



THE CANADIAN
BAR ASSOCIATION
L'ASSOCIATION DU
BARREAU CANADIEN

December 13, 2016

Via email: MaryAnn.Mihychuk@parl.gc.ca; Minister@cic.gc.ca;

The Honourable MaryAnn Mihychuk, P.C., M.P.
Minister of Employment and Skills Development
165 Hôtel de Ville Street
Gatineau, QC K1A 0J2

The Honourable John McCallum, P.C., M.P.
Minister of Immigration, Refugees and Citizenship
365 Laurier Avenue West
Ottawa, ON K1A 1L1

Dear Ministers:

Re: Temporary Foreign Worker Program

I am writing on behalf of the Canadian Bar Association Immigration Law Section (CBA Section) about the report on the Temporary Foreign Worker Program (TFWP) tabled by the House of Commons Human Resources, Skills and Social Development and the Status of Persons with Disabilities Committee (the Parliamentary Committee) in September 2016. This letter responds to the report and provides additional comments based on the TFWP as it stands today, which we trust you will find of use as you develop the government's response to the report and strive to improve the TFWP.

The CBA is a national association of over 36,000 members, including lawyers, notaries, academics and law students, with a mandate to seek improvements in the law and the administration of justice. The CBA Section comprises lawyers with an in-depth knowledge of citizenship and immigration law issues, including legislative changes, administration and enforcement.

Canada needs a TFWP that is flexible and responsive to changes in the Canadian economy. A key part of this is ensuring Canadian employers can operate in a predictable and reasonable regulatory environment, which also protects vulnerable temporary foreign workers who make valuable contributions to the Canadian economy and society.

We applaud the spirit of the Parliamentary Committee study and many of its recommendations. We continue, however, to recommend substantial revisions to the TFWP to address its purpose, structure and functionality. We also believe that some of Parliamentary Committee recommendations require further consideration prior to implementation. While the recommendations are aimed at Employment and Skills Development Canada (ESCD) and Immigration, Refugees and Citizenship Canada (IRCC), we have copied Minister MacAulay and Minister Freeland because of the spillover implications for their respective portfolios.

Background

Between 2011 and 2014, the government made major – and increasingly restrictive – changes to the TFWP in reaction to public and political pressure based on media coverage of abuse of the immigration system (and allegations of abuse) by a small minority of Canadian employers. These changes included a significant increase in procedural requirements, a four-year cap on working in Canada; a change in focus from skill level to wage, restrictions on the percentage of temporary foreign workers (TFWs) in a workplace, and a dramatic increase in user fees. The changes also increased administrative burdens on users under the Labour Market Impact Assessment (LMIA) application process. These burdens include more onerous forms, transition plans, broad employer attestations, increased inspections and bans, and punitive administrative monetary penalties. All of these are accompanied by a lack of procedural fairness, and of transparency on rules and standards.

These changes drastically altered the nature and functionality of the TFWP, and have had a substantial chilling effect on both legitimate employers and foreign workers¹. LMIA application processing times and refusal rates have increased significantly, and our members consistently report a lack of procedural fairness in the adjudication of applications and the increase of litigation based on the fettering of discretion.

Foreign workers, who were ostensibly protected by these changes, are in fact reporting that they are being punished by them. We understand that thousands of workers have lost their status because of processing delays, restrictions on the issuance of LMIAs, the four-year cap and the limited duration of associated work permits. The changes also penalize employers for using the TFWP, regardless of whether they are in sectors with a legitimate and demonstrable need for foreign workers. Many – especially small businesses – avoid using the TFWP because of its intrusive and hostile approach.

Admittedly, there were problems with the TFWP prior to the changes, particularly with certain vulnerable occupations. However, the current approach simply does not work, and has hindered Canada's ability to attract and retain foreign workers. In addition, the restrictions on the TFWP have negatively affected Canada's process for selecting permanent residents.

1. Separating High-Skilled and Low-Skilled Temporary Foreign Workers

***Parliamentary Committee Recommendation 4** – that ESDC review the policy with respect to foreign faculty members currently employed or seeking employment with a recognized Canadian academic institution, whose employment is currently dependent upon the labour market impact assessment with a view to providing exemptions or accommodations for this class of foreign national.*

***Parliamentary Committee Recommendation 6** – that ESDC appropriately restructure the TFWP such that it achieves better overall economic and social benefits for Canadians and program participants. That ESDC re-establish the temporary foreign worker program into more specific program areas and streams that adequately reflect the realities of labour market needs in Canada.*

The CBA Section is pleased that recommendations 4 and 6 of the report recognize that high-skilled foreign workers should be treated differently from other workers in the TFWP system, and that the global demand for high-skilled workers is much greater than for workers in low-skilled fields.

