THE MINISTERIAL INSTRUCTIONS:
Navigating Uncharted Territory

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1.0 INTRODUCTION

The Ministerial Instructions, introduced as a result of the increased discretion granted to the Minister of Citizenship and Immigration through Bill C-50, have been in effect for more than one year. Facing significant processing backlogs at most overseas Visa Offices and claims that the program was unresponsive to labour market needs, the federal government anticipated that restricting the individuals eligible to apply for permanent residence under the Federal Skilled Worker program to those with experience in certain occupations, with arranged employment in Canada or with work or study experience in Canada would best support the attainment of the country's immigration goals moving forward. The initial controversy regarding Bill C-50 and the Ministerial Instructions has lost much of its steam, as practitioners and applicants have turned their minds to navigating the new framework that accompanied the Ministerial Instructions, and addressing the idiosyncrasies that inevitably surfaced with the introduction of a new application process.

This paper discusses the new application process through the Centralized Intake Office ("CIO"), the effect of the Ministerial Instructions on the application process at overseas Visa Offices, and the three categories of eligibility.

2.0 THE MINISTERIAL INSTRUCTIONS AND THE CIO

2.1 The CIO Application Process

As a result of the Ministerial Instructions, all individuals wishing to apply for permanent residence under the Federal Skilled Worker program must first send an initial application to the CIO in Sydney, Nova Scotia. The initial application consists of the Federal Skilled Worker forms, a copy of the applicant's passport bio-data page, the cost recovery fee, the CIO checklist and one or two supporting documents evidencing eligibility under one of the three categories. The CIO will assess whether an applicant has paid work experience in the last 10 years in one of

the occupations listed in the Ministerial Instructions, has arranged employment in Canada or has resided in Canada for one year as a temporary foreign worker or student. Note that the CIO will only assess eligibility under the Ministerial Instructions. It will not assess whether an applicant meets the requirements under the *Immigration and Refugee Protection Act* ("IRPA")[1] by conducting a point assessment or by considering whether an applicant is admissible to Canada.

If the eligibility criteria are not met, the CIO will notify the applicant and refund the cost recovery fee. If the applicant does satisfy the Ministerial Instructions, the CIO will create a B file number in CAIPS, transfer an electronic file to the Visa Office identified by the applicant in his/her IMM 008, and notify the applicant of the 120 day deadline to submit to the Visa Office a copy of the entire Federal Skilled Worker application, including forms and supporting documents.

2.2 Lock-in Dates:

The date that an initial application is received at the CIO serves as the lock-in date for applications that pass the eligibility assessment.[2]

2.3 Recourse from CIO Refusal

What recourse does an applicant have if his/her initial application is denied by the CIO? Can an applicant appeal such a determination? Citizenship and Immigration Canada ("CIC") seems to have contemplated this very notion when drafting Subsection 87.3(5) of IRPA, which provides:

> 87.3(5) Clarification
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> The fact that an application or request is retained, returned or otherwise disposed of does not constitute a decision not to issue the visa or other document, or grant the status or exemption, in relation to which the application or request is made.

According to the above, the CIO refusal (or approval) may not constitute a decision at all. Adding fuel to that fire is the fact that application fees are in fact refunded to unsuccessful applicants. Nevertheless, Subsection 72(1) of IRPA does not limit the option of judicial review to "decisions" alone:

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[1] *Immigration and Refugee Protection Act*, R.S.C. 2001, c. 27.

[2] OP 6 - Federal Skilled Workers, at page 18, online: Citizenship and Immigration Canada, http://www.cic.gc.ca/english/resources/manuals/op/op06-eng.pdf." [OP 6]

> 72(1) Application for judicial review – Judicial review by the Federal Court with respect to any matter – a decision, determination or order made, a measure taken or a question raised – under this Act is commenced by making an application for leave to the Court.

