THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

February 8, 2019

Via email: IRCC.TempResRegulations-ResTempReglement.IRCC@cic.gc.ca

David Cashaback
Director
Temporary Resident Policy and Programs
Immigration, Refugee and Citizenship Canada
365 Laurier Avenue West
Ottawa, ON
K1A 1L1

Dear Mr. Cashaback:

Re: Proposed IRPR amendments re: open permits for migrant workers (Part 1, Volume 152, Number 50)

I am writing on behalf of the Canadian Bar Association Immigration Law Section (CBA Section) to comment on proposed amendments[1] to the *Immigration and Refugee Protection Regulations* (the Regulations)[2] facilitating open work permits for migrant workers and their family members when the migrant worker is experiencing or at risk of abuse.

The CBA is a national association of 34,000 members, including lawyers, notaries, academics and students across Canada, with a mandate to seek improvements in the law and the administration of justice. The CBA Section is comprised of over 1,000 lawyers, practicing all aspects of immigration law and delivering professional advice and representation on the Canadian immigration system to clients in Canada and abroad.

The CBA Section welcomes the introduction of regulations aimed at alleviating the impact of abuse on vulnerable migrant workers. There is an immediate need to fill a gap in the current regulatory scheme, which is focused on enforcement and compliance but offers little in the way of ameliorative relief for those subject to abuse.

In our view, Immigration, Refugees and Citizenship Canada (IRCC) officers already have authority to issue open permits to workers facing abuse, under section 24(1) of the *Immigration and Refugee*

1 Canada Gazette, Part I, Volume 152, Number 50: Regulations Amending the Immigration and Refugee Protection Regulations (December 15, 2018)

2 Immigration and Refugee Protection Regulations, SOR/2002-227

Protection Act and section 208(b) of the Regulations. But they rarely exercise that discretion to assist workers seeking to escape employer abuse or unsafe workplaces. We hope that the new Regulations send a clear message in support of assisting migrant workers in this situation.

We offer several comments and recommendations for improving on the proposed Regulations.

Definition of Abuse

To ensure the efficacy of the proposed Regulations, guidelines must be clearly defined to encourage a compassionate and purposive approach in their application. Our understanding is that the term "abuse" will be interpreted in the context of section 196.2 of the Regulations as including physical, sexual, psychological and financial abuse. In applying the new Regulations, this broad definition should be read to reflect the legislative intent expressed in the Regulatory Impact Analysis Statement (RIAS) which accompanied the draft Regulations – namely, to remove disincentives for those on employer-specific work permits from reporting mistreatment, to encourage reports against non-compliant employers and to enable affected workers to find alternate employment as quickly as possible.

For example, the following situations, commonly reported by in-home caregivers and agricultural workers, may fall short of the definition of abuse in the Regulations but give rise to the same rationale for relief as described in the RIAS:

- routinely unpaid or underpaid work (i.e. below the level promised in the contract)
- inordinate hours of work (even if paid)
- unsafe working conditions (including exposure to toxic chemicals without proper safety gear)
- unsanitary or inadequate living quarters
- harassment or unwanted sexual advances
- exposure to abuse against a third party
- restrictions on the worker's mobility or access to phone/internet/food

Much thought was put into the definition of "abuse" in the context of permanent residence for sponsored spouses, and the exception to certain rules in the context of abuse[3]. This material might offer some guidance when considering the application of the new Regulations to vulnerable migrant workers.

Administered with Compassion

The proposed Regulations stipulate that an officer need only have "reasonable grounds" to approve an application. The RIAS states that approval of a work permit under the Regulations will not predicate a negative compliance finding against an employer. This suggests an intent to apply the

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[3] IRCC Operational Bulletin 480, November 18, 2015, 3.4: "Abuse may take many different forms: physical abuse, including assault and forcible confinement; sexual abuse, including sexual contact without consent; psychological abuse, including threats and intimidation; or financial abuse, including fraud and extortion; and neglect consisting of the failure to provide the necessaries of life, such as food, clothing, medical care, shelter, and any other omission that results in a risk of serious harm."

new Regulations compassionately and flexibly, which is essential to achieving the desired positive impact. We urge IRCC to develop clear guidelines to ensure this approach is consistently taken.

