

## **Decisions, Decisions: Permanent Resident Applications for Foreign Nationals in Canada**

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The development of Provincial Nominee Programs and the introduction of substantial changes to skilled foreign worker selection in 2008 have created an array of opportunities for foreign nationals in Canada to apply for permanent residence. Indeed, while the changes have resulted in much of the world being shut out from our immigration process, new opportunities have been presented to those who are already here. This paper will examine the different choices available for potential applicants who have worked or studied in Canada. The intention is to highlight the advantages and disadvantages and to present insights and suggestions for successfully using these categories.

The preference given to applicants who have worked or studied in Canada reflects a shift away from the “human capital” model that was the basis for the redesigned Skilled Worker selection process that was introduced with the new *Immigration and Refugee Protection Act* (“IRPA”). The main limitations with the IRPA Skilled Worker selection model were that applicants might look good on paper but in fact might not be employable. As well, the pass mark was left too long at the 67 level, with the result that a tremendous backlog of applications ensued and processing times grew to five years or more at many Visa Posts. Conversely, highly desirable immigrants who had worked or studied in Canada could be turned off by the lengthy backlogs and seek their futures elsewhere.

The 2008 changes addressed both problems by restricting eligibility to apply to persons who fit a relatively narrow set of criteria. They now get applicants who are more likely to be employable. As well, fast tracking these applications should result in less loss of desirable candidates and more effective meeting of the needs of the Canadian economy. Finally, controlling the intake will allow the backlog to be gradually reduced.

At the same time, provinces across Canada have developed their own immigrant selection programs. Most provinces have a skilled worker stream which creates opportunities for foreign nationals who are already working in the province.

There are now several options available to the immigration lawyer who is approached by a potential candidate for permanent residence who is already in Canada. Fortunate applicants can choose from the various options. The difficult part is that our clients now look to us to advise them as to which option is preferable.

**Available Options:**

P.R. Options available to foreign nationals in Canada include the following:

1. Skilled workers who are currently eligible to apply:
  - a. Ministerial Occupations list;
  - b. Persons with Arranged Employment;
  - c. Students or workers who have legally resided in Canada for 12 months prior to submitting their applications.
2. Canadian Experience Class;
3. Provincial Nominee Programs;
4. Quebec Selection Program;
5. Humanitarian & Compassionate Grounds;
6. Spouse In-Canada Class; and
7. Convention Refugee Application.

This paper will not consider other applications for persons in Canada such Applications for Convention Refugee Status, Spouse In-Canada Class or on Humanitarian and Compassionate Grounds. As well, it will not consider the Quebec selection process. While I think it is important for lawyers in the rest of Canada to be familiar with options available in Quebec, I long ago learned that it was futile to try to stay up on the Quebec Selection Program and it was more than worthwhile to pass cases to my colleagues in Quebec.

## **SKILLED WORKER**

- **Ministerial Occupations List –**

- a. Requirements**

- i. Applicants must have one year of continuous full-time (or equivalent part-time) paid work experience in the last ten years in one or more of the occupations listed at the following website:  
<http://www.cic.gc.ca/english/immigrate/skilled/apply-who-instructions.asp>;
    - ii. Applicants may present evidence of a combination of full-time or part-time work experience in more than one eligible NOC category in the last 10 years for the purpose of meeting the one year of continuous work experience requirement, as long as their experience adds up to at least one year.
    - iii. Full-time work is equivalent to at least 37.5 hours of paid work per week. Full-time work experience requirement may be met by the equivalent in part-time paid work experience, e.g. more than one part-time job held simultaneously or one or more part-time jobs held over the equivalent of one year of full-time work.

- b. Advantages:**

- i. Fast processing;
    - ii. Great category **IF** you fit on the list.

- c. Disadvantages:**

- i. The List is subject to change and may be revised before an application can be submitted;
    - ii. The preliminary assessment by the Sydney CIU is not binding and a further assessment of eligibility will again be conducted at the Visa Office;

- iii. There is potential for disagreement on eligibility as there is a perception that some applicants try to unjustifiably shoehorn themselves into one of the eligible occupations (eg. Financial Manager).

**d. Tips**

- i. Being on the list is not sufficient for success. You must still obtain 67 points;
- ii. Provide strong proof that the applicant meets the requirement of one year experience in a listed occupation and ensure that employer's letters show performance of the main duties from the NOCC.
- iii. The list is currently under review and could be changed without notice. In order to avoid unhappy clients, counsel should file as quickly as possible in this category.

