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BULLETIN

Editor: James P. Egan, Egan LLP, Business Immigration Lawyers Allied with Ernst & Young

QUEBEC IMMIGRATION RULES: SKILLED WORKERS UPDATE

By Colin R. Singer, Lawyer, www.immigration.ca

On October 14, 2009 the Quebec Government implemented important modifications to the Selection Grid in Schedule A of the *Regulation respecting the selection of foreign nationals*, R.R.Q., 1981, c. M-23.1, r.2. These changes relate to the weighting of factors and criteria, the cutoff scores for certain factors and criteria and the passing scores for all factors that apply to a foreign national, with or without an accompanying spouse or *de facto* spouse, applying for admission to Quebec under the Economic stream.

The new rules primarily affect the skilled worker subclass by favouring applicants with a validated offer of employment and applicants with preferred areas of training acquired in Quebec. Administrative measures will give priority processing to these candidates.

To reach MICC objectives, the areas of training sub-factor within the training factor is being given more weight under a revised selection grid. A new and enlarged areas of training list has been created which enumerates a wider range of studies awarding points to applicants and a spouse or *de facto* spouse for diplomas acquired outside Quebec, obtained in Quebec or recognized as Quebec equivalent. (http://www.immigration-quebec.gouv.qc.ca/publications/fr/divers/liste-formation.pdf).

Additionally, a secondary preferred areas of training list derived from the above general list will provide qualified applicants or their spouse or *de facto* spouse with accelerated processing of their application. These preferred areas of training correspond to areas of employment that are in high demand in Quebec in the short term. The MICC has stated its intention to conclude these applications within 60 working days.

To qualify for accelerated processing, the applicant must have obtained a diploma in one of the preferred areas of training, during the five years preceding the application. Alternatively, the applicant must have practiced full-time a profession related to the diploma for at least one year in the five years preceding the application.

The following factors of Sub-Class I of the Selection Grid in Schedule A of the *Regulation respecting the selection of foreign nationals* (R.R.Q., 1981, c. M-23.1, r.2) respecting skilled workers, have incurred important changes.

Education/Training

The new grid awards between 2-4 additional points under the education level sub-factor where the diploma is post-secondary technical and it appears on the new areas of training list. The grid also merges the sub-factor Quebec diploma under the old grid, with the areas of training sub-factor. The areas of training sub-factor awards up to 4 additional points than previously. Distinction is made between diplomas acquired outside Quebec and diplomas obtained in Quebec or recognized as Quebec equivalent. The second specialty sub-factor from the previous grid has been removed. There is a one-point decrease in the maximum score for the Training factor.

Experience

Two additional points are awarded to recent graduates having only six months of employment experience. There is a one-point decrease in the maximum score for this factor.

Age

Points are now awarded to applicants between the ages of 18 and 42 with priority given to applicants between the ages of 18-35. There is a two-point decrease in the maximum score for this factor.

Stay and family in Quebec

Persons having worked for at least three months in Quebec as part of a recognized international youth exchange program, receive 5 points. There is a one-point decrease in the maximum score for this factor.

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Characteristics of the accompanying spouse or *de facto* spouse

Points are awarded between the age of 18 and 42 with priority given to the age of 18-35. One point has been added for a secondary school general diploma. Points are no longer awarded for professional experience. There is a two-point decrease in the maximum score for this factor.

Validated employment offer

This factor is now included in the employability pre-selection stage. This is an important change because it affords applicants with a validated offer of employment a greater chance of qualifying at pre-selection and selection, who otherwise have minimal French language proficiency or who are deficient in other factors.

For the greater Montreal area, an applicant with a validated employment offer will earn 6 points under this factor — a one-point increase from previously. Applicants with a validated offer of employment will be given first priority in the accelerated process.

Adaptability

Under the new grid this factor has been reduced to six points from the previous eight points.

The selection process: from the pre-screening to selection

The selection process continues to follow a three-stage review. Following the eliminatory pre-screening assessing education and settlement funding, applications will be evaluated under two pre-screening stages.

