THE CANADIAN BAR ASSOCIATION
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November 26, 2003

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

Dear Mr. Théault:

RE: Canada Gazette Part 1, September 27, 1003, p. 3016
Regulations amending the Immigration and Refugee Protection Regulations

I am pleased to attach the comments of the National Citizenship and Immigration Law Section of the Canadian Bar Association, regarding the proposed regulatory amendments pre-published in Canada Gazette Part 1 on September 27, 2003. We trust that you will find these valuable in finalizing the regulatory package. We would be happy to discuss any detail of our comments at greater length.

Yours truly,

Original signed by Tamra L. Thomson for Gordon Maynard

Gordon Maynard
Chair
National Citizenship and Immigration Law Section

cc.
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CANADIAN BAR ASSOCIATION
NATIONAL CITIZENSHIP AND IMMIGRATION LAW SECTION

COMMENTS ON REGULATIONS AMENDING THE IMMIGRATION AND REFUGEE PROTECTION REGULATIONS

Pre-Published in Canada Gazette, Part 1, September 27, 2003

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I. TEMPORARY RESIDENCE

The CBA Section believes that the majority of the changes to the temporary resident provisions are positive. They appear to increase flexibility, reduce processing times for temporary workers, and improve the provisions relating to students.

Proposed R. 46 amending R. 3 and 184:

The amendments remove unnecessary language respecting persons entering to become crew members.

Comments:

The changes are neutral, providing clarity.

Proposed R. 51(1), amending R. 199(b):

This amendment eliminates the three-month waiting period required to apply in Canada for a work permit, for temporary workers currently in Canada under R. 186.

Comments:

This is a positive amendment. We do not understand why it does not include R.186 business visitors.

Proposed R. 50, amending R. 198(2)(a):

This permits all visa exempt individuals who obtain a labour market opinion to apply for a work permit at a port of entry, rather than at a consulate abroad.

Comments:

This is a positive change that reduces the workload on consulates abroad while at the same time significantly decreasing the processing time and expense required in facilitating the admission of foreign workers.

Proposed R. 52 and R. 53, amending R. 200(1)(c)(iii) and R. 203(1):

This amendment removes the word “economic” from HRDC “neutral or positive” assessment requirements.

Comments:

This change further clarifies the factors to be assessed by HRDC and provides officers with greater flexibility to determine neutral and positive impacts on the Canadian labour market of employing a foreign worker.

Proposed R. 56, amending R. 217(1):

This amendment requires an applicant for renewed study permit to demonstrate they are "in good standing" at the current educational institution.

Comments:

In general, this provision is appropriate. However, an exception should be made for individuals suffering from illness, accident, family crisis, or other legitimate reason by which they were unable to remain in good standing at their previous educational institution.

Proposed R. 57, amending R. 219(2):

This amendment exempts applicants from the requirement to provide a letter of acceptance from an educational institution when applying to renew their study permit for 90 days or less, after completion of requirements for a degree or diploma.

Comments:

This amendment assists foreign students in qualifying for post-graduate work permits. It is a necessary technical amendment.

II. FAMILY ISSUES

The CBA Section has concerns with many of the proposed amendments to the regulations concerning family class and sponsorship. The concerns with respect to exclusions from eligible sponsors and excluded family class members are significant.

Proposed R. 3, amending R. 4:

The amendment clarifies that the two-part Horbas test applies and is a positive change.

Proposed R. 4, amending R. 4.1:

This section exempts from the family class those whose prior marriages, common law or conjugal relationships with the sponsor were dissolved or resumed for purposes of [anyone?] acquiring status under the Act.

Comments:

The language of this provision is awkward. It is unclear as to whether it's the dissolution of the prior relationship or the resumption, or both, which causes the person to lose status in the class.

Proposed R. 37, amending R. 117(4)(a):

For adoptions of children over the age of 18, the requirement for compliance with the law of the sponsor's province is deleted.

Comments:

No concerns regarding this amendment.

Proposed R. 39, amending R. 125:

Excluded relationships from spouse and common law partner in Canada class.
The exclusion of certain relationships from the class is made mandatory, reference to former spouse or common law partner is deleted, and saving provisions are added in R. 125(2), (3) and (4), consistent with the amendments to R.117.

Comments:

The change to R. 125(1) makes the application of this section mandatory. Previously there was room for some discretion, which is preferable. The changes to R. 125(1)(d) are similar to the changes suggested to R. 117(9)(d), which are dealt with in a separate part of this brief.

