



Sociaal Economische Raad
Social Economic Council

To the Minister of Public Health, Social Development and Labor
Mr. V.H. C. de Weever
Clem Labega Square
Philipsburg
Sint Maarten



Philipsburg, October, 22 2013

LETTER OF ADVICE

Our reference: SER /13/DCB/54

Re: Letter of advice concerning "The implementation of Article 10- Counterpart".

Honorable Minister de Weever,

In reply to your request for advice which was received by our Council on July 17th, 2013, concerning the implementation of Article 10- Counterpart of the Executive Order on Foreign Labor (in Dutch: "Uitvoeringsbesluit arbeid vreemdelingen") the Social Economic Council informs you as follows:

Background on article 10- Counterpart of the Executive Order on Foreign Labour :

Statistical information from the Sint Maarten Department of Statistics indicates an unemployment rate of 11.5 %, with youth unemployment (ages 15-24) at 27.7 %¹. The Ministry of Public Health, Social Development and Labor has made different strategic changes to address this issue, many of which were initiatives originated from the "SEI Employability Tru Training" project and various new processes within the Labor Affairs Department. Ongoing efforts also include an adult training program where unemployed Dutch citizens residing on Sint Maarten are being educated through direct job skills training.

The Labor Department also recognizes the dynamic mechanisms within the work permit section, where strong statistical data points to a labor market force consisting of non-nationals holding positions within top organizations, businesses, yet having a minimal of secondary academic education.

Placement of Dutch nationals has been improving, according to the Labor Department, yet further partnership with businesses is required and the Labor Department is therefore requesting the immediate implementation of article 10 of the Executive Order on Foreign Labor.

¹ Source: Sint Maarten Department of Statistics based on the Census 2011 results. All surveys were carried out according to age group, gender and country of birth.



Legal framework

The Council took into consideration that it is a priority for the government of Sint Maarten to protect local workers from immigrant competition. Therefore, the National Ordinance on Foreign Labor² was drafted and went into effect in 2002. This National Ordinance lays down rules relating to employment by foreigners and formulates a restrictive admissions policy for migrant workers by determining that a foreigner is only eligible for a job in Sint Maarten when there is no skilled local candidate available.

In order to ensure proper enforcement of this National Ordinance on Foreign Labor, specific policy measures are needed to counter the negative effects of the migrant workers versus Dutch nationals residing in Sint Maarten. In 2003 these policy measures were drafted and laid down in the Executive Order on Foreign Labor³. In 2009, a new article, the so-called counterpart article, was added to this Executive Order on Foreign Labor.

Elaboration of article 10: Counterpart

A counterpart is a local⁴ employee who will be placed next to the foreign employee and who has the potential to be trained in a certain job in order to replace the foreigner within three (3) years.

An employment permit for a foreigner will only be granted under the following conditions:

- A Dutch national residing on Sint Maarten will be made available by the Labor Department as counterpart to the position for which the work permit has been granted;
- A training plan must be presented to the Labor Department. The training plan may not exceed a maximum period of three (3) years;
- The cost of the training shall be borne by the employer;
- The counterpart shall be compensated according to acceptable standards;
- A request for renewal will be denied if the employer dismisses the counterpart without the prior approval of the Labor Department, or to the discretion of the Labor Department the employer fails to sufficiently train the counterpart.

For the proper implementation of article 10, the Labor Department will provide the following services:

- Thorough assessment of a suitable candidate to be referred to the business;
- Services of a job coach and job placement officer, to ensure suitability and matching of the counterpart with the desired career path;
- Monitor the training process on a monthly basis.

² In Dutch: Landsverordening arbeid vreemdelingen, P.B. 2001, no.82

³ In Dutch: Uitvoeringsbesluit arbeid Vreemdelingen, AB 2013, GT nr.73

⁴ A Dutch national residing in Sint Maarten.



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Recommendation SER on article 10:

Surely, compliance with current law is the very first fundamental right which can be demanded of every country and while the SER is well aware that the Executive Order on Foreign Labor is already applicable law, the SER strongly advocates revising this article 10 – counterpart because of the following concerns:

The purpose of the National Ordinance on Foreign Labor is that it is prohibited to allow a foreigner to work on Sint Maarten without the necessary employment permit⁵. An employment permit can be granted with restrictions and **only** when there is no suitable local candidate to fulfill the vacancy⁶. Violation of this article is a punishable offense. Pointing to non- nationals holding positions within top organizations, businesses, yet having a minimum of secondary academic education as *the* reason to effect the counterpart article appears to be the wrong policy to “solve” this problem. The work permit is only given after it has been established no suitable local candidate is available, in other words managing the influx of foreign labor can be done prior to issuing a work permit.

