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October 27, 2003

Mr. Alain Théault
Director General
Priorities, Planning and Research Branch
Department of Citizenship and Immigration Canada
356 Laurier Avenue West, 14th Floor
Ottawa ON K1A 1L1

Dear Mr. Théault:

RE: Proposed Amendments to Immigration and Refugee Protection RegulationsEconomic Class (Outside Quebec) Transitional Rules — Part 20 — Division 11 Canada Gazette, Part 1, October 11, 2003

I am writing on behalf of the National Citizenship and Immigration Law Section of the Canadian Bar Association (the CBA Section), to provide our views on the proposed transitional regulations.

OVERVIEW

The proposed regulations for Transitional Rules provide a framework for processing the backlog economic class applications filed prior to January 1, 2002, following the Minister's announcement of September18, 2003. The intent is to fulfill the commitment that economic class applicants for permanent residence who filed prior to the December 31, 2001 prepublication of the IRP regulations will not be subject to the retroactive application of the IRP regulation selection criteria.

We are cognizant that these regulations give effect to the Minister's public commitments, in response to court proceedings on the legality and fairness of the retroactive application of the IRP Regulations for selection to backlog applicants (pre January 2002). The court proceedings are ongoing and settlement negotiations are being undertaken. These comments are in no way intended to affect those discussions. They respond to the proposed regulations, and are given without any consideration of the settlement discussions.

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The proposed amendments remove the prior transition deadline of March 31, 2003 and enable all eligible federal economic class applications (independent immigrants, assisted relatives, investors, entrepreneurs and self-employed) submitted before January 1, 2002

to be assessed according to the selection criteria of the former Regulations, or alternatively under the new selection criteria with the reduced pass mark announced by the Minister.

If an application receives an insufficient number of units of assessment under the former Regulations, it will be assessed under the current *Immigration and Refugee Protection Regulations*. The pass mark will be 67 points for the skilled workers class and 35 points for the investor, entrepreneur and self-employed classes.

The transitional regulations are to come into force on October 31, 2003.

The eligible applicants are:

- Backlog applicants refused under IRP regulations between March 31 and June 20, 2003
- Backlog applicants who withdrew their applications between January 1,2002 and October 31, 2003
- Backlog applicants whose applications are still pending and who haven't had an assessment of points under the former regulations
- Backlog applicants whose applications were refused, but for whom Federal Court has ordered a yet unconcluded re-determination

REFUSALS OR WITHDRAWALS

The regulations (r. 70(2)b, 85.1, 109.1) create four new classes of applicants who may be selected for permanent resident status, pursuant to r. 70(2)b:

- transitional federal skilled worker class;
- transitional federal investor class;
- transitional federal entrepreneur class; and
- transitional federal self-employed persons class.

These classes include only those who either withdrew their applications on the Minister's invitation, or whose applications were refused under the IRP regulations between March 31 and June 20, 2003.

The regulations provide that these applicants:

- may reapply, and if they choose to, must reapply before January 1, 2005. (r. 85.2, r. 109.2)
- must comply with r. 10 and r. 11 respecting contents of application and place of application. (r. 85.2, r. 109.2)
- shall be assessed under the old criteria or the new criteria, whichever is more beneficial (67 points for skilled worker, 35 points for investor, entrepreneur, or self-employed) (r. 85.3, r. 109.3)
- are not required to pay a new processing fee (r. 295(2.1), r. 295(2.2)

Comments

1. The requirement to comply with r. 11 is not consistent with the advice given by CIC officials at the CICIPWG meeting of October 17, that applicants have the choice of applying to the mission where their application was previously filed, or the mission dictated by r. 11, at their option.

   This choice is fair and prevents applicants from being prejudiced by being forced to a mission experiencing slow processing. The choice should preferably be reflected in the regulations. Alternatively, explicit and public manual guidelines or Operation Memoranda can be used, but this is far less satisfactory.

2. The regulations do not reflect the advice of CIC officials at the October 17 CICIPWG meeting, that resubmitted applications will be placed into processing at the queue point where they left off (in other words, withdrawn and refused applications will be reinserted into the queue according to original date of filing). Again, this should be reflected in the regulations, but could be the subject of an explicit and public Operation Memorandum.

3. CIC officials advised that applicants bear the responsibility for resubmission of applications and for ensuring that their file is "IRPAized" to facilitate assessment under the IRP regulations if necessary.

   Will applicants be given a 90-day notice, or any notice, of a refusal under the former regulations, prior to assessment under the IRP regulations?

4. In s.6, r. 295(2.1) is confusing where it states "*if the fees for processing their withdrawn application have not been refunded or if they are not eligible for such a refund*." The underlined phrase needs to be clarified or removed. This same language appears in r. 295(2.2).

PENDING APPLICATIONS

Backlog applicants (independents, investors, entrepreneurs and self-employed) whose applications have not yet been assessed under the old selection criteria have the March 31, 2003 deadline removed. Pursuant to r. 361(4) and r. 361(4.1), this is applicable if:

- the application is still pending on October 31, 2003; and
- the foreign national has not, before that day, been awarded units of assessment under those Regulations. ("former")

These applicants obtain the benefit of the old selection criteria or the new selection criteria, whichever is more favourable (67 points for skilled workers, 35 points for others) (r. 361(4.2), r. 361(5), r. 361(5.1))

Comments

1. What is the meaning of "been awarded units of assessment under those Regulations"? Is it the award of points by an officer in the final selection stage, or the paper screening stage where a "selection decision" was made?

