

## **CRACKS IN THE FOUNDATION: TOP ISSUES FACING WESTERN CANADIAN PROVINCIAL NOMINEE PROGRAMS**

Over the past five years or so western Canadian practitioners have witnessed the decline of the Federal Skilled Worker Class, a once powerful force in the world of immigration application processing. In its wake a rising star emerged, offering faster service, extended benefits and flexible rules.

In its early days, the heir apparent, the Provincial Nominee Class, was a collection of boutique programs, servicing those “in the know” and was truly a win-win-win solution for provinces, immigration applicants and Citizenship and Immigration Canada (“CIC”) alike. Provinces were empowered to select immigrants well-matched unique economic needs, and CIC was relieved of the burden of making a selection decision and was given the confidence that an immigrant would successfully settle well within a specific province. Immigration applicants were and continue to be granted priority processing of their immigration applications, often with provincial support for work permits to bridge the gap between nomination and landing as an immigrant.

As the Canadian economy heated up, first to a simmer and then to a boil, and a once deep labour pool began to evaporate and thin, PN programs multiplied in terms of both the number of application streams and the volume of applications processed in an effort to help employers keep up with growing demand.

But like any rapidly expanding business PN programs have suffered their share of challenges. The once boutique programs have steadily and incrementally transformed into Wal-Marts (mini-Service Canadas or mini-CIC’s, at least) and their growing pains are felt by all those in their path. Compounding PN programs’ issues, a downturn in the economy has taken the wind out of the driving forces behind most PN programs. Employment opportunities have diminished and investment dollars are harder to find. Further yet, Provincial revenues and budgets have also decreased, leaving PN programs hard pressed to keep up with growing concerns.

This paper focuses western-Canadian PN programs. From friendly Manitoba to beautiful British Columbia, Evelyn Ackah and David Thomas have surveyed each PN program and together have identified the top issues facing this application class today and into the foreseeable future.

### **1. DISMISSAL AND OBLIGATION TO DISCLOSE**

During times of economic growth, Canadian employers actively recruited foreign workers to Canada for temporary or permanent employment. However, with the recent economic downturn, Canadian employers are now faced with the obligation to cut costs and reduce employee numbers. While employer obligations with respect to Canadian employees are well-established, what obligations are imposed on employers with respect to the foreign workers they have recruited and relocated to Canada?

### **a. Employer Obligations to Foreign Workers upon Termination**

Each province across Canada has Employment Standards legislation that governs the relationship between employers and employees, including temporary foreign workers. Employers who dismiss foreign workers must abide by the same notice provisions that apply to Canadian workers.

Once an employer terminates an employee who is in Canada on a temporary work permit, there is no obligation on the employer to notify Canadian Immigration and Citizenship (CIC) of the termination; however it is advisable in order to ensure that there is no possibility of the work permit being used for fraudulent purposes.

Employers who enter into employment contracts with low-skilled workers pursuant to the Service Canada Low-Skilled Worker Program are contractually obligated to pay for the employee's travel to and from Canada. Therefore, an employer who dismisses a low-skilled worker will still be contractually-bound to pay the travel expenses for the employee to return to their country of origin. There is no obligation on the temporary foreign worker to leave the country immediately following termination of employment. Although they might not be eligible to work for any other employer without obtaining a new work permit, the current work permit does allow them to remain in Canada until its expiration, regardless of whether they are still employed. This means that employers who fire low-skilled foreign workers will still be liable for travel expenses even if the employee chooses to remain in Canada until the end of their work permit.

### **b. The Effect on the Employee's Permanent Resident Application**

#### **i. PNP Stage**

When a PNP applicant is dismissed or leaves a position, that applicant or employer has an obligation or duty to disclose this information to the PNP office. This applies to all PNP programs across Canada. It is considered misrepresentation when an applicant or an employer fails to notify the PNP office of a significant change in employment status. Section 40 and 127 of the *Immigration and Refugee Protection Act (IRPA)* address misrepresentation and withholding material facts. In addition, Section 9 and 16 of the IRPA deal with the province's sole jurisdiction on selection - which makes the duty to disclose very clear.

In Saskatchewan, if an applicant loses his job, the PNP office recommends that they be contacted as they will attempt to assist the applicant to find new employment. If new employment cannot be found, then the nomination may be withdrawn. If an applicant misrepresents in the application, he or she will be banned from the program for a period of two years. In BC, Manitoba, and Alberta, a misrepresentation will result in the applicant's nomination being withdrawn. The employer, in all provinces except Manitoba, is also required to inform the PNP program if the applicant is no longer an employee.