Proposed R. 41, amending R. 133(1)(e):

These amendments expand the bars against sponsors for prior criminality.

Comments:

The bars for sponsors have been expanded. The proposed regulations remove from previously eligible sponsors those who have a conviction for sexual offences against anyone, not just a spouse. The proposed changes also prevent a sponsorship by a person convicted of an offence resulting in bodily harm, or attempts or threats to commit bodily harm against relatives.

The CBA Section submits that the new restrictions concerning attempts and threats to commit bodily harm are far too broad.

(a) R. 133(1)(e)(i) does not define an "offence of a sexual nature". Does this include "touching" offences or prostitution related offences? This term must be defined.

(b) Cases where the court assessed a minimum penalty should not lead to a bar from sponsorship. Further, not all sexual offences should lead to a permanent bar. There should be room for discretion to consider the severity of the offence as determined by the court.

(c) R. 133(1)(e)(ii), which includes a sponsorship bar for those convicted of threats or attempts to commit offences that result in bodily harm, as well as the offences themselves, paints far too broad a brush. The provision captures all convictions without looking at the circumstances and the way the court has assessed the offences. There must be room for officer discretion for minor situations in fact and in law. Not all such offences should prevent a sponsor from re-uniting with family members.

In the very least, convictions for attempts and threats must be treated differently from convictions for committing the offence itself.

The CBA Section suggests that one method of addressing these concerns is to amend the section to reflect conviction "for more than one offence", or to insert threshold penalties, and remove "or an attempt or a threat to commit such an offence against any of the following persons".

PROPOSED R. 37(3), AMENDING R. 117(9)(d) — EXCLUSION OF FAMILY CLASS MEMBERS

The significant impact of R. 117 necessitates extensive analysis and recommendations.

CURRENT LEGISLATION

R. 117(9)(d) under IRPA

Excluded relationships

> (9) No foreign national may be considered a member of the family class by virtue of their relationship to a sponsor if
>
> . . .
>
> (d) the sponsor previously made an application for permanent residence and became a permanent resident and, at the time of that application, the foreign national was a non-accompanying family member or a former spouse or former common-law partner of the sponsor and was not examined.

Family Member

> **IRPA s.** 42 A foreign national, other than a protected person, is inadmissible on grounds of an inadmissible family member if
>
> (a) their accompanying family member or, in prescribed circumstances, their non-accompanying family member is inadmissible; or
>
> (b) they are an accompanying family member of an inadmissible person.

Prescribed circumstances. Family members

> **R. 23.** For the purposes of paragraph 42(a) of the Act, the prescribed circumstances in which the foreign national is inadmissible on grounds of an inadmissible non-accompanying family member are that
>
> (a) the foreign national has made an application for a permanent resident visa or to remain in Canada as a permanent resident; and
>
> (b) the non-accompanying family member is
>
> (i) the spouse of the foreign national, except where the relationship between the spouse and foreign national has broken down in law or in fact,
>
> (ii) the common-law partner of the foreign national,
>
> (iii) a dependent child of the foreign national and either the foreign national or an accompanying family member of the foreign national act on behalf of that child by virtue of a court order or written agreement or by operation of law, or
>
> (iv) a dependent child of a dependent child of the foreign national and the foreign national, a dependent child of the foreign national or any other accompanying family

member of the foreign national has custody of that child or is empowered to act on behalf of that child by virtue of a court order or written agreement or by operation of law.

OM OP 03 - 19 June 2003

The OM provided guidance in applying R. 117(9)(d). Selection was to be facilitated on humanitarian and compassionate considerations when the section was applicable to family members not required to be examined under the old law (i.e. refugee family class members or family class members of persons landed under H and C grounds within Canada).

In the case of separated children, R. 117(9)(d) was not to be applied where the sponsor was not adequately counseled, prior to their own immigration, on the consequences of non-examination of children not in their custody.

There was no such consideration of counseling in the case of separated spouses. Their non-examination was determinative of exclusion from the family class.

R. 117(9)(d) in the proposed regulations

In the RIAS

The amendments to R. 117 ensure that certain family members who were not examined as part of a sponsor's application for immigration to Canada are no longer excluded from the family class and could be sponsored. These family members were originally not examined because they were not required to be examined for administrative or policy reasons. This change affects family members of refugees, persons who submitted humanitarian and compassionate applications in Canada and persons who applied prior to IRPA coming into force.

