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Work Permits for Temporary and Dual Intent Business Persons

**CANADIAN BAR ASSOCIATION
IMMIGRATION LAW SECTION**

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PREFACE

The Canadian Bar Association is a national association representing 36,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the Immigration Law Section, with assistance from the Legislation and Law Reform Directorate at the CBA office. The submission has been reviewed by the Legislation and Law Reform Committee and approved as a public statement of the Immigration Law Section.

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Work Permits for Temporary and Dual Intent Business Persons

I. INTRODUCTION

The Immigration Law Section of the Canadian Bar Association (CBA Section) appreciates the opportunity to comment on the issue of work permits for temporary and dual intent business persons. Immigration, Refugees and Citizenship Canada (IRCC) invited comments on this issue at the Immigration, Refugees and Citizenship Canada and Immigration Practitioners (IRCCIP) meeting in November, 2016.

The CBA is a national association of over 36,000 members, including lawyers, Québec notaries, academics and law students, with a mandate to seek improvements in the law and the administration of justice. The CBA Section has approximately 1,000 members practicing in all areas of immigration law. Our members deliver professional advice and representation in the Canadian immigration system to clients in Canada and abroad.

Canada needs to attract and retain temporary and permanent business workers as key talent to support economic development in today's competitive global market. The Government of Canada's pursuit of economic development through business is reflected in the objectives of the *Immigration and Refugee Protection Act (IRPA)*. The current Business Immigration Program (BIP) is inadequate to support these objectives. The CBA Section recommendations support the government's goal of revitalizing temporary and permanent business immigration programs in support of the Canadian economy.

II. ATTRACT THE TALENT: TEMPORARY BUSINESS WORKERS

A robust temporary business worker program supports Canada's short term needs in attracting talent, and serves longer term needs by supplying a key talent pool for the BIP. Having a temporary program that flows into the BIP also decreases risk to Canada by allowing foreign nationals to demonstrate their ability to become economically established as business persons before applying for permanent residency.

To better support Canada's economic objectives, the CBA Section recommends that the temporary business worker program be revised to make it more flexible and transparent, as well as to facilitate timely and consistent processing. This can be accomplished by refining the existing International Mobility Program 'C10' and 'C11' work permits (LMIA exemption codes) and adding a new 'C100' category. Foreign nationals contribute to the Canadian economy whether their stay is temporary or permanent, and could have either temporary or dual intent in any of these work permits.

The C10 and C11 work permits are authorized by subsection 205(a) of the *Immigration and Refugee Protection Regulations* (IRPR), which requires that the foreign worker "create or maintain significant social, cultural or economic benefits or opportunities for Canadian citizens or permanent residents."¹ C10 work permits apply to foreign workers who are employees; C11 work permits apply to foreign workers who are business persons. With amendments, these categories will continue to be useful tools for achieving Canada's business objectives.

The new 'C100' category of work permit, which would facilitate transition of appropriate applicants to permanent resident status in Canada, would also be authorized under R205(a). Similar to U.S. 'O Visas,' it would provide more flexibility in selecting talented individuals for permanent residence – empowering Canada to draw accomplished self-employed business workers and entrepreneurs from all sectors into our economy.

RECOMMENDATION

- 1. The CBA Section recommends refining the existing International Mobility Program 'C10' and 'C11' work permits (LMIA exemption codes) and adding a new 'C100' category.**

A. Expand C10 Work Permit Category

Historically, the C10 (Significant Benefit to Canada) work permit category was rarely used. With policy and program changes in Employment and Social Development Canada's (ESDC) Labour Market Impact Assessment (LMIA) process, it is now used more frequently.

It is a discretionary work permit meant to facilitate an application by a foreign worker who will contribute to Canada in a social, cultural or economic manner. The balance of considerations for a work permit in these applications is two-fold: the LMIA is not reasonably practical in the

¹ *Immigration and Refugee Protection Regulations*, SOR/2002-227, available [online](http://ow.ly/ZEdV30beJ8S) (<http://ow.ly/ZEdV30beJ8S>).

situation; and the social, cultural or economic benefits are so compelling that the importance of the LMIA can be overcome.