- **Skilled Worker with Arranged Employment**

**a. Requirements**

- i. Applicants must provide proof of the arranged employment offer (AEO) in the application. The AEO must still be valid at the time of final determination of eligibility and should be sufficiently detailed to support the claim that an offer of employment has been made to the applicant on an indeterminate basis. The AEO should include the employer's name, address, phone number and any other contact information. If currently working under a Work Permit, the Applicant should provide a copy of the Work permit.
- ii. If the applicant has a permanent job offer confirmed by Human Resources and Skills Development Canada (HRSDC)/Service Canada, a photocopy of the confirmation which was sent to the employer should also be included.

- iii. If significant time has elapsed since the date of application, Visa officers are advised to contact the employer to verify that the offer of permanent employment still exists.
- iv. Due to a perception of widespread fraud and abuse in AEOs, Visa Offices are now conducting rigorous checks into the *bona fides* of Arranged Employment Opinions. Visa Offices have been sending letters with documentary and information requirements that are far more demanding than what is required in order to obtain the AEO in the first place.
- v. Applicants should know that Arranged Employment Opinion decisions may be cancelled at any time by HRSDC.

**b. Advantages:**

- i. Priority processing at most Visa Posts;
- ii. Up to 15 bonus points (10 points for arranged employment and up to 5 points for adaptability);

**c. Disadvantages:**

- i. The applicant will no longer be eligible under this category if the employment is terminated or the offer of indeterminate employment is withdrawn.
- ii. The applicant must still qualify under the point system.

**d. Tips:**

- i. Failure to notify the Visa Office of the termination of the applicant's employment would likely be a material misrepresentation;
- ii. Pending Skilled Worker applications that were filed prior to February 2008 can be enhanced and expedited by an Offer of Arranged Employment;
- iii. Even if an applicant is laid off, they may still qualify for Arranged Employment if a Canadian employer is willing to go through the Arranged Employment approval process.

- **One Year of Employment or Study in Canada**

- a. Requirements**

- i. For international students, it is sufficient to have studied for one academic year (i.e. two terms or semesters) during one year of legal residence. For temporary foreign workers, anticipated short breaks between jobs are acceptable. For example, if an applicant is employed in one occupation for a 4-month contract and before the end of that contract, has secured other employment that will begin shortly after the end of the first contract, this break in continuity would be acceptable.
    - ii. Evidence of the Applicant's authorized stay may include: an entry stamp in their passport, a temporary resident record, temporary resident permit, a work permit, or a study permit. Students should also provide confirmation of enrolment from their educational institution, while workers should also provide a letter from their employer confirming their employment. Applicants may also wish to include records of pay, attendance, report cards, transcripts, etc. Evidence of being in Canada may include a residential address and correspondence sent to that address. These examples of evidence are neither exhaustive nor exclusive.
    - iii. Persons in Canada, such as refugee claimants, who have been studying or working here throughout a one-year period, during which they were also subject to an unenforced removal order, are not legally residing in Canada. Their applications are not eligible for placement into processing under Ministerial Instructions.

- b. Advantages**

- i. The employment need not be in skilled occupation;

- ii. For the purposes of qualifying under this category, the list of eligible schools is much greater than for other categories such as the Canadian Experience Class;

- iii. Fast processing.

**c. Disadvantages:**

- i. Applicant must still qualify under the point system;

- ii. Applicant must still have one year of skilled experience prior to filing an application;

- iii. Applications will go through two eligibility screenings; one at the Sydney CIU and a second at the Visa Office.

- iv. Processing delays in Sydney.

**d. Tips**

- i. This category can be good for applicants who do not meet the more restrictive requirements of other categories, provided that they get at least 67 points;

- **Canadian Experience Class**

**a. Requirements**

This category is available to individuals who plan to live outside the province of [Quebec](#) and are:

- i. a temporary foreign worker with at least two years of full-time (or equivalent) skilled work experience in Canada in the previous 3 years, or

- ii. a foreign graduate from a Canadian post-secondary institution with at least one year of full-time (or equivalent) skilled work experience in Canada

- iii. have gained their experience in Canada with the proper work or study authorization and have not worked or studied without authorization;

- iv. apply while working in Canada – or – within one year of leaving their job in Canada
- v. have demonstrated language ability in English or French commensurate with NOC skill level;

**b. Advantages**

- i. Simple and stream-lined selection criteria;
- ii. Documentary requirements are substantially less;
- iii. Applicants need only prove that they have the requisite study/work experience and language ability. There are no other selection factors or requirement to achieve a minimum points total;
- iv. Fast Processing;
- v. This category does not depend on continuing employment or an offer of future employment. Thus it can work well for candidates who have been laid off.

