the overall size of government. In fact, any case handled by the immigration court would correspondingly reduce the burden on other judicial structures, while personnel and infrastructure could be transferred from the ordinary judiciary to the immigration court.

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[21]. This end result should be achieved through mechanisms which are consistent with the Public Finance Management Act and the National Revenue Fund provided for in the Constitution.

[22] Section 32 of the ACA is very broad and meets the requirements of this policy, but it is rarely enforced and is not supported by a flow of monitoring and investigative activities.

[23]. This is a mere shifting of the *onus*, and not an exception or a facilitation, for the purpose of assisting small and micro businesses.

9.2 The process of review and adjudication should be expedited and formalized. The delaying tactics of representations should be abolished and be substituted by an appeal to the functional head of the I.S. who within a fixed number of days must confirm the decision, otherwise the decision lapses if such lapse is asked for by the appellant. When the lapse does not provide in itself the relief sought, the failure of the functional head of I.S. to decide the application within the deadline should be ground for an immediate writ of mandamus. The decision of the functional head of the I.S. may be appealed to the Minister of Home Affairs within strict deadlines. If the Minister does not review the decision within a matter of a few days the appeal is deemed to be rejected. The functional head of the I.S. may move any appeal lodged with the Minister to the Immigration Review Board, in which case the Minister may not decide it.

9.3 Anyone appealing against a deportation order should post financial security to cover his or her deportation costs, should the appeal fail. The deportation process should be entirely judicialized on the basis of a set of deadlines based on fixed schedules as set out in law. This approach eliminates delays as well as possible political influence in deportation procedures and the use of representation as a delaying tactic.

9.4 Any decision of the I.S., the Immigration Review Board or the Minister will be subject to the review of the immigration court, to be established in terms of section 166(e) of the Constitution. The immigration court should adopt its own rules of procedure in place of the Criminal Procedure Act, and shall not be subject to the I.S., the Minister or the Immigration Review Board. One of the major tasks of the immigration court will be the issuance of warrants for the arrest of illegal aliens. We believe that a short period of detention without warrants of illegal aliens is consistent with the Constitution, but that a judicial warrant must be obtained as soon as possible within the 48 hour period set forth in section 35(1) of the Constitution. Parenthetically, it can be noted that while it seems certain that the rights set forth in section 35(1) and (2) of the Constitution apply in respect of deportation procedures and detention incidental thereto, it seems that section 35(3) which refers to "accused" people may not, for illegal aliens are not regarded as accused persons. If this were the case, even though some of the principles of natural justice set out in that subsection would continue to apply, the immigration court could adopt simplified rules of procedures and the state may not be required to provide legal aid or an interpreter, and the decision of the court could be final.

10. The I.S. should operate separate detention facilities for aliens, so that they are not detained together with ordinary criminals. As noted in the Green Paper, illegal aliens should not be regarded as criminals and their detention does not have the purposes of punishing or rehabilitating them, nor does it intend to protect members of the community from the possibility of repeated crimes. Their detention is a stage of the process of deportation or repatriation and should be specifically designed and managed for that purpose.

11. The I.S. should continue to rely on privatisation for some of its functions. For instance detention services can be privatised. Contrary to what has been suggested by some

participants in public hearings, privatisation diminishes rather than increases the possibility of abuses. In fact, in a privatisation context, the role of government is that of monitoring a private entity and under these circumstances government is less likely to hide its own mistakes, malfunctions and waste. It is also simpler to remedy problems, for the possibility exists that the contract may be withdrawn to give it to another entity, while Government does not have the option of firing its own structures, but can only undertake complex, lengthy and often expensive processes of internal restructuring.

12. The statute should provide for an interdepartmental committee to coordinate education on migration issues at community level, schools, work places, etc. This committee should also supervise and manage a programme of specialised and roaming interdepartmental task teams, *inter alia*, consisting of an I.S. officer, a labour inspector, a police officer, a prosecutor and a social worker. This task team will obviate the present lack of specialised knowledge in the administrative and judicial enforcement of immigration laws.

13. One of the major missions of the I.S. will be to work with other departments and with NGOs to ensure that communities recognize the difference between illegal aliens and refugees, accommodate refugees and reject any type of xenophobia. A special campaign against xenophobia should accompany the I.S.'s on-the-ground presence.

14. In order to be successful, this policy requires that all refugees be given an alien registration number and for all intents and purposes be treated as permit-holding residents.

15. The I.S. should have the statutory discretion to waive sanctions on a general basis or provide other incentives in respect of illegal aliens willing to participate in programmes of voluntary repatriation.

16. The presence of a greater number of people in uniform enforcing the law at community level, including I.S.'s officials, will have an indirect positive effect on crime.

17. The present system of migration has registered several problems in respect of the utilization of agents to assist aliens with the necessary paperwork. Many cases of corruption have involved such agents. Suggestions were made to the Task Team that such agents should be prohibited in the future. This White Paper recognises that it would be unfair to tar honest and dishonest agents with the same brush. Problems should be solved through deregulation of the specific profession, recognising that it provides a valuable service to those who wish to use agents. The use of agents does not detract from the fact that their services may replicate those which the Department may provide free of charge. This is a consumers' issue. Regulations should ensure that officials do not extend any special preference to agents and under no conditions accept benefits or rewards from them. A list of accredited agents should be maintained by the Department on the basis of objective criteria and qualifications which prevent such a list from becoming a source of corruption in itself, i.e. if officials had the discretion to allow people to register. Any agent suspected of engaging in illegal activities should be removed from the list and provisions should be made to prohibit retired officials from becoming agents. If properly regulated and professionally conducted the agents' industry may assist the I.S. with its workload and may facilitate communications with aliens across cultural and linguistic barriers.