Currently, when assessing the economic benefit of a C10 application, reviewing officers tend to dismiss economic benefits that are not directly tied to a job growth number or a specific dollar value in profit for a Canadian company.

The CBA Section recommends that the C10 policy guidelines be expanded to allow for situations where the economic benefit is not limited, for example, to a concrete number of jobs or a set contract value.² It should include less tangible economic benefits – such as retaining Canadian jobs, filling a critical business function, or similar benefits that could reasonably be expected to avoid negative impacts to business operations – without requiring a specific dollar value to be tied to potential losses.

We suggest that the guideline be amended to read (amendments in italics):

For requests for work permits based on significant economic benefit, where entry into the labour market is concerned, all practical efforts to obtain ESDC's assessment should be made before C10 is applied. *Economic benefits are not limited to job growth or potential or realized profit gains from hiring the foreign worker. Less tangible benefits such as job retention, preventing operational disruption, or filling a business critical role should be considered.* Foreign nationals submitting an application for consideration under C10 should provide documentation supporting their claim of providing an important or notable contribution to the Canadian economy.

The C10 policy guidelines should also elaborate on reasons why an LMIA application could be considered 'not reasonably practical', and allow consideration to be given in cases where an employer and foreign national do not qualify for participation in the LMIA program.

We have found that immigration officers and Canada Border Services Agency (CBSA) agents are often unaware of the stringent requirements placed on a company by ESDC when applying for an LMIA. For example, part-time or non-regular work is not permitted in an LMIA application – it must guarantee a set number of hours (at least 30), salary and work location.

Employers seeking to hire a part-time industry expert or an executive with fluctuating hours and an irregular salary based on earnings would not qualify for the LMIA program. LMIAs are also impractical for start-ups without a proven track record (but with financial backing and a

² See Immigration, Refugees and Citizenship Canada, *International Mobility Program: Canadian interests – Significant benefit general guidelines [R205(a) – C10]*, available [online](http://ow.ly/AnoH30bejd6) (<http://ow.ly/AnoH30bejd6>).

solid business plan), or for employers of intermittent workers who travel between global jobsites (the program requires a company to detail which days an employee will be in Canada).

In addition to the existing sub-headings, *Assessing significant social or cultural benefit* and *Objective measures for significant social or cultural benefit*, we suggest a third sub-heading: *Assessing the reasonable practicality of obtaining a LMIA*. We suggest that this subheading read:

In considering whether the employer could, with reasonable practicality, seek an opinion from ESDC, officers should consider the specific timing and urgency of the role, and whether the position would qualify for use of the LMIA program. Examples of employment situations that fall outside of the LMIA program include:

Part-time (less than 30 hours per week) or non-guaranteed or irregular hours;

Intermittent travel between Canada and another country without a set schedule, including roles based in dual countries such as a Global CEO or Region Manager;

Positions that have a fluctuating or irregular salary (e.g.: reimbursed in commission, share ownership, profit sharing, paid outside of Canada in a foreign currency etc.).

We believe that these changes would significantly benefit a small group of Canadian businesses that contribute greatly to the economy, while not significantly increasing eligibility or applications under this category.

RECOMMENDATIONS

- 2. The CBA Section recommends that the C10 policy guidelines be expanded to allow certain situations where the economic benefit considered by an officer is not limited, for example, to a concrete number of jobs or a set contract value.**
- 3. The CBA Section recommends that the C10 policy guidelines elaborate on reasons why an LMIA application could be considered 'not reasonably practical', and allow consideration to be given in cases where an employer and foreign national do not qualify for participation in the LMIA program.**

B. Revise C11 Work Permit Category

The CBA section recommends revising the C11 Work Permit policy guidelines to clarify that the International Mobility Program may be used by applicants seeking to come to Canada

temporarily as a worker, applicants with permanent residency applications in process, or those with dual intent to seek status as a worker and then eventually as a permanent resident.³

Revisions include replacing the terms 'entrepreneurial activity' with 'business activity' and 'entrepreneurs' with 'business owners' throughout the guidelines. Specific amendments to sections of the guidelines have been set out below, with additions in italics and deletions in strikethrough.

