



Immigration and Work Permit Considerations



Canada's immigration legislation and programs are designed to assist the entry into Canada of business people and foreign skilled workers. The Canadian system also facilitates the entry of foreign entities and business people seeking to start new businesses or subsidiaries in Canada.

Immigration issues should be considered well in advance whenever a foreign entity or worker wishes to enter Canada to conduct business. The most appropriate immigration strategy and entry option will need to be identified. It must be determined whether the foreign national requires a work permit or if they may enter Canada as a business visitor.

1. Canada's Immigration and Refugee Protection Act (IRPA)

The *Immigration and Refugee Protection Act* (IRPA) and its regulations affect business operations, human-resource planning and potential liability. For example, the legislation:

- Affects the ability to hire foreign workers for positions in Canada;
- Has an impact on foreign service providers and business people wishing to come into Canada for business purposes;
- Affects the ability of foreign nationals to acquire Canadian permanent-resident status; and
- Exposes companies and individuals to potential liability for breaches of the IRPA.

2. Canada's Entry and Work Permit Rules: A General Overview

As a general rule, no person other than a Canadian citizen or permanent resident may work in Canada without valid authorization. Hence, it is important to determine whether or not a foreign national entering Canada requires a work permit.

A work permit is a document that specifies the entity that the foreign national is legally entitled to work for in Canada, as well as the occupation and the location of employment. The work permit has a specific validity period and sets out some conditions by which the foreign national must abide. The distinction between a genuine business visitor and a foreign national requiring a work permit is not always clear.

The definition for “work” is broad: “an activity for which wages are paid or commission is earned, or that competes directly with the activities of Canadian citizens or permanent residents in the Canadian labour market.” Business visitors are typically foreign nationals who wish to enter Canada temporarily to engage in interna-

tional business activities for a short time period. Business visitors must meet the following general criteria:

- Business visitors must have no intent to enter the Canadian labour market;
- The intended activity in Canada must be international in scope;
- The primary source of remuneration must be outside of Canada; and
- The accrual of profits of their employer must be outside of Canada.

A foreign national will usually be allowed entry as a business visitor if the purpose of their entry falls under certain activities. The following is a non-exhaustive list of potential business-visitor activities:

- Attending business meetings;
- Exploring business opportunities in Canada;
- Negotiating the sale of non-Canadian-origin goods to Canadian customers;
- Providing some types of after-sales service to Canadian customers;
- Training Canadians employed within the same corporate group as the trainer; and
- Attending seminars or trade shows.

If, after assessing the person and the purpose of the entry, it is determined that a work permit is required, the next step is to determine whether there is any work permit category under IRPA, under an international agreement (e.g., NAFTA) or under any government program that fits the situation. If there is not, the employer must first apply to Service Canada to obtain a Labour Market Opinion (LMO) allowing employment to be offered to a foreign national instead of a Canadian citizen or permanent resident.

3. Labour Market Opinions (LMOs) through Service Canada

Generally, the goal is to avoid the LMO process if possible. The reason for this is that it avoids the risk of Service Canada denying the LMO request. Secondly, having to apply for an LMO will delay the overall time frame for obtaining a work permit.

The application package for an LMO is detailed and must be prepared with great care. The entity wishing to hire the foreign national must demonstrate that it has met Service Canada's recruiting requirements and that the wage being offered meets the prevailing wage rate for the occupation. The location where the person will be employed must also be specified. The recruiting standard to be met depends on the skill level of the occupation under Canada's National Occupation Classification (NOC) system.

Service Canada reviews a number of factors when assessing an LMO application, including whether:

- The employer has made reasonable efforts to hire or train Canadian citizens or permanent residents;
- The work of the foreign national is likely to result in direct job creation or job retention for Canadians or permanent residents;
- The work is likely to result in the creation or transfer of skills and knowledge for the benefit of Canadians and permanent residents;
- The work is likely to fill a labour shortage;
- The wages and working conditions are sufficient to attract Canadian citizens or permanent residents; and
- The job offer is genuine.

If an LMO is granted by Service Canada, it can then be used to obtain a work permit.

If the foreign national will be working in the province of Québec, special rules apply. In addition to the LMO from Service Canada, a Québec Acceptance Certificate (CAQ) must be obtained from the Québec Immigration ministry.

4. LMO-exempt Work Permit Categories

There are a number of potentially useful LMO-exempt work permit categories that businesses seeking to hire or bring in foreign workers to Canada should consider. The following are some of the main LMO-exempt work permit categories.

a. Intra-company Transferees

This work permit category is useful for transferring managerial or specialized personnel to Canada from a related foreign entity.

The basic rules are:

- The applicant must be an executive, manager or have "specialized knowledge," and must be transferring into such a position;
- The applicant must have been employed full-time with the related foreign entity outside Canada for at least 12 consecutive months in the three-year period prior to the application; and
- There must be a proper relationship between the foreign entity and the Canadian entity receiving the transferee (e.g., a parent-subsidiary or affiliate owned and controlled by a common parent company).