¹ See Canadian Chamber of Commerce, [Immigration for a Competitive Canada: Why Highly Skilled International Talent is at Risk](#) (January 2016), which describes a broken LMIA process.

The CBA Section highlights the need to separate and distinguish between high-skilled and low-skilled occupations. This is because of practical considerations – such as advertising and other requirements not necessarily suited to the business realities of high-skilled roles – as well as more fundamental ones – such as the smaller power imbalance between employers and high-skilled workers.

Given these considerations, we continue to emphasize the importance of implementing timely and less bureaucratic processing for high-skilled workers, with a standard processing time of less than ten business days after receipt. Under the current approach, it takes two to three weeks for ESDC to receive and intake an application and often many weeks, if not months, to process the application.

2. Improving Service and Predictability for Canadian Businesses

***Parliamentary Committee Recommendation 2** – that ESDC review labour market impact assessment application process with a view to increasing speed and efficiency... as well as the adequate allocation of resources towards training and meeting service standards.*

***Parliamentary Committee Recommendation 11** – that ESDC, businesses and stakeholders continue to monitor labour market needs as to ensure skills, training and educational output match Canada’s current and future employment needs... then invest in better collection or retention of labour market information in Canada to adequately assess labour market needs.*

***Parliamentary Committee Recommendation 13** – that ESDC take immediate steps to improve the collection of labour market data and review the geographic zones used for determining unemployment rates.*

A general theme of the CBA Section’s TFWP submission to the Parliamentary Committee was the importance of improving service through efficient and timely processing. This requires proper allocation of resources toward effective training for ESDC officers, as well as efficient and consistent processing methods across jurisdictions.

The CBA Section supports recommendations 2, 11, and 13 of the Parliamentary Committee report, which support service improvements. However, we continue to emphasize the need for ESDC to regularly publish the compliance manuals, guidelines and operational instructions provided to officers, so employers and employees can understand the processes and rules that apply to TFWP applications and LMIA’s. The government website has proved to be an inadequate source for guidelines and updates, particularly given that there are no clear definitions or standards for important terms like “substantially the same” or “employer”, and changes to the rules that govern the TFWP are not published in a way that users can reference and follow.

3. Flexibility – Taking into Account Industry Norms and Business Realities

***Parliamentary Committee Recommendation 12** – that ESDC ensure the cap on the percentage of temporary foreign workers a business can employ a given time be set at a minimum of 20%, and further review sector and geographic considerations.*

Recommendation 12 would return some much needed flexibility to the TFWP, and is particularly timely for industries facing chronic shortages, such as hospitality, restaurant and food processing.

The current 10% cap for low-skilled positions is unrealistic, and may cause Canadian businesses to fail, or to be unable to expand and relocate outside Canada. Calculating the cap is a complicated procedure that can inconsistently interpreted and applied, for reasons including timing of provincial nominations, and the transition of workers from temporary foreign worker to permanent residents. The CBA Section recommends that the cap either be removed entirely, or that

it be set immediately to 20%, and that further studies, industry consultations and reviews be conducted to provide realistic caps by sector, if deemed necessary.

Parliamentary Committee Recommendation 5 – that ESDC permit minor modifications to contracts between employers and employees with regards the nature of the work and increases in wages if both parties consent, where the changes do not disadvantage the worker and ESDC is informed of any changes.

Recommendation 5 allows minor modifications of work contracts – particularly in the employee’s favour – which is also a good recommendation. Employers could adjust contracts to changing realities, as well as reward loyal and high performing employees with reasonable increases in remuneration. In essence, undue restrictions on temporary foreign workers should be removed, so Canadian employers can treat them the same as Canadian employees in compliance with employment and contract law. The ESDC contract template for employers is not a proper employment agreement, and exposes both parties to liability and potential for dispute. Although the TFWP website states that employers are not required to use the contract template, many Program Officers strictly require it.

The CBA Section recommends that ESDC allow minor modifications of service contracts between Canadian “end-user” employers and foreign third party employers who send workers to Canada as part of a service contract. Currently, foreign third party vendor employers must apply for an LMIA and pay a \$1,000 processing fee each time they seek entry to perform services. Many service contracts are executed in support of large capital projects that require foreign employers to send their workers to Canada on a rotational basis. Projects are often delayed and timelines modified in ways that do not reflect project cycles, as a result of restrictive requirements for LMIA approvals. ESDC should take the reality of project cycles into account, and remove redundant LMIA requirements and barriers to entry.