Moreover, Subsection 18(1) of the *Federal Courts Act* specifically provides that the Federal Court has jurisdiction to issue an injunction, writ of *certiorari*, writ of prohibition, writ of *mandamus* or writ of *quo warranto*, or grant declaratory relief, against any federal board, commission or other tribunal, or to hear and determine any application or other proceeding for relief against a federal board, commission or other tribunal.[3] "Federal board, commission or tribunal" is defined in Section 2 as "any body, person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament…"[4]

While it is beyond the scope of this paper to analyze whether the Ministerial Instructions are statutory instruments that constitute binding law, the CIO is certainly a body purporting to exercise jurisdiction or powers conferred by or under IRPA. If so inclined, an applicant should be entitled to pursue judicial review of a CIO determination, regardless of whether or not it constitutes a "decision" under IRPA. A judicial review application would raise interesting questions regarding procedural fairness and the CIO.

Short of judicial review, the CIO has been, by all accounts, reluctant to reopen and reconsider a negative determination. Applicants not wishing to pursue the uncertainty and cost associated with judicial review may simply wish to refile applications they believe have merit.

3.0 THE MINISTERIAL INSTRUCTIONS AND THE VISA OFFICE

3.1 Compliance with R11(1)

Applicants must identify the visa office that will process their application on their IMM 0008 – Schedule 3 prior to submitting the initial application to the CIO. If this section of the form is left blank, the CIO will consider the application to be incomplete and will return it to the applicant. However, as per CIC's OB 180, the CIO "is not responsible for assessing whether applicants are subsection R11(1) compliant at the visa office specified on their IMM 0008 – Schedule 3. The onus is on the applicant to correctly identify the visa office for processing."[5] If, after receiving the complete Federal Skilled Worker application, the Visa Office determines that the applicant was not R11(1) compliant (i.e. the applicant selected the wrong Visa Office) as of the date the

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[3] *Federal Courts Act*, R.S.C. 1985, c. F-7 [FCA]
[4] *Ibid.*
[5] Operational Bulletin 180 - January 22, 2010: http://www.cic.gc.ca/english/resources/manuals/bulletins/2010/ob180.asp.

application was received at the CIO, the Visa Office will return the application to the applicant, close the file and initiate a refund through the CIO. In such cases, an applicant must submit a brand new application to the CIO.

3.2 A Second Eligibility Review

Once an applicant has received a positive eligibility determination from the CIO, the burden imposed by the Ministerial Instructions does not end there. The Visa Office will also assess whether an application meets the Ministerial Instructions before placing it into processing. Visa Offices are instructed to complete this stage as quickly as possible. Recall that the lock-in date is the date that the application is received by the CIO. Arguably, therefore, eligibility should be considered as of the date that an application was received by the CIO.

The Visa Office's eligibility determination "is not just a confirmation of the preliminary determination made at the CIO."[6] Unlike the CIO, which must make eligibility assessments without the benefit of many supporting documents, the Visa Office must conduct an entire paper review of the application and supporting documents in order to determine whether the application should be placed into processing. While minimal documentation is required by the CIO, it is critical to carefully document eligibility under the Ministerial Instructions in the Federal Skilled Worker application sent to the Visa Office.

One exception to the above rule applies to those applications received by the Visa Office between February 27, 2008 and November 28, 2008. For such applications, the requirements will be applied in order to favour the applicant. For example, if an applicant meets the requirements of the Ministerial Instructions today but did not meet them when the application was first received, the application will be assessed as of today's date as opposed to the date the application was received.[7]

Applications that are determined by the Visa Office to not meet the Ministerial Instructions will be returned to the applicant, along with a refund.

3.3 The 120 Day Deadline

After receiving notice of a positive determination from the CIO, Federal Skilled Worker applicants have 120 days to submit a complete application to the relevant Visa Office. Visa

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[6]Operational Bulletin 120 - June 15, 2009, http://www.cic.gc.ca/english/resources/manuals/bulletins/2009/ob120.asp [OB 120].

