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**Servicing Canada:
Responding to the Skills and Labour Shortage**

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1. Introduction

As long as the Canadian economy maintains its current momentum, characterized by unemployment at a 32-year low, steady job creation and moderate growth, it is reasonable to assume that the shortage of skilled workers will persist.¹ In this environment, Canadian employers may increasingly need to explore and compete in the international labour market as part of their overall strategy to attract qualified people and sustain their businesses.

In addition to the challenges facing Canadian employers with respect to recruitment and retention of skilled workers, the regulatory system governing foreign workers is rather complex for the uninitiated, particularly small and medium enterprises. In fact, one of the key findings in a December 2006 study by the Canadian Federation of Independent Business was that “immigration red tape is a major obstacle to smaller firms, particularly the requirement to have the government issue a labour market opinion to verify labour shortages, recruiting efforts and salary levels.”²

For any given job offer, there may be several processes by which the person with skills and willingness to relocate to Canada may be authorized to work temporarily and / or immigrate to Canada. Each job offer is subject to federal laws, policies and procedures applicable to temporary and permanent residence in Canada, Service Canada’s mandate to assess the effect of employing the foreign worker on the national labour market, provincial employment standards and accreditation requirements, local wages, working conditions and collective bargaining units, as well as practical matters like securing affordable accommodation. In short, offering a job to a foreign worker brings many considerations to bear.

This paper is intended for an audience already familiar with the basic procedures for obtaining a labour market opinion (“LMO”) in Canada.³ The first section provides an update on recent initiatives by Service Canada and Citizenship and Immigration Canada (“CIC”), to improve the LMO process and make it a bit more employer-friendly. The second section reviews the current streams of eligibility for an LMO, with an emphasis on skilled workers, and identifies strategies, best practices and procedural tips for employers and their representatives to assess, document and obtain confirmation for an offer to employ a foreign worker. The final section discusses current policy issues and areas for improvement in the Foreign Worker Program (“FWP”), on a national and regional basis, as well as the outlook for Canadian employers seeking Service Canada approval to participate in the international labour market.

¹ See International Monetary Fund, “Regional Economic Outlook: Western Hemisphere” November 2, 2006 at 2, online: <http://www.imf.org/external/pubs/ft/reo/2006/ENG/02/wreo.pdf>; See also, The Canadian Chamber of Commerce, Canada – Economic Review and Outlook” (December 20, 2006), online: <http://www.chamber.ca/cmslib/general/EconomicOutlook2007.pdf>.

² Canadian Federation of Independent Business, “Immigration and Small Business: Ideas to Better Respond to Canada’s Skills and Labour Shortage” (December 2006) at i., online: <http://www.cfib.ca/research/reports/rr3026.pdf>.

³ For a practical review, see V.P. Langford and K.D. Swartzenberger, “Obtaining Labour Market Opinions in Western Canada” (The Canadian Institute, Legal and Human Resource Guide to Employing Foreign Workers, Calgary, September 18, 2006), online: <http://www.burstall.com/immigration.cfm>.

2. Service Canada: Recent Initiatives

(a) 2007 Initiatives

On February 23, 2007 in Vancouver, Minister Solberg announced the following initiatives:

(i) Low-Skilled LMOs – Increased Duration of Employment to Two Years

The decision to increase the duration of employment on LMOs for low-skilled job offers from one to two years was urged and anticipated for at least a year prior to the announcement. Nevertheless, this change represents a significant benefit to employers who have to bridge the gap and low-skilled workers who no longer have to leave Canada for four months and reapply after only one year of employment.

(ii) Live-in Caregivers – Increased Duration of Employment to 39 Months

As a result of this increase, Live-in Caregivers and their employers are relieved from having to apply to extend the LMO and Work Permit annually. There have also been indications that Service Canada may establish a processing centre in Ontario for all LMO applications under the Live-in Caregiver program.

(iii) Online Foreign Worker Applications - Commencing April 1, 2007

HRSDC announced that “As of April 1, 2007, employers will be able to completely fill-in and submit their Foreign Worker Application (the “*Application for a Labour Market Opinion*” form) over the Internet”.⁴ The online service was not available on April 1 and although it has since been launched, there appear to be functionality issues.⁵ Complete electronic filing of LMO applications is expected to be phased in over the next few months.⁶

⁴ The most comprehensive announcement about the online processing initiative can be found in an HRSDC press release by Minister Solberg entitled “Canada’s New Government Makes Improvements to the Temporary Foreign Worker Program” online:

<http://www.ccnmatthews.com/news/releases/show.jsp?action=showRelease&actionFor=637127&searchText=false&showText=all> (February 23, 2007).

⁵ HRSDC, online: <http://www.hrsdc.gc.ca/en/epb/lmd/fw/onlineappintro.shtml> (last modified: unknown). On April 1, 2007, the HRSDC web page for the Online Application was blank. It appears there were some technical difficulties during and since the launch.

⁶ HRSDC, “Introduction to the New FWP Online Application” online:

<http://www.hrsdc.gc.ca/en/workplaceskills/foreign_workers/fwp_application.shtml> (last modified: April 4, 2007).

“The steps to complete the online application are:

1. Complete the LMO online application form;
2. Print and Sign the "Declaration of Employer" page;
3. Review the "Application Summary", and if all the information is correct, click "I accept";
4. Press "Yes" to confirm that you have reviewed all the information in the application and wish to submit the application to Service Canada;
5. Print the "Thank You" page (which includes your application tracking number); and
6. Send a signed copy of the "Declaration of Employer" page, a copy of the "Thank You" page, and any supporting documents to Service Canada.

