



Business Immigration

LAW GROUP

The Foreign Worker Program – New Requirements

(April 9, 2014)

*please note that all information is current as of April 8, 2014, and subject to change.
The information contained herein should be treated as general information only.

Overview

1. Business Immigration Law Group - About Us
2. Our experience with corporations and Temporary Foreign Workers
3. Labour Market Opinion-based Worker Permits
4. Why applying for a Labour Market Opinion is a lengthy and complex process
5. The unreal world of Labour Market Opinion processing
6. Labour Market Opinion-exempt Work Permits
7. Why apply for Permanent Residence?
8. Questions?

Business Immigration Law Group – About Us

About Us: Business Immigration Law Group is an immigration boutique multidisciplinary law firm located in downtown Toronto. We provide Canadian and US immigration services and global visa assistance primarily to local and multi-national corporations, in a variety of languages including French. We also provide immigration assistance to individuals who are establishing themselves or reuniting with family members in Canada.

Our clients: We provide immigration services to clients from various industries including mining, IT, accounting, high-tech manufacturing, engineering, automobile manufacturing, management consulting, and athletics, among others. We assist individuals and families with an array of immigration matters.

OUR EXPERIENCE WITH CORPORATIONS AND TEMPORARY FOREIGN WORKERS

Types of immigration applications that we have helped corporations and Temporary Foreign Workers file:

- Labour Market Opinions and Work Permits;
- Temporary Resident Visas;
- US and other foreign visas and Work Permits;
- Federal Skilled Worker; Canadian Experience Class; and Provincial Nominee applications for Permanent Residence status in Canada;
- Inadmissibility issues.

We understand that corporations and Temporary Foreign Workers have specific concerns/needs:

- Immediate and urgent Human Resources needs;
- Short-term and long-term needs for specialized skill sets;
- Personal / family needs of Foreign Workers (Work Permits for spouse and status documents / Study Permits for accompanying children.

WORK PERMITS BASED ON LABOUR MARKET OPINIONS (LMO), ISSUED BY SERVICE CANADA / EMPLOYMENT AND SOCIAL DEVELOPMENT CANADA (ESDC)

1. Work Permit and LMO basics:

- In general, a Work Permit authorizes a Temporary Resident to work in Canada for a specific duration, in a specific occupation, for a specific Employer in a specific city in Canada.
- In most cases, the issuance of a Work Permit must be based on an LMO approval / confirmation.
- An LMO confirms an Employer's need for a Foreign Worker to fill the job and that no Canadian worker has the required skill set / level of skill to carry out the duties assigned to the position.
- A Foreign Worker could be required for any occupation.

APPLYING FOR AN LMO IS LENGTHY AND COMPLEX PROCESS

2. **Advertising requirements:**

- On the national Job Bank or its provincial counterpart.
- The advertisement must be posted for a minimum of four (4) weeks starting from the first day the ad appears and is accessible to the general public.
- On two (2) or more advertising venues that reflect recruitment methods consistent with the normal practice for the occupation (national in scope for higher-skilled positions); print media; general employment websites; specialized websites for specific occupation profiles (engineering, accounting, biotechnology, etc.).

4. **“WOW” factors:**

- Wages, Occupation and Working conditions.

APPLYING FOR AN LMO IS LENGTHY AND COMPLEX PROCESS

4. **Wages / Salary:** Substantially the same but not less favourable than those set out in the offer– increases; bonuses; discretionary payments; commissions.
5. **Same Occupation:** Occupation must be the same as stated in the offer of employment.
6. **Working conditions:** Occupation must be substantially the same – hours of work; location; free from abuse etc.
7. **Active business:** Employer must be actively engaged in the business indicated.
8. **Employer compliance:** Employer must comply with federal and provincial employment laws.

APPLYING FOR AN LMO IS LENGTHY AND COMPLEX PROCESS

9. **Job creation:** Employer must ensure that employment of Foreign Worker will create or maintain jobs for Canadians, if that was a factor in the LMO issuance.
10. **Skills transfer:** Employer must ensure the transfer of skills and knowledge, if that was a factor in the LMO issuance.
11. **Hire Canadians first:** Employer must make reasonable efforts to hire and train Canadians, if that was a factor in the LMO issuance.
12. **No convictions:** Employer must not be convicted of trafficking in persons; sexual offences; causing death or bodily harm to an employee; uttering threats to cause death or bodily harm to an employee; an offence involving violence against an employee; various other offences committed outside Canada.

APPLYING FOR AN LMO IS LENGTHY AND COMPLEX PROCESS

13. **Record keeping requirement** (for Employers who have applied for and received an LMO as of December 31, 2013):
 - Six (6) years – all information used to support the application for LMO; all resumes received; employment decision-making process; timesheets; evidence of salary paid; changes in title, position, job duties, salary etc.

15. **Employer Compliance Review (ECR) and workplace inspections:**
 - An ECR occurs as part of the LMO assessment process.
 - An ECR is used to review the wages, occupation and working conditions provided to Foreign Workers whose Work Permits were issued under previously approved LMOs.
 - A workplace inspection assesses whether an Employer has complied with the conditions set out in an LMO approval / confirmation.
 - The conditions may relate to a Foreign Worker's wage, occupation, working conditions, or to an Employer's commitment to train Canadians or to transfer skills to Canadians, if that was a factor in issuing the LMO approval.

APPLYING FOR AN LMO IS LENGTHY AND COMPLEX PROCESS

15. **Non-compliance:** Employer unable to demonstrate that they have met the requirements of the Temporary Foreign Worker Program (TFWP) or the conditions set out in an LMO approval may be found non-compliant.