If the employer fails to notify the PNP office, this may be considered misrepresentation. In BC and Alberta, a misrepresentation on the part of the employer may adversely affect future applications to the program by that employer. In Alberta and Saskatchewan, when

an applicant is dismissed or leaves the employer, the PNP office may still, in its discretion, nominate the applicant. In Alberta, the applicant is not required to be employed to continue to have his or her application assessed. However, Saskatchewan requires that the applicant find other employment in order to continue to consider the applicant for nomination. If the applicant fails to find employment then the nomination may be withdrawn. In BC, if an applicant in the Entry Level and Semi-Skilled Pilot Project is dismissed or quits their employment, he or she has four weeks to obtain other employment otherwise the nomination will be cancelled.

## **ii. Consular Stage**

When a PNP application is pending at the Consulate and there has been a change in the employment status of a nominee, it is suggested that the applicant and the employer have an obligation to notify the Consulate. Depending on what stage the Consulate is processing the application when the dismissal occurs, the consular officer will review each case individually and decide how to proceed. Generally, if the applicant would have qualified as a skilled worker for permanent residence or under the Canadian Experience Class, the application will continue to be processed. Alternatively, the applicant and/or employer may choose to contact the PNP office that had approved the initial nomination to advise of the change and seek advice and determine if the PNP office has any objection to the application continuing at the Consulate. It appears that some practitioners have gone back to the original PNP office and received amended nominations in cases where there is a new employer and have then communicated that amendment to the Consulate for final processing. It will be interesting to see how this ad hoc policy may or may not change over the next term in light of the economic crisis.

## **2. SEMI-SKILLED PNP PROGRAMS IN ALBERTA AND HOSPITALITY PROGRAMS IN BC AND SASKATCHEWAN**

Over the past few years, PNP's across Canada have adapted to meet the needs of the community. Initially focused on skilled workers, they are now embracing semi-skilled and hospitality industries. The below is a review of the Alberta, BC and Saskatchewan programs.

### **a. Alberta**

The Semi-Skilled Worker category in Alberta is intended to address the critical labour shortages in select occupations in the following industries: Food and Beverage Processing Industry, Hotel and Lodging Industry, Manufacturing Industry, Trucking Industry and Foodservices Industry. These select occupations are defined as NOC skill level "C" and "D" occupations.

i. Food and Beverage Processing Industry

AINP will consider the Alberta employer's business case for select occupations in the Food and Beverage Processing Industry<sup>1</sup> for the purposes of addressing the critical skill shortage of workers.

The Alberta employer's business case rests upon the satisfaction of the following criteria: The employer must (1) provide support of increase in temporary foreign workers wage over the duration of the work permit indicating an increase in skills; (2) submit an applicant who has the required qualifications, has demonstrated excellent work performance and will contribute to the long term success of the company; (3) possess a Service Canada Labour Market Opinion (LMO) Confirmation and meet the conditions such as salary and accommodation; (4) provide in their application to AINP, a plan outlining their approach to accommodation, settlement and retention for the applicant from the time the applicant commences employment with the employer; (5) ensure that the applicant is competent in speaking, listening, reading and writing English prior to nomination. If the applicant is not competent in English, the employer must provide the applicant with an in-house English as a Second Language (ESL) program or cover the cost of the ESL training for the applicant. Each employer is allocated a certain number of approvals based on factors including recruitment strategies and conditions, employment policies and practices, retention and settlement.

The applicant, likewise, must satisfy the following criteria prior to applying to the AINP: The applicant must (1) hold a valid work permit for the selected occupation and be residing in Alberta; (2) possess a total of three years of full-time work experience in their home country prior to arriving in Canada in a physically demanding job similar to that found in the food and beverage processing industry; (3) have, at minimum, a high school education; (4) complete an interview with the Alberta Agriculture and Rural Development staff and be able to satisfy Alberta Agriculture and Rural Development regarding suitability for AINP; (5) be employed in Alberta for a minimum of six months and meet or exceed all employer established work and performance standards; (6) if not competent in English, undergo ESL training from the time they arrive to work to when they become a permanent resident; (7) demonstrate integration into the local community; and (8) demonstrate the financial means or capability to pay for the costs of applying for permanent residency and establishing themselves and their family in Alberta.

ii. Hotel and Lodging Industry

AINP will consider the Alberta employer's business case for select occupations in the Hotel and Lodging Industry for the purposes of addressing the critical skill shortage of workers. The selected occupations are the following: Food and Beverage Servers, Room Attendants, and Front Desk Agents and Clerks. Each employer is allocated a certain number of approvals based on factors including recruitment strategies and conditions, employment policies and practices, retention and settlement. The Alberta employer is