**Please remember to include the tracking number on all documents being sent to Service Canada. You can send documents by mail or by fax to the Service Canada Centre responsible for your area.”

While it was hoped that this system would offer the principal advantage of an initial review of the application and acknowledgement of its receipt, it appears that there will only be an electronic acknowledgement and tracking number issued. Further, at least in initial stages of implementation, employers will still be required to deliver a signed original of the application form and supporting documents. If Foreign Worker Program Officers have to match online applications to original documents, then online service delivery may not reduce processing times. This is particularly important in Western Canada, where the new service standard is six to eight (6-8) weeks.

(iv) Concurrent Processing – LMO and Work Permit Applications

This is a significant improvement but will require effective communication among the employer and / or its representative, Service Canada and Citizenship and Immigration Canada to coordinate concurrent processing and immediate issuance of the Work Permit upon receipt of the LMO. Also, at least one visa office has reportedly rejected concurrent processing for bulk applications involving low-skilled workers.

(b) 2006 Initiatives

(i) Guidebook for Employers

In November 2006, the Government of Canada introduced “How to Hire a Temporary Foreign Worker (TFW): A Guidebook for Employers”. Generally, this is a helpful consolidation of information for those less familiar with the options and procedures. In fact, this guidebook contains as an annex a useful “Guide for Completion of an Application for a Labour Market Opinion (Form EMP5239)”.

(ii) Regional Occupations Under Pressure Lists

Human Resources and Skills Development Canada (HRSDC) has released the initial lists in a series of Regional Occupations Under Pressure Lists for Alberta, British Columbia and Ontario. Employers wishing to hire foreign workers for occupations on these lists are only required to advertise the position for seven days on the national Job Bank and/or demonstrate that they have ongoing and appropriate recruiting systems in place. For low-skilled positions (*National Occupational Classification* skill levels C and D), employers must satisfy both criteria above.

(iii) Foreign Graduates

HRSDC issued a Foreign Worker Program Bulletin stating that employers wishing to continue to employ foreign graduates after the expiry of their Work Permits may:

- be exempted from the need to demonstrate recruiting efforts;
- receive recognition that entry-level salaries are often lower than the average salary for the occupation; and
- receive LMOs valid for two (2) years to facilitate the transition of foreign graduates to permanent resident status in Canada.

(iv) Federal-Provincial Working Groups

HRSDC announced the formation of bilateral working groups composed of representatives from HRSDC, CIC and relevant provincial ministries to address labour shortages in Alberta and British Columbia. The purpose of these working groups is “to develop collaborative approaches to managing Federal and Provincial initiatives aimed at facilitating the entry of temporary foreign workers.” These groups are also stated to be responsible for developing and implementing pilot projects.⁷ However, little detail appears to be available on the progress and initiatives by these working groups to date or their interaction with the federal Sector Council Program in developing industry or sector-specific human resources solutions.⁸

3. Labour Market Opinions: Streams and Strategies

Service Canada’s mandate is to develop an opinion on whether the job offer is genuine and the employment of the foreign national is likely to have a neutral or positive effect on the labour market in Canada.⁹ Since 2002, the *Immigration and Refugee Protection Act* (“IRPA”), has changed the emphasis from assessing job offers based on a “Canadians first” policy to determining “the overall effect of the entry of the foreign worker on the Canadian labour force in terms of creation of jobs, transfer of skills, introduction of new technology or methodology in addition to the efforts to hire Canadians.”¹⁰ Aptly put, “overall, the criteria offer a more balanced approach to foreign worker recruitment by Canadian companies which engenders a healthy respect for the international/global nature of business interests.”¹¹

In practice however, some Foreign Worker Program offices have only recently begun to relinquish the “Canadians first” approach to LMOs. “Program integrity” has been used to rationalize FWP requirements that are truly ineffective in addressing worker shortages and also represent significant costs and delays for employers, particularly for small and medium sized enterprises. Many Canadian employers simply do not

⁷ HRSDC, “Backgrounder: Federal Provincial Working Groups on Temporary Foreign Workers in Alberta and British Columbia, online: http://www.hrsdc.gc.ca/en/epb/lmd/fw/TFW_WG_BG_e.pdf (undated).

⁸ For more information on the Sector Council Program, see online:

http://www.hrsdc.gc.ca/en/hip/hrp/corporate/init_sector.shtml (last modified: November 25, 2005).

⁹ *Immigration and Refugee Protection Regulations*, P.C. 2002-97 (the “Regulations”), Section 203(1).

Pursuant to Subsection 203(3) of the Regulations:

- (3) An opinion provided by the Department of Human Resources Development shall be based on the following factors:
- (a) whether the work is likely to result in direct job creation or job retention for Canadian citizens or permanent residents;
 - (b) whether the work is likely to result in the creation or transfer of skills and knowledge for the benefit of Canadian citizens or permanent residents;
 - (c) whether the work is likely to fill a labour shortage;
 - (d) whether the wages offered are sufficient to attract Canadian citizens or permanent residents to, and retain them in, that work;
 - (e) whether the employer has made, or has agreed to make, reasonable efforts to hire or train Canadian citizens or permanent residents; and
 - (f) whether the employment of the foreign national is likely to adversely affect the settlement of any labour dispute in progress or the employment of any person involved in the dispute.
- [Emphasis added].

¹⁰ J. Bart and A. Fragomen, eds., *Canada/U.S. Relocation Manual: Immigration, Customs, Employment and Taxation*, looseleaf (Toronto: Thomson Carswell, 1998) at1-16.