By moving the provision for excluding former spouses and common-law partners from R. 117(9)(d) to R. 4, the amendments make clear that dissolution and subsequent resumption of a conjugal relationship to facilitate immigration constitutes an act of bad faith.

Proposed Regulatory amendments:

Excluded relationships

(9) A foreign national shall not be considered a member of the family class by virtue of their relationship to a sponsor if:

. . .

(c) subject to subsection (10), the sponsor previously made an application for permanent residence and became a permanent resident and, at the time of that application, the foreign national was a non-accompanying family member of the sponsor and was not examined.

Exception

(10) Subject to subsection (11), paragraph (9)(d) does not apply in respect of a

foreign national referred to in that paragraph who was not examined because an officer determined that they were not required by the Act or the former Act, as applicable, to be examined.

Application of para (9)(d)

(11) Paragraph (9)(d) applies in respect of a foreign national referred to in subsection (10) if an officer determines that, at the time of the application referred to in that paragraph,

(a) the sponsor was informed that the foreign national could be examined and the sponsor was able to make the foreign national available to be examined, but the foreign national was not examined; or

(b) the foreign national was the sponsor's spouse, was living separate and apart from the sponsor and was not examined.

COMMENTS:

Background

Under the current and former Acts, foreign nationals could be inadmissible due to the inadmissibility of non-accompanying family members. An exception is made for separated spouses, and for children not in the custody of the applicant foreign national. In these cases, inadmissibility of the separated spouse or non-custodial child was declared by regulation to be irrelevant.

No provision in the former or current Acts relieves the applicant from having a non-accompanying separated spouse or non-custodial children from being examined. Nonetheless, officers would or can waive the examination of the dependents. (The exception was in the case of inland H and C applications and in refugee landings, where there was no requirement for non-accompanying dependents to be examined and no requirement for waiver by the officer.)

The legal effect of not having non-accompanying dependents examined was that they were forever removed from the family class. Sometimes applicants were made aware of this consequence, in other cases not. Even where applicants were aware of the consequences, the circumstances that allowed them to accept the removal from family class could subsequently change (i.e. non-accompanying custodial spouses subsequently dying).

The purpose of the provision for bar from future family class sponsorship of non-examined dependents was to prevent sponsors from benefiting from deliberate non-disclosure of dependents who would otherwise have adversely affected their own admissibility. Applicants would fail to disclose children or spouses, would obtain landing as permanent residents or subsequent citizenship, and then seek to sponsor their dependents. As residents or citizens, the sponsors would have the benefit of Appeal Division review on humanitarian and compassionate grounds to overcome the

inadmissibility of the dependents. By removing the family class membership of the non-examined dependents, sponsor access to the Appeal Division was removed. R. 117(9)(d) carried on the family class exclusion of dependents not previously examined when the sponsor obtained selection. The language was changed so that the non-examination was penalized in both visa and non-visa situations.

The Problem

The regulation excludes family class membership simply on the basis on non-examination, without considering the reasons for non-examination. The regulation does not allow any discretion of application, and completely bars remedial review by the Appeal Division. Future entry of the unexamined dependents is wholly within the humanitarian discretion of CIC, subject only to Federal Court review, by leave.

Under the former Act, the provision was not fully utilized. Indeed until the mid to late nineties it was sparingly applied so that its impact was not fully felt or appreciated. Under the IRPA environment, it is being applied and the inequities of its potential application being appreciated.

The regulation covers not only situations where the non-examination was wholly the result of deliberate non-disclosure by the applicant, but also situations where:

- the dependents were disclosed but not examined because the officer waived the examination;
- applicants did not appreciate the consequences of accepting waiver of examination;
- there was no requirement to examine non-accompanying dependents (inland H and C examinations, for example);
- the non-examination was the result of an undisclosed change in family circumstances after visa issuance prior to landing (marriage or birth, for example);
- there was a significant change in circumstances, such as death of custodial parent, since informed or uninformed waiver of prior examination and subsequent landing or permanent resident status.

These situations mix circumstances ranging from full malfeasance in the non-examination (deliberate non-disclosure) to full innocence (disclosure but waiver of examination without the sponsor being aware of the consequences). Even in cases of deliberate non-disclosure, there are degrees of culpability. Filipino nannies, for example, would often hide the existence of children because they believed they would not be eligible for the program unless they were single and unmarried. Once accepted into the program, they feared there could be no disclosure until PR status was completed. There was rarely any intent to hide an inadmissibility, or issue of inadmissibility. In any event, inadmissibility could be subsequently assessed. These cases were gender and economic

specific. CIC could choose to act against these cases when the failure to disclose became known, and sometimes did. Often, CIC chose not to act, and a subsequent sponsorship was allowed. In other cases, the IAD weighed all the circumstances.