At the initial employability pre-screening stage, single applicants must obtain a cut-off score of 42 points under six factors of assessment within the following criteria: training/education, experience, age, language (French and English), prior visits/ties to Quebec and validated employment offer. Applicants with a spouse or *de facto* spouse must obtain 50 points with factor six – Characteristics of accompanying spouse or *de facto* spouse, included in this assessment.

Where an applicant succeeds at the initial employability pre-screening assessment the application will undergo a second pre-screening stage evaluation with the remaining factors of consideration, excluding the adaptability factor.

To advance to the selection stage, single applicants must reach 49 points and applicants with a spouse or a *de facto* spouse must obtain 57 points.

Finally, at the selection stage, an applicant is assessed under the adaptability factor. Single applicants must reach at the selection stage, 55 points and applicants with a spouse or a *de facto* spouse must obtain 63 points in order to qualify for a Quebec Selection Certificate.

The MICC has implemented a system of priority processing of skilled worker applications to be carried out in the following order: 1. Validated employment offer; 2. Preferred areas of training (applicant, spouse or a *de facto* spouse); and 3. Others.

Overall it appears that the new rules will benefit applicants who have a validated employment offer or preferred areas of training and it will have minimal effect for applicants who do not possess any of these attributes.

CIC MOVES TO TIGHTEN THE TEMPORARY FOREIGN WORKER PROGRAM

By Zainab Somji and Jonathan E. Leebosh, Egan LLP, Business Immigration Lawyers, Allied with Ernst & Young

Canada's Temporary Foreign Worker (TFW) Program has recently come under much scrutiny — in the media, from Parliamentary Committees, and from the Auditor-General — as a program which is losing accountability. Two issues in particular have come under the spotlight: concern that the Temporary Foreign Worker Program is being used to replace long term solutions such as permanent immigration; and secondly, that Temporary Foreign Workers are being exploited and mistreated by employers who take advantage of the foreign workers' ignorance of Canadian laws. As a response to these criticisms, the Minister of Immigration, Jason Kenney, has recently proposed regulatory amendments which, if passed, will create an enforcement regime targeting employers of Temporary Foreign Workers (TFW) and ensuring that many foreign workers do not become established in Canada during their temporary stay here. This new regime will necessitate a new approach and level of diligence for employers who have TFWs in their operations.

This new proposal falls on the heels of other recent changes instituted to safeguard the labour market for Canadians. The last significant adjustment to the Program was the implementation of new Directives for approving Labour Market Opinion (LMO) applications. Being inextricably linked to the labour market, it was no surprise that the economic downturn had an effect on whether — and how — the hiring of foreign workers would continue to occur. The government reacted in January 2009 by imposing stricter and more standardized criteria for employers such as the requirement to advertise for a minimum period prior to applying for an LMO in efforts to recruit Canadians before seeking to hire foreign workers. Although the basic regulatory test for obtaining a positive LMO was not altered by the January Directives — namely whether the hiring of a TFW will have a positive (or neutral) impact on the Canadian labour market — the level of evidence necessary to meet this standard was increased.

The amendments proposed by Minister Kenney in October 2009 are meant to refine a program which has proven to be very successful for Canadian businesses seeking to address often severe labour shortages across the country. However, despite the TFW program's success in addressing the labour

shortage, there has always been a challenge on the enforcement side of the program to ensure that employers abide by their commitments to TFWs and those TFWs have recourse to mistreatment by employers. This problem has been particularly noticeable since lower-skilled occupations, known as "C" and "D" level occupations, were added to the TFW program several years ago. The increased usage of the TFW program over the past years has brought the issue even more to the forefront. By 2006, there were 161,295 temporary foreign workers in Canada, a 122 percent increase over the past ten years. This toll had risen to 251,235 as of 2008, a significant number of which were lower skilled workers granted entry to Canada (especially the Western region) to provide their labour for seasonal/agricultural movements, special events, or oil sand and other projects.