¹¹ *Ibid.*

have human resources managers or representatives who understand the options and procedures and can jump through the hoops presented by Service Canada in order to be able to hire a foreign worker. The ultimate impact of unrealistic or irrational advertising or salary requirements is the inability of the employer to staff sufficiently and meet customer demands.

Nevertheless, it appears that the sustained shortage of workers across Canada has caused a general shift away from localized operating procedures towards consistent and practical application of the assessment criteria. Most recently in Alberta, the pendulum appears to be swinging away from the gatekeeper approach to one based on issuing the LMO unless the employer disqualifies itself. FWP Officers are being directed to facilitate LMO applications as long as they are satisfied that the job offer is genuine and the employer is recruiting and offering market-based compensation.

In Ontario however, the gatekeeper approach is long gone and FWP Officers generally approach applications logically, focusing on the assessment criteria found in Section 203 of the Regulations. Only the prevailing wage and labour disputes are mandatory requirements and especially for NOC 0 and A skill level occupations, advertising is not being required if the other assessment criteria are met.

In Québec, for all occupations, including those subject to a national confirmation such as IT Specialists, the employer must obtain a Certificate of Acceptance (“CAQ”), from the Ministère de l’Immigration et des Communautés Culturelles.¹² Current processing times in Québec are four to five (4-5) weeks for CAQs and two to four (2-4) weeks for LMOs.

Perhaps the “Foreign Worker Recruitment Branch” could actually begin to live up to its name across Canada. Let us consider this proposition based on the seven or eight streams available for foreign worker applications.

(a) Skilled Occupations (NOC 0, A & B)

For skilled occupations including management, professionals and skilled business, technical and trades positions, the key issues to address in the LMO application are occupation, compensation, and recruitment and training programs.¹³

(i) Documenting the job offer

In most cases, the employer has already identified a foreign worker and made the job offer before engaging a representative to obtain the LMO. The first matter to review is whether the job offer is properly documented for the purposes of the Foreign Worker Program. To meet its technical requirements, the job offer must create a full-time employment relationship with a definite term. It must also clearly define the education, experience, skills and other requirements of the position. Ensure that the job title, main duties and requirements for education, experience and skills are set out in the offer letter, employment agreement and / or a detailed job description. Otherwise, it will be difficult to classify the occupation according to the NOC and assess the compensation offered against prevailing wage statistics used by Service Canada.

As a practical matter, particularly when dealing with bulk applications, the employer and its counsel are well-advised to develop and use job descriptions that are consistent with the NOC. This will provide greater certainty with respect to the duties, qualifications and the prevailing wage for each occupation.

¹² See online: <http://www.immigration-quebec.gouv.qc.ca/en/forms/dca-work.html> (last modified: August 29, 2006).

¹³ Skilled occupations generally involve management duties (NOC 0), or require university education (NOC A), college education or apprenticeship training (NOC B).

The Foreign Worker Application form asks whether the job is temporary with intent to permanent and the expected duration of employment. Generally, LMOs for skilled occupations are issued with a duration of employment of one to two (1-2) years, according to the job offer. However, if the employer indicates that the job is temporary with intent to permanent and the expected duration of employment to be at least three (3) years, Service Canada may issue an LMO valid for three (3) years. Since the LMO itself does not indicate that the job is temporary with intent to permanent, this will not affect CIC's decision whether to issue a temporary Work Permit. Therefore, any employer who reasonably considers the job offer to be permanent should document the business rationale for permanent employment and respond positively to this question. This gives Service Canada the opportunity to issue an LMO valid for three (3) years, allowing time for the skilled worker to obtain a permanent resident visa. Remember, this applies to skilled occupations only. Low-skilled occupations are not currently eligible to transition to permanent residence based on an LMO. However, as more low-skilled workers enter Canada to meet the growing demand, this will become a policy issue ripe for debate.

(ii) Regulated occupations

Regulated occupations account for approximately fifteen percent (15%) of Canada's labour market.¹⁴ Generally, the regulation of occupations has been delegated to provincial governments and professional associations. As a result, regulations vary by jurisdiction and by occupation. Each regulatory body has the authority to set entry requirements and standards of practice, to assess qualifications and credentials and to certify, register or license qualified applicants for occupations within its territory. Licensing usually requires having the foreign worker's credentials assessed and recognized and often involves successfully completing additional courses, examinations (including job-specific language tests), and working under supervision for a period of time.¹⁵

Regulated professions constitute a portion of these occupations and typically require university education, practical experience supervised by a licensed professional and successful completion of comprehensive exams. Accountants, engineers, nurses and physicians are examples of regulated professions. Some professional associations conduct their own educational assessments. For example, the College & Association of Registered Nurses of Alberta assesses foreign registered nurses based on education, experience, practice and other qualifications for compliance with provincial competency standards. This process may involve a competency assessment to determine substantial equivalence. Several professional associations have been criticized for being discriminatory and xenophobic.¹⁶ While this is subject to ongoing debate, it is clear that barriers need to be eliminated to facilitate the entry of qualified foreign professionals in Canada, particularly in the health care sector.

The Foreign Worker Application asks whether there are provincial/territorial/federal certification, licensing or registration requirements of the job and if so, the name of the certifying body. Since LMOs

¹⁴ HRSDC, "Frequently Asked Questions – Foreign Credential Recognition" online: <http://www.hrsdc.gc.ca/en/ws/programs/fcr/faq.shtml> (last modified: March 29, 2007).