There are obvious problems with an inflexible rule that excludes family class membership and the role of the Appeal Division in all cases.

The wisdom of continuing the exclusion regulation from the former to present Act should also be re-examined in light of the significant related changes to the IRPA environment:

- spouses and children are exempt from medical inadmissibility on demand grounds;
- the misrepresentation inadmissibility jurisdiction allows enforcement against applicants' or sponsors' misrepresentation in any process that could lead to error in the administration of the Act.

Finally, the broad and forceful scope of the exclusion regulation has to be measured against the mischief it attempts to regulate. If the intent is to prevent families from accomplishing immigration through the deception of deliberate disclosure, then why is the exclusion so broadly and inflexibly fixed?

The IAD decision in *Nenadic*, [2002] I.A.D.D. No. 888, August 18 2002, nicely presented the need for discretion and relaxation from strict application of the regulation. Although decided under the old regulations, the Board had reference to the new regulations. The interpretation is applicable to both.

The appellant in *Nenadic* had disclosed the existence of his non-accompanying dependent child, then in his former wife's custody, and the child was not examined in the course of his immigration to Canada. When he later gained custody, his sponsorship application was refused on the basis of prior non-examination. The Board found that exclusion provisions were

> "intended to protect the integrity of the immigration system, in that it operates as a disincentive for applicants to deliberately exclude certain dependents from examination, for fear they would be found inadmissible, and thus affect the applicant's own admissibility, only to sponsor them later, once the applicant is granted permanent residence."

However, in this case, there was no intent to thwart integrity. *Nenadic* had simply never been given an informed choice. Accordingly the Board held that the refusal in law was bad and a serious breach of procedural fairness.

Nenadic is good law. The OM would cover the *Nenadic* situation, on the basis that the sponsor had not been properly counseled, <u>if CIC so determined</u>. As drafted, R. 117(9)(d) would not permit inclusion of the *Nenadic* child in the family class. It is not

clear that the amended section would either — it depends on what is meant by the requirement of an officer deciding that examination was "not required".

Remedies to R. 117(9)(d)

There needs to be discretion and the ability to remedy inappropriate refusals of family class sponsorships on the grounds of prior non-examination.

The proposed amendments to R.117(9) do not achieve this need.

Exception

> (10) Subject to subsection (11), paragraph (9)(d) does not apply in respect of a foreign national referred to in that paragraph who was not examined because an officer determined that they were not required by the Act or the former Act, as applicable, to be examined.

Again, only non-accompanying dependents of inland H and C applicants or refugees seeking landing were not required by the Act to have non-accompanying dependents examined. If this is intended to include all cases with prior disclosure of non-accompanying dependents and an officer's decision to waive examination, then it should explicitly say so, for instance by adding:

> ….foreign national referred to in that paragraph who was not examined because an officer determined that they were not required by the Act or the former Act, as applicable, to be examined, or whose examination was waived by the officer, acting under the Act or the former Act, as applicable.

This would be a cumbersome way of legislating that foreign nationals who were not disclosed as non-accompanying dependants in a prior application for status by the sponsor (and so were not considered for examination) would be excluded from the family member class, but it is an improvement over the current regulation.

However, the exemption is modified, and substantially eliminated, by the new R. 117(11).

> (11) Paragraph (9)(d) applies in respect of a foreign national referred to in subsection (10) if an officer determines that, at the time of the application referred to in that paragraph,
>
> (a) the sponsor was informed that the foreign national could be examined and the sponsor was able to make the foreign national available to be examined, but the foreign national was not examined; or
>
> (b) the foreign national was the sponsor's spouse, was living separate and apart from the sponsor and was not examined.

We do not understand the need for (a), which depends on rare and debatable occurrences of:

- the sponsor being informed (by whom?) that the foreign national could be examined; and

- the officer determining that the sponsor was able to make the foreign national available for examination; but
- the foreign national was not examined.

This seems convoluted, exceptional and unnecessary. Is it worth chasing after some mischief in this manner?

Worse, the second arm of the exception from the exception eliminates the exception for all spouses who were non-accompanying dependents living separate and apart from the applicant. Why is it necessary to exempt previously separated spouses from the exemption? Is there a presumption that any prior separation was willful misrepresentation or a separation of convenience? Is it not conceivable that parties could legitimately separate and then legitimately reconcile, without the intervening immigration having been the motivating factor?

