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Dear Scott and Mark,

RE : WORK PERMITS AND VIPA APPROVALS

I refer to your recent emails concerning the work permit issues that have arisen in dealings between a foreign investor and the Labour Department.

You have sought our advice on 2 issues. As I understand it the first issue has been the subject of a ruling from the Labour Office, but the second issue may be more hypothetical.

First issue

As I understand the background, the issue arises out of circumstances where you have a person who, broadly described, is an 'approved foreign investor' ("AVI"), that is, someone who is carrying out an investment activity that is registered with the Vanuatu Foreign Investment Promotion Agency under the Foreign Investment Act 2019 ("FIA"), and flowing from that registration the AVI holds a residence visa. No distinction is drawn between whether the AVI in his/her registered business employs non-citizen employees.

However, outside the operation of that business, the AVI has been approached to take up employment with a business in Port Vila and in order to take up employment a work permit is required for that purpose.

As I understand your instructions, the Labour Office has taken the view that a person who has their residency on the back of obtaining registration/approval under the FIA, such as the AVI in this case , cannot at the same time be employed by another business for which a work permit would need to be obtained.

Second issue

As I understand it, the issue is whether a non-citizen employee working under a work permit and in turn holding a residence visa tied to their non-citizen

employee status can apply to carry out an investment activity registered under the FIA whilst remaining a non-citizen employee for a third person.

Advice re first issue

The logic for the Commissioner's view, as set out in your note, does not in my view accord with the meaning and effect of the legislation.

Critically, pertinent sections of the Labour (Work Permits) Act [Cap 187] (as amended) (the "Act") relevantly provides:-

Section 2(2):- "*Every employer who wishes to employ any non-citizen worker shall make application for a work permit to the Commissioner of Labour in the form and manner prescribed in Schedule 1.*"

Section 3(1) provides:- "*An employer to whom a work permit is issued under this Act....*" - (My underlining)

In short, the underlying process under the Act when a work permit is required is for the employer to apply for a work permit in respect to an intended employee who is not a Vanuatu citizen, but the work permit is a permit held by the employer permitting that employer to employ the non-citizen named in the permit. The permit is not the employee's permit.

As you correctly note, Section 5A of the Act relates to persons who have applied for and obtained registration of their investment / approval to carry on business in Vanuatu under the FIA, such as the AVI, and as part of the approval it entitles the AVI, in their capacity as an employer to be issued with work permits under the Act, that is in respect of non-citizen employees that the AVI wishes to employ. It is not in any sense a restriction under the Act preventing an AVI being employed in another business. It is not a relevant provision in my view.

Section 5B(3) of the Act provides that the AVI does not require a work permit to enable himself or herself to carry out their activities involved in the business investment the subject of their approval. It simply confirms that the AVI working within his/her registered/ approved business does not require a work permit to do so.

Unless there are express restrictions within the terms of the foreign investment approval provided to the investor to establish and carry on business in Vanuatu, which restrictions prevent that person working for another employer, then we do not see anything within the Act which otherwise prohibits a person who is an approved foreign investor and who has residency in Vanuatu from being employed by an employer who wishes to employ a non-citizen who just happens to be an approved investor in the country.

The reference in Section 5D(1) to a work permit granted to a foreign investor is simply a reference to a work permit issued in respect to the employment, within the business of the AVI, of a non-citizen. It is not a reference to the circumstances at issue here.

In short, in our view there is no prohibition or restriction in the Act which prevents an employer applying for a work permit to employ the AVI. Residency is a prerequisite to employment, but unless there are express prohibitions around employment within the AVI's residence permit, then there should be no issue.

