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Mr Thulas Nxesi

Minister: Department of Employment and Labour

Department of Employment and Labour

Private Bag X65

Pretoria, 8000

Per email: [NLMP@labour.gov.za](mailto:NLMP@labour.gov.za)

Dear Minister Nxesi

**RE: BUSA SUBMISSION ON THE NATIONAL LABOUR MIGRATION POLICY (G 45962)**

## **INTRODUCTION TO BUSINESS UNITY SOUTH AFRICA (BUSA)**

BUSA is the apex body representing business in South Africa. It represents business on cross cutting issues relating to economic, social, trade, environment and transformation in national and international structures and bodies and is the representative of business in Nedlac.

BUSA was formed in 2003 and consists of organisational members representing unisectoral business organisations; corporate representative organisations; chambers of commerce & industry; and professional organisations. Our membership reaches across the sectors from AgriSA, to the Minerals Council of SA, the Steel & Engineering Federation of South Africa, the Hospital Association of South Africa and the Banking Association of South Africa. It includes chambers of commerce and industry such as the SBI, as well as representatives of corporate South Africa, such as the Manufacturing Circle and Business Leadership SA. BUSA seeks to be a constructive contributor to economic growth, social prosperity and transformation in South Africa.

## **EXECUTIVE SUMMARY**

Business welcomes the opportunity to comment on the Draft National Labour Migration Policy (NLMP) and the draft Employment Services Act Amendments (Gazette no 45962), published 28 February 2022, which give effect to this policy. The formulation of a comprehensive labour migration policy taking an inter-ministerial approach is supported by Business, recognising that such an integrated approach was advocated by Business in the earlier consultations on the White Paper on International Migration for South Africa (2017).

## **DETAILED INPUT**

The national labour migration deliberations are perceived to be timeous, whilst South Africa faces the triple challenges of unemployment, inequality and poverty, and the need to support and stimulate economic growth and create jobs. Such policy must aim to find a balance between protection of employment for South Africans and ensuring the skills required by the country for economic growth are accessible. The more open approach to skilled migration, as documented, to expand the supply of high skills in the short-term, in a manner which obviates displacements of South Africans is supported and government ensures advocacy against xenophobia.

### **Employers' needs of an effective labour migration system**

1. Transparency
2. Flexibility and Agility
3. Efficiency, Digitalisation and Enforcement
4. Consistency and Predictability
5. Ongoing Private Sector engagement on all labour migration policy matters
6. Recognition and Assessment of Skills
7. Responsible Recruitment Frameworks
8. Enabling an effective digital administrative capability

### **Key Migration Challenges:**

1. Skills shortages – both high and semi/low skilled workers
2. Lack of agile and flexible access to foreign nationals to address skills shortages
3. Operational challenges with administrative/ visa processes
4. Credible labour market information systems on which quota systems are based
5. The evolution of the workplace – gig workers, short term assignments, project work
6. Irregular migration – need for effective inspection and enforcement
7. All of government approach with applicable engagement model
8. Changing the narrative around the employment of foreign nationals and the value they can bring to economic growth, thus mitigating the rise in Xenophobia
9. Changing the narrative about the concept of work and empowering potential workers to make informed decisions about the importance of being gainfully employed.

The approach to addressing the country's Critical Skills needs, requires enhancements and far greater flexibility is needed to ensure there are no blockages of skills shortages hampering economic growth. Recognition of the dynamic nature of the labour market and agility applied to supply and demand, need to be understood in order not to hamper economic progression. The proposed narrow and inflexible approach to limit Critical Skills access fails to recognise:

1. That recruitment cannot be limited to high skilled occupations, as the need for lower and unskilled foreign nationals in areas of work such as agriculture, including but not limited to seasonal work, currently exists and must be addressed. Failure to provide timeous recruitment of such skills could have severe negative consequences such as impacting food security.
2. The preferences and freedom of choice of individuals, who may by choice not elect to take up a work opportunity.
3. Critical skills may be available in the country, but the geographical location (rural/ remote areas) may be a barrier to recruiting for these occupations.
4. The evolution of work, with new and obsolete occupations arising, with the current static CSL making no accommodation for 4IR & 5IR developments, and
5. Lessons learnt from the pandemic whereby this external disruptor created a high demand for specific skills.