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<sup>1</sup> The selected occupations are as follows: Bakery Production Work (NOC 9617), Food and Beverage Production Worker (NOC 9617), Food and Beverage Processing Equipment Cleaner (NOC 9617), Industrial Butchers and Meat Cutters (NOC 9462), and Poultry Production Worker (NOC 9462).

eligible for a maximum number of allocations per year based on the total number of rooms at a property<sup>2</sup>. Allocations can be for Food and Beverage Servers and Room Attendants or a combination of both as well as for Front Desk Agent or Clerk.

iii. Manufacturing Industry

AINP will consider the Alberta employer's business case for select occupations in the Manufacturing Industry<sup>3</sup> for the purposes of addressing the critical skill shortage of workers. The Alberta employer's business case rests upon the satisfaction of similar criteria mentioned above. Each employer is allocated a certain number of approvals based on factors including recruitment strategies and conditions, employment policies and practices, retention and settlement.

iv. Trucking Industry

AINP will consider the Alberta employer's business case for select occupations in Alberta's Trucking Industry<sup>4</sup> for the purposes of addressing the critical skill shortage of workers. Applicants who can demonstrate a minimum of three out of the last five years work experience as a Hazardous Goods Vehicle driver will be given preference.

v. Foodservices Industry

In consultation with the Canadian Restaurant and Foodservices Association, AINP has introduced a new pilot project to address labour challenges faced by the foodservices industry in Alberta. This pilot project is limited to 600 nominations allocations for three eligible occupations: Food and Beverage Servers, Food Counter Attendants, and Kitchen Helpers. Once the allocations have been approved, no further applications will be

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<sup>2</sup>If the number of rooms is between 1-50 then the maximum number of allocations per property per year are 2. For every 50 rooms the allocation per property per year increases by 2.

<sup>3</sup> The selected occupations are as follows: Shipper and Receiver; Production Clerks; Purchasing and Inventory Clerks; Heavy Equipment Operator; Oil and Gas Well Drilling Workers and Services Operators; Machine Operator - Mineral and Metal Processing; Foundry Worker; Concrete, Clay and Stone Forming Operators; Inspectors and Testers, Mineral and Metal Processing; Chemical Plant Machine Operator; Plastics Processing Machine Operators; Rubber Processing Machine Operator & related workers; Water and Waste Plant Operators; Sawmill Machine Operators; Pulp Mill Machine Operators; Papermaking and Finishing Machine Operators; Other Wood Processing Machine Operators; Paper Converting Machine Operators; Lumber Graders & Other Wood Processing Inspectors & Graders; Process Control & Machine Operators, Food & Beverage Processing; Aircraft Assemblers and Aircraft Assembly Inspectors; Electronics Assemblers, Fabricators, Inspectors and Testers; Assemblers and Inspectors, Electrical Appliance, Apparatus and Equipment Manufacturing; Assemblers, Fabricators and Inspectors, Industrial Electrical Motors and Transformers; Mechanical Assemblers and Inspectors; Machine Operators and Inspectors, Electrical Apparatus Manufacturing; Manufactured Housing Production Worker; Prefabricated Housing Assembler; Furniture Finishers and Refinishers; Plastic Products Assemblers, Finishers and Inspectors; Painters and Coaters – Industrial; Plating, Metal Spraying and Related Operators; Machining Tool Operators; Forging Machine Operators; Woodworking Machine Operators; Metalworking Machine Operators.

<sup>4</sup> The selected occupation is Long Haul Truck Driver (NOC 7411-C). A long haul is define as a driver who operates a tractor-trailer combination vehicle and hauls commercial goods over long distances - thousands of kilometres away from home. Destinations are inter-provincial and international. A driver must be away from home for several days per week or weeks at a time.

accepted or assessed under this pilot project. Each employer is limited to one allocation per restaurant location for one of the three selected occupations.

## **b. Saskatchewan**

### **i. Hospitality Sector Project Category**

The Hospitality Sector Project is intended to address labour shortages on a permanent basis through a two phase process. Under this category, the SINP can nominate foreign workers that are currently working in Saskatchewan in the following categories: Food/Beverage Server; Food Counter Attendant/Kitchen Helper or Housekeeping/Cleaning Staff for a minimum of six months on a temporary work permit issued by CIC, supported by Service Canada's Temporary Foreign Worker labour market opinion confirmation. The applicant must first begin working in Saskatchewan for an approved Saskatchewan company on a temporary foreign work permit. If an approved business offers the applicant permanent employment, after a minimum of 6 months employment the applicant may apply to the SINP for permanent resident status provided that the applicant meets all the criteria for eligibility.

