

AS TABLED IN THE HOUSE OF ASSEMBLY

A BILL

entitled

BERMUDA IMMIGRATION AND PROTECTION AMENDMENT ACT 2020

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WHEREAS it is expedient to amend the Bermuda Immigration and Protection Act 1956;

Be it enacted by The Queen's Most Excellent Majesty, by and with the advice and consent of the Senate and the House of Assembly of Bermuda, and by the authority of the same, as follows:

Citation

1 This Act, which amends the Bermuda Immigration and Protection Act 1956 (the "principal Act"), may be cited as the Bermuda Immigration and Protection Amendment Act 2020.

Amends sections 2 and makes consequential amendments

2 (1) Section 2(1) of the principal Act is amended by inserting the following definitions in their correct alphabetical place—

“permanent resident” means a person who has been granted a permanent resident's certificate (other than one that has been revoked under section 31D or has otherwise ceased to have effect);

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“permanent resident’s certificate” means a permanent resident’s certificate granted under section 31A (including such certificate granted under section 31A as it was before being repealed and replaced by the Incentives for Job Makers Act 2011), or section 31B;”.

(2) In consequence of the insertion by subsection (1) of the definitions of “permanent resident” and “permanent resident’s certificate”, the principal Act is amended—

- (a) by repealing the definition of “permanent resident” in both sections 23 and 72(1);
- (b) in section 31C(1), by deleting “under section 31A or 31B”; and
- (c) in section 31D(1), by deleting “referred to in section 31A or 31B” and substituting “who has been granted a permanent resident’s certificate”.

Amends section 16

3 Section 16 of the principal Act is amended—

- (a) in subsection (2B)—
 - (i) by deleting “or (3)” and substituting “, (3) or (3A)”; and
 - (ii) by deleting “or (2)” and substituting “, (1A) or (2)”; and
- (b) by inserting after subsection (2B)—

“(2C) A person referred to in subsection (2B) shall from and after the day that he becomes a Commonwealth citizen possess Bermudian status.”.

Amends section 18

4 Section 18 of the principal Act is amended—

- (a) by inserting after subsection (3)—

“(3A) Where a person is, on or after the commencement of sections 4 and 5 of the Bermuda Immigration and Protection Amendment Act 2020, born outside Bermuda and neither of his parents is domiciled in Bermuda at the time of his birth, he shall possess Bermudian status if, at the time of his birth—

- (a) he is a Commonwealth citizen; and
 - (b) at least one of his parents or grandparents possesses Bermudian status that was acquired other than under this subsection or section 18AA(1A).”;
- (b) in subsection (6), by inserting “or (3A)” after “subsection (3)”; and
 - (c) in subsection (7)—
 - (i) by deleting “or (3)” and substituting “, (3) or (3A)”; and

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- (ii) by deleting “father” each time it occurs and substituting “parent or grandparent”; and
- (iii) by deleting “father’s death” and substituting “death of the parent or grandparent, as the case may be”; and
- (d) in subsection (9)(a), by deleting “his mother’s” and substituting “a woman’s”.

Amends section 18AA

5 Section 18AA of the principal Act is amended—

- (a) by inserting after subsection (1)—

“(1A) Where, on or after the commencement of sections 4 and 5 of the Bermuda Immigration and Protection Amendment Act 2020, a person not possessing Bermudian status who, on the date of his adoption, is both a Commonwealth citizen and under the age of 18 years is adopted outside Bermuda, under the law of an approved jurisdiction, he shall, provided the adoption was initiated before his sixteenth birthday, possess Bermudian status from (and inclusive of) the date of his adoption if—

- (a) neither of his adoptive parents is domiciled in Bermuda on the date of his adoption but, on that date, at least one of his adoptive parents or adoptive grandparents possesses Bermudian status that was acquired other than under this subsection or section 18(3A); and
- (b) his overseas adoption is recognized by the law of Bermuda.”; and
- (b) in subsection (5)—
 - (i) by deleting “Subsections (8)” and substituting “Subsections (7), (8)”; and
 - (ii) by deleting “the domicile” and substituting “the status or domicile”.

Amends section 19

6 Section 19 of the principal Act is amended—

- (a) in subsection (1)(b), by deleting “the period of ten years immediately preceding his application” and substituting “a period of at least 10 years preceding his application”; and
- (b) by inserting after subsection (1)—

“(1A) For the purpose of calculating the ten-year period referred to in subsection (1)(b)—

- (a) periods of ordinary residence may be aggregated, but only continuous periods of 12 months or more; and

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- (b) any period of ordinary residence before 20 years immediately preceding the application shall not be taken into account.”.