The RIAS anticipates that IRCC will receive approximately 500 applications each year. We hope the program will be "demand driven", so if more than 500 credible claims are received, resources will be available to assess and approve those applications.

The RIAS indicates that a worker's cooperation with an inspection or investigation is not tied to approval of their work permit under the Regulations. However, in a similar program, Temporary Resident Permits (TRP) for victims of human trafficking, CBA Section members have reported that TRP applicants perceive a connection between approval of their application and the willingness of the Crown to prosecute their alleged trafficker. While we do not attest to the validity of this claim, we highlight the tension between enforcement and compassionate relief. Officers should be cautioned that a worker's failure to report alleged abuse to police, reluctance to assist CBSA or ESDC with an investigation, or hesitation to file an Employment Standards or Worker's Compensation complaint should not undermine their credibility in the face of other evidence.

Timing Issues

The proposed Regulations offer protection only to those "experiencing" or "at risk of experiencing" abuse (proposed section 207.1(1)). This suggests that a person who has already left an abusive situation would be barred from protection. Further, subsections 207.1(1)(a) and (b) appear to restrict eligibility to those who hold a valid work permit or are applying to renew their status. This suggests that a person is precluded from applying if they have already lost status but are still within the 90-day restoration period stipulated in section 182 of the Regulations. In our view, a person who is out of status, but still eligible for restoration, should not be precluded from applying for a work permit under this provision.

The proposed Regulations do not indicate the duration of the initial work permit, nor whether a person can apply to extend their stay under this provision if they are unable to regularize their status before the initial open permit expires. We recommend that the initial permit be issued for a minimum of eight months given that low-skilled workers generally face delays of at least five months when applying for a new employer-specific work permit (including time for recruitment, LMIA processing and work permit processing). The extra three months will give workers a short window of time to recover, reflect and find a new job.

We also recommend that extensions or longer initial permits be approved in appropriate circumstances, i.e. where processing of an LMIA application is delayed and beyond the worker's control, or where the worker suffers from an injury or trauma caused by the abuse and is unable to immediately return to work.

Protecting Program from Misuse

The proposed Regulations, if not carefully administered, could be subject to misuse, especially if the estimated 500 applications is treated as an annual quota rather than a figure for planning purposes.

We appreciate that there is no easy fix where program integrity is concerned. The fact that vulnerable workers are among the most preyed upon by exploitative consultants makes this issue particularly fraught. IRCC might consider involving a trusted not-for-profit agency or network of agencies to administer the program, as is done under the terms of the Canada-BC Immigration

Agreement.[4] That said, our members have reported that the employees of the agencies appointed under the terms of this Agreement are often not sufficiently knowledgeable about its terms to give necessary support. Some of the organizations are large and diverse, and training all employees is a significant undertaking. As such, if IRCC elects this route, protocols for referrals to agencies must be clearly delineated.

Efficiency

The CBA Section recommends (as it has in past submissions) a more efficient and resourced approach, overall, to inspection and compliance monitoring. The same applies in the application of the new Regulations. Improvements are needed to enhance flexibility and to reduce the excessive delay which creates prolonged states of limbo while the parties await decisions, undermining the credibility of the process.

We appreciate the opportunity to comment on these proposed Regulations. Please let us know if you have any questions about our recommendations.

Yours truly,

(original letter signed by Sarah MacKenzie for Marina Sedai)

Marina Sedai
Chair, CBA Immigration Law Section

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[4] Canada-British Columbia Immigration Agreement 2015 – Foreign worker protection (Annex B, section 9.4), available online at: https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/temporary-residents/british-columbia-agreement.html