The Saskatchewan employer's business case rests upon the satisfaction of the following criteria: The employer must (1) meet the Service Canada employer criteria for the pilot project for Occupations Requiring Lower Levels of Formal Training (NOC "C" and "D") and agree to the program parameters; (2) provide a Recruitment and Settlement Plan outlining their approach to accommodation, settlement and retention for the foreign worker from the time the foreign worker commences employment with the employer; (3) possess a Service Canada Labour Market Opinion (LMO) Confirmation and meet the conditions such as salary and accommodation; (4) provide SINP and Service Canada copies of both mandatory Service Canada employer-employee contract and the offer of permanent employment that will take effect after the initial 12 months; (5) ensure that the applicant is competent in speaking, listening, reading and writing English prior to nomination. If the applicant is not competent in English, the employer must provide the applicant with English training and facilitate communication between the applicant and the rest of the employees.

The applicant must hold a valid permit for one of the selected occupations and be employed in Saskatchewan for an approved Saskatchewan company. If an approved business offers the applicant permanent employment, after a minimum of 6 months employment the applicant may apply to the SINP for permanent resident status provided that the applicant meets all the following criteria for eligibility: The applicant must (1) have completed a minimum of high school; (2) meet or exceed all employer established work and performance standards; and (3) have sufficient English language ability for continued employment in Saskatchewan. If English is not the applicant's first language then the employer must provide an Affidavit of English Language Ability and the applicant must provide proof of their enrolment in English training.

## ii. Long Haul Truck Drivers Category

The SINP Long Haul Truck Driver category allows Saskatchewan trucking firms to bring workers to the province for occupations requiring a high school diploma or on-the-job training under Service Canada's Temporary Foreign Worker policy.

The Saskatchewan employer's business case rests upon the satisfaction of the following criteria: The employer must (1) be in operation in Saskatchewan for at least five years; (2) have no compliance issues with the National Safety Code; (3) do primarily long-distance shipping that requires cross-border travelling (inter-provincially or internationally) or overnight travel; (4) submit a Long Haul Trucking recruitment and settlement plan; (5) meet Service Canada's requirements which include obtaining a Service Canada LMO and providing a Human Resource plan for each driver; and (6) provide the SINP and Service Canada copies of both the mandatory Service Canada employer-employee contract and the offer of permanent employment that will take effect after the initial 12 months.

The applicant, likewise, must satisfy the following criteria prior to applying to the SINP: The applicant must (1) hold a valid work permit for an approved Saskatchewan trucking firm for a minimum of six months; (2) have a current Saskatchewan Class 1A driver's license; and (3) have an offer of full-time, permanent employment from the applicant's employer.

## c. **British Columbia**

### i. Entry Level and Semi-Skilled Pilot Project

The Entry-Level and Semi-Skilled Pilot Project category is a pilot project which applies to select occupations and eligible employers in the following industries: Tourism/Hospitality, Long Haul Trucking, and Food Processing. These industries play a key role in BC's export-oriented economy and are experiencing acute and persistent labour shortages.

The BC PNP will only consider employers' applications to hire foreign workers in relation to the current demand and future outlook. Employer applications will not be approved for occupations where there is an adequate supply of workers domestically or where future prospects for employment in the occupation are poor. Employers must submit an LMO obtained from Service Canada that authorized the original hiring of the applicant under the federal Temporary Foreign Worker Program. The employer must (1) be incorporated or extra-provincially registered in BC; (2) have a permanent establishment in BC; (3) have been in operation in BC for at least 2 years and must have at least five permanent, full-time employees in BC; and (4) be financially sound and have a history of good workplace and business practises, including compliance with applicable employment, immigration, health and safety laws and regulations.

The applicant for each of the subcategories must satisfy the following criteria: The applicant must (1) have accepted the employer's offer for full-time permanent employment for an eligible occupation (see below); (2) must have completed formal education to a secondary level; and (3) have basic proficiency in English unless the LMO

indicates that no English language proficiency is needed for the job, the employer will pay for the applicant to take one of the following English language tests<sup>5</sup>: TOEFL, IELTS and LPI.

Applicants will be assessed according to whether they will become economically established in BC. Factors include: their income employment prospects, number of dependants, English language ability, education and connections to BC or Canada through work, study, residence, and family ties.

ii. Tourism/Hospitality

The applicant must have been employed in an eligible occupation<sup>6</sup> by the sponsoring company on a temporary work permit for at least 9 months prior to applying to the BC PNP.

iii. Long Haul Trucking

The applicant must have been employed as a long haul truck driver<sup>7</sup> by the sponsoring company on a temporary work permit for at least nine months prior to applying. The applicant must have at least two years of employment experience as a long haul truck driver in the three years prior to their application and must hold a valid BC Class 1 driver's license.

iv. Food Processing

This subcategory was introduced October 20, 2008. The applicant must have been employed in an eligible occupation<sup>8</sup> by the sponsoring company on a temporary work permit for at least nine months prior to applying to the BC PNP.

