THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

Entrée express

SECTION NATIONALE DU DROIT DE L'IMMIGRATION
ASSOCIATION DU BARREAU CANADIEN

Décembre 2014

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AVANT-PROPOS

L'Association du Barreau canadien est une association nationale qui représente 36 000 juristes, dont des avocats, des notaires, des professeurs de droit et des étudiants en droit dans l'ensemble du Canada. Les principaux objectifs de l'Association comprennent l'amélioration du droit et de l'administration de la justice.

Le présent mémoire a été préparé par la Section nationale du droit de l'immigration de l'Association du Barreau canadien, avec l'aide de la Direction de la législation et de la réforme du droit du bureau national. Ce mémoire a été examiné par le Comité de la législation et de la réforme du droit et approuvé à titre de déclaration publique de la Section nationale du droit de l'immigration de l'Association du Barreau canadien.

TABLE DES MATIÈRES

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I. INTRODUCTION

La Section nationale du droit de l'immigration de l'Association du Barreau canadien (Section de l'ABC), offre les commentaires et recommandations suivants au sujet des Instructions ministérielles sur la gestion de certaines demandes de résidence permanente (RP) présentées au titre de la catégorie économique (IM 15); instructions publiées le lundi 1er décembre 2014 dans la Gazette du Canada, Partie I.

Les IM 15 présentent en détail le nouveau système d'Entrée express (EE) exigeant de toute personne qui cherche à obtenir le statut de résidant permanent (RP) en se fondant sur les catégories existantes suivantes : la catégorie de l'expérience canadienne (CEC) ainsi que celles des travailleurs qualifiés (fédéral) et des travailleurs de métiers spécialisés (fédéral) de déposer une demande, qui soit être subséquemment accordée, d'invitation à présenter une demande de résidence permanente avant de pouvoir faire une demande de RP ou que celle-ci puisse être examinée. Les personnes qui ne reçoivent pas d'invitation à présenter une demande de résidence permanente ne peuvent ni présenter, ni faire traiter leurs demandes, sans égard à leur conformité avec toutes les exigences prévues par la réglementation pour ces catégories. L'exigence d'une invitation à présenter une demande de résidence permanente imposée en vertu du système d'Entrée express s'appliquera en outre aux personnes qui souhaitent être sélectionnées dans le cadre du volet d'Entrée express des programmes des candidats des provinces actuellement en cours d'élaboration par les gouvernement provinciaux.

Dans des séminaires, communiqués de presse, communications sur son site Web, Citoyenneté et Immigration (CIC) affirme que le système d'EE se traduira par une « expérience plus conviviale » permettant un traitement plus rapide des demandes et « facilitant la tâche » aux employeurs qui se tournent vers d'autres pays afin trouver des candidats compétents pour doter des postes qu'aucun citoyen canadien ou RP n'est qualifié pour occuper[1].

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[1] Voir par exemple, les webinaires suivants organisés par CIC par l'entremise de l'ABC, du Conseil des technologies de l'information et des communications et du Canadian Employee Relocation Council (deux dernier liens uniquement en anglais).

La Section de l'ABC est favorable à l'accélération du processus de RP et au fait qu'il tiendra mieux compte des besoins du marché canadien de la main-d'œuvre à court et à long terme, ainsi que de ses intérêts économiques et commerciaux. La réduction du temps de traitement des demandes de RP à moins de six mois est une évolution très appréciée tant pour les employeurs canadiens que pour les personnes qui prétendent au statut de RP. Cependant, nous avons de graves préoccupations au sujet de certains éléments essentiels du processus d'EE et présentons des recommandations pour y remédier.

II. OVERVIEW OF EE AND ITS USE OF LMIAS

Some applicants may benefit from faster processing times, but this will not be the case for all. Many applicants may languish in the EE pool for a year without ever receiving an ITA. Others may receive the invitation after delays of nine months or more. These applicants will include those with university credentials and professional accreditation, histories of successful schooling and employment in Canada and employers supporting their application with genuine offers of permanent employment in skilled worker applications. Applicants who would succeed now with PR applications in existing CEC, FSW or FST classes may not obtain an ITA under the EE system, and therefore be unable to apply for PR status. Alternatively, the ITA may be delayed for a year or more, to the detriment of their continuity of employment in Canada.

