ELUCIDATION

General

According to the Memorandum of Elucidation to the Federal Ordinance on Employment of Foreign Labor (Publication Sheet 2001, Nr. 82; 'LAV') that went into effect on January 07th, 2001, its objective is, among other things, to protect the local work force against unfair competition by foreign workers. This unfair competition consists in that the foreign worker, at the end of the day, does not have better qualifications than the local worker, or that the foreign worker will accept wages below market price and, not in the least, because the foreign worker is residing illegally on the island.

The Executive Council of Sint Maarten, in order to set further norms and utilizing the possibilities offered by the Federal Ordinance, in an Island Resolution entailing general measures, has set more detailed rules and regulations regarding employment of foreigners. This happened, for the first time, by Island Resolution entailing general measures of January 21st, 2003 (Island Publication Sheet 2003, No. 6): 'Decree on Employment of Foreign Labor'.

In the course of the years, however, it has been proven that the rules that were set in the aforementioned Decree allowed the labor market to be inundated by foreign labor, all to the detriment of local workers seeking employment. In addition, this influx of - mostly unschooled and low paid – labor has had its negative effects on the social infrastructure of Sint Maarten. Housing and recreation space are becoming more and more scarce by the day, the educational system is under growing pressure (ref.: children of foreign origin), there appears to be a correlation between illegal immigration and crime, Government's coffers are also put under pressure due to the costs for medical treatment of uninsured illegal foreigners.

Taking the foregoing into account, the Executive Council, in its meeting of June 10th, 2008, and based on the relevant internal and external advices received, decided to establish a revised policy regarding the issuance of employment permits, and such by revising the Decree of 2003.

The Tripartite Committee, established as per July 01st, 2006, with the task of periodically advising the Executive Council on matters regarding the labor market in general, and consisting of representatives of business respectively labor organizations, has had input in the creation of this revised policy, as evidenced by the present Decree. In early 2007 the draft was submitted to the Tripartite Committee for its comments, which comments were received in early 2008. It so happens that the better part of the recommendations of the Tripartite Committee were adopted by the Executive Council, which reflects a solid foundation for the adjusted policy now to be implemented.

Besides this an important agreement was made with the Tripartite Committee, namely that in future the Tripartite Committee will play a continuous roll in advising the Executive Council regarding the policy at hand, particularly concerning moratoria for certain professions and the quota respectively, but also in a more general sense.

Under the elucidating per separate article, it will be indicated each time which specific recommendations of the Tripartite Committee were adopted. On occasion reference will also be made to those recommendations that were not adopted by the Executive Council as well as the reasons why.

Finally, explicit mention must be made of the fact that both the Department and the Committee that has been appointed by the Executive Council to advise on letters of appeal (hereinafter to be referred to as 'the Appeals Committee') have made a number of relevant recommendations that were adopted by the Executive Council. Insights developed over time at the Department have led to proposals for the improvement of its own functioning. With regard to the Appeals Committee, it turns out that in executing its task the Committee has developed a good insight into matters and procedures that call for improvement.

The most important points of departure of this revised policy are:

1. The Executive Council of the Island Territory of Sint Maarten advocates a policy that guarantees, as much as possible, job security for the local work force above all. In other words: the admittance of foreign workers to the labor market must always bring with it a substantial degree of added value for Sint Maarten (in accordance, by the way, with the intended revised policy on the issuance of business and directors' licenses).

2. To obtain as much insight as possible in, and a firm grip on, the local supply of labor, and to attune this as much as possible to the demand for labor, so that foreign labor is not hired unnecessarily.

3. Promoting a knowledge based economy, which also entails discouraging as much as possible the influx of low-skilled foreign labor. In principle, employment permits will only be issued for the exercise of skilled professions.

4. The aim is to achieve as much synchronization as possible between the decision making based on the Decree on Foreign Labor (Executive Council) on the one hand and the decision making based on the Federal Ordinance on Admission and Expulsion (Governor) on the other hand.

5. Codification and publication of the policy, primarily by establishing such by Island Regulation entailing general measures. Further, in particular cases, always making the policy known by furnishing interested parties (= employers) with a copy of the Decree and its Elucidation. This is, on the one hand, to guarantee the

integrity of the process of taking in and advising on requests for employments, and on the other hand to avoid the policy from being contestable in Court.

6. The decision making regarding requests for employment permits is mandated to the Department of Labor and Welfare ('ArSoZa'; hereinafter to be referred to as 'the Department') and the Appeals Committee respectively. The foremost reason for this move is efficiency, when taking into consideration the relatively short period of six weeks respectively four months granted by Law for the complete decision making process. Now that the policy has been fine tuned, it behooves the Executive Council to fully guarantee a timely processing of requests respectively appeals.

Compared to the current policy, as is reflected for a large part in the Decree of 2003, the policy has now been amplified and modified on the following major points:

A. An employment permit is granted, in principle, for a maximum period of three years.

B. Granting of employment permits is bound to quota.

C. Introduction of the counterpart concept.

D. Change of profession or employer is not allowed.

E. Granting of the employment permit is contingent on the foreigner having passed the acculturation examination.

F. Granting of the employment permit is also contingent upon the employer guaranteeing adequate housing for the foreigner.

G. Renewal of the employment permit is contingent on whether or not the employer has paid all social premiums and wage taxes pertaining to the foreigner as well as the employer haven taken out appropriate medical insurance for the foreigner.

H. The vacancy notice goes hand in hand with advertising of the vacancy locally and in consultation and cooperation with the Department.

I. As of now on, those persons holding a director's license must also file for an employment permit.

J. From now on minimum and maximum ages will apply for the foreigner for whom an employment permit is requested.

K. When filing a first request, the employer must explicitly state, in writing, that the foreigner at that point in time is residing outside of the Netherlands Antilles and that the foreigner will remain there during the complete processing of the request.

L. The possibility exists that aforementioned limitation will be waived for foreigners who can procure a so called statement of intent with regards to residency issued by the Governor.

M. Explicit listing in the Decree of the conditions under which a request for an employment permit will not be processed.

N. Explicit listing of a number of anti-abuse stipulations in the Decree.

O. The fee has been adjusted upward and will be collected, in future, per year as opposed to per permit.

P. Remittance of the decision by fax or by e-mail, as opposed to sending it by mail or hand delivering it.

Q. Enhancement of the motivation of the decision, particularly if it regards a denial.

At the present moment a number of matters are being worked on, in order to implement this revised policy, namely:

- the process of selection and placement of the counterparts. To this effect the Department was already given instructions to spruce up the section of Labor Mediation and if necessary to submit proposals to thies effect to the Executive Council ;

- the setting up of training and re-training programs for local persons seeking employment, ref. the quota system: to this end instructions were already given to the Department to prepare said programs in cooperation with the Education Department ;

- the acculturation exam: instruction has already been given to the Education Department to work out the curriculum in collaboration with the Culture Department and the Tourist Office and if necessary to (partially) outsource this project ;

- supervision and controls: the Department has already received instructions to revamp the Control Section and if necessary to make proposals to that effect to the Executive Council ;

- information and publication: immediately after the enactment of this Decree, an intensive information campaign will be embarked upon, consisting of among other things, translation of the policy in English, Spanish and French and the publication of the policy in the local newspapers and on one or more official Government websites.