¹⁵ In Alberta, the assessment of professional credentials is done through IQAS (International Qualifications Assessment Service). The assessments are advisory only, which means that a professional association may make its own determination of the educational levels and credits earned in the foreign system. An assessment with IQAS is just one of the factors that will be considered. IQAS will usually require original or certified documents to conduct an assessment. Any documents not in English must be translated.

For a list of service providers for credential assessment in other provinces, see:

<http://www.cicic.ca/en/page.aspx?sortcode=2.20.23.25>

¹⁶ For example, see H. Kent, "College to Appeal Discrimination Ruling" (2000) 162(6) CMAJ 854, online: <http://www.cmaj.ca/cgi/content/full/162/6/854#FU145>. For a sample blog on this topic, see online: <http://www.readersdigest.ca/debate.html?a=v&di=217>.

involving regulated professions require identifying the applicable regulatory body and assessment procedures, we recommend communicating early in the process with the governing body in the province to which the worker is destined.¹⁷ One of the best sources of information on regulated occupations in Canada is Work Destinations.¹⁸

(1) *Foreign Credential Recognition Program*

Another recent and laudable initiative by HRSDC is the Foreign Credential Recognition (“FCR”) Program. According to its web page:

The Program is designed to facilitate the recognition of international qualifications so that internationally trained workers may better contribute to Canada’s economic and social development. Improving the processes for recognizing foreign credentials will help immigrants integrate more rapidly into the Canadian labour market and get the Canadian work experience they need to succeed in Canada. At the same time, Canadian employers will gain access to a broader pool of talented workers.

The federal government is reportedly providing \$68 million over six years to implement the FCR program and to fund key activities aimed at improving FCR processes in Canada. The stated objectives of the program are to ensure FCR processes across the country are fair, accessible, coherent, transparent and rigorous. According to published funding guidelines, sector councils, cross-sectoral councils, national consortia, not-for-profit organizations, professional associations, industry groups, unions, regulatory bodies, municipal governments, provincial and territorial governments, public health institutions, school boards, universities, colleges, CÉGEPs and ad hoc associations are eligible to obtain up to two million dollars (\$2 million) per fiscal year to research, design, develop, implement and disseminate information on tools to recognize the credentials of foreign-trained workers. The FCR program is initially focused on engineers, physicians and nurses. Additional initiatives include procedures for licensing other medical professionals and non-regulated occupations such as aviation maintenance and tourism.¹⁹

(iii) *Confirming salary standards*

Another key consideration for Foreign Worker Applications involving skilled occupations is the prevailing wage. This is often less of an issue for professional occupations, as Canadian employers are generally prepared to pay a foreign professional as much or more than the minimum standards, depending on the duties and experience requirements for the position. However, it may become an issue if the foreign professional is employed in an entry level position or the employer pays its Canadian professionals less than the statistical average salaries applied by Service Canada. The application of median salary statistics may create a situation where Service Canada requires an employer to pay a foreign worker with less experience and responsibility as much or more than a mid-level or senior professional in the same shop. In such cases, the employer has to either deal with an inequity created by Service Canada applying statistical averages to the job offer, adjust all employee salaries to maintain levels based on experience and duties, or abandon the job offer and muddle on without the required professional skills.

¹⁷ Requirements in Alberta for professions such as engineers, physicians and registered nurses can be found online: <<http://www.alis.gov.ab.ca/certinfo/Content/RequestAction.asp?format=html&aspAction=GetCERTHomePage&Page=CERTHome>>

¹⁸ Sponsored by The Forum of Labour Market Ministers; see online: <<http://www.workdestinations.org>>.

¹⁹ See online: <http://www.hrsdc.gc.ca/en/ws/programs/fcr/index.shtml>. (last modified: March 29, 2007).

The most common sources used by Service Canada to confirm the prevailing wage for skilled regulated occupations include:

- Provincial Wage and Salary Surveys such as the 2005 Alberta Wage and Salary Survey;²⁰
- University graduate salary reports by faculty;²¹ and
- Service Canada's Labour Market Information database;²²

If the compensation package does not meet or exceed the statistical average for the location where the skilled worker will be located (the "prevailing wage"), then prior to submitting the LMO application, the representative should verify whether the employer is willing to pay the prevailing wage if it becomes an issue with Service Canada. If the employer resists paying the prevailing wage, then it must provide strong rationale for the discrepancy (i.e. job functions and experience requirements are well below the median). Regardless of the rationale, it may be difficult to persuade Service Canada that the job offer warrants confirmation based on a salary below the median. Often FWP Officers are inflexible on this issue, but they are willing to consider reclassifying the occupation to one with a lower salary. In fact this is quite common and may provide FWP Officers with greater flexibility within the parameters of "program integrity" – even if the NOC category is not the most applicable to the job offer.

Fortunately or unfortunately for employers, the recent trend of steady upward pressure on wages and salaries means that this is less of an issue for regulated skilled occupations. In fact, prevailing wage statistics may not be keeping up with salaries for skilled jobs, particularly in medical and engineering occupations.

(iv) Ongoing recruitment and training programs

(1) *Regional Occupations under Pressure Lists*

For skilled occupations, recruitment efforts are determined by whether the occupation is listed on the applicable Regional Occupations Under Pressure ("ROUP") List. Currently, the ROUP List for British Columbia includes numerous professional occupations, the majority of which are in management, business and finance, natural and applied sciences, health, social sciences and education and the arts. For these occupations, according to the ROUP List, employers will be considered to have conducted appropriate recruitment efforts if they either advertise the position on Service Canada's national Job Bank for at least seven (7) days, or demonstrate ongoing recruitment mechanisms through appropriate media (i.e. employment websites, unions, professional associations, company website, professional journals, newspapers and newsletters).