The Act requests for a labour market check before a foreign national is offered a position and a corresponding visa application submitted. We would argue that this labour market check should not be applicable to those occupations that form part of Gazetted critical skills list, updated from time to time. The motivation hereof is that the Critical Skills list involves wide research by the Department of Higher Education and Training (DHET), a NEDLAC consultation process and public inputs. As such the determination has already been made that there is a shortage of skills in terms of these occupations. The proposed legislation to not exclude these occupations from this requirement places an undue burden on the employer and DEL for a determination already made by another Government Department.

Whilst new policy proposals are being considered, to achieve the desired compliance, implementation is a key challenge. Business seeks to raise its concern that in the current situation, Government, especially labour inspectorates, often face resource constraints and are unable to effectively inform, monitor, inspect and enforce existing laws and regulations. Any policy developments and enhancements must be considered with a view to ensuring there is effective implementation. Too often, the rules exist, but there is no capacity to enforce them. Many of the issues relating to illegal migration and allegations of exploitation and non-complaint rates of pay are compliance matters, to be addressed through better inspection and enforcement, and do not require policy changes.

Skills mobility, labour migration and the employment of foreign nationals have been part of recent discourses. While protecting local markets and enabling South Africans access to work, suitable mechanisms are needed for skills mobility, recruitment of critical skills and recognition of the need for timeous employment of valued skilled and low skilled foreign nationals, in a well-regulated environment, which controls and deters the steady growth of irregular migration. Cognisance needs to be taken of the competitiveness of labour markets, the need for effective skills access turnaround times, in a marketplace where “just in time” talent is a key element of workforce management and productivity enhancement.

Business acknowledges the Directive issued by Department of Home Affairs, in which Government announced and gave notice on 24 December 2021 that the limited permanent residency permits – Zimbabwean Exemption Permits (ZEP) - will not be renewed and the condition giving a 12-month grace period during which time ZEP holders and other such SADC dispensations, including the Angolan Special Dispensation, need to regularise their stay through normal immigration laws. An appropriate policy response is needed to address the SADC Regional Migration policy seeking to address technical elements such as portability of benefits and other regional migratory regulatory requirements.

Business believes it is premature to consider the introduction of quotas. An evidence-based labour migration policy needs to take cognisance of labour market needs, which does not have a negative impact on the rate of employment of local workers. Identification of critical skills is dependent on an effective labour market intelligence system (LMIS) and it is a key concern to Business that this policy is being considered for implementation, in the current situation, where there is a lack of credible labour market data. The policy reflects that the limited data available provides a very weak signal of skills demands in the country, and the proposal to consider introduction of quotas should be suspended, until such time as there can be evidence-based decision-making, which includes effective monitoring of skills availability in the country.

The proposed Quota system introduces a number of complexities, including the setting of such quotas, the monitoring and enforcement as well as the very broad definition of a sector, as proposed in the ESA Amendments which extends well beyond a sector. The present Employment Equity reporting addresses the employment of foreign nationals at company level, and it is recommended that this vehicle for monitoring and engaging on the employment of Foreign Nationals be continued, as adequate for DEL to engage with employers of such employees. Regulating the employment foreign nationals to be monitored through the Employment Equity Act may have unintended consequences as to what the EEA seeks to achieve. It is important to ensure that the “integration” does not erode the gains made in the transformation / employment equity space.

The objective in 2021 to review and align the national Critical Skills List to arrive at a common official national skills list aligned to the country’s social and economic priority goals, highlighted the need for improving data collection, co-ordination, and analysis as a matter of urgency. Business has raised its concerns that post NEDLAC deliberations, steps were taken to remove key occupations in healthcare from the list, which actions may have the unintended consequence of severely hampering social healthcare services, to the vulnerable public, in addition to constraining investment, growth and development.