Elucidation per article

Obviously the revised Decree is a more elaborate regulation compared to the Decree of 2003, as is expressed in the total number of articles. In particular, the number of imperative grounds for denial has significantly increased: compare the sole article 8 of the Decree of 2003 entailing the imperative ground for denial (ref. qualifications), with the new articles 6 (specialization), 8 (age), 9 (quota), 10 (counterpart), 11 (housing), 12 (acculturation), 13 (social premiums, taxes, medical insurance), 14 (change of function or employer), resp. 16 (function in relation to the total formation). The Decree of 2003 has, for sure, served as the basis for the revised Decree. In this context, certain articles have been mostly maintained where content is concerned, with the necessary adjustments, additions and / or omissions.
Certain other articles have simply been cancelled, either because the policy was changed on those points or as a logical result of the fact that this is a new Decree
(in particular the articles regarding enactment dates, to wit, the old articles 10, 11 and 12).

Next is the actual elucidation per article in which reference is made, as much as possible, to the comparable article in the Decree of 2003.

Article 1 (definitions)

It was deemed prudent to connect to the definitions in the Federal Ordinance, ref. 'employer', 'employment permit', 'residence permit', 'foreigner'.

Besides, the number of definitions has been expanded, among others: 'counterpart', 'Establishment Regulation', 'Inspection', acculturation examination'.

A special note regarding the use of the terms 'employer' versus 'petitioner'.

In the Federal Ordinance as well as in the Decree of 2003 the terms 'petitioner' and 'employer' are used indiscriminately. In the Federal Ordinance only the term 'employer' is defined; on the other hand the term 'petitioner' is not defined there. In the Decree of 2003 neither term is defined, though it must be assumed that in said Decree both terms have the same meaning or definition as used in the Federal Ordinance.

In the Federal Ordinance as well as in the Decree of 2003 the term 'petitioner' is used less frequently than the term 'employer'. The term 'petitioner' is to be found only once in the Federal Ordinance (article 5, section 6), whereas it appears only twice in the Decree of 2003 (article 2, section 2; article 4, section 1). In two of the three mentioned instances the term 'petitioner' can be substituted without problems by the term 'employer' (that is to say that the meaning and spirit of the stipulations concerned are absolutely not affected by this substitution), whereas in the third of the three instances the term 'petitioner' is

even used incorrectly in the sense that it should read ‘employer’ (re. article 4, section 1, of the Decree of 2003).

For clarity and simplicity, it was decided to use only the term ‘employer’ and not the term ‘petitioner’ in the present Decree. To do justice to the fact that it is not always the employer himself who actually submits the request (it is often an administration office, an attorney or other representative), it is explicitly stated in the present Decree that the request is submitted by or on behalf of the employer: see article 2, section 1.

In addition, and for the sake of clarity, the definition of the term ‘employer’ is explicitly copied from the Federal Ordinance.

Article 2 (submitting the request)

This is in fact the old article 2, with some adjustments and elaborations.

In the first section there is an addition in order to specifically indicate that the employer can have the request submitted by an entity representing him, which in practice is often the case. It is also clearly stated that the entity representing the employer may not be the foreigner himself; in particular it must be clear to the employer at all times that he, and not the foreigner, is the discussion partner of Government (the Department), when it comes to requesting an employment permit. In this respect reference is made to the elucidation to article 1, regarding the use of the terms ‘employer’ versus ‘petitioner’.

A third section has been added, in which the desired transparency is expressed: upon registering the vacancy or if so desired even at an earlier stage the employer will receive a copy of the Federal Ordinance and a copy of the Decree with Elucidation. For practical reasons, the Tripartite Committee had suggested giving the mentioned documents only upon the filing of a first request. However, the Executive Council has taken into consideration the fact that the average employer in the course of time will register more than one vacancy and or submit more than one request and that therefore, in keeping with the aim of full transparency, one cannot take the risk that in the event of an appeal the employer can successfully state that he was not duly apprised of the rules and regulations. The solution was found in the decision that the employer, when registering each separate vacancy, must state in writing that he has already received a copy of the regulations or that he has due knowledge thereof.

Article 3 (data, documents, information to be submitted)

This is in fact the old article 3, with quite a number of adjustments and additions.

Section 1, sub a
The stipulation that a fax number or an e-mail address is obligatory, is new.

Compared to the existing stipulations, the words ‘if possible’ have been eliminated. The Appeals Committee has ascertained that sending the decision by registered mail is not always effective. On the one hand due to the fact that such decisions can sometimes lie at the Post Office for an extended period of time, and on the other hand because it sometimes turns out that the addresses are incorrect and that therefore the decisions are not received.
If the Department itself sends out the decisions by fax or by e-mail, there will be more certainty a) that the decision is sent out as soon as possible, b) that it has been received and c) that there won’t be much room for discussion regarding the date when it was sent. All of the aforementioned serves to strengthen the position of the Executive Council with regard to appeals lodged with the Appeals Committee or with the Judge. Also see the elucidation to article 18, section 1, below.

Section 1, sub f
As was already indicated, new also is the requirement that now the employer must prove that he has arranged adequate housing for the foreigner; see also the elucidation to article 11, below. Upon the recommendation of the Tripartite Committee, it was established that the employer, when submitting the request, must give a first concrete indication of the above, by means of specific information regarding the housing.

In the heading of section 2 the words ‘by the employer’ have been added to make it clear that it is the employer - and especially not the foreigner himself – who is the discussion partner to Government (the Department) when an employment permit is requested.

Section 2, sub a
Also added is the stipulation that from now on, in addition to the employment contract and the job description, the employer must submit the formation plan of his company, both present and future. This is in connection with article 16, one of the explicitly introduced anti-abuse stipulations; reference is made to the elucidation to article 16.

Section 2, sub g
This stipulation has remained unchanged. This does not take away from the fact that the question, whether or not the obligation to register the vacancy for a period of five weeks, warrants exceptions. One can think of cases in which it is evident that there are no local workers available for the job in question, not at the moment of registration nor within the period of five weeks, whereas it regards a vacancy that is of a socially crucial nature, such as for example: medical specialists, teachers, pilots. Our sense of justice tells us that in such cases one should be able to make an exception to the rule. However, neither the formulation of the particular stipulation of the Federal Ordinance nor the elucidation thereto, offer space for deviation.
On the other hand it cannot be deduced from the Federal Ordinance nor its Elucidation that the vacancy registration is valid only for a particular period of time, or that one cannot register the vacancy more than five weeks prior to the actual filing of the request. Therefore, the Executive Council will allow for the employer, who can reasonably show the Department that he has in his organizational plan – ref. section 2, sub a, respectively article 16 – such socially crucial functions which may well suddenly become vacant, to

register those vacancies periodically, say every three months. Then, if there is such an unforeseen vacancy, the employer may, in consultation with the Department, submit a request immediately, given the fact that the vacancy will have already been registered.