[7] OP 6, *supra*, at page 14

Offices will not remind applicants of this deadline, but will rather make a final determination of eligibility for processing based on the electronic file transferred from the CIO and any documents received by the deadline. As per OB 120, "Without a complete application and supporting documents, the officer is unlikely to be satisfied the applicant meets the requirements of the MI."[8]

While the deadline is meant to ensure that eligible applications are processed with priority and to minimize processing backlogs, Visa Offices are permitted to consider requests for extensions on a case by case basis and may grant them in exceptional circumstances.[9] Nevertheless, in its Federal Skilled Worker Application Kit, CIC advises that "if you are not prepared to submit full documentation to the Visa Office within 120 days do not apply now."[10] Moreover, in an internal email exchange cited in February's edition of Lexbase, Burke Thornton, Consul (Immigration) of the Canadian Consulate in Buffalo states that "extensions should not be considered an option, but rather an exception. Our collective goal should be to enforce the 120 day deadline."[11] It is therefore a good idea to have the entire application prepared and ready to file prior to submitting the initial application to the CIO rather than trying to beat the 120 day clock following CIO approval.

3.4 Incomplete Applications

A fundamental shift in the processing of Federal Skilled Worker applications at Visa Offices accompanied the implementation of the Ministerial Instructions. Applicants are expected to submit a complete application within the 120 deadline, and really only have one shot at selection. While certain Visa Offices *may* notify applicants of missing documents and grant them a 60 day extension in order to submit a complete application, CIC has in fact instructed Visa Offices to make decisions based on the information on file and to not request that applicants submit *better* proof that they meet the eligibility requirements or selection criteria. OB 120 makes explicit this policy:[12]

> **Insufficient evidence of meeting Ministerial Instructions**: Visa officers will assess the application on the basis of the information on file. If the applicant's submission is insufficient to

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[8] OB 120, *supra*.
[9] As an example, Burke Thornton, Consul (Immigration) at the Canadian Consulate in Buffalo, NY, indicated that an extension was granted to an individual who had been hospitalized as a result of a car accident and was therefore unable to attend to preparing his application.
[10] www.cic.gc.ca/english/information/applications/guides/EG73.asp [Guide].
[11] Lexbase, Volume 21, Issue 2, February 2010.
[12] *Ibid*.

> determine that the application is eligible for processing, a negative determination of eligibility should be rendered.
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> **Missing SELDEC documents**: Visa officers will complete the final determination of eligibility on the basis of the information on file. If the application is eligible for processing, visa officers will complete the selection review based on the evidence presented. No follow-up request for the missing document is required.

An exception to this rule used to exist with respect to language proficiency. If an applicant presented evidence other than test results to prove their language proficiency in English or French that did not satisfy the Visa Officer as to the level of proficiency claimed, the Visa Officer would give the applicant an opportunity to submit to language testing. Effective April 10, 2010, however, Visa Officers will only consider the evidence of language proficiency provided at the time of application and will not give an applicant a second chance to provide language test results.[13] Applicants whose first language is not English or French are therefore strongly recommended to submit to language testing rather than providing alternative proof of language ability.

Note that one exception to the above rule endures: any missing documents or information relating to admissibility (e.g. police certificates) will be requested once the selection review is complete.

3.5 Visa Office Helpful Hints

Many of the Visa Office document checklists have been updated since the implementation of the Ministerial Instructions. While practitioners may have submitted dozens of Federal Skilled Worker applications to certain Visa Offices in the past, it is a good idea to go through the document checklist again to ensure that no requirements have been overlooked. Again, with only one shot at selection in most cases, it is critical that applications are complete.

Moreover, certain Consulates, including Buffalo, have in fact included a "Helpful Hints" link on their webpage geared specifically toward the preparation and submission of Federal Skilled Worker applications.[14]

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[13] Operational Bulletin 166 - March 10, 2010: http://www.cic.gc.ca/english/resources/manuals/bulletins/2010/ob166.asp.

[14] http://www.canadainternational.gc.ca/buffalo/imm/federal_worker_hints-conseils_travailleur_federal.aspx?lang=eng.