The proposed amendments are not sufficient for a number of reasons:

1. They are cumbersome and unclear. Exclusions with exemptions with exemptions.
2. They continue to try to apply objective standards to varied and complex events.
3. They continue to prevent review by an independent tribunal in cases involving refusal of family members of citizens or permanent residents.
4. They ignore the reality that any applicant must still be examined and found admissible.
5. They try to impose an unworkable test based on prior non-examination when the real issue is misrepresentation malfeasance.

Proposal to amend R. 117(9)(d)

These proposals are based on the following premises:

1. There is a need to refuse family class applications for prior non-disclosure, in appropriate cases.
2. It is not appropriate in all cases to refuse family class applications for prior non-disclosure.
3. There needs to be discretion to distinguish between appropriate and inappropriate cases, and the existence of circumstances that may overcome even deliberate disclosure,
4. Refusals of applications by spouses or children of permanent residents or citizens deserve to be reviewed independently, in fact, law and equity.

Recommendations

1. Delete R. 117(9)

Prior non-disclosure of dependents is a misrepresentation and should be dealt with accordingly. The misrepresentation allegation can be made against the sponsor or against the applicant (in appropriate cases).

There is no inherent reason to treat non-disclosure differently from any other misrepresentation. There is no inherent reason why decisions to refuse applications by spouses or children should not be reviewed by the Appeal Division to determine whether the failure to disclose was deliberate and whether the circumstances justify loss of status or refusal of the application.
Deleting R. 117(9)(d) does not give applicants license not to disclose non-accompanying dependents. Misrepresentation inadmissibility continues to apply, either at the initial application or during subsequent sponsorship. It does give an independent assessment of the misrepresentation, or of whether the misrepresentation should result in loss of status of the subsequent sponsor.

2. Create a reviewable ineligibility of sponsor for prior non-disclosure of a non-accompanying dependent, rather than exclusion from family class.

Ineligibility of the sponsor for prior non-disclosure would be reviewable in the Appeal Division on grounds of fact, law and equity. It would be like any other case of reviewable refusal of a family class member. It would apply to spouses or children.

The value is that there would be an independent review process to assess the circumstances of the non-disclosure, and to determine the appropriate consequences.

The value of either of the above processes is flexibility and independent decision-making. Both are absent in the current process of generally deeming exclusion for non-examination, and then trying to carve out exemptions from the exemptions.

III. BUSINESS AND SKILLED WORKER IMMIGRANTS

Proposed R. 27, amending R. 75(2)(a):

Part-time employment must be "continuous" to qualify for the one year of employment in the 10 years prior to the application.

Comments:

This is a significant change, which penalizes applicants with different types of part-time experience over a 10-year period or experience on a non-continuous basis. This will

have an adverse impact on mothers who work part-time, and appears to have a gender bias.

Proposed R. 28(2), amending R. 76(3):

A visa officer cannot use positive substituted evaluation to overcome insufficient points on the selection criteria if the applicant does not meet the minimum funds requirement.

Comments:

This penalizes an applicant with strong skills but insufficient funds. This will have a negative impact on otherwise strong applicants from countries where salary and income are lower. If an officer believes that the applicant will become economically established in Canada, taking into account the available funds, then substituted evaluation should be applied on a case-by-case basis.

Proposed R. 29, amending R. 79 (3):

The Minister will set the minimum test results required for each ability and level of proficiency in a test administered by a designated organization or institution.

Comments:

The levels chosen by the Minister must have a connection to objective English and/or French levels needed to function in Canadian society. This connection ought to be maintained.

Setting the minimum result for each ability tested instead of an overall score requires analysis and justification for each score of each test of each organization. This may be overly complex.

Proposed R. 30(1), amending R. 82(2):

This limits arranged employment to Skill Levels O, A and B.

Comments:

This provision clarifies existing HRDC policies.

Proposed R. 30(2), amending R. 82(2)(a)(i):

This provision clarifies that arranged employment requires a determination on the effect on the labour market in Canada.

Comments:

This amendment clarifies the original regulation and more appropriately relates to the function of HRDC, which is to review effects on the Canadian labour market, rather than being limited to “economic effect”.

Proposed R. 30(3), amending R. 82(2)(a)(iii):

This provision changes the requirement that, for a worker to receive 10 points for arranged employment, the work permit had to be valid for 12 months at the time of the application. As proposed, the applicant must hold a valid work permit at the time of the application and at the time of the visa issuance.

