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Blaney McMurtry
BARRISTERS & SOLICITORS LLP

Blaneys on Immigration Law

This newsletter is designed to highlight new issues of importance in immigration related law. We hope you will find it interesting, and welcome your comments.

Feel free to contact any of the lawyers who wrote or are quoted in these articles for more information, or call the head of our Immigration Law Group, Ian Epstein at 416.593.3915 or iepstein@blaney.com.

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"Effective June 26, 2010, Citizenship and Immigration Canada made an important change to permanent residence applications by making it mandatory for the submission of an English or French language proficiency test."

MANDATORY LANGUAGE TESTING REQUIRED FOR MOST PERMANENT RESIDENT APPLICANTS

Suzanne Bailey

Effective June 26, 2010, Citizenship and Immigration Canada ("CIC") made an important change to permanent residence applications by making it mandatory for the submission of an English or French language proficiency test. As of that date, if the principal applicant has not submitted *International English Language Testing System* ("IELTS") or a *Test d'Evaluation de Français* ("TEF") test results, his application will be returned to him, marked as incomplete. This is the case even for those applicants having been born, raised and educated in English speaking jurisdictions such as the United States, England and Australia.

This mandatory language test applies to all permanent residence applications under the Federal Skilled Worker Class, Canadian Experience Class and Business Class (investors, entrepreneurs and self-employed). The only exception is Family Class sponsorship applications and some Provincial Nominee Programs.

CIC's rationale for imposing a written language test was partially to eliminate incidences of fraud (for example in the past, some applicants fraudulently submitted another person's written work as proof of their own English language proficiency). Now when the applicant shows up at designated language testing centre, his personal identification is verified, so there is certainty that it is the applicant's work (instead of the work of someone else). In addition, as the language tests are standardized, it takes out the subjective element of an immigration officer using his discretion to decide a person's level of language proficiency based on his written work. The new mandatory language test now provides an unbiased and objective way to ensure a person's level of language proficiency.

Many people, particularly those born or raised in English or French language jurisdictions, are troubled by this change as it increases the cost of a permanent residence application (since the applicant must pay for the language test) and the location of the testing centres are not often convenient (particularly for those living in remote areas).

The above mandatory language test requirement was initially implemented by way of Ministerial Instructions. At the time, it was believed by many immigration practitioners that such a requirement was *ultra vires*, because Ministerial Instructions could not override the language of

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"Under Section 5 of the current Citizenship Act, in order to apply for Canadian citizenship, the applicant must (among other things) have accumulated three years of residence in Canada within the preceding four years."

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the *Immigration and Refugee Protection Regulations* ("IRPR"), which allowed alternative methods of establishing language proficiency. It would appear that the Canadian Government eventually came to the same conclusion because, on March 3, 2011, it amended the IRPR itself to specifically require mandatory language testing.

Initially, CIC made the English and French language tests valid for one year. However, very recently, they have relaxed the rule, such that effective December 23, 2010, those test results are now valid for 2 years from the time the applicant has taken his English or French language test. ■

POTENTIAL CHANGES TO THE RESIDENCY REQUIREMENT IN CANADIAN CITIZENSHIP APPLICATIONS

Ian Epstein (with assistance from Catherine Longo)

Under Section 5 of the current *Citizenship Act* (the "Act"), in order to apply for Canadian citizenship, the applicant must (among other things) have accumulated three years of residence in Canada within the preceding four years. The Act does not define "residence" and it has been left to the Citizenship judges to decide whether or not physical presence is strictly required to establish residence.

The case law sets out three legal tests which are available to determine whether an applicant has established residence within the requirements of the Act. The Citizenship judge may: (a) use a strict count of days, (b) consider the quality of residence (whether there are strong ties to Canada), or (c) conduct an analysis of the centralization of the applicant's mode of existence in Canada. The existence of three tests has created uncertainty in the system and has led at least one judge to comment in their decision that the system is akin to a lottery.

As it currently stands, on a strict count of days an applicant must have been physically present in Canada for 1,095 days in the preceding four years. If an applicant does not meet this mark, they can argue that they fall under the strong attachment to Canada or the centralized mode of existence categories. These arguments are sometimes called the "functional approach" to residence.