Accordingly, check the applicable ROUP List and if the occupation for the subject Foreign Worker Application appears, then have the employer post the position on the Job Bank, ensuring that the posting is consistent with the job offer in terms of NOC, salary, duties and qualifications. Many employers seem to get this wrong, giving Service Canada the opportunity to require further advertising and delays that negatively impact the employer's shop. Prudent practice is to always confirm the position is properly posted and to attach a copy of the Job Bank posting with the LMO application.

²⁰ Online: <http://www.alis.gov.ab.ca/wageinfo>. Note that the 2007 Alberta Wage and Salary Survey is underway and expected to be available in September 2007.

²¹ For example, see online: <http://www.ucalgary.ca/careers/employers/salary.html#engineering>.

²² Online: <http://www.labourmarketinformation.ca> (last modified September 22, 2005).

(2) *The Job Bank*

It appears that the ROUP Lists will increase the relevance of the Job Bank, as more employers are posting jobs there to satisfy minimum LMO requirements. To date, employers have generally regarded the Job Bank as ineffective. If unable to recruit qualified candidates through industry channels and needing to apply for an LMO, employers would advertise in newspapers to satisfy Foreign Worker Program requirements. Such advertising was frequently regarded as just another cost of doing business with the federal government, more akin to a cost deterrent intended to promote genuine recruiting efforts, rather than an effective means of finding skilled workers. Newspaper – and for that matter, Job Bank - advertising is also regarded by employers as just “red tape”, since it generally does not yield qualified candidates as effectively as industry connections do. In fact, until only recently, if at all, employers seeking to fill professional occupations would be hard-pressed to find good people on the Job Bank, as most professionals research and apply based on employer profiles rather than job advertisements. HRSDC maintains that advertising on the Job Bank encourages labour mobility within Canada. While this may be logical, the utility of the Job Bank is limited by its audience, which has traditionally not been professionals.

In any event, the best practice for occupations on the relevant ROUP List is, to borrow a term of art, “Just Do It”. And be relieved that you only had to bang through a few web pages, dig up the CRA employer payroll number, dream up a user name and password and rest assured that Service Canada will be satisfied once the position is advertised on the Job Bank. Better yet, have your client post the position – accurately.

(v) *Labour Market Benefits and Training Programs*

Where the foreign worker is skilled and not simply filling a labour shortage, Service Canada typically is receptive to information about the transfer of skills and knowledge to Canadians. This effectively addresses whether “the employment of the foreign national is likely to have a neutral or positive effect on the labour market in Canada.”²³ Particularly for specialists, an outline of a training program in which the foreign worker will participate can be useful to demonstrate labour market benefits. In deciding whether it is appropriate to require the employer to institute and / or the foreign worker to participate in a training program, Service Canada may consider the urgency of filling the position, the duration of the job and whether the business has the capacity to implement a training program.²⁴

In response to the Foreign Worker Application requirements for the employer to identify potential benefits to the labour market in Canada and to describe its training plan for the position filled by the foreign worker, consider submitting a training program document. This is one major value added service that legal counsel can provide, particularly for small and medium enterprises without documentation on human resources programs. Many skilled workers are recruited by Canadian employers to access expertise specific to an industry or that can only be developed through significant experience, which tends to draw on a limited talent pool both in Canada and internationally. Developing a training program can be used to support an LMO application with longer duration of employment and a foreign worker whose skills are highly industry specific and not based on formal education. For example, a training program was quite persuasive for a small airline to support its job offer to a customer service manager without hard

²³ Regulations, s. 203(1).

²⁴ According to Human Resources and Social Development Canada “Directives for Developing a Labour Market Opinion” (undated and unpublished) at 15, “...officers should exercise caution in making a confirmation contingent on the employer’s undertaking to provide training. Officers can encourage employers to train Canadians, but can only make this an absolute requirement in situations where there is structural support available to employers (such as a provincial government sectoral strategy for training).

technical skills or relevant education, but significant experience particular to the airline industry and vital to the start up business of the employer.

Another idea related to the transfer of knowledge and skills by a foreign worker to benefit the Canadian labour market is to apply for Employer Sponsored Training, a federal initiative to help employers avoid laying people off as a result of, *inter alia*, “significant changes in market conditions”. This program provides eligible employers with financial assistance to support training activities for employees who would otherwise lose their jobs. The assistance can cover as much as fifty percent (50%) of training costs, up to a maximum of \$100,000 per agreement, including salaries of employees delivering training.²⁵ This begs the question: will the federal government pay for a foreign worker to train Canadian citizens and permanent residents if the employer can demonstrate that the training will save their jobs?

(b) Post Graduate Employment

Since May 16, 2005, under CIC’s so called “Post-Graduation Work Program”, post-secondary graduates have been able to work in Canada for up to two (2) years on an LMO-exempt basis. To extend the Work Permit beyond two years, an LMO is required.

In 2006, HRSDC issued a *FWP Bulletin* to coordinators and officers responsible for the foreign worker program containing guidelines on the processing of employer applications to hire foreign graduates following the completion of a Work Permit issued under an LMO exemption category. The stated intent of the directive “is for HRSDC/SC officers to take an increasingly facilitative approach to these applications given broad labour market trends in Canada, and the general direction of federal and provincial levels of government on the employment of foreign students/foreign graduates.”

