



THE CANADIAN
BAR ASSOCIATION
L'ASSOCIATION DU
BARREAU CANADIEN

Variations to LMIA Minimal Advertising Requirements

**CANADIAN BAR ASSOCIATION
IMMIGRATION LAW SECTION**

September 2018

PREFACE

The Canadian Bar Association is a national association representing 36,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the CBA Immigration Law Section, with assistance from the Advocacy Department at the CBA office. The submission has been reviewed by the Law Reform Subcommittee and approved as a public statement of the CBA Immigration Law Section.

TABLE OF CONTENTS

Variations to LMIA Minimal Advertising Requirements

| | | |
|--------------|---|-----------|
| I. | INTRODUCTION | 1 |
| II. | ACADEMICS..... | 2 |
| | A. Temporary Foreign Worker Program | 2 |
| | B. International Mobility Program | 3 |
| | C. Analysis..... | 4 |
| III. | OWNER/OPERATORS | 4 |
| | A. Temporary Foreign Worker Program | 4 |
| | B. International Mobility Program | 5 |
| | C. Analysis..... | 7 |
| IV. | POSITIONS FOR A SHORT DURATION..... | 10 |
| | A. Temporary Foreign Worker Program | 10 |
| | B. International Mobility Program | 10 |
| | C. Analysis..... | 10 |
| V. | RELIGION INSTRUCTORS | 11 |
| | A. Temporary Foreign Worker Program | 11 |
| | B. International Mobility Program | 12 |
| | C. Analysis..... | 12 |
| VI. | SPECIALIZED SERVICE TECHNICIANS/SPECIALIZED SERVICE PROVIDERS..... | 13 |
| | A. Temporary Foreign Worker Program | 13 |
| | B. International Mobility Program | 14 |
| | C. Analysis..... | 15 |
| VII. | WARRANTY WORK | 15 |
| | A. Temporary Foreign Worker Program | 15 |
| | B. International Mobility Program | 16 |
| | C. Analysis..... | 17 |
| VIII. | CONCLUSION | 18 |
| IX. | SUMMARY OF RECOMMENDATIONS | 18 |

Variations to LMIA Minimal Advertising Requirements

I. INTRODUCTION

The Immigration Law Section of the Canadian Bar Association (CBA Section) offers its input, as requested by Employment and Social Development Canada (ESDC) representatives, on occupations not subject to the minimal advertising requirements in Labour Market Impact Assessment (LMIA) applications under the ESDC's Temporary Foreign Worker Program (TFWP), and which should be transitioned into LMIA-exempt or work permit-exempt occupations under the International Mobility Program (IMP).

The CBA is a national association of over 36,000 members, including lawyers, notaries, academics and law students, with a mandate to seek improvements in the law and the administration of justice. The CBA Section has approximately 1,000 members practicing in all areas of immigration law. Our members deliver professional advice and representation in the Canadian immigration system to thousands of clients in Canada and abroad.

Under the TFWP, employers who want to hire foreign workers are required to advertise the position(s), and comply with various requirements including duration of postings, advertising mediums and content of ads, to ensure that Canadians have first access to employment opportunities. However, certain jobs are subject to a variation of these advertising requirements (LMIA Variations).

There are currently fifteen LMIA Variations under the TFWP:

- Academics
- Camp counsellors (Ontario only)
- Certificate of Selection from Quebec (Quebec only)
- Collective bargaining agreement that stipulates internal recruitment
- Employer associations
- Entertainment sector
- Hiring by a foreign government
- In-home caregiver

- Primary agriculture positions using the streams for high-wage or low-wage positions
- Owner/operators
- Positions for a short duration
- Religion instructors
- Seasonal agricultural workers (Quebec only)
- Specialized service technicians/specialized service providers
- Warranty work

The CBA Section offers its analysis and recommendations on LMIA Variations for Academics, Owner/operators, Positions for a short duration, Religion instructors, Specialized service technicians/specialized service providers, and Warranty work.

II. ACADEMICS

A. Temporary Foreign Worker Program

An LMIA Variation is available under the TFWP for hiring a Foreign Academic, defined by ESDC as “an individual with at least one postgraduate degree (following a bachelor's degree) who earns the majority of their income from teaching or conducting research as employees at universities and university colleges in Canada.”¹

Almost all submissions under this category will be for university professors and lecturers under National Occupational Classification (NOC) 4011, whether the individual is teaching or conducting research. Collèges d'enseignement général et professionnel (CÉGEP) in Quebec are eligible for the LMIA Variation, and community colleges (outside Quebec) if they are affiliated with a university and their students can obtain degrees. If the foreign worker is employed by a university but in an occupation where the majority of the job duties are other than teaching or research (such as management, financial or administrative), the regular LMIA process applies.