Comments:

This allows workers holding permits that can be issued for only 12 months at a time, such as those under NAFTA, to qualify for 10 points for arranged employment. This is a good change. In view of the processing delays at Vegreville, this should be expanded to workers who have applied for a renewal of their work permit and are in implied status at either applicable time, with the extension being subsequently granted.

Proposed R. 30(5), amending R. 82(2)(b):

A skilled worker in Canada with a work visa pursuant to s. 205(c)(ii) will receive 10 points for arranged employment. This includes spouses of skilled workers spouses of students, and post-graduate employees.

Comments:

This expands the persons who may successfully apply as principal applicants in the skilled worker category. It is a good amendment.

Proposed R. 30(7), adding new R. 82 (2)(d):

This provision will allow for an HRDC opinion of a genuine job offer for a different job to be issued to a person currently holding a work permit for another employer or position.

Comments:

A person will now be able to obtain points for a job offer for a job different from the work visa currently held. Presently the worker must be working at the same job as the permanent job offer. The proposed amendment will still not allow arranged employment points for a person working in Canada under a work permit exempt category under R. 186, such as a religious worker.

Proposed R. 31(1), amending R. 88(1):

Definition of "entrepreneur selected by a province" and "investor selected by a province". The requirement for a selection certificate issued by the province is added. This has application to Quebec.

Comment:

These provisions clarify the law and make no significant change.

Proposed R. 31(2), amending R. 88(1):

This provision amends "qualifying business", requiring the two described criteria to be met in the same "year under consideration".

Comments:

The language of this amendment is confusing. The reference "during the year under consideration" is unclear and presumably intended to be a year from within the definition of "business experience". There should be reference to that definition. A poor interpretation could result in less flexibility.

Proposed R. 33, amending R. 96:

This provision clarifies that an "investor selected by a province" shall not be assessed using federal criteria.

The requirement for a provincial selection certificate and requirement of intent to reside in that province are deleted (but found in the definition of "investor selected by a province").

Comment:

This clarifies the earlier regulation and gives the provinces increased flexibility.

Proposed R. 34, amending R. 99:

This provision clarifies that a provincial entrepreneur shall not be assessed using federal criteria. "entrepreneur selected by a province"

The requirement for a provincial selection certificate and requirement of intent to reside in that province are deleted (but found in the definition of "entrepreneur selected by a province").

Comment:

This clarifies the earlier regulation and gives the provinces increased flexibility.

Proposed R. 35, amending R. 101:

This provision clarifies that a provincial self-employed person shall not be assessed using federal criteria.

The requirement for a provincial selection certificate and requirement of intent to reside in that province are deleted (but found in the definition of "self-employed person selected by a province").

Comment:

This clarifies the earlier regulation and gives the provinces increased flexibility.

IV. REFUGEES

General Comments on Proposed R. 42 to 45

Proposed amendments with respect to refugees will only affect refugees and humanitarian-protected persons abroad. The proposed amendments will not affect refugee claimants who submit their claims within Canada. The classes that will be affected are Convention refugees abroad class, and the humanitarian-protected persons abroad, which consists of country of asylum class and source country class.

Proposed R. 42, amending R. 138:

The definition of "referral organization" is expanded to include governments of a foreign state or government institutions where the Minister has entered into a memorandum of understanding under R. 143 or any international organization or government of a foreign state with which the Government of Canada has entered into an agreement relating to settlement

Comments:

Apparently the basis of referral is to be expanded, so more people in any of these three classes should benefit from more referral sources. This is a positive change.

Proposed R. 43, amending R. 143(1) and R. 143(2):

This amendment incorporates the additional referral sources proposed in R. 138 with whom the Minister may enter into a memorandum of undertaking.

Comments:

These changes are also positive, as they will expand the basis that can have access to overseas refugees seeking protection and resettlement in Canada.

Proposed R. 44, amending R. 151.1:

This is a new section to the Regulations, to create a new protected temporary residents class. This new class includes those who were issued Minister's permits under s. 37 of the former Immigration Act after seeking admission to Canada, and those who are issued temporary resident permits for protection reasons after making a claim for refugee protection outside Canada.