Initial work permits are usually granted for a three-year period. There are time caps that may limit the overall length of time that a foreign national may stay in Canada under this category. Executive or managerial transferees have a time cap of seven years, while "specialized knowledge" transferees may be in Canada under this type of work permit for up to five years.

This work permit category is often used when a foreign company wishes to start doing business in Canada. When setting up the corporate and ownership structure of a new business in Canada, consideration should be given to designing it in a way that will allow for the use of this work permit category.

There are also special rules for start-up situations where the Canadian branch or subsidiary has recently been started. For example, the initial work permit will be granted for only one year so that the viability of the Canadian operation may be examined prior to granting a renewal of the work permit.

b. NAFTA Professional Category

The North American Free Trade Agreement (NAFTA) Professional category may be used by eligible American and Mexican citizens. NAFTA lists 63 professions that may be eligible for a work permit. The foreign applicant must usually have a university degree related to a listed profession, and the applicant must be entering to apply the skills of that profession. A three-year work permit, which is renewable, may be obtained.

Some of the professions listed under NAFTA are: computer systems analysts, engineers, scientific technicians, management consultants, medical and some allied professions, and many scientific professions such as chemists, geologists and biologists.

c. Other Free Trade Agreements

Canada also has free trade agreements with work permit provisions that are relatively similar to NAFTA's Professional category with Peru and Chile, so eligible professionals from those countries may also have special work permit options.

d. NAFTA Investor or Trader Categories

These work permit categories are potentially available to American and Mexican applicants who will be employed in Canada by enterprises with American or Mexican nationality. "American or Mexican nationality" means that at least 50 per cent of the entity established in Canada must be held by American or Mexican citizens or entities.

For the investor category, the foreign-national applicant must (i) be seeking entry solely to develop and direct the enterprise (i.e., the applicant should have controlling interest in the enterprise), or (ii) if the applicant is an employee, be in a position that is executive or supervisory or involves essential skills. However, a one-year work permit may be granted to an employee not possessing essential skills if the employee is needed for the start-up of a new enterprise, such as a technical employee needed to train Canadians who will be hired by the new business.

In addition, a substantial investment has to be made. There is no set rule on what constitutes a "substantial" investment. It will depend on the circumstances and the nature of the business. The objective of the investor category is to promote productive investment in Canada. Therefore, an applicant is not entitled to this status if the investment, even if substantial, will produce only enough income to provide a living for the applicant and the applicant's family.

For the trader category, the foreign-national applicant must be entering Canada to carry on substantial trade in goods or services principally between Canada and the United States or Mexico. To be "substantial trade," over 50 per cent of the total volume of trade conducted by the entity in Canada must be between Canada and the United States or Mexico. The applicant must be employed in a capacity that is executive or supervisory or involves essential skills or services.

Initial applications under this category must be made to a Canadian visa office outside Canada. The initial work permit is issued for a maximum of one year. Work permit extensions under this category may be granted for two years at a time.

Generally, the intra-company transferee category is a preferable option. However, in situations where the corporate structure does not support that category or where the applicant has not worked for the related foreign company for at least 12 months, the NAFTA investor or trader category may provide a solution.

e. Entrepreneurs

There is a work permit category for entrepreneurs to enter Canada where they will be setting up a business that will hire Canadians to operate it. This is intended to allow the temporary entry of foreign nationals who will set up the business and then leave Canada once it is up and running.

f. IT Workers Programs

British Columbia and Québec have special work permit programs in place to assist the entry of some types of information technology (IT) workers and software developers to those two provinces.

g. Spousal Employment Program

Spouses (including common-law and same-sex spouses) of most foreign nationals working in Canada may apply for a work permit under the Spousal Employment Program. The principal foreign national must be working in a position that is at a higher skill level. Typically, this includes management, professional occupations, and technical or skilled trades workers. This program may assist companies in their recruiting efforts, since accompanying spouses will usually be able to work in Canada.

5. Permanent Resident Status

Many foreign workers who obtain work permits in Canada wish to apply for permanent-resident status. Canada's permanent-resident rules are designed to help such foreign nationals gain permanent status. If permanent-resident status is obtained, the person no longer requires a work permit to work in Canada. Canada also has permanent-resident programs aimed at business people, although these programs are under review.

If a foreign national intends to settle in Québec when he or she becomes a permanent resident, the foreign national will need to qualify for permanent-resident status under Québec's immigration system. Québec offers a skilled-worker category as well as programs for inves-

tors and entrepreneurs. There are also special programs offered by other provinces that may lead to permanent-resident status, which are discussed below.

6. Provincial Nominee Programs

Canadian provinces have Provincial Nominee Programs (PNPs) in place. Each of these provincial programs is different, but generally the PNPs are designed to facilitate the recruitment of foreign skilled workers who are able to address skills shortages within the nominating province. Foreign nationals who qualify under a PNP are able to apply for permanent-resident status on an expedited basis. If a foreign national is nominated under a PNP, he or she may obtain a work permit while the permanent-resident application is being processed.