Visa Offices are increasingly relying on email to communicate with applicants or their Authorized Representatives. It is therefore critical that representatives inform Visa Offices of any changes to their email address, and to ensure that spam filters are not blocking the receipt of such email communications. The Federal Court was recently faced with the problem of the rejection of an application for permanent residence based on the failure of an Authorized Representative to respond to an email communication from the Visa Office in *Zhang* v. *Canada (Minister of Citizenship and Immigration*[15]*)* The Authorized Representative did not deny receiving the email requesting further documents in support of his client's visa application, but indicated that he was not aware of receiving it and that he may have inadvertently deleted it or that it may have been caught by his spam filter. The court decided that the Visa Office did not breach the duty of fairness, and provided:

> An e-mail address provided on the face of a Use of a Representative form is, in my view, an open invitation to the Embassy to use that methodology. It is well-known to experienced immigration counsel … that embassies, consulates, and High Commissions regularly use e-mail to communicate, and … the sheer volume of visa applications handled by CIC offices must be considered when assessing its business practices on fairness grounds. If there is a concern that the receipt of email is unreliable because of automatic filtering or the like, all that counsel need do is to withhold the email address.

4.0 THE ELIGIBILITY CATEGORIES

4.1 The Occupations List ("SW1")

4.1.1 The Criteria

An individual may be eligible to apply for permanent residence as a Federal Skilled Worker if he/she has at least one year of continuous full-time or equivalent paid work experience in the last ten years in one or more of the 38 occupational categories identified by the Ministerial Instructions.[16]

Upon closer examination, there are three requirements that an applicant must prove in order to qualify under SW1: firstly, the work must have been paid and full-time or equivalent; secondly, the work must have been continuous; and thirdly, the work must fall under one of the 38 NOCs listed in the Ministerial Instructions.

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[15] (2010 FC 75).

[16] http://www.canadagazette.gc.ca/partI/2008/2008/20081129/html/notice-e.html#d105 [MI].

4.1.1.1 Full-time Work

Full-time work, as defined under Subsection 80(7) of the Immigration and Refugee Protection Regulations ("IRPR),[17] is equivalent to at least 37.5 hours of work per week, and full-time work experience requirements may be met by the equivalent in part-time paid work experience (e.g. two part-time jobs held simultaneously). OB 173 further clarifies the full-time experience requirement under SW1, and provides that individuals may use "any combination of full-time or part-time work experience in more than one eligible NOC category in the last 10 years in calculating their one year of continuous work experience, as long as their experience adds up to at least one year."[18] As an example, the bulletin provides that an SW1 applicant could use seven months of full-time (or equivalent) work experience in NOC 6242 immediately followed by 10 months of full-time (or equivalent) experience in NOC 6241 in the last 10 years. Note that the NOCs do not need to be similar occupations, as long as they are found on the Ministerial Instructions.

4.1.1.2 Continuous Work

When determining if the one year of work experience was continuous, OB 173 is again instructive. It confirms that short breaks or interruptions in employment are not considered to break the continuity of employment for the purposes of determining if an individual has one year of continuous employment in an eligible occupation.[19] Nevertheless, it does not define "short breaks", but rather indicates as an example that it would be acceptable if, before the end of a contract, an applicant had secured future employment beginning shortly after the end of the first contract. If future employment had not been secured and a two to four week gap ensued, it is uncertain how such a situation would be treated.

4.1.1.3 Work Experience

As per OB 89, to determine whether an applicant has the requisite work experience,[20]

> The main duties listed in the application form will be assessed to ensure that the applicant has performed the actions described in the lead statement for the occupation, as set out in the occupational descriptions of the NOC, and that they have performed a substantial number of the

[17] Immigration and Refugee Protection Regulations, SOR/2002-227
[18] Operational Bulletin 173 - January 8, 2010: http://www.cic.gc.ca/english/resources/manuals/bulletins/2010/ob173.asp [OB 173].
[19] *Ibid*.
[20] Operational Bulletin 89 - December 2, 2008: http://www.cic.gc.ca/english/resources/manuals/bulletins/2008/ob089.asp [OB 89].

> main duties of the occupation, as set out in the occupational descriptions of the NOC. The educational background of the applicant may also be a factor.