Comments:

The proposed amendment refers to an application for refugee protection made outside Canada and the claimant is then admitted to Canada on a temporary resident permit issued for protection reasons. The RIAS mentions that people in this class will be able to apply for permanent residence within Canada. It seems this is intended to facilitate early entry of people in this class on the basis of temporary resident permits before their

applications for refugee protection made outside Canada have been approved. It is unclear what may happen if the application for refugee protection made outside Canada is not approved after the person has been admitted to Canada on a temporary resident permit. However, the intent of the provision is positive.

Proposed R. 45, amending R. 178(2)(b)(i):

Two minor amendments change "with information" to "with any information", and "the Department and the Board" to "the Department or the Board".

Comments:

These changes are positive as they aim to facilitate Convention refugees or protected persons with insufficient identity documents to prove their identity in applications for permanent residence.

Proposed R. 72, amending R. 346(5):

This new section clarifies that applicants in the post-determination refugee claimants in Canada class who did not have a pre-removal risk assessment can benefit from a stay of removal.

Comments:

This proposal clarifies the position of PDRCC applicants and confirms that they will have a stay of removal until they apply for a pre-removal risk assessment. It is a positive proposal.

V. PERMANENT RESIDENTS

Proposed R. 20(1) and (2), amending R. 65:

The definition of member of permit holder class is expanded to include accompanying family members and persons inadmissible due to accompanying family members who are inadmissible on health grounds. Permit holders and their accompanying family members are subject to a three-year waiting period before landing.

Comments:

These provisions expand the class to include accompanying family members. The waiting time for landing for the whole family is changed from five to three years. These are positive changes.

Proposed R. 20(3), amending R. 65(d) (Similarly, amending R.69)

The amendment has the effect of including in the permit holders class the persons in need of protection if they meet the requirements of R.65 (a) to (c), but exempts them from meeting Province of Quebec selection criteria if they intend to reside there.

Comment:

This is a positive change.

Proposed R.21, adding R.65.1

This provision clarifies the requirements for landing the permit holder class. Permit holders will not be landed if their health condition will likely be a danger to the public or will likely cause excessive demand. The permit holder will also not be landed if any family members, whether accompanying or not, are inadmissible on any ground other than those on which an officer, at the time the permit was issued, formed the opinion that the permit holder was inadmissible.

Comments:

The medical admissibility requirement seems harsh and inequitable, as the permit holder may never be medically admissible. Likewise, the requirement not to be inadmissible on other grounds for the permit holder and family members seems harsh and inequitable, as non-accompanying family members are not required to be examined when a permit holder applies for a permit. As a result, the permit holder may never be admissible and landed, and never be in a position to sponsor family members. The amendments replace the discretionary powers given to the Minister pre-IRPA and thus remove the flexibility to deal with specific situations. While the additions clarify the landing requirements for the permit holder class, removing discretionary powers allows no flexibility to assess each case on its merits. Discretionary powers should be reinstated, or the prescribed circumstances pursuant to R23 should be included as exceptions.

VI. PERMANENT RESIDENT CARD

Proposed R. 17, amending R. 58 (1),(2),(3):

This provision requires photographs and signature within 180 days by new permanent residents, and the applicant to attend in person to obtain the PR card. Applicants must produce original documents, copies of which were included in the application. It removes CIC's obligation to attempt alternate delivery.

Comment:

For applicants to comply with these sections, notices must be sent to applicants in a timely manner. Otherwise, the applicant may miss the scheduled appointment or even the 180-day period, after which the card will be destroyed.

Due to the lengthy processing times for issuing PR cards and in view of an increased volume of travel abroad during the December holiday period with re-entry in the first weeks of 2004, the December 31, 2003 implementation date should be postponed to ensure that permanent residents have sufficient time to obtain their PR cards. Failure to

extend the deadline will create serious inconvenience to permanent residents who have yet to obtain their PR cards and would put undue pressure on under resourced visa offices to handle the high volume of applications.

General comments:

1. Document indicating status: R. 53(1) states that the document indicating status is the PR card. If government agencies accept only the PR card as the status document, then every permanent resident must obtain the card. However, the regulations indicate that only those traveling by commercial carrier require the card. (IRPA s. 148(1), R. 250) Clear instructions must be provided to all levels of government to clarify that the person bearing a record of landing (IMM 1000) has permanent resident status equal to a PR cardholder. It should be made clear that both documents are valid status documents.

2. Guarantor: R. 56(2)(b)(iii) continues to require the guarantor to declare the truthfulness of the application details "to the best of their knowledge and belief". This requirement is unnecessary and should be deleted.

