THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

February 23, 2009

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

Dear Mr. Sutherland:

Re: Minimum Recruitment Requirements

I write on behalf of the Citizenship and Immigration Section of the Canadian Bar Association (CBA Section), in response to the minimum recruitment requirements under the Temporary Foreign Worker Program, in effect January 1, 2009 (Minimum Recruitment Requirements).

The CBA Section acknowledges that there have been inconsistencies with respect to recruitment requirements enforced at regional Service Canada offices across Canada. We agree on the need to address these inconsistencies. However, making mandatory a set of minimum recruiting requirements is not a satisfactory solution, and is indeed creating more problems in practice. While we believe this initiative would have benefited from prior consultation with the CBA Section and other stakeholders, we were pleased to have the opportunity to discuss our concerns with you during our recent conference call, and to provide you with these written submissions. We hope our suggestions will assist in ensuring that the requirements respond to the needs of Canadian employers while meeting the other objectives of the *Immigration and Refugee Protection Act*, including the protection of Canadian workers' interests.

Regulatory Framework

Subsection 203(3) of the *Immigration and Refugee Protection Regulations* (IRPR) establishes the six factors that must be taken into consideration by Service Canada officers in providing a labour market opinion (LMO) as to whether a "job offer is genuine and if the employment of the foreign national is likely to have a neutral or positive effect on the labour market in Canada":

> 203(3) FACTORS - *An opinion provided by the Department of Human Resources Development shall be based on the following factors:*
>
> > (*a*) whether the employment of the foreign national is likely to result in direct job creation or job retention for Canadian citizens or permanent residents;

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> (*b*) whether the employment of the foreign national is likely to result in the creation or transfer of skills and knowledge for the benefit of Canadian citizens or permanent residents;
>
> (*c*) whether the employment of the foreign national is likely to fill a labour shortage;
>
> (*d*) whether the wages offered to the foreign national are consistent with the prevailing wage rate for the occupation and whether the working conditions meet generally accepted Canadian standards;
>
> (*e*) whether the employer has made, or has agreed to make, reasonable efforts to hire or train Canadian citizens or permanent residents; and
>
> (*f*) whether the employment of the foreign national is likely to adversely affect the settlement of any labour dispute in progress or the employment of any person involved in the dispute.[1]

According to subsection 203(3), therefore, recruitment is only one factor to be considered. Further, the Regulations specifically state that HRSDC *shall* consider *all* the enumerated factors. This ensures that the scope of IRPR section 203 is broad enough to adapt to the varied needs of Canadian companies and changes in our economy. As stated in the Regulatory Impact Analysis Statement accompanying the Regulations:

> The current Regulations restrict HRSDC to considering whether the prospective employer had made reasonable efforts to hire a Canadian for the job opening and whether or not the wages and working conditions offered were sufficient to attract a Canadian in the job. While these factors remain relevant considerations*, the new Regulations allow HRSDC to also consider other elements that might indicate a benefit for Canada and Canadian job-seekers. This recognises that some of these benefits might offset concerns HRSDC would otherwise have with respect to the employers' job search efforts.* It should be noted that HRSDC is to provide an opinion based on all the expertise and labour market information available to it, rather than being limited in the criteria it can take into consideration.
> ...
> With respect to the economic effect test, the alternative of maintaining the current narrowly focussed test was rejected as *it had proven to be resource intensive for Government, time consuming for employers, and unresponsive to the growing need to get workers (once a job offer has been made) into Canada as quickly as possible*...[2]

Unfortunately, the new recruitment requirements came without any directive that would ensure that Service Canada officers consider and give equivalent weight to the other factors in subsection 203(3), and remind them that a positive or neutral LMO may still be issued in circumstances where no recruitment took place. This may occur, for example, where strategic hires are made by companies to secure unique talent and/or shore up new business opportunities. In fact, such situations are more likely to exist in these unusual economic circumstances, but the principle remains true at all times.

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1 SOR/2002-227, emphasis added.

2 C. Gaz. 2002. II.177 at 187-188.

Need for Flexibility

The Minimum Recruitment Requirements are exclusively determined by the National Occupational Classification (NOC) Code. "One size fits all" recruitment efforts based on occupation classification are not possible in the current, volatile marketplace. The new Requirements do not take into consideration factors such as what recruiting efforts would be reasonable in local and current labour market industry conditions, or whether, given the business rationale for hiring the foreign worker, it would have been reasonable for the Canadian employer to hire and train Canadian citizens or permanent residents.

In numerous situations, it is not reasonable for an employer to have to attempt to recruit or train Canadians. These include where there is an extreme shortage of expertise in the Canadian labour market, the foreign worker possesses unique or proprietary skills and knowledge that will be transferred to Canadian and permanent resident employees, or the hiring of the foreign worker will help to create or maintain jobs in Canada. An obvious case is an application for a senior executive position, such as a CEO or a CFO. These positions are integral to a company's success and usually the desired person to take the helm has been carefully selected through a highly confidential process, or has held a similar position abroad and will significantly benefit the entity in Canada. Top-tier executives need to be quickly placed in their position and have been selected to make significant changes that would benefit the Canadian economy and save jobs. Frequently, there is little to no advertising that is done for these types of positions.