**c. Disadvantages:**

- i. Criteria are rigid and mandatory;
- ii. Applicant must have had valid work or study permits for work or study in Canada;
- iii. Applicant must not have engaged in illegal work or study;
- iv. Some schools or programs may not qualify. Generally, the educational institution must be a publicly funded college or university.

**d. Tips:**

- i. The education category has some flexibility, in that there is no requirement that the two year educational program must have been recent. Thus, a person could qualify under the CEC where they had obtained a two year educational diploma, left Canada for 20 years, and then returned and worked for one year in a skilled occupation.
- ii. The one year work must occur following the completion of studies and cannot have form a part of the studies. Thus, co-op programs



that were a mandatory part of course requirements would not qualify as work experience.

- **Provincial Nominee Programs**

- a. Requirements:**

- i. There are no national criteria, as the different provinces have developed different programs and categories. Common categories include: employer driven, strategic occupations and family streams.
    - ii. Because the categories have been customized and are based on provincial criteria, there may be situations where individuals will qualify under a provincial program, but not for the federal programs listed above. For instance in Manitoba and Alberta there are programs for low-skilled workers in specific industries who otherwise would not qualify for permanent residence. Similarly, in many provinces there exist business entrepreneur based programs that offer less stringent criteria and faster processing times for eligible individuals than any comparable Federal stream.
    - iii. Most PNPs require some previous ties to the province, such as education or work experience in the province, and some indication that the applicant intends to reside there.

- b. Advantages:**

- i. A nomination certificate may be sufficient for renewing work permits without obtaining an LMO;
    - ii. Provincial programs are often more flexible and have less stringent requirements for education, language ability and total points;
    - iii. PNPs often offer options for those who cannot obtain sufficient points or are ineligible under the Skilled Worker Category.

- c. Disadvantages:**

- i. Some of the PNP programs have become bureaucratic and unfriendly. Some have developed reputations for not holding

lawyers in high regard, or for circumventing the lawyer and communicating directly with the client.

- ii.** Since most PNPs are creatures of policy and not regulation, rules and requirements can be changed suddenly and without notice. Some programs believe that changes can be imposed retroactively to applications already in progress.
- iii.** Processing times in some PNPs have become very lengthy (eg. 10 months in Alberta);
- iv.** An application is not considered “locked in” until it is filed at the Visa Office. Thus, dependents might become ineligible if there is a delay at the PNP stage;
- v.** Many of the provincial programs require employer sponsorship. Termination of employment may result in refusal of the application even after the nomination certificate has been issued. It should be noted that the BC PNP has recently relaxed this requirement and will continue to support applications where employment has been terminated. Alberta considers such applications on a ‘case-by-case basis’ and frequently insists that another sponsoring employer be found and approved before they will continue to endorse the application.

**d. Tips**

- i.** This category is good where it appears that it will be difficult or impossible to extend a Labour Market Opinion;
- ii.** PNPs may be also be much more flexible for persons whose language ability is weak in some or all categories;
- iii.** Some PNPs offer opportunities for people in low skilled occupations;
- iv.** Some PNP’s offer opportunities for PR nomination without a job offer or current employment, such as graduates of publicly funded universities (eg. The recently announced Ontario International

Graduates Program) or for Tradespersons with Journeyman Certification (eg. The Alberta Strategic Recruitment Program).

### **General Tips for Permanent Resident Applications**

**File in the Right Place:** CEC applications are filed in Buffalo, unless the applicant doesn't comply with R10 (i.e. they are no longer in Canada or the US). Skilled worker applications are filed in Sydney, N.S. and then the applicant is invited to submit their application to the appropriate Visa Office within 120 days (no extensions). Buffalo is now complaining that they are becoming overwhelmed with applications and may have trouble meeting targeted processing times. Thus, if you have an option to file somewhere else, you may wish to take it.

