Toronto Law Journal

Canadian Corporate Immigration: What You Need to Know About the Foreign Workers Among Us

Benjamin A. Kranc, Kranc Associates

Introduction

Canadian immigration law may not come up every day for most practitioners, but when it does, it is important to know some basic tenets to ensure that the parties involved have an understanding of the issues. Though we loosely classify immigration law into one broad category, there are in fact many aspects to immigration law, each often considered a specialization within a specialization. Among other topics, there are issues of family-based immigration, refugee and other humanitarian issues, how to overcome inadmissibility, and various permanent residence options, to name a few.

And there is one area (which doesn't make the news as often), referred to as 'corporate immigration' which deals primarily with securing foreign workers the right to work in Canada. This is the area we will focus on today. Please note that this article is intended only to give general principles, and certainly, there is extensive law to consider both in terms of statute/regulation, as well as case law. Further still, immigration issues are often canvassed in governmental directives or policies provided online. Though there is often argument about whether an officer's discretion can be fettered based on such guidelines, there is still no doubt that there is significant information about the considerations an officer will have in making an immigration determination that can be gleaned from such guidelines and policies. It would be essentially impossible to provide proper guidance to a client without full knowledge of the ever-changing directives that are issued.

General Background

Though one can get caught up in the trees of corporate immigration law, it is often important to recall the forest, to keep issues in focus. From a corporate immigration law perspective, there are typically three essential issues in considering how to get a foreign worker to Canada, and we will canvass each of these in this article. The issues are:

- Work Permits requiring a Labour Market Impact Assessment (LMIA);
- Work Permits that can be secured without an LMIA; and
- Work without a Work Permit

Certainly, there can also be side issues such as inadmissibility, but the above are the three primary substantive considerations. There are also ongoing issues of compliance, and the increasingly common issue of audits of companies to ensure compliance.

October 2018

The Starting Point – LMIAs and Work Permits

Though many people see their application for a work permit as a starting point for the ability to work in Canada, the actual starting point is a prospective employer. The Immigration and Refugee Protection Regulations (IRPR) s. 203 indicates that before a foreign worker can fill a position in Canada, a prospective employer must take certain actions and receive certain approvals so that a foreign worker may apply for a work permit for the position. The process in this regard is known as an application for LMIA. LMIA guidelines are actually set by Employment and Social Development Canada (ESDC) and processing is done through Service Canada. Only once an employer secures an LMIA can a foreign worker then seek a work permit. Note that the foreign worker must still substantiate to an Immigration Officer his/her qualification for the position (for instance, if an LMIA is approved for a position that requires a bachelor's degree, and the applicant does not have a bachelor's degree, the work permit will still be refused, notwithstanding the issuance of a positive LMIA).

Particularly since 2014, regulations concerning LMIAs have become quite strict.[1] Various pre-application details are required, and Service Canada officers have wide latitude in consideration of the issues. In terms of pre-application procedures, and most notably, employers must (subject to a few exceptions) advertise for 30 days in 3 sources including the Canada Job Bank, with prescribed information including salary, working conditions, and location, and justify the reasons for the failure to hire Canadian citizen or permanent resident applicants.

Once filed, an officer will consider substantive issues including whether the employment of a foreign national will:

- result in job creation or retention for Canadians (citizens or permanent residents);
- lead to transfer of skills or knowledge to Canadians; and
- likely fill a labour shortage.[2]

In addition, an officer will consider issues including 'genuineness'[3], and whether employers have previously provided 'substantially the same' wages and working conditions in prior work permit scenarios.[4] If it is determined that employment factors have changed without prior authorization (including, for instance, a salary increase), then the employer may be seen as having failed to maintain substantially the same conditions, and may be denied an LMIA.

LMIA Exemptions

Though LMIAs represent the technical starting point for a work permit, the law provides for various LMIA exemptions, and quite often, it is finding one of those exemptions that is key to

[1] Regulations were made stricter following the 'RBC Scandal' where RBC was seen to have hired foreign workers and displaced their Canadian employees.
[2] IRPR, s. 203(3).
[3] IRPR, s. 203(1)(a) – there are prescribed factors that must be considered.
[4] IRPR, s. 203(1)(e).

the speed and success of allowing a foreign worker to work in Canada. Pursuant to IRPR ss. 204 and 205, various exemptions have developed, including:

- *Intra-company transfers*. Where a management level or 'specialized knowledge' worker is being transferred from a foreign affiliate to a Canadian entity, the law allows for a work permit without an LMIA. As with all the exemptions, there are numerous details which must be considered, including whether someone is actually 'specialized',[5] and whether the relationship of the foreign and Canadian entities is appropriate.
- *Professionals*. Pursuant to various international agreements, certain professionals may work in Canada without LMIAs. The most notable provision is that found in NAFTA,[6] which allows for some 100 professions to work in Canada. Some of the more commonly used professions include: engineer, accountant, management consultant, and various scientists. Other agreements, such as CETA (with the European Union) and the CPTPP (with various Pacific Rim countries) allow for more generalized professional provisions without specific occupation lists, but with restrictions relating to, *e.g.*, education, duration of stay, etc.
- *Reciprocal Benefit*. Less known than some of the other LMIA exemptions, this category allows a Canadian employer to argue that it gives opportunities to Canadians abroad, and therefore, should be permitted to allow foreign workers to work in Canada. This category allows Canada to maintain some goodwill with other countries and is seen to have a neutral labour market impact.
- *Significant Benefit*. In a kind of 'catch all' category, it is always open for a company to argue that they need a foreign worker (generally, urgently), and there is justification for same. Of course, this is a highly discretionary category, and its consideration should be carefully applied. There are some sub-categories that have evolved under this heading, including, notably, those coming for 'emergency repair', who are seen as vital, and needed forthwith to fix something crucial.

There are other categories, and sometimes there are temporary programs for specific situations, but it is important to be aware that LMIA exemptions exist, and to seek out an applicable one when necessary.

Work Permit Exceptions

The law also allows some people to come to Canada to work without a work permit. These can be divided into two broad types.

The first type are 'pigeon-holed' categories of people who can work in Canada without work permits. These are prescribed in IRPR s. 186(b) through (w), and include, for instance:

[5] Also since 2014, the term 'specialized' has been refined, and now requires advanced knowledge plus proprietary knowledge (it used to be that just one would be sufficient).
[6] Soon to be renamed the USMCA.

professional athletes, clergy, and journalists. As with all other matters in this article, there are details which must be heeded. For instance, for a journalist to be covered by this provision, he/she must be employed by a foreign news company and must be reporting on an event in Canada.

The second type of non-work permit work is that of 'business visitors', as set out in IRPR ss. 186(a) and 187. This is perhaps one of the most misunderstood categories in all of corporate immigration, and it is crucial that business travellers (and their home country employers, and Canadian 'sponsors') understand the issues. In this regard, firstly, and despite belief to the contrary, business visitors are not people who are not working in Canada. They are working, but the law allows them to carry out their activity without a work permit. The next issue becomes: what is activity that can legitimately be carried out as a business visitor, and the unfortunate answer is that it is not always fully clear. Over time, certain considerations and tests have evolved, but there is no definitive guidance on where business visitation ends, and work requiring a work permit starts.

Perhaps the simplest consideration is: is the person carrying out productive work. (That is by no means a definitive test either, but it provides some guidance.) As such, common activities either mandated or considered business visits include meetings,[7] intra-company training,[8] and sales not to the general public.[9]

Some common misconceptions often heard with regard to this category are that:

(a) being on foreign salary means you are a business visitor.

    a. It is true that you must be paid from abroad to qualify in this category, but this fact alone does not make you a business visitor.

(b) coming for a brief visit means you are a business visitor.

    a. It is the nature of the activity that counts, not the length (or brevity) of the stay. It is also true that a shorter stay is usually indicative of a potential business visitation scenario, but again, this variable is not determinative.

What many people believe is the simplest way to travel to Canada is actually often the most difficult — and clients need to be aware that they cannot take such visits for granted.

Procedural Issues

In addition to the substantive issues above, there are various procedural considerations, though in some cases the dividing line between substantive and procedural is often hard to draw as well — and whatever the label, the problem can still lead to a refusal. Among other matters:

---

[7] Quaere whether if you are in the business of conducting meetings (e.g. the HR Director of a company), whether this is still business visitation.
[8] IRPR, s. 187(b).
[9] IRPR, s. 187(c).

- Some people need to apply at a 'Visa Post' (Canadian Embassy, High Commission or Consulate). Others can seek their work permit at a Port of Entry.
- Even for those that can seek a work permit at a Port of Entry, the government now requires for most of those applicants that they first secure an Electronic Travel Authorization (eTA). This can catch issues of criminal inadmissibility in advance — and as such, disallow entry (subject to procedures to overcome inadmissibility).
- In some cases, applications can be 'pre-screened' for a government opinion before making a Port of Entry application.
- Work permits are temporary. The parties involved must make provision for what happens when the work permit is set to expire. This may involve questions of whether there are grounds for renewal (and that appropriate procedural actions are taken to remain in status) and/or whether permanent residence is desired and can be sought.

Ongoing compliance

As noted above, besides just getting a worker to Canada, there are ongoing compliance issues, and companies are now frequently audited. Failure to have met the terms of the LMIA and/or work permit granted can lead to various sanctions including monetary fines, the loss of right to hire more foreign workers, and blacklisting.

Conclusion

For those assisting employers or foreign workers, it is important to understand the basic principles of the work permit system, or 'corporate immigration'. When a party needs to consider any issues set out in this article, that should trigger the need for a deeper look at the situation to take an appropriate course of action.

The information in this article is for general purposes only, and not intended as legal advice for any particular situation.