



May 26, 2016

Via email: HUMA@parl.gc.ca

Bryan May, M.P.
Chair, Human Resources, Skills and Social Development and
the Status of Persons with Disabilities Committee
Sixth Floor, 131 Queen Street
House of Commons
Ottawa, ON K1A 0A6

Dear Mr. May:

Re: Temporary Foreign Worker Program

The Canadian Bar Association Immigration Law Section (CBA Section) commends the Human Resources Committee for initiating this important review of the Temporary Foreign Worker Program (TFWP). We share the view that the TFWP must be aligned with national economic development policies that drive growth and advance the concept of “Canada First”. “Canada First” takes into consideration the full economic benefit of foreign workers for Canadian companies, Canadian business owners and Canadian workers.

The CBA is a national association representing over 36,000 jurists, including lawyers, notaries, law teachers and students across Canada. Our primary objectives include improvement in the law and in the administration of justice. The CBA Section’s mandate covers citizenship and immigration law issues, including legislative changes, administration and enforcement.

The CBA Section supports a TFWP that is flexible and responsive to cyclical fluctuations in the Canadian and global economy, enables Canadian employers to operate in a predictable and reasonable regulatory environment and protects vulnerable temporary foreign workers who help drive Canadian economic success in a global and national marketplace.

Accordingly, the CBA Section recommends that the Government of Canada:

- separate high-skilled and low-skilled temporary foreign workers into two distinct programs;
- support the genuine business needs of industries that rely on low-skilled foreign workers through continued access, flexibility and processing efficiency;
- allocate sufficient resources for program integrity, and apply those resources in a focused and meaningful way, particularly where abuse is reported or suspected; and
- enforce existing legislation to demonstrate serious penalties for non-compliance.

Separate High-Skilled and Low-Skilled Temporary Foreign Workers

The current program does not effectively distinguish between high-skilled and low-skilled occupations. For example, advertising and other requirements that are suitable for low-skilled positions are not in line with business realities related to high-skilled roles. Also, the balance of power between employers and high-skilled workers is fundamentally different than when dealing with low-skilled occupations, and must be distinguished when developing abuse-prevention and compliance policies and processes.

High-skilled TFWs help Canadian businesses operate in an era of globalization and increased international labour mobility, where competition for a limited pool of higher-skilled workers can be fierce. Current Canadian demographics present a major challenge for workforce development. A low birth rate and lack of population growth, combined with a large wave of retiring baby-boomers is resulting in increasing shortages of high-skilled workers. This is compounded by documented gaps in essential skills and experience in the Canadian workforce. While education and training for Canadians will have some positive impact on the supply of high-skilled workers in the medium and long term, Canadian businesses will continue to require reasonable access to high-skilled foreign workers. In fact, many high-skilled foreign workers are already available in Canada with Canadian education or work experience to contribute to the development of the Canadian economy. Yet there are significant impediments to accessing this pool of high-skilled workers and transitioning them to permanent residence in Canada.

High-skilled foreign workers augment a skilled workforce to benefit the Canadian economy and labour market. In contrast to the perception that TFWs displace Canadian workers, high-skilled workers in the TFWP offer a net economic benefit – and ultimately job creation – that strengthen the Canadian economy and workforce. They “import” to Canada knowledge which drives innovation in many sectors of the economy. High-skilled foreign workers who have worked in other key markets provide Canadian business with crucial international insight and perspective that increases the ability of Canadian business to compete globally. They share knowledge of new methodologies and systems that increase efficiency, making Canadian businesses better able to compete and create growth. Temporary foreign workers with skills in short supply in the labour market allow Canadian businesses to pursue opportunities and projects that would otherwise not proceed, thereby creating employment for others.

A well-designed, flexible and responsive program for high-skilled TFWs would be an invaluable tool for employers and for the Government of Canada in responding to cyclical fluctuations in the economy, addressing gaps in skills and experience, supporting industries and regions where shortages persist, promoting innovation and offering competitive advantages for Canadian businesses.

The CBA Section recommends that the TFWP for high-skilled workers:

- refocus on assessing the net benefit to the labour market and the Canadian economy as a whole, rather than solely on protecting individual jobs for Canadians;
- be flexible, taking into consideration industry norms and business realities, especially relating to executive and key managerial positions.
- recognize that the balance of power between an employer and a high-skilled worker is more equal, making abuse less likely than low-skilled foreign workers. Program rules must reflect these differences to be fair and reasonable.
- be efficient, timely and less bureaucratic. A true processing time of ten days should be the norm for all applications for high-skilled workers.