Employers seeking to support valued employees' PR applications may not find EE user-friendly. ITAs will be issued on the basis of ranking scores (CRS) awarded to candidates in the EE pool. MI 15 heavily weights these scores to favour candidates whose offers of employment are supported by Labour Market Impact Assessments (LMIAs). Candidates with LMIAs will be far more likely to receive an ITA given their ability to score up to 1200 points on the CRS system, where candidates without LMIAs will never be able to score above 600.

While the need for an LMIA can be avoided by obtaining a PNP EE stream nomination, only limited numbers are available in each provincial program, and the PNP criteria and processing times are not consistent. Employers will be driven to LMIA issuance to ensure that their support for the employee will result in a timely ITA.

The CBA Section does not support the EE requirement that those seeking 600 points for a job offer must have an LMIA approval or PNP nomination, or the requirement that valid LMIA-exempt work permit holders must obtain LMIA approval if they wish to apply for landing in the economic class. The LMIA requirement will not be a burden for all employers, but it will be an

inappropriate burden for some, particularly where employees have been placed for years through LMIA-exempt work permits, or where the nature of the position and the LMIA application process place unreasonable requirements on both employer and employee. Employers are being driven to a difficult and unnecessary process of obtaining LMIAs to validate job offers that can be informal or not required at all in the economic categories.

The focus on LMIAs in EE follows a series of concerted efforts by ESDC and CIC to wean employers off the LMIA system and encourage transitioning temporary foreign workers to PRs. However, EE will make this transition more onerous for those who have already invested significantly in their employee's recruitment, relocation, training and development. Likewise, the lack of predictability of the ITA selection process has created new impediments to retention of those who have already proven their value and capacity to integrate successfully.

Accordingly, our comments below focus on the EE use of LMIAs. In our comments below, we first discuss in further detail the heavy weighting of LMIAs in the EE process and its effect of indirectly amending the requirements under the CEC, FSW and FST classes and of requiring LMIAs in inappropriate cases. Second, we address specifically the inappropriateness of the EE LMIA requirement in cases of existing employment of certain LMIA-exempt work permit holders, and make recommendations for correcting what we believe are inappropriate requirements for LMIAs. Third, we provide the basis for our conclusion that MI 15 s. 5(1)(b)(i) and (ii), concerning eligibility for ITAs, was drafted in error and recommend that these provisions be deleted. Last, we make additional comments and recommendations concerning the Authorized Representative portal to the EE process and "bridging" work permits to ensure continuity of employment during the application process.

III. INVITATION TO APPLY AND REQUIREMENT FOR LMIAS

CIC has promoted the EE system as a tool for managing the processing of PR applications and not as an amendment to the requirements of the CEC, FSW and FST economic class categories. However, the CRS is weighted in favour of LMIAs and the process for ITA issuance makes the obtaining of an LMIA (or eligible PNP nomination) virtually essential. While the CEC, FSW and FST requirements have not been directly revised, they have been amended indirectly to require the obtaining an LMIA as a condition of access to these categories. In drawing this conclusion, we rely on the following:

- ITAs will be issued with reference to the CRS score given to candidates in the EE pool. The CRS matrix allows for a maximum of 600 points in

Human Capital and Transferability factors, without an LMIA or eligible PNP nomination. A candidate with an LMIA obtains an additional 600 points, regardless of their Human Capital and Transferability points. Under the current CRS, a candidate with an LMIA will always have a higher score than a candidate without an LMIA, and will be certain of an early issuance of an ITA.

