



**Discussion Paper**

of the

**Proposed Amendments**

to the

**Immigration Law (2006 Revision)**

Laid on the Table

of the Honourable Legislative Assembly

on 13<sup>th</sup> September 2006

by the Hon. D. Kurt Tibbetts, JP, Leader of Government Business

## **The Immigration (Amendment)(No.2) Bill, 2006**

### **EXPLANATORY NOTES**

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In 2005 the Cabinet appointed a committee called the Immigration Review Team, 2005 (IRT, 2005) under the chairmanship of Mr. David Ritch, Chairman of the Work Permit Board to undertake a review of the Immigration Law 2003. The committee comprised the Chairpersons of the Business Staffing Plan Board and the Caymanian Status & Permanent Residency Board, the Cabinet Secretary, the Chief Immigration Officer, several elected members of the Legislative Assembly and a representative from the Legal Department.

The purpose of the review was both to address a number of anomalies and technical deficiencies that had come to light since the coming into effect of the law in January 2004 and also to create more stringent provisions in relation to immigration offences.

Following the submission of a report by the IRT 2005, the Cabinet appointed a second committee called the Cabinet Committee on Immigration Review to consider the recommendations of the IRT. The Cabinet Committee on Immigration Review comprised all Ministers and Members of Cabinet, the Chairperson's of the Business Staffing Plan Board, the Work Permit Board, the Caymanian Status & Permanent Residency Board, the Chief Immigration Officer and the Cabinet Secretary as Chairman. The review by Cabinet of the recommendations made by the committee is now complete and a significant number of amendments are to be put before the legislature in the form of a Revision of the principal law in the coming weeks. But before doing so the Government is inviting public input in relation to the proposed amendments. To facilitate this exercise this paper summarises and explains the key changes.

#### **Part I - Introductory**

It is proposed that several definitions contained in Part 1 of the principal law are to be created or amended:

“Offence”: The definition contained previously was not sufficiently wide to permit the respective Boards to take action against either a work permit holder, Permanent Residence holder or Caymanian Status holder where the relevant Board is of the opinion that the nature and circumstances of what has happened is sufficiently serious to warrant a revocation. The scope of the definition is to be broadened to allow the revocation of a temporary work permit, a work permit, permanent residence or the right to be Caymanian (previously Caymanian Status) (except for Caymanian Status granted under sections 22 or 27 of the Immigration Law, 2003) at a lower threshold where it is considered in the best interest of the community to do so.

“Legal and ordinary residence”: The definition is to be amended to clarify which absences constitute a break in residence in the Islands. Under the new definition absences abroad of six consecutive months or less for the purposes of education, health, vacation or business shall count as residence in the Islands. Absences abroad of more than six consecutive months but less than one year shall raise the presumption that there has been a break in residence. Absences abroad for twelve consecutive months or more shall constitute a break in residence.

“Automatic acquisition”: It is proposed that the right to be Caymanian by automatic acquisition be replaced in section 20(1)(d) of the law by the right to be Caymanian by entitlement. The definition for ‘automatic acquisition’ will therefore be deleted and a new definition created for ‘by entitlement’ (see below).

“By entitlement”: In relation to the right to be Caymanian under section 20(1)(d) this is to be defined as meaning entitlement by a person by virtue only of his being, in the determination of the Chief Immigration Officer:

- (a) the child of a Caymanian;
- (b) under the age of eighteen years; and
- (c) legally and ordinarily resident in the Islands for a period of not less than one year.

This inserts a minimum period of residence before a person may qualify for the right to be Caymanian by entitlement. However, provision is also to be made for children who are believed to possess the right to be Caymanian by entitlement to enter, remain and attend school in the Islands pending the outcome of an application for acknowledgement of the right to be Caymanian.

