

Canada

Executive Summary

Canadian immigration law facilitates both the temporary and permanent movement of workers. In fact, the fastest growing area of movement into Canada, and a key focus of the federal government, is the temporary foreign worker program. Recently, the government introduced major steps to expand opportunities for these workers to remain permanently in Canada. In addition, provincial governments have over the last decade rapidly introduced and expanded their own immigration selection programs, many of them focusing on employee recruitment. No relocation strategy is complete without a review of all federal, provincial and territorial programs.

Key Government Agencies

Citizenship and Immigration Canada (CIC) is the largest of the Canadian government immigration departments, with visa offices around the world and local offices for certain temporary and permanent immigration processing. By and large, the 11 Provincial Nominee Programs are run through provincial and territorial ministries responsible for citizenship and immigration, usually located in government offices within their capital cities. The federal government's department responsible for the labour market, Human Resources and Social Development Canada (HRSDC), receives applications for approximately half of all temporary worker applications where labour market opinions (LMOs) are required. The other half of all foreign workers are LMO exempt meaning they are eligible to apply directly to CIC at a visa office abroad, or Canadian port of entry if visa exempt.

Finally, provincial governments regulate employment standards through their labour ministries, and are increasing their involvement in

the area of foreign workers, and enforcement of employers that do not comply with their laws.

Current Trends

Whereas immigration levels have remained at a steady level (approximately 250,000) for the past decade, the level of temporary entry has substantially increased due largely to labour market demand. Students, workers, and business visitors have seen healthy increases and the trend is expected to continue for the foreseeable future, despite the recent recession. Stronger economic fundamentals and industry performance relative to the G8, with burgeoning natural resources, IT, financial services and advanced manufacturing sectors, ensure a growing demand for foreign workers. In 2009, approximately 180,000 foreign workers bolstered Canada's labour force. Due to the major changes made to Canada's immigration system in late 2008 that will expand opportunities, these foreign workers can now more easily settle in Canada permanently, even in skilled trades occupations, where this was previously more difficult.

On the compliance and enforcement side, both federal and provincial governments will balance the trend to expand economic immigration, with increased vigilance of employers that participate in foreign worker and immigration programs, by introducing new programs to fine and sanction employers. Compliance with foreign worker and immigration programs is crucial for domestic and multinational companies that wish to do business in Canada and avoid serious repercussions.

Business Travel

Foreign nationals may enter Canada to engage in business or trade activities. Generally, the employer's remuneration, principal place of employment and accrual of profits must remain outside Canada. Furthermore, there must be no intent to enter the Canadian labour

market (*i.e.*, no gainful employment in Canada), and the foreign national's activities must be international in scope. Most often, these activities fall within the areas of research, design, growth, manufacture, production, marketing, sales, distribution, and both general and after-sales services. Attending business or board meetings, conventions, conferences and negotiating contracts are common reasons for business entry. Dependents of business visitors may apply for visitor status to enter into Canada, as can persons employed in a personal capacity by short term temporary residents, such as caregivers.

There is no standard amount of time granted to applicants for business entry. Canadian immigration officers consider the activities being conducted. Generally, sales trips, business meetings, conference attendance or training sessions last only a few days, and the entry time permitted will be consistent with the business needs. However, longer amounts of time will be granted where appropriate. Individuals will generally not be issued a business stay of over six months. Rather, they will have to apply for an extension while in Canada, which is filed at Canada's inland processing centre in Alberta.

Visa-exempt Nationals

Canada exempts nationals from the following countries from the need to obtain a visa as long as they have valid passports:

Andorra	Antigua/ Barbuda	Australia	Austria	Bahamas
Barbados	Belgium	Botswana	Brunei	Cyprus
Denmark	Estonia	Finland	France	Germany

Greece	Hungary	Iceland	Ireland	Israel
Italy	Japan	Korea	Latvia	Lithuania
Liechtenstein	Luxembourg	Malta	Monaco	Namibia
Netherlands	New Zealand	Norway	Papua New Guinea	Poland
Portugal	St. Kitts/Nevis	St. Lucia	St. Vincent	San Marino
Singapore	Slovakia	Solomon Isl.	Spain	Swaziland
Sweden	Slovenia	Switzerland	United Kingdom	United States
Western Samoa				

This visa exempt list changes from time to time and should always be checked before travel at <http://www.cic.gc.ca/english/visit/visas.asp>. For instance, Canada removed Mexico and the Czech Republic from the list in 2009, giving the reason that there had been a marked increase in the number of “bogus” refugee claims from their nationals.

