

LEGISLATIVE COUNCIL BRIEF

Immigration Ordinance (Chapter 115)

IMMIGRATION (AMENDMENT) (NO. 2) BILL 1998

INTRODUCTION

At the meeting of the Executive Council on 13 October 1998, the Council ADVISED and the Chief Executive ORDERED that the Immigration (Amendment) (No. 2) Bill 1998, at the Annex, should be introduced into the Legislative Council.

BACKGROUND AND ARGUMENT

Illegal employment on construction sites

Existing provisions

2. Under Section 17I of the Immigration Ordinance, any person who employs an employee who is not lawfully employable commits an offence. However, prosecution of employers in the construction industry under this section has been difficult because under the sub-contracting system adopted by the construction industry, there are often several employers on a construction site. Due to the difficulty in identifying the employer of an illegal worker on a construction site for prosecution under section 17I, section 38A was introduced in 1990 to tackle the

specific problem of employment of illegal immigrants on construction sites.

3. Under the existing section 38A of the Immigration Ordinance, where it is proved that a person to whom section 38(1) applies (i.e. a person who has committed an offence of illegal remaining) was on a construction site, the construction site controller of the site commits an offence and is liable to a fine of \$350,000. It is a defence in proceedings for an offence under this section for the person charged to prove that he took all practicable steps to prevent persons to whom section 38(1) applies from being on the construction site.

Recent trend

4. While the existing section 38A has produced a marked effect in reducing the employment of illegal immigrants on construction sites, statistics also indicate a trend that illegal workers on construction sites comprise increasingly Two-way Permit holders -

	<u>1991</u>	<u>1992</u>	<u>1993</u>	<u>1994</u>	<u>1995</u>	<u>1996</u>	<u>1997</u>	<u>1998</u> <u>Jan - Aug</u>
Illegal immigrants	437	1,120	581	358	100	150	271	65
Two-way Permit holders	42	69	239	385	755	422	651	975

The number of Two-way Permit holders arrested on construction sites has increased from 42 in 1991 to 651 in 1997. The arrest figure for the first 8 months in 1998 is 975, which has exceeded the arrest figure for the entire year of 1997.

5. Two-way Permit holders arrested on construction sites now comprise a significant proportion of all Two-way Permit holders arrested for illegal employment -

	<u>1995</u>	<u>1996</u>	<u>1997</u>	<u>1998</u> <u>Jan - August</u>
TWPH arrested on construction sites	755	422	651	975
Total number of TWPHs arrested for illegal employment (excluding prostitutes)	2,324	1,435	1,461	1,957
Percentage	32.5%	29.4%	44.6%	49.8%

In the first eight months of 1998, 49.8% of all Two-way Permit holders arrested for illegal employment (excluding prostitutes) were arrested on construction sites. This is a sharp increase from the 29.4% in 1996.

Proposed amendment to section 38A

6. The change in the mix of illegal workers arrested on construction sites underlines the effectiveness of section 38A in respect of illegal immigrants working on construction sites, but reveals an inadequacy of the current law in respect of other types of illegal workers on construction sites.

7. To plug this loophole, it is proposed to include other types of illegal workers under section 38A. The Bill will add provisions to section 38A so that -

- (a) if a person who is not lawfully employable has breached a condition of stay by taking up employment

on a construction site, the construction site controller commits an offence and is liable to a fine of \$350,000; and

- (b) it is a defence in proceedings for the construction site controller charged to prove that he took all practicable steps to prevent persons who are not lawfully employable from taking employment on the site.

8. Under the Bill, a construction site controller will not be liable simply because a person not lawfully employable (other than an illegal immigrant), such as a Two-way Permit holder, is found on his site. The controller will be liable only if the person in question takes up employment on the site.

9. On the other hand, the existing provisions in section 38A regarding illegal immigrants will not be affected since construction site controllers will continue to be liable for illegal immigrants present on their sites, regardless of whether the illegal immigrants have taken up employment.

Travel Pass and APEC Business Travel Card

10. The Immigration (Amendment) (No. 2) Regulation 1997 made on 9 December 1997 empowers Director of Immigration to issue the Travel Pass to frequent visitors to Hong Kong and APEC Business Travel Card to Hong Kong residents travelling to APEC economies, and to charge fees for them.

11. The Travel Pass Pilot Scheme and the APEC Business Travel Card Trial Scheme were subsequently introduced in 1998. Although no forgery or false statement in relation to the two schemes has been encountered, it is desirable to put in place the necessary offence provisions.

12. Section 42 of Immigration Ordinance provides for the offences of false statements, forgery of documents and use and possession of forged documents. The section covers various documents including travel document, entry permit, re-entry permit, certificate of identity and document of identity. In order that the offences will also cover Travel Pass and APEC Business Travel Card, the Bill will add these two documents to section 42.

THE BILL

13. The provisions of the Bill are -

- (a) Clause 1 provides the short title and commencement date of the Bill;
- (b) Clause 2 provides the definitions of APEC Business Travel Card and Travel Pass in the Immigration Ordinance.
- (c) Clause 3 provides that a construction site controller commits an offence if a person not lawfully employable has contravened a condition of stay by taking employment on the construction site.

- (d) Clause 4 adds Travel Pass and APEC Business Travel Card to section 42 of Immigration Ordinance.
- (e) Clause 5 is a consequential amendment which removes the existing definitions of Travel Pass and APEC Business Travel Card from the Immigration Regulations.