17.1 In the long-run all temporary and permanent residency permits should be accompanied by a digitized photo which is super-imposed on the visa or permit and stored in data memory banks, as is currently done by the US Government. This will enable the computer system to produce a report on all the overstays with the relevant photographic records.[24]

18. The security of documents remains crucial for an effective migration system. Visa labels should be used to issue visas to reduce the risk of forgery. The following security features have been considered: coloured fibres chemically built into the paper, the use of not readily available very thin paper, the use of a glue backing that is almost irremovable, built-in images detectable only under ultraviolet light, holograms, or a control number for each visa label. Currently, a bar code system is used, which can be used on computerized visa labels. The applicant's data is captured at the South African diplomatic mission abroad and when the applicant arrives at a port of entry, his or her particulars appear on the immigration officer's screen when the bar code is scanned in. If the information on the screen does not correlate with the information on the visa and in the passport, the visa is fraudulent. As visa labels are face value forms, steps should be prescribed to ensure their safekeeping. This White Paper recommends a computerized visa system which captures all the relevant personal particulars of the applicants to be used both in connection with the issuance of visa and at the points of entry in respect of the three-month permit. As there are currently more than 90 South African diplomatic missions abroad, the financial implications of computerizing the process should be assessed.

19.1 A visa indicates to the immigration officer at a port of entry that the alien has been pre-cleared in respect of some but not all the entry requirements. The immigration officer may check some of these requirements, such as the question of the purpose of entry and the alien's bona fides. The visa does not give a right of entry but is a pre-requirement intended to facilitate or streamline examination at the point of entry. On 24 January 1996 Cabinet resolved that the principle of reciprocity should be taken into account in considering the granting of visa exemptions. The notion of reciprocity should serve the interests of South Africa and should not be a rigid criterion. It could be in the interest of South Africa to streamline the entry procedure of aliens of certain countries of origin when empirical evidence shows that they are likely to pose a substantially lesser risk of becoming illegal aliens or being prohibited persons, even when such foreign country could or would not make a similar assessment in respect of South Africans entering it.

20. Persons arriving without the necessary documentation at South African ports of entry should be dealt with strictly to ensure effective control of aliens. Visas should not be

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24 In the past the Department of Home Affairs used to generate a daily list of permit violators but would often not act on them because the inspectors did not know what the violator looked like.

issued on arrival. Aliens who arrive without the required documents should be placed on return flights and the conveyor held responsible in this regard. A system should be put in place to assist in meritorious cases where aliens arrive without the necessary documentation, and a deterring fee should be levied in this regard. Conveyors should be severely penalized for conveying aliens who are not properly documented. Provision should be made for conveyors to make representations for penalties that were given under certain circumstances.

21. In conclusion, the foregoing enforcement strategy reflects an overall policy in which immigration officials are freed from unnecessary paperwork and complex permanent and temporary residency procedures enabling them to move into the field to do investigative and monitoring work.

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Costing

1. Many of the suggestions contained in this White Paper will require significant restructuring, the cost implication of which cannot be assessed at this time. The White Paper is sensitive to the consideration that any given policy can only succeed if it can be supported by the available fiscal and financial resources. However, at this juncture, it is not possible to prepare a complete fiscal and financial assessment of this White Paper's implications which should be more properly assessed during the stage of its public discussion and the legislative process. In fact, while some of the suggestions contained in this White Paper will cause additional public expenditure, others may result in substantial savings, provided that internal expenditure is re-allocated and re-prioritized. Therefore, a meaningful cost analysis will require the development of a cost-saving matrix which goes beyond the scope of the present policy formulation exercise.

2. However, in assessing the financial implications of a new migration policy, one must be mindful of the relevant starting point: the present situation is less than satisfactory and if better results are sought it will be necessary to direct greater financial resources towards the management of migration. At a time of downsizing and fiscal austerity this might be difficult and, undoubtedly, it would be important to put a specific price-tag on this White Paper. While this is not possible at this juncture, it should be pointed out that the new policy creates not only direct but also indirect savings, especially in the long term. They include the reduction of the social costs of illegal migration, the enhanced policing at community level and better internal administrative procedures which should free existing financial and administrative capacity. Furthermore, the new policy should create intangible but very relevant benefits, such as the contribution towards human resources development and economic growth.

2.1 It can also be noted that separate structures do not necessarily entail a duplication of costs and resources. For instance, the establishment of migration courts would create a corresponding reduction in costs, courtrooms and prosecutor requirements, in the ordinary system of justice. Similarly, the transfer of surplus equipment from the defence force to the proposed specialised security service may create savings by virtue of a more efficient allocation of resources.