In many other situations, advertisement would serve no purpose because of the specialized knowledge or expertise required by the position.[3] Clearly, we are not suggesting that advertising be waived in all cases. It would, however, be helpful if Service Canada officers were reminded that, in accordance with the letter and the spirit of the Regulations, advertising is neither an absolute prerequisite to a positive LMO nor the overriding factor, and that all other factors listed in IRPR section 203 are to be considered equally in the assessment.

Job Bank

If the objective of the new requirements is to ensure meaningful recruitment, then the selection of the Job Bank as the mandatory vehicle is counterproductive. In the past, the applications of employers who advertised positions only on the Job Bank were often rejected on the basis of a purported lack of meaningful recruitment. The new guidelines directly contradict the way files have been processed by HRSDC over the past years.

Required use of the National Job Bank is inconsistent with business objectives, inefficient, cumbersome and not very practical. Clients continuously tell us that the Job Bank is not a useful advertising tool. First, there are numerous industry-specific job banks or other recruitment means that employers prefer to use instead of the National Job Bank (for example, www.menupalace.com or a cooking school for a chef). Posting on the National Job Bank significantly increases the workload of the employer and requires sorting through a large number of applications by unqualified candidates.

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[3] Some other examples include Ph.D.'s to conduct research for pharmaceutical companies, individuals with proprietary or patented knowledge not shared with Canadians, or independent contractors with specialized knowledge and experience with the company for short-term projects where there is no opportunity to train Canadians. The latter category is listed in the "Exceptions to the General Rule" provided on the webpage "HRSDC/SC Assessment for Labour Market Opinion." We would suggest, at a minimum, that the exceptions should be referred to in the Minimum Recruitment Requirements themselves or reproduced in the "What's New Section" of the Department's home page along with the Requirements.

Second, making the National Job Bank mandatory for Skill Level B positions leads to the unreasonable result that employers risk being denied if they rely instead on a recruitment firm. For example, in the video gaming industry, exceptionally talented graphic designers (NOC 5241) will often be identified through recruitment firms with extensive networks. Again, requiring an employer to post the position on the Job Bank will result only in additional work and delay for the employer. With extremely tight timelines for completing and releasing new games, imposing the additional requirement of advertising on the Job Bank will adversely affect Canada's thriving gaming industry.

Last, it is unclear whether the existing delays will be exacerbated with the increase in posting activity as result of the required use of the Job Bank. Already our members have cited examples of employers having problems opening accounts, experiencing delays in translation of ads and receiving messages on the Job Bank website regarding technical difficulties. In one case, due to a delay in posting after the advertisement was sent to the Job Bank, an employer inadvertently failed to meet a seven day posting requirement for an occupation under pressure. Delays lead to longer recruitment times and hamper the company's ability to make a timely request for a LMO.

Inclusion of Wages in Advertisement

The requirement that the wage (or wage range) be included in advertisements is extremely disruptive to current recruiting practices used by the majority of businesses across Canada. In the private sector, it is exceptional to advertise a wage for a salaried position. There are sound business reasons and human resource practices for not doing so. Specifically, the following points have been raised by our employer clients:

- The advertised wage may act as a discouragement to applicants when it is not disclosed in the context of other information provided by the company during the recruiting process, such as professional development opportunities, career advancement, benefits (e.g., pensions, stock options, RSP matching programs), vacation, flexible hours and other innovative employment benefits. Disclosing salary in the context of the recruitment process also permits applicants to adjust their financial expectations, which may not be realistic at the outset.

- It puts companies at a competitive disadvantage, as it exposes their wage information to competitors.

- It may affect the morale of existing employees if they learn that a new employee is paid more without understanding, for example, the greater qualifications and skills of the new employee.

- In advertisements with multiple positions listed, it may be impossible to list the wage and job description for each position. This is particularly the case for large projects or new contracts where large recruitment campaigns are launched for positions that could span different NOC classifications and levels.

Lack of Specificity Regarding Inclusion of Disadvantaged Groups

For Skill Levels C and D, it is a requirement that "reasonable ongoing recruitment efforts…include communities that face barriers to employment (e.g., Aboriginals, older workers, other disadvantaged groups.)" It is unclear whether Service Canada's expectation is simply for employers to state in its advertisements that it encourages applications from members from these groups. If this is the case, a statement to this effect would provide the necessary clarity for employers. If not, Service Canada

should provide further guidance to employers on what efforts would be considered adequate, and communicate this to officers so that requirements are enforced consistently. Some of our clients, particularly in Saskatchewan, have reported that that this requirement is being imposed without objective criteria or practical guidance on how to satisfy it.

Prevailing Wages and Collective Agreements

The requirement that an employer must agree to pay the higher of a prevailing rate or a rate agreed to under a collective agreement interferes with the ability of private parties to enter into binding collective agreements. Typically, companies spend enormous resources in negotiating and drafting collective agreements. Unions also expend significant effort ensuring workers are protected and that working conditions and wages are fair. It may be that a union has negotiated some other benefits for the workers as part of the collective agreement, with the results being a balanced and fair agreement for the workers, but at a wage rate that might be under the prevailing wage set by Service Canada. We have raised questions on a number of occasions about the accuracy of Service Canada's assessment of prevailing wages in light of existing collective agreements. Nevertheless, notwithstanding any methodology Service Canada uses to set prevailing wages, a collective agreement should always prevail.