These proposed regulatory amendments, along with the previously implemented Directives, are a strong indication of the government's clear intent to increasingly monitor employers who use TFWs, and that an increasingly complex system is being implemented to "ensure that the program is fair and equitable" (Kenney 2009). The result will be greater protection of the potentially vulnerable TFW, greater protection of the Canadian labour market, and greater risk for businesses who make use of temporary foreign workers, either as employees or for short term assignments.

Key among the proposed amendments are the ability of Citizenship and Immigration Canada (CIC) to impose a two-year ban an employer from participating in the TFW Program, and the public naming of any employer who has been deemed to have violated certain provisions of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27. The approach the government will be taking is to address the so-called "genuine offer of employment" aspects of a job offer. Although currently an employer must satisfy an officer that its offer of employment to a TFW is "genuine" before obtaining an LMO or a work permit, there is not sufficient guidance in determining whether or not an offer can be considered genuine. Not only will the new regulations give further guidance on assessing the genuineness of a job offer, they would enable the government to deem that, in the event that an employer was found to have extended a non-genuine offer, all job offers by the particular employer lack genuineness. In such a case, the employer would be barred from employing any TFWs for a period of two years.

The criteria for what constitutes a "genuine" job offer will include: whether the offer is being made by an employer actively involved in the field of the job offer; whether the offer is consistent with the employer's labour needs; whether the employer can reasonably fulfill the terms of the job offer; and whether the employer, or a recruiter acting on behalf of an employer, has previously complied with provincial or federal laws regulating employment or recruiting of workers.

A two-year ban to having any TFWs would also apply to employers who are found to have changed the working conditions or wages for a TFW so that they are "significantly" different than those originally presented in the initial job offer. Changes in employment duties, promotions, reductions or increases in wages or working hours could all be reasons for the government to deem a lack of genuineness in all of the employer's offers for the next two years. An Officer's finding that an employer failed to live up to its wages and working conditions commitment to any one employee could result in all future job offers to TFWs being deemed as lacking in genuineness for the following two years. Moreover, the employer's name would be posted on a public government website to ensure that foreign workers do not accept employers with any employers on the list.

The proposed changes should have the desired effect of protecting the TFWs, who as a group are vulnerable and more prone to exploitation by employers and recruiters. It is anticipated that the threat of limited access to the global market and the ill reputation a company can acquire by being placed on this list will minimize the potential for TFW exploitation by employers and encourage greater adherence by employers to the terms of their offers of employment with respect to wages, working conditions and occupations.

The fact is that the Canadian government does not currently have in place any guidance for assessing the genuineness of a job offer, nor does it have any regulatory authority to monitor employer compliance with the TFW Program. Working within the limited powers they have, the federal government has been requesting employers to participate in voluntary monitoring initiatives with no penalties if they choose not to participate. However, this current method has no teeth as it would be fair to assume that the employers who are likely engaging in exploitation are generally not the ones signing up to participate in such programs and exposing themselves so readily.

The criteria that has been developed to assess whether an offer is genuine or not is significant in the effect it will have on the reach of the federal government. One of the factors that will be looked at when determining whether an offer of employment is genuine is the past compliance of the employer with the federal or provincial laws that regulate employment, or the recruiting of employees, in the province in which it is intended the foreign national work. Moreover, an offer will be deemed to be not genuine if the employer provided to a foreign national wages or working conditions that were "significantly different" from those initially offered, or if the employer hired a foreign national in a "significantly different" occupation than what was described in the employer's original offer. These criteria will have profound effects on extending the ability of federal agencies to be able to request proof of past compliance or to implement mandatory monitoring initiatives so as to meet their regulatory objectives of determining the genuineness of an offer and protecting the foreign workers.

What is concerning, however, is the broadness with which the regulations have been drafted. While they will provide TFWs with the protection they deserve and require their vagueness leaves the federal government with possibly too much authority. For instance, what does a "significant" difference mean in this context? While it is understandable that "significant" can change depending on labour conditions or other relevant variables and thus it would not be wise to limit the term with a concrete defi-

nition, it would have been helpful to provide guiding factors that will drive the "significance" test. In not doing so, while the government has tried to clarify how it will determine the "genuineness" of an offer, it has only created another ambiguity.