3. It is hoped that once this White Paper has been approved by Cabinet and endorsed by Parliament and the implementing exercise is undertaken, it will be possible to give further consideration to the development of a business plan for its implementation. Staggered implementation may be a solution to meet existing financial constraints. This process will need to be assisted by a constant flow of inputs from the Department of Finance.

4. Being aware of the importance of financial implications, this White Paper has sought to identify the solutions which provide the greatest value for public monies spent. At the same time, it sought to redress present problems and inefficiencies which utilise resources and create costs without corresponding tangible benefits, in order to free available resources for tangible benefits. Better enforcement at a lesser cost, reallocation of resources towards effective policies, the avoidance of corruption and the avoidance of the social costs of illegal immigration have been some of the priorities underlying this process of policy formulation.

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Conclusions

It seems that the lack of satisfaction with the present system of alien control can be ascribed more to administrative rather than legislative requirements. Balancing the equation starting from the administrative aspect is more difficult that modifying legislation. This White Paper acknowledges that its proposals do not reflect conventional practices and perspectives . However, when conventional practices and perspectives have proven insufficient in dealing with the problems at hand, one if forced to go beyond them.

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Definitions

In this White Paper:

- "alien" means a person who is not a South African citizen or permanent resident;
- "annual quotas" means an annual negotiated upper limit on the number of migrants from one country allowed legal access to another country for purposes of employment;
- "bilateral agreement" means an agreement signed between two states to regulate the flow and conditions of contract and other forms of labour migration between those two states;
- "border pass" means a temporary residence permit offered to residents of border areas to make short-term cross-border visits;
- "brain drain" means the permanent or temporary departure of large numbers of skilled or professional workers from a country to the detriment of that country;
- "brain gain" means the permanent or temporary entry of large number of skilled or professional workers into a country to the benefit of that country;
- "brain train" means the high-level training of local skills in order to compensate for the effects of a brain drain;
- "business immigrant" means a person who takes up permanent residence in order to establish, participate or run a private sector company;
- "citizen" means a person who is a national of a country by birth, naturalisation or descent as defined by the domestic citizenship legislation of each country;
- "commuter migrant" means a person who lives in a neighbouring state and commutes regularly for work across borders on a daily, weekly or monthly basis;
- "compulsory deferred pay" means compulsory deferment of a fixed proportion of migrant earnings to the country of origin e.g. applicable to miners from Lesotho and Mozambique;
- "contract migrant" means a person who travels across borders for work under the terms of a fixed contract of employment with an employer;
- "deportation" means to cause an alien to be removed from a country when found in contravention of criminal or immigration legislation;
- "economic migrant" means a person who travels across borders for an express economic purpose such as employment or trading or self-employment;
- "emigration" means to leave one's country of normal residence in order to go and settle permanently in another country;
- "migration" means to travel so as to temporarily change one's place of residence; see also "international migration" and "temporary residence".
- "illegal alien" means some one who is not a citizen or a resident of a country in which he or she is physically present without being authorized by the law of that country to be in or to have entered the country;
- "immigration" means to enter another country in order to make one's permanent life and home there; see also "Permanent Residence".
- "international migration" means to travel across international boundaries so as to temporarily change one's place of residence;
- "labour migration" means to travel so as to temporarily change one's place of residence for the specific purpose of accepting employment;
- "national interest" means the determination conducted by the I.S. and reviewed by the Immigration Review Board that the policies of the government or the general welfare of a significant segment of South Africans may be materially enhanced by a particular action;

- "naturalisation" means to acquire citizenship of a country other than one's country of birth;
- "over-stayer" means a person who continues to reside or remain in a country after the expiration of his or her visa, visitor's permit or temporary residence permit;
- "permanent resident" means a person who is a citizen of another country who has acquired the legal right to remain permanently in South Africa (see Immigrant);
- "points system" means the selection of immigrants on the basis of a pre-determined point scoring system where applicants are assessed in particular categories e.g. qualifications, work experience, offer of employment, age, etc.;
- "project-tied migrant" means a person who crosses borders for a fixed period of time to work on a specific project being carried out by his or her employer.
- "prescribed" means prescribed by regulations adopted by the I.S. or the Immigration Review Board, as the case may be;
- "prohibited person" means a person who is not or is no longer eligible to enter or reside in South Africa;
- "quotas" has the meaning set out under "annual quotas", *mutatis mutandis;*
- "refugees" means people who have left their country because of political persecution or war and in accordance with relevant international standards are entitled to temporary protection until such time as they may safely return home;
- "regulations" means binding provisions adopted by the I.S. to implement the immigration laws on the basis of procedures requiring the participation of the public;
- "remittances" means funds earned by migrants in one country and sent home by formal or informal means to the home country; see also "compulsory deferred pay";
- "repatriation" means the non-coercive removal of an alien from a country to his or her country of origin or an agreed upon third country when he or she is not, or is no longer entitled to remain in the repatriating country, and also applies to the repatriation of refugees
- "seasonal migrant" means a person who travels across borders for work on a temporary seasonal basis.
- "skilled transient" means a highly-skilled person allowed temporary access to a country to pursue a particular employment opportunity or position.
- "temporary resident" means a person who is a citizen of another country who has acquired the legal right to time-limited presence in another country; see "migrant";
- "unauthorized immigration" means to enter or remain in another country on a permanent basis without proper authorization or documentation;
- "unauthorized migration" means to enter or remain in another country on a temporary basis without proper authorization or documentation;
- "visa" means a pre-approved document or passport stamp stating that the person is eligible to be considered for an entry and temporary residence permit in the country;
- "voluntary repatriation" means a voluntary and non-coercive return of aliens to their or another country; and
- "work permit" means a document authorizing a temporary resident of a country to take up employment in another country.

