

Business Immigration

December 2016

Every year, Canadian employers seek to address labour and skill shortages through the temporary recruitment and relocation of skilled workers from abroad. On the surface it would seem that this type of recruiting offers employers a simple and valuable opportunity to get the job done. However, bringing a temporary foreign worker to Canada is not without risk. If not undertaken properly, the foreign worker may face unnecessary delays in entering Canada or be denied the opportunity to work in Canada altogether. It is, therefore, important that employers fully familiarize themselves with the Canadian immigration process to avoid impairing the plans and operations of their business. The temporary relocation of foreign workers to Canada may be accomplished in a number of ways. Below, we outline, in general terms, several of the immigration categories under which foreign workers commonly seek entry into Canada.

Generally, in Canada, “work” can be performed pursuant to a Work Permit or pursuant to a category allowing work without a work permit (business visitors). Each of these two methods provide several subcategories, and should be used depending on a number of factors, such as type of work to be performed, nationality of the workers, and source of remuneration, among others.

1. Business Visitors: Work Permit Exempt

In special situations, foreign national may enter Canada to engage in work without holding a work permit. One such exemption is that of the business visitor, which allows a foreign national to engage in international business activity in Canada for a period of up to six months. In order to qualify under this exemption, the business visitor must not have the intention of entering the Canadian labour market. More specifically, the foreign worker must not have the intention of being gainfully employed in Canada, thus no position would be created for the foreign national, nor exist after the foreign national departs. In addition, the primary source of remuneration for the foreign worker’s business activities, as well



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the principal place of business and actual place of accrual of profits, must remain predominately outside of Canada.

Business visitors many engage in a number of permissible activities, including: attending business meetings and conferences; providing after-sales service; supervising the installation of specialized merchandise purchased or leased outside of Canada; providing familiarization or training services to prospective users and sales persons for goods and services manufactured and developed outside of Canada; and providing or receiving training at the Canadian subsidiary of the company that employs the business visitor outside of Canada, as long as any production of goods or services that results from the training is incidental.

2. Business Visitors (After Sales Service Providers): Work Permit Exempt

After sales services is the area where a person may enter as a business visitor to provide repair and servicing, supervising installers and setting up and testing commercial or industrial equipment (including computer software). It does not include operating the equipment

or machinery, or computer software of production and excludes hand-on building and construction work. This category applies to persons seeking entry to Canada to repair or service specialized equipment, purchased or leased outside Canada, provided the service is being performed as part of the original or extended sales agreement, lease agreement, warranty, or service contract.

To be covered by the business visitor exemption, service contracts must have been negotiated as a part of the original sales or lease agreements or be an extension to the original agreement. Service contracts negotiated with third parties after the signing of the sales or lease agreement are not covered by the business visitor exemption. If, however, the original sales agreement indicates that a third company has been or will be contracted to service the equipment, then the business visitor exemption applies.

All visitors entering Canada to perform after sales service for work periods of longer than 2 days are documented on a Visitor Record. In order to facilitate the entry of foreign national as a business visitor into Canada, Citizenship and Immigration

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The Work Permit is the status document that a foreign national obtains following a successful application. It is the first document that is usually obtained following employee relocation to Canada, and will allow the foreign national to obtain other secondary employment-related documents such as a temporary Social Insurance Number (SIN).

Canada requires that the foreign worker have in their possession upon arrival at a Canadian port of entry a copy of the sales agreement or lease agreement between the employer of the foreign worker and the Canadian company or the parent company of the Canadian subsidiary. If the agreement is in a language other than English or French, a certified translated copy of the agreement should be provided to the employee for review by an immigration officer. It is important that there is clear wording in the agreement which sets out the goods and services to be provided, the location and the name of the Canadian company to whom the goods and/or services are to be provided and the nature of the after-sales services to be performed in Canada.

3. The Work Permit

Should the foreign national not be eligible to enter Canada as a business visitor, an application for a work permit must be made. The work permit is analogous to work authorization, and is generally required when a foreign national engages in “work”. From the point of view of Immigration, Refugees and Citizenship Canada (IRCC), “work” is any activity for which wages are paid or commission is

earned or that competes directly with activities of Canadian citizens or permanent residents in the Canadian labour market.

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In order to obtain a Work Permit, an application can be made either under the Temporary Foreign Worker Program (TFWP) or under the International Mobility Program (IMP). The place of application will be contingent on the foreign worker’s nationality. Those individuals from visa-exempt countries can make the work permit application directly at the border, upon arrival to Canada. By contrast, those individuals that

do require a Temporary Resident Visa (TRV) must apply with a Canadian consulate or embassy abroad, which in turn increases processing times and documentary requirements.

4. The Temporary Foreign Worker Program (TFWP)

The TFWP is program jointly administered by IRCC and Employment, and Social Development Canada (ESDC), commonly known as Service Canada. It allows employers the ability to recruit foreign workers when qualified Canadian citizens or permanent residents are not available.

In order to obtain a work permit under the TFWP, an employer has to follow a 2-stage process. First, an employer must obtain a Labour Market Impact Assessment (LMIA) from ESDC, which will serve as the legal basis upon which a work permit application is made to IRCC. When an employer has a job vacancy, it must advertise the position in accordance with minimum advertising rules set out by ESDC. If following these recruitment efforts, no Canadian citizens or permanent residents have been identified, and then an LMIA application can be submitted for consideration to ESDC. The mandate of ESDC is to ensure that Canadian workers are given first choice at available jobs, thus the LMIA is a process which should be used as a last resort, when no other work permit options exist.