**Take the test: Proving Language Ability** – The Skilled Worker categories and the Canadian Experience Class all require proof of English or French language ability. Applicants may take a designated language test or provide alternate proof of their ability. Formerly, if a Visa Officer wasn't satisfied with the written submissions about language ability, they would write to ask the applicant to submit test results from an approved testing agency.

In 2008, the Minister proposed regulations that would make it mandatory for all skilled worker applicants to provide test results. Alternate forms of proof would no longer be accepted. The regulations were the subject of much debate and the CBA, *inter alia*, made submissions that were highly critical. The proposed regulations were subsequently withdrawn and have not been reintroduced. However, on March 12, 2010, the Minister announced that there would be a “policy change.” As a result of this policy change, applicants will no longer get a fairness letter requesting that they submit language test results if an officer is unsatisfied with their written submissions. Instead, assessments will be based upon the documents submitted. If an officer is not satisfied with the submissions, points will be awarded based upon their subjective assessment. This will be

fatal to many applications. Website instructions now strongly encourage applicants to submit language test results. At the same time, Visa Offices appear to be quite willing to accept the language ability of persons who come from countries where they clearly would have achieved language fluency in English or French. The exception would be from countries where, although for instance English is the national language, it is unclear whether the applicant would have spoken English in their home. Examples include South Africa, where English is not the dominant language for many residents, and the Caribbean, where many people speak Patois.

In the circumstances, it would be prudent for counsel to advise that all applicants take the language test unless they clearly came from a unilingual English or French speaking country. It seems clear that the Department will not be awarding the benefit of the doubt to the applicant and it would thus be very risky to rely on secondary forms of proof.

If a person is going to provide written submissions rather than language test results, they would be well advised to provide very detailed proof and to ensure that reference letters from employers, etc, clearly addressed the applicant's competency in terminology from the Canadian Language Benchmarks. It should not be assumed that officers will read in or presume anything. Although requests for follow up submissions or documentation will no longer occur, it is worthwhile to note that officers have recently been asking applicants to provide samples of material they have generated at work to prove their English language competence.

With the new "streamlined language assessment process," the government has effectively achieved its goal of mandatory language testing for skilled worker applications. As a result, it would be extremely dangerous and perhaps even negligent for counsel to submit an application from a non-native French or English skilled worker applicant without providing language test results.

**Applicants may wish to file concurrent applications:** An applicant under the economic classes may file as many concurrent applications as they wish. The Regulations only

prohibit concurrent sponsored applications in the Family and Spouse in Canada classes. An applicant whose Skilled Worker application is bogged down in the backlog may wish to consider filing a new application under one of the other categories. However, CIC will require filing a new application package and paying new fees. An existing Skilled Worker application can also be enhanced and expedited by obtaining an offer of Arranged Employment. As well, if an application is withdrawn prior to assessment, it may be possible to obtain a refund of fees.

**Advise your clients to take a taxi:** As with all classes, in-Canada applicants can be denied due to the inadmissibility of themselves or any family member. Accordingly, I caution work and study permit holders that a simple slip-up can jeopardize their chances for Permanent Residence. I also warn them to advise family members. A valued employee or otherwise diligent student who becomes inadmissible due to a criminal conviction may be able to obtain a Temporary Resident Permit to allow them to stay temporarily. However, it is unlikely that they would succeed in obtaining PR status on humanitarian grounds prior to obtaining a pardon.

It should also be noted that none of the classes discussed in this paper is available to persons with unexecuted removal orders (i.e. unsuccessful Refugee claimants). Those who have been deported will require an Authorization to Return to Canada. For refugee claimants who may have an opportunity to succeed under one of these classes, it may be advantageous to leave Canada before a conditional Departure Order becomes a Deportation Order.

**Filing a PR application will not maintain Temporary Status:** With the exception of some PNP nominations, the filing of an application for permanent residence will not entitle extension of temporary status. The applicant must still file applications at the CPC Vegreville and convince port of entry officers of their legitimate temporary intent. This can be problematic where the applicant is no longer employed or attending school. Conversion to visitor status may be possible, but an application should provided good reasons for staying in Canada pending the granting of PR status. I would provide a letter

from counsel explaining the circumstances together with proof of filing the PR application. Reference should be made to the Dual Intent provisions of the Act.

HRSDC has a policy which waives advertising requirements for Labour Market Opinions when the Foreign Worker is a Post Graduate worker who has used up their eligibility for C43 work permits and is applying for Permanent Residence. However, this policy does not extend to other classes of Work Permits.

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