Appendix

Temporary residence permits under the present system

Introduction

The admission and sojourn of aliens in the Republic is regulated by the Aliens Control Act, 1991 (Act 96 of 1991) and the regulations promulgated in terms thereof. While wishing to further tourism to South Africa, circumstances such as the economic and employment situation have to an increasing extent necessitated a more rigid approach to the admission of foreign workers to the Republic. Amendments were made accordingly to the existing Act and culminated in the promulgation of the Aliens Control Amendment Act, 1995 (Act 76 of 1995).

Consistent with international practices the amended Act now not only provides for the levying of fees but for the issue of temporary residence permits in distinctive categories. It is also compulsory to apply for the permit whilst the alien is still outside the country. This implies that an alien may not apply to change the purpose of his or her visit whilst in South Africa, *i.e.* a person who enters South Africa as a visitor will not be allowed to apply for a work permit whilst he or she is in the country. The six categories of permits which have now been introduced are:-

a) a visitor's permit;
2) a work permit which is subdivided into a permit for temporary employment and a permit to temporarily manage or conduct a business;
c) a business permit for purposes other than that for which a work permit is required;
d) a study permit;
e) a work-seeker's permit;
f) a medical permit.

The overriding consideration in dealing with applications for work permits is whether the employment or task to be undertaken cannot be performed by a South African citizen or an approved immigrant already residing in South Africa. It therefore follows that work permits are only granted in instances where South African citizens or other legal permanent residents are not available for appointment or cannot be trained for the position.

Employment opportunities are extremely limited as a result of the prevailing economic climate in South Africa and there is at present no special drive or project to attract foreign workers to South Africa. Even as far as the so-called scarce employment categories are concerned the position has worsened to the extent where professionally and technically qualified persons are being retrenched and are finding it extremely difficult to secure alternative employment. It is for this reason currently a prerequisite that foreigners wishing to take up employment in South Africa, be in possession of firm and acceptable offers of employment commensurate with their training, qualifications and experience before an application for a work permit can be considered.

Applications by foreigners in the own business category are considered mainly on grounds of foreign capital introduced or to be introduced in the RSA for investment, the feasibility/viability of the business and whether the investment will generate employment opportunities for South African citizens.

In terms of section 26(1)(b) of the Aliens Control Act, 1991 (Act 96 of 1991), a work permit may be issued to any foreigner who applies for permission either to be temporarily employed in the Republic with or without any reward; or to temporarily manage or conduct any business in the Republic whether for his or her own account or not. In terms of section 26(2)(a) an application for a work permit may only be made while the applicant is outside the Republic (Regulation 16(1)

i.e. in the country of which the applicant is a passport/permanent residence holder) and such applicant shall not be allowed to enter the Republic until a valid permit has been issued to him or her.

The above-mentioned shall not apply in terms of section 26(2)(b) in respect of the holder of a work-seeker's permit, if he or she applies for a work permit in the Republic after the contract of employment or other contract contemplated in the work-seeker's permit has been entered into. The same applies in terms of section 26(5) when a temporary residence permit is issued to an alien, and an appropriate permit in terms of this section may also be issued to the spouse and to a dependent child of the foreigner, as well as to a foreigner who is in the employ and a member of the household of the first-mentioned foreigner, accompanies or resides with the first-mentioned foreigners.

The Director-General, in terms of section 26(6), may from time to time extend the period for which, or alter the conditions subject to which, a permit was issued. In terms of section 26(7), however, foreigners have to keep their permits valid at all times, as well as comply with the conditions thereof, in order to avoid legal action being taken against them in terms of the Act. In terms of the Regulations (Fees) a foreigner has to pay an administrative fee of USD150.

Worker's permits

Certain requirements must be complied with in the temporary employment (worker) category. Applicants in the worker category must be in the age group 18 to 51 and submit the following documentation: application forms BI-159: A & C duly completed; decree of divorce/court order, where applicable, as well as proof of maintenance paid to family members (also in case of separations); marriage certificate, where applicable; full birth certificate(s) including family's where applicable; an employment contract specifying the occupation and capacity in which employed, maximum duration of employment and remuneration; qualifications (evaluated by the Human Sciences Research Council, in the case of doubtful qualifications), especially in respect of technicians and engineers; testimonials/service certificates from previous employees indicating, inter alia, the applicant's competencies and/or skills; Curriculum Vitae; proof of advertisements (advertised in the national media over a period of at least 30 days), an indication of the steps taken to fill the post, how many South African citizens/permanent residents applied and why they were found unsuitable, the number of South African citizens and permanent residents employed by the company and their identity numbers; police clearance certificates (unless otherwise indicated below). All applicants 18 years and older, in respect of all countries where person(s) resided one (1) year or longer; medical certificate(s); English translation of certificates and other documents, if submitted in a foreign language; proof of registration with a South African professional body, if applicable; cash deposit/bank guarantee for repatriation purposes; and a passport valid for at least 12 months.