- CIC advised at the November 2014 Citizenship and Immigration Canada and Immigration Practitioners (CICIP) meeting and in outreach seminars that candidates may still be able to obtain ITAs solely on the basis of their human capital and transferability points. CIC refers to the fact that last year only a minority (1200) of selected economic category applicants had offers of employment supported by LMOs, and that CIC will still have to meet selection targets – necessitating selection of non-LMIA candidates from the EE pool. We question this assurance. CEC and certain FSW applicants did not need LMOs/LMIAs to access the application process or meet selection requirements. The EE now gives priority issuance of ITAs to persons with LMIAs. This priority will drive employers and candidates to seek LMIAs that previously were unnecessary. Persons without LMIAs will fall farther and farther behind in the ranking for ITA issuance.
- Delays in ITA issuance will jeopardize the continuity of work permits and will pressure employers to seek LMIAs to avoid loss of key employees.
- The requirement for non-LMIA candidates to register on Job Bank while awaiting an ITA (MI s.5(1)(c) will pressure employers to seek LMIAs to avoid inappropriate recruiting of their employees by other employers (discussed further below).

Ministerial Instructions are meant to be an administrative tool. There is concern amongst our members that use of LMIAs as a requirement for selection from the EE pool is a substantive change and effectively an amendment of the CEC, FSW and FST criteria and regulations through Ministerial Instructions. Denying processing of applicants who meet the regulatory requirements for the economic classes will likely be the subject of a court challenge.

At the least, the current EE system necessitates obtaining LMIAs in inappropriate cases. This can be corrected by our recommended changes to the CRS scoring system, and for ESDC variations in requirements for LMIAs, outlined at the end of the next section.

IV. LMIAS AND LMIA-EXEMPT WORK PERMIT EMPLOYEES.

The EE LMIA requirement is inappropriate in cases of existing employment of certain LMIA-exempt work permit holders. This includes professionals under free trade agreements (NAFTA, Canada-Chile FTA and others), intra-company transfers (ICT) under FTAs (s.204(a) of the *Immigration and Refugee Protection Act Regulations*) and general ICT provisions (*Regulation*

s.205(a)), specialty positions such as Canada Research Chairs (CRC), Canada Excellence Research Chairs (CERC) and postdoctoral work permits (*Regulation* s.205(c)), and persons employed through the Significant Benefit Category (C10, *Regulation* s.205(a)).

Professionals and ICT workers are typically individuals with very high level credentials, including postsecondary education, professional accreditation and specialized work experience. They have also typically been engaged in employment with the Canadian employer for a lengthy period (up to five years and more) and have long-standing employment relationships with the corporate family of companies. These individuals may occupy senior management and executive positions (NOC 0) or professional occupations (NOC A) and their permanent placement ensures continued economic benefit to the employer and maintenance of business operations, as well as employment of Canadians and PRs in Canada. For companies looking to invest in Canadian operations and expand the employment of Canadians, a message that their key employees or executives will not be welcomed on a permanent basis acts as a deterrent and costs, rather than protects, Canadian jobs.

Persons employed through the Significant Benefit Category or through CRC, CERC and postdoctoral or research award work permits are recognized for exceptional achievement, outstanding artistic ability, contributions or research by peers, governmental organizations, professional and business association, or Canadian universities. The requirements for selection or nomination from abroad can be exceptionally rigorous and the social, cultural, economic and academic benefits are compelling. Collectively, these individuals are clearly and demonstrably suited for permanent establishment in Canada and could qualify under a number of economic class categories. Until the introduction of EE, LMIAs were not required to support their employment or facilitate their PR applications. Under EE, these individuals cannot be assured of receiving an ITA without an LMIA. Consequently, a retail sales supervisor earning $40,000 per annum with an LMIA will be issued an ITA before a CEO with six years' experience working for a major Canadian corporate employer and earning $300,000 per annum, or before a renowned PhD holder with recognized academic excellence and advanced expertise.

Requiring employers of these LMIA-exempt work permit holders to obtain LMIAs to support genuine offers of employment with associated economic, social, academic or cultural benefit is not appropriate. The current ESDC policies for LMIAs require the employer to advertise for candidates nationally and publicly through multiple media, apply to Service Canada for assessment of whether the employer has made adequate efforts to recruit Canadian or PRs for the position, and justify the need for placement of the foreign national. The advertising must

include details of the corporate business and the position being sought. The application requires the employer to detail all responses from Canadians and PRs, and reasons why each of them was unsuitable for the position.