Section 2, sub h
This stipulation is new, but obviously very necessary. The Elucidation to article 9, sub a, of the Federal Ordinance, states clearly that it is expected of the employer that he can prove that he has made sufficient effort to hire a local worker, but that it must also be clear what is understood by 'sufficient effort'. To date, the Appeals Committee has often had employers state that they did not know that, in addition to registering the vacancy, they themselves also had to make an effort to find a local worker; this is not in the least due to the fact that the present Decree is not totally clear in this respect. It is the opinion of the Executive Council that the mentioned effort can be best and most effectively expressed through the placing of one or more advertisements in the local daily newspapers. Besides, the Department must be able to check whether the employer has reacted adequately to the applications received from local workers. Therefore a set up was chosen in which the employer is obligated to draft the text of the advertisement in consultation with the Department, which text will entail among others that applications must be sent directly to the Department. In this manner the Department will be able to control the process and mediate where necessary. Next, the employer must give the necessary cooperation to the Department in an effort to accommodate local applicants. The proof meant here consists of, on the one hand, the submission of the advertisements, and on the other hand the fact that the employer provided the Department with sufficient cooperation in trying to accommodate local workers. To be clear, the costs for the advertisement are for the account of the employer. It should be noted that the Tripartite Committee completely subscribes to this obligation for the employer to prove that 'sufficient effort' was made.

Section 2, sub j.
This stipulation is new and can, in part, be attributed to the input of the Tripartite Committee.
The stipulation, in as far as it regards the obligation for the foreigner to await the complete processing of the request outside of Sint Maarten, ensures an effective synchronization between the procedures regarding the employment permit on the one hand and those regarding the residence permit on the other hand, which procedures always go hand in hand.
Such a stipulation already exists when it comes to requesting a residence permit, ref. the Instruction of the Minister of Justice regarding the application of the Federal Ordinance on Admission and Expulsion (Publication Sheet. 1966, No. 17; "LTU") Where the request for an employment permit is concerned, because of the mentioned stipulation regarding the residence permit, it has always been assumed that the foreigner must also await the complete processing of the request outside of Sint Maarten. Now that assumption is being made explicit. Note that this stipulation is only applicable in the event of a first request.
Regarding the question of the statement of intent with regards to residency issued by by the Governor:

This is no more than the realization of that which was agreed upon with the Minister of Justice in 2006 on the tackling of illegality in terms of residency and employment: implementation of a more flexible admittance policy, aimed at giving preference to the hundreds and possibly thousands of foreigners already residing and working illegally on the island for an extended period of time, over newly to be attracted foreigners, pertaining to the issuance of employment permits. It was agreed with the Governor that he would apply a so called statement of intent (compare the procedure sanctioned by the Court regarding requests for guardianship of foreign children): the foreigner who can prove that he has worked for five or more years consecutively and who has now found an employer who is willing to request an employment permit for him, and who further meets the conditions set by the Governor, mainly in the area of security vetting, will receive from the Governor a statement of intent regarding the possible issuance of a residence permit. The processing of the request for an employment permit then becomes subject to the submitting of the statement of intent. Introducing, in addition, the possibility of obtaining a statement of intent is a way to encourage employers – who wish to employ new foreigners – to legalize the status of those illegal workers that they already have in their employ, sometimes for a long time already.

Section 4.
The stipulation was added to the former: information concerning the existing or projected business turnover in relation to the total sum of the wage costs is considered as part of the additional data. This stipulation is directly related to article 17, which is one of the explicitly introduced anti-abuse stipulations; see the elucidation to article 17.

The sections 5 thru 8 are new, and regard instances in which the request is not processed by the Department. In part these stipulations give more substance to the relevant stipulations of the Federal Ordinance, whereas on the other hand these stipulations entail newly introduced anti-abuse clauses.

Section 5.
Article 5, section 5, heading, sub a of the Federal Ordinance, indicates in which instances the request may not be processed. Despite this, there still exists some confusion, not only among employers but also within the Department itself, according to the findings of the Appeals Committee. Though article 3 of the existing Decree (first to fourth section) is based on said premise, namely that by not submitting or showing the data or proof meant the request will not be processed, in light of mentioned confusion it is advisable to once again explicitly mention this fact in the Decree, simply to avoid further confusion in future.

Section 6
The fact that the submitted labor agreement contains a clause that is in contravention of the (labor) laws is an imperative ground for denial, according to article 8, first section, sub b, of the Federal Ordinance. This would imply that the Department must process the request, even if they have knowledge of the forbidden clause in the labor agreement. On the other hand, nowhere in the Federal Ordinance does it explicitly state that the Department must process such a request. Therefore it is more practical to stipulate that

such a request will not be processed. Processing such a faulty request and letting the employer pay the fee, whereas one knows that the request will be denied, is not in keeping with the principles of good governance. It is likely that the employer, when given the opportunity, will include the correct clauses in the labour agreement. Thereafter it is up to the Department to establish, through controls, if those legally imperative stipulations are actually being adhered to.

Section 7
This stipulation is new and regards an anti-abuse clause. It deals with the prohibition of re-submitting a request after having previously received a denial. Both the Department and the Appeals Committee have experienced that to date it happens rather frequently that, upon a denial, shortly thereafter – and usually bypassing the possibility of an appeal with Government or the Judge – a new request is filed for that same foreigner, be it by the original employer, be it by a new employer; in some cases the request is even filed for a totally different occupation. Our sense of justice tells us that this should not be allowed. However, neither the Federal Ordinance nor the existing Decree provide at this moment any explicit possibilities to refuse to process a re-submitted request as meant here. Under the existing Decree the Department may only deny such a request on the grounds of the hypothesis that it is highly unlikely that the foreigner suddenly does meet the established requirements whereas such was clearly not the case some weeks or months earlier. This does mean, however, that the Department must process the request. It is much easier if the Department is not obligated to process such a re-submitted requests. Under the new rules an employer can only re-submit the same request after a substantial period of time has passed.

Section 8
This is a new stipulation and concerns an anti-abuse stipulation. In cases like these the Department can refuse to process the request. If processed, the request may be refused; reference is made to the elucidation to article 18.

Article 4 (the fee)

This article is a fusion of the old articles 4 and 5; both old articles regard the fee to be paid, therefore there is no reason to maintain these articles separately.

It starts with, see first sentence, the emphatic addition that the fee is owed to the Island Territory, this is for sake of clarity and safety.