Amends section 20

7 Section 20 of the principal Act is amended by repealing subsection (1A).

Amends section 31B

8 Section 31B of the principal Act is amended—

(a) in subsection (1)—

(i) by repealing paragraph (b) and substituting—

“(b) subject to subsection (3), he has been ordinarily resident in Bermuda for a period of at least ten years preceding his application; and”;

(ii) in paragraph (c), by deleting “before 1 August 2010” and substituting “on or after the commencement date of section 8 of the Bermuda Immigration and Protection Amendment Act 2020 but before the expiry of two years from that date”; and

(b) in subsection (2)—

(i) by repealing paragraphs (a), (b), (c) and (d);

(ii) by deleting “or” at the end of paragraph (e), and inserting after paragraph (e)—

“(ea) the son or daughter of a person who has been granted a permanent resident’s certificate under this section where that son or daughter is above the upper limit of compulsory school age;

(eb) the spouse of a person who has been granted a permanent resident’s certificate under this section where that spouse does not qualify for such grant or for the grant of Bermudian status; or”.

(c) by repealing subsection (3) and substituting—

“(3) For the purpose of calculating the ten-year period referred to in subsection (1)(b)—

(a) ordinary residence shall be calculated from not earlier than when the relationship of son or daughter, or spouse, is established under subsection (2)(e), (2)(ea), (2)(eb) or (2)(f) as the case may be;

(b) periods of ordinary residence may be aggregated, but only continuous periods of 12 months or more; and

(c) any period of ordinary residence before 20 years immediately preceding the application shall not be taken into account.”; and

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- (d) by repealing subsection (5).

Amends First Schedule A

9 The First Schedule A (Persons with a Qualifying Bermudian Connection) to the principal Act is amended—

- (a) in paragraph 2—
- (i) in subparagraph A—
- (A) by repealing sub-subparagraph (b); and
- (B) in sub-subparagraph (c), by deleting “or (b)”;
- (ii) by repealing subparagraph C; and
- (iii) by inserting after subparagraph D—

“E a person who is the son or daughter or brother or sister of a person who has been granted Bermudian status under section 20A of this Act;

F a person who is the son or daughter of a person who has been granted Bermudian status under section 20B(2)(b) of this Act.”;

- (b) in paragraph 3, by inserting “subparagraphs B or D (as the case may be) of” after “specified in”; and
- (c) by inserting after paragraph 3—

“3A. For the avoidance of doubt, paragraph 3 does not apply to subparagraphs A, E or F of paragraph 2.”.

Commencement

10 This Act shall come into operation on such day as the Minister responsible for immigration may by notice in the Gazette appoint.

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EXPLANATORY MEMORANDUM

This Bill would amend the Bermuda Immigration and Protection Act 1956 (“the principal Act”) to address certain issues that have resulted in members of families of persons who possess Bermudian status, or of permanent residents, not being able to remain in Bermuda because they are unable to acquire either Bermudian status or permanent residence. The Bill would also make provision for a person who is born or adopted outside Bermuda to acquire Bermudian status at the time of birth or adoption (as the case may be) if at that time, although neither parent is domiciled in Bermuda, at least one parent possesses Bermudian status - see clauses 4 and 5.

Clause 1 is self-explanatory.

Clause 2 clarifies the meaning of “permanent resident” and “permanent resident’s certificate” and makes consequential amendments.

- Subsection (1) inserts in section 2 (interpretation) a new definition of “permanent resident” and a definition of “permanent resident’s certificate”.
- These definitions make it clear that a permanent resident is a person who holds a valid permanent resident’s certificate, and that a permanent resident’s certificate is any such certificate granted under the principal Act (including such certificate granted under section 31A as it was before being repealed and replaced by the Incentives for Job Makers Act 2011). The following consequential amendments are made in subsection (2):
- Subsection (2)(a) amends sections 23 and 72(1) by, in each of those sections, repealing the definition of “permanent resident” (because that expression would be defined in section 2).
- Subsection (2)(b) amends section 31C(1) (rights, etc. of permanent residents) by deleting “permanent resident under section 31A and 31B” and substituting “permanent resident”, which would have the meaning given in section 2.
- Subsection (2)(c) amends section 31D(1) (revocation of permanent resident’s certificate) by deleting the reference to a person “referred to in section 31A or 31B” and substituting a reference to a person “who has been granted a permanent resident’s certificate”.

