Immigration and Refugee Protection Regulations amendments (Temporary Foreign Workers)

NATIONAL CITIZENSHIP AND IMMIGRATION LAW SECTION
CANADIAN BAR ASSOCIATION

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PREFACE

The Canadian Bar Association is a national association representing 37,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the National Citizenship and Immigration Law Section of the Canadian Bar Association, with assistance from the Legislation and Law Reform Directorate at the National Office. The submission has been reviewed by the Legislation and Law Reform Committee and approved as a public statement of the National Citizenship and Immigration Law Section of the Canadian Bar Association.

TABLE OF CONTENTS

Immigration and Refugee Protection Regulations amendments (Temporary Foreign Workers)

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I. INTRODUCTION

The Citizenship and Immigration Law Section of the Canadian Bar Association (CBA Section) is pleased to comment on the proposed Regulations Amending the Immigration and Refugee Protection Regulations (Temporary Foreign Workers), posted in the Canada Gazette, Part I on October 10, 2009.

The Temporary Foreign Worker Program (TFWP) provides much needed labour in key sectors of the Canadian economy. However, the CBA Section is aware of legitimate concerns of fraud and abuse in the recruiting and employment of some Temporary Foreign Workers (TFWs). Human Resources and Skills Development Canada (HRSDC) and Citizenship and Immigration Canada (CIC) are constrained by current legislation, which is virtually silent with respect to enforcement and compliance. The *Immigration and Refugee Protection Act* (IRPA) and Regulations (IRPR) do not explicitly authorize officials to refuse to deal with employers or representatives who have lied or blatantly failed to comply with terms and conditions. As a result, some employers and representatives have taken advantage of vulnerable foreign workers, such as live-in caregivers and low-skilled workers, and the foreign worker system has been compromised.

In the absence of compliance legislation, HRSDC has been forced to rely on front end scrutiny of Labour Market Opinion (LMO) applications. This manifests as rigid adherence to policy and intense scrutiny of each and every application, regardless of the nature of the application or the previously demonstrated integrity of the employer. Employers are often not given the benefit of the doubt and fraud is constantly suspected.

While we support the government's intention to protect vulnerable TFWs, this should not be accomplished at the cost of the legitimate use of the program for the vast majority of

Canadian employers. We have serious concerns with several aspects of the proposed regulations:

1. Some of the concepts are severely flawed to the point of being unworkable;
2. Too much is left to be explained in policy manuals, rather than specified in the regulations;
3. There is no legislative recourse for denial of service, creating the risk of a system that is arbitrary and encumbered with litigation;
4. Provisions will unnecessarily burden the application process, making it slower, less efficient and less accessible to legitimate employers of foreign workers;
5. Contrary to the intent of protecting to foreign workers, the legislation punishes workers by creating an arbitrary four year cap on working in Canada, and by penalizing those who unknowingly accept employment from "blacklisted" employers.

II. DISCUSSION

2.1 Low Skilled vs. High Skilled Workers

Both the Auditor General of Canada[1] and the Commons Citizenship and Immigration Committee[2] have recently commented on the vulnerability and abuses of low-skilled workers. Neither report focuses on skilled workers, who are in a better position to look after their own interests. Yet the proposed regulations apply to *all* workers regardless of skill. There is no policy justification for attempting to address problems that do not exist. Solutions to the vulnerability of low-skilled workers should focus on their particular circumstances. Otherwise, there may be unanticipated and negative consequences.

Recommendation:

1. **Any regulatory amendments aimed at providing protection to TFWs should be limited to employment in the National Occupational Code (NOC) C and D occupations.**

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1 Chapter 2, Selecting Foreign Workers under the Immigration Program, *2009 November Report of the Auditor General of Canada*, online: http://www.oag-bvg.gc.ca/internet/English/parl_oag_200911_e_33252.html.

2 *Temporary Foreign Workers and Non-status Workers, Report of the Standing Committee on Citizenship and Immigration* (May 2009), online: http://www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=3866154&Language=E&Mode=1&Parl=40&Ses=2 .

2.2 Punitive Measures Against Employees

Proposed s.183(1)(b.1) would impose a condition on a foreign national not to sign an offer or extend the term of an employment agreement with a blacklisted employer. This condition is unnecessary with the proposed new application reviews. It is also not realistic to assume that foreign nationals would know about the blacklist prior to accepting offers of employment. Low-skilled foreign workers would be particularly vulnerable as they are less likely to have competent language abilities or access to computers. Imposing this condition on workers who do not have a realistic ability to comply is arbitrary and punitive.