Business permits

The following requirements must be complied with in the own business category: application forms BI-159: A & C duly completed; decree of divorce/court order, where applicable, as well as proof of maintenance paid to family members (also in case of separations); marriage certificate, where applicable; - full birth certificate(s) including family's where applicable; police clearance certificates (unless otherwise indicated below). All applicants 18 years and older, in respect of all countries where person(s) resided one (1) year or longer; medical certificate(s); English

translation of certificates and other documents, if submitted in a foreign language; proof of registration with a South African professional body, if applicable; cash deposit/bank guarantee for repatriation purposes; and a passport valid for at least 12 months; documentary proof of funds available in foreign currency for transfer to the RSA, consistent with the type of business to be established as well as to meet the daily running expenses in respect of the business and own subsistence; documentary proof of funds already transferred to South Africa via the South African Reserve Bank; certified documentary proof of audited financial statements of personal assets and liabilities in respect of the applicant as well as partners who may be involved in the venture, together with confirmation by banking institutions as to the amount in foreign capital available for transfer to the Republic for investment in the business; a feasibility/business plan; full details regarding the business intended, e.g. what commodities will be imported/exported, market surveys, expected income, number of people to be employed, proof of import and export permits; when investing in an existing concern, certified audited financial statements should be tendered in addition to the above-mentioned; certified copies of the registration certificate; a job description and *curriculum vitae* in respect of each key personnel to be employed; a repatriation guarantee equal to the cost of a single air fare from South Africa to their countries of origin; renewal of a permit will be subject to the documentary proof of additional foreign capital invested; audited financial and bank statements in respect of the business for the preceding twelve (12) months; proof that South African citizens/permanent residents are being employed; and proof that the business has been registered with the Receiver of Revenue. Permits are usually issued for a period of twelve (12) months and can be renewed annually at domestic offices for the same period.

Contract permits

In respect of contract workers from neighbouring countries (Mozambique and BLS countries) specific provisions are in place. Labour agreements have been signed between the Governments of the RSA and the above-mentioned countries, and workers are regulated in terms of section 40(1)(a) of the Aliens Control Act. At present no labour agreement exists between the RSA and Zimbabwe. No contract workers may thus be recruited from Zimbabwe and prospective workers from Zimbabwe are to follow the normal procedures of obtaining work permit.

The main differences between contract workers and persons with a work permit are following:

(a) When a person wishes to work in the RSA, he or she obtains an offer of employment, then applies for a work permit from the Department and if successful, enters the country on a temporary residence permit. This permit is thus the result of negotiation between the worker and the RSA authorities and the conditions set by the Department of Home Affairs, which may be altered (i.e. period of time, purpose etc.).

(b) The contract worker (national of Mozambique or one of the LBS countries) signs a contract with the prospective employer from within his or her own country of origin. This contract is then certified/attested by the local authorities of his or her country. On entering the RSA the immigration officer ascertains whether or not the documents presented are in order and ensures that the prospective employer was in possession of a valid recruitment authorisation from the RSA Government. This authorisation may be obtained from the RSA authorities after procuring certain undertakings to the State in respect of repatriation of the worker.

(c) There are thus four parties involved viz. the worker, the employer and the various governments. The Department of Home Affairs can therefore not take any decisions regarding contract workers without consulting all the relevant parties involved.

Contract workers must present the following documents on entering the RSA

(a) A valid passport/travel document/worker's document;
(b) a complete set of fingerprints (a double set in the case of TEBA recruits);
(c) a valid labour contract drawn up and attested/certified in his or her country of origin, with an undertaking by the prospective employer that the worker will be repatriated to his or her country of origin on completion/expiry or termination of the contract, without any cost to the State;
(d) a completed arrival form (BI-55);
(e) BI-17 'No objection permit' which was obtained from an office of the Department of Home Affairs and which authorises the recruitment of contract workers; and
(f) health requirements if applicable.

Work-seeker's permits

The difference between a work permit and a work-seeker's permit is that in the former case the applicant already has a firm job offer and employment contract, while in the latter case the applicant's appointment is still subject to negotiations and the signing of the relevant contract. Work-seeker's permits are issued in terms of section 26(1)(e) of the Aliens Control Act, 1991 (Act 96 of 1991). Applicants have to apply in the country of which they are passport/permanent residence holders, await the outcome and have their passports duly endorsed, prior to making travel arrangements to the RSA. These permits are valid for three (3) months only and may only be extended for short periods in "meritorious" cases.

Once the applicant has obtained the relevant permit, he/she may proceed to the RSA and should he/she receive an offer of employment, an application for the work permit and the relevant fee may be submitted at any domestic office of the Department for finalisation.

A passport valid for at least twelve (12) months is required together with a fully completed application form BI-159: A & B; an administrative fee; certified copies of educational qualifications; testimonials and certificates of previous employment; the region in which the applicant wishes to be employed; a letter from the employer(s) with whom a contract is to be negotiated/entered into; and a cash deposit/bank guarantee for repatriation purposes.

Study permits

It is a generally accepted principle that the international exchange of academic knowledge serves as stimulation for the development of the academic thinking of a country. Without research and the opinions of dissidents, the local academic field could stagnate.