Section 5.9 of Chapter 5 of the Citizenship Policy Manual ("CP 5"), published by Citizenship and Immigration Canada ("CIC"), sets out the current citizenship policy dealing with residence and specifically acknowledges that there are "exceptional circumstances" where citizenship should be granted even where the 1,095 days of physical presence has not been established. CP5 outlines six questions (taken from the Federal Court case of *Koo (Re)*, [1993] 1 F.C. 286)), which should be considered when making a determination under the functional approach:

1) Was the individual physically present in Canada for a long period prior to recent absences which occurred immediately before the application for citizenship?

2) Where are the applicant's immediate family and dependants (and extended family) resident?

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"As a policy, it seems short-sighted for Canada to send the message to business people who are contemplating moving to Canada that their international business ties may be held against them."

Ian Epstein is a partner in the firm's Immigration Law group. Ian's interest in immigration work stems from the fact that he is an immigrant to Canada himself who experienced the many challenges that immigrants face when they seek permanent status in Canada. The focus of his immigration practice is business immigration, including obtaining work permits and permanent status for employees who are needed in Canada, permanent status for professional, entrepreneurial and investor class applicants. Ian has had some considerable success handling difficult cases.

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3) Does the pattern of physical presence in Canada indicate a returning home or merely visiting the country?

4) What is the extent of the physical absences? If an applicant is only a few days short of the 1,095-day total, it is easier to find deemed residence than if those absences are extensive.

5) Is the physical absence caused by a clearly temporary situation such as employment as a missionary abroad, following a course of study abroad, accepting temporary employment abroad, accompanying a spouse who has accepted temporary employment abroad? and

6) What is the quality of the connection with Canada: is it more substantial than that which exists with any other country?

Unfortunately, the possibility of arguing that the functional approach should apply to an applicant's case may soon come to an end. On June 10, 2010, Bill C-37 (referred to as *An Act to Amend the Citizenship Act*) received first reading in the House of Commons. The CIC Backgrounder (entitled "Strengthening the Value of Canadian Citizenship: Amending the Citizenship Act to Protect the Integrity of Canadian Citizenship") states that one of the goals of the proposed legislation is to "strengthen the rules around citizenship residence requirements so that people applying for citizenship would have to be physically present in Canada for three of the previous four years." Under the transitional provisions, if an application is referred to a citizenship judge before the new Section 5 of the Act comes into force, the old Section 5 will apply.

Should Bill C-37 become law, it will certainly clarify the residence requirement for citizenship, but it will also narrow the definition so that the citizenship applications of many talented business people will be excluded by virtue of their international commitments. Given the growing globalization of the Canadian economy, there are circumstances where senior and valued members of the business community must spend considerable periods of time abroad to promote their business interests. These are the very people that Canada hopes to attract as immigrants.

As a policy, it seems short-sighted for Canada to send the message to business people who are contemplating moving to Canada that their international business ties may be held against them. This problem may be exacerbated by the fact that many of these people will have spouses and children living in Canada who will qualify for citizenship.

Those permanent residents who intend to apply for Canadian citizenship, but who will not satisfy the 1,095-day threshold, should consider applying as soon as they satisfy the other requirements. If Bill C-37 is enacted in its current form before their citizenship case is heard by a citizenship judge, they may have to choose between their business commitments and their desire for Canadian citizenship. ■

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"On August 4, 2010, the governor-general-in-council published amendments to the Immigration and Refugee Protection Regulations, *which will adversely affect many temporary foreign workers."*

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SIGNIFICANT AMENDMENTS TO THE TEMPORARY FOREIGN WORKER PROGRAM EXPECTED ON APRIL 1, 2011

Henry J .Chang

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.

"Many questions remain unanswered regarding how the amendments to the Temporary Foreign Worker Program will be implemented, despite the fact that these amendments become effective on April 1, 2011."