IRPR s. 200(3)(e) precludes foreign nationals from obtaining a work permit for six months if they fail to comply with a condition. Proposed s. 183(1)(b.1) would invoke this six-month bar even where a foreign national had innocently signed an employment agreement with a blacklisted employer, or renewed an existing contract of employment. The breach of condition also allows an officer to administratively cause loss of status and issuance of a removal order. These are excessive consequences, especially for innocent employees acting in good faith. We fail to see the policy rationale for punishing foreign nationals for the previous conduct of their current or prospective employers, particularly when the primary policy reason for the proposed regulations is the protection of temporary foreign workers.

Recommendation:

2. The proposed amendment to IRPR s. 183 should be withdrawn.

2.3 Genuineness of an Offer – Discretionary Determinations

In an effort to make accountable "employers, or third-party agents working on their behalf [who] are failing to abide by commitments made to [temporary foreign] workers,"[3] the proposed regulations provide:

- A mechanism to assess whether offers of employment are genuine;

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[3] Canada Gazette at page 2052

- A bar against employers accessing the TFWP if they are found or deemed not to have made a genuine offer of employment in the present application, or in the preceding two years; and
- A blacklist of employers whose offers of employment are deemed non-genuine.

2.3 (i) Factors to Determine Genuineness

The genuineness requirement for employment offers is not an innovation. It is currently in IRPR s. 200(1)(c)(iii) when an LMO is required. Proposed s. 200(5) goes further by enumerating the factors to be considered by a CIC, CBSA or HRSDC officer in determining genuineness.

The first requirement relates to employer credibility. Proposed s.200(5)(a) requires that the employer is "actively engaged in the business in respect of which the offer is made." Neither the English nor the French wording ("l'offre est présentée par un employeur véritablement actif dans l'entreprise à l'égard de laquelle elle est faite") are clear. There is no defined meaning of "employer" or "actively engaged". It is unclear if "employer" is the individual representing the employer in the application, the company employing the individual or any affiliate or parent company. It is also unclear if "actively engaged in the business" refers to an individual in a hands-on managerial position in the company or to the company itself. If it refers to the company, it is unclear what additional proof of "active engagement" is required beyond evidence of the company's existence (i.e. letterhead, a minute book).

We are concerned with how this factor might apply to NAFTA or other intra-company transferees coming to establish a new, related business not yet actively engaged in Canada. It appears that this factor could preclude new start up businesses from benefiting from the services of foreign workers to establish and grow their businesses.

The second requirement, in proposed s. 200(5)(b), is that the offer must be "consistent with the reasonable employment needs of the employer". This is a well intentioned and reasonable criterion. However, it will be difficult to assess in practice and will lead to erroneous and subjective determinations by officers. We question whether officers are

qualified to evaluate the business needs of employers, especially given that there are no further specifications in the proposed regulations.

Third, proposed s. 200(5)(c) requires that the employer demonstrate its ability to fulfill the terms of the offer. Employers who wish to hire key foreign workers to grow their business (for instance a TFW with the ability to open new foreign markets to a Canadian manufacturer), could be precluded from hiring the foreign worker because of the past economic performance. Again, we are concerned that a well intentioned criterion may lead to strict and rigid applications by officers, who lack the necessary resources and time to assess the financial situations of Canadian companies.

Last, proposed s. 200(5)(d) requires consideration of the employer's or recruiter's past compliance with applicable federal or provincial employment legislation. This is not an appropriate factor, as it is irrelevant to the authenticity and sincerity of an employer or its offer. It is bad behaviour that the government may want to punish, but it does not indicate that an employer does not exist, is acting in bad faith, or is making a fraudulent offer.

Many Canadian companies may be considered non-compliant with federal or provincial legislation at some point in their existence. Under the proposed wording, a minor provincial Health Act violation (like an employee not wearing a hairnet) could be the basis of determination of non-genuineness of a job offer. We understand, in fact, that a similar issue arose with respect to the Alberta Immigrant Nominee Program – previous Health Act violations (e.g. improper food storage) made restaurants ineligible to utilize the Program. Further, the federal government may not have the capacity to train immigration officers to assess compliance with employment standards legislation in each province and territory, or indeed the constitutional jurisdiction to create penalties for non-compliance with provincial legislation. Most jurisdictions have sophisticated mechanisms to ensure compliance, with specialized tribunals to adjudicate employment standards and robust appeal rights. Non-compliance with provincial laws and determinations of non-compliance by government officials outside federal jurisdiction should not have federal consequences. This incursion into provincial jurisdiction is likely to spawn litigation.