In recognition of the importance of cross-cultural and academic stimulation and in view of the economic interdependence of South Africa and other African countries, the admission of a limited number of foreign students to local residential universities and technikons, at both undergraduate and post-graduate level, is left to the discretion of the respective institutions. The mere fact, however, that a student is accepted by an educational institution does not automatically imply that he/she will be issued with a study permit and it is therefore imperative that a prospective student await the outcome of an application for a study permit outside the RSA.

The overriding consideration in dealing with an application for a study permit is that no foreign student may displace a South African student at a local educational institution. Foreign students are currently still being subsidised by the South African Government to the same extent as South African students. (A case in point being the Gauteng Province currently spending R250 million annually on the education of illegal immigrants). Full payment by foreign students and foreign scholars is being investigated by the Universities and Technikons Advisory Council and will most probably go into effect in 1997. The Department of Home Affairs from its side consequently only requires that proof of adequate funds to both support the student during his/her stay in South Africa and to cover one year's tuition fees (or proof of bursary) in addition to a cash deposit or bank guarantee to cover possible repatriation and incidental costs plus a written undertaking that a student will leave the country on completion of his/her studies, be furnished before a study permit is considered.

According to the Aliens Control Act, 1991 (Act 96 of 1991) section 26(1)(d) and (5):a study permit may be issued to any alien who applies for permission to enter and temporarily sojourn in the Republic as a *bona fide* student at any primary, secondary or tertiary educational institution. Study permits are classified into two categories namely scholars or pupils who are still minors and wish to attend pre-tertiary studies at primary and secondary schools, and under-graduate and post-graduate students who wish to study at local residential universities and technikons.

In terms of section 26(2)(a), but subject to section 26(5) of the Act, applications for study permits may only be made from outside the Republic and a prospective student/scholar will not be allowed to enter the Republic until a valid study permit has been issued to him/her. Regulation 16(1) of the Regulations promulgated in terms of the Act furthermore stipulates that an application for a study permit referred to in section 26 of the Act must be made in the country of which the applicant validly holds a passport, or in which he/she normally resides and to which he/she returns after any period of temporary absence. Once an application for a study permit has been successful, an appropriate permit will be issued to the applicant in terms of section 26(3)(a) to enter the Republic and to sojourn therein, during such period and under such conditions as may be set forth in the permit.

A guarantee by a bank finally registered in terms of the Bank Act, 1990 (Act 94 of 1990) or an amount fixed by an immigration officer will in terms of section 26(4)(a) be collected from a student when lodging an application for a study permit. The said bank guarantee/cash deposit shall in terms of section 26(4)(b) either be refunded after final departure of a student from the Republic or at the expiry of the study permit and due to lack of funds be utilised upon acquisition of the student to cover the cost of his/her departure. Should a student fail to leave the Republic upon expiry of a study permit, the bank guarantee/cash deposit will in terms of section 26(4)(c) be forfeited to the State in order to cover all repatriation costs.

Although provision is made in section 26(6) of the Act for the renewal of or the alteration of the conditions subject to which a study permit was issued, a change in the purpose for which the permit was originally issued is not provided for and will not be allowed whilst the student is in the Republic. The Act furthermore does not provide for the extension or renewal of a study permit once such permit has expired and students should therefore be attentive to section 26(7) of the Act. In terms of the Regulations on Fees, a prescribed fee equivalent to 150USD in respect of tertiary institutions and 100USD in the case of primary or secondary institutions will be collected

upon receipt of an original application, whereas the prescribed fees for extension of study permits will only amount to R500 (100USD).

The following are requirements for tertiary students: duly completed application forms BI-159: A & F; a passport valid for at least twelve (12) months; an official letter of admission from the educational institution concerned stating that the foreign student will not displace a South African citizen and confirming details regarding arranged accommodation; proof that the applicant has sufficient funds to cover tuition fees, maintenance and incidental costs; a cash deposit/bank guarantee in an amount equivalent to the cost of an air ticket to the applicant's country of origin/residence for repatriation purposes, should this become necessary or forfeiture to the State if study permit conditions are not complied with (except in the case of students attending religious institutions or students attending courses for periods not exceeding twelve (12) months who must be in possession of a valid return/onward ticket, or in the case of students from Lesotho in respect of whom, in terms of a bilateral agreement, a deposit may also be waived); a written undertaking (as provided for on the application form) by the applicant that he/she will return to his/her country of origin/residence on completion of the specific course indicated; a medical certificate and particulars of arrangements made regarding medical cover; and the prescribed administrative fee equivalent to 150USD in respect of a study permit.

Students participating in approved international exchange programs are exempt from the requirements to provide full documentation and the formal duly completed application forms must be accompanied by a letter of registration from the relevant educational institution, a letter of confirmation of the guardian in South Africa and a return ticket. A work permit and registration with appropriate professional institutions are also required, if applicants are to be utilised in their professional capacities, whether they are remunerated or not.

Since many courses prescribe practical training as a requirement for qualifying for the degree, diploma students will be allowed to undergo such training on condition that the student is registered for the particular course whilst undergoing the practical training, provided that the fact that practical training is a requirement is stated on the application form or supporting documentation; and that a letter from the company/institution in the Republic offering the practical training is submitted.