It is insensitive to corporate realities to expect corporate employers to advertise for candidates for placement to executive or senior management or specialized knowledge positions already occupied by qualified and longstanding personnel that the company has no desire to replace. Indeed, even advertising (let alone, replacing these personnel) may carry significant negative consequences to the economic well-being of the company and to Canadian employees. It is also unreasonable to require universities to advertise for replacement of academics in Research Chair positions, when the intent is to support the permanent employment of these particularly exceptional individuals. The idea that these individuals can be replaced through Job Bank internet advertising is not tenable.

Further, requiring employers to advertise for candidates for a position already occupied by an employee under contract, or requiring contracted employees to register on the Job Bank as seeking alternate employment may constitute improper interference with a valid and subsisting employment relationship. The requirement for employees to actively seek a job offer while in the pool, when they are legally authorized to work in Canada for a specified employer, undermines the employee/employer relationship. It may result in a competitor of the existing employer poaching the employee, and result in the loss of the existing employer's investment in the development and relocation of the employee.

MI 15 does not sufficiently recognize the value of these candidates for PR status, nor that requiring an LMIA to ensure ITA might be inappropriate in some cases. This can be corrected by changes to the CRS scoring system or through ESDC policy to facilitate issuance of LMIAs in appropriate applications for LMIA-exempt work permit holders.

RECOMMENDATIONS:

1. **That the CRS matrix be amended to provide points equivalent to LMIA possession for candidates with intra-company transferee (Regulations s.205 or s.204), treaty professional (Regulation s.204) or C10 Significant Benefit Category work permits employed in Canada by the employers named in the work permit who has provided them with informal, genuine offers of permanent employment.**

2. **That the CRS matrix be amended to provide points equivalent to LMIA possession, for candidates with Research Chair or Immigration Manual C44 postdoctoral or research award LMIA-exempt work permits and offers of permanent employment by the university or postsecondary institution named in the work permit.**

3. **Alternatively, that obtaining LMIAs by these employers be facilitated by Service Canada waiving the advertising and recruitment requirement for employees employed by and with offers of permanent employment from employers named in intra-company transferee (Regulations s.205 or s.204),treaty professional (Regulation s.204), C10 Significant Benefit Category, Research Chair or C44 postdoctoral/research award work permits.**

V. MINISTERIAL INSTRUCTIONS – SECTION 5(1)(b)(i) & (ii)

MI 15 s. 5(1)(b)(i) and (ii), concerning eligibility for ITAs, state:

> 5. (1) In order to be eligible to be issued an invitation, a foreign national must
>
> …
>
> (b) meet the requirements of
>
> (i) subparagraph 82(2)(c)(ii) of the Regulations, if they are a foreign national referred to in paragraph 82(2)(b); or
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> (ii) clause 87.2(3)(d)(iv)(B) of the Regulations, if they are a foreign national referred to in subparagraph 87.2(3)(d)(iii).

The CBA Section believes these provisions were drafted in error and should be deleted from the Ministerial Instructions, for the following reasons:

- *Regulation* s.82(2)(b) and s. 87.2(3)(d)(iii) concern persons in Canada with LMIA-exempt work permits issued under *Regulations* s.204(a) or (c). These are principally persons with NAFTA, or other FTA agreement permits, and would include professionals and intra-company transferees;[2]
- MI 15 5(1)(b) says that these persons can only be issued an invitation if they meet the requirements of *Regulations* s.82(2)(c)(ii) or s.87.2(3)(d)(iv)(B).

[2] *Regulations* s. 82(2)(b) and s.87.2(3)(d)(iii) each refer to persons in Canada holding a work permits "referred to in paragraph 204(a) or (c)." Subsection 204(c) refers to work permits issued under a federal-provincial agreement, and would include work permits supported as a consequence of regular Provincial Nomination.

Each regulation refers to the requirement of holding a LMIA (an s.203 opinion).

Thus, this mandates that persons holding NAFTA (or similar treaty) professional or intra-company transferee work permits cannot receive an ITA without an LMIA. This is contrary to the Questions and Answers[3] issued concurrently with MI 15, and is contrary to CIC advice at employer seminars and in CICIP meeting with authorized representative groups, where it was expressly stated that LMIAs were not mandatory for entry into the pool or for selection for ITA.

