THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

April 1, 2008

Mr. James Sutherland
Director
Human Resources and Social Development Canada
Temporary Foreign Workers
140 Promenade du Portage
Gatineau, QC K1A 0J9

Dear Mr. Sutherland:

Re: Labour Market Opinion (LMO) Issues

I am writing to you on behalf of the Canadian Bar Association National Citizenship and Immigration Section (CBA Section) to bring to your attention a number of concerns regarding operational and policy issues relating to LMOs in the Foreign Worker Program. We believe the program is not effectively addressing the needs of the Canadian economy, and the matters we discuss below require the urgent attention of Human Resources Social Development Canada. We look forward to discussing these matters with you further at our meeting on April 3, 2008.

Processing Times

The current processing times for LMO applications are unacceptably long in all of the western provinces, the Yukon and Northwest Territories. Despite HRSDC's announcements in 2007 of the allocation of additional resources to reduce the backlog, and new initiatives, such as the expedited LMO (ELMO) and centralization of the location for applications under the live-in-caregiver program, processing times remain unacceptably long. In fact, processing times at the Service Canada offices in Alberta and British Columbia have increased. As of September 2007, applications at the Alberta Services Canada office were taking 20 weeks; as of February 1, 2008, the processing time was 29 weeks. The Service Canada Office in British Columbia is currently processing cases received in June of 2007 – over seven months ago.

We understand that the 33 occupations eligible for the ELMO program in BC and Alberta apparently represent approximately 50% of the LMO applications processed by these offices. However, the other 487 occupational groups must apply under the regular LMO process. Along with the requirement that businesses prove that they have been operating with at least one employee for at least one year, there will be many businesses that are not able to use the ELMO program. The 44% refusal rate for ELMO registrations in BC and Alberta reflects this.

500-865 Carling, Ottawa, Ontario, Canada K1S 5S8
tel/tél. : 613.237.2925 toll free/sans frais : 1.800.267.8860 fax/téléc. : 613.237.0185 info@cba.org www.cba.org

The LMO processing delays have a significant negative impact on businesses, and the integrity of the entire LMO process. Immediate action should be taken. Over the past three years, the Ontario Service Canada office has been successful in reducing its processing times from 12-14 weeks to three to four weeks as a result of restructuring and additional training for employees. The CBA Section respectfully suggests that some of the techniques, training and management used at the Ontario Service Canada office be considered for implementation at the Alberta and British Columbia offices.

If there are procedural or policy changes made to facilitate the issuance of positive LMOs, it would be extremely helpful if the national CBA Section or branch Sections could be notified formally of such procedural or policy changes rather than leaving it to our members to perceive such changes in the course of handling applications.

Advertising

Regulation 203(3)(e) under the *Immigration and Refugee Protection Act* (IRPA) requires HRSDC to consider "whether the employer has made, or has agreed to make, reasonable efforts to hire or train Canadian citizens or permanent residents". "Reasonable efforts" is not defined under IRPA or the Regulations. However, it should be interpreted in the context of current economic and labour market conditions. In times when unemployment is high, it would be reasonable to expect greater recruiting efforts. Conversely, current conditions suggest that only minimal efforts should be required, particularly in occupations and industries that are experiencing chronic shortages.

The particular requirements for advertising used by the British Columbia and Alberta Service offices are often unreasonable and arbitrary, contributing to inordinate processing times. For instance, Service Canada officers in British Columbia require employers to include the wage/salary in the advertising. This is not reasonable because:

- Salary negotiations are a fluid process. Often the employer may be prepared to pay more for an applicant after interviewing them and assessing their qualifications. A posted salary may unnecessarily deter candidates, and consequently, the employer misses the opportunity to assess the suitability of these candidates and offer a salary based on their particular qualifications.

- Similarly, candidates deterred from applying because of an advertised wage miss the opportunity to learn more about the company, its business practices, environment and the position being offered. In the interview process, the wage is but one factor that the candidate will consider. Other factors include the benefits that a company may offer, such as the potential for promotion, professional development and training, unique work environments, medical benefits or pensions, business philosophies and corporate reputations. All of this information cannot be put into the advertisement. Candidates that do not apply for a position because of the wage listed in the advertisement miss opportunities for a position that they might otherwise have found acceptable after having learned more about the company.