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. ■

HRSDC ANNOUNCES CHANGES TO LABOUR MARKET OPINION APPLICATION PROCEDURES AS OF APRIL 1, 2011

Henry J. Chang

Many questions remain unanswered regarding how the amendments to the Temporary Foreign Worker Program ("TFWP") will be implemented, despite the fact that these amendments become effective on April 1, 2011. Neither Citizenship and Immigration Canada ("CIC") nor the Canadian Border Services Agency ("CBSA") has provided any guidance on how these amendments will affect the processing of work permits. To date, only Human Resources and Skills Development Canada ("HRSDC") has provided any significant information on how these amendments will affect the TFWP.

HRSDC has announced that new Labour Market Opinion ("LMO") application forms will be available as of March 25, 2011; these new forms will be specific to each stream under the TFWP (i.e. Live-in Caregiver ("LCP") Program, Seasonal Agricultural Worker Program, etc.). Among other things, the new forms will require:

1) The Canada Revenue Agency ("CRA") business number of the employer;

2) A description of the employer's main business activities (not required for the LCP);

3) An explanation of how hiring a TFW meets the employment needs of the employer; and

4) A signed statement attesting that the employer will abide by the TFWP requirements.

5) All LMO applications submitted on or after April 1, 2011 must use these new forms.

As HRSDC will have the authority to conduct a genuineness assessment of any job offered to a TFW and to verify that returning employers have lived-up to employment requirements stipulated in previous LMO, employers may be asked to submit additional documentation to support their LMO application. A summary of this additional documentation appears below:

All Program Streams Except the LCP Stream

When applying for an LMO, all new employers to the TFWP will be required to provide a copy

of their business licence or permit. They may be asked to provide other evidence of their business in lieu of or in addition to a business licence or permit.

The genuineness of the job offer made to the TFW will be assessed based on whether the:

1) Employer is actively engaged in the business in which the job offer is being made;

2) Job offered to the TFW meets the employment needs of the employer, and is consistent with the type of business the employer is engaged in;

3) Employer can fulfil the terms and conditions of the job offer; and

4) Employer, or the third party representative acting on behalf of the employer, is compliant with the relevant federal-provincial/territorial employment and recruitment legislation.

LCP Stream

As of April 1, 20011, the following documentation must now be submitted along with the new LMO application for all LCP stream cases:

1) Proof of age or disability for the person requiring care:

   - *Child* – long-form birth certificate or official adoption documents. If these are not available, any other official document issued by a government authority demonstrating the child to parent relationship (e.g. original birth certificate for children born abroad translated into English or French).
   - *Senior* – birth certificate, Old Age Security Identification Card, passport or any other official documents showing the date of birth of the senior requiring care.
   - *Disabled person* – medical certificate stating that the disabled person requires care (but not the nature of disability).

2) A detailed description of the private accommodations provided to the live-in caregiver.

3) An Option C-printout that any taxpayer can obtain from the CRA, proving that the employer has the income necessary to pay the live-in caregiver.

Employers may also be required to provide, if requested by HRSDC, a provincial workers compensation clearance letter or other appropriate provincial documentation.

The genuineness of the job offer made to the live-in caregiver will be assessed based on whether the employer:

1) Demonstrates a reasonable need for a full-time live-in caregiver to provide child care, elder care or care for a disabled person;

2) Can provide adequate, private accommodations to the live-in caregiver;

3) Has sufficient financial resources to pay the live-in caregiver.

4) The employer, or the third party representative who recruited the live-in caregiver on behalf of the employer, must be compliant with the relevant federal-provincial/territorial employment and recruitment legislation.

"On November 10, 2010, Citizenship and Immigration Canada published regulations in the Canada Gazette, which restored the Canadian Federal Immigrant Investor Program..."