## **Part II – Administration**

### **Appeals**

It is proposed that appeals against a decision of an Immigration Officer will now be made to the pertinent Board rather than the Work Permit Board as is the case presently. Also, the categories of decision that may be appealed are to be expanded to include the refusal of a Temporary Work Permit and the refusal of an application for a Person of Independent Means.

The conduct of appeals contained in section 16 of the law has been re-drafted to give effect to a new procedure. Upon receipt of a notice of appeal the Board or the Immigration Appeals Tribunal ("IAT") will within fourteen days notify the Immigration Officer or the Board, as the case may be, of the decision against which the appeal is made.

The Immigration Officer or the Board then has twenty-eight days to submit to the Board or the IAT, as the case may be, and the appellant the reasons for his or its decision. The appellant will then have twenty-eight days to file his grounds of appeal and upon receipt of such grounds the Immigration Officer or the Board will have the opportunity to file a written defence.

The appellant will still have the option of being heard personally at the hearing and appeals to the IAT will be by way of rehearing. The section also makes provision for the IAT when hearing an appeal to take into account fresh evidence and any change in circumstances that may have arisen in relation to the parties.

### **Part III – Right to be Caymanian**

#### **Right to be Caymanian by 'automatic acquisition'**

Section 20(d) of the Immigration Law, 2003 provides that a person is deemed to possess the right to be Caymanian if he has obtained the right by automatic acquisition. It is proposed that the words 'automatic acquisition' be replaced by the words 'by entitlement'.

#### **Acknowledgement of the right to be Caymanian**

It is proposed that a person who believes that he possesses the right to be Caymanian may apply to the Chief Immigration Officer for the formal acknowledgement of that right in his passport. Whilst the need for the acknowledgment for the right to be Caymanian has always been recognized there was no statutory authority for the practice. The Chief Immigration Officer is also to be given the power to cancel the passport acknowledgement in cases where by application of law a person loses his right to be Caymanian. There will also be a right of appeal to the Caymanian Status & Permanent Residency Board in respect of the Chief Immigration Officer's decision.

### Application for the right to be Caymanian on the basis of marriage to a Caymanian

It is proposed that the existing section 22(5) of the law be re-drafted to clarify how any period of time that an applicant and their spouse have been apart is to be calculated. Rather than giving examples of every circumstance that is an exception, the Board will now have wider discretion to make the determination as to which absences should be taken into account.

### Application for the right to be Caymanian by the surviving spouse of a Caymanian

It is proposed that the existing section 22(6) of the law be re-drafted to insert a provision for persons who are living apart generally as opposed to under a decree of a competent court or under a deed of separation. This recognises that few married couples live apart under a formal separation whereas many couples are simply living apart because the marriage has irretrievably broken down but they have not taken formal steps to dissolve the marriage.

## **Part IV – Permanent Residence**

### Residential Certificate for Entrepreneurs and Investors

It is proposed that this category of residence be abolished. Since the coming into effect of the Immigration Law, 2003 in January 2004 there have been no successful applications. This is due mainly to the very strict criteria to be satisfied and it is considered that any lowering of the criteria would attract abuse of the category.

### Residential Certificate for Persons of Independent Means

It is proposed that the residence category of 'Residential Certificate for Retirees' in the Immigration Law, 2003 be replaced by 'Residential Certificate for Persons of Independent Means'.

The reason for the proposed change in title is due to changes in the requirements. The principal law is to be amended to remove both the qualifying age limit of 55 years and the present prohibition on dependants under the age of eighteen years. These proposed changes recognise that persons are now retiring at a much younger age and that it is likely that such retirees may have children who are minors.

Although the principal law gives the Caymanian Status & Permanent Residency Board discretion to allow persons under the age of fifty-five to apply for a Residential Certificate for Retirees it was recognised that the two-stage process of having to apply first to the Board if the applicant was under the age of 55 and then to the Chief Immigration Officer was unnecessarily cumbersome. The relaxation of the requirements for this category of residence will, it is hoped, attract increased investment in the Islands due to the fact that the category has removed the minimum qualifying age. A person granted a Residential Certificate for Persons of Independent Means and any dependants approved by the Board to be included with the grant will still not be allowed to work. A right of a dependant child to reside in the Islands will also cease (as is the case in the principal law) upon completion of his full-time tertiary education or when he reaches the age of twenty-four years, whichever happens earlier.