Clause 3 inserts in section 16(2B) references to the new sections 18(3A) and 18AA(1A), which subsections are inserted by clause 4 and 5 respectively. It also moves the provisions of section 20(1A) to a new subsection in section 16 (subsection (2C)).

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- Section 16(2B) of the principal Act currently provides that a person who, but for the fact that he is not a Commonwealth citizen, would possess Bermudian status under section 18(1), (2) or (3) or section 18AA(1) or (2) shall be deemed to possess Bermudian status, and section 20(1A) provides that: “A person referred to in section 16(2B) shall, from and after the day that he becomes a Commonwealth citizen possess Bermudian status.”
- As the provisions of section 20(1A) fit with those of section 16(2B), section 20(1A) is repealed (see clause 7) and a new subsection (subsection (2C)), which repeats what is stated in section 20(1A), is inserted in section 16.
- The references to sections 18(3A) and 18AA(1A) inserted in section 16(2B) would mean that persons who fall in this new category who are not Commonwealth citizens would also be deemed to possess Bermudian status and would, if and when they were to become Commonwealth citizens, possess (full) Bermudian status.

Clause 4 amends section 18, which prescribes the requirements for the acquisition of Bermudian status at birth by a child who is born to a person who possesses Bermudian status.

- Currently, under section 18(3), a child born a Commonwealth citizen in Bermuda to at least one parent who possesses Bermudian status at the time of the child’s birth will acquire Bermudian status at birth. If the child is born outside Bermuda, at least one of the parents must be domiciled in Bermuda at the time of the child’s birth. If neither parent is domiciled in Bermuda at the time of the child’s birth, the child does not acquire Bermudian status at birth but, under section 16(2), is deemed to possess Bermudian status until he reaches the age of 22.
- The country in which a person is domiciled is the country that the person regards as home. Therefore, to be domiciled in Bermuda, a person must regard Bermuda as home (i.e. the place to which he eventually intends to return) regardless of the country in which he is temporarily or ordinarily resident at the time. In this regard, see the Bermuda Supreme Court judgment of Jennifer Susan Millar v Minister of Labour, Home Affairs and Housing (2011 No. 93), dated 8 December 2011, by Wade-Miller J.
- The amendment made by clause 4(a) to section 18, by the insertion of subsection (3A), would make provision for a person who is born outside Bermuda and whose parents are not domiciled in Bermuda at the time of birth to acquire Bermudian status if at least one parent or grandparent possesses Bermudian status at that time.

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- With the related amendments made by clause 4 to sections 18(6), (7) and (9), every person who, on or after commencement of this Bill, is a Commonwealth citizen born outside Bermuda to at least one parent who at the time of the person's birth possesses Bermudian status and is not domiciled in Bermuda, will acquire Bermudian status at and from the time of his birth, but the passing on of Bermudian status to children born overseas to parents that are not domiciled in Bermuda at the time of the child's birth will be limited to two generations.

Clause 5 amends section 18AA, which prescribes the requirements for the acquisition of Bermudian status by a child who is adopted by a person who possesses Bermudian status. As in section 18, for a child who is adopted overseas on or after commencement of this Bill, the requirement that at least one of the child's parents must be domiciled in Bermuda at the time of the child's adoption is removed, but the amendments will limit to two generations the passing on of Bermudian status to children adopted overseas to parents that are not domiciled in Bermuda at the time of the child's adoption.

Clause 6 amends section 19 to change the period of ordinary residence requirement from a period of ten years immediately preceding the application for Bermudian status, to a period of ten years before the application, although the ordinary residence must fall within an outer-limit period of 20 years preceding the application.

Clause 7 repeals subsection (1A) of section 20 because the provision has been moved to section 16 - see clause 3.

Clause 8 amends section 31B (right of certain other persons to permanent resident's certificate).

- Currently, if a person is at least eighteen years of age and is the son, daughter or spouse of a person who has been granted a permanent resident's certificate under section 31A, he may under section 31B(2)(e) and (f) apply to the Minister to be granted a permanent resident's certificate.
- Clause 8(a)(i) repeals and replaces section 31B(1)(b). The requirement that the applicant for a permanent residence certificate must have been ordinarily resident in Bermuda for a period of ten years immediately preceding the application is changed to a period of at least ten years before the application. Calculation of the ten-year period is provided for in section 31B(3) - see clause 8(c).
- Clause 8(b)(ii) insert paragraphs (ea) and (eb) into section 31B(2). These new paragraphs allow a person to apply to the Minister to be granted a permanent resident's certificate if he is at least eighteen years of age and is the son, daughter or spouse of a person who has been granted a permanent resident's certificate under section 31B. However, clause 8(a)(ii) amends section 31(1)(c) to allow an application under paragraph (ea) or (eb) to be made only during a period of two years starting from the commencement date of clause 8 of this Bill.