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Additional Requirements for Returning Employers

All returning employers must demonstrate that they have met the terms and conditions of employment set out in previous LMO confirmation letters and annexes (if applicable). In addition, some employers may be required to submit documentation to support a more detailed employer compliance review including any or all of the following documents:

1) Payroll records;
2) Time sheets;
3) Job descriptions;
4) Copies of the employer-employee contract;
5) Collective agreements;
6) The TFW's work permit;
7) Provincial workers compensation clearance letter or other appropriate provincial documentation;
8) Receipts for private health insurance (if applicable);
9) Receipts for transportation costs; and
10) Information about accommodations provided by the employer;

If it appears that employers did not fully respect the terms and conditions of employment set out in the LMO confirmation letters and annexes (if applicable), the employer will have the opportunity to provide a rationale. In this case, HRSDC will work with the employer to implement the appropriate corrective action, which may include providing compensation to the TFW of live-in caregiver. Employers may be found non-compliant if they refuse to provide a rationale and/or provide only partial compensation to the TFW or live-in caregiver. ■

CITIZENSHIP AND IMMIGRATION CANADA RESTORES THE FEDERAL IMMIGRANT INVESTOR PROGRAM

Catherine Longo

On November 10, 2010, Citizenship and Immigration Canada ("CIC") published regulations in the Canada Gazette, which restored the Canadian Federal Immigrant Investor Program ("IIP"); these regulations came into force on December 1, 2010. Under the revised IIP, investors are now required to have a personal net worth of $1.6 million CAD and to invest $800,000 CAD. The regulatory amendments modify the definitions of "Investor" and "Investment" under R88(1) to reflect these new values.

A moratorium on the IIP had been in place since June 26, 2010, when the Federal Government first proposed changes to the program's personal net worth and investment criteria. Prior to that date, investors were only required to have a personal net worth of $800,000 CAD and to make an investment of $400,000 CAD.

The previous personal net worth and investment levels were initially established in 1999. CIC explained that a net worth of $800,000 CAD in 1999 was considered substantial enough to attract applicants with the financial wherewithal and expertise to make a significant positive economic contribution to Canada. However, due to increasing global wealth, it now believed that a net worth of $800,000 was within easy reach of a modest property owner in a large city, who may not have other transferable resources as originally envisioned. In addition,

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"...for all the hard work and sacrifice that international students must face while residing in Canada, their first real hurdle is to get through immigration smoothly."

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CIC stated that most other countries with similar programs now required an investment closer to $1 Million CAD. The recent changes were designed to update the IIP and align it with similar programs in Australia, New Zealand, the United Kingdom, and the United States as well as decrease wait times for processing applications.

Under the IIP, the required investment is a five-year, zero interest loan to the Government of Canada. These funds are distributed to participating provinces and territories to fund economic development and job creation initiatives in their regions. The investor is granted permanent residence status and repayment of the loan is guaranteed by the recipient province or territory. British Columbia, Manitoba, Ontario, Nova Scotia, Prince Edward Island, Newfoundland and Labrador and the Northwest Territories currently participate in the IIP. However, other provinces and territories have expressed an interest in participating as well. ■

THE PAPER CHASE - STUDYING ABROAD, IN CANADA

Daniel I. Horovitz

Each year, thousands of foreign nationals come to Canada to pursue higher education. They cross borders, oceans, and sometimes their parents, for the chance to develop new skills and new goals in the Great White North. Yet, for all the hard work and sacrifice that international students must face while residing in Canada, their first real hurdle is to get through immigration smoothly. Filling out all of the necessary paper work and attaching all of the required documents to get a study permit must seem like a daunting task for young adults and their families, but it need not be.

The first important thing to know is that not everyone needs a permit to study. There are several examples worth highlighting:

1) A family member or a member of the private staff of a foreign representative who is properly accredited by the Department of Foreign Affairs and International Trade and who is in Canada to carry out official duties as a diplomatic agent, consular officer, representative or official of a country other than Canada, of the United Nations or any of its agencies or of any international organization of which Canada is a member do not require a study permit.

2) Members of the armed forces of a country that is a designated state (including Great Britain, France, and the United States) for the purposes of the *Visiting Forces Act* do not require a study permit. This includes a person who has been designated as a civilian component of those armed forces.

3) If the duration of their course or program of studies is six months or less and will be completed within the period for their stay authorized upon entry into Canada, no study permit is required.