You will see in section 2(4)(d) of the Act that when the work permit is issued by the Commissioner of Labour it has to contain "*details of the residence permit of the employee in cases where the employee is subject to immigration control.*"

When the Immigration Act is considered, s.30 and s.30A respectively provide for the grant of a residence visa and a permanent residence visa and s.45(2) relevantly provides:-

> ***45 Employment and commercial or business activities***
>
> *(2) The holder of a residence visa may:*
>
> > *(a) subject to the Labour (Work Permits) Act [CAP. 187], commence or continue in any employment in Vanuatu.*

As noted, the Act requires the holding of a residence visa, but there is no limitation in the Immigration Act per se dealing with the point in issue. Instead there is a reference back to requirements and pre requisites of the Act which impact the right of the holder of a residence visa to take up employment.

Unless the residence visa has express limitations in relevant terms attaching to it which prevent that individual from working other than in the business for which foreign investment approval has been obtained, then I can see no basis for the restriction which the Labour Office is seeking to impose. The refusal to grant a work permit in respect to the employment of an AVI on the grounds relied upon by the Labour Office would seem, on its face, to be unlawful.

Section 7 of the Act sets out the matters the Commissioner is to consider when an application is made

> *In considering any application made for the issue of a work permit or for the renewal or extension of a work permit or for the amendment of a work permit to authorise a change of employer or change of occupation, the Commissioner of Labour –*
> *(a) shall ascertain whether the employer has advertised the vacant position adequately and whether any suitably qualified citizen worker has applied for the position or has sought similar employment, and*

(b) may have regard to such other matters as he considers relevant and in particular –

(i) the employment record of the employer;

(ii) the ability of the employer to provide reasonable training facilities for a citizen-worker counterpart to a work permit holder;

(iii) the professional or technical qualifications and experience of the prospective employee;

(iv) the protection of local and national interests; and

(v) whether the conditions of employment offered are in conformity with the laws of Vanuatu and with the terms of any collective agreement which may be in force in respect of the industry or occupation concerned, if any.

Whilst the Act does not support the position taken by the Commissioner reliant upon s.5A, she may argue, reliant upon the underlined words in s.7, that her discretion to refuse is sufficiently widely premised as to justify refusal on the grounds that it is against the national interest to permit investors to take jobs beyond the investment element of their visa. The visa as issued under the Immigration Act would suggest otherwise, given the wording of s.45 (2) (a) set out above.

What I would suggest, is that a letter is sent to the Labour Office disputing, in a respectful and reasoned manner, the ruling which appears to have issued, and asserting that it is not a valid basis for refusing a work permit and indicating in that letter that if a work permit continues to be refused on the grounds they have suggested, that would give rise to a claim for judicial review to challenge the exercise of power beyond the limits of the power granted to the Commissioner to consider applications for work permits. In short that commissioner has applied and relied upon an irrelevant and unlawful considerations in refusing the grant of the permit above and beyond any lawful grounds upon which permits can be refused under the Act.

If the intended employer is itself the holder of a FIA registration / approval which sanctions the grant of work permits in favour of that investor for the engagement of non-citizens in their business, then that would be an added element to include in the letter to the Commissioner.

Advice re second issue

A person who is the beneficiary of a work permit granted to his/her employer, must hold a residence visa.

The FIA allows for any "foreign investor" (as defined in the FIA) to apply for registration / approval. The FIA does not exclude from the term "foreign Investor", a person already holding a residence visa. So in short, there is no prohibition in the legislation against a person working under a work permit and residing in Vanuatu applying to

carry on a business in addition to being employed. The employer may have something to say about it under the terms of any restrictions on operating other businesses whilst employed but that is a separate issue not considered here.

Again, on its face, there are no statutory provisions I am aware of that would prevent, in principle, a person from working under a work permit whilst at the same time gaining approval for, and operating a business.

Summary

It is not known if there any policy considerations attaching to either of these issues that we have addressed which may result in any intransigence shown to what on its face is not a prohibited application. That may only evidence itself when the bureaucrat is challenged about their decision making.

Please feel free to call me to discuss any aspect of the above with a view to advancing the matter with the Commissioner as necessary.

Yours sincerely
RIDGWAY BLAKE LAWYERS

Garry Blake