



CORPORATE IMMIGRATION
LAW FIRM

Immigration Updates - Canadian Definition of Business Visitor

The Business visitor category is supposed to be broad and facilitate the entry of persons who intend to engage in business or trade activities. The business person must have no intent to enter the Canadian labor market in that there must be no gainful employment in Canada; the activity of the business person must be international in scope in that there is a presumption of an underlying cross-border commercial activity; the primary source of the individual's remuneration must remain outside Canada; the principal place of the individual's employer must be located outside Canada; and, the accrual of profits of the business visitor's employer must be located outside Canada.

After-sales service is a common area where people may enter as business visitors to provide repair and servicing, supervising installers and setting up and testing commercial or industrial equipment, including computer software. This does not include hands-on installation generally performed by construction or building trades. It does include people coming to service or repair specialized equipment, purchased or leased outside Canada, provided that the service is being performed as part of the original or extended sales agreement, lease agreement, warranty, or service contract. The operative word here is "original".

If the proper provisions such as warranty periods and service agreements are not provided for in the original agreement to purchase or lease equipment then foreign workers coming to repair or service this equipment must have a labour market opinion and a work permit. The labour market opinion is approved on the basis that there are no Canadians or permanent residents available to perform the work and/or there will be no negative labor market impact ie. labour market impact must be positive or at least neutral. There are issues when the equipment or machinery is older and original purchase agreements are not available such as situations where a piece of industrial equipment was purchased 40 years ago and now needs critical repairs. Obtaining labor market approval, and subsequently a work permit, takes time. Although there are provisions for the entry of repair and service personnel in emergency situations and to avoid labour disruption, such situations are thoroughly scrutinized and work permit approval is at the sole discretion of the port of entry officer, who may or may not be familiar with the equipment or industry in question. Some officers expect employers to make efforts to obtain labour market opinions even with as little as 24 to 48 hours notice. In fairness, however, in many cases business visitors show up at the port of entry with little or no documentation that meets the requirements of the immigration

regulations and policy to substantiate the purpose of their entry. Although labour market opinion confirmations in Ontario are currently processed in three weeks or less, and Service Canada officers in Ontario are helpful and open to facilitating clients in emergency situations, that cannot be said for provinces such as Alberta and British Columbia where current processing times are approximately 4 months and facilitation is rare.

Recently there has been a clarification in the foreign workers manual with respect to whether a work permit is required when a Canadian company hires a foreign company to provide a service, such as consulting services, engineering design, architectural design etc. where the actual "work" will not be performed in Canada but rather, at the foreign company's offices abroad. For example, a Canadian company retains a world-renowned architectural firm to provide the design for a new building being constructed in Canada. All architectural design work is performed outside Canada. Foreign architects come to Canada for one or two days at a time on a monthly basis to attend meetings with Canadian architects, engineers and construction managers who are implementing the designs on site. The foreign architects answer questions and clarify their intent concerning the designs and then leave the country. They do not visit the construction site. They receive their salary from their foreign employer.

Prior to the clarification in the foreign worker manual these foreign architects would have been approved and admitted, in many cases, as business visitors. The clarification stipulates that these foreign architects require work permits. It has been determined that by virtue of the fact the Canadian company has retained and pays the foreign architectural firm who in turn pay their employees, that those employees are being indirectly remunerated by a Canadian source. Furthermore, Canadian immigration policy stipulates that a consultant coming to Canada to gather data from a Canadian firm then returning to their home country to do the analytical work and either mail the results or return to deliver them, requires a work permit. Canadian immigration policy, sees the gathering of data and the delivery of results/reports as part of the consultation services. This is not the case with respect to US immigration business visitor policy where business visitors in the same situation can enter the United States to gathered data as business visitors without work permits.

Policy such as this does little to promote a global business environment. Immigration policy makers would do well to sit down with economists and representatives from Service Canada from Ontario to develop business friendly business visitor requirements to deal with situations where original purchase agreements are no longer available or where the foreign business person is merely collecting data or delivering results to a Canadian client.

New Intra-company Transfer Provisions

CIC has made recent changes to the provisions regarding intra-company transferees. This category was created to allow international companies to temporarily transfer senior managers and executives and individuals with specialized knowledge to

corporately related entities in Canada in the interest of improving management effectiveness, expanding Canadian exports, and enhancing the competitiveness of Canadian entities in the global marketplace. They have now harmonize the provisions of IRPA and NAFTA with respect to intra-company transfer it to the extent that there is now supposed to be no difference in the requirements for entry and work permit durations.

Probably the most helpful change in policy, from a business point of view, is that intra-company transferees in the specialized knowledge category are now entitled to an initial work permit for a period of three years with a total of five years overall, as opposed to the previous policy which allowed only one year work permits to be issued up to a total of three years.

The downside to changes in the intra-company transfer provisions relates to the fact that there is now a seven-year cap on executive and managerial transfers. Under previous policy this applied with respect under NAFTA but not the general provisions of the Immigration and Refugee Protection Regulations. This could be particularly harmful, from a business point of view, where, for example, an executive was dividing his time between offices in Canada and the United States. He is still in Canada on a temporary basis, but under the new policy would only be permitted to do this for seven years. This aspect of the provisions can only harm Canadian business. In spite of the fact that policymakers in Canada suggest they have harmonized the general provisions with those of NAFTA, they seem unaware that US immigration officials will allow senior executives and managers to remain in United States as intra-company transferees beyond the seven-year cap where they can demonstrate that they have not worked in the United States for more than 183 days in the previous year; where they can provide documentary evidence of their time spent in both Canada and the United States in the previous 12 months; and where they can continue to show their ties to Canada. In the United States, these extensions beyond the seven-year cap are issued for one year at a time for an indefinite period as long as the requirements are met.

Canadian policymakers obviously fail to see the significance of the economic impact in circumstances where a senior executive or manager is splitting his/her time between the US and Canadian entities.

To discuss how these new requirements could impact your business, please contact either:



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