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- Clause 8(c) repeals and replaces section 31B(3) to clarify that the ten years' ordinary residence requirement referred to in section 31(1)(b) is to be calculated to begin from not earlier than the time at which the relationship of son or daughter, or spouse, is established under subsection (2)(e), (ea), (eb) or (f), as the case may be. The ten years of ordinary residence must also fall within an outer-limit period of 20 years preceding the application.

Clause 9 amends the First Schedule A (Persons with a Qualifying Bermudian Connection).

- Section 19(1) currently provides that a person may apply to the Minister under that section for the grant of Bermudian status if: (a) he is a Commonwealth citizen of not less than eighteen years of age, (b) he has been ordinarily resident in Bermuda for the period of ten years immediately preceding his application, and (c) he has a qualifying Bermudian connection.
- The ten-year period immediately preceding the application would however be changed to ten years of ordinary residence before the application - see clause 6.
- Paragraph 1 of the First Schedule A provides that, for a person to have a qualifying Bermudian connection under section 19(1)(c), the person must fall within a "class" of a description in paragraph 2, and those descriptions are subject to paragraph 3.
- The various "classes of persons" that have a qualifying Bermudian connection are described in paragraph 2 (subparagraphs A to D).
- Subparagraph A(a) of paragraph 2 of that Schedule provides that a person has a qualifying Bermudian connection if he at any time was deemed to possess Bermudian status under section 16(2) (i.e. by virtue of having been a child, stepchild or adopted child of a person with Bermudian status, which deemed status ends at the age of 22 if the person has not (before turning 22) applied for, and subsequently been granted, Bermudian status under section 20).
- Subparagraph A(b) contains another class of persons, i.e. persons who were deemed to be domiciled in Bermuda under section 5(1)(e) of the Immigration Act 1937. This is repealed because the provision is spent.
- Paragraph 3 provides that the requirements specified in paragraph 2 must have been satisfied throughout the period mentioned in section 19(1)(b) (which is the ten years preceding the application for the grant of Bermudian status). This contradicts subparagraph A(a) of paragraph 2 of the First Schedule A, which requires only that a person must have "at any time" satisfied those requirements and makes it difficult, if not impossible, for anyone to show that they have a qualifying Bermudian connection under that subparagraph. In this regard, see Bermuda Supreme Court judgment of Luis Correia and Carly McQueen v Immigration Appeal Tribunal and Minister of Home Affairs (2016 No: 28) dated 25 October 2017.

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- Therefore, paragraph 3 is amended to refer to only subparagraphs B and D of paragraph 2 and, for the avoidance of doubt, a new paragraph 3A makes it clear that paragraph 3 does not apply to subparagraph A, E or F of paragraph 2. Subparagraph C is repealed because it is spent, and subparagraphs E and F are added (see below).
- A new class of person with a qualifying Bermudian connection is added by the new subparagraph E of paragraph 2. This is a person who is the son or daughter or brother or sister of a person who was granted Bermudian status under section 20A.
- A second new class of person with a qualifying Bermudian connection is added by the new subparagraph F of paragraph 2. This is a person who is the son or daughter of a person who was granted Bermudian status under section 20B(2) (b).
- Sections 20A and 20B were inserted into the principal Act in 1994 by the Bermuda Immigration and Protection Amendment Act 1994. Persons granted Bermudian status under these sections had to have been ordinarily resident in Bermuda on 31 July 1989.
- Applications for the grant of Bermudian status under section 20A had to be made before 31 July 2008 and, therefore, applications for the grant of Bermudian status under this section can no longer be made.
- Applications for the grant of Bermudian status under section 20B(2)(b) can currently still be made. In this regard, see Bermuda Supreme Court judgment of Minister of Home Affairs v Carne and Correia (2014 No: 9) dated 2 May 2014.
- Any person in the new classes of persons with a qualifying Bermudian connection - i.e. the son or daughter or brother or sister of a person who has been granted Bermudian status under section 20A, or the son or daughter of a person who has been granted Bermudian status under section 20B(2)(b) - would qualify to apply for Bermudian status if the applicant were also: (a) a Commonwealth citizen of not less than eighteen years of age, and (b) ordinarily resident in Bermuda for a period of ten years before the application, although the ordinary residence must fall within an outer-limit period of 20 years preceding the application.

Clause 10 provides for commencement.