THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

January 18, 2010

Maia Welbourne
Director
Temporary Resident Policy and Program Development Division
Citizenship and Immigration Canada
Jean Edmonds Tower South, 8th Floor
365 Laurier Avenue W
Ottawa, ON K1A 1L1

Dear Ms. Welbourne:

Re: Amendments to the Immigration and Refugee Protection Regulations (Live-in Caregiver Program), Canada Gazette, Part 1, December 19, 2009

I write on behalf of the Citizenship and Immigration Law Section of the Canadian Bar Association (CBA Section) regarding the proposed *Regulations Amending the Immigration and Refugee Protection Regulations* pre-published in the Canada Gazette, Part 1, on December 19, 2009 (the proposed LCP Regulations).

The CBA Section recognizes that urgent action is required to address issues faced by workers and immigrants in the Live-in Caregiver Program (LCP). However, the proposed LCP Regulations fall short of addressing the systemic problems underlying the LCP and may simply replace some problems with new and equally serious obstacles for this vulnerable group of workers.

I. Extension of the Qualifying Period

We support the government's effort to remedy the problems faced by live-in caregivers who are unable to complete the work requirements prescribed at s.113(1)(d) of the *Immigration and Refugee Protection Regulations* within the three-year qualifying period. However, we do not believe that expanding the qualification period to four years will adequately address the needs of Canadian employers or workers in the LCP, for the following reasons.

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(a) Incompatibility with Proposed Temporary Foreign Worker Guidelines

The proposed LCP Regulations are incompatible with the proposed Regulations Amending the Immigration and Refugee Protection Regulations (Temporary Foreign Workers) (the proposed TFW Regulations) pre-published in Part 1 of the Canada Gazette on October 10, 2009. The proposed TFW Regulations would subject temporary foreign workers 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.

In our December 2009 submission on the proposed TFW Regulations,[1] we pointed out the potential negative effect of the four-year cap on live-in caregivers. At present, live-in caregivers who complete 24 months of authorized employment within three years of their admission to the LCP typically wait seven to eight months for their permanent residence application to receive first stage approval, and then an additional 22 months before landing if they have family members living overseas.[2] If the qualifying period is extended to four years under the Proposed Regulations, the resolution of the application may take even longer. Processing delays combined with the proposed four-year cap means the vast majority of live-in caregivers will not be able to renew their work permits during processing of their application for permanent residence, through no fault of their own. They will thus be ineligible for landing because they are no longer able to comply with s.113(1)(b) and (c) of the Regulations, which require a live-in caregiver class applicant to maintain temporary resident status and authorization to work as a live-in caregiver up until the grant of landing.

The impact of the four-year cap on live-in caregivers was one reason we recommended its elimination, and we reiterate that this would be the best way to avoid these negative effects.

(b) Incompatibility with Operational Bulletin 025

Operational Bulletin 025 authorizes Human Resources and Skills Development Canada and Citizenship and Immigration Canada to issue labour market opinions (LMOs) and work permits to live-in caregivers for a maximum of three years and three months from the date of the applicant's entry to the LCP. The duration of LMOs and work permits for live-in caregivers should be extended to four years and seven months to reflect the changes to the qualifying period in the proposed LCP Regulations and ensure that live-in caregivers maintain status in the LCP until they obtain first-stage approval for landing.

(c) Prolonged Family Separation

Operational Bulletin 025 states the policy of Citizenship and Immigration Canada that the family members of live-in caregivers will not normally be allowed to accompany the caregiver into Canada even if the worker's employer has indicated a willingness to accommodate accompanying family members.

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1 Online: http://www.cba.org/CBA/submissions/pdf/09-66-eng.pdf.

2 The Canadian Embassy in Manila, which processes the vast majority of applications for family members of live-in caregivers, estimates an average 22-month processing delay: www.canadainternational.gc.ca/philippines/visas/processing_times-delais_traitement.aspx?lang=eng

The Commons Committee report, *Temporary Foreign Workers and Non-Status Workers* (the Committee Report), acknowledges that prolonged family separation has a traumatic effect on the children of live-in caregivers, with adverse effects including lack of integration and isolation following their arrival in Canada.[3] The proposed LCP Regulations will not mitigate this problem. Live-in caregivers taking four years to qualify for permanent residence under the proposed LCP Regulations may face an even longer wait for family reunification than at present.