This is somewhat consistent with Subsection 80(3) of the IRPR, which provides the framework for assessing an applicant's work experience for the purposes of calculating points, with a rather significant departure. It appears that under the Ministerial Instructions, the educational background of applicants under SW1 will be assessed to determine whether they meet the education requirements set forth in the NOC for the occupation listed, whereas under Subsection 80(3) of IRPR, it is irrelevant whether an applicant meets the occupation's employment requirements.

Note that the term "substantial number" in relation to the duties described in the NOC is not defined, nor is "main duties". This provides the CIO and Visa Offices with a significant amount of discretion to determine whether an applicant meets the SW1 work experience requirement. OB 120 provides Visa Officers with the following guidance regarding documents related to work experience:[21]

> They should include sufficient detail to support the claim of one year of continuous work experience or equivalent paid work experience in the occupation in the last 10 years. Documents lacking sufficient information about the employer, or containing only vague descriptions of duties and periods of employment, should be given less weight. Descriptions of duties taken verbatim from the NOC should be regarded as self-serving. Presented with such documents, visa officers may question whether they accurately describe an applicant's experience. A document that lacks sufficient detail to permit eventual verification and a credible description of the applicant's experience is unlikely to satisfy an officer of an applicant's eligibility.

While OB 120 discourages applicants from copying job duties from the NOC, Burke Thornton has indicated that the Visa Office in Buffalo *may* accept employer letters certifying that applicants have performed the job duties listed in a particular NOC. If an applicant wishes to pursue this option, it is likely a good idea to also include an additional letter of employment that describes the job duties the employer's own words.

4.1.2 Evidencing Eligibility under SW1

Applicants under SW1 are not required to submit additional documentation evidencing work experience to the CIO. Rather, an eligibility assessment is presumably made based on information provided in the IMM 0008 – Schedule 3, and careful consideration should therefore be paid to the NOC description provided on the form. Eligibility under SW1, however, must be

[21] OB 120, *supra*.

carefully documented at the Visa Office stage. Counsel should assist with the preparation of letters of employment to ensure consistency with OB 120 and with the relevant NOC. Moreover, in light of OB 89, it may be wise to ensure the individual's educational background is consistent with NOC requirements.

4.2 Arranged Employment ("SW2")

4.2.1 The Criteria

Individuals may also be eligible to apply for permanent residence under the Federal Skilled Worker program if they have an offer of arranged employment in Canada, as defined by Section 82 of IRPR. Under SW2, applicants not working and residing in Canada must hold a full-time job offer under NOC 0, A or B that has been confirmed by Human Resources Skills Development Canada ("HRSDC") in the form of an Arranged Employment Opinion ("AEO"), and must also meet all of the required Canadian licensing or regulatory standards associated with the job.

Individuals working in Canada may be eligible under SW2 if they are currently working in Canada on a work permit that is valid at the time of application and at the time of visa issuance, and have an offer of indeterminate employment from their employer in NOC 0, A or B. Such individuals will also receive points for arranged employment in Canada.

Given the requirement that individuals working in Canada with arranged employment have a valid work permit at the time of landing, it may be wise to consider obtaining an AEO for those whose Labour Market Opinion-based work permits may be expiring soon, for individuals whose five to seven years of intracompany transferee status is close to running out, or for IT Workers, whose blanket LMO is about to be eliminated.

4.2.2 Evidencing Eligibility under SW2

Again, documents required by the CIO to prove eligibility under SW2 are minimal, and include a letter from the employer evidencing an offer of indeterminate employment after receiving permanent residence status, and a photocopy of the applicant's current work permit or of the AEO issued by HRSDC. The offer from the employer should be detailed, and clearly show that the applicant will be employed on an indeterminate basis after receiving permanent residence. The offer should also include the employer's name, address, phone number and any other contact information.[22]

[22] OB 120, *supra*.

