



## Incentives for Job Makers

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The Incentives for Job Makers Act 2013 and the Bermuda Immigration and Protection Amendment (No.2) Act 2013 come into operation yesterday. These two acts effectively introduce various changes to the Bermuda Immigration and Protection Act 1956 (“**Immigration Act**”) and the Economic Development Act 1968 (“**EDA**”) which seek to make it easier for companies to obtain work permit exemptions for certain senior executives and for certain senior executives to be eligible to apply for a Permanent Resident’s Certificate (PRC).

This E-Guide summarises the requirements for such applications.

### Exemptions to Work Permit Requirements

This effectively involves the following two stage application process:

- i. The company applies to be designated (pursuant to Section 3B(2) of the EDA) as a company whose senior executive employees can apply for exemption from Part V of the Immigration Act (“**Section 3B(2) Designation**”)
- ii. An application is then made (pursuant to Section 5 of the EDA) for a qualifying senior executive to obtain exemption to Part 5 of the Immigration Act (“**Section 5 Exemption**”).

In practice, both stages can be dealt with in one application, the cost of which is \$20,000.

#### Stage 1: Section 3B(2) Designation

To obtain the designation, an application is made by the CEO of a company to the Minister responsible for the Bermuda Economic Development Corporation.

The Minister must be satisfied that the company:

- Has at least 10 (the number was 25 prior to the current amendments) Bermudians on its staff.
- Bermudians are employed at all levels in the company subject to the availability of suitably qualified Bermudians.
- Provides entry level positions for Bermudians.
- Has programmes in place for development and promotion of Bermudians.
- Exercises employment practices which have not regularly required the intervention of labour relations officers or Workforce Development or HRC.



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## Stage 2: Section 5 Exemption

Where a Section 3B(2) Designation is granted to a company, a qualifying senior executive of that company is then eligible to apply for Section 5 Exemption.

The application must demonstrate that:

- The applicant is indeed a person in senior executive position.
- The applicant is responsible for making decisions that are critical to the continuity of the company in Bermuda.
- The continued presence of jobs in Bermuda with the company for Bermudians must be dependent on the applicant remaining in Bermuda.
- The applicant will continue to be employed in the company for the duration of the exemption.
- The company must continue to meet the requirements of a “designated” company.

The recently published guidelines (**“the Guidelines”**) indicate that applications for Section 3B(2) Designation and Section 5 Exemptions should be processed within 4 weeks. It is essential that applications thoroughly address all the requirements for the applications with supporting documentation. Ensuring that applications are in good order will assist in a faster processing time and successful outcome.

Once the application is approved, certificates confirming the Section 3B(2) Designation will be sent to the company (identifying the number of exemptions it can apply for at any one time and the date the designation took effect - this is relevant in terms of PRC applications).

A certificate will also be sent to the senior executive confirming Section 5 Exemption.

## What a Section 3(B)2 Designation means to a company

Before the current amendments, a company having obtained Section 3B(2) Designation could only obtain work permit exemptions for 5 qualifying senior executives. However the latest amendments now allow for such number of exemptions as specified by the Minister in the guidelines. The Guidelines indicate that generally the number of exemptions available to a company will correspond to the number of Bermudian staff hired by the company, on a sliding scale as follows:

- 1 to 6 Bermudian staff: up to 2 executives exempted at any one time
- 7 to 12 Bermudian staff: up to 3 executives exempted at any one time
- 13 to 25 Bermudian staff: up to 5 executives exempted at any one time
- Over 25 Bermudian staff: up to 5 executives exempted at any one time, for each additional 25 Bermudian staff

In an attempt to acknowledge that not one size fits all, a general discretion is now also available to the Minister to consider applications from smaller companies and newly incorporated companies to seek a Section 3B(2) Designation. Such companies may not have as many staff but are still making a tangible and significant contribution to Bermuda. Factors which will be taken into consideration include the size of the company, the significance of the company to the economy of Bermuda, the economic situation of in Bermuda, protection of local interests and the interests of the community as a whole.

In practice, for companies which can demonstrate a substantive commitment to employing, promoting and creating jobs for Bermudians, well thought out applications can be made to the Minister to obtain exemptions for one or more qualifying senior



executives who are key decision makers critical to the continuity of the company and who are instrumental in securing jobs for Bermudians.

### **What a Section 5 Exemption means to a Senior Executive**

Once a senior executive has Section 5 Exemption, he/she will be exempt from needing a work permit and his or her family has permission to reside with the exempt employee, provided that (i) they continue to have a familial relationship (ii) live in the same household and (iii) their dependent children are under the age of 19 (25 if they are in college). The spouse once given permission to reside, can seek employment with no requirement for specific permission, although interested employers will continue to be required to obtain a work permit to employ the spouse.

If the senior executive leaves the company, the senior executive will no longer be eligible to hold the exemption. However, if the senior executive is employed by another company that also has 3B(2) Designation and the new company has not exceeded its maximum number of exemptions, then the new company can apply for that person. The exemption period with the previous employer can still be counted.

The senior executive with Section 5 Exemption may also be eligible to apply for a PRC (see below).

### **Applications by Qualifying Senior Executives for a Permanent Residency Certificate**

As a result of the recent legislative amendments, certain senior executives will also now be eligible to apply for a PRC. In order to make such an application, the following conditions (set out in Section 31A of the Immigration Act) must be met:

- The company for whom the senior executive works was eligible for Section 3B(2) Designation on or before 1<sup>st</sup> January 2002 and has obtained that designation
- The senior executive met the requirements for Section 5 Exemption on or before 1 January 2002 and has either obtained Section 5 Exemption or has applied for Section 5 Exemption
- The senior executive has been ordinarily resident in Bermuda for a period of at least 10 years
- The senior executive has been ordinarily resident in Bermuda during the two years immediately preceding the application

The cost of the application has now been reduced from \$120,000 to \$25,000.

The application is made to the Department of Immigration. An application form must be completed together with the required documentation which includes a copy of the senior executive's Section 5 Exemption certificate and where the senior executive is counting any period between 1 January 2002 and 1 January 2012, a copy of the company's certificate that identifies the date from when the company was assessed as having met the criteria for Section 3B(2) Designation.

Effectively, if a company can demonstrate that it met the requirements for obtaining Section 3B(2) Designation as at 1 January, 2002, then a Section 3B(2) Designation application, Section 5 Exemption application and the PRC application can be made at the same time.

Under section 31B of the Immigration Act, the spouse and children of the senior executive can make an application immediately after a PRC is obtained, provided that they (i) have reached the age of 18, and (ii) have been ordinarily resident in Bermuda for 10 years immediately preceding the application. The fee for this application is \$1100.



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Our attorneys at MJM Limited are experienced in Section 3B(2) Designation and Section 5 Exemption applications and can assist with general enquiries regarding the applications and can also assist with the preparation and follow through of all the applications discussed in this E-Guide.

#### **About the Author**

Fozeia is a senior associate in the firm's commercial litigation practice group. She practices in the areas of civil and commercial litigation and is an accredited mediator. Fozeia regularly advises local and international clients on contentious/non contentious employment and immigration matters.

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