The CBA Section supports the minority position in the Committee Report, namely that live-in caregivers and their family members should be admitted to Canada as permanent residents, subject to the condition that they complete 24 months of authorized employment within four years of their admission to Canada. Like entrepreneurs, caregivers would apply to remove the conditions following completion of the LCP work requirements. This would address the family separation issue while still acknowledging the purpose of the LCP – to bring workers into Canada to address long-term labour shortages in the Canadian market.

II. Recognition of 390 Overtime Hours

The government has proposed that live-in caregivers be permitted up to 390 overtime hours toward completion of the LCP, to allow completion of the LCP in as few as 22 months. The CBA Section is in support of a faster route to permanent residence for live-in caregivers, but we are not satisfied that the overtime provision will be practical for the majority of live-in caregivers.

The Committee Report acknowledges that many live-in caregivers in Canada face unsuitable working conditions and work long hours without overtime compensation. While the government's Regulatory Impact Analysis Statement (RIAS) indicates that "administrative changes" will be made to ensure that employers of live-in caregivers document overtime hours, the power to enforce employment standards falls within the exclusive jurisdiction of the provinces and territories. Provincial labour legislation already mandates overtime pay and imposes obligations on employers with respect to documentation. Nevertheless, our members are aware of many complaints to provincial authorities from live-in caregivers who do not receive proper compensation for overtime work or payslips that accurately reflect their true working hours.

The proposed LCP Regulations would likely cause a further proliferation of employment standards complaints by workers who require proof of overtime for immigration purposes. At present, provincial labour boards in numerous provinces have employed early-settlement techniques (mediation and dispute resolution) to resolve employment complaints in a timely and non-adversarial setting. If the proposed LCP Regulations are passed, settlements, typically reached without any written acknowledgment of liability by the employer, will be more difficult to achieve as live-in caregivers will need written proof of overtime hours for immigration

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

authorities.[4] In effect, the most effective method for resolving employment standards complaints will be severely compromised, to the detriment of employers and caregivers alike.

Instead of requiring proof of overtime hours, we recommend the government simply shorten the requisite period of authorized employment to 22 months within four years across the board. This reflects the federal objective to reduce program length and at the same time, will not compromise the resolution of employment standards complaints. It also avoids one potentially problematic consequent of the proposed LCP Regulations – creating a legislated incentive for caregivers to work punishing 12 hour days over a two year period to achieve family reunification.

III. The "Juana Tejada" Amendment - s.30(2.1)

The CBA Section is pleased that the government intends to remove the second medical currently required of live-in caregivers. The so-called "Juana Tejada"[5] amendment will reduce processing delays for live-in caregiver class applications and facilitate timely reunification of families long separated by the LCP.

The RIAS indicates that the proposed LCP Regulation will apply only to those who enter Canada ***after*** the changes come into effect, not to those already admitted to the LCP. We strongly recommend that the proposed exemption be applied to caregivers who have already been admitted to the LCP. The RIAS states that the number of LCP applicants who face exclusion on medical grounds is extremely small. We understand that the number of LCP dependents who are similarly excluded is also small. There is no financial or other policy incentive to impose transitional provisions that prevent current live-in caregivers from benefiting from this change.

Further, we recommend an option for spouses and dependents of live-in caregivers to undergo medical examinations before the worker is admitted to the LCP, to reduce the possibility of medical exclusions once the worker has completed the LCP work requirements. At present, medical examination of family members does not occur until after the worker has qualified for permanent residence, at which point the principal applicant has already established herself in Canada over a three to four year period. Early medical examinations of family members would allow live-in caregivers to make an informed decision about whether to enter the LCP. If family members were permitted to accompany the live-in caregiver, as we recommend above, we also recommend that they, like the caregivers themselves, not be subject to a second medical. If they are not permitted to come until the end, we recommend that a second screening of spouses and dependents who have undergone an initial medical examination be confined to public health risks, and that they be granted exemptions from medical inadmissibility based on excess demand arising after the first examination.

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[4] For example, we have received information from British Columbia's Employment Standards Branch indicating that of all complaints filed by live-in caregivers in 2008-2009, 43% were complaints about non-payment of regular and overtime wages. For the same year, 44% of all complaints filed at the BC ESB by live-in caregivers were resolved by settlement agreement without a formal determination.

[5] See Nicholas Keung, "Juana Tejada, 39: Nanny inspired reforms for caregivers," *Toronto Star (*11 March 2009). Ms. Tejada was diagnosed with colon cancer in 2006, three years after coming to Canada to work as a live-in caregiver. Her struggle to achieve permanent residency and resist removal proceedings instigated because of her medical status inspired the campaign to change the two-step medical exam required of caregivers.

