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PUBLICATION

Citizenship and Immigration Canada Proposes Regulatory Changes to the Temporary Foreign Worker Program

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Background

In early April 2013, it was reported that forty-five Royal Bank of Canada ("RBC") employees in Toronto would be losing their jobs because the company had outsourced several technology services to iGate, a California-based firm that specializes in sending jobs offshore. RBC faced a severe public backlash over the incident. Questions were also raised regarding how iGate had brought its own employees into Canada under the Temporary Foreign Worker Program ("TFWP"), so that they could be trained at RBC offices.

As a result of the RBC incident, the Government of Canada announced several changes to the TFWP. On April 29, 2013, the Minister of Human Resources and Skills Development ("HRSDC") and the Minister of Citizenship, Immigration and Multiculturalism, announced that they were introducing changes, which would:

- Immediately require employers to pay temporary foreign workers at the prevailing wage by removing the existing wage flexibility;
- Immediately suspend the Accelerated Labour Market Opinion ("A-LMO") process;
- Increase the Government of Canada's authority to suspend and revoke work permits and Labour Market Opinions ("LMOs") if the program is being misused;
- Add questions to employer LMO applications to ensure that the TFWP is not used to facilitate the outsourcing of Canadian jobs;
- Ensure employers who rely on temporary foreign workers have a firm plan in place to transition to a Canadian workforce over time through the LMO process;
- Introduce employer fees for the processing of LMOs and increase the fees for work permits so that the taxpayers are no longer subsidizing the costs; and
- Identify English and French as the only languages that can be used as a job requirement.

Some of these changes were implemented administratively. Other changes will require regulatory amendments before they can be implemented.

Recently Implemented Administrative Changes

As previously reported in the May 2012 issue of *Blaneys on Immigration*, HRSDC announced last year that it would permit employers to pay the temporary foreign worker ("TFW") up to 15% less than the average wage for higher skilled occupations (NOC Skill Levels 0, A, or B) or 5% less than the average wage for lower skilled occupations (NOC Skill Levels C or D), if they could document that their Canadian workers were also receiving the same wage. This flexibility was due to the fact that the average wage figures established by Statistics Canada were not always appropriate. For example, they did not consider a particular worker's level of experience in the field or the presence of a very large employer in the region that paid above average wages to its workers. In any event, HRSDC has now removed this wage flexibility. Ironically, this may require certain employers to pay TFWs more than their Canadian counterparts.

Also, as previously reported in the May 2012 issue of *Blaneys on Immigration*, HRSDC announced last year that it was implementing an A-LMO initiative that would allow certain employers, who had an established track record of compliance, to obtain expedited processing of their LMOs. Although the A-LMO program was considered a success, HRSDC has now suspended it. Although the announcement on April 29 suggested that the suspension of the A-LMO program was temporary, it is unknown when the program will resume.

In addition, HRSDC is now requiring employers who have submitted an LMO application to complete a Canadian Labour Market Impact Questionnaire, which asks questions about whether the entry of the TFW will lead to job losses due to outsourcing or offshoring, or otherwise facilitate outsourcing or offshoring. Presumably, answering "yes" to one or more of these questions will result in a denial.

Finally, HRSDC already appears to be prohibiting the use of foreign languages as a job requirement. However, knowledge of English and/or French can still be used as job requirement, when appropriate.

Proposed Regulatory Amendments

As mentioned above, some of the changes previously announced by the Government of Canada will require regulatory amendments before they can be implemented. In furtherance of this objective, Citizenship and Immigration Canada ("CIC") published proposed regulatory amendments to the *Immigration and Refugee Protection Regulations* ("IRPR"), SOR/2002-227, in the *Canada Gazette* on June 8, 2013. These proposed amendments are described in greater detail below.