### **3. INSIGHTS FROM THE BC, ALBERTA AND SASKATCHEWAN PNP OFFICES**

#### **a. Semi-Skilled PNP Programs in Alberta and Hospitality Programs in BC and Saskatchewan**

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<sup>5</sup> If the Applicant fails to demonstrate basic proficiency, the employer must pay for the Applicant to enroll in a recognized ESL program for a minimum of 6 months.

<sup>6</sup> The eligible occupations includes the following: Hotel Front Clerks; Tour and Travel Guides; Outdoor Sport and Recreational Guides; Casino Occupations; Maitres d'hotel and Hosts/Hostesses; Food and Beverage Servers; Food Counter Attendants, Kitchen Helpers and Related Occupations; Light Duty Cleaners; Specialized Cleaners; Janitors, Caretakers and Building Superintendents; Other Attendants in Accommodation and Travel: Doorkeeper, Hotel Guest Services Attendant, Dry Cleaning and Laundry Occupations (Hotels/Resorts only); Ironing, Pressing and Finishing Occupations (Hotels/Resorts only); Other Elemental Service Occupations: Attendant, Sauna Room (Hotels/Resorts only), Hotel Valet.

<sup>7</sup> A long haul truck driver is defined as an individual who operates articulated or multi-articulated heavy commercial vehicles on routes more than 160 km from home base.

<sup>8</sup> The eligible occupations include the following: Process Control and Machine Operators, Food and Beverage Processing; Industrial Butchers and Meat Cutters, Poultry Prepares and Related Workers; Fish Plant Workers; Testers and Graders, Food and Beverage Processing; Labourers in Food, Beverage and Tobacco Processing; Labourers in Fish Processing.



In BC and Alberta, the number of approvals in this stream or category will not be reduced this year as a result of the economic crisis. Alberta believes that it can best weather this current economic situation and therefore are taking a long-term 10 year approach.

### **b. Quotas**

Alberta has a general quota of 3,000 nominations for the 2008/2009 year, down from 5,000 in previous years. The only subcategory that has a specific quota is the Foodservice subcategory whereby when 600 nominations have been made this subcategory will be closed. Alberta has noticed an increase of applications during this economic uncertainty. AINP believes that this is due to (1) employers not wanting to lose good employees and (2) many applicants and employers are only now learning of this program.

Manitoba and BC claim that they have open programs and will nominate as many applicants as necessary whereas Saskatchewan has a general quota of 3,800 nominations for the 2008/2009 year.

In BC, the entry level low skilled program requires 9 months prior work experience for that employer but not necessarily under an LMO based work permit. It could presumably be an open work permit or a working holiday visa. There apparently has been some talk that BC may cancel this program when it comes up for review after the initial 2 year pilot project period in September as they had only 6 applicants in the first year.

### **c. Family Member Applicants**

Manitoba and Saskatchewan have not changed their policies for applicants in the Family stream or category due to the economic conditions. The AINP's Family stream remains the lowest priority with the longest processing times.

## **4. WORK PERMIT GAP-BRIDGING**

### **a. Work Permit Expirations**

BC, Saskatchewan and Manitoba will, upon notification from the applicant, send a letter of Support for an extension of the work permit that is being extended at CPC-Vegreville. The AINP claims that they have an understanding with the CIC to extend work permits. Once the applicant is in Canada, they must apply within Canada to extend their work permit. They do not need to apply to the Visa Office, where they originally applied.

The situation appears to be different when the applicant is outside of Canada - there is real inconsistency in how Canadian Consulates around the world are dealing with work permit applications pursuant to PNP nomination.

## **5. ALBERTA AINP AND US H1B**

### **a. U.S. Visa Holder Category**

The objective of the U.S. Visa Holder category is to facilitate the entry of U.S. visa holders currently working temporarily in the United States into Alberta's permanent labour force. Applicants working in skilled occupations in high demand in Alberta, in specific visa categories may be eligible to apply to AINP. This is a unique program that currently only exists in Alberta.

The applicant must also satisfy the following criteria prior to applying to the AINP: The applicant must (1) demonstrate a clear ability and intention to live permanently in Alberta; (2) be currently working in the United States and possess a valid visa in one of the following temporary skilled worker visa categories: H1-B, H1-B1, H-1C, E-3 at the time the AINP makes a final decision; and (3) have a minimum of one year of work experience in the United States in one of the qualifying visa categories.

