

LEGISLATIVE COUNCIL BRIEF

Immigration Ordinance
(Chapter 115)

IMMIGRATION (AMENDMENT) BILL 2009

INTRODUCTION

At the meeting of the Executive Council on 16 June 2009, the Council ADVISED and the Chief Executive ORDERED that the Immigration (Amendment) Bill 2009 (the Bill), at Annex, be introduced into the Legislative Council (LegCo).

JUSTIFICATIONS

Immigration Convenience Measures

2. We have reached agreement with the Macao Special Administrative Region Government on a number of immigration convenience measures which are to be implemented by end of 2009 as announced in the context of 2008 Policy Address. One of the measures is for Macao permanent residents to enter Hong Kong solely on the strength of their Macao permanent identity cards (PICs).

3. A Macao PIC does not meet the existing definition of a “valid travel document” (VTD) under the Immigration Ordinance, primarily because it does not indicate the holder’s nationality. We recommend that a new category of documents be included under the definition of VTD. To maintain effective immigration control, the new class of VTD should fulfill the following requirements –

- (a) be able to establish to the satisfaction of an immigration officer/assistant the identity of its holder, and his domicile or place of permanent residence;

- (b) be issued by a competent authority to its holder for identification or traveling purposes, and is valid according to the laws of the country or territory of origin;
- (c) allow its holder to return to the country or territory of origin; and
- (d) be subject to visa control, where applicable.

The amendment will facilitate the implementation of similar convenience measures for visitors from other places in the future.

Technical Amendments

4. At present, Macao visitors coming to Hong Kong are given limit and conditions of stay. Since the limit and conditions of stay cannot be endorsed on the card surface of a Macao PIC, the relevant conditions will be issued on a printed slip. We propose amending the relevant provision under the Immigration Ordinance to modify the requirement that conditions of stay be endorsed on the VTDs. We will make similar technical amendments to the provisions on visa, as a visa (if applicable) cannot be endorsed on a card-face document either.

Offence of Taking Employment or Establishing/Joining in Business by Illegal Immigrants and Others

5. There is currently no offence against the taking of employment or establishing/joining in of business by illegal immigrants (IIs). The established policy has been that IIs found working illegally would be prosecuted for “unlawful remaining”. However, the policy was recently challenged in a judicial review case (*Iqbal Shahid, Waseem Abbas & Others v Secretary for Justice*). The court ruled in early March 2009 that recognizance granted to the IIs represented an authority from the Director of Immigration for them to remain in Hong Kong. Hence they would have a defence against the charge of unlawful remaining. The Department of Justice has lodged an appeal against the ruling.

6. Following the ruling, we are given to understand that some “snakeheads” have spread a message that non-ethnic Chinese IIs (NECIIS)

could take employment in Hong Kong once they make torture claims and are granted recognizance. Although the law enforcement agencies have strengthened boundary control in collaboration with our Mainland counterparts, there was an upsurge of NECIIs (not including Vietnamese) following the judgment: from the monthly average of 37 in January and February 2009, to 136 in March to May 2009 (representing an increase by over 260%). In the same period, the monthly average number of torture claims rose from 196 to 274 (representing an increase by 40%). There is an urgent need to specify as an offence for the taking of employment or establishing/joining in business by IIs. This will deter those who intend to smuggle to Hong Kong, thus preventing the situation from deteriorating.

7. We also propose that the new offence should cover persons subject to removal or deportation (since a removal order or deportation order would have the effect of invalidating the conditions of stay of the person concerned (including one barring him from taking employment)).

8. The proposed penalty level of the new offence should be a fine of level five and imprisonment for three years, which are comparable to those under the offences of “unlawful remaining” and “breach of conditions of stay” under sections 38(1)(b) and 41 of the Immigration Ordinance respectively¹.