Proposed s. 200(5)(d) also provides that a determination of whether an employment offer is genuine will take into account the past non-compliance or bad practices of a recruiter who found the foreign worker. Although this is well intentioned, its application may have unfair results. Employers have no effective means to investigate a recruiter's compliance history with all federal and provincial laws, particularly if the government does not publish lists of non-compliant recruiters. An employer could lose the services of a potentially valuable foreign worker, and a foreign worker their employment, due to previous non-compliance by a recruiter about which they had no knowledge.

Recommendations:

3. **S. 200(5)(b) should be replaced with "whether the employer has provided reasonable justification for employing the foreign worker, in all the circumstances."**

4. **S. 200(5)(d) should be eliminated. At the very least, it should be restricted to consideration of employment situations involving similar NOC levels, and the regulations should not impose sanctions for breaches of provincial legislation.**

5. **Determinations of "genuineness" of employment offers should require concurrence by a senior officer, given the seriousness of an adverse determination.**

2.3 (ii) Fairness and Due Process

The proposed regulations provide no opportunity for the employer to appeal a determination of previous non-compliance or a determination of non-genuineness, or to argue that the LMO or work permit should be issued notwithstanding previous non-compliance or deemed non-genuineness. There should be a mechanism, given the harsh consequences following such a determination.

The proposed amendments make no distinction between minor or serious non-compliance or between single and multiple violations. It provides no discretion to consider the employer's corrective measures. All violations would be punished equally and without recourse. While a breach may deserve to be punished, it may not reflect on whether the foreign national is at risk of abuse by the employer. The prior breach may have been

isolated and minor, occurred years ago, or be unrelated to the future employment relationship. The employer may have addressed the problems that gave rise to the breach.

Recommendation:

6. **If the compliance component remains, the regulations should provide for review or reconsideration of the issue of non-compliance (i.e. where a previous breach was isolated or minor or the employer has taken corrective measures).**

2.3 (iii) Violation of International Agreements

The s. 200(5) assessment of genuineness may run contrary to international agreements, in particular, NAFTA. Currently, intra-company transferees of U.S. and Mexican citizens under NAFTA are LMO exempt under IRPR s 204(a) (CIC exemption code T24). The additional requirements for all employer-specific work permit applications would add criteria not contemplated by NAFTA for professionals and intra-company transferees.

2.4 Deemed Non-genuine Offers of Employment - "Blacklist" Restriction of Employer's Eligibility to Access Temporary Foreign Worker Permits

The CBA Section has serious concerns with the proposed regulations that would deem offers of employment to not be genuine:

- Proposed s 200.1(1)(a) stipulates that offers of employment will be deemed not to be genuine if an employer has in the previous two years provided wages, working conditions or employment position that were significantly different from the offer of employment;
- Proposed s 200.1(1)(b) automatically applies the "deeming" to all subsequent offers made for two years following the employer being first informed that an offer of employment was deemed to be not genuine; and
- Proposed s 200.1(2) requires CIC to maintain on its website a list of all employers who have had offers of employment deemed to be non-genuine in the past two years. Employers would be ineligible to obtain any form of work permit, or extension of work permits, for two years following being listed, and foreign workers would be precluded from signing offers or extensions of offers from those employers (proposed s.183 (b.1)).

These provisions risk inappropriate and debilitating punishment of employers. A major employer may have scores of foreign worker employees, ranging from labourers to highly

educated and critically required specialized scientists and senior executives. A single instance of inappropriate placement of a line worker could invoke the deeming provisions, with the consequence that none of the current foreign workers – including senior executives and specialists – could renew their work permits in the two-year penalty period. These potential consequences are excessive.

These problems would be compounded by confusing and potentially overlapping penalty periods following determination of a prior breach, informing the employer of the deemed non-genuineness, and being placed on the CIC list. We detail our concerns below.

2.4 (i) Who Determines Deemed Non-genuineness or Listing?

In discussions with CIC officials, we understood that deeming offers of employment not genuine would occur only after non-compliant employers were placed on the list. Listing would be done only by senior officers with delegated authority to determine if past non-compliance justified the listing and its punitive effects. This is not what the proposed regulations provide. Instead:

- Listing on the s.200.1(2) list is an automatic and mandatory consequence of any decision to deem an offer non-genuine based on prior employer non-compliance with salary, work conditions or occupation;
- Any HRSDC, CBSA or CIC officer may make a determination of prior non-compliance in assessing any work permit application;
- Instead of the list being the basis for "deeming" offers non-genuine, previous officer determinations of non-compliance are the basis for deeming and consequent ineligibility for work permits for two years. Officers can deem an offer not genuine if they find that the employer previously paid incorrect salary, provided incorrect working conditions or employed a worker in an incorrect occupation. An officer can also deem non-genuineness as a result of another officer's previous finding of a breach in the previous two years, regardless of whether the employer is on the list of non-compliant employers.

