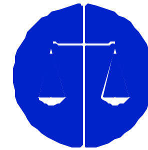

THE CANADIAN BAR ASSOCIATION
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profession juridique

May 18, 2004

Johanne DesLauriers,
Director, Citizenship and Immigration Canada
Social Immigration Policy and Programs
300 Slater Street Jean Edmonds North Tower 7th Floor
Ottawa, ON
K1A 1L1

Dear Ms. DesLauriers,

RE: Regulations Amending the Immigration and Refugee Protection Regulations (September 19, 2003)

I am writing on behalf of the Canadian Bar Association's National Citizenship and Immigration Law Section (CBA Section). When the CBA Section responded to the pre-published immigration and refugee protection regulations dated September 19, 2003, we addressed the whole amendment package, but focused on regulation 117(9)(d). We now have further comments about the same regulation, in anticipation of Part II publication of that regulation in the near future.

In our previous response, the CBA Section supported a focus on prior non-disclosure rather than non-examination. Refusals would be reviewable by the Immigration Appeal Division (IAD) on legal and equitable grounds. This process would continue to find family class membership where non-examination was because prior law did not require examination of the non-accompanying dependents, or the sponsor's waiver of examination was uninformed. The IAD would consider legal or equitable relief in all other cases, including cases where there was willful non-disclosure or an informed waiver of examination.

The CBA Section continues to strongly support IAD review of any refusals of family class sponsorships on any ground based on prior non-examination or non-disclosure. This is the most comprehensive and fair basis for separating deserving cases from those that are undeserving. Some alternatives we have suggested to accomplish this objective include:

i. Delete regulation 117(9)(d) and rely upon the misrepresentation inadmissibility to address situations of prior non-disclosure.

ii. Create a reviewable ground of inadmissibility based on prior non-disclosure or non-examination.

iii. Amend the regulations to provide for officer or Board member discretion to allow continuing family class membership on compassionate grounds.

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The first option would focus on malfeasance cases, with IAD review through the existing jurisdiction for misrepresentation cases that involve spouses, children or permanent residents. The scheme would not capture cases of disclosure and informed decisions to waive examination at the expense of family class disqualification. While the second option would require an amendment to the Act, it is the process that arguably should have been initially provided. The third option is consistent with finding a solution from within the regulations, where the problem originates.

While the Department has not yet published the new regulations, you have indicated that the Department views the changes as only technical amendments. The Department's position is that regulation 117(9) will be amended so that it conforms to the policy reflected in the OM 03-19 (June 2003), narrowing the unintended and overly broad scope of the current regulation.

We recognize that the OM of June 2003 is an improvement over the current regulation 117(9)(d), but we believe that the proposed regulations do not meet the policy objectives of the OM and must be amended simply for that purpose. While we address those deficiencies, the CBA Section strongly endorses a different policy approach – in our view, refusals of family class applications should be reviewable in IAD for all cases based on prior non-examination.

OM 03-19

The OM identified three groups of persons that regulation 117(9)(d) was not intended to catch:

i. Dependents of persons landed as refugees within Canada, for whom the law did not require examination of non-accompanying dependents,

ii. Dependents of persons landed on Humanitarian and Compassionate (H and C) grounds within Canada, for whom the law did not require examination of dependents, and

iii. Children separated from an applicant and not examined for custody reasons, if the applicant (now sponsor) was not counseled on the consequences of non-examination.

The Proposed Regulations

<u>Regulation 117(10) - the exception from regulation 117(9)(d)</u>

The amendments adequately address unexamined dependents of refugees and H and C cases within Canada. They are excluded from regulation 117(9)(d) by the new exception in regulation 117(10):

> **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.**

You indicated that this exception is also intended to cover separated spouses and non-custodial children whose examinations were waived with the blessing of an officer under the former or current Acts. An example is waiver of examination through regulation 6(5) of the *Immigration Act* regulations. We appreciate this intention, but believe that it should be clarified with more explicit language.

> **Recommendation:**
>
> The CBA Section recommends that the exception provision (regulation 117(10)) should expressly include cases where officers determined that separated spouses and non-custodial children were not required to be examined under the prior or current law, as well as cases of unexamined dependents of refugees and humanitarian cases landed in Canada, in a non-exhaustive list of examples.

