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Via email: jason.kenney@hrsdc-rhdcc.gc.ca

The Honourable Jason Kenney, P.C., M.P.
Minister of Employment and Social Development
Employment and Social Development Canada
140 Promenade du Portage
Gatineau, QC K1A 0J9

Dear Minister:

Re: Temporary Foreign Worker Program

On behalf of the Canadian Bar Association Immigration Law Section (CBA Section), thank you once again for appearing at our annual conference on May 9, 2014. In your remarks, you invited the CBA Section to provide submissions on the Temporary Foreign Worker (TFW) Program. We would like to take this opportunity to summarize some of the comments our members shared with you and some additional suggestions on improvements to the Program.

The TFW Program is critical to the Canadian economy, allowing employers to bring foreign workers to Canada to achieve strategic business objectives and fill gaps in their work force. We support measures that ensure companies using the TFW Program comply with the letter and spirit of its requirements. At the same time, regulatory requirements must be transparent and procedurally fair.

Unfortunately, the recent moratorium on access to the TFW Program for all food service positions affected not only employers apparently abusing the Program, but also companies in full compliance and those that have never applied to the TFW Program, but have now exhausted all reasonable means to hire Canadians to fill labour shortages. In many instances, use of TFWs allows Canadian businesses to grow and create jobs for Canadians. We encourage the government to move past the moratorium to a more nuanced response to recent concerns.

An example provided by one of our members illustrates the concomitant benefits and burdens of the TFW Program. She represents a fast food franchisee, who said, "I thought I bought myself a business, but I bought myself a job." The owner operator advertised for Canadian workers to fill staff vacancies, and included the prevailing wage (as required under the Program) as part of the advertisement. This wage was higher than minimum wage and what would be considered an entry level wage. Still, he was so short of staff that he had to mind the till and the grill. He had no time to manage the business and to consider expansion, with insufficient employees to staff the store during regular hours. Keeping the drive thru open until midnight meant closing the restaurant because there were too few employees to staff both. After ten foreign workers arrived, the owner operator

remarked, “The foreign workers saved my business investment, my health and my marriage.” It freed him to work on his business, including more time or recruiting and retaining Canadian employees. At the same time, use of the TFW Program came with a cost. He had to purchase two homes for the foreign workers and take time away from his business operations to maintain them. He also incurred significant recruiting, transportation and legal expenses.

In our experience, most companies hire foreign workers only as a last resort, abiding by the rules and the intent of the Program. Owner operators who spend time working *in* their business and not *on* their business are unable to grow them. Often, these businesses fail, with a resulting loss to the Canadian economy.

The CBA Section has the following suggestions for changes to the TFW Program:

1. Use ratios of low skilled foreign to Canadian workers

We recommend limiting the number of low skilled foreign workers that Canadians can employ under a labour market opinion (LMO) to a ratio or percentage of their Canadian work force. The government should also permit an EDSC Program Manager to grant approval if the company needs to exceed the ratio or percentage. Factors to be considered in deciding whether to approve could include the geographic region, unexpected growth in business, high departure rate of employees, a special event, seasonal work and any other special circumstances.

2. Make recent hiring of a Canadian intern or apprentice a positive factor in the LMO application

It is unrealistic to require some businesses, especially those that are owner operated, to be heavily invested in educational programs or training for Canadians. These companies do not have the human or financial resources to do so. Those that do invest in an intern or apprentice should be given special consideration in an LMO application. The program should use incentives to encourage desirable practices and not penalize businesses that do not have the resources to undertake these types of initiatives.

3. Avoid over-regulation of employment contracts

Recent issues with the Program arose in part due to employment contracts that Service Canada insisted Canadian companies adopt. On occasion, these contracts have provided greater benefits and more favorable terms and conditions of employment than required under provincial employment legislation. In cases of an unexpected closure or business slow down, for instance, these contracts have required employers to guarantee a number of paid hours to the foreign workers in circumstances where there was no similar obligation to Canadian employees. We recognize the need to protect foreign workers when they are able to work for only one employer in Canada. If their employer is unable to offer sufficient hours, the foreign worker should be afforded an opportunity to work for another employer and have those terms and conditions transferred to another employer in a timely way.

Further, government should avoid requiring employers to pay foreign workers more than Canadian employees already employed by the company in analogous positions, as a mechanism to discourage employers from using the TFW Program. This solution fosters resentment towards foreign workers and poor working environments. Instead, we recommend a system that would require employers to pay a foreign worker more the longer they remain with the employer. This would encourage employers to either facilitate a path to permanent residence for the foreign worker or train a Canadian to replace them.