The vagueness of "significant changes" in wages, working conditions or occupation increases the risk that officers will make inappropriate determinations.

2.4 (ii) No Discretion or Review for Deemed "Non-genuineness"

The officer has no discretion not to apply the deeming provision in appropriate cases, or to allow an employer to make a case for review or exercise of discretion, even where the

results may be perverse. Specifically, it is not uncommon that a TFW will receive a salary increase, title change, and change in duties and responsibilities. The employer is not necessarily required to amend the LMO and work permit, so long as the new position is in the same NOC. A closed work permit normally stipulates only the occupation, location of employment and name of employer. A raise or promotion does not usually trigger the need to apply for a new LMO or to vary the work permit. There is no abuse of the foreign worker in these circumstances. Yet, under the proposed regulations, a promotion or raise could be seen as a significant difference in wages or occupation and result in a two year bar from obtaining or extending work permits. The proposed mechanism will make it difficult to attract and retain key foreign worker employees, particularly exceptional performers or senior executives.

The recent economic downturn has forced many employers to take drastic measures to avoid layoffs or to ensure their survival – pay freezes, pay cuts, or mandatory days off without pay. Although they apply uniformly to all employees, these measures could result in a finding of a "significant difference" in a TFW's wages or working conditions. Up to now, although a decrease in pay or hours would make the terms of employment inconsistent with the approved LMO, it would not cause the employer or employee to be in violation of the terms and conditions of the work permit. Employers may now be faced with exempting foreign workers from austerity measures to avoid creating a "significant" difference from the terms of the LMO (which might in turn bring employers into conflict with human rights legislation prohibiting discrimination based on nationality), or engaging in recurrent costly and demanding LMO applications.

Employers could inadvertently contravene the proposed regulations if their physical location changes and they do not notify Service Canada, or they fail to obtain approval to vary terms and conditions of the work permit. Similarly, employees may be asked to work at a different location even though their duties, responsibilities and terms of compensation remain the same. All these circumstances could be interpreted by Service Canada or CIC as a "significant" change in working conditions, and trigger the need for an application to vary the LMO and work permit or face a ban from hiring a foreign worker for two years.

To avoid the punitive consequences of a determination of significant difference, employers may clog the system with unnecessary applications for new LMOs and work permits. This would require significant additional resources that do not appear to be contemplated in the Regulatory Impact Analysis Statement (RIAS). Other employers will refrain from employing TFWs because of the uncertainty and arbitrariness of the process.

Recommendation:

7. **Eliminate the provisions deeming offers of employment not to be genuine.**

Alternatively, if the current scheme of deeming offers not to be genuine is maintained:

Recommendations:

8. **Deeming a job offer not genuine should be based only on the listing of employers and not on the previous findings of other officers.**

9. **The proposed s.200.1(2) listing should be completed by only by senior officers, perhaps at national headquarters. Listing should follow a fair determination based on all relevant circumstances – including the nature of the breach, the employer's previous history, and the employer's efforts to avoid future breeches – that the listing is justified as a punitive measure.**

10. **If officers continue to be authorized to determine prior non-compliance under proposed s.200.1(a)(i), the determinations should require concurrence of a senior officer.**

11. **A determination of significant difference in wages or working conditions or occupation under proposed s.200.1(a)(i) should be limited to situations where the employer paid significantly less, provided working conditions significantly less advantageous or employed the worker in a position that would constitute a demotion from the position in the offer.**

12. **No finding of significant difference should be made under s.200.1(a)(i) where the new wages or working conditions are consistent with industry practice and standards that apply generally to all employees.**

13. **There should be a process for reviewing an initial decision to list an employer and for having an employer's name removed from the list (i.e. where corrective measures have been taken to avoid repetition of the same, minor violation).**

In the further alternative, we suggest another deeming scheme:

Recommendation:

14. Where an officer has established on the balance of probabilities that the employer has significantly not complied with wages, conditions or occupation in a previous offer, the following scheme should apply:

(i) there would be a presumption that the current offer of employment is not genuine;

(ii) the employer would have the onus of establishing on the balance of probabilities that it is genuine or that all the circumstances of the case justified the issuance of a work permit; and

(iii) The shift in onus and presumption would apply for two years from the determination of prior non-compliance.