17. **Non-compliance penalty:** Two (2) year ban from using the TFWP and company name published on the blacklist on the CIC website; pending LMO applications refused; revocation or suspension of previously approved LMOs; revocation of Work Permits based on such LMOs.

19. **Non-compliance justification:** Non-compliance justification factors could include a change in federal / provincial law; a dramatic change in economic conditions directly affecting the business of the Employer; an error in interpretation made in good faith by the Employer; or an unintentional accounting or administrative error made by the Employer.

APPLYING FOR AN LMO IS LENGTHY AND COMPLEX PROCESS

18. **Employer Attestations:**

As part of an LMO application, for example, the Employer must attest that their company is compliant with all federal / provincial laws regulating employment and recruitment including collective agreements: due diligence required; and that they comply with the prevailing wage which of course, may change without notice and this requires monitoring and ensuring that they are compliant with the prevailing wage in each jurisdiction in which the Foreign Worker may work.

20. Due diligence required (last point for now): Significant due diligence is required by the Employer. Please see our news bulletin (March 2014).

THE UNREAL WORLD

1. **NO discretion:** Officers have no discretion for the most part.
2. **Limited advertising exemptions:** Very few if any exemptions to the advertising requirements and an exemption from posting on the Canada Job Bank cannot be obtained in advance.
5. **Specific wages required:** Service Canada does not like wage ranges – they prefer a specific wage.
7. **NO flexibility:** There is no flexibility regarding LMOs and Employer Compliance Reviews (ECRs) – Employers are strictly responsible for what is in the Annex to the LMO, i.e. no raises.

THE UNREAL WORLD

5. **Subjective wage assessments:** The prevailing wage as indicated in the “Working in Canada” statistics may be based on, for example, two years experience and a Bachelor’s degree but if the Employer advertises for five (5) years experience and a Master’s degree then the prevailing wage may be deemed too low by an officer. Be sure the wages are high enough depending on qualifications. This creates ambiguity and requires a subjective decision by an officer.

7. **Impossible NOC/wage determination:** Determining an occupation’s prevailing wage in a specific geographic location in Canada requires classifying the occupation as per the National Occupational Classification, a framework developed by Service Canada / Statistics Canada. Determining the most accurate NOC code for a position is an inexact science, as one NOC code may include up to 40-50 different position titles and includes all skill and experience levels.

THE UNREAL WORLD

7. **Employer language preferences:** If an Employer wants to hire an English / French bilingual person they must provide a detailed explanation and justification before an LMO would be approved. Any other language requirement must be justified.
8. **Report ALL changes:** Any change at all to wages, occupation, location, or other working conditions must be reported to Service Canada and a new LMO will be required in almost all cases.
11. **Re-application:** Any re-application for an LMO requires full advertising and full processing.
12. **Transition plan:** Employers will be required to provide a transition plan to transition their workforce to a Canadian / domestic workforce in the near future.

THE UNREAL WORLD

11. **Foreign Student wages:** LMO applications for Foreign Students who have graduated from a Canadian university (who are on their Post-Graduation Work Permit) require the median prevailing wage. However, the Employer is not required to demonstrate recruitment efforts.
12. **Short-term solution:** Employers should ensure that Foreign Workers apply for Permanent Resident status as soon as possible as second LMOs are unlikely to be approved – the LMO program is for short term, temporary, labour shortage solutions only.
13. **Coming next...** A tightening and raising of bar for the Intra-Company Transferee program requirements.

LMO-EXEMPT WORK PERMITS

Some Work Permits may be obtained without an LMO approval. Some examples include:

1. **Intra-Company Transferees** (Executives / Managers / Specialized Knowledge Workers).
2. **Significant** social, cultural or economic benefits to Canada.
3. **Canada – International Free Trade Agreements** (FTA): NAFTA (North American Free Trade Agreement); Canada-Chile FTA; Canada-Peru FTA; GATS. Provisions for European nationals expected in the next two (2) years.
4. **International Youth Programs** / International Experience Canada (IEC) Programs.
5. **Post-Graduation Work Permits** issued to Foreign Students who have graduated from a post-secondary institution in Canada [minimum duration of the study program: eight (8) months].

WHY IS IT IMPORTANT TO APPLY FOR PERMANENT RESIDENCE STATUS?

- **Foreign Workers may not remain in Canada indefinitely:** Foreign Workers often fail to put in place a strategy to facilitate their ability to remain in Canada beyond the validity period of their Work Permits.
- **Application for Permanent Residence:** Applying for Permanent Resident status (and supporting an employee's application for Permanent Residence) could be a way to meet a corporation's human resources needs. Once a Foreign Worker obtains Permanent Residence, he / she no longer requires a Work Permit.
- **Four-Year Maximum for Temporary Foreign Workers (Cumulative Duration):** The new Cumulative Duration [four (4) year maximum] regulation came into effect April 1, 2011. All work performed in Canada from April 1, 2011 counts towards a Temporary Foreign Worker's four (4) year total. While there are some exceptions for holders of higher skilled NOC 0 and A Work Permits and those issued under international agreements, and Canadian interests, Foreign Workers and Employers should be aware that their stay in Canada may be capped at four years.
- **Family re-unification:** The sooner Foreign Workers become Permanent Residents, the sooner they will be eligible to sponsor family members to join them in Canada (i.e. future spouse).
- **Future citizenship application:** Many applicants do not realize that Permanent Residence status in Canada is a mandatory step toward Canadian citizenship.

Business Immigration Law Group – Key Contact Information

Harry Goslett

hgoslett@bizimmigration.com // 416.368.1222

Brenda Wong

bwong@bizimmigration.com // 416.368.2333

Sjarif Ismail

sismail@bizimmigration.com // 416.309.4355

*Please feel free to call or email us
anytime with your questions.*

Thank you / Merci.