Recruitment Efforts within Three Months

We believe that limiting consideration of a company's recruitment efforts only to those during the three months prior to applying for the LMO is too restrictive and out of touch with the reality of the recruitment processes of many companies. The entire recruitment process from advertising to acceptance of an offer can easily take more than three months, and could easily take 6-12 months depending on a position. Until an offer is actually made the employer cannot, under provincial human rights legislation, ask for proof of the candidate's ability to work in Canada. It is only after this process, therefore, that the company would be in a position of requiring a LMO and work permit.

We recommend that there be no limitation on the time period for consideration of an employer's recruitment efforts. Alternatively, we suggest six months be the minimum time period, with the discretion to extend it where the employer can demonstrate the need for additional time.

Extension Applications

Applying the Minimum Recruitment Requirements to extension applications will result in "recruiting for the sake of recruiting," which clearly will not meet government or business objectives. Extension applications ordinarily are made in circumstances where applicants have become integral to the company's business and possess proprietary knowledge and skills not readily available in the labour market. If a business loses these employees because of a failure to re-advertise according to the Minimum Recruitment Requirements or because a minimally qualified Canadian applied for the position, it will have wasted valuable resources on training and development and could result in workplace disruption. The risk of losing a foreign worker may also push employers prematurely into supporting a worker's application for permanent residence.

Live-in Caregiver Program

We also have concerns about the requirement to demonstrate recruitment efforts prior to renewal under the Live-in Caregiver Program. These work permit holders have formed an intimate relationship with the family members for which they are caring and have become an integral part of the family unit. To require a family to advertise to replace the live-in caregiver will have serious

repercussions for the caregiver and the family, as the caregiver may feel threatened, inadequate or abandoned as the employer attempts to recruit another individual to fill the job. It is unrealistic to conceive that Job Bank recruitment efforts in this particular area of employment would be sincere or meaningful in any way due to the nature of the job. Employers are very unlikely to switch caregivers, as the person they have hired has formed a relationship with their family.

Delays

The delay and increased costs to business in attempting to comply with the new requirements is compounded by HRSDC processing delays that currently reach seven weeks in some regions. The introduction of the new recruitment requirements will most certainly lead to longer processing times while Service Canada officers and applicants become familiar with the new requirements. The result will compromise the efforts of the last fiscal year to lower processing times at Service Canada offices across Canada, particularly in B.C. and Alberta. The slower processing times in turn will hamper businesses' abilities to respond swiftly to current economic conditions, which all experts agree is necessary to ensure the economic downturn does not worsen.

Conclusion

We believe the Minimum Recruitment Requirements were a reaction to the unique and unexpected economic circumstances which arose in autumn 2008. However, they do not pay sufficient attention to business realities, particularly during economic downturns. The effect of these changes will immediately be felt by businesses across Canada. We are concerned that there will be a negative impact on companies' ability to grow their businesses, which is the exact opposite to the desired effect during this economic crisis. Specifically, this initiative could handcuff businesses' ability to create new jobs and maintain existing jobs by limiting the ability of companies to make swift hiring decisions and recruit workers that are currently qualified and trained.

Recruitment remains relevant in the vast majority of applications, but it is imperative that Service Canada officers consider all other relevant factors and be permitted to offset the advertising requirement where appropriate. The current "checklist" approach fetters the discretion of officers to make a determination based on the real issue, namely, whether "the employment of the foreign national is likely to have a neutral or positive effect on the labour market in Canada." At this time, *everyone must advertise* according to the new Requirements. This will cause a severe delay for employers, some of whom are in desperate need to fill a vacancy in their business.

We therefore recommend the following:

- Service Canada officers receive a directive emphasizing that recruiting is not necessarily mandatory, that it is only one of six factors under IRPR section 203, and that there may be situations where no recruiting is necessary.

- The strict requirement for Job Bank posting be removed, and posting on other reputable websites or utilizing recruitment firms be accepted for NOC B, C and D occupations.

- The requirement for NOC Skill Level B be revised to permit advertising in a medium normal in the industry during the minimum two-week recruitment period, and that for salaried positions, the requirements be amended so that wages need not be included in the advertising.

- Further details be provided regarding the recruitment efforts required for disadvantaged groups.

- Detailed information be provided in a directive with respect to how recruitment will be reviewed for LMO extension applications.

- The requirement that recruiting efforts take place during the three months prior to applying for a LMO be removed. Alternatively, the requirement should be amended so that the relevant time period is six months prior to applying for a LMO, unless some reasonable explanation for longer delays is provided.

- The requirement that the employer pay the higher of the prevailing rate established by HRSDC/Service Canada or the collective agreement be removed.

We look forward to meeting with you to continue our discussion regarding these concerns and proposals for immediate change. Thank you for your consideration.

Yours truly,

(Original signed by Baerbel Langner)

Baerbel Langner
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