If the applicant has engineering credentials, the applicant must provide a "Letter of No Objection" from the Association of Professional Engineers, Geologist and Geophysicists of Alberta (APEGGA) or demonstrate that they are registered with APEGGA as a foreign licensee. Applicants must meet the above criteria. There is no automatic approval.

## **6. DISCRETION AT THE PNP OFFICE LEVEL**

Generally speaking, "discretion" exists at the provincial level on a number of issues. Each provincial nominee program is governed by an accord between each province and the federal government. Each province sets out the criteria upon which they wish to select immigrants to their province based on their perceived ability to contribute to the economic growth and development of the province.

All provincial nominee selections are governed by the basic statutory requirements (medical and criminal admissibility) and by the new rules set out in Regulation 87 to IRPA

However, it should be noted that a great deal of discretion does exist at the Provincial level. The basic intention of the relationship between the provinces and the federal government is to allow the provinces to make decisions that they feel reflects their priorities and goals.

Examples of Positive Discretion:

- Over Age Accompanying Family Members. Provincial officers have been known, from time to time, to grant a separate nomination certificate for an over age accompanying dependant who might not otherwise meet the test under IRPA. This is particularly true for older children of business applicants, where there is a demonstrable economic dependence and a clear ability of the parent to provide financial support.

- Ownership in Employer. Some provinces restrict the selection of a skilled worker if the applicant has an ownership interest in the employer company. Exceptions can be made to this rule.
- Provincial Licensing. Some occupations are regulated by the provincial authorities. However, in some cases, obtaining provincial licensing can take years, or may require the applicant to have long-term immigration status. Provinces have been known to exercise discretion by exempting a licensing requirement, provided the employment activity is still authorized. An example would be a Dental Technician who might be employed in Canada as a Dental Technician Assistant before they become fully licensed.

## **7. CONSULAR PROCESSING ISSUES - REJECTIONS**

Under the various federal-provincial agreements that govern the administration of provincial nominee programs, the federal government allows the province to make the “selection decision” for immigration purposes. The selection decision must be made within the parameters of the agreement, which has been carefully negotiated between the province and Citizenship & Immigration Canada.

The Policy Manuals lay out three grounds upon which a federal visa officer may reject a provincial nominee after the nomination has been made and the application is at the visa office for finalization:

- the officer has reason to believe that the applicant does not intend to live in the province that has nominated them;
- the officer has reason to believe that the applicant is unlikely to be able to successfully establish themselves economically in Canada; or
- the officer has reason to believe that the applicant is participating in, or intends to participate in, an immigration-linked passive investment scheme as defined in the Regulations.

### **a. Intention to Reside in the Nominating Province**

Intention to reside in the nominating province tends to arise when there is only a tenuous connection to the province concerned. Applicants who have resided temporarily in another province, or who have relatives or investments in another province, should be prepared to meet this question head on. Significant connections to a different province could be a serious handicap.

Furthermore, there have been cases of provincial nominees being denied landing at the very end of their process. One nominee from Alberta misunderstood the letter he received from the Embassy when his passport was requested for visa issuance. The letter told him not to quit his job until his visa had been issued. Once he received his visa. He immediately quit his job in Alberta, the job for which he had been nominated. (He

understood the embassy's letter to imply this was acceptable.) When he attempted to land in British Columbia, the CBSA officer asked him about his job in Alberta. When he admitted he recently quit the job, his immigrant visa was taken from him without landing.

In another instance, a business PNP applicant destined for Manitoba attempted to land in Vancouver. When requested to provide a mailing address for his PR Cards, he gave his residential address in British Columbia where he already owned a home. The applicant thought he only needed to start a business in Manitoba, and claimed he didn't realize he was supposed to move there with his family. He was denied landing.

### **b. Ability to Successfully Establish Economically**

This category is of particular concern to nominees of limited financial means who are coming to Canada to work in lower-paying occupations. British Columbia, Saskatchewan and Alberta all have provincial nominee programs for lower skilled, NOC C & D occupations. If an applicant is coming to a province under one of these occupations, consideration should be given to the Low Income Cut-Off (LICO) tables and the size of the family unit.

### **c. Participation in a Passive Investment Scheme**

While the four western provinces have slightly different categories for selection, new Regulation 87 specifically excludes nomination of any applicant participating in an "immigration-linked investment scheme." The federal government has always wanted to shelter its Investor category from any competition. With the obvious exception of the Quebec Investor program, the federal Investor program is the only sanctioned, passive investment scheme allowed.