Parliamentary Committee Recommendation 9 – that ESDC provide an exemption on the transition plan requirements for 5% of the businesses’ work force that consists of high wage temporary foreign workers.

Canada’s Global Skills Strategy emphasizes faster processing for global talent. The CBA Section recommends a blanket exemption from the requirement to file Transition Plans for high wage workers and critical skilled occupations under pressure. It is, for example, an unnecessary step for businesses and institutions to rationalize how they will ensure that the next University President or Executive may not be a Canadian, when, for strategic business reasons, employers have invested considerable time and resources in recruiting a high-skilled individual in an international competition. Further, many multinational companies do not support their employees in applying for permanent residence. Requiring multinational employers to submit Transition Plans is neither necessary nor aligned with the spirit and objectives of the TFWP.

Parliamentary Committee Recommendation 18 – that IRCC amend the Immigration and Refugee Protection Regulations to remove the relevant provisions with respect to the “cumulative duration” rule.

The CBA Section supports eliminating the arbitrary four-year cumulative duration rule, which has caused considerable hardship to Canadian businesses and their valued, stable employees. Many workers who might have been eligible for transition to permanent residence in Canada have been unnecessarily shut out through failures in both federal and provincial programs for permanent residence, although they had made significant contributions to the Canadian economy and society, which should have warranted their admission as permanent residents. If there are issues within

particular industries that have contributed to their reliance on temporary foreign workers, then those issues need to be studied and addressed, rather than dealt with through a blunt cap.

4. Information Sharing

***Parliamentary Committee Recommendation 17** – that IRCC work with provinces, territories and other government departments to increase information sharing that will create more harmonization with immigration and nominee program to function in collaboration with one another. That these efforts aim to reduce duplication of work benefiting both the government and applicants. (See also **Recommendations 16 and 20**)*

The CBA Section endorses the restructuring of the TFWP to achieve better economic and social benefits for Canadians by addressing critical and demonstrated long term shortages in workers. We also commend the government on its efforts to enhance cooperation with provinces and territories, and to harmonize programs in a manner that is complementary and allocates both responsibility and jurisdiction appropriately.

With information sharing, the CBA Section urges the government to maintain the privacy and confidentiality of businesses and individuals. Restructuring to allow increased information sharing should involve ongoing consultations with industries, stakeholders, provinces and territories. It also requires significant improvements in the research and development of high quality labour market data and the analysis of that data to keep it current, strategic and forward-looking.

Labour market data must account for significant differences, including location of employment (by more specific economic centres than regions or provinces), industries and other factors. It should also reflect the net economic benefits of employing foreign nationals in both high-skilled and low-skilled occupations.

The CBA Section recommends consideration of moving appropriate management, supervisory and other specialized occupations from the TFWP to the International Mobility Program (IMP). These occupations would be exempt from LMIA requirements – similar to exemptions used effectively in the past under the previous Labour Market Opinion process. They should also be subject to expedited processing to facilitate work permits and mobility to meet Canadian economic demands. These occupations would include executives and managers in organizations that employ significant numbers of Canadians in high-skilled and semi-skilled occupations based on the net effect of their employment in Canada. They would include technical occupations (e.g. IT professionals, software and game developers) and skilled trades with demonstrated shortages notwithstanding ongoing investment and promotion of education and training for Canadians. They would also include occupations in academic, scientific, cultural and artistic fields for which access to international talent is necessary to promote the development of Canadian institutions and businesses and the advancement of Canadian education and culture.

The CBA Section recommends developing and maintaining appropriate lists of low-skilled occupations that would remain in the TFWP, but subject to appropriate advertising and recruitment exemptions, as well as streamlined application procedures. This has been done in the past through pilot projects. Examples of appropriate occupations in this category include tourism, hospitality and food processing occupations. In particular, the TFWP needs to be responsive to seasonal and regional demands in these types of industries to help Canadian businesses succeed.

The CBA Section also supports the development of programs to facilitate permanent residence for foreign nationals in the occupations listed above – as well as other occupations where improved data and analysis confirms the net economic and social benefits – to increase the likelihood of retaining foreign nationals in key occupations.

5. Program Efficiency and Integrity

Parliamentary Committee Recommendation 3 – that ESDC implement a Trusted Employer a program with the objective of reducing labour market impact assessment processing timelines for employers that have demonstrated trustworthiness in their use of the TFW program.

