

REQUIREMENTS FOR FOREIGNERS TO OWN A BUSINESS IN KENYA

By formAKenyanCompany.com

Foreigners who want own, or run a business in Kenya, need to have a work permit from the Ministry of Immigration or risk deportation. There are generally two types of permits that foreigners would apply for: a Class H permit or a Class A permit. The type of permit applied for depends on whether the foreigner will be an owner of the business or simply an employee. This article outlines the procedure and requirements for application for the different class of permits..

LEGAL PROVISIONS REGARDING WORK PERMITS

It is illegal for any non Kenyan to enter or work in Kenya without a valid work permit. The exact provisions of the **Immigration Act (Cap 172, Laws of Kenya)** are as follows:-

Section 4 (1) *“Subject to this Section, no person who is not a citizen of Kenya shall enter Kenya unless he is in possession of a valid entry permit or a valid pass.”*

(2) *“...the presence in Kenya of any person who is not a citizen of Kenya shall, unless otherwise authorized under this Act, be unlawful unless that person is in possession of a valid entry permit or a valid pass.”*

Section 13(2) (f)- *“A person who, not being a citizen of Kenya, engages in any employment, occupation, trade, business or profession, whether or not for profit or reward, without being authorized to do so by an entry permit...shall be guilty of an offence and be liable to a fine not exceeding twenty thousand shillings or imprisonment for a term not exceeding one year or to both.”*

Section 13(2) (g) provides for a similar penalty for

“Any person who employs any person (whether or not for reward) whom he knows or has reasonable cause to believe is committing an offence under paragraph (f) by engaging in that employment.”

If convicted of either of these two offences, deportation will invariably follow. The fact that an application for a work permit has been lodged does not entitle someone to work in Kenya, and cannot therefore be a defence in the event of a criminal prosecution.

CLASS H WORK PERMIT

A Class H Work Permit is applied for by foreigners who will be shareholders in the business. To apply for a Class H Work Permit, it is necessary that the company first be registered.

Company Registration

To register a limited liability company (LLC) in Kenya you will need:

1. two shareholders
2. two directors

3. A registered office within the republic of Kenya (both physical and postal address).

One does not require a work permit before registering the company, it is not a pre-requisite. In fact when applying for a class H work permits, it is a prerequisite that the company first be in existence.

Restrictions on Ownership

For certain types of businesses, there are legal restrictions on foreign ownership either wholly or partly. For instance, private companies that intend to purchase agricultural property in Kenya cannot have foreign shareholders at all. For telecommunications companies, at least 30% of the shareholding must be taken up by Kenyans.

Requirements as to Nominal Capital

There are certain businesses where the various laws require certain limits of nominal capital to be met (regardless of whether it is owned by locals or foreigners). For instance the businesses of banking, insurance, foreign exchange, and security firms require certain minimums for nominal capital.

Procedure for Application

The requirements for applying for a Class H Work Permit are:

1. That the applicant must have already existing company
2. That the applicant must have proof of sufficient capital. Foreigners are restricted from carrying out petty business in Kenya, and therefore the applicant must show proof of a substantial amount to invest in Kenya to justify award of this work permit. This proof is either:
 - a. A local bank account statement in the sole names of the applicant which shows that he has 100,000 USD in his control; or
 - b. An auditors Report on the company issued by a duly registered auditor which shows that the applicant has invested the said USD 100,000 already.
3. A list of directors issued from the Companies Registry;
4. A tax PIN certificate of the applicant;
5. Two passports size photographs;
6. A duly filled application form;
7. Payment of the prescribed fees.

CLASS A WORK PERMIT

A foreigner may choose to apply for a Class A Work Permit where he expects to be employed by the company. This is a relatively more difficult permit to get especially if the work for which the applicant is employed is something that local expertise can meet. This stems from ministerial policy to prevent companies from giving foreigners work which Kenyans can do.

Procedure for Application

An applicant is required to have the following before applying for this class of work permit

1. Form 3 Application for an entry permit. This form is issued by the Ministry of Immigration and it must be completed and signed by the employer and is submitted in duplicate.
2. Two passport-size photographs of the applicant;
3. Copies of the applicant's educational and professional certificates;
4. Originals of the applicant's educational and professional certificates which the immigration office will verify and return;
5. The applicant's curriculum vitae signed and dated;
6. A letter from the employer explaining why the applicant is suitable for the position, why the applicant was offered the job as opposed to a Kenyan citizen and setting out the applicant's strengths e.g. experience, training ability, qualifications etc.

NOTIFICATION OF APPROVAL/REJECTION

Once the application is submitted at the Ministry of Immigration it shall be presented to a committee for approval. This process may take between two and six months depending on how many times the committee sits and the number of applications they must process.

The committee will usually consider the following things when deciding whether to approve or reject the application:

1. The amount of investment and its impact on Kenya's economy, which is determined by the auditors report or bank statement
2. The number of jobs that will be created for Kenyans, which is determined by the application letter submitted by the applicant's agent
3. The nationality of the applicant. An applicant has a higher chance of approval of his application if his or her country of origin has a stronger economy's than that of Kenya and low criminal statistics and security threats

For both types of work permit applications where the application is approved a Notification of Approval will be issued. If it is rejected, a Notification of Rejection will be issued. This Notification of Approval is valid for ninety days pending payment of the government fees.

For a Class A permit if the application is approved a security bond of KES. 100,000/= from either a bank or insurance company should be furnished and a fee of KHz. 100,000/= per annum should be paid, although it is preferable to pay KES. 200,000 for two years. The entry permit is then endorsed on the applicant's passport.

APPLICATION FOR REGISTRATION AS AN ALIEN

All foreigners who remain in Kenya for more than three months (90 days) must register as an alien and get an alien registration card. The requirements for this application are:-

1. Filling and signing of the statutory form
2. Presentation of the application to the Immigration Department by the applicant in person;
3. The application must be accompanied by:
 - a. Two passport-size photographs (either colored or black and white and taken not more than 12 months earlier) of the applicant;

- b. a valid passport or some other official document establishing identity and nationality;
and
- c. The prescribed fee

DIRECT APPLICATION VS APPLYING THROUGH AN AGENT

An applicant may make an application directly or choose an agent such as a law firm or consultancy which specializes in permit applications to pursue their application. There are advantages and disadvantages to both methods with the main advantage in direct application being the saving of fees paid to the agent. The primary disadvantage of direct application is that such applications take a long time to receive a notification. Where the applicant uses an agent to make his/her application they will usually benefit from the speed and experience of the agent.

While every effort has been made to ensure the accuracy of this publication, it is not intended to provide legal advice as individual situations will differ and should be discussed with an expert and/or lawyer. For specific technical or legal advice on the information provided and related topics, please contact the author.