IV. Employer-Specific Work Authorizations

The government has rejected the Commons Committee's recommendation that live-in caregivers be issued sector-specific employment authorizations.[6] The CBA Section urges the government to reconsider this position. We believe the LCP will continue to fall short of the needs of workers and employers in the LCP unless the mobility rights of live-in caregivers are improved.

The Government Response to the Committee Report asserts that mobility rights for live-in caregivers have already been improved by the priority processing of "new employer" applications at the Case Processing Centre. While we applaud this initiative, it comes with additional advertising requirements and wait times for employers. LCP employers must now advertise jobs for a two-week period, and then wait an additional three to four weeks to obtain a LMO before the worker can apply for a new LCP work permit. Even with priority processing of "new employer" applications, it takes a minimum of three months for caregivers to obtain a new work permit in the LCP. During this period, caregivers who have already lost their former job are prevented from earning an income. The availability of Employment Insurance during the intervening period is not a viable solution – 55% of a minimum wage salary simply does not provide subsistence income. This may force live-in caregivers to work "under the table" during the interim for survival reasons, which increases their vulnerability to exploitation. Last, when live-in caregivers lose their employment, they also lose their accommodation. Requiring these workers to find temporary accommodation when year-long leases and a deposit of first and last month's rent are often required is a significant hardship.

It is not unusual for an employer to wait more than two years before a live-in caregiver hired abroad will arrive to fill a recognized labour market shortage.[7] It is difficult for many Canadian families to anticipate needs for child care or elder care more than two years in advance. Because of long processing delays at busy visa offices, many caregivers arrive to find that their intended employer has made alternate care arrangements. Rather than accommodating these workers, they are summarily returned to their country of origin, leaving the worker to re-enter the two to four year processing queue and other Canadians struggling to recruit a live-in caregiver from within Canada. Unless the employer-specific nature of the LCP work permit is amended, urgent needs of many Canadian employers will continue to go unmet.

V. The Live-In Requirement

We respectfully disagree with the government's position that the Canadian labour market demands only *live-in* caregivers. The existence of the LCP supplies Canadian employers with a steady supply of temporary workers who are compelled to live in their employers' homes and are willing to accept less attractive working conditions to qualify for landing. This has skewed the government's capacity to accurately measure the needs of the Canadian labour market. Indeed, if

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6 *Government of Canada Response to the Report of the Standing Committee on Citizenship and Immigration: Temporary Foreign Workers and Non-Status Workers* (August 2009), online: www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=4017803&Language=E&Mode=1&Parl=40&Ses=2 (Government Response).

7 Processing times for LCP applications handled by the visa office in Manila is currently posted as 12-18 months: *supra* note 2. The average processing time for an LCP application in India is 42 months: www.canadainternational.gc.ca/india-inde/visas/processing_times_tr-durees_traitement_r.aspx?lang=eng .

the live-in requirement were removed, the Canadian government would be in a better position to measure true labour market needs.

While many employers prefer to have care provided in their own home, we fundamentally disagree that workers must live in their employers' homes in order to meet this demand, or that there are sufficient caregivers in Canada to satisfy the demand for live-out care. Further, caregivers raise legitimate concerns that live-in caregiving increases vulnerability and isolation. Clearly, a compromise must be reached between employers' demand for "on-call" workers and workers' individual rights to privacy, mobility and a safe work environment.

One option would be for the government to modify the program so that both live-in and live-out work could be counted toward completion of the program requirements. This would not prevent the government from assessing labour market needs, since employers are already required to document efforts to recruit a Canadian citizen or permanent resident and are refused authorization if recruitment efforts are deemed insufficient. Similarly, immigration officers have discretion to refuse a work permit if they are not satisfied that there is a *bona fide* job offer in place. If a clear labour market need for live-out care is established in the LMO supporting the work permit, the applicant should be able to count live-out work in satisfaction of the requirements for permanent residence. In cases where the labour market need is established, we do not see the policy reason to deny recognition of live-out caregivers.

VI. Conclusion

We commend the government's initiative in proposing amendments to the LCP. Thank you for the opportunity to respond to the proposed LCP Regulations and we look forward to hearing from you.

Sincerely,

(Original signed by Kerri Froc for Stephen Green)

Stephen Green
Chair, National Citizenship and Immigration Law Section