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Via email: Matthew.Graham@cic.gc.ca

Matthew Graham
Acting Director
Citizenship and Immigration
Immigration Branch
Economic Immigration Policy and Programs Division
365 Laurier Avenue West
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Dear Mr. Graham:

Re: Proposed Amendments to the Live-in Caregiver Program

I write on behalf of the National Immigration Law Section of the Canadian Bar Association (the CBA Section). The CBA is a national association of over 37,000 lawyers, notaries, students and law teachers, with a mandate to promote improvements in the law and the administration of justice. The CBA Section comprises lawyers whose practices embrace all aspects of immigration and refugee law.

This letter responds to the October 31, 2014 announced changes to the Live-in Caregiver Program (the Program), to be instituted 30 November 2014.[1] We applaud the government for introducing policy reform to mitigate the hardship faced by workers in the Program. We believe that many aspects of the anticipated policy change will serve this laudable policy goal, but have concerns about the policy being introduced by Ministerial Instruction. We are also concerned that the plans for transitioning into the new "Caregiver Program" might inadvertently cause greater hardship for those who have been admitted to Canada under the existing regulatory scheme. Our concerns are set out in more detail below.

Policy Reform by Ministerial Instruction

The CBA Section opposes the use of Ministerial Instruction as a means of introducing significant change to immigration eligibility criteria, particularly when the change involves vulnerable

[1] Government of Canada, News Release, "Improving Canada's Caregiver Program"; Backgrounder, "Improving Canada's Caregiver Program."

communities.[2] Changes to the Program will affect a large community of workers whom CIC has acknowledged face unique vulnerabilities in Canada. Although we anticipate that caregivers will generally welcome the new Caregiver Program as an improvement, some of the proposed changes will complicate an already complicated workplace dynamic for those admitted to Canada under the existing Program. Since CIC has already committed to rolling out the new program on November 30, we would welcome the opportunity to participate in a consultation, along with other stakeholders, approximately three months after the launch to report on any issues arising from the transition plan from a front-line perspective, and to discuss how those issues might be addressed.

Further, public information about the new Caregiver Program has been imperfect, incomplete and even contradictory. For instance, the CIC Backgrounder indicates that the Child Care Provider stream under the new Caregiver Program will be capped at 2,750 cases per annum, but has no quota for the High Medical Needs stream. By contrast, the News Release with the Backgrounder indicates that both streams under the new program will be capped at 2,750 per annum, for a total of 5,500 applicants per year. When we contacted your office for clarification on the caps, we were advised that the quotas will be used to limit admissions at the front end of the process – i.e. that only 2,750 new workers will be admitted to the new program per year after November 30. However, the Chief of Staff tweeted on November 11 that there would be "no limit to LMIAs at the front end. 2750 is max # of principal app PR admissions for each pathway announced."

These matters will no doubt be clarified once the new rules are published. However, this lack of clarity may have detracted from the ameliorative intent of the policy shift. It has caused many workers to fear that they will not be able to regularize their status as permanent residents even after completing the program criteria. These workers have spent years living apart from their families, having gone abroad with the goal of earning their right to permanent residence in Canada.

Caps on the Numbers of Applicants in the Two Streams

We believe the 5,500 application cap should be applied at the intake stage to ensure that CIC admits only as many caregivers as they intend to grant permanent residence. This approach would eliminate hardship to caregivers who enter Canada and meet the eligibility criteria, but cannot then obtain permanent residence solely because the annual cap has been reached. The caps must be responsive to genuine labour market need, and those who are admitted and qualify under the program terms must have a right to permanent residence, not just an opportunity to apply. It would be particularly unfair to applicants who came to Canada under the existing Program to be prohibited from entering the permanent residence queue due to changes made well after their admission to Canada.

Most caregivers will be subject to an overall four-year limitation on work permit issuance (with the exception of the Registered Nurses and Registered Psychiatric nurses under the High Medical Needs pathway). If the caps are applied at the permanent residence stage, many will lose temporary resident status while waiting to be accepted into the permanent residence processing queue.

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[2] See, for instance, our February 2008 submission to the Commons Committee on Citizenship and Immigration on Bill C-17 (vulnerable foreign nationals); our May 2012 letter to Commons Committee on Finance and the Senate Committee on National Finance on Bill C-38 (federal skilled worker backlog and ministerial instructions), our November 2013 submission to the Senate Foreign Affairs and International Trade Committee and the Commons Committee on Citizenship and Immigration (Expression of Interest and Ministerial Instructions for the Canadian Experience Class); and the CBA's 2012 Resolution on Ministerial Instructions.