4. Allow voluntary compliance reviews

In April 2011, Service Canada discontinued its voluntary monitoring program and instituted random compliance reviews. During these reviews, processing LMO applications is suspended for three to six months. Often, affected applications involve critical, senior level positions. Delays in filling these positions may have a severe impact on operations, particularly when coupled with the standard two to three month processing time.

In another example from a CBA Section member, an Ontario manufacturing company's poor financial results necessitated a restructuring. This included hiring a new CEO. It took over five months for the LMO to be approved because of a random compliance review. During the delay, the company lost a candidate, had to reactivate recruiting, and renegotiated an offer to a second candidate. The company could not wait any longer for the LMO or risk losing the second candidate, so it had to incur additional costs of obtaining a C-10 work permit to allow him to commence employment pending the outcome of the LMO.

5. Establish and publicize service standards and procedures for compliance reviews

This would allow companies to respond to compliance reviews efficiently and effectively, helping to ensure their completion in a reasonable period. The existing procedures lack clarity, which would be improved by the government establishing clear time lines and a requirement of formal notification of completion to employers. Currently, Integrity Officers will inform companies that they have passed the compliance review by phone but no documentation is issued. Often, it takes weeks and sometimes months before processing the pending LMO that triggered the compliance review is resumed. Only then does the company know with certainty that the review was favourably resolved.

As well, Compliance Reviews generally take in excess of 60 days, beyond which foreign workers in Canada do not benefit from implied status. Citizenship and Immigration Canada and ESDC should work together to develop policies to ensure the immigration status of foreign workers does not lapse while a review is pending.

6. Permit responses to compliance reviews by email or facsimile

Allowing companies or their third party representatives to respond to compliance reviews by email or facsimile would make the process more efficient, and avoid unnecessary delays.

7. Establish a Trusted User Program

A Trusted User Program should be implemented immediately for all companies that have passed a Compliance Review in the last two years, including those in the food service industry. Companies that qualify for the Trusted User Program should have their applications processed without the risk of a random compliance review and guaranteed processing within three to four weeks.

A Trusted User Program would limit the economic impact on companies due to delays caused by random compliance reviews (see point 4 above). It would also allow Service Canada to allocate more resources to processing applications and conducting reviews of higher risk employers.

8. Publication of policy manuals used by Service Canada officers

We appreciated your undertaking, in response to a question from one of our members, to look into why Service Canada manuals are unavailable to the public. Publication of these manuals is necessary for transparency, consistency and clarity, so companies can better understand how ESDC will conduct compliance reviews and how applications will be processed. For

example, an interpretation is required of the obligation to provide the TFW with “substantially the same” terms and conditions of employment, as set out in the LMO application. Companies need to know whether small changes, such as incremental salary changes resulting from an annual employee review, are likely to make the company non-compliant with the terms of the LMO.

9. Do not use general unemployment rates for LMOs and instead introduce flexibility for less populated or remote areas

Using unemployment rates to assess labour shortages results in inaccurate LMOs. These rates are not specific to industries or positions and are therefore of little assistance in gauging local labour market conditions.

Serious problems with labour shortages are typically found in more remote or less populated areas. If the government wishes to apply a formula that more accurately responds to these needs, we suggest explicitly considering population. We recommend allowing for great flexibility in approving LMOs for businesses in regions with smaller populations (e.g. less than 3000 people) or more than 250 km outside a large city (e.g. more than 250,000 people).

10. Separate the TFW Program into Low Skilled and High Skilled Workers

There are unique challenges in using the TFW program for low skilled workers, as recent cases receiving national attention have illustrated. There is much less risk of exploitation and abuse with high skilled workers. Additional regulation should be precisely targeted to address these risks. There is a danger that overly broad regulation will have an undue economic impact on the majority of companies who use the TFW Program appropriately and have real and substantial unmet labour needs.

Some requirements currently applied across the Program are simply not appropriate for high skilled workers. For instance, minimum advertising requirements for National Occupational Code (NOC) skill levels A and O should not have to include the salary in the advertising and should be able to substitute the results of a professional recruiting company in lieu of the Job Bank. The requirement to post a senior position, such as a C-Suite position, on Job Bank could negatively impact a company by making the vacancy known to stakeholders, including shareholders, vendors and employees.

We recommend that specific programs be developed for these two streams of workers, with possibly different application and compliance requirements for each.

We appreciate your consideration of these suggestions and welcome further opportunities to work with your Department on improving the TFW Program, ensuring its integrity and that access is available to all companies that are genuinely prepared to abide by its terms.

Yours truly,

(original signed by Kerri Froc for Mario Bellissimo)

Mario Bellissimo
Chair, Immigration Law Section