It is also proposed that the Chief Immigration Officer be granted the power to vary a Residential Certificate for Persons of Independent Means in certain circumstances to add or delete dependent children. Dependent children who were listed in the original application for the Certificate who have attained the age of eighteen years and who are of proven good character will be permitted to apply for the grant of permanent residence in the same category as those persons who have resided in the Islands for at least eight years.

#### Persons legally and ordinarily resident in the Islands for eight years

It is proposed that the category of persons eligible to apply for the grant of permanent residence on the basis of legal and ordinary residence for a period of eight years is to be expanded to include persons who continue to be legally and ordinarily resident and those persons who have ceased to be so resident but who submit their application within ninety days of ceasing to be legally and ordinarily resident.

This builds in a measure of flexibility for the benefit of the applicant and removes the previous situation where there was technically only one day upon which a person could apply for permanent residence. In considering an application for permanent residence under this category the Caymanian Status & Permanent Residency Board is required to grant or refuse the application in accordance with the score attained by the applicant under the points system. This makes it clear that the Board would not have discretion to grant permanent residence to persons who do not meet the requisite number of points under the points system.

It is also proposed that where there is a change in the number of children who are dependants of the holder of a Residency and Employment Rights Certificate and who are born after the issue of the Certificate the Board must amend the Certificate upon the request of the holder to include any additional children.

The Caymanian Status & Permanent Residency Board will also be given the power to vary or amend the terms of the grant of permanent residency under any repealed law to add or remove dependants. And dependant's so removed will have the right to apply to the Board for the grant of a Residency & Employment Rights Certificate in his own right. This proposed amendment corrects an omission from the Immigration Law, 2003 in that the Board did not have the power to amend or vary permanent residency status that was granted under a previous law.

### Spouses of Caymanians

It is proposed that the Law be amended to remove spouses of Caymanians from the work permit system. This will reduce the number of work permit applications before the Boards and thereby improve efficiency in processing times. Spouses of Caymanians will be required, if they intend to work, to apply to the Caymanian Status & Permanent Residency Board for the grant of a Residency & Employment Rights Certificate as provided for already by the principal law.

However, since there may be delays in processing such applications by the Caymanian Status & Permanent Residency Board a new system is being introduced whereby a spouse of a Caymanian may apply directly to the Chief Immigration Officer who will be given authority to grant a provisional or temporary Residency & Employment Rights Certificate for a period of six months. If approved, this will enable the spouse to begin work very quickly and continue to work whilst awaiting the outcome of their application to the Caymanian Status & Permanent Residency Board. If the latter is approved, the Certificate will be valid for seven years from the date of the application. Although the proposed amendments to the law will prohibit a spouse of a Caymanian from applying for a work permit, the spouse may continue to work under the terms and conditions of any work permit that is in force at the date of commencement of the amending legislation.

It is also proposed that the requirements that must be taken into account when considering an application by a spouse of a Caymanian for a Residency & Employment Rights Certificate are to be amended to the effect that the character of the non-Caymanian applicant must be taken into account. This corrects an error in the principal law which required the character of the Caymanian spouse to be taken into account.

## **Part V – Gainful Occupation of non-Caymanians**

### **Work Permits and Key Employee Status**

It was thought desirable to replace the term Exempted Employee and substitute Key Employee to clear up the belief that an Exempted Employee was exempt from the entire Term Limit provisions of the Law.

The powers of the both the Work Permit Board and the Business Staffing Plan Board to refuse applications for work permits are to be more clearly defined to combat abuse of the work permit system and to create provision for the refusal or revocation of work permits of persons who are convicted of offences under the Immigration Law and/or who have been fined by an Immigration Officer under the provision contained in the law.