The LMIA requirement is also inconsistent with the requirements for the FSW or FST classes in the *Regulations*. The FSW and FST classes do not require s. 204 work permit holders in Canada to obtain an LMIA to qualify in the class. They can rely on an informal offer.[4] The s. 203 opinion is only required in either class if the person is outside of Canada, to formalize an offer of future employment. Similarly, a s. 204(a) or s. 204(c) work permit holder does not require an LMIA if they meet the requirements for the CEC class. Under EE, an LMIA may well be required by many before they can obtain an ITA for landing in the FSW or FST classes.

If these provisions were intended to be interpreted differently than our interpretation, this should be stated plainly. If the above interpretation was intended, they should be deleted.

RECOMMENDATION:

4. **That s.5(1)(b) be deleted.**

VI. EE PORTAL FOR AUTHORIZED REPRESENTATIVES

The CBA Section has asked for confirmation that there will be a Representatives' EE portal, similar to that now available to submit online work permit applications. An EE portal would facilitate counsel submitting and updating of client profiles, receipt of the ITA and submission of the electronic PR application. We have been assured by CIC that a portal will be provided, but have not received confirmation that it will be ready concurrently with the EE launch.

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3 Citizenship and Immigration Canada, "Notice – Express Entry questions and answers" (December 1, 2014)**: 33. Do I need a job offer to get into the Express Entry pool?** If you meet the criteria of one of the economic immigration programs subject to Express Entry, you will be accepted into the Express Entry pool. A job offer supported by a Labour Market Impact Assessment (LMIA) from an employer in Canada is a significant asset, but not a requirement.

4 See *Regulations* s.82(2)(b) and s.87.2(3)(d)(iii)

Availability of a Representatives' EE portal is important to clients and to CIC. The period of inadmissibility for applicants found to have made misrepresentations on their applications has recently been extended to five years. The CRS and ITA criteria, limited time frame for application submission, requirements for Job Bank registration and issues of work permit continuity are all matters that can have significant impact on employers' and applicants' EE participation and for which authorized representatives have responsibility.

RECOMMENDATION:

5. **That a Representatives' Portal be concurrently implemented with the EE program, or alternately, that the launch of EE be delayed until the Representatives' portal is fully functional. The portal should permit authorized representatives to fully participate on behalf of employer or applicant clients. The portal should include the ability to submit and update client profiles, to receive ITAs and to submit PR applications.**

VII. BRIDGING WORK PERMITS

CIC has advised that bridging work permits will continue to be available, but that applicants will not be eligible to apply for the bridging work permit until the PR application has been submitted and has received approval in principle. The current policy is for bridging work permits to be available on acknowledgement of filing the Economic Class application.

Eligibility for bridging work permits should be shortened to the date of the ITA, or at latest, the acknowledgement of receipt of PR application. The uncertainty of waiting for an ITA for up to 12 months jeopardizes the ability of applicant to maintain seamless authorization for employment, particularly where LMIAs are solely for the purpose of supporting the PR application. Awaiting approval in principle imposes an undue delay of eligibility for bridging work permit.

RECOMMENDATION:

6. **That the eligibility for bridging work permit be shortened to the date of the ITA, or at latest, with proof that the PR application has been submitted.**

VIII. STUDENTS WITH LMIA-EXEMPT POST-GRADUATE WORK PERMITS

The EE program is unlikely to assist Post-Graduate Employment Work Permit (PGWP) holders. These individuals will not likely have sufficient Human Capital and Transferability points to justify ITA without a LMIA. They are also unlikely to qualify for LMIAs. PGWP holders were previously eligible for LMIAs with waiver of advertising if an employer was offering permanent employment. That waiver was removed in April 2014.

The overhaul of the Foreign Worker Program in June 2014 imposed new salary requirements and a more rigorous assessment of availability of Canadian or PR applicants for advertised employment. A PGWP holder who is a recent graduate from Canadian university is unlikely to obtain an LMIA in support of a work permit or in support of a permanent offer of employment.

CIC representatives have stated clearly that there is a policy shift for foreign students graduating from Canadian postsecondary institutions. There is no longer to be a smooth passage to PR status.

