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Wealthy Immigrants to Canada Turning to Temporary Work Visas (Foreign Investors Apply for Temporary Work Visas Under Ottawa's Business Owner-Operator Rules)

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Wealthy business immigrants are buying businesses and turning to Ottawa's temporary work visa, 'owner-operator' policies to gain entry to Canada. Opportunities for investment based immigration to Canada is otherwise limited. Current federal permanent immigration programs although operational on paper, are not attracting interest from foreign investors. The federal government's Immigrant Investor Venture Capital (IIVC) Pilot Program, offering permanent residence to ultra-high net worth individuals, is practically non-existent according to the current Ambassador to China and former federal immigration minister John McCullum.

Similarly, the federal Start-Up Visa Program also offering permanent residence and a work visa aimed at mid-level net worth entrepreneurs, has hardly garnered interest since its inception in 2014, with Ottawa refusing to divulge its disappointing numbers.

This leaves a large pool of international investors seeking permanent admission to Canada to compete for a relatively small number of quota based openings under Canada's provincial business immigration programs. The Province of Quebec dominates this area with its Quebec Immigrant Investor Program, (QIIP). It plans to receive 1900 new applications in 2017 and spots are filling quickly.

Temporary Foreign Worker Program - Owner-Operator Guidelines

Foreign investor entrepreneurs wishing to relocate to Canada, should consider acquiring an established business or launch a new business in Canada, and apply for a work visa as a management employee. Revised federal policies governing new business owners under the Temporary Foreign Worker (TFW) program is gaining considerable attention. After a period of less

than 1 year, successful temporary work visa holders can transition to permanent residence under a provincial program or as a federal skilled worker under Express Entry.

The rules are complex but navigable. A foreign employee-investor can create a new business, acquire an existing Canadian business, or invest substantially in an enterprise and qualify for a work permit as a TFW. The acquisition of the business by the foreign national must, among other conditions discussed below, result in the creation or retention of Canadian jobs and there must be knowledge transfer to Canadians.

How Is an Owner-Operator Defined?

First and foremost, an employer must be an entity (person, business, corporation or organization) that makes an offer of employment to a foreign national to perform work for compensation, and for an identifiable term, in Canada. The employer is generally the entity that hires, controls working conditions and remunerates the foreign national. It must be an identifiable entity that will enable government authorities the necessary scope to fulfill its regulatory responsibilities attendant to the administration and enforcement of the Temporary Foreign Worker TFW Program.

To qualify as an owner-operator the foreign employee-investor should be able to establish a level of controlling interest in the business (e.g. a majority or plurality of shares, is not able to be fired) and be actively involved in its operation. Foreigners who do not meet this definition would not qualify for the program exemptions under owner-operator.

In all instances, the transaction must be genuine. To meet such determination, the offer must be made by a foreign employee-investor that will be actively engaged in the management of the business. This will be assessed by reviewing the foreign national's intention to operate the business as well as prior experience in managing or operating a business.

Ownership of shares does not by itself guarantee that a foreign national qualifies as an owner-operator. Additionally, the sale and purchase of shares in an existing Canadian entity by a foreign national will require immigration approvals and will likely be conditional to the issuance of the work permit. The transaction will often therefore be strategically carried out in stages to meet both immigration and commercial practices. Consideration must therefore be given to a variety of instances, including fully completed purchases, pending complete purchases and partial purchases of the Canadian enterprise by the foreign employee-investor.

What Constitutes an Employer?

Current policy requires that "an employer/employee relationship must be clearly identified to permit regulatory responsibilities in the administration of the Temporary Foreign Worker Program.

In cases where a self-employed individual intends to enter Canada to establish or purchase a business and be involved in its day-to-day operations, the business plan and contract to purchase shares in the business must establish an employer/employee relationship with an offer of employment.

Therefore, in the absence of a job offer as in most TFWP cases, the case officer looks at the foreign worker's business plan or share purchase contract to assess the strength of the case. The factors being considered during this evaluation are those mentioned above, i.e. will the foreign worker's presence in Canada create or retain jobs for Canadians, or transfer skills or knowledge to Canadians.

Existing Businesses

Where the foreign employee-investor acquires or intends to acquire 100% or substantial interest of an existing Canadian business, the following considerations will apply for the assessment of an LMIA.

1) Complete Purchases

Where a 100% purchase has been completed and documentary evidence is provided (share purchase agreement, share certificate, notice of articles, central securities register, CRA#), reflecting purchase/ownership change application, the burden of proof is less onerous. However, the requirement on creation or retention of Canadian jobs and knowledge transfer to Canadians in the form of a transition plan, still needs to be satisfied.

The new owner as employer, will apply for a Labour Market Impact Assessment (LMIA), to support an owner-operator management based work visa.