   What is the effect on backlog applicants who received the usual letter from the mission, prior to March 31, 2003, saying that processing without interview was anticipated? Is this a selection decision that is locked in, or is the decision reopened for new assessment as a pending case? Does this category apply to all backlog applicants who have not had a final decision made, so that all are eligible for assessment against the 67 point standard, if necessary?

   Clarification of the meaning of being "awarded units of assessment" is necessary.

   Clarification of the meaning, and the mechanism of processing of applicants such as above (those with the "no interview" letter) is necessary, preferably in the regulations and at least in explicit and public manual provisions or OM.

2. Notice Requirements:

   At the October CICIPWG meeting, CIC officials advised that officers would be instructed that no final decisions would be made unless 90 days had passed since an applicant was advised to "IRPAize" a file, and 90 days had passed since the legislation came into force. No second notice will be sent to pending applicants who had a prior notice to "IRPAize".

   The CBA Section has concerns with the fairness of this process, and the risk that backlog applicants will be refused under IRPA for failure to comply with application requirements.

Even where backlog applicants have previously received a request to "IRPAize" their applications, this was under the 70-point and not the 67-point standard. Applicants, particularly unrepresented ones, may have not sent in materials because they did not believe they would meet the pass mark, and may not be aware of the change to the pass mark or its applicability to their applications.

It is not sufficient to rely on Canada Gazette publication to advise of the change in the deadline and the pass mark, or on a website link as sufficient notice to applicants that they have 90 days from implementation for submission of materials to support selection under IRPA at a new pass mark.

The 90-day limitation is not in the regulations in any event.

The CBA Section recommends that written notice be sent from each CIC mission to each affected applicant, advising of the continuing assessment under the old law, and the alternative selection under IRPA, with a request for supporting materials within 90 days of the notice.

This is in addition to website notification. In the alternative, all backlog applicants should be given until December 31, 2004 to submit additional materials.

As per the CICIPWG discussion, where an applicant provides materials and advises that language test results are being obtained, there will be no IRP regulation decision pending receipt of test results.

RE-DETERMINATIONS FOLLOWING FEDERAL COURT REVIEW

The IRP regulations provided that where refusals of applicants under the old law had been successful in judicial review and there was court ordered re-determination, March 31, 2003 was the cut-off for re-determination under the old law.

Under the transitional regulations, r. 350(3) and (4) would be amended to provide that any court ordered re-determination not done by October 31, 2003 is to be conducted according to amended r. 361(4.1), (5.1), (5.2) and (6).

This binds CIC to assess as though there are applications still pending and eligible for assessment under the old regulations or with respect to a pass mark of 67 (skilled workers) or 35 (investors, entrepreneurs or self-employed), under IRP regulations.

Comments

1. The October 31 cut-off date leaves open the possibility of Federal Court returns that were re-determined after March 31, 2003 under the new law and not under the prior regulations. If re-determined under the new law, they would be

assessed against a pass mark higher than 67. If such applicants exist, they should be entitled to re-determination under the old law or against a pass mark of 67.

Would these applicants be captured by the amended regulations for persons previously refused? It is not clear that they would necessarily have had an application pending on June 28, 2002, per r. 85.1(2) or r. 109.1(2).

We suggest that the transition regulations be amended to include any applicant whose re-determinations of old refusals, post IRPA, was not assessed under the old law, or was refused against a 75 or 70 pass mark.

2. The requirement in r. 361(4),(5) that the foreign national has not, before that day, been awarded units of assessment under the former Regulations does not properly apply to re-determinations of prior refusals under the old regulations, followed by re-determination. This requirement should not apply in the case of re-determinations of old criteria refusals.

3. In s.8, amending r. 361, it should be clarified in (5), (5.1), (5.2) and (5.3) that if the applicant does not achieve the number of units of assessment under the former Act, there is an obligation to be reassessed under IRPA. This clarification can be made by adding in each section, after the words "required by those Regulations, they…":

"*shall be reassessed under these Regulations and"*

GENERAL COMMENTS

Changing application category

The reduction of pass mark under IRP regulations may mean that backlog applicants who previously applied under a business category (investor, entrepreneur, self-employed) may now be eligible for assessment as a skilled worker.

To accommodate this scenario, the CBA Section suggests that CIC have a published and transparent policy facilitating category change by backlog applicants, without penalty of change in queue. The category change would be initiated by the applicant requesting the change in writing, with submission of appropriate forms and materials.

Expedited processing of backlog applicants

In CICIPWG discussions on October 17, CIC officials advised that there is no commitment to expeditiously process the eligible backlog applicants to finalization. There is a commitment to deal with the backlog without creating new delays, in a manner consistent with the priority based on original application dates (for applicants resubmitting applications) but that final determinations and visa issuance will continue to be done in a manner consistent with meeting annual projections.

There is a commitment to restoring inventory, but not to finalizations that are inconsistent with annual projections given to Parliament.

We trust that these comments will be helpful in crafting the final transitional rules.

Yours truly,

Original signed by Tamra L. Thomson for Gordon Maynard

Gordon Maynard
Chair, National Citizenship and Immigration Law Section