At the Visa Office, applicants should be prepared to provide further documentation in connection with the offer of arranged employment. While an AEO issued by HRSDC should speak for itself, Subsection 10.14 of OP 6 provides that, in the context of awarding points for arranged employment, even with an AEO, Visa Officers must still assess whether an applicant "is able to perform and is likely to accept and carry out the employment. Officers may take into account the applicant's education and training, background and prior work experience to determine if the applicant meets this requirement."[23] It may be the case, therefore, that in making an eligibility assessment, Visa Officers in fact look behind an AEO to determine if an individual is able to perform the role and is likely to actually perform the job after arriving in Canada. Counsel may wish to consider including submissions regarding the applicant's educational background and work experience, the nature of the position in Canada, and the nature of the employer's business in all cases.

4.3 Temporary Foreign Workers and Students ("SW3")

4.3.1 The Criteria

Temporary foreign workers and international students residing legally in Canada for at least 12 months immediately prior to submitting an application may be eligible for the Federal Skilled Worker program under SW3.

The language describing the SW3 criteria differs in the Ministerial Instructions, the Federal Skilled Worker Instruction Guide and the Operational Manual. For example, the Ministerial Instructions provide that "applications submitted by foreign nationals residing legally in Canada for at least one year as Temporary Foreign Workers or International Students"[24] are eligible for processing, and OP 6 echoes this language.[25] The Instruction Guide[26] on the other hand, stipulates that the 12 month period must fall *immediately prior* to the submission of the application. According to anecdotal evidence from members of the Bar, CIC is insisting on the latter interpretation.

Moreover, the CIO is rejecting applications when employment is not full-time and continuous. The language regarding continuity of employment in OB 173 also applies to applicants under SW3, and confirms that anticipated short breaks in employment are acceptable. Nevertheless, we are left wondering what constitutes a short break for the purposes of determining eligibility.

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[23] OP 6, *supra*, at pg. 27.
[24] MI, *supra*.
[25] OP 6, *supra*, at pg. 13.
[26] Guide, *supra*, at pg. 4.

Section 8.2 of OP 6 confirms that for international students, it is sufficient to have studied for one academic year (i.e. two terms or semesters) during one year of legal residence.[27]

Subsection 8.2 of OP 6 also provides that SW3 applicants must still be in Canada at the time of application.[28] According to OB 93, once this requirement has been met, an eligibility assessment has been conducted and an application has been placed into processing, temporary foreign workers and international students are not required to continue to legally reside in Canada.[29] Given that the lock-in date is the date that the application is received by the CIO, arguably, a temporary foreign worker or international student could leave Canada immediately after applying to the CIO under this category.

Note that an individual need not hold a Work Permit or a Study Permit in order to be eligible for SW3. As per Subsection 8.2 of OP 6, "Applicants can meet the eligibility requirements with evidence that their authorized period of stay has been at least one year, that throughout this period they have been temporary foreign workers or international students and that they are still in Canada."[30] For example, individuals who are authorized to work in Canada without a work permit pursuant to Section 186 of the IRPR may still qualify under SW3.

Interestingly, the Ministerial Instructions do not specify that qualifying work experience in Canada must be in NOC 0, A or B. Individuals working in Canada in NOC C and D positions for a period of 12 months, therefore, may be eligible to apply under SW3. At the Visa Office stage, however, they would still need to prove that they have at least one year of continuous, full-time skilled work experience in the last 10 years and meet the points threshold. No points would be received for arranged employment with respect to unskilled work in Canada.

4.3.2 Evidencing Eligibility under SW3

The CIO document checklist stipulates that temporary foreign workers and international students must submit:

1. proof of legal residence in Canada for at least 12 months immediately prior to submission; and

2. copies of:

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[27] OP 6, *supra*, at pgs 13 - 14.
[28] *Ibid*, at pg. 13.
[29] OB 93 - December 9, 2008: http://www.cic.gc.ca/english/resources/manuals/bulletins/2008/ob093.asp [OB 93]
[30] OP 6, *supra*, at pg. 14.

a. In the case of a student:
    i. the study permit; or
    ii. other proof of student status and proof of enrolment from the relevant educational institution;

b. In the case of a worker:
    i. the work permit; and
    ii. a letter of employment or other proof of employment status.