While we believe that a flexible, effective and efficient TFWP for high-skilled workers can be developed, we recommend in the alternative that high-skilled workers be governed by the International Mobility Program (IMP). This would require that Labour Market Impact Assessment (LMIA)-exemption categories, such as C-10 (Significant Benefit) or C-11 (Entrepreneurs), be elaborated to facilitate employment of certain high-skilled foreign workers without having to first prove that obtaining an LMIA is impractical. This policy would also require a review of the Comprehensive Ranking System (CRS) criteria in the Express Entry system to ensure that individuals working in Canada on LMIA-exempt work permits are also eligible to claim CRS points for arranged employment without obtaining an LMIA.

Low-skilled foreign workers serve a critical role for certain Canadian industries including agriculture, food processing, food services and hotels, among others and especially in rural areas. Many Canadians are drawn to high-skilled (high-wage) occupations, leaving menial jobs difficult to fill, particularly with reliable personnel. Access to low-skilled temporary foreign workers is critical to the viability of Canadian food production and service industries.

Our members report that the current 10% cap for low-skilled positions is unrealistic and causes Canadian businesses to fail or relocate outside Canada. Calculation of caps is overly complicated and subject to inconsistent interpretation for reasons including timing of provincial nominations and transition of low-skilled employees (current, inbound and departing low-skilled workers). A prime example of the negative impact of 10% caps is the restaurant industry, where caps prohibit Canadian employers from having adequate kitchen staff or opening new locations.

The low-skilled stream has been subject to significant abuse by employers with high rates of non-compliance in some industries. The CBA Section supports ongoing efforts to protect foreign workers and ensure non-compliant employers are held accountable. We recognize that program integrity is developing through employer compliance reviews, inspections and reviews under Ministerial instructions, first in the TFWP and now also in the IMP. We urge the Government of Canada to do two things: allocate sufficient resources to undertake meaningful inspections; and abandon excessive practices that range from the initial attestations on LMIA applications to focusing on minor payroll discrepancies when resources should be used to address substantial abuses and non-compliance.

Compliance

The CBA Section welcomes reasonable efforts to protect foreign workers and the Canadian labour market from abuse and unfair practices by employers. We have identified a number of concerns with the current compliance regime. In particular, lack of transparency and appropriate processes, overly harsh penalties and the lack of an effective appeal process undermine efforts to create a flexible, responsive and predictable structure for Canadian businesses and workers.

While we recognize the importance of program integrity, the current framework needs substantial improvement. The CBA Section recommends that the Government of Canada:

- Increase transparency and clarity, and ensure consistency in decision-making;
- Clearly define key compliance concepts and allow flexibility to address business realities;
- Provide clear guidelines for the allocation of severity points and what actions or issues will be allocated points at the low, medium and high end of the ranges;
- Publish compliance manuals, guidelines and operational instructions provided to officers so employers and employees clearly understand the test to be met for compliance;

- Set out a clear process for employers wishing to make voluntary disclosure of compliance issues and possible risks and consequences if the disclosure is not accepted;
- Establish a mechanism through which employers can advise of changes in terms and conditions of employment prior to their implementation.
- Amend the compliance framework to allow flexibility for reasonable changes and to take into consideration industry norms and the needs of employers to respond and adapt to rapid changes in market conditions. Officers should have discretion to reduce penalties or not impose them at all where breaches are less serious, inadvertent or well-intentioned;
- Establish an effective process through which employers can address a finding of non-compliance expeditiously and prior to the imposition of any penalties;
- Reduce penalties for non-compliance to ensure they are proportional to the harm resulting from the breach and direct penalties at deterring abuse; and
- Shift some resources from compliance and enforcement to operational improvements to balance an effective compliance regime with meeting the economic goals of the TFWP.

We thank you for the opportunity to offer our suggestions to help you redesign and administer the TFWP to meet the evolving needs of the Canadian economy and Canadian businesses, and to prevent exploitation of vulnerable workers.

Yours truly,

(original letter signed by Kellie Krake for Stéphane Duval)

Stéphane Duval
Chair, Immigration Law Section