THE BILL

9. The main provisions of the Bill are -

- (a) clause 3 expands the definition of “valid travel document” in section 2(1) of the Immigration Ordinance by including a new category of documents;
- (b) clause 4 amends section 17G of the Ordinance by providing that a person who is not required to be registered under the Registration of Persons Ordinance (Cap. 177) is a lawfully employable person if that person holds a valid

¹ The maximum penalty for unlawful remaining is a fine at level 4 and imprisonment for 3 years; and for breach of conditions of stay, a fine at level 5 and imprisonment for 2 years.

travel document, is not subject to any conditions of stay prohibiting the taking of employment and in respect of whom no removal or deportation order is in force after having entered Hong Kong lawfully;

- (c) clause 5 adds a new section 38AA to the Ordinance to prohibit illegal immigrants or persons who are subject to removal or deportation orders from taking any employment or establishing/joining in any business; and
- (d) clauses 6 and 7 amend section 61(1) of the Ordinance and the Immigration (Unauthorized Entrants) Order (Cap. 115 sub. leg. D) by providing that a visa may be issued in a manner other than an endorsement on a valid travel document.

LEGISLATIVE TIMETABLE

10. The legislative timetable will be -

Publication in the Gazette	19 June 2009
First Reading and Commencement of Second Reading Debate	24 June 2009
Resumption of Second Reading debate, committee stage and Third Reading	To be notified

IMPLICATIONS OF THE PROPOSAL

11. The Bill is in conformity with the Basic Law, including the provisions concerning human rights. The Bill does not affect the existing binding effect of the Ordinance. The proposals have no significant economic, financial, civil service, productivity, environmental or sustainability implications. The Immigration Department and other concerned departments will absorb additional

workload and resource requirements, if any, arising from the proposals from within their existing resources.

PUBLIC CONSULTATION

12. We consulted the Panel on Security of LegCo on 2 June 2009 on the proposal. There was general support from Members for making legislative amendments for the implementation of the immigration convenience measures for Macao. On the specification as an offence for the taking of employment or establishing/joining in business by IIs (and other ineligible persons), there was not yet a consensus among Members.

PUBLICITY

13. A press release will be issued on 17 June 2009. A spokesman will also be arranged to handle media inquiries.

ENQUIRIES

14. Enquiries on this Brief should be addressed to Mr W H Chow, Principal Assistant Secretary (Security), at telephone number 2810 2506.

Security Bureau
17 June 2009

IMMIGRATION (AMENDMENT) BILL 2009

ANNEX

Annex

Immigration (Amendment) Bill 2009

A BILL

To

Amend the Immigration Ordinance and its subsidiary legislation to expand the scope of valid travel documents; to prohibit certain persons from taking employment or establishing or joining in any business; to provide that a visa may be issued otherwise than by means of an endorsement on a valid travel document; and to revise the meaning of lawfully employable persons.

Enacted by the Legislative Council.

1. Short title

This Ordinance may be cited as the Immigration (Amendment) Ordinance 2009.

2. Commencement

This Ordinance comes into operation on a day to be appointed by the Secretary for Security by notice published in the Gazette.

3. Interpretation

Section 2(1) of the Immigration Ordinance (Cap. 115) is amended by repealing the definition of “valid travel document” and substituting –

““valid travel document” (有效旅行證件) means –

- (a) a passport furnished with a photograph, or any other document establishing to the satisfaction of an immigration officer or immigration assistant the identity and nationality of the holder of the document and the domicile or place of permanent residence of the holder of the document, which –
 - (i) indicates in specific or general terms that it is not invalid for Hong Kong;

- (ii) indicates that it is still valid according to the laws of the country or territory by or on behalf of which it was issued;
 - (iii) allows its holder to return to the country or territory by or on behalf of which it was issued; and
 - (iv) complies with section 61; or
- (b) a document issued by or on behalf of a competent authority of any country or territory to its holder for the purpose of identification or travel, which –
- (i) establishes to the satisfaction of an immigration officer or immigration assistant the identity of its holder and the domicile or place of permanent residence of its holder;
 - (ii) indicates that it is still valid according to the laws of that country or territory;
 - (iii) allows its holder to return to that country or territory; and
 - (iv) complies with section 61;”.