The primary LMIA Variation when hiring Foreign Academics is an exemption from the Transition Plan, provided the employer university makes an annual submission to Universities Canada, to be included in an annual report to ESDC, on transition measures undertaken for this occupation across Canada.

¹ Employment and Social Development Canada, [Hire a foreign academic](#).

ESDC's advertising standards for LMIA applications for Foreign Academics are also lower and less specific. Before a degree-granting educational institution can hire a Foreign Academic for a position in Canada, it must:

- advertise the vacant position in Canada;
- ensure any vacant position advertised abroad is also advertised simultaneously in Canada;
- advertise for a reasonable length of time (approximately a month) to allow broad exposure of the vacancy to Canadians and permanent residents;
- demonstrate that the advertising medium used - web, print or electronic - is effective in attracting appropriate candidates for the position;
- include in the advertisement this statement: "All qualified candidates are encouraged to apply, however Canadians and permanent residents will be given priority";
- meet all conditions of applicable collective agreements; and
- be prepared to submit an annual summary report on recruitment practices and results for Canadian academics.

In practice, however, processing ESDC officers typically hold a university employer to the same advertising standards as regular LMIA applications. For example, an application for a Foreign Academic that does not include advertising on the National Job Bank will almost always be rejected, despite the LMIA Variation guidelines not requiring advertising on this site.

B. International Mobility Program

While there is no direct IMP in which university professors and lecturers currently fit, there are work permit exemptions for academic consultants and examiners, graduate assistants and self-funded researchers.

A new Global Skills Strategy work permit exemption is available for researchers at a Canadian publicly funded degree-granting institution or its affiliated research institution for one 120-day period in Canada, once every 12 months.² There are also LMIA-exempt IMP opportunities for post-doctoral fellows, research award recipients, research chairs, guest lecturers, visiting professors and, in certain circumstances, professors from Mexico, USA or Chile under NAFTA and CCFTA respectively.

² IRCC, [Global Skills Strategy](#).

C. Analysis

Professors are the core academic employee group at Canadian universities. ESDC policy acknowledges their importance, saying: “Employing foreign academics can help degree-granting post-secondary educational institutions in Canada meet their staffing and teaching needs and attract new knowledge and expertise to Canadian campuses.”³ IRCC also expressly acknowledges that exchanges and mobility are common in academia in its policy on Reciprocal Employment under IMP R205(b).⁴ These statements are at odds with requirements to obtain LMIA for professors, particularly since individuals who perform identical or similar job duties (i.e. guest lecturers, 120-day researchers, visiting professors and professors from certain countries) are LMIA-exempt under IMP. Removing the LMIA requirement for foreign academics would attract new knowledge and expertise to Canadian campuses, and promote mobility and reciprocal employment opportunities abroad.

RECOMMENDATION

1. **Create a new IMP for Foreign Academics Conducting Teaching and Research.**

III. OWNER/OPERATORS

A. Temporary Foreign Worker Program

Business owners are eligible for an LMIA Variation if they hold a controlling share in a business and cannot be dismissed. A “controlling share” means the person is a sole proprietor, the only voting shareholder, or holder of at least 50.1% of the shares.⁵ The owner must also be involved in the day-to-day operation of the business and have an employment relationship with it (i.e. the employee is the majority owner of the employer company). In other words, this stream is not aimed at passive investors.

The Owner/Operator LMIA Variation requires the employer to have been “actively engaged” in the business prior to application.⁶ This requirement should not be onerous for those seeking to purchase an existing Canadian business. For start-up ventures, a prospective owner/operator can show active engagement through preparatory activity such as investment, negotiation of

³ *Supra* 1.

⁴ [IMP – Canadian Interests-Reciprocal Employment-Academic Exchanges \[R205\(b\)\] \(exemption code 22\).](#)

⁵ Employment and Social Development Canada, [Variations to minimum advertising requirements.](#)

⁶ [Immigration and Refugee Protection Regulations](#), SOR/2002-227, 2017, s. 203(1)(a).

business contracts (i.e. a lease agreement), applications for a CRA business number and permits or licenses (if needed), and a strong business plan.