Business is of the view that the policy appears to be highly ambitious. Noting the goal to strengthen a range of Public Employment Services (PES) deliverables including strengthening the work visa processing system, strengthening inter-ministerial co-ordination with relevant departments, the critical need for an effective inspectorate and for credible labour market data including supply and demand, Business perceives the aim to be overly ambitious in so far as the below:

- Extend Department of Employment and Labour Public Employment Services to offer placement services to global employers seeking South African workers,
- The objective to expose intending migrant workers to his/her contract of employment in the presence of an authorised labour official before the migrant embarks on his/her journey,
- The creation of a dedicated unit for the placement of South African work-seekers abroad,
- The planning, negotiation, conclusions, implementation and monitoring of bilateral labour agreements; and
- The monitoring of labour migration (diaspora) from South Africa.

A realistic, phased approach would need to be considered to ensure priority matters are addressed to ensure resource management in a constrained economy and a Ministry presently under resource challenges. Business would welcome sight of the planning; from short, immediate needs to long-term goals.

## DETAILED RESPONSE BY BUSINESS

### Section 1: Rationale, Background & Context

BUSA supports the rationale with the inter-ministerial approach is supported as detailed in paragraph 2.2.4 of the NLMP. We are of the view that this needs to be enabled by integrated databases.

We seek greater clarity on how the proposed quota system for foreign owned businesses might be imposed. Business generally advocates far greater flexibility in applying quotas and conditions, recognising that a one size fits all approach may deter vital foreign direct investment.

### Policy Development Context and Methodology

The principle of Labour Migration to and from South Africa which takes place in a manner which contributes to South African society, does not undermine its own labour protection regime and serves regional integration goals, is supported, however the ambitious goal to ensure labour migration from South Africa takes place in such a manner, appears to be challenging.

### The UN Global Compact for Safe, Orderly and Regular Migration

Business supports the guidelines of the Global Compact for Safe, Orderly and Regular Migration, a range of principles, commitments, and understandings re migration. South Africa participated in its development, and we contributed to the drafting of the objectives through the International Organisation of Employers and Global Forum on Migration and Development.

Objective 6: Facilitate fair and ethical recruitment and safeguard conditions that ensure decent work 22(g) conflicts with the principle of linking migration to work opportunities, by proposing the text, "*Develop and strengthen labour migration and fair and ethical recruitment processes that allow migrants to **change employers** and modify the conditions or length of their stay with minimal administrative burden*". We support the principle of skills migration linked to work opportunities and believe this conflicting view with the GCM should be noted.

### Section 2: Labour Migration Assessment (LMA) and Beyond: Conclusions and Recommendations

South Africa currently faces immediate skills shortages which constrain investment and economic growth. Business concurs with the Medium-Term Strategic Framework (MTSF) 2014 – 2019 that "*while measures are being put in place to develop scarce skills, it is also necessary to encourage in-migration of skills in the short-to medium term. Steps will be taken to ensure that the regulatory environment makes South Africa an attractive destination for skilled people*".

### Economic Background, Labour Market and Past Migration Policies

We recognise that there is ample evidence that the issuing of temporary residence visa and permanent residents' permits is not attracting the categories of international migrants who will contribute to the growth of the economy while in the country. Such migrants may be dependent on the state for social assistance and services and may be competing directly for low to middle level skilled work with unemployed South Africans. It is however recognised that migrants are and may continue to be required to provide low level skills, in such circumstances, where for several reasons, South Africans may make the choice not to pursue the work occupation, such as seasonal work, undesirable location or non-preferred work,

It is acknowledged that people have the freedom of choice and South Africa has been losing substantial numbers of skilled and experienced professionals to emigration (Page 31 – 2.1.6). Business is of the view that this is a complex matter; and factors which may influence the “brain drain” include:

- Global War for Talent
- BBBEE initiatives
- Freedom of Movement
- Undeclared work over borders
- Personal safety and security

It is recommended that the focus is on the policy matters relating to incoming talent, with South Africa positioned as the country of destination.

#### Governance of Labour Migration Since 2002

As there is no integration of databases or no integrated services to the public as yet, Business perceives the burden of reporting to seek to monitor and measure the “brain drain”, would fall on the private sector, which would add further undesirable reporting burdens on business and may not be a full, complete set of data.