2.5 Longer Processing Times and Increased Burden on Employers Resulting from Determinations of Genuineness and Deemed Non-Genuine Offers

The additional process of determining the genuineness of a job offer and applying the factors in proposed s. 200(5), would lengthen processing times for TFW permits and place additional burdens on employers to prove compliance and genuineness in every application. The RIAS notes that this was raised as a concern in the spring 2007 consultation. Officials assured participants that such requirements would be kept to a minimum.[4] However, the proposed regulations would result in potentially onerous requirements.

The proposed regulations would require employers to meet eligibility requirements on every application, even where the employer has consistently demonstrated a history of compliance. There are likely to be documentary requirements for each genuineness factor. For example, an employer would likely have to produce financial statements, tax records, payroll records and other records to satisfy proposed s.200(5)(c) (ability to fulfill the terms of an offer). Further, documents may have to be produced more than once during an application, as the proposed regulations suggest that HRSDC, CIC and CBSA officers are required to make genuineness determinations at all stages. Since it appears that proving past compliance under proposed s. 200(5)(d) also includes compliance with respect to

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[4] Canada Gazette at page 3059.

employees who are Canadian citizens or permanent residents, the documentary burden could be many times greater, if not impossible to provide.

Ironically, foreign workers would be disadvantaged by this attempt to ensure their fair treatment. The increased scrutiny will add to documentary requirements and processing times and make it more difficult for foreign nationals to obtain work permits. It will also put an additional burden on CIC's TFW units and CBSA officers when work permits applications are made at a port of entry by an LMO exempt and visa exempt applicant.

Recommendation:

15. HRSDC, CIC and CBSA should adopt a two-stage determination, as with Expedited LMOs. An employer determined to be eligible (compliant or meeting the factors in s.200(5)), would not have to prove eligibility again for a period established by regulation (e.g. 12 months).

2.6 Multiple Determinations

We agree with the following findings of the Auditor General in her Fall 2009 Report:

> We found that HRSDC and CIC have not clearly defined their respective roles and responsibilities for assessing the genuineness of job offers and how that assessment is to be carried out. Both departments' operational manuals are silent on this matter.[5]

Although the proposed amendments have added measures to ensure compliance, they do not address the concerns of the Auditor General. While the Auditor General's Report pointed out the need to assess genuineness, it does not suggest that all departments must make independent determinations. The genuineness determination in the proposed regulations can be made by HRSDC officers when reviewing an LMO application, by CIC TFW units when reviewing a request for an LMO exemption, by visa officers abroad when deciding whether to issue a work permit approval letter and by CBSA port of entry and CIC inland officers before they issue a work permit. Nothing indicates that an HRSDC opinion would be determinative. The proposed regulations appear to require multiple determinations of the issue of genuineness, adding more frustration and processing delays to an already cumbersome process. This will be exacerbated in visa

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[5] Report of the Auditor General of Canada, *supra* note 1 at page 32, section 2.102.

offices already plagued by lengthy processing delays and will further reduce Canada's ability to meet the foreign worker needs of its employers.

Recommendations:

16. **Immigration Manuals should stipulate that, absent evidence of fraud or a change of circumstances, a determination of genuineness by HRSDC or CIC TFWU should be accepted by visa, port of entry and inland officers.**

17. **To avoid longer processing times for LMOs and TFW permits, ongoing monitoring or auditing should be implemented for employment relationships already in force rather than imposing proof of compliance requirements in every application.**

2.7 Retroactivity

Despite commentary in the RIAS that the amendments would apply prospectively,[6] it goes on to state:

> In addition to the assessment of the genuineness of a job offer related to an application for a work permit or a request for an LMO, the employer's compliance with previous offers of employment **in the past two years** to TFWs would be considered, specifically regarding wages, working conditions and the occupations.[7]

This would create a requirement that is effectively retroactive. Retroactivity also arises from the proposed s. 200(5)(d) requirement of compliance with all federal or provincial laws regulating employment for an unspecified (and therefore potentially unlimited) period preceding the application. We are concerned about retroactive consequences for acts or omissions that occurred when the law did not stipulate consequences for violations.

Recommendation:

18. **Any refusal of work permits based on breaches of employer obligations in ss. 200 and 200.1 should be limited to breaches that occur following implementation of the regulations.**

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[6] At p.3054.