- Frequently, employers do not want to include the wage because this information would be available to their competitors. This has become increasingly more relevant as market conditions have become more competitive, and the workforce is more mobile. For example, in British Columbia, certain occupations in the health care sector were privatized, and there was fierce competition to recruit workers from the public sector. Advertising wages would have put a company at a significant disadvantage vis-à-vis their competitors.

- Advertising wages can create morale problems in existing employees. Compensation is considered confidential and although large companies will often have occupational levels and pay ranges for each occupational level, smaller organizations generally do not. Assessing a person's value to the business and his or her contribution and qualifications should be left to employers. Making salary information public undermines the employer's abilities to assess and determine wages for existing employees.

Officers at the British Columbia Service Canada office often require that the advertising include a job description listing the duties and requirements of the position being offered. It is often not realistic or financially feasible to include this level of detail in the advertisement. Some companies advertise numerous positions at once in the same advertisement and it would be prohibitive to list out the job duties for each position. Typically, when a company lists multiple positions in an advertisement, it will invite the candidates to learn more about the positions by visiting a company website. The British Columbia Service Canada office has refused to accept this as sufficient. For example, in one instance, a company spent over $10,000 in advertising to fill 100 positions for 15 different occupations. An officer determined that the advertising was unreasonable because the wages and job duties were not listed, despite the fact that the advertisements included a link to the company's website that contained detailed job descriptions for each occupation.

In Saskatchewan, some Service Canada officers are requiring employers seeking LMOs to go above and beyond recruiting efforts that would be considered reasonable in other provinces, on the grounds that the labour market in Saskatchewan is "different" from other parts of Canada. This approach is regarded by many employers as obstructionist and unreasonable, particularly when Saskatchewan is experiencing unprecedented labour shortages and when Service Canada does not provide clear, objective guidelines for such recruiting efforts.

Offices in Western Canada routinely require employers who have waited months to have their applications considered and who have advertised extensively in appropriate and reasonable marketing medians, to post a position for 7-14 days on the National Job Bank. Again, officers should be encouraged to consider the overall reasonableness of the employer's efforts to advertise, taking into account the type of position and the other media being used to advertise. They should not have to insist on rigid requirements that may not be appropriate or effective in the particular circumstances.

The officers in the Foreign Worker units are supposed to be Canada's experts on the labour market. However, instead of applying their cumulative labour market knowledge acquired through years of processing thousands of applications, officers are trained to insist that each employer follow rigid advertising requirements in every application. Employers who have waited five months or more for their applications to be processed are routinely told that the advertising they have conducted is not "reasonable" because it did not adhere to formulaic standards. The application is refused and the employer is provided with an extremely short window of opportunity to submit a reconsideration application with evidence of acceptable advertising. The regulations do not require a rigid checklist approach. Officers should be encouraged to apply their labour market knowledge and exercise discretion in determining whether recruiting efforts have been sufficient in light of the general and specific labour market situation.

This more flexible approach was regularly applied by the former HRSDC office in Calgary and is currently applied by the office in Ontario. As well, IRPA Regulation 203 could allow officers to approve the application on condition the company agrees to make further reasonable efforts to hire or train Canadian citizens or permanent residents, rather than rejecting or putting applications on hold.

Both of these options would reduce the impediment to reasonable processing times caused by the current advertising requirements.

Prevailing Wage

IRPA Regulation 203(3)(d) requires wages offered to a foreign national to be consistent with the prevailing wage rate for the occupation. The lack of a definition for "prevailing wage rate" has led to a great number of disagreements between employers and Service Canada officers, particularly in Western Canada. Service Canada's rigid and often inflexible approach has been the source of much frustration and has driven many employers away from the program.

Service Canada maintains that a prevailing wage is not a starting wage. It has instead defined a prevailing wage to be the wage paid to a worker with three years of previous work experience, primarily as determined from Employment Insurance data or from employer surveys. However, this information can be very unreliable. Employment insurance data cannot be used reliably when there is relatively low unemployment in an occupation. Surveys can be skewed by large unionized employers. Moreover, wage comparisons do not consider other benefits that may be available to the foreign worker, such as eligibility for commissions and bonuses, medical benefits and pensions.

Employers frequently complain that the "prevailing wage" required by Service Canada is not consistent with the wages being paid locally by their competitors. Again, the problem arises in large part due to rigid adherence to a formulaic approach (for example, making no distinction between unionized and non-unionized workplaces). We recognize and respect Service Canada's obligation to ensure that the hiring of foreign workers does not negatively impact wages paid to Canadians and permanent residents. However, the insistence upon inflated wage rates may have the perverse effect of driving up inflation by increasing Canadian wages. It deters many employers from applying for foreign workers because it would have an inflationary effect on the wages paid to all other workers in the same enterprise.