As mentioned above, one of the most important changes in the policy is that the fee has been revised upwards. Under the existing Decree the basic fee is ANG 1.500,= respectively ANG 800,= (management position versus non-management position); in future this becomes ANG 3.000,= respectively ANG 1.600,=. The increase in fee was prompted by a number of factors, namely:

- as a deterrent, re. focusing on a knowledge based economy and highly skilled foreign labour ;

- compensation for loss of revenue resulting from an expected drop in the number of requests filed on account on the tightening of the policy ;
- the cost of the improved infrastructure for the Department (human and other resources) in order to guarantee proper and timely decision making, also in view of heightened controls that must be done according to the new Decree ;
- the same goes for the costs brought about by the role of mediation by the Department based on the tightened rules ;
- the cost of financing of external assistance for the Appeals Committee as well as for external legal assistance in Court representation.

The system for collecting the fee is as follows:

- Contrary to what is possible under the existing Decree, the Island Territory will no longer refund the fee, completely nor partially. The idea is for the Island Territory to maintain as much as possible the level of revenue derived from the issuance of employment permits.
- The point of departure remains that the employment permit will be granted for one year each time, with the possibility for renewal (to a maximum of three years). The revised editing of the old article 4, section1, sub a resp. b (no change in the new Decree) alludes to the possibility of granting an employmenbt permit for two or three years at once, for reasons of efficiency, particularly if it's clear that the vacancy in question cannot be filled on the short term by a local worker.
- As of now, the fee will be charged per year, instead of per permit. The employer will be met to some degree in giving him a reduction in the fee if the employment permit is granted at once for a longer period of time. For managerial positions the fee is reduced to ANG 2.700.= for the second year and to ANG 2.500.= for the third year. For non-managerial positions the fee is reduced to ANG. 1.400,= for the second year and to ANG 1.300,= for the third year.
- Upon recommendation of the Tripartite Committee it was decided that when an employer requests an employment permit for more than one year at once, but the request is denied, the employer will not owe a multiple of the fee. In such a case, the employer will only owe the basic fee which is ANG. 3.000.= or ANG. 1.600.=. In practice this means that when the request is made, the employer will have to pay one time the basic fee of ANG. 3.000.= or ANG. 1.600.=, regardless if the permit is requested for one year or more. If the permit is granted for more than one year, the employer will have to pay the additional fee before the permit is issued.

In section 3, which replaces the old article 5, the reality is further detailed: payment is often done cash or by check payable to the Island Receiver.

In this respect, the following is noted:
The Executive Council is well aware of the fact that often the employer makes the foreigner shoulder the burden of the fee. This practice is in contradiction with the spirit of the Federal Ordinance, and is rather abusive in nature. However, it is not the competence of the Island Territory to regulate this matter, in the sense that the employer would be legally prohibited from entering into such a practice; this is the competence of

the Federal legislator. The Executive Council by all means is grasping this opportunity to raise this issue in this Elucidation, hoping that employers will accept that this is an immoral action and that the foreigner will become aware of their rights in this respect.

Article 5 (exemptions)

In this article the former articles 6 and 7 have been merged, as both articles deal with the possibilities of exemption.

Section 1, sub a, regards the former article 6, section 1, sub a. Introduction of this stipulation at the time was a matter of practical considerations. The reality was – and still is – that it is frequently the case that someone who works as a housekeeper or a gardener at the home of a private person does not always find full employment with a sole employer. For this reason it was decided back then to grant such foreigners the possibility of working for different employers, whereas these different employers – or any one of them individually – would be expected to request an employment permit for the foreigner. At the time it was reasoned that this group of foreigners was rather limited to the point that they were negligible. In hindsight, this regulation implies undesired complications with regard to the immigration issue in the general. This is because these foreigners do not qualify for a residence permit if they don't have one already, based on the fact that they cannot prove beyond reasonable doubt that they derive sufficient income from their various sources of employment in order to cover their living expenses in this country. This, in turn, has consequences for the family members of these foreigners in the event that they are the providers for their family: the spouse or partner and children do not qualify for a residence permit either. In fact, with this regulation illegality is promoted and condoned. Moreover, it is known that in such cases, the Island Territory exposes itself to costs for medical care of the foreigners in question, if it turns out that they are not medically insured and neither have the means to carry said costs themselves.
The Executive Council remains of the opinion that said exception is justified, for the practical reasons mentioned. It will be considered whether or not this regulation needs to be adjusted, leading to the obligation of both employer and foreigner to report such a situation to the authorities. It was agreed with the Governor that the foreigner would then receive a residence permit, if he can prove that he can provide for himself based on income derived from various sources of employments, according to the norms valid in this country.

To section 1, sub b, the following is added, compared to the old article 6, section 1, sub b : ' ... as long as it is not the intention of the foreigner to reside on Sint Maarten'.
Contrary to the old rule which did not require an employment permit for the recipient of a director's license planning to factually reside here, under the new policy this is no longer the case. This measure aims to stem the still existing practice where foreigners, in an attempt to circumvent the Federal Ordinance, choose the path of the director's license as a basis to be able to reside and work on the island. It must be noted here that this position is emphatically embraced by the Tripartite Committee. The fact is that up to not too long

ago it was much easier to obtain a director's license that automatically brought with it a residence permit. The reason for this was that the Executive Council normally didn't scrutinize requests for director's licenses very closely, not in the least because of the lack of detailed stipulations in the Establishment Regulation. As time went by, a trend of abuse of the regulation was detected. It happened all to often that a foreigner, whose request for an employment permit had been denied or was in danger of being denied, would request a director's license pertaining to a yet to be established company or an existing limited liability company. Following this, it was not very difficult to obtain a residence permit due to the fact that the Governor would suffice with a background check for criminal records. So from 2007 onward the Executive Council started screening requests for director's licenses more closely. Such requests are invariably turned down by the Executive Council, once it is apparent that the director's license was requested in order to circumvent the Federal Ordinance and was therefore done on improper grounds (among other things: putting the foreigner back to work on the work floor, after obtaining a director's license for him) or if it appears that the foreigner has already been working and residing illegally for some time on the island. This tightened policy was recently supported by the Administrative Court (ref., among others, Administrative Ruling Nr. 2008/05 dated June 17th, 2008).
To be even more on the safe side, further abuse of the director's licenses is avoided by now also requiring an employment permit for persons holding a director's licenses and who wish to reside here. The advantage of this new approach is that the proposed (statutory) director will have to show that he has the qualification to function as such on the island of Sint Maarten (among other things: possession of management skills, a proper command of our national language), something that up to date was not really checked.

Section 2, sub c and d are totally new.
The stipulations under c is for the benefit of the foreigner who, upon reaching adulthood, would otherwise end up between a rock and a hard place. Foreign minors can obtain a residence permit linked to that of their legal guardians. However, at the moment that such a person becomes an adult, this is no longer possible, ref. the Federal Ordinance on Admittance and Expulsion; in order to obtain a continuous residence permit, this person must be able to prove that he can provide for himself. In principle, to do so he must have employment. However, even if this person would find an employer willing to request an employment permit, he would run into the obstacle that in order to qualify for a residence permit he must be residing outside the Netherlands Antilles, all based on the policy of the Governor and the Minister of Justice. A practically impossible situation therefore. And yet, such persons are considered to be attached to the island, making it unreasonable not to allow them to work here legally. In this manner it is also made easier for such persons to independently request a residence permit. Upon recommendation of the Tripartite Committee the condition was added that these young persons must have resided legally on the island for at least five consecutive years before reaching adulthood, as some form of acculturation must also be guaranteed.