B. International Mobility Program

IMP options for business owners break down into two groups: Canadian Interests and International Agreements.

Canadian Interests include LMIA exemptions granted under s. 205(a) of the *Immigration and Refugee Protection Regulations* (IRPR).⁷ Work permits are available to those who can demonstrate that admitting them as workers would create or maintain “significant social, cultural or economic benefits or opportunities.”

This type of work permit is granted under the following exemption categories:

- Significant Benefit (exemption code C10): This exemption can be used when the social, cultural or economic benefits of admitting a worker are significant and obvious, and an LMIA is either not available or the benefits are compelling enough to overcome the need for one. In practice, it tends to be used when admitting foreign workers is tied to a specific number of jobs created or significant monetary value for the company.⁸
- Significant Benefit – Entrepreneurs and Self-Employed Candidates (exemption code C11): This category is intended for business persons seeking only a temporary work permit, or permanent residence applicants in business classes – that is, potential or actual provincial nominees or Quebec Selection Certificate holders – allowing them to start their Canadian business ventures before receiving a provincial nomination or permanent residence status. For access to the temporary work permit only, this exemption requires at least 50% ownership of a business.⁹ Unlike the LMIA, there is no requirement for “active engagement.” Rather, viability of the business plan is considered as well as its foreseeable benefit to Canadian workers. Permanent residence hopefuls wishing to access this exemption must at least have submitted an expression of interest and received a letter of support from a province or territory, or have received a nomination or Quebec selection certificate (CSQ). It is not necessary to show that an LMIA is unavailable.
- Intra-Company Transferees (exemption code C12): This option is available for those working for a multi-national company in an executive, senior managerial or specialized knowledge role. There must be an employer-employee relationship between the business owner and

⁷ *Supra* 5, s. 205(a).

⁸ CBA submission, [Work Permits for Temporary and Dual Intent Business Persons](#) (April 2017).

⁹ Government of Canada, [International Mobility Program: Canadian interests – Significant benefit – Entrepreneurs/self-employed candidates seeking to operate a business](#) [R205(a) – C11].

worker, and the company must have existed for at least one year at the time of application.

- Start-Up Visa Program (exemption code A75): This is a permanent residence program for entrepreneurs who are supported by a designated investor organization. The list includes venture capital funds, angel investor groups, and business incubators. The applicant must jointly hold more than 50% of the voting shares of the company, together with the organization.¹⁰ Up to five people can apply as owners of a single business, and each must independently own at least 10% of the voting rights. The applicable exemption code is for a “bridging” work permit because it allows applicants to begin working in Canada on a temporary permit while their permanent residence application is being processed, if they have a Letter of Support from their designated organization.¹¹

International Agreements create exemptions authorized by section 204(a) of the IRPR to facilitate trade agreements with other nations or groups of nations that include reciprocal provisions for worker mobility. Provisions relevant to business owners can be found in NAFTA, CETA, and bilateral agreements with Chile, Peru, Colombia and Korea. Business owners eligible to come to Canada as workers under these agreements are:

- Traders (exemption code T21) and Investors (exemption code T22, or T46 for CETA participants): These exemptions are accessible to traders and investors employed in a supervisory capacity or one that involves essential skills. They must commit a substantial amount of capital in Canada to trade in goods or services.¹² “Substantial” is not defined, but will be measured in proportion to the enterprise and the amount necessary for the proposed activity.
- Professionals (exemption code T23): This category encompasses activities related to research and design; growth, manufacture and production; marketing; sales; distribution; after-sales service; and general service. It is not specific to owners, but accessible to owners who are also salaried employees of their Canadian companies or have a contract with a Canadian enterprise. The applicant must be qualified to work in one of the professions identified in the agreement, and the professional service must be arranged in advance.
- Intra-Company Transferees (exemption code T24): Like the C12 exemption, an Intra-Company Transferee under NAFTA or a bilateral agreement must be employed by a multi-national company in an executive, managerial, or specialized knowledge role.
- GATS Professionals (exemption code T33): Certain professions are eligible for this exemption if the applicant is a national of one of the

¹⁰ Government of Canada, [Who can apply to immigrate with a Start-up Visa](#).

¹¹ Government of Canada, [Operational Bulletin 555](#).