Scholars/pupils

Only minors may apply for study permits in this category and since no foreign scholar may be granted admission to a specific school at the expense of a South African child, a declaration issued by the governing body of the relevant school must be submitted together with the prescribed application forms and should contain the following: confirmation that the candidate complies with the language requirements; confirmation that the governing body is satisfied that the candidate can pay the relevant fees (foreign scholars do not qualify for any state subsidies except those from SADC countries and children of accredited diplomats, with the result that these scholars are responsible for paying the full fees as prescribed by educational authorities in consultation with governing bodies of the schools); proof that the candidate has provided a written undertaking to leave the country on completion of his/her studies; and the grade in which the scholar will be placed.

The following additional documentation will be called for when an applicant lodges an application

for a study permit: application forms BI-159: A & F, duly completed; an own passport valid for twelve (12) months; a medical certificate, which may also be submitted directly to the school and the school shall confirm receipt thereof together with their declaration; written permission by both parents, since all applicants in this category are minors. In the event of the parents being divorced, a copy of the court order must be submitted, accompanied by a suitable letter of consent; confirmation of satisfactory accommodation arrangements should be submitted, since parents on visitor's permits may not accompany their children and such scholar may only be accommodated in an educational institution's boarding school/hostel or with close relatives of the applicant, e.g. grandparents who are South African citizens or permanent residents; and a bank guarantee for repatriation purposes, equivalent to the cost of an air ticket to the country of origin/permanent residence or in the case of a private school, confirmation that the school will take full responsibility in this regard.

Validity of permits

Study permits in all categories are issued for a maximum period of twelve (12) months and extended on an annual basis with the expiry date of 31 March of the following year of study, with the exception of a final year scholar, in which case the permit may only be extended until 31 December of the year of study.

Visitor's, business and medical permits

Visitor's, business and medical permits will mainly be issued at the port of entry should the alien hold an appropriate visa. In this respect a large number of countries are exempt from visa control for bona fide holiday or business visits and are allowed to enter the Republic for these purposes for up to three (3) months, the exception being citizens of countries e.g. the UK who have been completely exempt from visa control and may be issued with a temporary residence permit valid for the purpose and period requested. Aliens subject to visa control must apply for visas prior to their departure for South Africa and will not be permitted to enter the Republic without the necessary visa.

In terms of section 26(1)(a) of the Aliens Control Act, 1991 (Act 96 of 1991), a visitor's permit may be issued to any foreigner who applies for permission to temporarily sojourn in the Republic for any bona fide purpose. In terms of section 26(1)(c) of the Aliens Control Act, 1991 (Act 96 of 1991), a business permit may be issued to any foreigner who applies for permission to enter the Republic to attend to business matters, other than business matters for which a work permit is required. In terms of section 26(1)(f) of the Aliens Control Act, 1991 (Act 96 of 1991), a medical permit may be issued to any foreigner who applies for permission to enter the Republic for the purpose of receiving medical treatment.

In terms of section 11 of the Aliens Control Act, 1991 (Act 96 of 1991), foreigners wishing to enter the Republic for visitor's, business or medical purposes must be in possession of visas, if not exempt from visa control. In terms of section 23(3)(a) of the said Act, an immigration officer shall issue the temporary residence permit, free of charge, to holders of such visas or to persons exempt from such visa requirements, at the port of entry, if such persons meet with all the entry requirements. It is expected of foreigners to ensure that their permits are kept valid at all times and in terms of section 26(6) the validity of an existing permit may be extended from time to time by the Director-General. In terms of section 26(7), however, a person to whom a permit was issued and who remains in the Republic after the expiration of the period for which, or fails to

comply with the purpose for which, or condition subject to which it was issued, shall be guilty of an offence and may be dealt with under the said Act as a prohibited person.