The title of the long-term section of the guidelines should be changed to 'long term *business owners*/ self-employed applicants', and the section should be revised to read:

Applicants who have repeatedly been issued work permits over several years in ~~the self-employed~~ *this* category should, in addition to satisfying the indicators of general economic stimulus, be able to provide evidence of the following...

The temporary resident applicants section of the guidelines should be revised to read:

For applicants who do not intend to reside permanently in Canada, R205(a) ~~may be difficult to satisfy if~~ *can be satisfied if the applicant demonstrates the profits and economic spin-offs generated by the enterprise do not will predominantly remain in the Canadian economy or that other significant benefits will accrue in Canada. However,* ~~There~~ *will be situations where the business or the intended period of work is genuinely temporary, i.e., the applicant intends to leave Canada after starting a business, and either close the business (it being seasonal), or hire a Canadian to operate it. Significant benefit must still be demonstrated. However, benefit to a self-employed worker's Canadian clients or customers may also be considered in this case, particularly if the worker is providing a unique service or product, or one unique to the region in question. If the applicant intends to start or buy a business where their own temporary status may be indefinite (i.e., permanent), officers should encourage the person to apply for permanent residence.* There may also be self-employed workers who can demonstrate significant social or cultural benefits who intend to work in Canada for only a temporary period.

The work permit duration section of the guidelines should be revised to read:

The initial work permit ~~can~~ *should* be issued for a ~~maximum of two years, and subsequently extensions are possible only if a proof of selection by a province or territory is provided. It is expected that the province or territory will decide during this two-year period whether or not to nominate the person~~ *time appropriate to the business in question, usually two to three years, and may be extended if the applicant again*

³ See Immigration, Refugees and Citizenship Canada, International Mobility Program: Canadian interests – Significant benefit – Entrepreneurs/self-employed candidates seeking to operate a business [R205(a) – C11], available [online](http://ow.ly/ZlnR30beKct) (<http://ow.ly/ZlnR30beKct>).

demonstrates the business generates significant economic, social or cultural benefits or opportunities for Canadian citizens or permanent residents pursuant to [R205\(a\)](#).

Extensions should be granted where an applicant has a permanent residency application in process or has proof of selection by a province or territory (see [Agreements](#)). [Note:] It is not necessary that the application for permanent residence of the foreign national be received by ~~the~~ IRCC for the work permit to be issued. The letter from the province or territory is sufficient to trigger this Labour Market Impact Assessment (LMIA) exemption.

For temporary resident applicants, extensions should be granted where the applicant can demonstrate that profits and economic spin-offs have remained predominately in Canada, or that other significant benefits have accrued in Canada.

The factors in considering “significant benefit” section of the guidelines should be revised to read:

In cases where significant benefit is being argued, officers may wish to consult organizations in Canada who can provide an opinion. For example, if an applicant wishes to be self-employed in the tourism industry, officers should contact the provincial tourism authority to determine whether the activity would be beneficial or actually impinge on Canadian service providers. Other sources of information and advice include local Canadian *and provincial* Chambers of Commerce, *related business and industry leaders*, and Employment and Social Development Canada (who, while unable to formally confirm self-employment, should have knowledge of the local labour market situation). *Examples of indicators of ‘significant benefit’ include: general economic stimulus (such as job creation, development in a regional or remote setting or expansion of export markets for Canadian products and services) and advancement of the Canadian industry (such as technological development, product*

Not all economic benefits are as tangible as profits or sales, and officers should consider less tangible economic benefits. Examples of indicators of ‘significant benefit’ include, but are not limited to:

- *general economic stimulus such as:*
 - *job creation;*
 - *development in a regional or remote setting;*
 - *the expansion of export markets for Canadian products and services; or*
 - *Canadian job retention in situations such as an existing business being purchased or a business critical function being filled by a business owner or self-employed person that allows a company to continue operating;*

- *advancement of the Canadian industry such as:*
 - *technological development; or*
 - *unique product or service offerings, either in Canada or regionally.*

The sole or partial ownership section of the guidelines should be revised to read:

~~Irrespective of permanent residence requirements, ideally, the~~ issuance of work permits for ~~business owners or self-employed applicants~~ should generally only be considered when the applicant controls at least 50% of the business in question, ~~or less where an applicable Provincial/Territorial Nominee Program has a lower ownership threshold.~~ ~~However,~~ there may be cases where an individual owns a slightly smaller stake and will be coming to work in the business. In these cases, a partial owner with an ownership share of less than 50% ~~would be required to apply for a work permit as an employee (rather than as an entrepreneur) and thus may require an LMIA, or alternatively less than the Provincial/Territorial Nominee Program threshold, would have to demonstrate that they are primarily controlling the business. Officers may also take into consideration situations where a business owner or self-employed applicant having less than 50% is the controlling shareholder, and other shareholders are Canadian investors that will benefit from the issuance of the work permit. Otherwise, they would be required to apply for a work permit as an employee (rather than as a business owner or self-employed applicant). In such situations, an officer may consider whether [R205\(a\) - C10](#) is a more appropriate category under which to issue a work permit. The officer may also determine the employee requires an LMIA.~~

...

If there are multiple owners, generally only one owner would be eligible for a work permit pursuant to R205(a), unless exceptional circumstances can be demonstrated. ~~While CIC does not want to discourage investment in Canada, these guidelines are intended to prevent transfer of minority shares solely for the purpose of obtaining a work permit.~~

RECOMMENDATION

4. The CBA Section recommends revising the C11 Work Permit policy guidelines.

C. Add a C100 Work Permit Category

Adding a 'C100' work permit category would assist Canada in attracting key talent. To illustrate Canada's current limitations, Janet Yellen (economist), Bill Gates, Donald Knuth (computer scientist), Sofia Coppola (screenwriter, director and producer), Ana Roš (chef) and Susan Wojcicki (YouTube CEO) are all accomplished individuals who might not be able to obtain a work permit to operate a business or be self-employed in Canada under the existing categories.

The authority for the C100 work permit would flow from subsections 3(1)(a) and (g) of the IRPA, and subsection 205(a) of the IRPR. It would be available to applicants who are recognized as accomplished in their field, considering their outstanding knowledge, skill/talent, leadership, notability, or contribution. The duration of the initial work permit would be three years, with two year extensions, and no cumulative maximum.

An applicant would need to demonstrate their outstanding accomplishments through compelling evidence. The following is a list of evidentiary examples - no one item would be sufficient:

- Body of work (academic or professional publications, peer-reviewed published research, artistic product, competitions)
- Consultation (field expert opinion, professional body or union)
- Awards and accolades
- Media or public recognition
- Positions of authority or leadership
- Critical or essential employment positions
- Professional memberships
- Income generated from professional activities
- Contracts (past, future)

Applicants would also need to demonstrate a reasonable likelihood of adding value to Canada through contributions in one or more of the following areas:

- Social - usually requires salubrious social welfare and development;
- Cultural - usually requires desirable consumption of the cultural good or activity and/or an above-average contribution to the individual's field; or,
- Economic.

Because these applicants will have proven themselves as accomplished and able to contribute, imposing a maximum age limit, minimum education, or restricting by National Occupational Classification codes and skill levels would be counterproductive. There should also be no specific required minimum for an applicant's net worth; however the applicant's available funds should be appropriate to support their specific business activity.

As this work permit would be for intended business persons as opposed to employees, the applicant would need to intend to be an entrepreneur or self-employed in Canada. This would be assessed by consideration of their control, tool/equipment ownership, ability to hire assistants or subcontract, financial risk, responsibility for investment/management, and profit/loss opportunity. A minimum two years of experience would be required within the most recent five years. The intended business structure would be irrelevant.