¹² [North American Free Trade Agreement between the Government of Canada, the Government of Mexico, and the Government of the United States](#), 17 December 1992, Annex 1603 Section B.

signatories to the General Agreement on Trade in Services. It is not targeted to business owners, but certain business owners who provide professional services (for example, engineers, architects, legal consultants and urban planners, among others) may be eligible.

- CETA contractual service providers and professionals (exemption code T43): This exemption is for citizens of EU member states who are either employees of an EU enterprise or self-employed professionals; in either case, the worker must have a temporary contract to provide a service to a Canadian consumer.

C. Analysis

Several types of business owners may be eligible for both an Owner/Operator LMIA and an IMP exemption. An LMIA is the only option for business owners who do not meet the personal net worth, minimum investment capital, or other requirements to apply to a provincial nominee program (PNP). An LMIA is also an important alternative for investors with enough capital to start their own venture, but who do not wish to work with (or are unable to reach an agreement with) an investment organization, and who do not have a PNP available in the province where they intend to operate. For example, an entrepreneur from New Zealand with personal funds to invest in an ecotourism business based in Newfoundland would not be a strong candidate for the C10 exemption, would not be covered by a free trade agreement, and would not be eligible for a PNP stream. Since the Ontario PNP requires 36 months of management experience, the same would be true for a young innovator who had just sold a two-year-old company in India and is looking to access the Toronto talent pool for a new project.¹³

Overlap between the TFWP and IMP categories available to business owners is as follows.

Canadian Interests

IMP C10 exemptions were not intended to circumvent or supplant Service Canada's evaluation of a particular migrant's impact on the Canadian labour market. They are exceptions to the rule that allow greater flexibility, and officers are instructed to use them where needed, not routinely.¹⁴ In practical terms, the C10 exemption will have limited overlap with the LMIA program.

¹³ Ontario Ministry of Citizenship and Immigration, [Ontario Immigrant Nominee Program Entrepreneur Stream Guide](#).

¹⁴ Government of Canada, [International Mobility Program: Canadian interests – Significance benefit general guidelines \[R205\(a\) – C10\]](#).

For provincial nominees (or potential nominees), C11 exemptions are offered as stepping stones on route to permanent residence. Most PNPs offer opportunities for business owners or prospective owners who are able and willing to make an investment in the province. Like the Owner/Operator LMIA, these programs contemplate candidates immigrating to manage the business themselves and exclude passive investors. Unlike the LMIA option, a candidate must show a minimum net worth or commit to a minimum investment of capital (with limited exceptions in New Brunswick and Northwest Territories), which may be out of reach for talented entrepreneurs of more modest means. Most PNPs have additional requirements.

A provincial nomination effectively guarantees that the nominee will swiftly be invited to apply through the Express Entry system by adding 600 points to their Comprehensive Ranking System (CRS) score. However, fewer spots are available in these programs: IRCC's 2018 target across the PNP classes is 55,000, compared to 74,900 for Federal Skilled Worker (i.e. other Express Entry) classes.¹⁵ The targets increase in 2019 and 2020, but proportions remain similar.

The second use of this exemption code – solely for temporary work permits – is for cases ineligible for an LMIA. For example, applicants who hope to open a temporary, seasonal business would not meet LMIA requirements.

For those interested in and able to work with a business incubator, venture capital fund or investor group, the Start-Up Visa Program offers a route to both a temporary work permit and permanent residence application without the need for an LMIA.

International Agreements

There is overlap between the provisions of international agreements and the Owner/Operator LMIA regime in the limited case of nationals of countries that have signed a relevant agreement with Canada, currently only the European Union and six other countries. However, accessibility is fairly broad for these nationals, encompassing many types of professionals and business investors. An LMIA will still be useful for smaller ventures due to the requirement for a “substantial” capital commitment to access the IMP Investor exemption.

For business owners eligible for an IMP exemption, obtaining an LMIA may still be preferable due to the advantage it offers in the Express Entry pool. For many, the decision to buy or start a business in Canada hinges on the opportunity to apply for permanent residence, either because

¹⁵

Government of Canada, [Notice – Supplementary Information 2018-2020 Immigration Levels Plan](#).

immigration to Canada is their primary motivation, or because they want to be assured of seeing the venture through in the long term. They want to know before investing that they have a strong chance of being selected to apply for permanent residence.

