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Via email: david.manicom@cic.gc.ca; James.McNamee.@cic.gc.ca

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Dear Messrs. Manicom and McNamee:

Re: December 2014 communication from David Manicom "Express Entry Instructions – Section 5(1)(b)"

I am writing on behalf of the CBA Immigration Law Section (the CBA Section) in response to the communication sent to several of our members from Mr. Manicom on December 12 and 15, explaining the application of Ministerial Instruction 15, s. 5(1)(b).

On December 12, the CBA Section sent you an extensive submission on the Express Entry Ministerial Instructions. A primary focus is the requirement for LMIAs before workers holding LMIA-exempt work permits can effectively access Express Entry processing. Other issues include the interpretation and application of MI s. 5(1)(b), a Representative portal for EE processing, eligibility for bridging work permits and the inability of PGWP holders to access the permanent resident stream.

We trust these concerns will be addressed by CIC, but we wish to immediately acknowledge the comments and explanation of government intent on MI s. 5(1)(b) from Mr. Manicom. The explanation of intent is very helpful. However, we wish to be sure of our understanding of the government intent of MI s. 5(1)(b) application.

We provide below five fact patterns and our understanding of how each would be dealt with under the Express Entry Instructions. We would appreciate your comments on each, to confirm or correct our understanding.

(Note: The MI s. 5(1) rule applies to both 204a (Treaty professionals and ICTs, including NAFTA) and 204c (Provincial/Federal Agreement LMIA-exempt WP). For simplicity, references to Treaty ICT WP holders also apply to any treaty professional and to Provincial/Federal Agreement workers as applicable. Similarly, I refer to FSW applications, but could also refer to equivalent FST class applications, as applicable.)

Example 1: A Treaty ICT has been in Canada for less than one year and wants to enter EE on the basis of an FSW class. There is no LMIA. The applicant has 67 points without relying on any points for arranged employment.

Our understanding: The Treaty ICT can enter the pool. They meet the requirements for the FSW class without relying on arranged employment points, so no LMIA is needed to submit the profile.

An ITA does not require a LMIA, but the candidate will have to rely on good CRS Human Capital and Transferability points, and no bonus points for LMIA or PNP EE nomination. It will have to be a deep scoop to fish them out of the pool, and no competition from LMIA holders. (para. 6 Manicom message).

The candidate also has the option of pursuing a provincial EE nomination or regular nomination, depending on provincial criteria.

Example 2: A Treaty ICT has been in Canada for less than one year, and wants to enter EE on the basis of FSW class. There is no LMIA, but the worker has an informal offer of arranged employment. The candidate has more than 67 points, relying on 15 total points from the arranged employment points.

Our understanding: The candidate cannot enter the pool, and would not be given an ITA if they did enter the pool.

The informal arranged employment points cannot count to meet the FSW requirement of 67 points. An LMIA is required for the arranged employment points to be counted, even just to show meeting the requirements of the class.

But, if the candidate's employer obtained an LMIA they could count the points, enter the pool and be selected for ITA. (paras. 5, 6 Manicom message)

The candidate also has the possible option of pursuing a provincial EE nomination or regular nomination, depending on provincial criteria.

Example 3: A Treaty ICT has been in Canada for more than one year, employed by the same employer, who informally offers permanent employment. There is no LMIA and the candidate needs arranged employment points to meet 67 points under FSW.

Our understanding: The Treaty ICT can enter the pool, not because of meeting the requirements of FSW, but on the basis of meeting requirements of CEC (assuming they have language test results). The candidate is not relying on the FSW offer of employment, so no LMIA is needed.

The Treaty ICT can receive an ITA based on Human Capital and Transferability points and a low scoop. If the employer obtained an LMIA, the bonus 600 CRS score would be awarded and the candidate issued an ITA for the FSW or CEC class.

This answer also applies to any work permit situation – ICT, Treaty, IEC, spousal, PGWP – where the candidate has worked for one year and has the language test to support CEC application.
The candidate also has the possible option of pursuing a provincial EE nomination or regular nomination, depending on provincial criteria.

Example 4: A non-treaty ICT (or IEC, PGWP etc.) permit holder is in Canada for less than one year and working full time for a Canadian employer. The employer has obtained subsequent LMIA to support an offer of employment and application for permanent residence.

The possibilities for this situation are not clear.

Possible understanding 1: The candidate cannot enter the pool because they do not meet the requirements of any of the three economic classes. They have not worked for one year so CEC doesn't apply. They don't have a work permit issued by LMIA or an r. 204 work permit, so FSW/FST can't apply.

The candidate must either:

- wait for one year until CEC requirements are met; or
- use the LMIA to obtain a work permit issued under r. 203 and then the FSW/FST categories are available (assuming point requirements are met).

Possible understanding 2: This candidate can enter the pool using the LMIA and initial work permit, because the CIC interpretation is that the initial work permit and subsequent LMIA meet the requirements for arranged employment and eligibility for the FSW class (assuming other requirements are met – points, etc.).

The candidate does not need to wait one year, unless they wish to await CEC eligibility.

The candidate also has the possible option of pursuing a provincial EE nomination or regular nomination, depending on provincial criteria.

Example 5: A person in Canada with a LMIA supported work permit enters the Express Entry pool, looking at CEC requirements as they have one year's employment. The person is issued an ITA for the CEC category. By the time their application is made, the work permit has expired and not been renewed. The person is no longer employed and no longer holds an LMIA supported work permit.

This scenario arises from IRPA s.11.2 coming into force with Express Entry:

> Visa or other document not to be issued
> 11.2 An officer may not issue a visa or other document in respect of an application for permanent residence to a foreign national who was issued an invitation under Division 0.1 to make that application if — at the time the invitation was issued or at the time the officer received their application — the foreign national did not meet the criteria set out in an instruction given under paragraph 10.3(1)(e) or did not have the qualifications on the basis of which they were ranked under an instruction given under paragraph 10.3(1)(h) and were issued the invitation.

The person would not now qualify for the CRS 600 pts for LMIA work permit. Is the application refused? How would it differ if the applicant was invited to apply for FSW class?

Lastly, we would appreciate your comments on the elimination of Occupational Lists. This has been stated by the Express Entry Ambassador as the intent on implementation of the Express Entry

program. MI 12 of April 26, 2014 is being repealed on January 1, 2015. MI 12 sets occupation lists for the FSW stream (occupations that don't need arranged employment points), FST trade occupation lists and CEC lists of ineligible occupations, as well as providing for quotas for classes and listed occupations.

Are all of these lists being eliminated? If not, which ones and to what end in the Express Entry processing?

Thank you for your attention to these questions and your anticipated reply. We will distribute your answers to our members on receipt.

Yours truly,

(original signed by Tamra Thomson for Deanna Okun-Nachoff)

Deanna Okun-Nachoff
Chair, Immigration Law Section