With respect to key employee status a number of important changes are proposed. Employers are to be provided with the benefit of applying for key employee status for their employees at any time prior to the expiration of the worker's final work permit or a Fixed Term Work Permit. Previously, the employer could only apply for key employee status at the same time as applying for the grant or renewal of a work permit. This created the situation where many employers missed the opportunity to apply for key employee status in respect of a worker and this understandably caused unreasonable hardship to many employers and employees alike.

It is also proposed to amend the principal law to the effect that any length of time spent in the Islands after the expiration of a person's final work permit or his Fixed Term Work Permit pending the outcome of an application to have the person granted key employee status shall not be taken into account by the Caymanian Status & Permanent Residency Board in determining his length of legal and ordinary residence in respect of an application for permanent residence in the event that the application for designation as a key employee is denied.

Where a worker is designated as a key employee it is proposed that the law be amended to create a presumption in favour of renewals until that worker has been legally and ordinarily resident in the Islands for a period of nine consecutive years to enable him to apply for permanent residence. This presumption may however be rebutted in certain circumstances including where a qualified Caymanian is available and desirous of filling the position.

It is proposed also that provision also be created for the Governor-in-Cabinet to determine by way of policy directions to the Board that workers employed in certain professions or vocations, or categories thereof, are to be designated as Key employees.

Under the proposed amendments there is no right of appeal to the Immigration Appeals Tribunal in respect of a decision of the Work Permit Board or the Business Staffing Plan Board to refuse an application for key employee status.

### Work Permits and Term Limits

The introduction of limitations concerning the length of time that a worker may remain in the Islands on a work permit remains a central feature of the revised legislation. However, that section of the law concerning term limits (section 50) has been comprehensively re-drafted.

In the principal law the Work Permit Board and the Business Staffing Plan Board may not grant or renew a work permit in the case of a worker whose term limit has expired until two years after he has left the Islands. Under the proposed amendment the Boards or the Chief Immigration Officer may not grant a work permit or a temporary work permit until the worker has left the Islands for a period of one year.

Provisions relating to persons who are working by operation of law, i.e. persons whose final work permit has expired and who have applied for the grant of permanent residency prior to its expiry or within ninety days after its expiry but where the application has not yet been determined, are to be amended to require such persons to receive an endorsement in their passport acknowledging that they are working by operation of law. To obtain such an endorsement would require payment of a fee equivalent to the fee that was applicable to their final work permit. Previously, such persons were able to work without paying a work permit fee and were unable to have their stay on the Islands clarified by way of an endorsement in their passport.

There are proposed new provisions in relation to persons who have reached the end of their term limit but who are married to another work permit holder, a Government employee or a person who is working by operation of law. Such persons may, during the currency of the spouse's work permit or government contract or in the period during which the spouse is working by operation of law, apply for the grant of a work permit or the renewal of an existing work permit. There are, however, new limitations on the length of time that work permits can be granted on this basis. Also, the period of any work permit granted or renewed under these provisions shall not be taken into account in relation to an application for the grant of permanent residence.

### Temporary Work Permits

Under the proposed amendments the Chief Immigration Officer or his designate will now have the power to vary or modify the terms of a temporary work permit.

It is proposed that the law also be amended to remove the ability of a worker to continue in employment during the period between the expiry of the temporary work permit and the outcome of the application for an annual work permit or any subsequent appeal thereof. In effect, this reverts to the situation that existed prior to hurricane Ivan.

### Business Staffing Plans

Under the principal law the deadline for the submission of a business staffing plan application for those companies that are required to do so was until 31 December 2005. This deadline has now been extended to 31 December 2006 for those companies who had carried on business for six months or more on or after 1 January 2004 and who employ fifteen or more persons on work permits. For companies that do not fall within this category they will be required to submit a Business Staffing Plan within six months from the date upon which they commence employing fifteen or more persons on work permits.