The provision under d has bearing on the so called European Dutch person. According to the Federal Ordinance, such persons fall under the definition of foreigner; that's a given

for the Island Government. In practice however, no employment permit is required for a European Dutch person, as he enjoys the status of being legally admitted to the island based on the Federal Ordinance on Admittance and Expulsion, the same as is the case with a naturalized Dutch person. This situation requires formalization, especially if exception can be made for a foreigner who wishes to work as a gardener or as a housekeeper, ref. section 1; this is the reason for this addition.

Section 3 is in fact the old article 7, which makes provisions for interns. There is no reason to place this stipulation, which as a matter of fact remained unchanged, in a separate article. Upon recommendation of the Tripartite Committee, the limitations in the existing Decree with regard to the catering industry were dropped. Thought was also given to the idea exempt the so called 'trainers', namely in the hotel sector; but to avoid the risk of abuse, the Executive Council decided not to pursue this idea.

Article 6 (specialization, skills)

This article, together with article 7, forms the nucleus of the tightened regulation.

In reality, unfortunately, it has turned out that in practice employment permits are requested and obtained for foreigners who do not possess such professional skills that it can actually be said that their work could not be done by local workers. Improper reasons for an employer to hire a foreigner are: a) that they can offer a salary to that person that would not be acceptable for a local worker, given the local person's socio-economic reality, b) that they can let the foreigner do work that falls outside the realm of the official job description, without the foreigner daring to make an issue (= abuse), c) that the employer considers the foreigner to be a confidant, more often than not pertaining to his own background or ethnicity.

All these factors contribute to the fact that it is sometimes very difficult for the local worker to find employment. The Executive Council feels obligated to put a stop to such practices, to the advantage of the local worker.

The conclusion is therefore that in future, employment permits will no longer be granted, in principle, for low or unskilled occupations, given the present state of the supply of local workers. The matter is quickly resolved by immediately instituting a negative list where these non-specialized occupations are concerned. These are occupations of which it is known that there is (more than) sufficient supply on the local labor market. Section 1 concerns said list. As far as this listing of non-specialized occupations goes, the Tripartite Committee had proposed to work with the international classification "International Standard Classification of Occupations (ISCO-88) Group 9", in order to avoid confusion in the description of functions. The objection to this proposal is that the ISCO-classification is subject to changes, that is why it was considered more effective to work with our own classification system.

Aside from the above, at the moment there are a number of occupations that may well be classified as specialized, in the sense that they require a specific formal education, but of which it has been ascertained that there is sufficient supply on the local labor market. These are listed under section 2. As is the case with the first section, this list constitutes an imperative ground for denial. Based on the recommendations of the Tripartite Committee regarding the second section, which called for defining this as an optional ground for denial, it was decided to insert the clause '… unless it is proven that special circumstances apply…', which creates the necessary flexibility, among other things the possibility to deviate if it concerns a renewal or an extension. The Tripartite Committee had also recommended, specifically, to remove the professions of carpenter and mason from this list, because of the present construction boom; however, the Executive Council is of the opinion that the present construction boom is slowly coming to an end and that therefore there is no reason to remove those professions from the list.

Aside from that, it is the intention to have the lists mentioned in the first and second sections evaluated periodically and if necessary revised. To this effect an explicit agreement was made with the Tripartite Committee, who will be charged with the semi-annual evaluation as well as advising of the Executive Council thereon.

Section 3 is in fact the old article 8, that contains the so called imperative ground for denial. In addition, the words '… according to the information given by the employer…' have been added to this stipulation. This alludes to the situation where the employer, in order to avoid the obligation to hire a local worker (see above, ref. improper reasons) lists a number of qualifications in the job description, which he assumes and hopes no local worker will be able to match; subsequently he goes on to employ a foreign worker, who quite often, does not have those – high – qualifications either. Next, one often sees that that foreigner is then permitted to acquire the qualifications necessary for the function on the job itself, whereas a local worker should really have been offered that chance, something that the employer obviously prefers not to do. The aforementioned is also connected with the stipulations on the appointment of a counterpart , ref. article 10. This addition to the stipulations further guarantee the rights of local workers.

Given the fact that tourism is still the most important sector of our economy, it is being considered to require in future that the foreigner, in addition to the regular job qualifications, also be able to show specific certification for the catering industry, such as for example the regionally accredited "CaribCert Certification". The Tripartite Committee will be asked to give some consideration to this aspect in its next advice. Depending on that advice, the stipulation in question may then be extended in due time, in the sense that mentioned 'catering certification' will also be one of the qualifications required for the foreigner.

The addition '… according to information given by the employer…' also applies to section 4. An extra addition here is '… when considered in relation to the nature and the gravity of the function…' A similar reasoning as by section 3 is applicable here. Section 4 is in fact the old article 9, which contains the so called optional ground for denial.

Aside from the above, it is the intention that the Department will have built a database of supply and demand, to use as an objective instrument to determine to which extent foreign labor is actually necessary. The degree to which the supply side of this database will be complete, will depend eventually on the extent to which local workers seeking employment register as such at the Department, which registration to date is optional. However, with the introduction of the obligation of the employer to advertise vacancies in collaboration with the Department and with the understanding also that all applications will go directly to the Department – see elucidation to article 3, section 2, sub h – on the long run the Department will obtain a much better insight in and a firmer grip on the supply of local workers, as a result of which they will be better suited to adjust the supply to the demand. This in turn will lead to a situation where it will not easily occur that foreign labor is hired unnecessarily, to the detriment of local workers seeking employment. In this sense and speaking more generally, all the present revisions to the policy (quota, counterparts, limitations to the time for which employment permits are granted) are geared towards encouraging employers to recruit as much as possible from the local supply of workers.

Article 7 (maximum duration of the employment permit.)

Together with article 6 this stipulations is, as mentioned, the core of the tightened regulations.

The stipulation that the employment permit is granted for a maximum period of three years, after which the foreigner will be obligated to leave the island, is new. Once the employment permit has expired, a request for an employment permit for the same foreigner may only be submitted after a minimum of one year has lapsed.
The rationale behind this stipulation is to avoid that more and more foreigners are allowed to accrue residency rights on the island (ref. the Federal Ordinance on Admittance and Expulsion: the longer a person has been admitted here, the stronger a right to residency he accumulates), as a result of which at some point the may no longer be subject to the Federal Ordinance. The purpose of the Federal Ordinance and the Decree is to continue to protect the local workers as much as possible. The added limitations is of enormous help to the local labor market. It is expected that because of this particular restriction, employers will be inclined to train as many local persons as possible for functions within their businesses; see in this connection the regulation of the counterparts (article 10).