Subsection 8.2 of OP 6 provides guidance regarding how to evidence authorized stay, temporary foreign worker and student status and residence in Canada.[31] Proof of authorized stay may include a passport entry stamp, a temporary resident record, a work permit or a study permit. Evidence of being a temporary foreign worker or international student may include letters from employers or schools, records of pay, attendance, report cards, transcripts, etc. Letters from employers or schools should include the name of the employer or school, address and phone number. Lastly, evidence of residing in Canada may include a residential address and correspondence sent to that address. While these suggestions may be geared toward those who do not have work or study permits, it may be prudent to provide such evidence in support of all SW3 applications to both the CIO and the Visa Office in order to facilitate processing.

5.0 NO EXCEPTIONS TO THE ELIGIBILITY CRITERIA

5.1 Substituted Evaluation

Note that substituted evaluation cannot be used to overcome failure to meet the Ministerial Instructions.[32] In other words, if an applicant fails to meet the criteria of one of the three eligibility categories, no amount of documentation evidencing an applicant's ability to become economically established in Canada can overcome a negative eligibility determination at the CIO or the Visa Office.

5.2 Humanitarian and Compassionate Requests

As a result of Bill C-50, Section 25 of IRPA was amended making the obligation to assess Humanitarian and Compassionate ("H&C") requests from foreign nationals outside of Canada discretionary. Moreover, Subsection 87.3(4) was added to IRPA, stipulating that officers shall

[31] Ibid, at pg. 14.
[32] Ibid.

comply with any instructions from the Minister before exercising any powers under Section 25. The Ministerial Instructions specifically provide:[33]

> Requests made on the basis of Humanitarian and Compassionate grounds that accompany a Federal Skilled Worker application made overseas that is not identified for processing under Ministerial Instructions will not be processed.

In other words, Federal Skilled Workers may only receive H&C consideration at the Visa Office if their application otherwise meets the eligibility requirements of the Ministerial Instructions. H&C grounds cannot be used in order to overcome the eligibility requirements of the Ministerial Instructions.

Now-expired OB 101 provides that applications received by Visa Offices between February 27, 2008 and November 28, 2008 requesting H&C consideration will be reviewed to determine if there are sufficiently compelling circumstances that warrant changing the class from Federal Skilled Worker in order to ensure continued processing. If, however, there is insufficient evidence of H&C grounds, applicants will be informed that they do not meet the eligibility requirements of the Ministerial Instructions, and their fees will be refunded.[34] It is unclear what force and effect all of the contents of the expired OB 101 have.

6.0 INTAKE AND PROCESSING TIMES

6.1 CIO Intake

Since the introduction of the Ministerial Instructions, the overwhelming majority of individuals have applied to the CIO under SW1. Interestingly, SW1 also has the highest denial rate. For example, between June 8 and July 3, 2009, of the 3656 initial applications that were assessed based on experience in one of the 38 eligible occupational categories, 1,133 received a negative determination. During the same period, 145 initial applications were assessed based on arranged employment in Canada, and of those, only nine were refused. Similarly, only 14 applications of 148 were refused under the International Student / Temporary Foreign Worker category.

Also of note is that even with the relatively basic application requirements (i.e. forms and very few supporting documents), the CIO returns approximately 30% of applications for being incomplete. It is therefore critical at the CIO stage to implement all of the best practices used to

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[33] MI, *supra*.
[34] Operational Bulletin 101 - February 27, 2009: http://www.cic.gc.ca/english/resources/manuals/bulletins/2009/ob101.asp

prepare Federal Skilled Worker applications, including writing "N/A" in any blank spaces on the forms, inserting NOC codes beside each position listed on the IMM 0008 – Schedule 3, etc.

6.2 CIO Processing Times

As of the time of writing, processing times at the CIO are sitting at approximately six to eight weeks, far exceeding the original processing target of ten days. Projected intake at the CIO for FY 2009/2010 is estimated at 70,000 cases, but the CIO is currently only funded to process 50,000 cases.[35] As a result, CIO processing times are expected to continue to increase.