The directive provides that in cases where an employer wishes to retain a foreign graduate as employee after the expiry of his or her Work Permit, the employer can be exempted from demonstrating advertising and recruitment efforts. The rationale for this directive is that labour market information and forecasts suggest high demand for professional, managerial and technical/trade occupations in the long-run in Canada. Accordingly, the employer who wishes to retain a foreign graduate is exempted from advertising. This does not apply to job offers to new employees who are foreign graduates.

On the issue of wages, the directive states:

HRSDC/SC officials are encouraged to take into account that entry-level professional occupations may require a lower level of responsibility and thus generally are associated with lower salaries than the average for the entire occupation. In cases where HRSDC/SC officers have questions regarding acceptable wage ranges on specific applications, they are encouraged to contact regional LMI specialists or other relevant contacts for information (e.g. employment offices in colleges/universities), as well as Regional FWP consultants, who can in turn raise specific cases with NHQ.

With respect to the duration of employment for post-graduate LMOs, the directive indicates that for consistency with the general direction of facilitating the hiring of skilled foreign nationals and their transition to permanent residence in Canada if so desired, LMOs for foreign graduates should be issued for two (2) years.

²⁵ Service Canada, “Employer Sponsored Training” online: http://www1.servicecanada.gc.ca/en/epb/est/desc_est.shtml (last modified: February 7, 2007).

While two years may still not be enough time for a foreign graduate to obtain permanent residence in Canada, this initiative is a very positive one for employers wishing to retain skilled foreign workers. It also is logical in allowing the foreign worker to gain valuable employment experience after post-secondary education, which is directly relevant to eligibility for permanent residence in Canada.

In practice, it appears that not all FWP Officers are familiar with or implementing this directive. Several offices across Canada have reportedly indicated that they still require evidence of advertising, at least on the Job Bank, for LMO applications involving the extension of foreign graduate employment.

(c) Agreements in Principle (“Bulk LMOs”)

Service Canada accepts a single Foreign Worker Application for an employer seeking approval to fill multiple positions in the same occupation, provided the working conditions, location and other terms of the job offer are the same. If the application is complete and warrants approval based on the assessment criteria (i.e. occupation, wages and working conditions, advertising and recruiting, labour market benefits, union consultations and labour disputes), then Service Canada will issue a positive LMO, which should be valid for sufficient time for the employer to identify, recruit and make offers to individual foreign workers. Once job offers have been made to specific individuals, the employer can deliver the Foreign Worker Information to Service Canada and expect confirmations to be issued within a few days.

As with LMOs for individual foreign workers, LMOs for multiple foreign workers are usually subject to conditions, including continued recruitment and documentation of efforts, minimum compensation, and layoffs affect foreign workers before Canadian citizens or Permanent Residents. Breach of any of the conditions may result in the denial of future applications by the employer. Service Canada (at least in Alberta), frequently requests payroll records to verify the employer met the conditions of approval prior to approving an application to extend. They also ask the employer to notify the issuing office and the foreign worker in the event that the job offer is cancelled prior to the foreign worker obtaining a Work Permit and entering Canada.

If the agreement in principle involves a regulated occupation (e.g. welders), then Service Canada will not issue a confirmation until the provincial regulatory authority (i.e. Alberta Apprenticeship and Industry Training), confirms that the worker is qualified to practice in Alberta or can challenge the certification exams. If the worker is not qualified, then Service Canada will issue the LMO valid for six months, during which time the worker must obtain journeyman certification. Until the worker is certified at the journeyman level, he or she must work under the supervision of a journeyman. Once the provincial authorities confirm that the worker is certified, then the employer must apply to extend the LMO. Further, if the employee is not in a low-skilled occupation, the employer can support his or her application for permanent residence in Canada.

Agreements in principle for LMOs involving fifty (50) or more foreign workers in the same occupation by a single employer are submitted to HRSDC National Headquarters (“NHQ”) for mandatory review and consultation. This process is designed to ensure that NHQ is informed and regional decision-makers have made the necessary considerations in developing the LMO.

HRSDC has entered into several memoranda of understanding and agreements with industry stakeholders in the agricultural, construction and manufacturing (tooling and machining trades) in Ontario.²⁶ These

²⁶ See “Foreign Worker Programs: Sectoral Agreements”, online: Service Canada Home Page http://www.sdc.gc.ca/asp/gateway.asp?hr=/en/on/epb/fwp/agreements_sector.shtml&hs=hze#agriculture (last modified: 13 December 2004).

agreements recognize shortages of skilled workers in particular industries and establish conditions and procedures for Service Canada to facilitate the processing of LMOs for employers hiring experienced foreign workers while taking steps to promote the apprenticeship of Canadian citizens and permanent residents in demand occupations.

One excellent method for planning to hire large numbers of foreign workers is to follow the guidelines set out in the Memorandum of Understanding for the Entry of Temporary Foreign Workers for Projects in the Alberta Oil Sands.²⁷ This Memorandum of Understanding documents recognition of the labour needs and economic significance of the oil sands, clarifies the respective roles of employers, HRSDC, Alberta Learning and Citizenship and Immigration Canada, confirms the regulatory context for employers to obtain LMOs and Work Permits for foreign workers and establishes guidelines for employers regarding:

- Comprehensive Recruitment Plans – for major projects in the pre-approval stage, the employer should arrange to meet with HRSDC to provide a project overview and outline its recruitment plan, including human resource requirements by trade, duties and certifications, advertising and recruitment programs, outreach to technical schools and Aboriginal communities, union consultations, wages and working conditions and hiring timelines;
- Agreements in Principle – HRSDC undertakes to issue a number of LMO confirmations within a one year period for specified occupations, provided ongoing recruiting efforts are documented, wages and working conditions are acceptable and other relevant conditions (i.e. union consultations) are met. Agreements in Principle can be renewed and HRSDC has committed to attempting to streamline the renewal process.
- Issuing Confirmations – during the term of the applicable Agreement in Principle, LMO confirmations will be issued for up to three (3) years, depending on employer requirements;
- Employers of Record – the employer must be the entity that assigns work, supervises and pays the employee, rather than recruiters or labour brokers. HRSDC applies the *Income Tax Act* definition to determine whether the employer meets these requirements; and
- Assessment and Certification – Alberta Learning will evaluate the credentials of foreign skilled trades people, on a cost-recovery basis, prior to arrival in Canada. Employers are responsible for arranging such assessment and certification.

(d) Arranged Employment

The Arranged Employment Application for Skilled Workers is only relevant for an employer who has made a permanent job offer to support a foreign worker’s Application for Permanent Residence (“APR”), in Canada. It does not facilitate temporary employment in Canada while CIC processes the APR application. In other words, it does not support a Work Permit application. This still requires an LMO.

Service Canada does not require the employer to demonstrate recruitment efforts for an Arranged Employment Opinion. The emphasis is on determining whether the job offer is *bona fide*, including minimum requirements that the employer has been doing business as a going concern with at least one (1) full-time employee for a full year prior to the date of application. The advantage of the Arranged Employment Opinion is fifteen (15) points for arranged employment and adaptability on the APR assessment for skilled workers. In addition, applications for permanent residence supported by arranged

²⁷ HRSDC, online: < <http://www.hrsdc.gc.ca/en/epb/lmd/fw/mouforOilAlberta.pdf>>.

employment under any of the subsections of Section 82 of the Regulations have the benefit of expedited processing at visa offices.²⁸

(e) Information Technology (IT) Specialists in High Demand Occupations

In response to the need of employers to fill critical shortages in the software industry, CIC collaborated with HRSDC, Industry Canada and the Software Human Resource Council (SHRC) to facilitate processing for certain occupations in the software industry. Under the facilitated processing for IT occupations, the LMO process was replaced by a national (i.e. “blanket”), confirmation letter which recognizes that the seven (7) designated software occupations cannot be filled by Canadian citizens or permanent residents.²⁹

To qualify for expedited processing, the job offer must fit within one of the enumerated job descriptions for specific software editors, designers and developers.³⁰ Provided CIC is satisfied that the foreign worker meets the minimum requirements for education, language and work experience and the salary meets the minimum requirements for the occupation, then employers making job offers to foreign workers in these occupations are exempted from the entire LMO process and the foreign IT specialist can apply directly for a Work Permit at a visa office or, for citizens of contiguous states (i.e. U.S., St. Pierre, Miquelon and Greenland), at a port of entry.

(f) Low-Skilled Occupations (NOC C & D)

Employers should understand the transitional provisions for the “Pilot Project for Occupations Requiring Lower Levels of Formal Training (NOC C&D).” In particular, for employers who either currently employ or recently employed a foreign worker subject to an LMO valid for twelve (12) months, if the foreign worker is still in Canada, the employer may apply to extend the LMO for a total of twenty-four (24) months without demonstrating new recruiting efforts or the foreign worker having to leave Canada. If the application to extend is submitted prior to the expiry of the current Work Permit, then the foreign worker can continue to work pending the outcome of the application to extend the LMO and the Work Permit. If the Work Permit expires before the application to extend it is submitted, then the foreign worker will be out of status and required to obtain a restoration of status within ninety (90) days of the Work Permit expiry.

The employer is also obligated to renew the employment contract and agree to review the worker’s wages when requesting a renewal that exceeds twelve (12) months of employment. In addition, when processing applications to extend, Service Canada increasingly requests payroll records for the period subject to the initial LMO. This is consistent with recent indications that program integrity (i.e. compliance verification and oversight), will receive more emphasis in the future.

Current employer bulletins indicate that the “hold period” for an LMO confirmation after two years of low-skilled employment will remain four months.³¹ However, there have been indications that this is still

²⁸ CIC “Operational Instructions – 2004: RIM 068 – Processing of skilled worker applications with an offer of arranged employment (R82)” online: http://www.ci.gc.ca/international/missions/messages/2004/04rim068_e.aspx (last visited: November 2, 2005).

²⁹ CIC “Facilitated Processing for Information Technology Workers”, online: Citizenship and Immigration Canada Home Page < <http://www.cic.gc.ca/english/work/itw.html> > (last modified: 28 August 2002).

³⁰ HRSDC, “IT Exemptions” online: <http://www.hrsdc.gc.ca/en/epb/lmd/fw/itexemp.shtml> (last modified: April 10, 2006).

³¹ HRSDC Employer Information Bulletin “Pilot Project for Occupations Requiring Lower Levels of Formal Training (NOC C & D): Transition Period for Employers Who Currently Employ or Until Recently Employed a

being discussed by policy makers. It may be important from a program integrity perspective for the low-skilled worker to demonstrate the ability to leave Canada after two years of employment. However, it is imperative that “program integrity” not be the justification for the Service Canada to add new oversight criteria for assessing an application to renew after the hold period. In fact, if the employer and foreign worker agree to renew after the hold period, then the employer should be able to rely on Service Canada to process the LMO extension in plenty of time for the foreign worker to obtain a new Work Permit effective immediately after the hold period. An effective advocate for the employer will ensure that complete, timely applications are submitted and both Service Canada and CIC deliver approvals within the hold period – no minor feat in today’s environment.