The new regulation also specifies that if a provincial nominee has made an investment as part of their contribution to the province, the following conditions apply:

- The applicant's percentage of equity in the target business must be at least 33.3 %  
**OR**  
An equity investment of at least \$1,000,000;  
**AND**
- The applicant must provide active and ongoing management to the enterprise from within the province that nominated them;  
**AND**
- The terms of the investment must not include "a redemption option."

In each of the above situations, the federal visa officer is required to have evidence to support this belief and overcome the presumptions implied by the provincial nomination. Every provincial nominee agreement obliges the immigration officer to consult with an

official of the nominating province regarding the intention to refuse before the refusal is actually made.

#### **d. Source of Funds**

In addition to the foregoing reasons, a visa officer may also refuse an application on either of the statutory grounds, medical or criminal inadmissibility. While these grounds for inadmissibility are usually quite obvious, there have been cases refused for less obvious reasons.

Officers are always concerned about criminality and sources of funds. Applicants should be prepared to give an account for the provenance of their funds. Historical financial records are the best, but not always available. In such cases, an historical account outlined in an affidavit or solemn declaration might be helpful. If an applicant has a substantial net worth, practitioners should build a case for the legitimacy of the source of funds, even if the question was never raised at the provincial level.

#### **e. Intention to Return to Home Country**

Certain provinces, most notably B.C., provide for the issuance of an interim work permit before the immigration process is complete. In the case of Strategic Occupations, a work permit facilitation letter is issued as soon as a positive nomination has been made. However, some practitioners have experienced rejections of the work permit applications on the basis that the applicant has not demonstrated sufficient connection or intention to return to their home country at the end of the term of their work permit. The reasoning makes little sense, given that the very nature of a provincial nomination implies the intention to reside in Canada permanently. For the most part, provincial officers have been unsuccessful in attempts to rectify this situation, which fortunately seems limited to just a few visa posts. (Notably New Delhi and Tehran.)

Ironically, the opposite holds true at some other visa posts. In some circumstances, there have been foreign workers in Canada on LMO-supported work permits, but their immediate family members have been denied visas to accompany them to Canada temporarily. Again, the reason given is that the accompanying family members do not demonstrate sufficient connection to the home county to suggest a willingness to return after the authorized temporary stay. However, some visa posts (notably Manila) are very willing to grant temporary visas to accompanying family members as soon as a provincial nomination has been granted to the principal applicant.

### **8. TRANSFER OF FILES FROM BUFFALO CONSULATE TO OTHER CONSULATES**

After a province selects an applicant and issues a nomination certificate, the applicant must submit a full federal application to a visa post outside of Canada. The overseas visa office has the responsibility for ensuring the applicant and accompanying family members satisfy the requirements under the statutory medical and criminal background

checks. Furthermore, the federal office will ensure compliance of the conditions under Regulation 87 – with respect to “passive investment schemes” and the applicant’s ability to become successfully economically established in Canada.

The location of the visa office outside Canada is subject to the normal considerations under Regulation 11 of IRPA. The majority of applications are processed through the Canadian Consulate in Buffalo. The majority of applicants are already in Canada working, either pursuant to an LMO-based or exempt work permit, or on a work permit issued in conjunction with a provincial nomination.

Since January 1, 2006, Provincial Nominee applications submitted to the Canadian Consulate in Buffalo have been delegated. The files are created in Buffalo, fees processed and a file number is given. Applicants are also given a letter acknowledging receipt for the application.

Although there are exceptions based on processing case loads at the different offices, it was intended that PNP applications would be delegated by Buffalo as follows:

British Columbia and Alberta PNP’s = Seattle

Saskatchewan and Manitoba PNP’s = Los Angeles

Ontario PNP’s = Buffalo

Maritimes PNP’s = New York

When the applicant receives a notice that their file has been transferred to one of the US satellite offices, this is generally a good sign that the processing of the application is well underway.

Average processing times listed on the CIC web site only include a comprehensive estimate for Buffalo. As of February 2009, these times are estimated as:

<b>Individual Visa Offices in the Americas</b>	<b>30% of cases finalized in: (months)</b>	<b>50% of cases finalized in: (months)</b>	<b>70% of cases finalized in: (months)</b>	<b>80% of cases finalized in: (months)</b>
Buffalo	5	6	7	8

## **9. CHANGE IN ECONOMY AND IMPLICATIONS FOR FUTURE OF PNP PROGRAMS ACROSS WESTERN CANADA**

As noted previously in this paper, there are significant changes underway in the economy in Western Canada. Although demographers are still adamant that we will be experiencing skill shortages in the long-run, the near-term looks more bleak. Many employers are cutting back, or implementing hiring freezes.