Training

There is a fine line between when a foreign national can simply enter as a business visitor, and when a work permit is required. Employers must carefully consider the parameters of the training, or plans may go awry at the border, delaying business requirements and training plans.

Training under business entry vs. training requiring work permit

Short-term trainees, particularly employees of a related corporation abroad, will be permitted under the business provisions as long as the trainees continue to be paid abroad, and do not cross over into work, while in Canada.

Those coming to provide training can also often enter as business visitors, including training contemplated in the after-sales service provisions of a contract. For instance, coming to train Canadians on machinery or software does not require work permits, as long as the contract clearly sets out the training requirement.

Public speakers (for conferences/company meetings) may also qualify as business visitors, or require work permits, depending on the situation. Guest speakers for short-term events of less than five days (such as conferences) may qualify as business visitors, or require work permits, depending on the situation. These speakers normally qualify as business visitors if they rent out their own space and charge their own admission. However, commercial speakers hired by Canadian companies to provide training services for their employees require work permits.

Work permits must be obtained for commercial trainers or speakers contracted from outside a company to train Canadian employees (unless the training falls under the after-sales service provisions of a contract). U.S. and Mexican nationals may benefit from the North American Free Trade Agreement (“NAFTA”) provisions that allow

professionals to obtain work permits for pre-arranged training sessions for subject matter within the trainer's profession.

Employment Assignments

In most cases, employers should consider work permits for international assignments. Canadian immigration regulations provide various routes to work permits. Still others have recently been made available through the ongoing development and expansion of provincial nominee programs, which provide for work permits as an adjunct to permanent residence (nomination) applications.

There are three ways in which foreign nationals may enter Canada for international assignments involving activities considered to be "work". They are, from the most straightforward to complex:

- Work that is exempt from the need for a work permit;
- Work requiring a work permit, but exempt from a labour market opinion (LMO); and
- Work requiring an LMO.

Before the most appropriate entry category can be selected, a company must determine whether the employee will be engaged in "business" or "work" activities while on assignment in Canada. There is often a fine line between these two types of entry, as discussed above: business visitors must enter Canada to be doing business, not work.

"Work" generally means an activity for which wages or commission is earned, or one that competes directly with activities of Canadians (even where wages are not being paid). International assignments of a period of more than a week or two tend to fall under the classification of work, save for after-sales services provisions of a contract, or

longer-term training assignments, if the employer and remuneration remain outside Canada.

Activities not considered to be work include volunteer and charity duties for which a person would not normally be remunerated, or helping a friend/family member while in Canada (such as babysitting or small household repairs). Work done via internet or telephone when the employer and remuneration are outside Canada, and self-employment where the individual does not enter the labour market are also not considered to be “work” but rather “business”.

Work that is exempt from the need for a work permit

The vast majority of foreign nationals entering Canada to do “work” rather than “business,” require a work permit. There are, however, certain exceptions to this rule. Individuals who qualify for work permit-exempt work would not typically be international assignees of companies. The most frequent work permit-exempt foreign nationals include:

- diplomats and representatives of international organizations (of which Canada is a member), and their accompanying dependents;
- visiting members of armed forces;
- on-campus work for full-time international students;
- certain athletes, speakers, performing artists, crew, and referees;
- certain individuals on conference organizing committees;
- certain religious workers and clergy;

- students with practicums in the health field;
- emergency workers, including those rendering medical services; and
- certain transportation workers, including aviation inspectors and crew involved in international transportation.