There is now also a proposed statutory requirement that a company which possess a valid business staffing plan certificate must apply for the renewal of the business staffing plan before the expiry of the existing plan and shall be permitted to continue to operate under the existing terms and conditions of the expired plan pending the renewal of the plan.

It is proposed that neither the Work Permit Board nor the Chief Immigration Officer may entertain an application for a work permit or a temporary work permit where the company concerned is in breach of the requirement to possess a business staffing plan.

With respect to business staffing plans, it is proposed that the Business Staffing Plan Board be granted the authority to vary or amend a business staffing plan.

### Administrative Fines

It is proposed that in the revised legislation an Immigration Officer above a certain rank will have the power to impose a fine up to a prescribed limit on immigration offences. The law would retain provision, however, for higher fines to be imposed by the court on summary conviction.

### Defence of having made 'reasonable enquiries'

Whilst it will still be possible for a person charged with an offence under Part V of the law to use as a defence that he had made reasonable enquiries to determine whether he was in contravention of this part of the law, the revised law now specifies what will constitute 'reasonable enquiries'.

### Proposed new offence in relation to unlawful employment

It is proposed that a new offence be created in the revision to the law which would apply to persons who do not have permission to work in the Islands but who are found in or in the vicinity of a place of work with any article in their possession for use in the course of any gainful occupation. The article in their possession will be deemed to be with them for the purpose of work unless they are able to prove the contrary.

### **Part VI – Entry and Landing**

It is proposed that provision be created for dependants of Caymanians to be granted permission upon application to the Chief Immigration Officer to reside in the Islands for a renewable period of up to three years. There was no provision previously in the law that allowed dependants of Caymanians to reside in the Islands. This put Caymanians at a disadvantage as compared to work permit holders, Government employees and permanent residents who are allowed to be accompanied by dependants. The provision would only apply however to the parent, grandparent, brother or sister of the Caymanian.

It is also proposed that a new provision be created under which sponsors of a tourist visitor seeking permission to land or seeking an extension of their stay may be required by an Immigration Officer to give an undertaking in writing that they will be responsible for that tourist visitor's maintenance and accommodation during his stay in the Islands. In giving this undertaking the sponsor will also be required to inform the Chief Immigration Officer of the continued presence in the Islands of the visitor after the expiry of his permission to remain.

### Administrative Removal from the Islands

It is proposed that provision be created in the revised law for persons who have no right to be in the Islands or who obtained permission to enter by deception to be removed without the need for a deportation order. This would remove the need to seek the approval of Cabinet for a deportation order in each and every case where a person has been found in the Islands illegally.

### Proposed new offence in relation to assisting persons to enter or leave the Islands illegally

If a person is convicted of assisting another person to land in or depart from the Islands in contravention of the law it is proposed that the court is now in certain circumstances empowered to order the forfeiture of the vehicle or vessel used or intended to be used in connection with the offence.

### **Part VII - Asylum**

#### Proposed new offence in relation to assisting an asylum-seeker to enter the Islands

It is proposed that a new offence be created in relation to a person who knowingly and for gain facilitates the arrival in the Islands of an individual where that person knows or has reasonable cause to believe that the individual intends to apply for asylum.

### **Part VIII – General**

#### Proposed new general offences

It is proposed that provision be made for a number of general offences as follows:

- possession of an immigration stamp or replica immigration stamp without reasonable excuse.
- assisting entry in breach of a deportation, exclusion or removal order.
- provision of immigration services for gain or reward by unqualified persons.
- assisting or facilitating the transportation, harbouring or movement into or out of the Islands of an individual in contravention of the law (human smuggling).
- entering a marriage of convenience. Under this new provision if a marriage officer has reasonable grounds for suspecting that a marriage will be a marriage of convenience and fails to report his suspicion to the Chief Immigration Officer without delay he is guilty of an offence.