6.3 C-50 Visa Office Processing Times

With the introduction of the Ministerial Instructions, CIC committed to processing eligible Federal Skilled Worker applications on a priority basis, with a target processing time of between six to 12 months. Processing times were recently posted on the CIC website, and if accurate, they confirm that most Visa Offices are meeting this objective.[36]

Still, with intake at the CIO and Visa Offices on the upswing, a backlog in inventory in C-50 Federal Skilled Worker applications could be right around the corner. Moreover, at the Visa Office in Buffalo, for example, the Provincial Nominee Program target is higher than the Federal Skilled Worker target. This could leave CIC in a conundrum, given that it has committed to priority-processing such applications.

6.4 Pre-C50 Applications

Between February 2008 and September 2009, the pre-C50 backlog was reduced by 33%.[37] Nevertheless, average processing times at Visa Offices for Federal Skilled Worker applications filed before February 27, 2008 are still lengthy (e.g. between 31 and 60 months). What should an applicant who is stuck in the backlog of most Visa Offices do?

If the applicant does not qualify for the Federal Skilled Worker program under the Ministerial Instructions, the answer is clear: the applicant will need to stick with the pending application. However, if an applicant meets the requirements of one of the eligibility categories, he/she does have the option of refiling, and given current processing times, may be wise to do so. According

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[35] Lexbase, *supra*, February 2010.
[36] http://www.cic.gc.ca/english/information/times/international/02b-skilled-fed.asp
[37] Lexbase, *supra*, February 2010.

to OB 101, applicants can have multiple Federal Skilled Worker applications in process at once:[38]

> The applicant can choose to either maintain the first application and submit a new C-50 application with a new processing fee; or withdraw the first application and submit a C-50 application. If an applicant chooses to withdraw their pre-C-50 application before processing begins, they will receive a refund.

Some members of the Bar have confirmed that after obtaining and sending offers of arranged employment for applicants with pending pre-C50 applications to the relevant Visa Office, the permanent residence visa was issued a short-time later. Nevertheless, this could simply be consistent with CIC's long-standing policy of prioritizing Federal Skilled Worker applications with arranged employment. Burke Thornton has confirmed that it is very difficult to dislodge applications from the backlog, even with new evidence that an individual may qualify under the Ministerial Instructions.

Applicants who filed Federal Skilled Worker applications directly to the Visa Office between February 28, 2008 and November 28, 2008 likely find themselves in a state of limbo. According to OB 89, these applications will be assessed against the Ministerial Instructions to determine if they are eligible for processing, and if so, will be processed on a priority basis. Those not eligible will receive a full refund. In the writer's experience, applications filed during this period at the Visa Office in Buffalo were processed in 12-18 months. It is difficult to determine if this is considered "priority processing", or if these applications are in fact somehow landing on the backlog pile.

7.0 MORE CHANGES TO THE PROGRAM?

Burke Thornton has indicated that we can anticipate several changes to the Ministerial Instructions and to the selection criteria of the Federal Skilled Worker program in the near future. For example, the list of 38 occupations will soon be amended, and the number of eligible occupations may be reduced. This change is likely aimed at stemming the volume of applications being received by the CIO. Changes to the selection system will likely include an increased emphasis on language ability and possibly mandatory language testing. Also, higher points may be awarded in the future to applicants under a certain age.

In addition, CIC is considering methods to increase the monitoring of SW2 Arranged Employment cases given the level of fraud that is perceived to occur in this category. It is also

[38] OB 101, *supra*.

planning to conduct more interviews with SW1 applicants. This will undoubtedly put further strain on processing times.

8.0 CONCLUSION

Whether or not the Ministerial Instructions are effectively addressing Canada's Federal Skilled Worker woes or have simply created a new layer of bureaucracy with which we must now contend, it is critical for immigration counsel to have a solid understanding of the mechanics of the instructions and the multitude of issues created by the new regime. An understanding of the CIO framework, changes to Visa Office processes, and the finer points of the eligibility categories is a great aid in navigating the uncharted waters of the Federal Skilled Worker program in the wake of the Ministerial Instructions.