2) Pending Complete Purchases

Where the transaction is pending, and contingent on an LMIA and WP, immigration authorities will broadly assess if the anticipatory project is genuine. Key factors include how advanced the transaction is, (signed share purchase agreement, monies in escrow), how sound the foreign employee-investor's business plan to acquire 100% ownership in the shares of the business as principal owner is and whether the intent to hire or retain Canadian workers can be established.

The existing or incoming owner as employer, will apply for a Labour Market Impact Assessment (LMIA).

The existing owner could also submit the LMIA to hire the foreign employee-investor into a specific management position in the business, in which case the usual program requirements will apply. Once the purchase takes place in the future, the new owner as employer will submit a new LMIA to support an owner operator management based work visa.

3) Partial Purchases

Where the transaction is pending and contingent on an LMIA and WP, once again immigration authorities will broadly assess if the anticipatory project is genuine. Key factors include how advanced the transaction is, (signed share purchase agreement, monies in escrow), how sound the foreign employee investor's business plan to acquire a substantial ownership in the shares of the business as principal owner or co-owner is, what percentage of the business is being transferred and whether the intent to hire or retain Canadian workers can be established.

Other considerations here include establishing who owns the largest part of the business, and whether existing shareholders will continue to play an active role. Depending on this assessment, the foreign national may be treated as a new management employee. In such instance, an evaluation on the prognosis of continuing employment is required. The business must have sufficient profitability in the form of retained earnings, to incur the salary of the foreign employee-investor, without taking into consideration, the injection of new capital into the business.

The structure of the overall commercial transaction and the role the new employee will take on, is paramount to this determination.

The existing owner as Employer, will hire the foreign national and apply for a Labour Market Impact Assessment (LMIA), to support a management visa, if one does not exist.

New Businesses

Where the foreign investor plans to start a new business that is contingent on a positive LMIA and work permit, the business should be in "operation", providing goods or services. The following considerations will apply for the assessment of an LMIA under the Owner-Operator guidelines:

- Preparation efforts made towards opening the business (incorporating the business, applying for business licenses, executing a lease agreement, securing new contracts, etc.).
- The presence of a viable business plan.
- Hiring intentions: whether the company intends to hire Canadians/permanent residents.
- Role of foreign-employee investor to become sole owner and actively engaged and carry out anticipatory work on behalf of the business as a TFW.

The Labour Market Impact Assessment

In all cases, the LMIA is a regulatory tool used by authorities under the *Immigration and Refugee Protection Regulations* to determine if a Canadian exists to perform a specific job. A

positive LMIA allows an employer to bring in a foreign worker, whether on a temporary or permanent basis.

Where the Owner-Operator provisions apply, the requirement to advertise the position to the Canadian labour market, is specifically exempted.

When assessing labour market factors, for owner operator LMIA's, the focus is first and foremost on the genuineness of the job offer and on job creation or retention and/or skills transfer.

The employer pursuant to a well-documented transition plan, must demonstrate a level of controlling interest in the business. In most instances, this should be in the form of being the sole proprietor or a majority shareholder. But this is not a hard and fast rule. The employer should also be able to demonstrate that such temporary entry will result in the creation or retention of employment opportunities for Canadians and permanent residents and/or skills transfer to Canadians and permanent residents.

The new owner will in all instances where the reasonable employment needs of the business demands, be required to demonstrate effective communication skills, either personally or through a hired translator-employee, to ensure the continuity of the existing business and the prognosis for effective skills transfer. The intending applicant for an LMIA, in such instances, is advised to include language proficiency with the application in the form of a valid IELTS language test with a CLB of 5.0 in each of the 4 components. In some instances, language requirements can be overcome, where the employer can demonstrate that use of non-official language is a bona fide occupational requirement.

Conclusion

The TFW program is a suitable vehicle to facilitate the admission to Canada of a foreign owner, following the sale of a Canadian business or the launch of a new entity.

With baby boomers reaching retirement age in Canada, thousands of small and medium sized business owners within this large demographic, are looking to sell. With second generation children, often not an option to take over a family business, this creates the need for buyers. That buyer need not come from within Canada. Canadian businesses and their owners can readily consider the international investment market for viable transition strategies. For many foreign investors, the pathway to Canada is 2-staged, beginning with a temporary work permit under the federal Owner-Operator rules. These policies will apply for the sale and transfer of a significant portion of ownership in a Canadian business to a foreign national. Once admitted on a work permit, successful candidates can at a later stage, apply for permanent residence to Canada under one of the programs serviced by the Express Entry system or under a suitable provincial business immigration stream.

Although the burden of proof can be onerous, the issuance of a positive LMIA and work permit to a foreign national, pursuant to the transfer of ownership of a successful Canadian business, is feasible. Above all, the project must be genuine and carried out with the foregoing considerations.

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