We recommend that caregivers currently in Canada, whether under initial work permit status or with pending permanent residence applications, be "grandfathered" under the previous Program criteria and not be subject to new criteria such as caps, educational requirements or language proficiency.

Elimination of the Live-In Requirement

The CBA Section welcomes the government's decision to eliminate the requirement for caregivers to live in the homes of their employers and agrees with the stated reasons for doing so, namely to reduce caregivers' vulnerability to abuse and exploitation and reduce distortion of the labour market value of the work done by caregivers.

While eliminating the live-in requirement is a positive development, the CBA Section has concerns about the way the government plans to implement the changes. In particular, granting the right to live out to new caregivers entering the program after November 30, while requiring existing live-in caregivers to obtain new work permits and Labour Market Impact Assessments (LMIAs) to receive the same right will create two tiers of caregivers, each with different rights and obligations. Caregivers in Canada prior to that date will have to live with working requirements that the government has conceded to be unfair, or be forced to re-negotiate existing employment arrangements without any leverage. Vulnerable workers should not bear the onus of having to negotiate for new rights.

To mitigate the adverse effects of the new bargaining dynamic and the inequality between different classes of caregivers, the CBA Section suggests that the live-in requirement be eliminated for existing live-in caregiver work permits, enabling them to work on a live-out basis without violating the conditions of their work permits or requiring their employers to obtain new LMIAs. Similarly, employers who agree to amend working conditions such as live-out arrangements and higher salary should not be penalized for non-compliance. Caregivers already in Canada who have successfully re-negotiated live-out conditions should be able to qualify for permanent residence under s. 113 of the Regulations, despite the fact that a portion of their work was on a live-out basis.

High Medical Needs Stream

It is unclear why high-skilled National Occupation Classification (NOC) category A and B occupations are included in the new High Medical Needs stream, particularly registered nurses, registered psychiatric nurses and licensed practical nurses. These three occupations could qualify under other permanent residence streams in a shorter time, for instance, after completing one year of qualifying work under the Canadian Experience Class and immediately in the Federal Skilled Worker Program and various Provincial Nominee Programs. We understand that under the new proposed Express Entry system, all persons who hold LMIA-based job offers can seek invitations to apply for permanent residence. Presumably, these applicants could apply for permanent residence on receipt of their LMIA and invitations to apply, with no additional work requirement.

If sub-caps apply for this category, including registered nurses in this stream would mean that the 2,750 quota could effectively be taken up by applicants who have options under other high-skilled streams and prejudice caregivers for persons with high medical needs versus those who care for children. Including nurses in this stream also unnecessarily complicates the qualification requirements. Licensing requirements as well as higher minimum language levels (Canadian Language Benchmark 7 verses 5) are listed for these occupations only.

We recommend that registered nurses, registered psychiatric nurses and licensed practical nurses continue to be processed under high-skilled existing permanent residence streams and be eliminated from the caregiver program altogether.

The Caregiver Program and Provincial and Territorial Employment Standards Regimes

The Program was established with the aim of supporting a strong Canadian economy by responding to long-term labour market shortages for qualified and trained caregivers. Like other immigration programs, the government facilitated economic migration of live-in caregivers with the understanding that the rights of caregivers would be protected under provincial and territorial employment standards laws. Employment standards regimes were meant to work in conjunction with federal immigration schemes. Over the years, provincial, territorial and federal governments worked to ensure that employment standards protections work in harmony with Program rules, particularly given the live-in caregiver community's vulnerabilities to immigration exploitation.

The proposed new streams for different professions in the healthcare field raise questions about their compatibility with employment standards protections. In all provinces and territories, live-in caregivers are protected by employment standards legislation. They are subject to provincial and territorial minimum wages and other basic protections such as the right to overtime wages and vacation entitlements.

Many of the professions the government has identified for the High Medical Needs stream are excluded from usual employment standards protections. For example, in British Columbia, home support workers are excluded from the hours of work and overtime provisions of the *Employment Standards Act* and minimum wages for these workers are set at a daily rather than hourly rate.

Given the vulnerabilities and precariousness for migrant, temporary workers in pursuit of permanent residence, the lack of employment standards for many of the new professions in the High Medical Needs stream is a cause of concern. The CBA Section suggests that the federal government discuss with provincial and territorial governments strengthening existing employment standards protections, to ensure that workplace rights for professions in the new program will be respected and that consistency continues between federal goals and provincial and territorial protections.