(g) Live-in Care Givers

The Foreign Live-in Caregiver program involves specialized forms, procedures and eligibility to apply for permanent residence in Canada after working for two years in a three year period. In British Columbia there are additional LMO assessment criteria and employer registration requirements. In Quebec, a Quebec Acceptance Certificate (CAQ) is also required.

The most recent development for this program is that upon request by the employer, Service Canada will issue an LMO valid for 39 months and CIC will issue a Work Permit valid for the same duration. This change eliminates the cost and effort of reapplying annually to renew the LMO and Work Permit, which provides certainty and relieves stress for Canadian families and their care-givers.

In practice, it appears that Service Canada has prioritized Live-in Caregiver Program applications. This may or may not be true. In 2006, Live-in Caregiver applications in Alberta were typically processed in 2-3 weeks on overtime shifts made available to Foreign Worker Program Officers on a voluntary basis. Since November 2006, FWP offices in Alberta and British Columbia have been transferring Live-in Caregiver Program applications to Ontario with the objective of redistributing the workload and reducing processing times for all application streams. This practice is currently under review as Service Canada considers establishing a processing unit in Ontario for all applications in this stream.

4. Servicing Canadian Employers: Issues and Outlook

(a) Prioritizing Applications and Blanket Validations

There does not appear to be much public information available on how HRSDC prioritizes foreign worker application streams. It is generally known that FWP applications for medical professions and Live-in Caregivers are being fast-tracked, at least in Alberta. However, these may not be the only types of applications that deserve prioritization.

In Ontario, the employer can request urgent processing and provided the urgency is not caused only by the employer’s delay in applying, these applications are often processed in 24 hours. Also, NOC skill level 0 positions and medical professionals are typically prioritized. Current practice is not to submit the application by fax but rather by Priority Post marked “Urgent”. These applications are generally expedited for review and if warranted, immediate confirmation by a FWP Supervisor.

It is certainly worth considering whether HRSDC should issue national or regional (“blanket”) confirmations for more high demand occupations, including low-skilled positions, provided such

initiatives were based on fresh labour market information, monitored closely and for limited durations of employment. This may be an important area for consideration by Federal-Provincial Working Groups and Sector Councils.³²

(b) The Role of the Representative

IRPA was enacted without provisions recognizing the role of third party representatives for LMO matters as is the case for immigration matters. According to the internal FWP manual called “Directives for Developing a Labour Market Opinion”³³, Foreign Worker Officers may, at their discretion, contact the employer to confirm the Appointment of Representative.

In Alberta, FWP Officers frequently ignore the Appointment of Representative and contact or correspond directly with the employer in complete disregard of the representative. This is not the case in Ontario, where the representative is the first point of contact but if not reached promptly, then the FWP Officer may contact the employer to avoid delays.

The practice of circumventing the role of counsel often causes confusion for the employer about documentation on the LMO application file and typically creates unnecessary work and expense for the employer and its duly appointed representative. Accordingly, all parties would be better served if Service Canada began to consistently observe professional courtesy with practising lawyers and accredited consultants.

(c) National Resource Allocation and Service Delivery

The allocation of additional resources to the Foreign Worker Program in Western Canada is long overdue. The program did receive funding in Alberta in September 2006 and as a result, additional officers are being recruited and trained. Employers and their representatives in Ontario and Quebec realize how good they have it locally when they submit LMO applications in Alberta and British Columbia. But if Western Canada continues to lead the Canadian economy, then isn't it absolutely necessary to deliver greater resources to the employers that require them most? Minimum service standards of 6-8 weeks (and frequently longer),³⁴ constitutes a significant hardship for employers and impacts their businesses in ways that affect all Canadians.

(d) Program Integrity / Oversight

Service Canada has recently begun to indicate that the days of Foreign Worker Program responsibility ending upon issuance of the LMO may be coming to an end. It appears that there may be greater emphasis on quality assurance for the full cycle of employment and system integrity for foreign workers in Canada. One example is the reference to “bundling” services provided by HRSDC, which would involve processing FWP applications while introducing employers to community organizations and industry associations to identify local workers available to fill shortages. In particular, employers seeking agreements in principle can expect introductions to union representatives and local and Aboriginal community organizations. On the dark side of oversight, there is the increasing tendency to request payroll records for LMO extension applications, contact unions and even contact employers directly

³² For a list of Sector Councils, see online:

<http://www.hrsdc.gc.ca/en/hip/hrp/corporate/sector/listsectorcouncils.shtml> (last modified: April 5, 2007).

³³ HRSDC, “Directives for Developing a Labour Market Opinion at 4 (undated and unpublished).

³⁴ In the first week of April 2007, Service Canada in Edmonton was reportedly processing applications received on December 8, 2006, about four (4) months earlier.

(although they appointed a representative), to ask whether they really signed the Appointment of Representative form attached to the application.

It would be interesting to explore whether such emphasis on program integrity and oversight is a reaction to abuses of the FWP by employers or whether there are other policy forces at work. This is particularly relevant for the future as Service Canada acknowledges that immigration will account for all net labour force growth in Canada within the next 10-15 years and all net population growth in Canada within the next 30 years.³⁵ What does HRSDC think it needs to be as Canada grows through immigration?

³⁵ HRSDC, “Frequently Asked Questions – Foreign Credential Recognition” online: <http://www.hrsdc.gc.ca/en/ws/programs/fcr/faq.shtml> (last modified: March 29, 2007).