The CBA Section welcomes reasonable efforts to protect foreign workers in the Canadian labour market from abuse and unfair practices by employers. While a compliance regime with appropriate enforcement mechanisms is necessary, numerous problems with the current regime – including a lack of transparency, due process and an effective appeal process – as well as arbitrarily harsh penalties – must be addressed.

We agree that Parliamentary Committee recommendation of a Trusted Employer Program with faster processing times would motivate employers to maximize compliance efforts by rewarding them with greater certainty and processing speed. A Trusted Employer Program would be an effective tool to increase overall program efficiency, without jeopardizing program integrity. The CBA Section recommends considering this and other methods to reduce the detrimental effects of the compliance and enforcement regime on Canadian employers using the TFWP.

6. Increasing Duration of Employment

Parliamentary Committee Recommendation 1 – That ESDC and IRCC take immediate steps to extend work permits for caregivers in the low-wage stream from one to two years.

The CBA Section recommends that all LMIA-based work permits be extended from 12 to 24 months, unless an employer specifically requests a shorter duration based on its requirements. Current LMIA processing times of three to six months after one month of advertising create an onerous lead time for LMIA approval, even before a work permit is obtained. The apparent rationale for 12 month duration of LMIA was to facilitate close monitoring of labour market requirements. However, employers are now forced to engage in a constant cycle of advertising, applying and paying fees, while TFWs are in a constant cycle of uncertainty, stress and transience as a result of the current operation of the TFWP. Twenty-four month work permits would be more reasonable for all involved without compromising program integrity. Employers would continue to be held to account through robust compliance.

The availability of 24 month work permits is particularly important for low-skilled workers in certain sectors and in permanent, full-time positions, to facilitate work permit extensions and transition to permanent residence where eligible. Many low-skilled workers who relied on Provincial Nominee Programs (PNPs) to transition to permanent residence have been unnecessarily rejected due to spikes in processing times and the imposition of the four year cap. In addition, many PNPs require a minimum period of Canadian work experience for eligibility. Once workers meet this requirement and apply, they are subject to often lengthy PNP processing times, which may jeopardize their chance of obtaining permanent residence.

7. Recommendations Requiring Careful Consideration

Parliamentary Committee Recommendation 14 – that ESDC take immediate steps to eliminate the requirement for an employer specific work permit; provided that it implement appropriate measures to ensure temporary foreign labour is only utilized within existing provisions of the LMIA process, including sector and geographic restrictions.

In our view, recommendation 14 requires careful study. While in some circumstances there can be disadvantages for foreign workers who are tied to specific employers, consideration must also be given to employers who incur significant expense and efforts to bring foreign workers to Canada.

Measures designed to curb abuses in one sector (such as the Agricultural Workers program) may have unnecessary and inappropriate consequences for legitimate employers in other sectors.

While work permits that are sector or geographic specific – rather than employer specific – could give temporary foreign workers increased mobility rights and reduce the power imbalance with employers in some situations, there would be little or no benefit to employees in smaller communities with only be one or two employers in a sector or geographic limit.

Work permits restricted by sector and geography could create a significant disincentive to employer participation in the TFWP, particularly for smaller employers. For example, an employer could induce the temporary foreign workers of another employer to work for them without having to go through LMIA process, pay fees or pay the workers' transportation costs.

We recommend that ESDC and IRCC review and reestablish the Group of Employers (GoE) program, which was launched as a pilot in January 2010. This program allowed employers operating in the same industry sector to jointly seek LMIAs. Once recognized, a GoE could collectively hire temporary foreign workers for common projects or initiatives in a specific geographic sub-area of a province or territory, and within established timelines. This program would offer employers flexibility through access to a shared pool of skilled temporary foreign workers, as long as there was a demonstrated need for the mobility of workers between employers in the group.

The CBA Section appreciates the government's current initiatives on the TFWP. We recognize that it presents challenges as well as opportunities, and we trust that our comments will be of assistance, and welcome the opportunity to discuss them with you, and provide any clarifications you may request.

Yours truly,

(original letter signed by Kate Terroux for Vance P. E. Langford)

Vance P. E. Langford
Chair, Immigration Law Section

Cc: The Honourable Chrystia Freeland, P.C., M.P.
Minister of International Trade
Chrystia.Freeland@parl.gc.ca

The Honourable Lawrence MacAulay, P.C., M.P.
Minister of Agriculture and Agri-Food
Lawrence.Macaulay@parl.gc.ca