As is evident from this specialized list, the vast majority of companies hiring foreign workers cannot benefit from exemptions and require work permits.

Work permits exempt from Labour Market Opinions

The general rule states that any foreign national doing “work” must obtain a work permit unless there is an available exemption (*i.e.* business visits and other activities in the bulleted list above). There are two types of work permits applicable to international assignments: work permits requiring labour market opinions (LMOs), and those which are LMO-exempt.

LMOs add complexity and time to the process, particularly during and in the aftermath of an economic downturn, when unemployment is higher than normal. Therefore, in considering any international assignment, companies should consider whether any LMO-exempt work permits are available. Canadian immigration law establishes various categories for LMO exemptions. The most common of these categories for international assignees follow in the next section.

Intracompany transfers

Multinational companies seeking to assign foreign employees to Canadian positions often use the LMO-exempt intracompany transferee category. These work permits are initially valid for assignments of up to three years, and extendable in two-year

increments. Executive and managerial-level employees can obtain this status for seven years, whereas specialized knowledge employees are limited to five years.

Executive and managerial-level staff must generally manage other employees, although management of crucial company functions or processes may qualify. Employment in a specialized knowledge capacity requires proof that the employee holds knowledge of the organization's products, services, research, equipment and techniques or an advanced level of knowledge about the position that is unique, and not ordinarily held by others within the industry. The applicant should be coming from a similar position at an affiliate outside Canada, which he/she has occupied for at least one continuous year in the past three.

There are a number of affiliate relationships that qualify to be eligible under this category, but all generally rely on common control (*e.g.*, parent-subsidiary, sister corporations, branch or representative offices).

Under Canada's previous immigration law, the intra-company provisions were more generous to U.S. and Mexican nationals under both NAFTA and General Agreement on Trade in Services (GATS). Current law creates parity between nationals qualifying under these international agreements, and all other workers, such that it no longer makes a difference which intra-company transfer provisions are used. That being said, there are definite advantages provided by these and other international agreements for international assignees.

International Agreements

Many International Agreements other than NAFTA and GATS allow international assignees with certain nationality to obtain work without labour market opinions, as long as they have employment opportunities in Canada. These agreements include:

- Artists Residencies Program (USA, Mexico)
- Professional Trainees (Bermuda)
- Canada Chile Free Trade Agreement (“CCFTA”)
- Film Co-Production Agreements
- International Air Transport Association (“IATA”)
- Seasonal Agricultural Program (Certain Caribbean countries)
- Professional Accounting Trainees (Malaysia)
- Scientific and Technical Cooperation Agreement (Germany)

The most widely commonly used of the international agreements for international employment transfers are still the NAFTA, CCFTA and GATS, which both allow certain professionals and skilled workers to come to work in Canada for periods of up to a year (90 days in the case of GATS, subject to extensions).

North American Free Trade Agreement (NAFTA)

The NAFTA provides expanded mobility and foreign workers rights for citizens of the United States and Mexico, although in the case of Mexico, some of the benefits of expanded rules have been complicated by the visa requirement imposed by Canada in June 2009.

The “NAFTA Professional” category contains a list of over 60 occupations, the most commonly used of which include accountants, architects, economists, engineers, hotel managers, industrial/graphic/interior designers, lawyers, management consultants, research assistants (in post-secondary institutions), scientists (botanists, geologists, chemists, etc.), scientific technicians

and technologists, teachers, technical publications writers, urban planners and computer systems analysts. Some of these require licenses, and/or a post-secondary education. Health professions (which all require degrees and provincial licenses) include doctors, nurses, dentists, nutritionists, dietitians, medical laboratory technologists, occupational/physiotherapists, pharmacists, psychologists and veterinarians.

These NAFTA Professional work permits are issued for up to a year, but may be extended multiple times in most occupations.