CONDITIONS APPLICABLE TO ALL WORK PERMITS

Under the proposed regulations, all employers will be required to demonstrate that they are complying with (or that they have complied with) certain conditions during the period of the TFWs work permit:

- The employer (other than the employer of a live-in caregiver) must be actively engaged in the business in respect of which the offer of employment was made;
- The employer must comply with the federal and provincial laws that regulate employment and the recruiting of employees in the province in which the TFW works;
- The employer must provide a TFW with employment in the same occupation as that set out in that TFW's offer of employment and with wages and working conditions that are substantially the same as, but not less favourable than, those contained in the offer;
- The employer must make reasonable efforts to provide TFWs with a work place that is free of abuse, specifically:
- Physical abuse, including assault and forcible confinement,
- Sexual abuse, including sexual contact without consent,
- Psychological abuse, including threats and intimidation, and
- Financial abuse, including fraud and extortion;
- The employer must not be convicted of an offence of human trafficking under the Immigration and Refugee Protection Act, unless there has been a final determination of an acquittal or a pardon/record suspension has been granted; and
- The employer must not be convicted, or discharged, under the Criminal Code of any of the following offences, unless there has been a final determination of an acquittal or a pardon/record suspension has been granted:
- Trafficking in persons (or related offence);
- An offence of a sexual nature (or an attempt) against an employee;
- An offence causing death or bodily harm to an employee;
- Uttering threats to cause death or bodily harm against an employee; or
- An offence involving the use of violence (or an attempt) against an employee.

In addition, the employer must not be convicted outside Canada of an offence that would constitute one of the above offences if committed in Canada, unless there has been a final determination of an acquittal.

These conditions will typically be enforced by CIC.

CONDITIONS APPLICABLE TO LMO-BASED WORK PERMITS

Where an LMO is required, employers who are issued a positive LMO will be required to comply with the several conditions during the period of foreign national's employment (or, where applicable, during any other period that has been agreed to by the employer and HRSDC). As appropriate, employers will be required to demonstrate that they are complying with, or have complied with, one or more of the following conditions:

- Employers must ensure that the employment of the foreign national will result in direct job creation or job retention for Canadian citizens or permanent residents, if that was one of the factors that led to the issuance of the LMO and subsequent work permit;
- Employers must ensure that the employment of the foreign national will result in the development or transfer of skills and knowledge for the benefit of Canadian citizens or permanent residents, if that was one of the factors that led to the issuance of the LMO and subsequent work permit;
- Employers must make reasonable efforts to hire or train, or hire or train, Canadian citizens or permanent residents, if that was one of the factors that led to the issuance of the LMO and subsequent work permit; and

- In the case of an employer who employs a TFW as a live-in caregiver, the employer must:
- Ensure that the TFW resides in a private household and provides, without supervision, the care for which the TFW was employed;
- Provide the TFW with adequate furnished and private accommodations in the household; and
- Have sufficient financial resources to pay the TFW the wages offered.

The exact conditions with which a particular employer will be required to comply depend on their specific LMO and will be established by HRSDC prior to the issuance of the LMO. These conditions will typically be enforced by HRSDC.

IMPROVED COMPLIANCE VERIFICATION

The current regulations provide that returning employers seeking to hire TFWs, including live-in caregivers, are required to demonstrate compliance before they are granted a positive LMO or the employer is granted a work permit. CIC and HRSDC may examine previous offers of employment within the two years preceding the date of receipt of a new LMO or work permit application and the employer may be required to produce evidence of compliance (i.e. that they provided each TFW with substantially the same wages and working conditions as those set out in their offer of employment). However, CIC and HRSDC can only verify compliance at the time that a new LMO or work permit application is submitted by the employer. As a result, unless a subsequent LMO or work permit is filed, it is impossible to verify whether the employer has complied with the terms of a previous job offer.

Under the proposed amendments, employers will now be required to demonstrate that, within the six years preceding the date of receipt of a new LMO or work permit application, that they provided each TFW with substantially the same wages and working conditions as, but not less favorable than, those set out in their previous offer of employment. Employers will also be required to retain documents that demonstrate their compliance with any conditions that were imposed on them, for a period of six years after the date that the TFWs work permit expires.