The CBA Section requests that Service Canada provide us with further details on data used to calculate "prevailing wages," to ensure that it is sufficiently, broad, relevant and reliable. We also recommend that officers be instructed to apply some flexibility, taking into account other evidence of wages paid in similar occupations in the region in question and the other benefits that may be included in the compensation package.

In addition, the Alberta Service Canada office has indicated, particularly for low-skilled workers, that employers may be required to pay a "living wage" that is consistent with the cost of living in the location of employment, rather than the prevailing wage based on labour market conditions. Again, it appears that Service Canada may be imposing arbitrary standards without authority or clear guidelines. We ask that Service Canada clarify its policies with respect to "living wage".

Term of the Labour Market Opinion

In view of the predicted long term labour market shortages in Western Canada, LMOs should be issued for the longest term possible. The current approach is for officers to use one to two year LMOs as a default, with 3 year LMOs rarely issued. This results in a considerable duplication of efforts and waste of resources as employers are forced to apply for more frequent renewals. We recommend that employers be encouraged to apply for, and officers encouraged to grant, LMOs for 3-year periods, particularly in Alberta and BC.

Right to Counsel

The CBA Section is very concerned about the development in Western Canada of a practice of disregarding employer's representatives by sending LMOs and other correspondence directly to employers without copying legal counsel. This practice not only fails to respect the employer's choice to use the services of a lawyer to deal with the application, it frequently results in confusion and questions by the employer as to why Service Canada will not deal with duly appointed and authorized legal counsel.

The concern is greatest with respect to the ELMO program. The pilot program prevents officers from discussing ELMO applications with third party representatives. This is most unusual. We suspect this is an attempt to prevent unscrupulous recruiting agencies from making applications. If so, there are alternative means to solve the problem without precluding officers from discussing applications with the applicants' lawyers. A simple fix would be to require the employer's signature on the form with an advisory that they are accountable for the actions of their representatives. A longer term fix would be to pass a regulation limiting who could represent applicants, as in IRPA.

For the reasons that follow, the CBA Section strongly urges Service Canada take steps immediately to give clear and guidelines to its officials to communicate exclusively with employers' legal counsel, whether in relation to a regular LMO or an ELMO application:

- Right to counsel

  In the context of various immigration applications and procedures, Canadian courts have repeatedly held that the duty of fairness requires applicants be afforded the opportunity to have counsel assist in making representations, present legal arguments or new evidence. The LMO/ELMO programs require the applicant to agree to meet certain conditions set by government. It also requires the applicant to sign a legally binding employment contract and make certain representations and declarations. Given the legal rights and obligations at stake, an employer's right to retain legal counsel with respect to LMO/EMLO applications should be respected. This right ought to be explicitly stated in policy, rather than the current provisions, which makes reference only to information-sharing with third parties.

- Benefit to Service Canada

  Competent legal counsel can ensure that applications are properly prepared and supporting documents are in order before applications are filed, so that unnecessary delays are avoided. Lawyers are bound by strict rules of professional conduct, including obligations of confidentiality and acting with integrity. Therefore, confidential information, such as government-issued Access Codes, is not at risk when shared with legal counsel representing applicants.

- Valuable Service to Applicant

  Legal counsel provides valuable services to applicants. Many applicants, particularly under the ELMO Program, are owner-operated businesses, with no in-house human resource support or legal counsel. Small businesses hire lawyers because they don't have the time, resources or expertise to make the applications themselves and because they want the job done properly. Larger employers regularly use legal counsel to assist them in these matters because of their expertise and the importance of the applications. Most members of the public are not aware of Service Canada's policies or the regional differences between offices. Legal counsel provide valuable services on procedural and substantive issues to applicants and they should not be frustrated in their ability to rely on legal counsel to assist them in navigating the system.

ELMO Forms and Processes

Perhaps the strongest example of a rigid checklist approach interfering with administrative efficiency is the insistence that employers file 12 consecutive PD7A forms. The program is limited to legitimate employers who have a history of employing people. However, officers have been instructed that they cannot apply any flexibility to this requirement, regardless of information available to them that clearly demonstrates that the business has been operating for more than one year with at least one Canadian employee. This results in applications from a clearly legitimate and substantial employer being rejected where one of the forms is not available due to mishap or error. Requesting copies of missing PD7As from CRA may take several months, and may contain errors requiring further time for the local District Taxation Office to correct.

