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Via email: Philippe.Masse@cic.gc.ca

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

Dear Mr. Massé:

Re: Immigration and Refugee Protection Regulations (Live-in Caregiver Program) April 2010 amendments

I write on behalf of the Citizenship and Immigration Law Section of the Canadian Bar Association (the CBA Section) regarding the amendments to s.113 of the *Immigration and Refugee Protection Regulations*, which took effect on April 1, 2010 (Amended Regulation). We also ask for clarification regarding the interaction between the Amended Regulation and the latest amendments affecting Temporary Foreign Workers (TFW Amendment), which will come into effect on April 1, 2011.

When the Amended Regulation was pre-published in the Canada Gazette, the accompanying Regulatory Impact Analysis Statement made clear that the three-year qualifying period for live-in caregiver class applicants would be extended to four years to ameliorate the situation facing caregivers who were unable to complete 24 months of authorized employment within three years of their initial entry to Canada.[1] The RIAS further stipulated that the Amended Regulation was intended to apply "to all live-in caregivers, *including those already in Canada*, for whom a determination on permanent residence had not yet been made" (our emphasis).

Notwithstanding this assurance, the FAQ section on Citizenship and Immigration Canada's website (FAQ) indicates that the pre-April 2010 version of the Regulation (Former Regulation) will continue to apply to live-in caregiver class applications made by workers whose initial entry into the Live-in Caregiver Program (LCP) was more than three years and three months prior to April 1, 2010.[2] According to the FAQ, a live-in caregiver who completed 24 months of authorized employment on March 1, 2010 will be denied permanent residence, even though she qualifies under the Amended

1 http://www.gazette.gc.ca/rp-pr/p2/2010/2010-04-14/html/sor-dors78-eng.html

2 www.cic.gc.ca/english/information/faq/work/caregiver-faq27.asp#answer_1

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Regulation, solely because she was admitted to the LCP more than 39 months before the Amended Regulation came into effect.

Citizenship and Immigration Canada's attempt to apply the Former Regulation to permanent residence applications decided after April 1, 2010 is problematic, both on legal and on policy grounds. Further, to give effect to the Amended Regulation, the CBA Section believes that LCP workers must be exempted from s.200(3)(g) of the TFW Amendment, which limits the duration of a temporary foreign worker's total stay in Canada to four years.

Legal Concerns with CIC's Interpretation

The FAQ suggests that the Former Regulation will continue to apply to eligibility determinations rendered after the Amended Regulation took effect. This interpretation violates Canada's *Interpretation Act*[3], as well as the common law principle that legislation will be given immediate effect when applied to a series of facts that has not yet concluded at the coming into force of an amendment.[4]

Section 10 of the *Interpretation Act* states that the "law shall be considered as always speaking, and where a matter or thing is expressed in the present tense, it shall be applied to the circumstances as they arise, so that effect may be given to the enactment according to its true spirit, intent and meaning" (emphasis added). This provision supports the proposition that the Amended Regulation is to be applied to all live-in caregiver class applications determined after April 1, 2010. Section 12 of the *Interpretation Act* requires a "fair, large and liberal construction" of Canadian statutes to ensure that the remedial intent of legislation is given full effect. Since the intent of the Amended Regulation was to remedy injustices caused by the Former Regulation, the amendment must be applied immediately to determinations rendered since its implementation.

The common law principle of immediate application was considered by the Supreme Court of Canada in *Attorney General of Quebec v. Expropriation Tribunal* [1986] 1 S.C.R. 732. At issue was whether the Quebec government could unilaterally discontinue an expropriation, or whether it needed to comply with new legislation requiring approval of the Expropriation Tribunal. The Court found that, at the time the new legislation was passed, one of the elements required for the discontinuation to be authorized under the former legislation (non-payment of an indemnity) was still ongoing, and the intention to discontinue had not yet been formulated. Therefore, the Amended Regulation was given immediate effect and the government's unilateral discontinuance of the expropriation was disallowed.

In the present case, the Amended Regulation renders applicants eligible for permanent residence as a consequence of the following facts: a) entering Canada as a live-in caregiver; b) completing 24 months of authorized employment; and c) applying for permanent residence. In the case of a LCP applicant who remains in Canada and makes an application for permanent residence after April 1, 2010, the Amended Regulation should be given immediate effect, following *Attorney General of Quebec v. Expropriation Tribunal*.

The FAQ alleges that a caregiver who entered the LCP more than 39 months prior to April 1, 2010 was "not holding a valid work permit in the LCP" when the Amended Regulation came into effect, even though she remained in Canada beyond this date with authorization to work as a live-in caregiver. Nothing in the Former Regulation or the Amended Regulation supports this interpretation. Both versions of the Regulation stipulate a time frame within which live-in

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3 R.S.C. 1985 c.I21

4 Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, Fourth Edition, (Markham: Butterworths, 2002), 557.

caregivers must accumulate work experience to qualify for permanent residence in the live-in caregiver class. Neither version indicates that live-in caregivers who remain in Canada beyond the qualifying period are automatically "outside" the LCP, or that they might become disqualified for permanent residence solely because they have remained in Canada beyond 39 months of their admission to the LCP.

Policy Concerns with CIC's Interpretation

The purpose of the Amended Regulation, as described in the RIAS, was to liberalize the live-in caregiver class eligibility criteria, ensuring that worthy applicants would not be deprived permanent residence by reason of pregnancy, illness or other circumstances beyond the applicant's control. Given the ameliorative intent of the amendment, it would be incongruous to arbitrarily limit the application of the law as specified in the FAQ.

Four-Year Cap on Temporary Foreign Workers

In keeping with the CBA Section's December 2009 and January 2010 submissions,[5] we ask that LCP workers be exempted from the four-year cap contemplated by s.200(3)(g) of the TFW Amendment.

At present, live-in caregiver class applicants face processing delays of eight to nine months before approval-in-principle, with further delays (often spanning several years) before landing is finalized. Given that it takes a minimum of 22 months to qualify for permanent residence in the live-in caregiver class, LCP workers rarely achieve landing within four years of their admission to Canada. If live-in caregiver class applicants are subject to the four-year cap, the majority will lose status and become non-compliant with the requirements set out in s.113(1)(b) and (c) of the Amended Regulation before CIC can process their application.

If the stated purpose in enacting the Amended Regulation is to be realized, it is essential that *all LCP workers* who qualify for landing within four years of their admission to the LCP be exempt from s.200(3)(g) of the TFW Amendment. Specifically, we recommend that LCP workers seeking to remain in Canada beyond four years of their admission be granted an extension if they can demonstrate that they have applied for landing in the live-in caregiver class.

Conclusion

The CBA Section is of the view that the application of the Amended Regulation should not be confined as envisioned by the FAQ, and requests that you amend the website accordingly. Further, we ask that LCP workers be exempt from the four-year cap contained in the TFW Amendment. We look forward to hearing from you on these points.

Yours truly,

(original signed by Chantal Arsenault)

Chantal Arsenault
Chair, National Citizenship and Immigration Law Section

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5 "Immigration and Refugee Protection Regulations (Temporary Foreign Workers)," online: http://www.cba.org/CBA/submissions/pdf/09-66-eng.pdf; Letter to Maia Welbourne, "Amendments to the Immigration and Refugee Protection Regulations (Live-in Caregiver Program), Canada Gazette, Part 1, December 19, 2009," online: http://www.cba.org/CBA/submissions/pdf/10-01-eng.pdf.