The Executive Council will obviously be able to make exceptions to this rule, but only if it concerns highly specialized professions; reference is made to professions of which it has been established that it isn't expected that any local worker will have developed said specialization on short term. The Tripartite Committee had also argued that exceptions be allowed for so called key personnel, being foreign workers who occupy a special position in the business. The Executive Council did not adopt this recommendation, as it goes against the grain of the counterpart concept to be introduced: if there are local workers who have the potential to fill such key positions, be it with or without training,

then they should most certainly be placed there: see also the position of the Executive Council – ref. the elucidation to article 9, hereunder – regarding the long term goal of placing as many local workers in management positions.

Section 4 focuses on special categories, for which employment permits are granted for a short period of time.
Part i): for logistical reasons – ref. the time and effort involved in securing residence permits, visas, landing permits, et cetera – it was decided to now grant employment permits for so called female adult entertainers for a maximum of six months instead of three months.
Part ii): the second category regards skilled construction workers who would be temporarily necessary for the completion of specific construction projects with a definitive completion time frame, and who are not readily available on the local labor market because of a sudden high demand. The duration of the validity of the employment permit is directly related to the duration of the project where the worker will be put to work. The employment permit will be granted for the duration of three to twelve months (short term versus long(er) term projects), with the possibility of a one time renewal for the same amount of time. Once such construction projects are completed there will be no more work for those foreigners. In order to prevent these persons from loitering on the island and looking for other work, the obligation to immediately and unconditionally leave the island also applies to them. By 'skilled construction worker' is meant a foreign worker with a specialization such as, for example, masonry or carpentry; therefore an ordinary construction helper is not meant, being a function for which no special skills are required and which can easily be filled with local workers.

Article 8 (age)

Where the maximum age is concerned: Persons over 60 normally do not qualify for medical insurance. The foreigner who is admitted after age 57 runs the risk of still being on Sint Maarten when he turns sixty and will possibly not be able to get medical insurance. This is by all means an undesired situation, seeing the consequences that it may have for Government's coffers.
Where the minimum age is concerned: It is a known fact that on Sint Maarten the population group between 16 and 24 years of age constitutes a group that is tied to diverse types of social problems. In view hereof, it is considered irresponsible to allow more persons in this vulnerable category onto the island.

Article 9 (quota)

This stipulation is new and also constitutes one of the main pillars of the new policy.

The issue of quota means that per business a maximum percentage of foreign labor will be allowed in relation to the percentage of local workers. The quota will vary per

business sector. The combined quota will have to be a reflection of the desired composition of the labor force; this gives the Executive Council a steering mechanism with regard to the desired development of the island.

Presently the division between foreign workers versus local workers on the whole is approximately 60% - 40%. The goal is to turn these proportions around in the transitional period of three years (see article 23): 60% local labor versus 40% foreign labor. To this end, the present percentage of foreign labor has to decrease, which now will be achieved by a) strongly curtailing the influx of new foreigners, b) granting employment permits for a maximum period of three years, after which the foreigner is obligated to leave the island. On the other hand the goal is achieved by increasing the amount of employment for the local workers through: a) implementing training and re-training programs and b) the expected influx of Sint Maarteners presently living abroad and who stand a better chance of obtaining employment locally as a result of the new policy.

The quota will be evaluated after three years and, if necessary, they will be actualized through an updating of this Decree. As agreed, the Tripartite Committee is charged with performing said evaluation and advising the Executive Council on its findings. By that time, but preferably at an earlier date, the Tripartite Committee will also have to give advice on the important question whether, throughout all the sectors, special quota have to be set with regard to management positions: not only is it Government's aim to guarantee more employment for the local work force on n the long run, but also to ensure that local workers are better represented within companies at management level.

Article 10 (counterpart)

This stipulation is also new and essential to the new policy.

When defining the concept of 'counterpart' the Tripartite Committee pointed out, rightfully so, that it was necessary to add the clause: '…who have the potential of being trained within a period of three years': neither can it be so that a counterpart remains endlessly in training and moreover at the expense of the employer. The maximum training period of three years for a counterpart stands in direct relation to the maximum duration of the employment permit, see above. It is the obligation of the employer to do all within his power within said maximum period of three years, so as to make the need for employing foreign labor superfluous. This means that the employer, in consultation with the Department, will take on the training of a local person who in time will fill the position in question.
The Department will play an active and steering role in the selection and placement of local workers as counterparts, among other things by actively taking part in the selection interviews of the local candidates by the employers. To be sure, these interviews will always take place in the presence of the Department (in other words: it will not suffice to propose local workers to the employers; the Department must see to it that the local worker is called up for a job interview and that the latter actually takes place). If within

the three year period the employer is not successful in training a local person to fill the position, then the employer may request a new employment permit, but this will then have to be for a new foreigner, see article 7.

As mentioned, the costs for engaging a local counterpart is for the account of the employer. These costs entail the salary and other costs pertaining to the training of the counterpart. It is expected that this extra financial obligation for the employers will lead to them working harder to immediately find a local worker or to have one trained as a counterpart for the function.

Article 11 (housing)

This stipulation is also new.

Hiring a foreign worker is often attractive for the employer, because the foreigner will often be satisfied with living circumstances which are far below the acceptable norm of the local worker. A number of things are achieved by demanding that the employer secure adequate housing for the foreigner, which housing must answer to norms of this society. The general level of well being is promoted, which goes hand in hand with the fight against further pauperization of the island. Also, the employer is then forced to offer a realistic salary, which makes it more interesting for the local worker to accept the function in question.

In the event of a first request, the employment permit, if granted, will not be issued until the employer has shown, to the satisfaction of the Department, that he has arranged proper housing for the foreigner. Upon recommendation of the Tripartite Committee, it was decided – see elucidation to article 3, section 1, sub f – that upon submitting the request already the employer must indicate where and how he will house the foreigner. Once the employment permit is finally issued, factual controls by the Department are possible at all times.

Article 12 (acculturation)

This stipulation is new and is emphatically supported by the Tripartite Committee, who indicated that, contrary to what was initially proposed by the Executive Council, there must be an examination instead of a course.

The reality is that lack of acculturation by foreigners on the island has consequences for the good state of our social fabric. Disruption of public order can often be attributed to cultural clashes between foreigners and the local population on the one hand and local authority on the other hand. Segregation is also promoted when foreigners are not required to familiarize themselves with the norms and values of this country, among which our language. It does not matter if a foreigner is admitted to the island for only a limited period of time; in terms of social integration, one to three years is a relatively

long period. Some elements of the acculturation examination are therefore: our national language, the history and culture of Sint Maarten, the cultural and social norms and values of Sint Maarten, knowledge of the economy in general and of the tourist product of Sint Maarten in particular, knowledge of our constitution and our Government (among other things: the names of the persons in Government, not only on Insular level but also on Federal and Kingdom level).