The CBA Section asks that Service Canada officers be instructed to look first for the requested 12 PD7A forms, and then to consider whether a reasonable explanation has been given for the lack of the 12 PD7A forms. If so, they should consider other documentation that may have been submitted to support the criteria of the program.

We also have the following suggested changes to the ELMO forms, to make them clearer and more "user friendly":

- The employer's signature is required on pages 1 and 2 of the Occupational Profile, yet there is no designated spot on either of these pages for the signature nor are these pages numbered. In fact, the first two pages merely look like instruction pages and do not give the appearance that they are a part of the actual application form;

- The instructions should be revised to make it clear whether a business with more than one location needs to apply for eligibility for each location.

- On the application for an ELMO, boxes 12-20 only need to be filled in if the employer information has changed since the application for eligibility. This should be made clear on the form itself. Otherwise, applicants will be filling in this information unnecessarily.

Low Skilled Worker Program

We would like to address three issues with you regarding this program: 24-month LMOs within the Pilot Project for Low Level Occupations; pay roll deductions for accommodations, and recruiting fees.

In February 2007, the Pilot Project for Low Level Occupations was revised to allow businesses to apply for an LMO for a period of up to 24 months for low skilled foreign workers, up from 12 months. The rationale for this increase in duration was to address the shortage of low skilled workers, alleviate the hardship on employers caused by the disruption of employment after 12 months, and to ease the administrative burden on Service Canada and employers due to the processing of renewal applications. A condition of obtaining an approval for 24 months is that employer's sign an employment contract that includes a provision for review of the employee's wage after 12 months. If the wage is lower than the current prevailing wage, the employer must agree to increase the wage to that amount.

We appreciate that the decision to approve a 24-month LMO is within the discretion of the local officers, taking into account local economic conditions. However, this discretion is being used as a means to enforce employer compliance with their obligations under the employment contract to review and to pay a higher prevailing wage after one year of employment. In other words, some LMOs for low skilled workers are being limited to 12 months purely to ensure that the wage review occurs.

There may be circumstances where a company has previously broken terms under the program and a Service Canada officer may have reasonable belief or concern that the employer will not meet their obligation to review the wage after one year. However, failing any such evidence of prior breaches under the program, the duration of the LMO should not be restricted to 12 months purely for enforcement purposes. There are significant costs to the company and to foreign workers in having to apply for extensions of LMOs. Furthermore, when Service Canada offices already have long backlogs, it would appear that this would only add to them.

With respect to accommodation fees, most Service Canada offices have been imposing a cap on the amount an employer can charge back to an employee through pay roll deductions for accommodation (typically 30 to 35% of gross wages). However, Services Canada officers in Saskatchewan will not apply that general rule and are forcing companies to significantly subsidize accommodations being provided to foreign workers. They have also imposed terms within the employment contract allowing the foreign worker to give notice to find other accommodations. Employers make significant investment, and incur additional financial obligations, in order to ensure reasonable accommodation is available to foreign workers. This is done without any assurance the workers will stay in the accommodations for more than one month. Evidence of these costs is provided to Service Canada, and yet significant time is taken up negotiating this issue. We would make a recommendation that the 30 to 35% cap simply be applied across the board as a Service Canada policy.

Last, the CBA Section requests that Service Canada stipulate in its guidelines that recruiting fees under the Low Skilled Worker Program do not include fees paid to members of law societies of any Canadian province or territory. Recruitment fees should be defined as those fees related to the recruitment and selection of employees.

Conclusion

HRSDC is to be commended for its introduction of new initiatives to streamline processing and eliminate obstacles to efficiency. However, the desired results are clearly not being achieved. We realize the situation is far from simple, but a major problem is the departmental focus on form over substance. Officers are discouraged from exercising reasonable judgment in favour of rigid application of hard and fast rules. The result is a system that is labour intensive, extremely frustrating, and inefficient.

The CBA Section respectfully recommends that Service Canada address the training and guidance it provides to its officers with a view of developing a more facilitative and flexible approach to exercising their statutory responsibilities. This would greatly contribute to a reduction in processing times, which would clearly be in Canada's best interests.

We look forward to discussing these issues and working with Service Canada in developing solutions

Yours very truly,

(original signed by Kerri Froc on behalf of Alex Stojicevic)

Alex Stojicevic
Chair, National Citizenship and Immigration Section