

POLICY REVIEW DOCUMENT:



Government of Bermuda
Ministry of Home Affairs
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Bermuda

Impact Assessment on the Elimination of Term Limits

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PREAMBLE

The Government of Bermuda seeks to explore options and study the impact on the elimination of the "Policy: Measures to Inhibit Long-Term Residency" more commonly referred to as Term Limit Policy. The legislation in respect of immigration issues is contained in the Bermuda Immigration & Protection Act 1956. The policy which was introduced in April 2001 provides a maximum length of stay in Bermuda by any work permit holder up to six years after which time the holder must leave Bermuda for a period of two years thereafter before eligibility to return to Bermuda.

An employer may apply for an exception from the policy where the employer can demonstrate a genuine need for the work permit holder to remain and such an exception will be in terms of a three year extension or waiver if the case is strong enough. The basis on which this policy was created is to discourage groups of long-term residents who would claim to have an expectation that they could ultimately acquire permanent residence in Bermuda.

LEGAL OPINIONS

Three separate legal opinions from Appleby, Laurie Fransman QC, and Mello Jones and Martin were sought to provide advice on long-term residency concerning the term limit policy. Each concluded the following:

The term limit policy is not necessary as a tool to prevent long term residency claims

As a legal precaution, a declaration document could be added to Immigration documentation. This documentation would state that the work permit holder understands that Bermuda law does not confer rights of permanent residence and that the holder has no expectation of such residence.

EXTERNAL STAKEHOLDER OPINIONS

Business

Under the current policy, work permit holders cannot stay longer than six consecutive years. Consequently, businesses fear the risk of vacant posts affecting the bottom-line, which was felt substantially in April 2007, the first cycle of policy implementation. This prompted a 2008 policy proposal to offer work permits of six to ten years for senior key employees.

As work permit holders leave, they may be difficult to replace, often as a result of a challenging labour market conditions, post qualifications, recruitment costs and delays in processing new work permit applications. In sum, Bermuda will not be able to attract or retain the employees it needs and may prompt international companies to consider choosing an alternative domicile in other jurisdictions.

Consequently, there is no evidence to suggest that jobs, once vacated by guest workers, are then filled by Bermudians. This defies the notion that term limits protect Bermudian employment. Irrespective of the term limit policy, work permit applications require qualified Bermudians to always be considered first.

Community

The primary concern by some Bermudians is that termination of the term limit policy would encourage long-term residency and lead to gentrification of the community. In this regard, long-time or original neighbourhood residents may be displaced because of higher costs of living such as the cost of rent. In other words, while the hidden economic characteristics may well be considered favorable, rising

demand drives up property prices and some activity costs, leaving renters and low-income Bermudians with the realization they may be adversely impacted.

The standard view of gentrification is that guest workers benefit greatly at the expense of lower-income residents. The new arrivals get affordable, stylish housing and all of the expensive accoutrements of life in a trendy neighborhood, such as access to modern amenities. While long-time residents may benefit initially from cleaner, safer streets and better schools, they are eventually priced out of renting or buying. As guest workers impose their culture on the neighborhood, lower-income residents become economically and socially marginalized. This can lead to resentment and community conflict that feeds racial and class tensions.

Overarching, Bermudians are concerned by a policy reversal having no positive direct impact on the local community. While it may prove successful in recruiting and retaining guest workers, this may equate to lost employment opportunities for Bermudians who may otherwise qualify for these positions. Despite advertising the post to provide for Bermudian opportunity, there is a lack of faith in the system that the process is truly fair and transparent. In most cases, employers inevitably will get the employees they seek if determined to be non-Bermudian. Lastly, on an island 21 square miles, the risk of over-population and congestion remains a concern and requires a delicate balance.

PROPOSITION

To eliminate the term limit policy to help spark economic growth and create employment opportunities for Bermudians.

RATIONALE

For economic reasons it is imperative for Bermuda to have workers from abroad. There are insufficient numbers of Bermudians to fill jobs that are available. Consequently, the employment of qualified non-Bermudians is essential if Bermuda is to remain competitive and prosperous as an island community.

The term limit policy is redundant to conditions established by work permits. Work permits are offered for a set period of time relevant to application. Upon expiry, employers can apply for a new work permit. The administrative consideration is the removal in duplication of process.

POLICY CONSIDERATIONS

- The Government must be mindful of the legitimate needs and expectations of Bermudians.
- The greater the number of people with Bermudian status or permanent residence, the greater population and potential overcrowding concern becomes.
- International law including applicable treaty law makes no provision for long-term residents to be granted permanent residence or any status equivalent to Bermudian status.
- The normal work permit policies and procedures continue to apply. The employer will continue to be required to advertise the position and hire qualified Bermudians where identified.
- Minus a major swelling in birthrates, Bermuda will never supply enough Bermudians to satisfy the job market. In order for Bermuda's economy to thrive, there will be a need for guest workers in the foreseeable future.

