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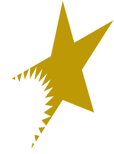

EXPECT THE BEST

Significant Amendments to the Temporary Foreign Worker Program Expected on April 1, 2011

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On August 4, 2010, the governor-general-in-council published amendments to the *Immigration and Refugee Protection Regulations* ("IRPR"), which will adversely affect many temporary foreign workers ("TFWs"). As these amendments will become effective as of April 1, 2011, a brief overview of these amendments is provided below.

Assessment of Employment Offered [R200(5)]

The amendments establish specific factors to assess the genuineness of the employer's offer of employment to a TFW, both in Labour Market Opinion ("LMO") cases and in LMO-exempt cases. These factors include:

1) Whether the offer is made by an employer that is actively engaged in the business in respect to which the offer is made (except in the case of live-in caregivers, who are typically employed by households instead of businesses);

2) Whether the offer is consistent with reasonable employment needs of the employer;

3) Whether the terms of the offer are terms that the employer is reasonably able to fulfil; and

4) The past compliance of the employer, or any person who recruited the foreign national for the employer, with the federal or provincial laws that regulate employment, or the recruiting of employees, in the province in which it is intended that the foreign national work.

Additional Employer-Related Requirements for Live-In Caregivers [R203(1)(d)]

In the case of a live-in caregiver, an immigration officer must determine, on the basis of an LMO provided by Human Resources and Skills Development Canada ("HRSDC"), if:

1) The foreign national will reside in a private household in Canada and provide child care, senior home support care or care of a disabled person in a household without supervision;

2) The employer will provide adequate furnished and private accommodations in the household; and

3) The employer has sufficient financial resources to pay the foreign national the wages offered.

Ban on Employers who Fail to Substantially Comply with the Terms of a Previous LMO or Work Permit [R200(1)(c)(ii.1)(B) and R203(1)(e)]

The amendments make an employer ineligible to seek a work permit on behalf of a TFW unless, during the period beginning two years before the initial request for an LMO is made to HRSDC or, in the case of an LMO-exempt work permit, beginning two years before the work permit application

is received by Citizenship and Immigration Canada ("CIC") or the Canadian Border Services Agency ("CBSA"):

1) The employer provided each of its foreign workers with wages, working conditions and employment that were substantially the same as the wages, working conditions, and occupation set out in the employer's offer of employment; or

2) The failure to do so was justified in accordance with R203(1.1).

The permitted justifications described in R203(1.1) include:

1) A change in federal or provincial law;

2) A change to the provisions of a collective agreement;

3) The implementation of measures by the employer in response to a dramatic change in economic conditions that directly affect the employer, provided that the measures are not directed disproportionately at foreign nationals employed by the employer;

4) An error in interpretation made in good faith by the employer with respect to its obligations to a foreign national, if the employer subsequently provides compensation or makes sufficient attempts to do so to all foreign nationals who suffered a disadvantage as a result of the error;

5) An unintentional accounting or administrative error made by the employer, if the employer subsequently provides compensation or makes sufficient attempts to do so to all foreign nationals who suffered a disadvantage as a result of the error; or

6) Circumstances similar to those set out above.

The assessment is undertaken at the time that a new LMO is requested or, in the case of an LMO-exempt work permit application, when the work permit application is received by CIC/CBSA.

Published List of Banned Employers [R203(6)]

The amendments provide that CIC must maintain on its website a list of banned employers, stating the names and addresses of each employer and the date that the determination was made. HRSDC will not issue an LMO, and CIC/CBSA will not issue a work permit, for any banned employer.

Temporary Foreign Workers Limited to Four Years [R200(3)(g)]

The amendments provide for a cumulative four-year cap on TFWs until a period of 48 months (four years) has elapsed. However, exemptions from the four-year cap exist in the following situations:

1) The foreign national intends to perform work that would create or maintain significant social, cultural or economic benefits or opportunities for Canadian citizens or permanent residents. Therefore, work permits based on LMO exemptions such as significant benefit to Canada (C10) and intracompany transferee (C12), among others, will be exempt from the four-year cap.

2) The foreign national intends to perform work pursuant to an international agreement between Canada and one or more countries, including an agreement concerning seasonal agricultural workers. Therefore, work permits issued in accordance with international agreements such as the *North American Free Trade Agreement*, the *General Agreement on Trade in Services*, and the *Canada-Chile Free Trade Agreement*, among others, will be exempt from the four-year cap.

Fortunately, a TFW who has reached the four-year cap is not required to leave Canada; they just may not obtain a work permit during the subsequent 48-month period. In other words, the foreign

national could obtain a study permit, attend school for 48 months, for example, and then once again become eligible for a work permit.

LMOs to Indicate Period of Validity [R203(3.1)]

The amendments provide that LMOs shall indicate the period during which the opinion is in effect. If the TFW does not obtain a work permit within the time period, the employer must request a new LMO from HRSDC.

HRSDC's current policy is that all LMOs expire six months after issuance. It is unknown whether this validity period will continue once the amendments come into force. ■