[7] At p. 3058, emphasis added.

2.8 Privacy

We have privacy concerns related to the proposed list on CIC's website setting out names and addresses of employers who have made offers of employment deemed not to be genuine under the proposed ss. 200.1(1)(a) and (b). With no appeal process for a decision under proposed s 200.1, the employer's only recourse would be an application for leave for judicial review. While the matter works its way through the Federal Court, an employer would not be able to participate in the TFW Program, and their reputation as an employer would be diminished. There is already significant competition among employers in certain industries for skilled workers. Negative information pertaining to an employer could significantly impact its ability to hire Canadians as well as foreign nationals. A negative determination by a single officer could have severe financial consequences arising from the inability to retain foreign workers and the damage to a firm's reputation, even if the determination is based on minor non-compliance or even concluded erroneously.

Recommendation:

19. The identity of an employer should not be published on the CIC list until a final determination is made under the internal review process recommended by the CBA Section.

2.8 Maximum Cumulative Duration of Four Years Work

2.8 (i) Imposition of an Arbitrary Limit

In an effort to "emphasize to both workers and employers the employment under the TFWP is intended to be temporary in nature,"[8] proposed s.200(3)(g) would subject TFWs to a maximum cumulation of four years' work in Canada, with exemptions in certain circumstances, followed by at least six years of being prohibited from working in Canada.

We believe the proposed four-year cap is unnecessary and, at best, overly broad. It will undermine objectives of Canada's immigration program by placing unnecessary restrictions on foreign workers who are making legitimate contributions to Canada's

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[8] Canada Gazette at page 3058.

economy and unnecessarily hurting employers. The purpose of the TFWP, as stated on CIC and HRSDC websites, is to "help address skill and labour shortages."[9] CIC recognizes that foreign workers make preferred candidates for permanent residence, reflected in the Canadian Experience Class (CEC) and Live-in Caregiver Program (LCP). Demographic and economic studies demonstrate that Canada faces chronic shortages of workers, particularly in certain industry sectors and certain regions. It is generally accepted that both temporary and permanent immigration are necessary to maintain Canada's workforce and preserve our economic strength. The proposed regulations seem to run contrary to this acknowledged demographic reality, and the government's stated objectives. The regulations must be responsive to changing labour market needs and not simply to unfavorable market conditions prevailing at the time of implementation.

While there may be a policy reason for prohibiting indefinite stays by lower skilled foreign nationals who have no hope of ever qualifying for permanent residence, arbitrarily limiting TFW stays to four years would deny the needs of the Canadian economy in sectors where shortages continue to be demonstrated year after year via the LMO process. At the very least, there appears to be no legitimate policy reason to place limits on *skilled* foreign workers. Many of these TFWs, most of whom would qualify for permanent residency, do not decide to apply until they have been in Canada long enough to know they would like to make it their permanent home. Some may never apply, but this is irrelevant if they are fulfilling a critical need. Requiring Canadian employers to retrain a new employee in such circumstances could have considerable cost and loss of productivity.

As well, there is no flexibility to extend the four-year period where a permanent residency application is in process. Applications for permanent residence frequently run into unexpected and lengthy delays due to backlogs in processing, background security checks, difficulty in obtaining police reports from some countries, investigations, interviews, and delays of examining dependants through visa offices abroad. There is no good reason to deny employment to these individuals while their applications are in process. The

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[9] See HRSDC, online: http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/index.shtml; and CIC, online: http://www.cic.gc.ca/english/work/index.asp.

proposed cap could result in unemployment and possible removal of TFWs who are desirable permanent residency applicants.

2.8 (ii) Permanent Residence Applications under LCP and CEC

The RIAS states that the four-year limit is intended "encourage the use of appropriate programs and pathways to permanent residency in order to respond to the long-term labour needs of employers."[10] However, the limit would actually undermine "appropriate programs and pathways to permanent residency." In particular, it would severely limit the ability to apply for permanent resident status through the LCP or CEC.

CIC Manual IP 4, "Processing Live-In Caregivers in Canada" states:

> Citizenship and Immigration Canada established this program to meet a labour market shortage of live-in caregivers in Canada, giving qualified foreign caregivers the opportunity to work and eventually apply for permanent residence within Canada.[11]

One requirement of those applying for permanent residence under the LCP is that the Live-in Caregiver (LIC) must have worked as an LIC for at least two years in the three years following their entry (IRPR s. 113(d)). LICs who apply for permanent resident status after working as an LIC for three years and continue to work as their application is processed may not be able to achieve permanent residence within the four year limit. On departure from Canada, their application would become void. The current processing time for first stage approval of these applications is approximately seven to eight months.[12] Our experience is that it often takes many months or years for the rest of the process.[13] Processing times can be significantly lengthened if the LIC has a spouse or other dependants living abroad to be processed concurrently.