Upon recommendation of the Tripartite Committee an exception is made for persons who have successfully completed their secondary schooling on Sint Maarten.

The Department of Education has a leading role in setting up the curriculum for the acculturation examination and also for the logistics with regard to the sitting of these examinations; it is not excluded that specialized bureaus can be certified to this effect.

Article 13 (payment of social premiums and wage tax; medical insurance)

This stipulation is also new.

This tool is urgently needed for more than one reason. In the first place, because fraud is still often committed where it concerns the mere existence of the business of the employer. Many cases are known whereby employers, after the requests have been processed, have refused to receive the employment permit once granted as it turns out that someone else usurped the name of the employer upon submitting the request, whereas the employer is absolutely not familiar with the foreigner in question.
Besides, it happens on a regular basis that employment permits are requested for businesses that do not even exist or that no longer exist.
A third form of fraud regards cases, whereby the employer indicates that he will pay the foreigner a certain salary (which salary the Department sanctions in the framework of the request), while later it becomes evident that a much lower salary is being paid in reality.
By controlling whether social premiums and wage taxes have been paid, not only is it checked that the employer is abiding by the law (and as such is contributing to Government's coffers), but it is also verified that the foreign worker is being paid that which the employer agreed to pay him as was sanctioned by the Department.

The implications of not having a medical insurance were already discussed, see among other things the elucidation to article 8.

Article 14 (prohibition to change function or employer)

This stipulation is new.

The phenomenon exists that once the employment permit has been obtained, the employer has the foreigner, be it immediately or gradually, fulfill a different job in his business than that for which the employment permit was granted, and as such is

defrauding Government. Lawfully, this is not the intention, certainly not when taking into consideration the protection of the local work force. This prompted this prohibition taken up in article 1.

Section 2 concerns the prohibition of 'cherry picking'. To date, too often abuse has been made of the employment permit in this sense. The interpretation one gives to the rules is that a foreigner, for whom an employment permit has been granted, can effortlessly transfer to another employer, either because he himself does not want to work any longer for the original employer, or because the original employer does not want him anymore (termination of employment, downsizing of the company). Besides the fact that such is formally not permissible, the Island Territory, by condoning such practices could, in certain cases, be an accomplice to unfair competition toward the original employer. Therefore to avoid possible liability for Government in aforementioned sense, this practice which is popularly called "cherry picking" is prohibited as of now.

Article 15 (residence permit)

Infringement on the Federal Ordinance on Admittance and Expulsion is a ground for denying an employment permit, see article 8, first section, sub d of the Federal Ordinance. Therefore it is Government's task to exercise controls in this regard.
It is a known fact that employers, once having obtained the employment permit, quite frequently never bother to pursue the residence permit. However, when a residence permit is requested, the Governor most certainly initiates a criminal background check. Here too it has often turned out that the foreigner in question has a criminal record (on Sint Maarten), even after the employment permit was granted. Such information must be secured in as early a stage as possible, with the general interest and public order in mind. From a financial point of view, these controls will become even more interesting when in future the office of the Governor begins charging a fee for the processing of requests for residence permits (at this moment residence permits are issued free of charge), which is obviously beneficial to the coffers of the Federal Government and, indirectly, to the coffers of Island Government.

Article 16 (function in relation to business formation plan)

This stipulation is new and is correlated to article 3 section 2, sub a. It is an anti-abuse stipulation.

The Appeals Committee in particular has established that from time to time employment permits are abused as a means of obtaining legal residence on the island for family members, compatriots, friends or acquaintances of an employer. The employment permit is certainly not meant for this. He who requests an employment permit on aforementioned grounds is acting in contravention of the spirit of the Federal Ordinance. By demanding insight into the formation plan of the business beforehand, the Department

can establish whether the function really fits in the formation plan or if it is in keeping with the nature of the business.

Article 17 wage costs compared to business turnover)

This stipulation is new and is correlated to article 3, section 4. It is an anti-abuse stipulation.
What was stated in connection with article 16 also applies here, namely abuse of employment permits as a means of obtaining legal residence for family members, compatriots, friends and acquaintances of business people.

It is a fact that the Department has required, for the longest of while, that a natural person who requests an employment permit for a housekeeper must be able to prove that he or she has a gross annual income of at least ANG 36.000,= . In itself this is a good point of departure: the individual must be able to pay the salary of the worker. What catches the eye is that when it concerns a regular company, neither the Decree nor the Federal Ordinance explicitly require that the turnover of said company be sufficient to pay the total salary costs of the employees. It is however logical that a similar rule should apply for limited liability companies and other legal entities. Such companies and businesses held in sole proprietorship employing various persons should also be made to prove their turnover beforehand (by giving insight into their financial statements, their profit tax filings and returns and or their income tax filings and returns; as far as the future is concerned, their assignment portfolios where applicable). In other words: the demand for foreign labor must stand in an acceptable proportion to the business turnover and or the ability of the enterprise to pay the salaries of the foreign workers it wants to hire. In this manner too misuse of the employment permit as a means of securing legal residence for family members, friends, acquaintances and compatriots of the employer can be prevented. For the time being, the stipulation as it is now defines will suffice. In due time the Department, based on the results going forward with this new policy, will be able to formulate more concrete criteria, to be incorporated in this Decree.

Article 18 (public order, good morals)

This stipulation is new and is correlated to article 3, section 8, regarding the possibility of not processing a request if there is a suspicion that the employer handled in contravention of public order or the general interest. It is therefore a general anti-abuse stipulation, which came about based on the findings of the Appeals Committee. Here too situations are targeted where employers speculate with the employment permits as a means of securing legal admittance to Sint Maarten for family members, compatriots, friends or acquaintances. This stipulation refers to a situation where the request was processed, but later certain abuse was discovered.

The stipulations of this article and of article 3, section 8, are meant for all those cases that are not covered either by the Federal Ordinance or by the existing Decree. Concretely, the following types of situations are meant:

- there is a well founded or strong suspicion that, after an employment permit has been issued, the foreigner will not go to work for the employer at all (shady enterprises, particularly in the construction field and among job agencies) ;
- there are well founded or strong suspicions that the submitted diplomas are falsified ;
- there are well founded or strong suspicions that the foreigner was forced to or will be forced to foot the bill for the processing fee, or that some other financial sacrifice was asked of him – in principle, higher than the processing fee – so that the employer could request the employment permit on his behalf.

Article 19 (the decision)

Section 1 regards the fact that in future the employment permit will be sent by fax or by e-mail; remittance by registered mail or hand delivery will be done only in exceptional cases. Reference is also made to article 3, section 1, sub a, above. It is inconceivable that in the year 2008 there are still businesses – and private persons – who do not have a fax number or an e-mail address at their disposal. If one doesn't have one's own fax number or e-mail address then one surely has a relative or business associate with same. This stipulation is naturally also applicable to decisions on appeals.