4. Interpretation

- (1) Section 17G(2)(c) is amended by repealing “is the holder of”.
- (2) Section 17G(2)(c)(i) is repealed and the following substituted –
 - “(i) is the holder of a valid travel document and, having landed in Hong Kong lawfully, is not prohibited from taking employment, whether paid or unpaid, under any condition of stay, and in respect of whom no removal order or deportation order is in force;”.

(3) Section 17G(2)(c)(iii) is amended by adding “is the holder of” before “a”.

(4) Section 17G(2)(c)(iv) is amended by adding “is the holder of” before “a”.

(5) Section 17G(2)(c)(v) is amended by adding “is the holder of” before “any”.

5. Section added

The following is added before section 38A –

“38AA. Prohibition of taking employment and establishing business, etc.

(1) A person –

(a) who, having landed in Hong Kong unlawfully, remains in Hong Kong without the authority of the Director under section 13; or

(b) in respect of whom a removal order or a deportation order is in force,

must not take any employment, whether paid or unpaid, or establish or join in any business.

(2) A person who contravenes subsection (1) commits an offence and is liable on conviction to a fine at level 5 and to imprisonment for 3 years.”.

6. Travel document to bear visa

(1) The heading of section 61 is repealed and the following substituted –

“Visa issued in respect of valid travel document and its holder”.

(2) Section 61(1) is amended –

(a) by repealing “travel document shall not be valid” and substituting “document is not a valid travel document”;

(b) by adding “, or its holder has obtained,” after “bears”;

- (c) by repealing “the person to whom the travel document relates” and substituting “its holder”.

Related Amendment

Immigration (Unauthorized Entrants) Order

7. Declaration of unauthorized entrants

Paragraph 2(2)(a) of the Immigration (Unauthorized Entrants) Order (Cap. 115 sub. leg. D) is repealed and the following substituted –

- “(a) any person holding a valid travel document –
- (i) who is exempted from section 61(1) of the Ordinance under section 61(2) of the Ordinance; or
 - (ii) who has obtained a visa issued by or on behalf of the Director of Immigration, if the visa has not expired; and”.

Explanatory Memorandum

This Bill amends the Immigration Ordinance (Cap. 115) (“the Ordinance”) and its subsidiary legislation and its main objects are –

- (a) to expand the scope of valid travel documents to include documents which do not indicate the holders’ nationality and are issued for the purpose of identification or travel;
- (b) to create a new offence prohibiting illegal immigrants and persons who are subject to removal or deportation orders from taking employment, whether paid or unpaid, or establishing or joining in any business;
- (c) to provide that a visa may be issued otherwise than by means of an endorsement on a valid travel document; and
- (d) to revise the meaning of lawfully employable persons.

2. Clauses 1 and 2 provide for the short title and the commencement of the Bill when enacted.

3. Clause 3 amends the definition of “valid travel document” in the Ordinance by including documents which do not indicate the holders’ nationality and are issued for the purpose of identification or travel.
4. Clause 4 amends section 17G of the Ordinance by providing that a person who is not required to be registered under the Registration of Persons Ordinance (Cap. 177) is a lawfully employable person if that person holds a valid travel document and, after having landed in Hong Kong lawfully, is not subject to any condition of stay prohibiting the taking of employment, whether paid or unpaid, and in respect of whom no removal or deportation order is in force.
5. Clause 5 adds a new section 38AA to the Ordinance to prohibit illegal immigrants and persons who are subject to removal or deportation orders from taking employment, whether paid or unpaid, or establishing or joining in any business.
6. Clauses 6 and 7 amend section 61(1) of the Ordinance and paragraph 2(2) of the Immigration (Unauthorized Entrants) Order (Cap. 115 sub. leg. D) respectively by providing that a visa may be issued otherwise than by means of an endorsement on a valid travel document.