After examining the National Ordinance on Foreign Labor, the SER concludes that proper implementation and enforcement of this law, without the counterpart article 10, provides adequate safeguards to achieve its intended purpose. If, in reality, locals do not get a fair chance for job opportunities, as it is stated in the advice request, the SER suggests increased enforcement of the already existing regulations, since the success of any legal framework depends on the effectiveness of controls on compliance with the rules it lays down.

The SER further recognizes the intention of article 10 counterpart (raise employment opportunities for locals) in connection with article 20 paragraph 1 of our Constitution. Nonetheless, a thorough investigation is necessary to solve any problem. To start, all surveys ever done on unemployment were executed based on gender, age and place of birth. So, it has never been clear what percentage of (youth) unemployment concerns Dutch nationals, or what the demand is for employees in terms of type of profession, required education and skills and the extent to which local employees can fulfill the demand. The SER therefore is of the opinion that as long as a thorough research has not been executed, it is unwise to implement additional legislation.

Moreover, if there is no qualified local Dutch national to fulfill a certain vacancy, this confirms that Sint Maarten is facing challenges in educating its nationals to fulfill certain positions in Sint Maarten or Sint Maarten suffers from a brain drain. In both cases one cannot expect employers to bear the additional costs, especially not when this is a consequence of an omission on the part of the government of Sint Maarten.

If it appears that the supply on the local labor market does not meet the demand, positive measures (education, training) should be taken to fill in the gap between insufficiently skilled local employees and the positions offered.

⁵ Article 2 paragraph 1 of the National Ordinance on Foreign Labor.

⁶ Article 6 and 8 paragraph 1 under a of the National Ordinance on Foreign Labor.



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In view of short term solutions, the SER proposes to create a tax- break for employers who take on unskilled local youth or youngsters who are not adequately prepared to enter the job market and provide these youngsters with on-the-job training.

Additionally, executing this article will have a negative effect on Sint Maarten's business climate, considering that the supply on the labor market of Sint Maarten is strongly dependent on immigration.⁷

The execution of article 10 will drastically harm especially small businesses through double labor costs: having to pay two people (the foreign employee and the counterpart) two salaries for doing the same job. Also, execution of this policy by the Labor Department will have a random effect on businesses. For some positions held by foreigners, counterparts will be available, but in many cases there will be no counterpart, as the (unemployed) local candidates are simply too small in number compared to the number of foreigners employed. This will cause the counterpart policy to have an unpredictable effect on the cost of doing business, while it will most certainly lead to unfair competition between businesses. Consequently, this will negatively and unpredictably affect a business's profit margin and could easily cause companies on Sint Maarten to go out of business, thus damaging our economy.

While examining article 10- counterpart, the SER realized that there are additional articles that need to be revised as well:

1. Based on article 2 paragraph 3 under h of the Executive Order on Foreign Labor, all application letters should be sent immediately to the Labor Department with a copy to the employer, since the Labor Department first examines if there is a suitable local candidate available for the vacancy. This can- in practice- impose a heavy burden of proof on the Labor Department in finding the right candidate for a vacancy, because it is the employer who ultimately assesses whether the proposed candidate is suitable to fill the vacancy or not. It is first the responsibility of the employer to make an effort in finding a local suitable candidate for a vacancy. The Labor Department should have a monitoring role but the obligation to first find a local for the job still rests with the employer.
2. Some foreigners work (as domestic help) for various employers, but for none of these employers more than 16 hours per week, meaning that none of these employers then need to request a work permit. This exception actually creates illegality. In addition, a work permit goes hand in hand with a residence permit. Before an employment permit can be issued, the foreigner should be able to provide the Labor Department with a copy of a valid residence permit or at least proof that such a residence permit has been requested. But in order to be granted a valid residence permit, the Immigration and Naturalization Department needs proof of sufficient funds. Furthermore, violation of the National Ordinance on Admission and Expulsion⁸ is a ground for refusal when it comes to granting work permits⁹.

⁷ Available data show that 21% of all employees are born on Sint Maarten, 13% on the other islands of the Dutch Caribbean and 66% elsewhere (source: Ecorys, Economic Outlook Sint Maarten 2012- 2013 p.35).

⁸ Landsverordening Toelating en Uitzetting, P.B.1966, no.17

⁹ Article 8 paragraph 1 under Part D of the National Ordinance on Foreign Labor



3. Addressing the issue of youth unemployment, the SER noticed that all surveys on (youth) unemployment were carried out according to age, gender and country of birth. Since country of birth is not synonymous with nationality, it is difficult to assess the percentage of unemployed

Dutch nationals. No unemployment survey was executed based upon nationality, yet article 10 tends to place Dutch nationals next to a foreign counterpart, in order to reduce the unemployment rate of Dutch nationals. It is thus not certain what percentage of the unemployed youngsters have the Dutch nationality.