The Express Entry program offers two options for business owners: the Federal Skilled Worker stream for those with less than one year of work experience in Canada, and the Canadian Experience Class for those with one year or more. For individuals not yet in Canada, or in Canada for less than one year, the bar is high for selection through the Federal Skilled Worker stream. Very often a candidate must score CLB 9 or 10 in every skill on the language test, in addition to being well educated, with skilled work experience, and under a maximum age limit, to have enough points for a reasonable chance of being selected from the Express Entry pool. A business owner may excel in their field, and be fluent enough in Canada's official languages to be an effective manager, but still not earn enough points to receive an invitation as a Federal Skilled Worker.

Arranged employment in Canada offers 50 or 200 CRS points, depending on the applicable NOC code, or 600 points with a provincial nomination based on employment. "Arranged employment" for the purpose of the Express Entry system means a job offer supported either by an LMIA or an IMP exemption, but if supported by an IMP exemption the candidate cannot claim the points until after a year of work.¹⁶ Business owners who have invested in Canada may choose to obtain an LMIA rather than an IMP exemption, to receive immediate Express Entry points and secure permanent residence status as soon as possible.

The IMP does not include a viable alternative for all categories of entrepreneurs who might establish themselves in Canada and contribute to the Canadian economy. Even for those candidates eligible to apply through the IMP, obtaining an LMIA may be preferable as a quicker route to permanent residence.

RECOMMENDATION

2. Continue to offer the Owner/Operator LMIA Variation.

¹⁶

Government of Canada, [Offer of employment – Skilled immigrants \(Express Entry\)](#).

IV. POSITIONS FOR A SHORT DURATION

A. Temporary Foreign Worker Program

An LMIA Variation is available under the TFWP in very limited circumstances for positions of short duration where: there is a demonstrated need to hire a TFW on short notice; the position is available for 30 days or less; the job will no longer exist after the TFW leaves the country and; there is no opportunity to train a Canadian or a permanent resident because the position requires specialized or proprietary knowledge to ensure the safe and efficient provision or operation of machinery or equipment. This exemption is available across Canada.¹⁷

B. International Mobility Program

Emergency repair personnel or repair personnel for out-of-warranty equipment may apply for a work permit exempt from the LMIA requirement under section 205 of IRPR (LMIA exemption code C13). This LMIA exemption was expanded in May 2015. Although previously available only to emergency repair personnel coming to Canada to repair industrial or commercial equipment to prevent a disruption of employment, expanding this exemption resulted in the inclusion of individuals coming to Canada to repair industrial or commercial equipment no longer under warranty or covered by an after-sales or lease agreement. The category was expanded to allow preventative work where failure to repair industrial equipment immediately would have a negative impact on productivity. This exemption is available to repair personnel if there is a need for specific knowledge, there is no commercial presence by the company that manufactured the equipment being serviced, and Canadian jobs would be greatly affected if the equipment is not repaired in a timely fashion. IRCC's Program Delivery Instructions related to this LMIA exemption indicate that repair personnel and service technicians will typically be admitted to Canada for a short duration, generally for less than 30 calendar days, with extensions permitted in exceptional cases.

C. Analysis

LMIA's are required for many foreign workers who come to Canada to fill positions of short duration on short notice in which they use specialized or proprietary knowledge to ensure the safe and efficient provision or operation of machinery or equipment. This requirement – often

¹⁷ ESDC's *Directive on Recruitment and Advertising Requirements* contains no guidance about this advertising exemption. This directive is not publicly available online, but can be accessed through an [Access to Information Act](#) request.

undertaken repeatedly for the same person, despite there being an exemption to actually test the labour market – is costly and time-consuming for Canadian employers and for ESDC.

The C13 LMIA exemption should be further expanded to include foreign workers coming to Canada for periods of short duration where the position requires specialized or proprietary knowledge to ensure the safe and efficient provision or operation of machinery or equipment, allowing work permits valid for up to six months for foreign nationals who will be in Canada continuously, and up to a year for foreign nationals who will be in Canada periodically.

Criteria for the exemption should mirror that currently used for the LMIA Variation.

A mandatory wage threshold could be added if there is a concern that some foreign workers in positions of short duration might be paid less than the prevailing wage range as a consequence of this transition from TFWP to IMP.