The recommendations 2.2.5 for all aspects of labour migration governance should be consolidated and strengthened within the DEL, such enhancements have financial implications which need careful consideration in a constrained economy. An inter-ministerial approach towards securing a work visa adds additional timelines to the process and impedes on business’ ability to respond to labour constraints and the need for resources where urgently or strategically needed. A more detailed proposal on the implementation of this change is required to fully comment on the direct impact it will have on business and in turn on the economy where delays are experienced to attract key resources whether skilled, semi-skilled or unskilled.

#### Migration Trends and Developments Since 2001

It is reassuring to note that South Africa’s share of migrant workers to total employment according to the previous census fell within the international standard of 10% of total employment. It is essential that policy makers appreciate and recognise the value skilled migrants bring to the labour market. Business recognises that the NLMP has been designed to serve the overarching objectives of the National Development Plan (NDP) and other key national policy frameworks. The NDP recommends “*a labour market which is more responsive to economic opportunity*” and “*adopting a more open immigration approach to expand supply of high-end skills*”. The principle that the economy cannot function and grow without the value of foreign labour is key.

There is support for the regulation of Private Employment Agencies and the ratification of C181, to better regulate all industry players and to take remedial action to provide better protection for and equal treatment of all workers, including migrants. Article 7 of C181 recognises the principle of no fees for work seekers, which principle provides desired protection for vulnerable work seekers.

The lack of credible labour market data is acknowledged and a need for co-ordination of systems for analysis and statistical data.

*“The limited data available provides a very weak signal of skills demands in the country”.*

There is a need for a well-functioning Labour Market information system, to which labour migration planning and policy frameworks should be linked (Page 39 – 2.3.5).  
Until such time, as this is not evidence based, there should be flexibility in skills migration, in order to avoid creating barriers to economic growth.

The high sentiment of anti-immigrant is driving some of the policy decisions – need to ensure advocacy to promote migrant rights, those who have legitimate work permits and better manage illegal / undocumented migrants.

### Section 3: Guiding Principles of South Africa's National Labour Migration Policy

There is support for this section, endorsing the principles of equal opportunity, combatting discrimination and protection of migrant workers' fundamental human rights.

#### ILO Conventions and Protocols:

South Africa has ratified all fundamental ILO conventions although we have not yet ratified C181 the Private Employment Agencies Convention of 1997. The NEDLAC Decent Work Country Programme supported ratifying C181, which position Business supports.  
Business supports the Global Compact for Safe, Orderly and Regular Migration.

#### Other Relevant International Frameworks:

- ILO Principles and Operational Guidelines on Fair Recruitment.
- Supported by Business – endorsed by WEC (World Employment Confederation & included in GCM).
- International Organisation for Migration (International Recruitment Integrity System (IRIS)).  
The Confederation of Associations in the Private Employment Sector or the World Employment Confederation is abreast of developments and note concerns regarding an additional compliance, reporting requirement without integration or harmonisation with other national systems including Employment Equity and Broad-Based Black Economic Empowerment.

To support Skills mobility, there is a need to progress the alignment and finalisation of national qualification frameworks and systems, as currently being piloted in several SADC Member states.

The principle of focusing on unscrupulous employers, in order to reduce irregular migration is supported. This requires effective inspection and enforcement.

#### The Quota system

In the absence of credible labour market data to inform supply and demand, Business cannot support the introduction of a quota system. The proposals, too, do not reflect the current trends in workforce compositions, which vary, and the rationale that 60% of the applicant employer's workforce should be permanent staff does not take into account sectoral realities, the evolving forms of work, seasonal and workplace peaks and troughs, nor employees' preference for non-permanent forms of work.

This input was provided by Business in January 2019, during the public consultations on the draft Regulations on the Employment of Foreign Nationals.

Section 21(2) of the Immigration Act of 2002 refers to the principle of applying quotas, however no rationale has yet been provided as to the setting of the proposed 60/40 percentage. Business opposes the principle of imposing quotas, neither does it support the principle that such quotas be generally set at 60%, as is stated “*subject to a proper labour market analysis to confirm or review the set percentage*”. Such proposal requires further research before any further steps are taken.