Some of the western PNP offices are exercising discretion by allowing nominations to stand even though the original job offer may have been withdrawn. (This phenomenon was addressed previously in this paper.)

On the other hand, PNP business programs, such as those found in BC, Manitoba and Saskatchewan, are based on business plans and performance agreements. These business plans and agreements are forward commitments of the applicants to come into the province and to implement the business plan as outlined.

One of the constant issues with the business PNP programs has been the length of time from application to final approval. Quite often business opportunities arise, but do not remain available during the lengthy approval process. In the past, applicants have been faced with the dilemma of passing on a genuine business opportunity, or risking a purchase of a business or assets before the business plan has been approved by the province.

Manitoba and British Columbia have become more flexible on this point. Both provinces are amenable to applicants coming forward and asking permission to deviate from their original business plan. It is understood that the economic situation is rapidly changing, and that certain business plans are not as viable as originally thought. There is generally a willingness to listen to the argument in favour of change. From a practitioner's standpoint, this stated flexibility in approach has implications in the drafting of business plans and performance agreements.

Saskatchewan has a formal approach to incorporate flexibility. Business applicants can either submit a Business Plan, or, they can submit a "Relocation & Settlement Plan."

Relocation and Settlement Plans will typically include the following:

- Accounting firms who will be providing the applicant advice on business organizations, business valuation, bookkeeping, and taxation matters
- Legal firms who will assist with legal transfers, purchase agreements, etc.
- Commercial/residential real estate firms
- Commercial Bankers
- Public/private school officials regarding enrollment of children
- Contact with government/private English language training providers and settlement services (if required)
- Detailed record of contacts made with community-based economic development officers or industry associations

- Contacts made with Saskatchewan based ethnic/cultural associations who can assist with business networking and social integration
- A financial estimate of the costs of relocating the applicant, family members and personal household effects to Saskatchewan
- A pro forma personal financial statement estimating the costs of living and other expenses in Saskatchewan – and an indication how these expenses will be met prior to establishment of the applicant’s business
- An estimate of when business investment will be made and operations will commence

## **10. PURCHASE EXISTING BUSINESS VS. NEW BUSINESS -HOW MUCH CAPITAL IMPROVEMENT REQUIRED?**

Under the business program in British Columbia PNP office wants to see the applicant’s investment to result in a “new” or “improved” business. An applicant will be discouraged if they simply intend to acquire an existing business and run it as before. The BC PNP office wants to see substantial new investment made into any existing business. The applicant should always be looking to show capital improvements, even if the purchase price of the business exceeds the minimum investment level. As a general rule, the BC office is looking for no more than 2/3 of the investment minimum going into the purchase of an existing business.

At the regional level, that means they will be looking for additional investment of at least \$67,000. At the regular level, (for investments in the Greater Vancouver area) the minimum additional investment sought will be approximately \$133,000 (ie. 1/3 of the minimum \$400,000 investment.)

The minimum additional investment can be applied to the following types of business costs, provided that the amounts are reasonable for the business involved:

- Machinery, equipment, furniture and fixtures
- Leasehold improvements
- Inventory
- Patents and licenses
- Franchise purchase fees
- Allowable real estate and franchises
- Initial promotion and marketing
- Other start-up expenses, such as incorporation and permit fees, legal and other professional fees

If the applicant still cannot spend the minimum amount required on the above expenses, they may also apply the minimum amount to the following expenses for the first 6 months of business operations:

- Wages;
- Business premises rent; and



- Other normal operating expenses (including remuneration to the applicant and their family members.

(These amounts will be limited to the first 3 months of business if the applicant purchases a franchise or existing business.)

In addition to the required additional investment, the BC PNP office expects there to be new jobs created. The requirement is at least one new, full-time job for regional businesses, and at least three new jobs for businesses in Greater Vancouver.

The Manitoba business program is in stark contrast to the requirements of the B.C. program. In Manitoba, the purchase of an existing business is perfectly acceptable, and there is no need to inject additional capital into the enterprise. Furthermore, the continuance of existing employment is considered beneficial to the province, and there is no need to increase the number of employees.

## **11. CONCLUDING THOUGHTS**

As PN programs are largely governed by a blend of IRPA and Federal-Provincial agreements, the at times ad hoc decisions flowing from this unique collection of discretion-based and ever-evolving programs present a complicated set of challenges for employers, potential nominees, practitioners and the programs themselves. The absence of a strict regulatory paradigm allows these programs to evolve with the times but often at the cost of certainty for those who engage them. Whether the PN programs will become a victim of their own success is yet to be determined and any outcome will likely reflect the PN programs collective ability to adapt to ever changing circumstances while respecting stakeholder priorities and program integrity.