RECOMMENDATION

- 3. Extend the C13 LMIA exemption to include foreign workers coming to Canada for periods of short duration where the position requires specialized and/or proprietary knowledge to ensure the safe and efficient provision or operation of machinery or equipment.**

V. RELIGION INSTRUCTORS

A. Temporary Foreign Worker Program

The current LMIA Variation for Religion Instructors reads:

The position is for an instructor in a faith-based independent school (NOC 4217 - Other Religious Occupations). This variation only applies to situations where the provincial or territorial Ministry of Education delegates to the independent school the ability to establish the qualifications of their instructors based on religion.

Variation: Employers must advertise on the national [Job Bank](#) (or provincial or territorial equivalent), or conduct similar recruitment activities consistent with the occupation (e.g. advertising in church publications) for a minimum of four weeks within three months prior to applying for an LMIA.

Applicability: All provinces and territories

The exemption does not remove the need for all advertising. It reduces the number of platforms required, from three to one.

B. International Mobility Program

The IMP regulations R186(I) and R205(d), exemption code C50, address religious workers.

R186(I) exempts clergy – defined as persons whose employment will consist mainly of preaching doctrine, presiding at liturgical functions or providing spiritual counselling either as an ordained minister, layperson or member of a religious order – from the need for a work permit.¹⁸

Religious workers who do not fit the definition of clergy require an LMIA-exempt work permit under R205(d). IRCC guidance states that the primary duties of the temporary worker should reflect a particular religious objective, such as providing religious instruction or promoting a particular faith, advance the spiritual teachings of a religious faith and maintain the doctrines and spiritual observances on which those teachings are based.¹⁹

The guidance distinguishes between “religious workers” and other employees of a religious organization, such as a cook or an accountant, who do not qualify for the LMIA exemption.

C. Analysis

At first glance, the LMIA Variation for Religion Instructors appears to address a niche – individuals employed at religious academic institutions approved by a Ministry of Education – that is not included in IRCC’s guidance for R205(d). The guidance on R205(d) encompasses workers who are not clergy but who provide religious instruction or assist in the promotion of a particular faith (although exactly what kind of workers these would be is unclear). While it appears that R205(d) contemplates individuals employed at religious organizations that are not formal schools, nothing in the text or guidance of R205(d) suggests that teachers at formal schools are beyond the scope of R205(d), which simply states that the intended work must be of “a religious or charitable nature.”

IRCC’s guidance limits R205(d) to work directly religious in nature, including religious instruction or the promotion of a faith. It excludes supporting roles at a religious organization. Clergy benefitting from R186(I) can also apply for a work permit under R205(d).

¹⁸ Government of Canada, [International Mobility Program: Authorization to work without a permit – Clergy](#).

¹⁹ Government of Canada, [International Mobility Program: Canadian interests – Charitable or religious work \[R205\(d\)\] \(exemption code C50\)](#).

As it is not clear who qualifies under R205(d) beyond individuals directly involved in the preaching or teaching of religion, it can be argued that R205(d) includes religious teachers employed in formal academic institutions, and the LMIA requirement for Religion Instructors should therefore be eliminated. Alternatively, it should be clarified whether R205(d) includes religious instructors in formal schools or contemplates only religious workers employed in locations that are not schools. The distinction is important given the licensing requirements for teachers that LMIA officers are well-positioned to review.

R205(d) is worded broadly enough to include Religion Instructors. Both elementary and secondary school teachers are eligible for LMIA-exempt work permits under R205(b) *Canadian Interests – Reciprocal Employment*, as long as the reciprocity test is met.

Likewise, nothing in the text or guidance for R205(d) suggests that formal teachers fall beyond the regulation's scope. Religious institutions are well-equipped to select their faith-based teachers and those teachers are unlikely to compete directly with Canadian citizens or permanent residents in the Canadian labour market.

RECOMMENDATION

- 4. Eliminate LMIA requirement for Religion Instructors and allow applicants to apply directly under R205(d). Alternatively, clarify whether R205(d) includes religious instructors in formal schools or only contemplates religious workers employed in locations that are not schools.**

VI. SPECIALIZED SERVICE TECHNICIANS/SPECIALIZED SERVICE PROVIDERS

A. Temporary Foreign Worker Program

Under the TFWP, LMIA applications for specialized service technicians/specialized service providers are exempt from advertising:

When the work requires a specialist having proprietary knowledge and/or experience related to the work to be performed — duration of the work is limited and there is no opportunity for Canadians to be trained.

Situations to which this variation could apply include (but are not limited to):

1. Service required for equipment manufactured outside of Canada and the original equipment manufacturer (OEM) does not have Canadian

licensees that can do the work (equipment is generally no longer under warranty, or covered by an after sales agreement).