#### Section 4: National Labour Migration Policy Thrust and Vision

Well-managed, labour migration can add benefits to stakeholders, including an opportunity to employers to benefit from the added value of a skilled foreign workforce; but poorly drafted, managed and implemented this could hamper economic growth, deter foreign investment and lead to job losses.

#### Section 5: Key Areas of Intervention

The four interrelated Key Areas of Intervention (KAI) are:

1. Labour migration governance and management
2. Data for evidence-based policy monitoring and evaluation
3. Labour migration to South Africa
4. Labour migration from South Africa

The ambition to strengthen the Department of Employment and Labour’s role in terms of matters relating to the emigration of South Africans abroad, in search of employment, is perceived as overly ambitious considering the limited resources and the high volumes of unemployed South Africans requiring Public Employment Services.

The governance of Private Employment Agencies by proposing presence of an authorised labour official as per 5.1.2.3, when contracting with a potential migrant worker, appears an unnecessary bureaucratic barrier.

The proposal that Public Employment Services establish and capacitate a dedicated unit for the placement of South African work seekers abroad, 5.1.2 of the NLMP significantly shifts Public Employment Agencies from the mandate to assist vulnerable work seekers, the employed and displaced workers and directly competes with Private Employment Agencies. It is our view that these services should be complementary and not competitive.

The proposed changes to the Immigration Advisory Board are supported, as the current situation of individuals being appointed in their personal capacity, has created gaps in information and communication and in its present form, the Board does not add value to Business (page 76 – 5.1.4.1).

The extension of the role of an existing structure – the Employment Services Board (page 77 – 5.1.4.3)– is supported, as opposed the creation of a further structure.

The need for inter-ministerial co-ordination in terms of paragraph 5.1.5.2 of the NLMP is currently one of the weakest points in the management of labour migration in South Africa must be addressed and improved through integration and efficiencies. The establishment of a skill-planning mechanism which is the primary responsibility of DHET, requires collaborative work between various ministries.



The importance of data for evidence-based NLMP monitoring and evaluation has repeatedly been highlighted by Business as a burning priority, to ensure evidence-based and informed decision-making.

Business is concerned about issues relating to the data sources of the proposed Emigration module as per 5.2.2.2 in order to monitor South Africans residing abroad for purposes of employment.

The deficiencies in the Critical Skills List processing, as set out in 5.3.3.7, have been raised and it is not perceived by Business to be “proactive recruitment of foreign skills”.

The approach to skills transfer measures is supported as the requirement needs to be adapted to the relevance and type of qualification and skills brought by the foreign national, taking cognisance of the availability for upskilling too (5.3.3.10).

Business welcomes the approach to the retention of skills (5.3.3.11) including but not limited to:

- Joint visa procedures for spouse and dependents
- Automatic issuance of work visa for spouse and dependents

The imposition of quotas as set out in 5.3.4, with the aim to protect job opportunities for local workers has been addressed and although recognising enabling legal provisions would need to give this effect, Business submits it is premature to consider such a system in an environment where there is clear acknowledgement that labour market information is weak, and as noted in 5.3.4.4, quotas must be informed by labour market evidence.

The recommendations relating to Private Employment agencies including compliance with contracts of employment, (5.3.5.4.) where the PrEA (Private Employment Agency) is the employer, are supported as is the progressive consideration of self-regulation by the industry confederation, as indicated in 5.3.5.7 which sets and manages the professional standards for its members.

The capabilities and financial resources for DEL to deliver on 5.4 Labour Migration from South Africa (page 98 – 5.4.1.1) is questioned given the complexity of the matter. Practical challenges such as funding Incentives to stay and Incentives to come back need further clarity.

#### Section 6: Summarised Conclusions and the Way Forward

It is noted that timelines require adjustment. Business would welcome an indication in terms of timeframes envisaged for taking the policy to market.

We thank the Department for the opportunity to provide written input into the National Labour Migration Policy and will make ourselves available should Department officials wish to engage further on the submission above.

Kind regards



**Cas Coovadia**  
**CHIEF EXECUTIVE OFFICER**