An equally significant change in regulations is the four-year cap that will now be put on foreign workers, requiring them to wait at least six years to be eligible for another work permit once they have accumulated four years' employment in Canada. There will be exceptions to this regulation for workers performing work that creates significant social, cultural or economic benefits for Canada as well as for foreign workers who are performing work pursuant to international agreements (*e.g.*, NAFTA). However, this will (and should) be concerning for employers and foreign workers who require LMOs and will thus be directly affected.

In establishing a maximum cumulative duration of time a worker may work in Canada, the government is emphasizing that that the Temporary Foreign Worker Program is just that — temporary. The TFW Program was implemented to address short-term labour market shortages and was not meant to be a solution to long-term labour needs. Where a foreign worker may be required to be in Canada longer than four years, the government encourages the use of the Permanent Resident program to address the long-term labour needs of employers.

However, the LMO application generally involves some assessment of the labour market, as the issuance of an LMO requires HRSDC to consider factors such as whether the foreign worker will likely fill a labour shortage. In fact, employers generally must prove unsuccessful efforts to seek Canadians as a way of demonstrating that there is an existing labour shortage and that no Canadians are available to perform the job. The problem with the cap can be seen when we consider the situation of an employer whereby a temporary foreign worker has been working on a crucial project in Canada for four years in an industry where there is a gaping labour shortage, recruitment efforts have demonstrated that there are no Canadians willing or able to perform the job, and the employer continues to requires the foreign worker's services for one more year. In such a case, the employer requires the foreign worker to meet a short-term labour need, which is in tune with the purpose of the Temporary Foreign Worker program, but will have to overcome extensive cost and disruption of work by hiring a new foreign national and training him or her to assume the duties of the previous foreign worker. This could hardly be what the government was envisaging — surely business productivity and practicalities do (we hope) have some place in the balancing equation, at least in recessionary times.

While the obvious answer to this conundrum is for the foreign worker to obtain permanent residence, the main criticism is that there are limited avenues for lower-skilled residents to achieve permanent status in Canada. For employers of higher skilled workers, the four-year cap will mean being strategically conscious of, and supporting, permanent residence. These employees will have a myriad of categories under which they will be eligible, including new programs such as the Provincial Nominee Program (PNP) and the Canadian Experience Class (CEC) which is designed to transition the temporary foreign worker to becoming permanent.

However, for many temporary foreign workers (a large segment, in fact), permanent residence will not a feasible option. A majority of lower skilled workers will not be able to meet the points criteria required to be eligible under the Federal Skilled Worker category, either due to a lack of education or language proficiency. The CEC class primarily targets skilled labour, eliminating those in NOC C and D from applying, as do many of the PNPs. For these individuals, we seem to be sending a message that is a blatant contradiction to the Standing Committee on Citizenship and Immigration's recent report on the situation of Temporary Foreign Workers and Non-Status Workers in Canada which states that if foreign workers are "good enough to work, they are good enough to stay".

In fact, it would not be surprising if this four-year cap, which has an unbalanced negative impact on lower skilled workers, encourages foreign workers to stay and work in Canada illegally. There is currently no method in place to effectively track whether temporary residents leave Canada at the end of their term, making this a real possibility. As illegal workers, these individuals would be even more vulnerable to abuse by employers than ever before.

The proposed regulatory amendments are a good start to addressing the widespread criticism that surrounds the TFW program. The risk of non-compliance by the employers will be too high for employers; very few employers will be able to continue successfully if their access to temporary foreign workers is limited for two years or if their reputation is tarred from being placed on the "list". Employers, therefore, will have to begin exercising a higher level of assiduousness than ever before when it comes to their labour and employment practices. The four-year cap on foreign workers will also serve as an effective way of underlining the fact that the TFW program is meant to address immediate and short-term labour shortages. It is not meant to be a means by which foreign workers can stay in Canada indefinitely with temporary status. While the proposed amendments are not without criticism, they will increase the power of the federal government to more effectively monitor employer compliance and to more severely penalize employers for non-compliance so as to deter employers from mistreating foreign workers and become more cognizant of their legal and ethical responsibilities.

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