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10 Canada Gazette, at 3053.

11 CIC, online: http://www.cic.gc.ca/ENGLISH/RESOURCES/manuals/ip/ip04-eng.pdf, at section 2.

12 CIC, online: http://www.cic.gc.ca/english/information/times/canada/process-in.asp

13 For example, the Manila visa office website states that it takes between 12-18 months from the time the overseas application is submitted to approval. Further, the overseas application is not usually submitted until after the LIC has been approved in principle from within Canada. This demonstrates that the standard processing of a LIC application for a worker who has completed the LCP within three years and has family members in the Philippines takes LICs well beyond the four year cap contemplated in the proposed regulations. See: http://www.canadainternational.gc.ca/philippines/visas/processing_times-delais_traitement.aspx?lang=eng.

The situation is similar for those applying for permanent residence through the CEC. CIC Manual OP 25, "Canadian Experience Class" states, "The Canadian Experience Class is prescribed as a class of persons with experience in Canada. It was developed for temporary foreign workers or graduates with Canadian work experience."[14] To be eligible to apply for permanent residence in this class under the Foreign Worker stream, "an applicant must have two years of full-time equivalent, skilled-work experience at the NOC A or B level … within three years preceding the date the application is made."[15]

Processing times for CEC applications are currently six to twelve months. A foreign worker working or studying in Canada for two years who waits a third year before applying will have to rely on CIC to process their application for permanent residence under CEC within twelve months. If processing times exceed twelve months, the foreign worker would be offside the proposed regulations through no fault of their own.

There may be other circumstances where the processing time of a permanent resident application requires a TFW to continue working as a TFW for over four years. For example, foreign workers may apply for permanent residence under the Federal Skilled Worker program in their home country. Processing times in overseas visa offices are unpredictable and may be subject to delays beyond the applicant's control. The permanent resident application may not be processed before the TFW hits the four-year cap. There is no policy reason for a TFW not to be able to work in Canada while the application is processed.

The proposed regulations fail to recognize that processing of permanent resident applications will often be delayed as a result of a security, criminal or medical issues. This may result in the foreign worker having to apply for repeated extensions of their work permit. Again, the hard rule of a four year cap would be unreasonable in these situations and would create significant hardship to foreign workers and their employers.

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[14] CIC, online: http://www.cic.gc.ca/EnGLIsh/resources/manuals/op/op25-eng.pdf, at section 5.

[15] *Ibid.* at section 5.1, emphasis added.

There are often legitimate reasons for foreign workers not to proceed with permanent residence immediately on arriving in Canada but to wait several years before making that commitment. The decision to permanently relocate has major consequences, the consideration of which can cause delay. One's family happiness, separation from friends and relatives abroad, and uncertainty of employment must all be taken into account. The proposed regulations would force foreign workers to proceed with permanent residence almost immediately upon arriving in Canada, causing employers and employees to risk unnecessary resources on a premature application. There are legitimate policy reasons (such as marriage to a Canadian, best interests of a child or significant economic contribution) for extending work permits and temporary resident permits to people awaiting eligibility for approval of rehabilitation or eligibility under the Permit Holder Class.

While the four year bar would not apply to TFWs in some LMO exempt occupations, it does not consider the circumstances of a TFW who has worked in Canada under an exempt occupation who then wishes to work under an LMO. For example, a TFW who worked in Canada for 3½ years as an intra-company transferee and then was laid off could have an employer-sponsored application for permanent residence terminated. They would only be eligible to work for a further six months in Canada if hired by another employer with an LMO. The employee could have much to contribute to our economy and be an excellent candidate for permanent residence, but be barred from working in Canada for six years under proposed s.200(3)(g)(i).

2.8 (iii) No Time Limit for Cumulative Four Years' Work

Section 200(3)(g)(i) imposes a six year bar for a TFW with four years' cumulative employment. There is no time limit for the period of cumulative previous employment, which could be unfair. An employee who has worked sporadically in Canada may be offside the regulations as a result of employment many years earlier. This is more than a hypothetical possibility; for instance, many foreign senior executives come to Canada from time to time to fulfill various employer mandates over the course of their career.