Dependents

Foreign nationals who make caring for Canadians their life's work have been forced to live separately from their own family members for many years under existing immigration rules. Yet, caregivers' dependents have as much need for hands-on attention as Canadian children, elders and persons with disabilities.

Under the Program, processing applications from arriving in Canada to achieving permanent residence can be as long as seven years. Even with the plan to improve processing times to six months, the new Caregiver Program will still separate families for at least 2.5 years – likely far more given the frequency with which caregivers generally change employers in the face of employers' changing needs. If caregivers' applications for permanent residence are triaged through the Express Entry system, there may be additional delays between the date one qualifies for permanent residence and when one is invited to submit that application into the processing queue.

The rationale for preventing dependents from accompanying caregivers has been that employers might not have space in their homes to accommodate the dependents, and even if a first employer agrees to accommodate family members, a subsequent employer may not. This rationale is no

longer viable, and families who are expected to qualify for permanent residence together should also be admitted to Canada together. The situation of caregivers is fundamentally different from that of other NOC C and D workers who will likely not have a path to permanent residence, and for whom the move to Canada is temporary.

We recommend that caregivers under the new Caregiver Program be permitted to bring their spouses into Canada on LMIA-exempt open work permits, and their children on visitor or study permits for the duration of their temporary stay in Canada, and that they be eligible for in-Canada processing for permanent residence. We also recommend that the overseas dependents of all caregivers currently in Canada be permitted to enter Canada on a temporary basis while the principal applicant earns the right to apply for permanent residence.

Initial Work Permit Application

Processing initial LMIA and work permit applications under the existing Program has routinely spanned between six months and over two years. Long delays in processing initial work permit applications compromises program integrity because most caregiver jobs cannot realistically endure a two-year processing delay. This has given rise to a widespread practice among unscrupulous recruiters of falsifying job offers (often unbeknownst to the caregiver) even in the face of a genuine labour market shortage. This flaw should not be allowed to reemerge in the new program.

At present, those who apply for their initial work initial permit through high volume visa offices such as Manila and New Delhi face longer processing times and are required (in the case of Manila) to pass screening tests that are not utilized at any other visa office. If the admission caps under the new program are applied at the front end of the process, we hope these will be an effective means of controlling volume and managing processing times. We recommend also that processing times be equalized, to prevent a disproportionate impact on those from the most popular source countries, and that steps be taken to ensure admission criteria are applied consistently across visa offices.

Conclusion

As we said in our submission to CIC on the Program in January 2010, 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. It remains our view that this would be a more effective means of bringing workers into Canada to address long-term labour shortages without compromising their ability to advocate for safe and fair working conditions, mandating prolonged family separation, and exacerbating the stress caused by not knowing whether they can achieve permanent residence.

However, if CIC pursues the strategy outlined in its October 31, 2014 announcement, we recommend the following to address the concerns we have raised:

- the CBA Section and other stakeholders should be invited to participate in a discussion forum on the new Caregiver Program launch within three months after it comes into force;
- caregivers currently in Canada should be "grandfathered" under the existing live-in caregiver class criteria (with the exception of the live-in requirement) and not be subject to new caps or educational/language proficiency requirements;
- caps on applications received after November 30, 2014 should be applied at the intake stage rather than at the permanent residence stage;
- CIC should eliminate the live-in requirement for all existing live-in caregivers;

- ESDC should waive any non-compliance finding against an employer who has allowed a live-in caregiver to continue working on a live-out basis, improved that worker's salary or waived board and lodging deductions;
- registered nurses, registered psychiatric nurses and licensed practical nurses should be eliminated from the Caregiver Program;
- the federal government should discuss with provincial and territorial governments strengthening existing provincial and territorial employment protections;
- immediate family members of caregivers admitted to Canada after November 30, 2014 should be permitted to accompany the caregiver to Canada;
- caregivers' applications for permanent residence should be processed outside the Express Entry scheme, to ensure there is no additional delay between meeting program qualifications and achieving permanent residence;
- spouses of those already admitted to the Program should be entitled to apply for LMIA-exempt open work permits, and their children be permitted to apply for study permits or visitor visas as their accompanying dependents; and
- admission criteria should be applied consistently across all visa offices, and the processing times be kept as low as possible and within consistent time frames.

We hope our comments are helpful as you prepare to implement the new Caregiver Program. We would be happy to continue our discussions with you on any aspect of our recommendations.

Yours truly,

(original signed by Kerri Froc for Deanna L. Okun-Nachoff)

Deanna L. Okun-Nachoff
Chair, Immigration Law Section