<u>Regulation 117(11) - application of paragraph (9)(d)</u>

The proposed regulation 117(11) reads:

> **Application of paragraph (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.**

Informed Decision

Sub-paragraph (a) of the Application provision (the exception from the exception) is based on whether the applicant made a clear decision not to have an examination that was an available option. This test works better in some situations than in others. It works well where dependents were not examined because they were non-custodial children and the applicant could not compel their examination. It does not work where the examination was waived for administrative convenience and without the applicant being made aware of the consequences of future exclusion from the family class.

Sub-paragraph (a) should include the condition that the applicant has made an informed decision, understanding the consequence of family class exclusion in future sponsorships. This is consistent with the intent of the OM.

In cases where a review shows that it is unclear that the applicant actually made the choice not to have a child examined and that the applicant understood the consequences of such a choice, a review board may conclude that the visa officer was in breach and that the applicant was incorrectly advised. Natural justice and fairness require that the consequences of an important decision be fully explained and understood, whether at interview or through correspondence (per OM 03-19).

> **Recommendation**
>
> The CBA Section recommends that regulation 117(11)(a) be amended to say:
>
> (a) the sponsor was informed by an officer that the foreign national could be examined, the sponsor was able to make the foreign national available to be examined, the sponsor was informed by an officer that the consequence of non-examination was that the foreign national could not be sponsored as a family class member in the future, but the foreign national was not examined.

Regulation 117(11)(b) provides for a blanket exclusion from family class of any non-examined spouse, regardless of the circumstances under which the spouse was not initially examined and whether there was an informed waiver by the applicant (sponsor). The CBA Section does not see any principled basis for treating separated spouses differently than separated children for assessing if there has been an informed waiver of examination, and whether the subsequent exclusion from family class membership is a breach of natural justice or fairness.

Recommendation

The CBA Section recommends that regulation 117(11)(b) be deleted as unnecessary and overly broad. Exclusion of unexamined separated spouses would be determined by regulation 117(11)(a), in the same manner as separated children. Only if an informed decision to waive examination was made should regulation 117(9) apply.

Cases of undisclosed spouses would be caught by regulation 117(9)(d) because no officer had determined that examination was not required. Cases of disclosed "separations of convenience" would be caught by the misrepresentation provisions, or by the proposed "dissolving of convenience" amendment (proposed regulation 4.1). Regulation 4.1 may require amendment to make "separations of convenience" clearly included, but this is preferable to the blanket exclusion of all separated spouses.

Undisclosed, unexamined Dependents

Undisclosed and unexamined dependents are not saved by the exemption provisions and continue to be excluded from family class sponsorship. These are cases that the CBA Section believes should be dealt with under the misrepresentation provisions, or otherwise with IAD review. The IAD can be trusted to determine whether the sponsorship should be saved on humanitarian or equitable grounds, or whether the refusal should be maintained.

Included in this group would be sponsors who have succeeded in being allowed to remain in Canada on H and C grounds, after IAD review of removal order for misrepresentation of undisclosed dependents. For these sponsors, there must be a review process for any subsequent refusal of the previously undisclosed dependents. There should not be a blanket disqualification where the prior non-disclosure or non-examination was excused on H and C grounds.

Officer H and C review

Currently, the visa officer can address such cases on humanitarian grounds. However, too often, visa posts simply refuse the applications without requesting H and C submissions. This requires the applicant to resubmit on H and C grounds, which is time consuming and unnecessary.

Recommendation

The CBA Section recommends that in any case where the visa office is determining exclusion from family class, there should be a request for submissions and consideration of processing on H and C grounds. This requirement should be set out in the regulations.

Thank you for your attention to the views of the CBA National Citizenship and Immigration Law Section.

Yours truly,

(original signed by Gaylene Schellenberg for Gordon H. Maynard)

Gordon H. Maynard
Section Chair

Appendix:

Proposed Regulations (Gazette Part I, Sept 2003)

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(2) The portion of subsection 117(9) of the English version of the Regulations before paragraph (a) is replaced by the following:

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

(3) Paragraph 117(9)(d) of the Regulations is replaced by the following:

(d) 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.

(4) Section 117 of the Regulations is amended by adding the following after subsection (9):

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 paragraph (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

Definition of "former Act",
(12) In subsection (10), "former Act" has the same meaning as in section 187 of the Act.