Some PNPs also have programs designed to bring in new businesses or entrepreneurs. For example, Ontario's program has a category that facilitates the entry of foreign nationals where a major investment and new business will be created in Ontario that will create employment for Ontario residents.

7. Other Immigration Issues

There are a number of other immigration considerations that need to be reviewed when bringing a foreign worker to Canada.

a. Is an Entry Visa Required?

Depending on the citizenship of the foreign national, an entry visa (called a "Temporary Resident Visa") may be required before the person may enter Canada. Where this is the case, the foreign national must apply for both the work permit and the entry visa at a Canadian visa office outside Canada. Business visitors from countries that require an entry visa must also apply at a visa office before travelling to Canada.

b. Is an Immigration Medical Required?

Foreign nationals who have lived in certain designated countries for more than six months in the 12 months prior to the application and who are coming to Canada

for more than six months require an immigration medical as a condition of entry. This requirement may delay the application process, as a work permit applicant who needs an immigration medical must apply through a visa office outside Canada.

c. Admissibility Issues

A foreign national (and any accompanying dependants) seeking entry to Canada must not be inadmissible for such things as criminal convictions, medical problems or prior entry refusals. Where a candidate is inadmissible due to criminality, steps can sometimes be taken to remedy the situation, depending upon the seriousness of the offence and the number of convictions.

d. Dependants

The accompanying spouse and children of a foreign worker will need to obtain immigration documentation. Spouses may qualify for a work permit under the Spousal Employment Program. Children may need a visitor record or a study permit.

8. Other Considerations

There are numerous practical considerations beyond identifying the proper immigration or work permit category to use.

a. The Application Package and Supporting Documentation

It is imperative to put together a strong application package when applying for a Service Canada LMO or for a work permit. By ensuring that an application is well-documented and complete, the likelihood of it being approved is significantly increased. The extent and content of the material included in the application package will depend on the work permit category and the particular circumstances of each situation.

b. Employment Issues

Offers of employment and employment contracts for foreign workers must be carefully crafted. Offers of employment to foreign workers should be made conditional on the worker obtaining a work permit and main-

taining valid status to work in Canada. Transferred employees and foreign hires should be required to sign an employment contract during the hiring process to govern the employment relationship.

c. Tax Issues

Different tax rates or dual tax-filing obligations may need to be addressed in intra-company transfer situations. As well, there may be tax issues or withholding issues for the company or for personnel whenever services are being rendered in Canada, even where the foreign national may not be directly remunerated in Canada.

d. Obtaining Provincial Health Coverage

Health coverage is provided by provincial governments in Canada. Transferees or foreign-national hires on work permits and their dependants will usually be eligible for public health coverage. The eligibility rules of the province in question need to be examined. Private coverage should be arranged prior to entry to cover any waiting period. Extensions of work permits should be obtained early to avoid potential disruption in public health coverage.

e. Social Insurance Numbers

Foreign workers will need a social insurance number so that they may be paid employment income in Canada. This may be obtained from a local Service Canada office or by mail. The work permit must be obtained prior to applying for a social insurance number.

9. Conclusion

Companies doing business in Canada may need to hire or engage foreign nationals to address their human-resource needs. When hiring or recruiting foreign nationals, companies need to be aware of the applicable immigration rules, issues and options. When hiring a foreign national, it is also imperative to prepare strong application materials to support the immigration status being sought.

gowlings: expect innovation, results and value

Founded in 1887, Gowlings is one of Canada's largest law firms, with over 750 professionals in offices across the country and in Moscow, London and Beijing. Recognized for excellence in business, advocacy and intellectual property law, Gowlings provides dedicated industry expertise in the energy, mining, infrastructure, life sciences, government, financial services, technology, manufacturing and distribution sectors, and in areas such as corporate finance and M&A, transfer pricing and tax, patents and trade-marks, and occupational health and safety. For more information, visit

gowlings.com/dbic

This publication is part of Gowlings' *Doing Business in Canada* guide, which provides business executives, foreign counsel and investors with an overview of the legal aspects of Canadian business operations. The information in this guide is current as of September 2011 and is for general information purposes only. It does not constitute a legal opinion or other professional advice.

For further information or to view the rest of the guide, please visit us at gowlings.com/dbic.

montréal • ottawa • toronto • hamilton • waterloo region • calgary • vancouver • beijing • moscow • london • gowlings.com

Gowlings provides legal services in Canada and abroad through the entities Gowling Lafleur Henderson LLP, Gowling Lafleur Henderson S.E.N.C.R.L., s.r.l., Gowlings (UK) LLP, and Gowlings International Inc. In 2011, the firm opened the Gowlings International Inc. Beijing Representative Office. © 2011 Gowlings