3. Issuance of New Permanent Resident Card: R. 59(1)(b) penalizes the applicant by not issuing the PR card if the applicant has been convicted of misuse of the card. Misuse should result in punishment through the judicial system and not by loss of the status document. This unfairly punishes the permanent resident by impairing a right of status — entry in and out of Canada. This section should be deleted.

4. Renewal: No provisions allow permanent residents to apply for renewal of their cards. Applicants should be allowed to apply for renewal of the card during the last year of its validity to prevent processing gaps leaving the resident without evidence of status or the ability to travel by commercial carrier.

VII. ENFORCEMENT REGULATIONS

Proposed R. 7, amending R. 18(a),(b)

Offences of less than 10 year sentence - Deemed Rehabilitation:

….persons who have been convicted outside Canada of an offence that, if committed in Canada…(punishable by less than 10 years) has been changed to "...no more than one offence that if committed in Canada…."

The deemed rehabilitation provision only applies if there is only one prior conviction (less than ten years).

Other conditions (passage of 10 years, not committing subsequent offence, not being convicted of subsequent offence, not criminally inadmissible under R. 36) are in separate subsections.

The amended R.18(b) covers offences committed outside of Canada, without conviction.

Comments:

This clarifies that the deemed rehabilitation section is applicable only to a single prior conviction ("an" offence) or committed offence. It is very narrow. We suggest hat the deemed rehabilitation provision be expanded to not more than two offences more than 10 years old.

Proposed R. 7, amending R. 18(b) - Summary Offences – Deemed Rehabilitation:

The amended R.18(c) applies to summary offences. Deemed rehabilitation for two or more summary offences in or out of Canada has been changed to include only offences outside of Canada. There is no deemed rehabilitation for in Canada summary offences, but the new R. 18.1 exempts persons with only two summary convictions from the inadmissibility definition.

Comments:

Why does rehabilitation only apply to two convictions rather than two or more (as stated in the IRPA description of summary inadmissibility)? The RIAS states it applies to two or more summary convictions. Why does the exemption apply when there is passage of time from one sentence ("…sentence for any offence…") rather than both? Why exempt persons from inadmissibility rather than maintain the deemed rehabilitation provision? What is the meaning of the new R. 18(a)(iv) or R. 18(b)(iv)? It seems that requiring no inadmissibility is unnecessary, as it is already covered by the other provisions for rehabilitation.

Proposed 59(2), amending R. 228(4) - Unaccompanied minors/persons not appreciating nature of proceedings:

This provision exempts officers from the jurisdiction for issuing removal orders against unaccompanied minors or person not appreciating nature of proceedings.

Comment:

This is an appropriate filling of a gap in the existing regulations.

Proposed R. 47(2), amending R. 185(b)(v) - Guarantees and Deposits:

The French text is amended to distinguish conditions applying specifically to guarantors.

Comment:

These changes appear to be consistent with the English.

Proposed R. 13, amending the French text of R .49(4) – Forfeiture of Guarantee:

The amendment clarifies that a breach by a member of a group triggers the forfeiture of the guarantee.

Comment:

This change appears to be consistent with the English version.

Proposed R. 60(2), amending R. 229(1)(k) – Immigration Division Removal Order for IRPA 41(b) breach:

The Immigration Division has jurisdiction to issue a departure order against a permanent resident in breach of non-compliance of IRPA s. 41(b).

Comment:

This is a housekeeping item. Unnecessary language is deleted.

Proposed R. 60(3), amending R. 229(3.1) – Mandatory deportation order, other than departure order, where conviction in Canada and departure order would otherwise be issued:

This addition clarifies that when a departure order would otherwise be issued under R. 229(1), a deportation order shall issue if the person has been convicted in Canada for an indictable offence or two summary offences, and that a hybrid offence is considered an indictable offence, even if proceeded with summarily.

Comment:

For foreign nationals and permanent residents, the "deemed indictable" provision converts a departure order to a deportation order for offences that may be minor and for which modest penalties have been imposed. A permanent resident could receive a deportation order for a conviction that would not on its own support removal proceedings. This provision should be amended to have no application to permanent residents at least, and generally no application when the conviction on its own would not support removal.

Proposed R. 60(4), amending R. 229(4) – IAD gives same order as would be given by Minister:

This is a housekeeping revision and further outlines the Board's jurisdiction for unaccompanied minors and persons not appreciating the proceedings

VIII. FEES

The CBA Section has reviewed the proposed amendments to the Fees Regulations and has no comment.