4) Every minor child in Canada, other than a child of a temporary resident who is not authorized to work or study, is authorized to study at the pre-school, primary or secondary level. In Canada, each province and territory decides the age of majority which varies from 18 to 19.

5) Any foreign national who has applied to renew an existing study permit can stay in Canada past the expiration of their current permit until a decision has been made on their renewal application. This is referred to as "implied status."

Most students who are not exempt from the study permit requirements will need to apply for a study permit, along with a temporary resident visa, at a Canadian consulate prior to arriving in Canada. However, prospective students from visa-exempt countries, including United States citizens and U.S. lawful permanent residents, may also apply at the time of arrival at a Canadian port of entry.

Along with the completed application and filing fees, each applicant will need to provide supporting documents. These requirements vary from country to country but will for the most part include proof of identity, proof of acceptance, and proof of financial support. Each of these categories is briefly discussed below:

1) To satisfy the proof of identity requirement a valid passport will suffice, along with two passport-sized photos with the applicant's name and date of birth written on the back. A valid passport is normally required of any person entering Canada, and the photos can be easily obtained at any photo studio, and many cameras stores.

2) To satisfy the proof of acceptance requirement, a student will usually need to provide a letter from the school confirming the student's acceptance and enrolment in the program of study. That letter should include the duration of the academic program and the latest date for registration.

3) Finally, each applicant must prove that he or she has sufficient funds to cover tuition, travel, and living expenses while in Canada without working. Obtaining proof of a bank account and financial statements for the last four months will act as critical evidence, as will proof of payment of tuition.

Although it is outside the scope of this article, it should be mentioned that prospective students applying to study in Quebec will also need a *Certificat d'acceptation du Québec* issued by the Quebec Government.

Students are required to demonstrate financial sufficiency for only the first year of studies, regardless of the duration of the course or program of studies in which they are enrolled. In other words, a single student entering a four-year degree program with an annual tuition fee of $15,000 must only demonstrate funds of $15,000 to satisfy the requirements, and not the full $60,000 that would be required during the course of his or her four-year program. However, immigration officers should be satisfied though that the probability of funding for future years exists.

In addition to establishing financial means to cover tuition, prospective students are also required to demonstrate that they have to means to satisfy requirements relating to transportation and maintenance, including the cost of books, equipment, and supplies. For example, a prospective student coming to an academic institution in Ontario must prove that he or she possesses funds of $10,000 CAD per twelve-month study period ($833 per month), plus the cost of tuition. An additional $4,000 CAD per twelve-month period ($333 per month) is

required for the first family member who will accompany him or her to Canada and an additional $3,000 CAD per twelve-month period ($255 per month) is required for each additional family member thereafter.

Of course, just because an international student is required to demonstrate that he or she will be able to live in Canada without resorting to employment in Canada does not actually mean that he or she cannot legally work. Indeed, a part-time job can provide a student with helpful supplemental income and valuable field experience.

Under the regulations, a full-time post-secondary student with a valid study permit may work on-campus without the need for a work permit. Any student intending to work off-campus must apply for a work permit but, in some cases, the work permit will be issued without the need for an LMO. These situations include the off-campus work permit program and co-op or internship program, among others.

The student's spouse or common law partner and dependent children may also acquire temporary resident status for the same duration as the principal applicant. In addition, if the spouse or common law partner wishes to work while in Canada, he or she may also be eligible for an open work permit.

Many students who come to Canada to study do so with the intention of immigrating after graduation. The intention to become a permanent resident does not preclude an applicant from acquiring a student visa, so long as the immigration officer is satisfied that the student will leave Canada by the end of the authorized period. The person's desire to work, study or visit in Canada before or during the processing of an application for permanent residence may be legitimate. An officer should distinguish between such a person and an applicant who has no intention of leaving Canada if the application is refused.

Studying in Canada is a wonderful opportunity for students from a plethora of cultures and backgrounds to engage the rich Canadian tapestry and discover a new part of themselves. A diligent review of the steps necessary to receive a study permit will make the transition to life in Canada far easier, and the experience far more enjoyable. ■

EXPECT THE BEST

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