General Agreement on Trade in Services (GATS)

GATS international mobility provisions are much narrower than NAFTA's, although GATS applies to over 150 signatory countries (including the U.S. and Mexico). GATS only provides for one 90-day work permit in any 12-month. Its list contains period for nine occupations: engineers, agrologists, architects, foresters, urban planners, foreign legal consultants, land surveyors, geomaticists and senior computer specialists. All but the last two occupations require licensing and degrees. Computer specialists are given the choice between post-secondary credentials, equivalent or work experience.

Reciprocal Employment

This category can be used for international exchanges both in public and private sector contexts. The purpose of this LMO exemption is to provide complementary opportunities for international work experience and cultural interchange. It includes well-known student work-abroad programs (such as SWAP and AISEC), which are negotiated on a reciprocal basis by Canada's Department of Foreign Affairs and International Trade.

Companies can also use this exemption category if they create equivalent opportunities for Canadians abroad. For companies to

benefit from these work permits, a formal exchange or employee transfer program, or at minimum positions for Canadians sent abroad, should be provided. Entry under this exemption category must result in a neutral labour market impact. Note that direct reciprocity does not need to be demonstrated for academic exchanges.

Provincial Nominee Programmes (PNPs)

PNPs are run by each province and territory and result in a nomination for permanent residence in Canada. A side benefit of receiving a nomination in most PNP employment categories is the ability to receive an LMO-exempt work permit. Specific rules cannot be neatly summarized because the eleven PNPs each have distinct rules. Suffice it to say, PNPs are another valuable tool in an HR manager's arsenal in avoiding the need for an LMO.

Other types of common LMO-exempt work permits

Several other LMO-exempt categories are available, and include:

- “Significant Economic Benefit” work permits;
- Entrepreneurs/self-employed work permits;
- Post-graduation employment (for international students); and
- Research, educational or training programs, including post-doctoral fellows and award recipients.

These categories are not traditionally used for intra-company international assignments, but are useful alternatives to consider for recruitment strategies in other contexts.

IT/Software Workers is over

A special program was created in 1996 to facilitate processing of work permits for IT specialists in seven then high demand occupations: senior animation effects editors; embedded systems software designers; MIS software designers; multimedia software developers; software developers (services); software developers (products); and telecommunications software designers. The occupational descriptions became somewhat outdated, and the government considered changes to them, but in the aftermath of economic downturn, decided to eliminate this exemption category. Most IT workers will now have to obtain work permits through a Labour Market Opinion.

Work permits requiring Labour Market Opinions

International assignees who do not fit into any of the exemption categories discussed above must obtain a labour market opinion before they are eligible to receive a work permit. LMOs would typically be necessary for persons who are not being transferred from a foreign affiliate, who have not studied in Canada, and who do not have a designation that could qualify under one of the NAFTA or GATS professions. LMOs are obtained from Human Resources and Skills Development Canada (HRSDC) through their customer-facing arm, Service Canada, offices across the country.

The LMO process is lengthy: it can take anywhere from three weeks to six months to adjudicate (depending on the province, and the case). The HRSDC officer takes six factors into account in adjudicating the foreign worker request, namely whether:

- the work is likely to result in the direct job creation or job retention for Canadian citizens or permanent residents;

- the work is likely to result in the creation or transfer of skills and knowledge for the benefit of Canadian citizens or permanent residents;
- the work is likely to fill a labour shortage;
- the wages and working conditions offered are sufficient to attract Canadian citizens or permanent residents and retain them;
- the employer has made, or has agreed to make, reasonable efforts to hire or train Canadian citizens or permanent residents;
- the employment is likely to adversely affect the settlement of any labour dispute in progress.

The process is also complex in that it includes the requirement to recruit and advertise, screen out non-qualifying and interview qualifying applicants and explain why Canadians do not qualify for the position.

Even if the application for the foreign worker confirmation is successful, employers must undertake to train Canadians to ultimately take over the position, hence the “temporary foreign worker” program title. An employer must ultimately satisfy the government that the foreign worker will have a neutral or positive economic effect on the Canadian labour market.

Given the lengthy LMO timelines, companies can apply simultaneously for the work permit with CIC. However, a work permit cannot be issued by CIC until HRSDC grants the LMO. Visa-exempt individuals may apply directly with Canada Border Services Agency (CBSA) at a port of entry if in possession of an LMO, avoiding CIC.