- A continuous focus on development strategies to prepare the next generation of Bermudian workers with the necessary skills and education to take advantage of an increasing sophisticated job market must remain at the forefront.
- Bermuda is in a global war for talent. Even as jurisdictions are facing recession, downsizing and layoffs, competition to reinvent and retain top talent remains relevant and fierce; Bermuda's preparation for long-term prosperity remains essential.

BY THE NUMBERS

- In March 2011, of the 6,817 work permits subject to term limits: 2,394 (35%) had been granted waivers, 2,386 (35%) had been granted extensions; and 2037 (30%) were subject to the term limit of 6 years.
- Five top Class 4 reinsurers based in Bermuda, have cut staff numbers on the island by almost a quarter over the last 4 years. In 2010, ABIR members reported 1,696 employees, 1,128 were Bermudian.
- In 2010, ABIR members estimated they spent just over \$26.6 million in Bermuda on hotels, air fare, restaurants, taxis and catering; nearly \$81 million in Bermuda on legal, accounting, actuarial and temporary services; almost \$10.6 million to Bermuda charities, and; just over \$116 million on construction, real estate and housing costs.
- In 2010, the Bermudian population stood at 50,565 compared to 13,515 non-Bermudians. An analysis of the population indicates 34% of the foreign-born population have Bermudian status. Between 2000 and 2010, the proportion of foreign-born persons who acquired Bermudian status increased by 3 percent.
- In 2010, Bermudians accounted for 74% of the workforce, non-Bermudian spouses and permanent residents numbered 8%, and other non-Bermudians totaled a 17% share of the workforce. The second largest share of non-Bermudians worked in the service, shop and market sales workers group. This reflects the relatively high number of guest workers in fields such as waiter, chef, cook, nanny, barber and hairdresser.

IMPACT ASSESSMENT

Under the presumption of the Term Limit Policy being lifted, what is the expected impact this will have on Bermuda?

Economic

- Increased certainty for employers, home owners, landlords and others who reap direct benefit (such as direct income) from guest workers.
- Boost in consumer confidence. (Renewal of faith in the Bermudian economy is an intrinsic value which translates to real economic outcomes – chiefly, the recruitment and retaining of IB)
- Indirect revenue generation / economic benefit to movers and truckers, recreational and charitable, retail and commercial agents. Increased revenue generation to these industries is likely to spur Bermudian employment as demand for these services increase.

- Increase in Bermudian employment, particularly as they relate to supportive occupations such as administrative staff and personal care assistants, in addition to entrepreneurship and company growth requiring new hires.

Business

- Decreased human resource expenses from the cost of employee turnover including recruiting and training of potential new employees. The resultant is also increased productivity which has a significant financial impact. (In some instances of business practice, new permits provide the opportunity to offer a reduced salary from what they'd pay an incumbent.)
- Sustained business continuity subject to approval of a work permit. Businesses are able to ensure greater certainty of critical business functions in turn satisfying customers and other entities who may rely on these services. Business continuity cannot be assured by assuming a Bermudian is able to qualify for the work requirement. While employment flexibility is maintained, there is no certainty of Bermudian employment.

Administrative (Government)

- Significant reduction in administration, freeing up time from responsibility of processing and preparing correspondence concerning term limits; additional time saved by the Chief Immigration Officer who must review these files.
- Relief of potential backlog created by employers who wait until the last minute to submit applications.
- There will be no shift with existing files concerning work permit holders. The Immigration Board, under the direction of the Minister of Home Affairs will continue to make determinations on work permit applications.

Social & Political

- Reflective of the "red carpet" approach that Bermuda is open for business. The underlying message however is that of social inclusion where not only business, but guest workers believe greater alignment and acceptance of Bermudians to welcome their contributions.
- Perception of born Bermudians taking less precedence to help rebound the economy. Recognizing the disparity between Bermudian and non-Bermudian workers, the elimination of the term limit policy is primarily targeted at international business and the importation of guest workers.
- Broad spread support from the international business community. The anticipated resultant is the ease of process and transition to employ guest workers. The spinoff is a net positive impact that guest workers will have in social contribution to local events, charity and organizations, in addition to being consumers helping to bolster the local economy,
- Perception may be held negatively however among community stakeholders who don't clearly understand the details of the policy. Communication and staying ahead of the message on policy change is critical. In the medium to long-term, it is expected a rebounding economy in conjunction with no term limits will help shift public opinion.

POLICY EVALUATION STATEMENT

The Term Limit Policy is a redundant effort to control work periods for guest workers. The process for granting work permits achieves the same objectives. The Term Limit Policy also represents a duplication of effort concerning processing within the Department of Immigration, utilizing additional human resources and bottlenecking the intended streamlining of work permits.

