CIC Updates Foreign Worker Manual Provisions Relating to Intracompany Transferees

Date: July 24, 2012

Original Newsletter(s) this article was published in: Blaneys on Immigration: July 2012

Citizenship and Immigration Canada ("CIC") recently updated its Foreign Worker Manual ("FWM"), which provides guidance to CIC and Canada Border Services Agency ("CBSA") officers who adjudicate work permit applications. The updated version includes revisions to sections that describe the C12 (Section 5.31) and NAFTA (Appendix G, Sections 4.1 and 4.3) intracompany transferee ("ICT") exemptions from the Labour Market Opinion requirement.

Both the C12 ICT and NAFTA ICT exemptions apply to executives, managers, and specialized knowledge workers who are transferring from one entity to another within the same multinational organization. These two ICT exemptions are essentially identical. However, the NAFTA ICT exemption applies to citizens of the United States and Mexico only, while the C12 ICT exemption applies to all nationalities.

The first change is a positive one. It clarifies that the foreign national must have worked outside Canada for a related entity of the Canadian employer for at least one year within the three years preceding the date of the initial work permit application. This is intended to address cases where the foreign national has already been working in Canada for at least three years.

Prior to the clarification, there was some uncertainty whether such a foreign national could seek an extension of his or her ICT work permit after the first three years, despite the fact that the maximum period of stay is seven years for executives/managers and five years for specialized knowledge workers. If the relevant three-year period preceded the date of the foreign national's *current* application, rather than the date of the *initial* application, it would be impossible for any ICT to ever reach the maximum periods of stay allowed under these exemptions. The revision adopts the most logical interpretation.

Unfortunately, the second change is not as logical as the first, and seems to serve no purpose other than to inconvenience Canadian employers. The updated version of the FWM now states that the foreign national must be *currently* employed by the multinational organization that plans to transfer him or her to Canada.

CIC may be taking the position that a foreign national should not be considered an ICT unless he or she is actually transferring from the related foreign entity (i.e. employed by the related entity immediately prior to the transfer). However, this is an overly-mechanical interpretation and it violates established principles of NAFTA reciprocity.

Prior to the revision, a foreign national was only required to work outside Canada with the related entity for at least one year within the three years preceding the work permit application. In other words, the foreign national could have worked for the related foreign entity for one year during the previous three years but then have worked for an unrelated company during the year immediately prior to transferring to the Canadian employer. As long as the foreign national had at least one year of employment abroad with the related foreign entity during the three years prior to the application, he or she could still qualify as an ICT.

This has also been the longstanding position of United States Citizenship and Immigration Services and United States Customs & Border Protection when adjudicating ICT applications (known in the U.S. as L-1 petitions) filed on behalf of Canadian citizens. It is clear that the revision to the NAFTA ICT guidelines violates principles of reciprocity since the U.S. Government does not impose such a restriction on Canadians who apply as ICTs in the United States. Although principles of reciprocity do not necessarily apply to the C12 ICT exemption, given the fact that it was modelled after the NAFTA ICT exemption it seems illogical to impose this requirement on C12 ICTs also.

Until this problem is resolved, multinational organizations can still satisfy the new requirement by rehiring the foreign national abroad immediately before his or her transfer to the Canadian employer. Unfortunately, this is an added inconvenience for such employers.