2.8 (iii) Six Year Bar is Unnecessary Overkill

The six year bar from working in Canada will impose an unnecessary hardship for TFWs and Canadian employers. By way of contrast, foreign nationals found to have made a misrepresentation are inadmissible to Canada for two years [IRPA s.40(2)]. A shorter period would accomplish the same purpose, and not be unnecessarily harsh to persons who have legitimately worked in Canada and contributed to its economic well-being.

2.8 (iv) Differing Limits for Members of the Same Family

The four year limit and its exemptions can create problems for members of the same family who hold different types of work permits. For instance, Mr. X obtains a work permit as a managerial intra-company transferee through NAFTA. His wife, Mrs. X is granted an open work permit pursuant to IRPR s. 205(c)(ii). As a NAFTA intra-company transferee, Mr. X would be exempt from the four year limit pursuant to proposed s. 200(3)(g)(iii) and could work to the maximum seven year limit imposed by NAFTA. However, Mrs. X would be limited to four years of employment, contrary to the IRPA objectives of family reunification and integration of permanent residents into Canada (ss.3(1)(d) and 3(1)(e)).

Recommendation:

20. The four year cumulative maximum employment should be withdrawn.

Alternatively, if a cap is retained:

Recommendations:

21. The cap should be limited to NOC Skill Level C and D employees. There should be an exemption for persons with an application for permanent residence in process.

22. Calculation of the cumulative period for previous work in Canada should be restricted to the 10 years preceding an application for a work permit.

23. The bar from working in Canada after accumulating four years of employment should be limited to six months or a year.

24. The exemption should apply to all work permits obtained pursuant to IRPR s. 205 (or the spousal permit should be reclassified as deriving from s. 205(a)).

2.9 Restricting Who May Make Representations to HRSDC

Many integrity issues with foreign worker programs are caused by unregulated recruiters and third party representatives who take advantage of vulnerable low skilled workers. While the proposed regulations have significant and far reaching penalties for employers determined not to have made genuine offers or not fulfilling the terms of their offers, the regulations fail to prohibit the involvement of unregulated recruiters and third party representatives. Restricting the ability to represent an employer on LMO applications to regulated professionals (i.e. members of law societies, the Chambre des notaires, and the Canadian Society of Immigration Consultants) would enable Service Canada to manage the risk of issuing a LMO for a non-genuine offer of employment. This requirement would also have the effect of limiting the risk of vulnerable foreign workers relying on non-genuine offers of employment by unregulated recruiters and third party representatives. Competent, regulated professionals can also ensure that applications are properly prepared and supporting documents are in order, which facilitate processing of LMO applications. There would be greater accountability, as Law Society, Chambre and CSIC members are subject to discipline and possible loss of license for misconduct.

Recommendation:

25. The proposed regulations should specify that only employers or authorized representatives who are members of a provincial Law Society, the Chambre des notaries, or CSIC may submit LMO applications and make representations to HRSDC and Service Canada.

III. CONCLUSION

As the Auditor General concluded in her report earlier this year,

> Our findings this year underscore the importance of thinking through the implementation challenges when policies and programs are developed or changed. Having a complete picture of what needs to be done, by whom and when, how much it will cost, what risks are involved, how other programs might be affected, and what has or has not worked well to date, can make the difference between a program that meets its objectives and one that does not, one that delivers results for Canadians and one that does not.[16]

[16] *Supra,* note 1, "Matters of Special Importance – 2009," at 6.

The current lack of effective enforcement mechanisms in the current legislation and the corresponding lack of accountability for employers, recruiters and unregulated representatives is a problem that must be addressed. However, we have serious misgivings about the compliance and accountability mechanism in the proposed regulations. In particular, further screening by a multiplicity of departments and additional evidentiary requirements will likely bog down an already cumbersome application process and punish legitimate employers unnecessarily.

The proposed changes will have a negative impact on the employment of TFWs and will undermine the TFW program. Legitimate employers will be less willing to go through the increasingly burdensome process, given the uncertainty and risk of a future finding of non-compliance. Legitimate employers will face unnecessary challenges with human resources shortages. The international competitiveness and viability of Canadian employers will be negatively affected.

The proposed penalties are arbitrary and the lack of review or remedy will lead to unfairness and litigation. We recommend that the government consider alternative measures that are less demanding on resources and more targeted towards abusers.

Although the proposed regulations were designed to protect TFWs, in many ways they will punish TFWs for errors of employers and recruiters and will place unnecessary limits on their ability to contribute to the economy and become permanent residents of Canada.

In summary, we believe that the proposed regulations need substantial reconsideration and revision before they can be implemented.