In light of this evaluation, it may also be presumed that the elimination of term limits will not help alleviate the disparity between Bermudian and non-Bermudian workers. Broader policy arrangements are required. Policy recommendations, not carefully monitored, may actively work to expand that gap.

POLICY RECOMENDATIONS

Upon approving the proposition to eliminate the 2001 Term Limit Policy, appropriate safeguards must be put in place to ensure organized changeover and protection from any adverse cost stemming from policy transition. The following are initial but not exhaustive recommendations:

- A declaration document could be added to Immigration documentation. This documentation would state that the work permit holder understands that Bermuda law does not confer rights of permanent residence and that the holder has no expectation of such residence.
- Enable a rigid and quantifiable labour market test upon request for new of work permits. Work permits shall be established for limited periods based on pre-defined criteria and subject to the position being genuinely unfillable by a Bermudian or holder of a Permanent Residents Certificate.
- Swifter advancement to automation of the work permit process currently underway within the Department of Immigration to quantify work permit statistics and track the employment activity of employers. Automation and advanced tracking will enable the effective monitoring and enforcement of work permit violators which will become paramount as term limits are lifted.
- Next to automation, ensure efficiency in all aspects of the work permit process and the timely, consistent and appropriate application of remaining work permit policies. Primary considerations must include delays, restrictions, application of policies, and the appeals process. In part, processing times should be clear and enforced.
- Get tough on enforcement. For the protection of Bermudian workers and the prevention of exploitation from employers to guest workers, effective rules marked by progressive disciplinary measures must be advanced.
- Clear and consistent communications strategy must be orchestrated to inform the general public on the merits and expected benefits of the policy reversal. This must be substantiated using various forms and put in terms which speak to Bermudian grassroots. An important part of that campaign must be about the protection and promotion of Bermudian employment. Work permits may be tied to advanced training opportunities and sponsorship of policies which articulate 'Bermuda first'.
- Establish new synergy between the Department of Labour and Training and the Department of Immigration. Aligned efforts between departments, academic and business institutions to provide ongoing assessment of Bermuda's labour market needs and the funneling of qualified Bermudians into prospective labour market opportunities.

APPENDIX

Measures to Inhibit Long-Term Residency

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POLICY: Measures to Inhibit Long-Term Residency REF: W8

PURPOSE:

To discourage the expectation that work permit approval is tantamount to permanent residence rights in Bermuda.

EXPLANATION:

There are about 8,000 non-Bermudians in the workforce. These in turn have 4,000 dependants between them. The pattern of employment in Bermuda is such that half the non-Bermudians= who arrive in any given year are still in Bermuda five years later. Of those, half (a quarter of the original arrivals) are still here ten years after arrival. Of those in turn, half (one eighth of the original entrants) are still in Bermuda after fifteen years, and so on.

The community is very concerned that non-Bermudians, who work in Bermuda, should not be allowed to stay for such a long time that they and their children acquire a legitimate expectation of permanent residence status.

Unless there is the capacity and ability to grant some form of long-term residency status to large numbers of non-Bermudians, there has to be consideration given at the earlier stages to control and monitor the grant of work permits for extended periods.

Voluntary Waiver of Residence Rights

One measure adopted here is to have a mechanism whereby a person for whom an initial work permit application is being made should be invited to sign a waiver on first arrival in Bermuda. By signing, the person waives the right to exercise any claims or expectations of long-term residence that might normally arise as a result of his or her ordinary residence in Bermuda.

STATEMENT:

The invitation to sign the waiver does not apply to anyone who first took up ordinary residence in Bermuda for employment before 1 August 1989, unless an existing permit holder chooses, on a voluntary basis, to sign. Note that, the Government has enacted the Bermuda Immigration and Protection Amendment Act 2002 to provide long-term residents who arrived in Bermuda before 1 August 1989 access to Bermudian status or permanent residence.

All other persons are invited to sign a waiver, either before entering Bermuda to take up employment, or at the next work permit renewal. The waiver is framed in the following terms:

“I hereby, freely and without coercion, waive any rights that may accrue to me, or to my dependants, on the basis of the British Nationality Act 1981, British common law or natural justice as a result of my ordinary residence in Bermuda for the purpose of employment in Bermuda on a work permit. With respect to my permission to reside and work in Bermuda I declare that I have read and understood section 7A of the Bermuda Immigration and Protection Act 1956, which states:

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‘(1) A grant to a person shall not, except to the extent, if any, expressed in the grant, confer upon him any right, or ground or support any hope, claim or expectation which he may assert—

(a) to or of any extension or renewal of the right or rights expressed in the grant; or

(b) to or of the award of any right or rights other than the right or rights so expressed.