In addition, the proposed amendments will allow a compliance verification inspection in the following cases:

- A CIC officer or the Minister of HRSDC has a reason to suspect that the employer is not complying with or has not complied with any conditions imposed;
- The employer has not complied with conditions in the past; or
- The employer is randomly chosen for verification compliance.

In other words, compliance verification will no longer be triggered solely by the filing of a subsequent LMO or work permit application by the employer. It can be initiated at any time during the compliance verification period.

NEW VERIFICATION COMPLIANCE INSPECTION POWERS

Under the proposed amendments, for the purposes of verifying compliance, CIC or HRSDC will have the authority to require an employer to report at any specified time and place in order to answer questions and provide documents that relate to compliance with any condition imposed on it. HRSDC may also exercise its authority to verify the conditions that would typically be enforced by CIC, at the request of a CIC officer.

More significantly, CIC and HRSDC will have the authority to enter and inspect any premises or place where the TFW works, without the consent of the employer. Upon entering the premises or place where the TFW works, CIC or HRSDC may:

- Ask the employer and any person employed by the employer any relevant questions;
- Require from the employer, for examination, any documents found in the premises or place;
- Use copying equipment in the premises or place, or require the employer to make copies of documents, and remove the copies for examination or, if it is not possible to make copies in the premises or place, remove the documents in order to make copies;
- Take photographs and make video or audio recordings;
- Examine anything in the premises or place;
- Require the employer to use any computer or other electronic device in the premises or place in order to allow the officer to examine any relevant document contained in or available to it; and
- Be accompanied or assisted in the premises or place by any person required by CIC or HRSDC.

The above powers may be exercised by CIC or HRSDC without the consent of the employer and without a warrant. There is only one exception described in the proposed amendments - if the TFW is employed at a dwelling house (for example, in the case of a live-in caregiver), CIC and HRSDC may only enter without the occupant's consent if they are in possession of a warrant issued pursuant to the regulations.

INFORMATION SHARING BETWEEN CIC AND HRSDC

The proposed regulatory amendments include an information-sharing provision that will allow the disclosure of information from CIC to HRSDC, in relation to an application for a work permit or an employer's compliance with the conditions imposed upon them. They also include a provision that will allow the disclosure of information from CIC to the competent authorities of the provinces and territories in relation to the above matters.

MISCELLANEOUS AMENDMENTS

The proposed regulatory amendments will also implement the following miscellaneous changes:

- Subsection 203(1.1) of the IRPR, which describes circumstance in which an employer's failure to comply with the conditions imposed is justified, will be amended to include "force majeure" as an additional justification ground.
- The issuance of an LMO or work permit will be prohibited where the foreign national intends to work for an employer who, on a regular basis, offers stripping, erotic dance, escort services, or erotic massages. The Ministerial Instructions issued in 2012 already prohibited

the processing of work permit applications filed by TFWs who would be working in a sector where there were "reasonable grounds to suspect a risk of sexual exploitation of some workers."

- All temporary residents will be prohibited from entering into an employment agreement or extending the term of an employment agreement with an employer who, on a regular basis, offers stripping, erotic dance, escort services, or erotic massages.
- The prevailing wage rate will now be determined by HRSDC, by taking into account the rates that are made publicly available by the Minister of HRSDC and the wages paid to Canadian citizens and permanent residents by the employer making the offer, if that information is provided by the employer on request of that Minister.
- Currently, work permits may not be issued when the specific work that the foreign national intends to perform is likely to adversely affect the settlement of any labour dispute in progress or the employment of any person involved in the dispute, except where all or almost all of the workers involved in the labour dispute are not Canadian citizens or permanent residents and the hiring of workers to replace the workers involved in the labour dispute is not prohibited by the Canadian law applicable in the province where the workers involved in the labour dispute are employed. To ensure consistent assessments of this factor, the above exception will be eliminated.

Effective Date of Regulatory Amendments

The above regulatory amendments will come into force on the day that they are registered.