Companies requiring many foreign workers may apply for bulk LMOs, which facilitate the issuance of individual-specific LMOs at a later date. Bulk approvals are useful where larger-scale labour market shortages can be demonstrated, and recruiting may occur at a later date. Another bulk option newly available to Alberta and British Columbia employers, called the E-LMO, accelerates the approval process, for jobs in 33 critical skilled occupations.

A new program, commonly referred to as the “Low-skilled Pilot,” allows companies to obtain LMOs for semi and low-skilled foreign workers if the employer meets hiring conditions, including transportation costs and providing affordable housing.

Finally certain industries have approached HRSDC for industry labour market validation letters. This has helped industries such as the IT and construction industries to obtain concessions, having been able to demonstrate grave labour market shortages.

It should be noted that any of the various LMO options outlined above are subject to refusal in the current labour market environment with relatively high unemployment in certain regions of the country. Back-up strategies should always be considered.

Province of Quebec

Quebec is the only province that has its own immigration selection system which is distinct from other provincial nominee programs. In terms of work permits, international assignees who benefit from any of the above-mentioned foreign worker exemptions need not apply to the province. Those who require an LMO must first obtain a Certificat d'Acceptation (CAQ) from Quebec, and only then can apply for a work permit.

Spouses and Children

Spouses are eligible for open work permits, and dependent children are eligible for study permits for most international transfers. In order for spouses and children to qualify for dependent status, the transferee simply has to be entering Canada for a high-skilled position that falls under Canada's National Occupation Classification codes O, A and B. These classifications cover both professional occupations and skilled trades. For instance, managers, financial analysts, engineers and scientists fall under the NOC O and A codings. Secretaries, bookkeepers, bricklayers and drywallers are all NOC B codings.

Spouses, including common-law and same sex spouses, receive open work permits with the payment of a filing fee. This work permit generally lasts the duration of the spouse's permit, and allows for work at any employer, in any occupation (subject of course to licensing and other workplace laws of Canada). One caveat is that the accompanying spouse must pass a medical examination before being able to work with children or in a health care occupation. In a recent Pilot program, adolescents whose parents are working in the Province of Ontario may also obtain a work permit. This rule does not apply across the country.

Turning to studies, school children entering Grade I (about six years old) usually require study permits when accompanying international transferee parents.

Spouses and children, along with the primary worker, are also eligible for public health insurance in most cases. This insurance is provincially run, and provincial rules must be checked on a case-by-case basis.

Other Comments

Finally, in terms of permanent residence, two major changes introduced in late 2008 have changed processing priorities to favour

long-term options for temporary foreign workers. Both (Bill “C-50”), and the Canada Experience Class (CEC) provide quick routes to permanent residence for foreign workers in NOC A, O and B categories. Aside from these federal permanent residence programs, foreign workers should also consider provincial nominee programs, which also provide quick routes to both work permit and immigrant status. Any intracompany transferees considering long-term moves to Canada should also consider both customs and tax strategies, such as the creation of an immigration trust. Our Toronto Office has written a Canadian Immigration Manual on these topics, and we would be pleased to provide you with a copy upon request.

Likely changes to Canada’s foreign worker program include new enforcement measures, such as penalties against non-complying employers. These changes will likely also be implemented in 2011, but as of the time of writing (August 2010) are still unannounced.

Another new initiative is the establishment of provincial-federal Temporary Foreign Worker Agreements, which are expected to create new opportunities for companies’ international assignments. Many of these groundbreaking initiatives in Canada were precipitated by the significant growth of temporary entry to Canada, driven by broadly accepted statistical and policy findings that the future growth of Canada’s labour market will be entirely driven by immigrants (and foreign workers) by 2013.

Further Information

Baker & McKenzie’s *Canadian Immigration Alerts* provide regular updates on current developments and the firm’s *Canadian Business Immigration Manual* provides a detailed overview of Canada’s immigration laws.