(2) In subsection (1), “grant” means a certificate, licence, permit or other permission (whether so called or by any other name) given or issued to a person under any provision of this Act.’ ”

The purpose of the waiver is to be transparent by disclosing, up- front, that, irrespective of any work permit renewals, any form of long-term resident status will not be conferred on the permit holder.

Whether the person signs the waiver or not is completely voluntary. It will have no bearing on whether the initial work permit will be granted or not. However, the person who does not sign the waiver will know that, unless he or she is otherwise exempt, his or her term in Bermuda on a work permit will be limited to the maximum under current policy.

Term Limits on Work Permits

The Minister has always had, and will continue to have, the authority to limit the length of time a person may stay in Bermuda on work permits. The Bermuda community has made a clear statement that Bermuda should not be host in the future to large numbers of long-term residents. To achieve the community’s wishes, it will be necessary for the Minister to exercise the right to limit the length of time individuals remain in Bermuda on work permits.

STATEMENT:

The practical effect of this policy is that, where there are no Bermudians available in these areas, there will be no term limits on work permits where the business that is applying, demonstrates to the Minister that it is a good corporate citizen. The absence of available Bermudians may be the result of a severe shortage, either because the scarce resources world-wide have a local impact, or there are shortages locally owing to the exceptional demand. Alternatively the person or position may be key to the success of the business. The effect is that, where a case can be made that the required skill-sets are not available locally, the work permit holder will be designated as key. Accordingly, there will be no term limits put on such a person’s employment in Bermuda unless and until there is a shift which reflects that Bermuda is able to produce, and is in fact producing, the numbers required to sustain the economy.

The aim is to enact policies which recognise the diversity of the economy and our reliance on international business as a key component of the economy and therefore to produce policies which do in fact work in tandem to maintain and sustain key personnel. While it would be wrong in principle to define categories so that only those occupying higher echelon positions are able to be designated as key personnel, the intent is not to discriminate against small businesses

Measures to Inhibit Long-Term Residency

by only affording the international business sector the opportunity to have persons designated as exempt from term limits.

Unless the work permit holder is otherwise exempt, he or she will be limited to a maximum term of six years. This term limit is a reasonable compromise between the uneconomical short end and the socially unacceptable long end of the scale.

There will be shorter-term permits and renewal beyond the general maximum number of six years is possible if the employer makes a strong enough case to justify it because of a genuine and real need to renew the permit. Generally, no extensions will be permitted beyond a further three-year period bringing the maximum to nine years in total.

Work permit term limits do not apply where the individual is key to the business. For an employee to be categorised as “key” to the business’s operation, the business must demonstrate that one or more of the following is true:

- the person is among the best practitioners in the world; or
- the person has rare specialised expertise that cannot be easily found world-wide; or
- although not particularly specialised, there is a “severe shortage” of the person’s particular skills i.e. a shortage in Bermuda arising from the difficulty of recruiting persons because there is a general, chronic shortage of resources overseas; or
- without the continued presence of the individual the business will be seriously injured to its own detriment and to that of the interests of Bermuda and Bermudians; or
- the person has crucial business contacts which are critical to the business’s continued success; or
- the individual is directly responsible for creating well-paying jobs to which Bermudians can aspire; or
- the person is directly responsible for training Bermudians in worthwhile careers and the business, based on its objective assessment of the individual’s attributes, relies on his or her skill and expertise in this regard.

Key persons can be found at all levels and in all areas of a business and are to be found not only among Chief Executive Officers, Chief Financial Officers and other senior managers. They can be technical, professional, clerical or service as well as managerial staff. It is up to the employer to make the case to the Minister that a particular individual or post is key to the organisation`.

Work permit term limits will not apply where there is a shortage in Bermuda arising from the difficulty of recruiting persons because there is a general, chronic shortage of resources overseas with a local impact. Examples of categories where there is such a shortage include: chartered accountant; actuary; chef; registered nurse; technically skilled specialists in information systems/technology fields. There may be other, less prominent categories where there are severe shortages. Employers are invited to make their case in advising the Minister.

When a person is required to leave Bermuda after working for six (or at most nine) years, in order for that person to become eligible, again, for employment in Bermuda, he or she will have to break ordinary residence in the Island for at least two years. A person who has broken his or her residence in Bermuda for two years or more may reapply for work in Bermuda and start afresh.

Measures to Inhibit Long-Term Residency

The policy took effect from 31 March 2001. As of 1 April 2001, any application for a new work permit, or a work permit renewal, will be based on the foregoing policy. For each work permit holder, whose initial permit began on or before 31 March 2001 and to whom the policy applies, his or her term limit started on the 1 April 2001. A work permit holder's length of residence in Bermuda, before 1 April 2001, will not count towards the six- year term limit. It is acknowledged that the Minister can refuse a work permit on a case-by-case basis, if the circumstances warrant it, regardless of a person's length of residence in Bermuda. However, to make the policy retroactive across the board would be unfair and could have legal implications.

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