When applying for an LMIA, the Canadian employer must demonstrate this extensive search effort for local candidates, in addition to ensuring that the wages and working conditions proposed are commensurate with Canadian standards for that occupation, in the geographical region where employment will occur. Employers have the ability of submitting one application to cover multiple positions in the same occupation, however the processing fees are calculated based on number of positions required, not number of applications submitted. Once

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a positive “bulk” LMIA decision has been approved, the employer can then finalize the recruitment process, and identify the foreign workers to Service Canada. Individual and named LMIA's will then be granted for each identified worker.

In addition to serving as the legal basis for work permit applications, LMIA's also meet the definition of “arranged employment” for Canadian Permanent Residency (PR) purposes. What this means is that it aids individual applicants in obtaining higher scores in the PR selection process. Thus, the LMIA process is an attractive mechanism for onboarding new foreign workers, while also ensuring a benefit should these workers decide to remain in Canada.

5. The International Mobility Program (IMP)

Unlike the TFWP, the IMP category includes all work permit categories which are exempt from an LMIA. By comparison, this option is much more attractive to foreign employers, as they are generally able to bring in foreign workers quicker to Canada. Additionally, work permits issued under the IMP may have less restrictions compared to their TFWP counterparts. Out of all the IMP work permit categories, some of the most common include the Intra-Company Transferee (ICT), International Experience Canada (IEC), Spousal Work Permits, and permits granted pursuant to a Free Trade Agreement (such as NAFTA).

The Intra-Company Transferee (IMP – ICT)

In order to qualify as an Intra-Company Transferee, the foreign worker must have been employed with the parent, branch, subsidiary or affiliate of the Canadian company in an senior executive or managerial position, or in a position requiring specialized knowledge, and must be coming to Canada to work in one of those three capacities. The foreign worker must also have been employed with the



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foreign entity on a full-time basis for a period of no less than one year within the three-year period immediately preceding the date of application. It is worth noting that to qualify as an individual with specialized knowledge requires a demonstration that the foreign worker possesses advanced level knowledge of a company's products or services (including research, equipment, techniques and management) and expertise in the organization's processes or procedures.

Additionally, the expectation is that those workers possessing Specialized Knowledge are remunerated at a rate higher than the posted prevailing wage for that occupation. IRCC takes the position that those workers that are highly specialized should also be remunerated higher than the average. It is interesting to note that the ICT category is also available pursuant to Free Trade Agreements such as NAFTA. However, ICT applications under NAFTA (or any other specifically designated free trade agreement) do not also have a prevailing wage requirement. This means that it is expected to pay Specialized Knowledge workers a higher wage, but it is not mandatory

Generally speaking, work permits are issued for periods ranging from

1 to 3 years, and may be extended, although not automatically, to a maximum of seven years for executives/ senior managers and five years for individuals with specialized knowledge.

International Experience Canada (IEC)

International Experience Canada (IEC) is an annual quota-based system which provides young individuals the opportunity to travel and work in Canada. The two main categories include Young Professionals (employer-specific work permits) and Working Holiday (open work permits). IEC is available in countries that have a bilateral youth mobility arrangement with Canada. The IEC category is designed for eligible applicants who intend to travel in Canada and who wish to find temporary paid employment to help pay for their stay (up to 12 months). Work permits are non-renewable under this category, thus foreign workers will require an LMIA in order to extend stay in Canada.

Spousal Work Permits

Open Spousal Work Permits allow an assignee's spouse to work in Canada during the duration of the assignment. The spouse will

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be eligible to apply for a work permit without the need for a LMIA where the foreign worker spouse (or common law partner) is authorized to work in Canada for at least six months and qualifies as a skilled worker in accordance with the National Occupational Classification. If these requirements are met, the spouse may apply for an open work permit, which allows that individual to work in most occupations in Canada. Note that an immigration medical examination will be required if the intended field of work is employment in the health care field or working with minor children. The spouse's work permit will then expire when the principal applicant's work permit expires.

This category makes Canada an attractive option for international assignments, as Federal laws also recognize common-law partnerships (including same sex couples) as eligible to apply for this type of permit.

Free Trade Agreements

In certain instances, Free Trade Agreements provide specific instructions for expedited admission into Canada for employment purposes. The current FTAs eligible for this work permit category include:

- The North American Free Trade Agreement (NAFTA) which applies only to citizens of the

United States of America and Mexico;

- The Canada-Chile Free Trade Agreement (CCFTA) which applies to Chilean citizens;
- The Canada-Peru Free Trade Agreement (CPFTA) which applies to Peruvian citizens;
- The Canada-Colombia Free Trade Agreement (CCoFTA) which applies to Colombian citizens; and
- The Canada-Korea Free Trade Agreement (CKFTA) which applies to South Korean citizens.

Each FTA contains individually negotiated eligibility requirements, and most will have provisions for Business Visitors and ICTs. However, work permits subject to an FTA can also benefit from the Professionals subcategory, for those foreign workers coming to work in specialized occupations which normally require a university degree.

6. Conclusion

The successful recruitment and relocation of foreign workers to Canada should be done properly to avoid impairing the plans and operations of your business. Each situation should be assessed well in advance to ensure that the most appropriate immigration strategy is adopted in light of the

of the applicant's skill-set, the purpose of the entry and any long term goals. Dale & Lessmann's Immigration Practice Group offers a specialized range of immigration and international mobility services to ensure a seamless process for businesses, employees and any accompanying family members. We provide cost-effective immigration solutions to businesses from Canada, the United States and Europe on major projects, executive transfers, and in obtaining business visitor status, work permits, temporary resident visas and permanent resident status. We invite you to contact us to further discuss your immigration needs.

For more information, we encourage you to contact a member of our Immigration Practice Group.

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