However, regarding unemployed non- Dutch youngsters, the SER considers that this might be due to the omissions in the current 2013 Executive Order on Foreign Labor, where children of immigrants who were born and raised on Sint Maarten, but do not have the Dutch nationality are not exempted from applying for a work permit. The(se) minor children of immigrants fall under the residence permit of their parents until they reach the age of majority (18)¹⁰. From this age onwards, these youngsters have to apply for a residence permit by themselves. In order to qualify for a residence permit, one must prove to have sufficient financial funds. At the same time, the current National Ordinance on Foreign Labor and the Executive Order on Foreign Labor forbid employers to employ foreigners without the necessary employment permit. So, even though these youngsters were born and raised on Sint Maarten, current legislation makes no exception for them regarding work permits.

4. Examining the work of clergy to the criteria of the Executive Order on Foreign Labor may lead to an impasse. According to the Executive Order on Foreign Labor, we should first look within Sint Maarten for clergy before looking abroad. In practice this is often not feasible for Sint Maarten.
5. In the current Executive Order on Foreign Labor there are no measures taken against employers who offer foreigners a job with a compensation which is less than the statutory minimum wage.
6. Article 6 states that an employment permit will not be granted in case of a new request for low skilled or unskilled labor. An enumeration of these jobs is listed in article 6. This article is favorable for nationals of Sint Maarten. Together with the Labor Department the employer shall first look for local people to perform these jobs. If for whatever reason there is no local person available to perform one of these jobs, the Executive Order on Foreign Labor leaves no room for a foreigner to apply for these jobs. In this respect, the SER agrees that there is a gap in the legislation which must be filled.
7. The capacity to decide on an employment permit is mandated to the Head of the Labor Department (article 16 paragraph 1), without any further instructions or restrictions.

¹⁰ Article 6 "Landsbesluit, houdende algemene maatregelen van de 17de januari 1963 ter uitvoering van de artikelen 7 lid 6, 8 lid 1, 11 lid 1, 20 en 21 lid 1 van de Landsverordening toelating en uitzetting, AB 2013, GT.no. 498.



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8. Since the new constitutional reform of the Kingdom of The Netherlands on the 10th of October 2010, Sint Maarten has a new country status and thus the wording of the National Ordinance on Foreign Labor and the Executive Order on Foreign Labor should be changed accordingly.

The SER has reached consensus on the following:

1. To change article 2 paragraph 3 in such a way that all applications go directly to the employer with a copy to the Labor Department. In this way, the Labor Department still has its monitoring role and the obligation to first find a local for the job, still rests with the employer.
2. To draft and enforce the same rules and the same exceptions for all; not tolerating some foreigners to work without a valid employment permit.
3. That the group of foreign clergy also be exempted under Article 5 of the Executive Order on Foreign Labor, under the following cumulative conditions:
The person in question should have a religious function for which a specific training/ education is required;
and, whose presence is of great importance for the functioning of that church;
and, who is not employed by the church.
4. A work permit shall be refused when the foreign national will earn less than the statutory minimum wage. The SER proposes this to protect our nationals and prevent foreigners to accept wages below the legal minimum.
5. To fill the gap regarding adolescents, who were born and raised on Sint Maarten, but who do not have the Dutch nationality regarding applications for work permits.
6. That the Executive Order on Foreign Labor should be amended regarding article 6 with the intention to close the loophole concerning the listed jobs for which no new employment permit shall be granted.
7. Article 16 paragraph 1 should also mention that the Head of the Labor Department can only base the decision to grant or refuse someone a work permit on the National Ordinance on Foreign Labor and the associated Executive Order on Foreign Labor, in order not to decide randomly on the work permits.
8. That as a result of Sint Maarten's new constitutional status, the wording in the Executive Order on Foreign Labor should be adjusted accordingly.



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Advice:

The SER has taken notice of the request how to implement article 10 of the Executive Order on Foreign Labor. Pursuant to the SER meeting on this topic, the SER unanimously advises:

- To revise article 10 of the Executive Order on Foreign Labor and not execute this article 10 counterpart:

The emphasis of the current National Ordinance on Foreign Labor is to protect and to favor nationals above foreigners. In the first place, this law without article 10, if enforced correctly, already provides sufficient guarantees thereto.

Secondly, before implementing new regulations, an in-depth research should be done, outlining the problem that needs to be addressed. This way, policy makers can assess the urgency of the matter, the essential measures and their effectiveness in solving the problem. (And not the other way around, as the current situation where a law has been implemented, but there is uncertainty on how to carry it out).

Lastly, article 10, as it is currently formulated, is detrimental for an economy like Sint Maarten's, where the labor supply is strongly dependent on immigration.

The SER further advises:

- To review the entire Executive Order on Foreign Labor, taking the SER's concerns into consideration.
- To set a reasonable timeline in which the concerns of the SER and the revision of the Executive Order on Foreign Labor can be executed.

We trust to have informed you sufficiently herewith.

Should you require any additional information after reading the above, please feel free to contact us at your earliest convenience.

Respectfully,

René A. Richardson
Chairman

Gerard M.C. Richardson
Secretary-general