LEGISLATIVE TIMETABLE

14. The legislative timetable is -

Publication in the Gazette	23 October
1998	
First Reading and commencement of Second Reading debate	4 November 1998
Resumption of Second Reading debate, committee stage and Third Reading	to be notified

HUMAN RIGHTS IMPLICATIONS

15. The Department of Justice advises that the proposed legislation is consistent with human rights provisions of the Basic Law.

FINANCIAL AND STAFFING IMPLICATIONS

16. The introduction of the Bill will increase the workload of the Police and Immigration Department in enforcement and prosecution. Both departments will absorb the additional workload from within their existing resources.

PUBLIC CONSULTATION

17. The Fight Crime Committee and the Panel on Security of the Legislative Council were consulted on 23 May and 3 September 1998 respectively on the proposal to amend section 38A of Immigration Ordinance. Both the Committee and the Panel in general supported further measures to tackle the problem of illegal employment. Some Panel Members felt that the Administration should be fair to construction site controllers while tackling the problem.

18. The Administration has had meetings with the Hong Kong Construction Association. The Association regard the Bill as unfair to the construction industry as other industries are not subject to the same provision. They are preparing a code of practice to assist their members in complying with the new legislation. The Administration is providing advice in this regard, but has pointed out that compliance with the code will not by itself constitute a defence in court.

PUBLICITY

19. A press release will be issued on 22 October 1998. The Bill will be published in the Gazette on 23 October 1998.

ENQUIRIES

20. For enquiries, please contact Mr K S So, Principal Assistant Secretary for Security at 2810-2506.

Security Bureau
22 October 1998

A BILL

To

Amend the Immigration Ordinance.

Enacted by the Legislative Council.

1. Short title and commencement

(1) This Ordinance may be cited as the Immigration (Amendment) (No. 2) Ordinance 1998.

(2) This Ordinance shall come into operation on a day to be appointed by the Secretary for Security by notice in the Gazette.

2. Interpretation

Section 2(1) of the Immigration Ordinance (Cap. 115) is amended by adding -

“ “APEC business travel card” (亞太經合組織商務旅遊證) means a document -

(a) issued by -

(i) the Director of Immigration; or

(ii) the person -

(A) of a place outside Hong Kong which is -

(I) a member of the organization known as the Asia Pacific

Economic Co-operation established in 1989; and

(II) recognized in writing by the Director of Immigration for the purposes of this definition; and

(B) who is, in relation to that place -

(I) equivalent to the Director of Immigration; or

(II) accepted in writing by the Director of Immigration as the person who may issue the document; and

(b) which enables the holder of the document -

(i) if the document is issued by the Director of Immigration, to go to the place referred to in paragraph (a) (ii) (A) without a visa;

(ii) if the document is issued by the person referred to in paragraph (a) (ii), to come to Hong Kong as a visitor without a visa;

“travel pass” (旅遊通行證) means a document -

(a) issued by the Director of Immigration to a person (other than a Hong Kong permanent resident) who -

(i) is not the holder of an identity card; or

(ii) is the holder of an identity card (other than a permanent identity card within the meaning of the Registration of Persons Ordinance (Cap. 177)) which belongs to a class of identity cards, if any, specified

in writing by the Director of Immigration for the purposes of this definition; and

- (b) which enables the holder of the document to come to Hong Kong as a visitor without a visa;”.

3. Site controller commits offence if illegal immigrant on construction site, etc

Section 38A is amended -

- (a) in subsection (3), by repealing “this section” and substituting “subsection (2)”;
- (b) by adding -

“(4) Where it is proved that a person, who is not lawfully employable by virtue of section 17G(2), has committed an offence under section 41 by taking employment on a construction site, the construction site controller of that construction site commits an offence and is liable to a fine of \$350,000.

(5) It is a defence in proceedings for an offence under subsection (4) for the construction site controller charged to prove that he took all practicable steps to prevent persons who are not lawfully employable from taking employment on the construction site.

(6) Where a construction site controller is charged with an offence under subsection (4), a certificate purporting to be signed by the Director and certifying that the person concerned who has committed an offence under section 41 by taking employment on a construction site was, at the date of the alleged offence, not lawfully employable,

shall be admitted in evidence on its production without further proof and, until evidence to the contrary is adduced, it shall be presumed -

- (a) that the certificate was signed by the Director;
and
- (b) that the person concerned who has committed an offence under section 41 by taking employment on a construction site was, at the date of the alleged offence, not lawfully employable.”.

(7) Section 17G shall apply to this section as it applies to Part IVB.”.

4. False statements, forgery of documents and use and possession of forged documents

Section 42(1) (c), (2) (a), (b) and (c) (i) and (3) is amended by adding “, APEC business travel card, travel pass” after “document of identity”.

Consequential Amendments

Immigration Regulations

5. Interpretation

Regulation 1A of the Immigration Regulations (Cap. 115 sub. leg.) is repealed.

Explanatory Memorandum

The purpose of this Bill is to amend the Immigration Ordinance (Cap. 115) to -

- (a) include APEC business travel card and travel pass in section 42, the offence creating section relating to false statements, forgery of documents and use and possession of forged documents;
- (b) provide that the construction site controller commits an offence if a person not lawfully employable has contravened a condition of stay by taking employment on the construction site.