2. The work to be performed requires someone currently unavailable in Canada, with proprietary knowledge, experience and/or tools from the OEM (or an approved OEM licensee) to perform the work or to oversee and direct Canadians doing the work.
3. Service required for equipment that is so old (no longer in production) that customized parts have to be manufactured/or new parts reconfigured by an OEM approved technician/representative.

ESDC's *Directive on Recruitment and Advertising Requirements*²⁰ offers additional guidance about this advertising exemption:

The intent of this variation is to cover situations that require the expertise of specialized workers for the repair/maintenance of equipment. The variation should only apply to positions intended to service equipment and should not be expanded to other types of work (e.g. would not cover someone who operates equipment/machinery).

IRCC has an existing LMIA exemption for repair personnel for out-of-warranty equipment, which may make this variation redundant.

This advertising exemption is available in all provinces and territories but is more easily accessed for short periods of work. Six months seems to be the unofficial maximum duration (outside of Quebec). Service Canada officers have applied the exemption to longer periods of employment where the work is periodic if an anticipated schedule is included with the LMIA application. For example, it is often possible for employers to secure an LMIA confirming the intermittent employment of a specialized service technician in Canada over a 12-month period.

B. International Mobility Program

Emergency repair personnel or repair personnel for out-of-warranty equipment may apply for a work permit exempt from the LMIA requirement under section 205 of IRPR (LMIA exemption code C13). Previously available only to emergency repair personnel coming to Canada to repair industrial or commercial equipment to prevent a disruption of employment, the exemption was expanded in May 2015 to include foreign workers needed to repair industrial or commercial equipment no longer under warranty or covered by an after-sales or lease agreement. This expansion allowed preventative work where failure to repair industrial equipment immediately would negatively impact productivity. Related IRCC Program Delivery Instructions indicate that

²⁰

Supra 17.

repair personnel and service technicians will typically be admitted to Canada for a short duration, generally less than 30 calendar days, with extensions permitted in exceptional cases.

C. Analysis

In spite of many of the facilitative immigration changes introduced under the Global Skills Strategy and CETA, the LMIA requirement remains for specialized service providers who come to Canada to repair industrial or commercial equipment no longer under warranty or covered by an after-sales or lease agreement. It is costly, time-consuming (especially as the application is often made repeatedly for the same person) and, in these circumstances where the labour market is not even required to be tested, unnecessarily burdensome both for Canadian employers and ESDC.

The C13 LMIA exemption should be further expanded to include specialized service providers or technicians coming to Canada to perform regular maintenance (and other technical work on proprietary equipment no longer under warranty), and the maximum duration lengthened to allow as much flexibility as the current LMIA advertising exemption for specialized service providers. The criteria should mirror the current ESDC criteria for the specialized service providers/technicians advertising exemption. A mandatory wage threshold can be added if there is concern that this transition might result in specialized service providers/technicians being paid below the prevailing wage range.

RECOMMENDATION

- 5. Extend the C13 LMIA exemption to include specialized service providers/technicians coming to Canada to perform regular maintenance (and other technical work on proprietary equipment no longer under warranty). Allow for work permits valid for up to six months (for foreign nationals who will be in Canada continuously), and up to a year (for foreign nationals who will only be in Canada periodically).**

VII. WARRANTY WORK

A. Temporary Foreign Worker Program

Under the TFWP, LMIA applications for foreign nationals coming to Canada to perform warranty work are exempt from recruitment and advertising if the work entails installation, inspection or repair of equipment, and the terms of the warranty require the work to be done by skilled

workers designated by the manufacturer. The LMIA Variation is available in all provinces and territories.

ESDC's *Directive on Recruitment and Advertising Requirements* gives additional guidance about this advertising exemption:

The warranty work variation is different from the specialized service variation because it is specifically related to situations where the position is for work, which under the authority of a warranty, must be done by skilled workers designated by the manufacturer. The specialized service variation has no such requirement.