In light of the fact that Canadian universities and other postgraduate institutions have aggressively recruited foreign students to Canada with the enticement of progression to PR status, we recommend that CIC clearly and promptly notify these institutions that the EE program will not support most PGWP holders and that easy progression of foreign students in Canada to PR status is no longer supported by government policy.

RECOMMENDATION:

7. **That CIC clearly notify designated postsecondary institutions that the EE program will not support most PGWP holders and that easy progression of foreign students in Canada to PR status is no longer supported by government policy.**

IX. CONCLUSION AND SUMMARY OF RECOMMENDATIONS

For the last three years, Canada's Immigration Ministers have touted EE as a system engineered to attract and retain the "best and the brightest" new immigrants to Canada.[5] At the

[5] Citizenship and Immigration Canada, "Speaking notes for The Honourable Jason Kenney, P.C., M.P. Minister of Citizenship, Immigration and Multiculturalism: On "Moving Towards a Targeted, Fast and Efficient Immigration System focusing on Jobs, Growth and Prosperity" to the Surrey Board of Trade," (June 26, 2012); "Backgrounder — Expression of Interest (EOI): Preparing for Success in 2015" (October 28, 2013); 'Speaking notes for Chris Alexander, Minister of Citizenship and Immigration" (November 21, 2013).

same time, Ministers Kenney and Alexander have routinely remarked that the LMIA scheme for employment of foreign workers is intended to be a system of limited and last resort[6]. In our view, it is unreasonable to tie the PR triage mechanism designed to attract and retain the "best and brightest" to a separate system designed with the contrary objective of filling critical labour market shortages on a temporary basis.

The key reason for our concern is that MI 15 has been written to preclude those recognized by domestic law or international treaty as being so uniquely suited for work in Canada that their employment is sanctioned even in the absence of an LMIA approval. We question why those chosen for special treatment under the Temporary Foreign Workers program are now deemed less deserving of permanent residence. In our view, granting points only to those with "job offers" (in the form of LMIA approval or PNP nomination certificate) will work to the detriment of many who are most deserving of the "best and the brightest" designation.

Our recommendations are:

1. **That the CRS matrix be amended to provide points equivalent to LMIA possession for candidates with intra-company transferee (*Regulations* s.205 or s.204), treaty professional (*Regulation* s.204) or C10 Significant Benefit Category work permits employed in Canada by the employers named in the work permit who has provided them with informal, genuine offers of permanent employment.**
2. **That the CRS matrix be amended to provide points equivalent to LMIA possession, for candidates with Research Chair or Immigration Manual C44 postdoctoral or research award LMIA-exempt work permits and offers of permanent employment by the university or postsecondary institution named in the work permit.**
3. **Alternatively, that obtaining LMIAs by these employers be facilitated by Service Canada waiving the advertising and recruitment requirement for employees employed by and with offers of permanent employment from**

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6 Employment and Social Development Canada, "New Requirements for Employer Compliance" (October 15, 2014); Employment and Social Development Canada, "Overhauling the Temporary Foreign Worker Program" (July 21, 2014); Citizenship and Immigration Canada, "Reducing the Length of Time a Temporary Foreign Worker can Work in Canada" (September 30, 2014); Citizenship and Immigration Canada, *2014 Annual Report to Parliament on Immigration* (October 2014).

employers named in intra-company transferee (*Regulations* s.205 or s.204),treaty professional (*Regulation* s.204), C10 Significant Benefit Category, Research Chair or C44 postdoctoral/research award work permits.

4. **That s.5(1)(b) be deleted.**
5. **That a Representatives' Portal be concurrently implemented with the EE program, or alternately, that the launch of EE be delayed until the Representatives' portal is fully functional. The portal should permit authorized representatives to fully participate on behalf of employer or applicant clients. The portal should include the ability to submit and update client profiles, to receive ITAs and to submit PR applications.**
6. **That the eligibility for bridging work permit be shortened to the date of the ITA, or at latest, with proof that the PR application has been submitted.**
7. **That CIC clearly notify designated postsecondary institutions that the EE program will not support most PGWP holders and that easy progression of foreign students in Canada to PR status is no longer supported by government policy.**

We would welcome the opportunity to engage in further discussions about the recommendations contained in this letter.