RECOMMENDATION

- 5. The CBA Section recommends adding a 'C100' work permit category, available to applicants who are accomplished in their field, to assist Canada in attracting key talent.**

III. KEEP THE TALENT: FEDERAL SELF-EMPLOYED CLASS

Retaining key business talent on a more permanent basis supports Canada's economic development over the long term. The majority of permanent residence applications are currently submitted to the BIP through one of the three Self-Employed Class occupation streams – farming, cultural activities and athletics. A small minority of BIP applications are received through the Start-up Visa Class.

The Self-Employed Class works well for cultural and athletic activities, and the CBA Section recommends that this successful program be expanded to allow the government to select highly accomplished self-employed persons from the same breadth of occupations as the C100 work permits.

The farming stream has not worked well, at least when processed using R88(1)(a). It needs an overhaul.⁴ To attract farming talent with experience and skills suited to the livestock and crop farming industry (unique in each Canadian region), farmers should be processed under R88(1)(b), if the applicant or self-employed person has been selected by a Provincial Nominee Program, or, in a stand-alone federal farmer class outside the Federal Self-Employed Class.

RECOMMENDATIONS

- 6. The CBA Section recommends expanding the R88 Self-Employed Class to allow the government to select highly accomplished self-employed persons from the same breadth of occupations as the C100 work permits.**
- 7. The CBA Section recommends that the farming stream of the R88 Self Employed Class be overhauled to process farmers under R88(1)(b) or in a stand-alone federal farmer class outside of the Federal Self-Employed Class.**

⁴ *Supra* note 3.

IV. INTAKE MANAGEMENT

Intake management is crucial to ensure timely processing and to meet annual Immigration Levels Plans. The BIP would be well suited to an Expression of Interest system that favours applicants with Canadian business experience.

We caution, however, that selection system biases against age and education would be counterproductive for the BIP. Many accomplished members of the global talent pool are aged 40 to 70, may have little or no post-secondary education, or may have language skills at or below a Stage II Canadian Language Benchmark (CLB) of 5-8.

RECOMMENDATION

- 8. The CBA Section recommends that the BIP be subject to an Expression of Interest system that favours applicants with Canadian business experience, but without selection system biases against age and education that would be counterproductive for the BIP.**

V. CONCLUSION

To support economic development and stay competitive, Canada needs to attract and retain temporary and permanent business workers. The current Business Immigration Program is inadequate to support the government's goal of revitalizing both the temporary and permanent business immigration programs in support of our economy. We trust that our recommendations to improve these programs will be of assistance, and would be pleased to provide any clarifications requested.

VI. SUMMARY OF RECOMMENDATIONS

The CBA Section recommends:

- 1. that the existing International Mobility Program 'C10' and 'C11' work permits (LMIA exemption codes) be refined and a new 'C100' category be added.**
- 2. that the C10 policy guidelines be expanded to allow for certain situations where the economic benefit considered by an officer is not limited, for example, to a concrete number of jobs or a set contract value.**

- 3. that the C10 policy guidelines elaborate on reasons why an LMIA application could be considered 'not reasonably practical', and allow consideration to be given in cases where an employer and foreign national do not qualify for participation in the LMIA program.**
- 4. revising the C11 Work Permit policy guidelines.**
- 5. adding a 'C100' work permit category, available to applicants who are accomplished in their field to assist Canada in attracting key talent.**
- 6. expanding the R88 Self-Employed Class to allow the government to select highly accomplished self-employed persons from the same breadth of occupations as the C100 work permits.**
- 7. that the farming stream of the R88 Self Employed Class be overhauled to process farmers under R88(1)(b) or in a stand-alone federal farmer class outside of the Federal Self-Employed Class.**
- 8. that the BIP would be subject to an Expression of Interest system that favours applicants with Canadian business experience, but without selection system biases against age and education that would be counterproductive for the BIP.**