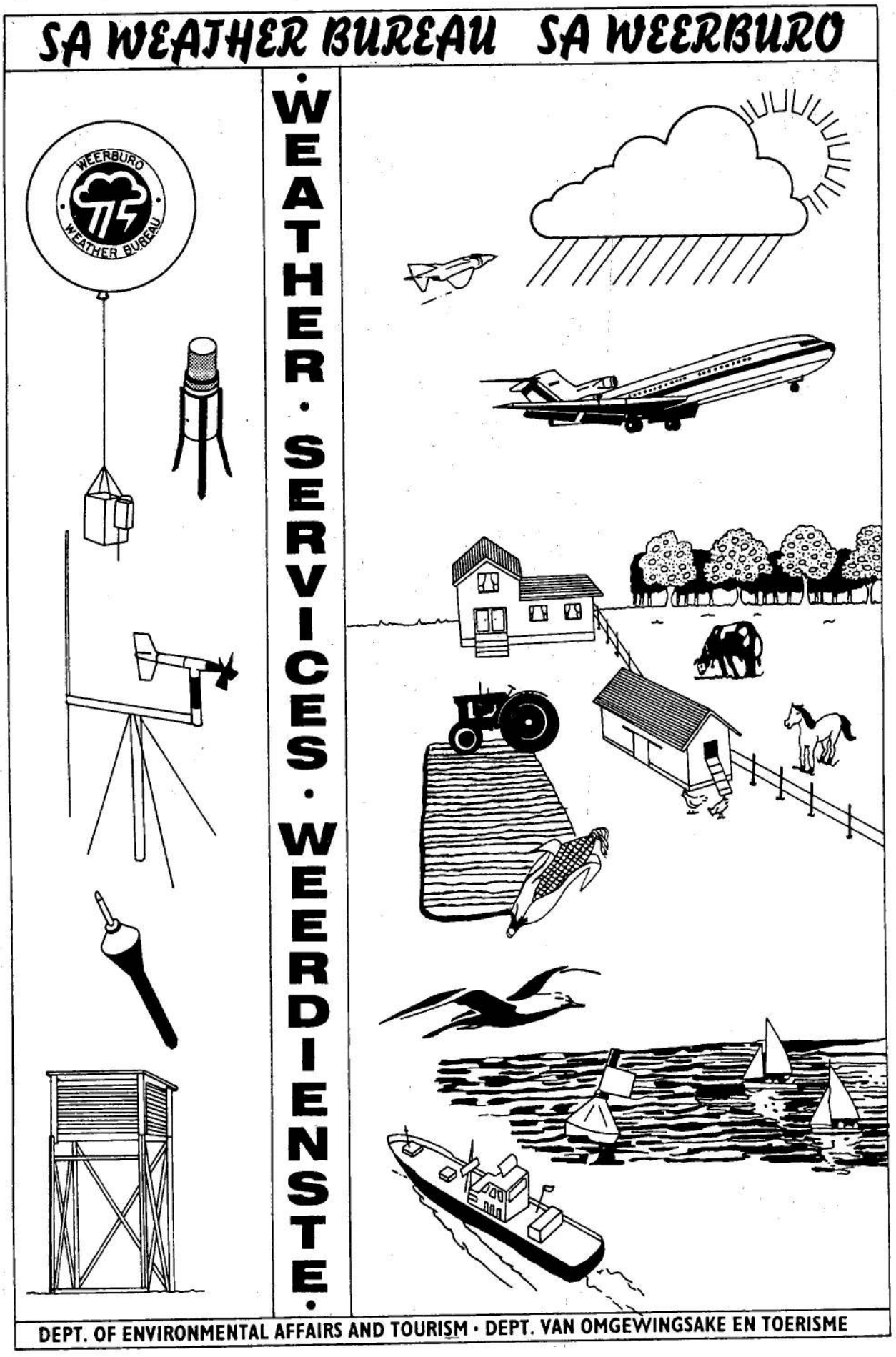
The following documentation must be submitted when lodging an application for the extension of a visitor's permit: BI-159: G (one (1) form per family, but the fee is levied per passport holder); a valid return ticket/cash deposit equal to the amount of a return ticket; an acceptable motivation as to why an extension is necessary and why the correct duration of stay was not applied for initially; proof of sufficient funds to sustain the applicant's extended stay; a copy of visa in passport (if applicable); and the prescribed fee of R150 and proof of hotel/guest house booking. Should residential addresses be provided, the host should confirm the applicant's purpose of visit in writing.

The following documentation must be submitted when lodging an application for the extension of a visitor's permit to accompany a South African or permanent resident spouse: BI-159: G (one (1) form per family, but the fee must be levied per passport holder); marriage certificate; South African identity document of spouse; letter from the spouse confirming support for the issuing of an extension; an indication of future plans; and the prescribed fee of R150.

Business stays may not exceed three (3) months, unless very well motivated and the following documentation must be submitted when lodging an application for the extension of a business permit: BI-159: G (one (1) application per family, but the fee is levied per passport holder); a letter from the South African company(ies) confirming and describing the business activities being undertaken by the applicant; return ticket; and the prescribed fee of R150.

Only private patients may be issued with medical permits and the following documentation must be submitted when lodging an application for the extension of a medical permit: BI-159: G (one (1) application per family); a letter from the doctor/hospital confirming the type of treatment, duration and that the expenses are paid; proof of funds to cover the medical expenses as well as subsistence expenses; and return ticket/cash deposit to the value of a return ticket. These extensions are granted free of charge.

It is normally only in exceptional circumstances that it is possible for any foreigner with a job, possessions and responsibilities in his/her own country of residence to visit a foreign country for extended periods of time. It would be expected of a foreigner envisaging an extended stay for visitor's, business or medical purposes to have timeously planned his/her visit and initially to have applied for a permit of the required duration.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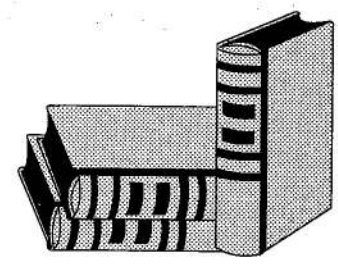

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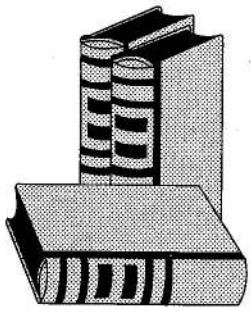

Waar is die meeste weerkundige inligting in die hele Suid-Afrika beskikbaar?

Department of Environmental Affairs and Tourism
Departement van Omgewingsake en Toerisme

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