Section 2 was written in order to prevent the foreigner from claiming at one point in time that his stay on the island was condoned by Government, with all necessary consequences regarding him accruing strong residence rights. Based on this section the employer is also obligated to inform Government immediately of circumstances which could lead to the retraction of the employment permit. Such a stipulation strengthens Government's position particularly if the case is brought before the Judge.

Section 3, regarding the motivation of the decision, is also with regard to Government's position in the event of appeal with the Appeals Committee or the Judge. The format used for, in particularly, the negative decision has been expanded in such a manner that in future there will be space for listing more than one ground for denial whereas there will also be space for sufficient, specific motivation.
For the sake of completeness it should be stated that the Appellate Administrative Court has, meantime, clearly indicated what the procedural sequence is pertaining to appeals: appealing the decision before the Judge is not facultative, the employer who is not in agreement with the decision is obligated to first appeal the case with the Appeals Committee after which decision he can, if so desired, take his case to the Judge (see the decision of the Appellate Administrative Court of November 29th, 2007 in the case nr. 200 HLAR 28/07). It is for this reason that the clause in the decision pertaining to appeals possibilities only mentions the Appeals Committee, whereas in a decision taken by the Appeals Committee mention will be made of the possibility to appeal the decision with the Judge.

Even though the employment permit is formally directed to the employer, the foreign worker in question has an interest in being privy to the decision. Sometimes abuse is committed toward the foreigner in the event that the employer – for example – does not apprise him of the fact that the permit has been granted; the foreigner then remains in the assumption that his status is illegal, with all the dire consequences for him, such as exploitation by the employer. Section 4 purports to protect the rights of the foreigner in general.

Article 20 (controls)

As mentioned above (see among others article 13) the lack of supervision has lead to various forms of fraud being committed by employers, hence these explicit stipulations regarding controls. This stipulation is meant to work preventively.

Article 21 (mandate)

Thanks to the expansion in 2006/2007 of the number of personnel at the Permits Section of the Department, the Department has managed to put forward advices to the Executive Council within a normal period of time – four weeks – as opposed to previous times. However, the decision making process of the Executive Council, combined with the physical course of the documents, frequently results in Government surpassing the legal term of six week. Given the fact that in some 95% of all cases Government goes along with the Department's advice, it is justified to completely mandate the decision making to the (Head of the) Department.

In order to save time and also due to the fact that Government usually decides according to the advice of the Appeals Committee, the decision on appeals is also mandated to said Committee, in as far as the Committee is of the opinion that the primary decision is to be upheld. To be sure, the Appeals Committee who up till recently was faced with a sizeable backlog (going back to the year 2004), as of the ending of 2007 has been totally up to date meaning that appeals are being handled within the period of four months as stipulated by Law.

Control of the mandate.
The limitation in the mandate to the Appeals Committee as mentioned is the first instance of checks and balances in the total process followed by Government. Namely, the mandate is paired with the obligation of the Department respectively the Appeals Committee, to report monthly to the Executive Council on all decisions taken in mandate. The Executive Council passes on this information to an independent institution – the Government Accountant's Bureau, in principle – whose assignment it is to periodically conduct random checks on proper execution of the mandate; this then becomes the second instance of checks and balances of the total procedure followed by Government. Finally, Government will also base its evaluation of the mandate given on the measure to

which the Administrative Court reverses decisions made by the Department; this then is a third instance of checks and balances performed by Government regarding the total procedure.
In all, there are sufficient built-in checks and balances, making it possible for Government to step in timely, if necessary.

For good order, it should be noted and emphasized that the Federal Ordinance explicitly departs from the premise of mandating the decision making. Reference is made, for example, to the elucidation to article 6 (' … or the head of the Department who issues the employment permit on behalf of the Executive Council…').

Article 22 (enactment)

The new policy goes into effect two months after its promulgation, with the exception of the stipulations regarding the revised fees (see article 4, section 2). Meaning that requests received prior to said date will be processed according to the old rules. All requests submitted after abovementioned date will be handled according to the new rules of policy.
The revised fee (see article 4, first section) goes into effect two months later (that is: four months after promulgation), which is another way of meeting the target group half way.

Article 23 (Transition regulation)

A consequence of the revised policy is that a sizeable group of foreigners, for whom employment permits have already been issued, will be faced with the reality that, in time, they will have to leave Sint Maarten. This will only be different for such persons who can prove to the Governor that, aside from having an employment permit, they can lay claim to continuous residence.

The Executive Council has drawn the line at five years of consecutive legal employment or legal residence, see section 1. In this sense, the admittance policy of the Minister of Justice based on the Federal Ordinance on Admittance and Expulsion has been taken into consideration – see the already mentioned Instructions of the Minister. The foreigner who has had five consecutive years of legal residence on the island has, in principle, accrued the so called strong right to residency and can thereafter not be so easily repatriated. Matters become even more complicated if the foreigner can lay claim to family life. For this group of foreigners, upon enactment of this Decree, the employment permit does not have to be bound to a maximum period of time.
In his Instructions – ref. paragraph 3.3.1 – the Minister leaves it up to the Island Territories to decide if after five years, the foreigner who has accrued the so called strong residence rights, still is required to request an employment permit. The Executive Council has emphatically chosen for this to be the case, meaning that such foreigners are still required to request an employment permit. This choice has a lot to do with financial considerations, given the fact that requests for employment permits generate a steady

stream of revenue for Government, whereas training programs for local workers require continuous financing. It may therefore well be that a foreigner at a given moment in time cannot easily be repatriated based on accrued residency rights and that his employment permit is not bound to a maximum period of time; this however does not take away from the fact that his employer is still obligated to request an employment permit and pay the fee to Government.

To be exact, the tightened regulations are not disadvantageous for the employers in the sense that, in case a particular foreign worker is not allowed to stay on the island, the employer is always free to request an employment permit for a new foreign worker, as long as he adheres to all the conditions and limitations set forth by Law to protect the local worker. Once more, the aim is to have jobs taken up as much as possible by the local labor force, this being the most important point of departure of the tightened policy.

Section 2 refers to the quota. Government considers a transition period of three years reasonable for all sectors in the business community to adjust to the established quota. After said period of three years Government will move to enforce the rules regarding quota. Businesses are advised not to wait until the last minute to try and meet the quota. If in the year 2009 a business realizes that it is far above the established quota for that particular business sector, they would be wise to immediately begin hiring larger numbers of local workers to take over spots occupied by foreign workers, be it by way of training and counterpart. One has to keep in mind that if by the year 2012 the number of positions occupied by foreign workers tends to exceed the quota, a number of employment permits will subsequently be denied in as far as issuing same would lead to factual exceeding of the quota.

For the sake of completeness it should be noted that of all of amendments represented in this Decree, the rules of transition are only applicable to the issue of the maximum duration of the employment permit (section 1) and that of the quota (section 2).

Article 24 (official title)

This is in fact the old article 13.

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