B. International Mobility Program

Business visitors who meet the following specific criteria do not require a work permit, pursuant to subsections 186(a) and 187(3) of IRPR:

- There must be no intent to enter the Canadian labour market (i.e., no gainful employment in Canada).
- The activity of the foreign worker must be international in scope (i.e., that is, there is the presumption of an underlying cross-border business activity, e.g., after-sales service).
- There is the presumption of a foreign employer, as
- the primary source of the worker's remuneration remains outside Canada;
- the principal place of the worker's employer is located outside Canada;
- the accrual of profits of the worker's employer is located outside Canada.²¹

After-sales and lease services, including warranty work, is a clear and accepted example of activities included in the IMP business visitor category. IRCC Program Delivery Instructions describe after-sales and lease services as follows:

After-sales and lease services

After-sales and lease services include those provided by persons repairing and servicing, supervising installers, and setting up and testing commercial or industrial equipment (including computer software). Setting up does not include hands-on installation generally performed by construction or building trades (electricians, pipe fitters, etc.).

²¹ IRCC Program Delivery Instructions, [International Mobility Program: Authorization to work without a work permit – Business Visitor \[R186\(a\)\]](#).

Section R187 also applies to persons seeking entry to repair or service specialized equipment purchased or leased outside Canada, provided the service is being performed as part of the original or extended sales agreement, lease/rental agreement, warranty or service contract.

After-sales and lease services also include situations where the sales or lease agreement or purchase order is for a software upgrade to operate previously sold or leased equipment. A service person coming to Canada to install, configure or give training on the upgraded software should receive consideration as a business visitor, as long as the after-sales or lease services activity is clearly articulated in the new sales or lease agreement or purchase order. A sales or lease agreement or purchase order for upgraded software is a new contract for a new product. As with NAFTA, **hands-on building and construction work is not covered by this provision.**

Warranty or service agreement

Service contracts must have been negotiated as part of the original sales or lease/rental agreements or be an extension of the original agreement. Service contracts negotiated with third parties after the signing of the sales or lease/rental agreement are not covered by this exemption. If, however, the original sales agreement indicates that a third company has been or will be contracted to service the equipment, section R187 applies. Where the work is not covered under a warranty, a work permit and a Labour Market Impact Assessment (LMIA) is generally required.²²

C. Analysis

The LMIA advertising exemption under the TFWP is superfluous in light of the work permit exemption for business visitors performing after-sales service.

Infrequently there may be circumstances where the service technician coming to Canada to perform warranty work may benefit from a work permit rather than a visitor record. For example, service personnel performing warranty work in Canada for a long period may require a work permit to be issued a Social Insurance Number,²³ to access provincial health insurance or to facilitate the issuance of visitor records or open work permits to accompanying dependents. These would be infrequent cases since most provinces and territories make government-funded health insurance available only to foreign workers issued work permits valid for at least 12 months, and spouses of skilled foreign workers are eligible for open work permits under LMIA exemption code C41 only where the principal foreign worker has a work permit valid for at least six months. Where warranty service personnel may need or want a work permit, the LMIA

²² *Ibid.*

²³ Visitor Records must contain remarks indicating a foreign national is authorized by regulation to work in Canada without a work permit before Service Canada will issue a SIN.

exemption for emergency repair personnel or repair personnel for out-of-warranty equipment (LMIA exemption code C13) could be leveraged.

RECOMMENDATION

- 6. Eliminate the LMIA Variation for warranty work.**

VIII. CONCLUSION

The CBA Section appreciates the opportunity to comment on LMIA Variations, and how they might be adjusted, eliminated or transitioned into LMIA-exempt or work permit-exempt occupations under the IMP in the interest of simplifying the LMIA process and for the sake of consistency.

IX. SUMMARY OF RECOMMENDATIONS

The CBA Section recommends:

- 1. Create a new IMP for Foreign Academics Conducting Teaching or Research.**
- 2. Continue to offer the Owner/Operator LMIA Variation.**
- 3. Extend the C13 LMIA exemption to include foreign workers coming to Canada for periods of short duration where the position requires specialized and/or proprietary knowledge to ensure the safe and efficient provision or operation of machinery or equipment.**
- 4. Eliminate LMIA requirement for Religion Instructors and allow applicants to apply directly under R205(d). Alternatively, clarify whether R205(d) includes religious instructors in formal schools or only contemplates religious workers employed in locations that are not schools.**
- 5. Extend the C13 LMIA exemption to include specialized service providers/technicians coming to Canada to perform regular maintenance (and other technical work on proprietary equipment no longer under warranty). Allow for work permits valid for up to six months (for foreign nationals who will be in Canada continuously), and up to a year (for foreign nationals who will only be in Canada periodically).**
- 6. Eliminate the LMIA Variation for warranty work.**