



Temporary Foreign Worker Program

NEW IMMIGRATION REGULATIONS TAKE EFFECT: WHAT EMPLOYERS NEED TO KNOW

On April 1, 2011, the much-anticipated regulatory changes to Canada's Temporary Foreign Worker Program ("TFWP") took effect. Employers who currently employ TFWs, or who wish to do so in the future, should have a solid understanding of these changes in order to mitigate their impact. As a result of a recently published policy bulletin, employers now have more certainty regarding the interpretation of the new rules.

MAXIMUM PERIOD OF WORK IN CANADA

The new measures limit the length of certain TFWs' work-authorized stay in Canada, referred to as the "cumulative duration." Subject to several exceptions, TFWs will be permitted to work in Canada for a maximum cumulative duration of four years, following which time they must spend four years not working in Canada to be eligible to reapply for a Work Permit.

The four-year limit will only be counted starting from April 1, 2011 for all TFWs, regardless of how long they have already been in Canada. Note that the four-year limit includes periods in Canada as a business visitor (e.g., intra-company trainee) or under other Work Permit-exempt categories (e.g., after-sales service provider), and that gaps in employment (e.g., intermittent work in Canada) can be deducted if they can be documented.

Citizenship and Immigration Canada ("CIC") has clarified the exceptions to the four-year cap with the fortunate result that they are significantly broader than the regulatory amendments initially suggested. The four-year cap will not apply to several categories of TFWs making Work Permit applications, including the following:

- new - TFWs in managerial or professional positions (specifically those that are listed as "O" or "A" level on the National Occupation Classification)
- new - TFWs who have applied for permanent residence and have received a Provincial Nominee Program certificate or a positive selection decision, if applying under the Federal Skilled Worker Class or the Canadian Experience Class
- TFWs who are applying pursuant to an LMO-exempt category, including:
 - NAFTA Professionals
 - intra-company transferees
 - spouses and common-law partners of TFWs in managerial or professional positions
 - spouses and common-law partners with In Canada Permanent Residence applications in process
 - holders of temporary resident permits (TRPs) valid for a minimum of six months

ADDITIONAL FACTORS IN LMO AND WORK PERMIT PROCESSING

Service Canada, CIC and the Canada Border Services Agency ("CBSA") are now implementing additional factors to be considered when processing LMO and Work Permit applications. These factors consist of an assessment of whether the offer of employment is genuine and an assessment of whether employers have complied with the terms of employment for TFWs regarding the occupation, wage and working

conditions (referred to as a “Substantially the Same” or “STS” assessment). The policy bulletin suggests that officers likely will not conduct these assessments frequently at first.

1. Genuineness of Job Offers

The regulations prescribe a set of factors to assess the genuineness of an offer of employment to a TFW, and stipulate that the genuineness of an offer is to be considered by Service Canada before an LMO is issued or by CIC or CBSA when an LMO-exempt Work Permit is requested. The assessment will be used to ensure that the employer legally exists and can demonstrate the ability to provide stable employment for the requested period. At a minimum, the employer must have an operating/functioning business, provide goods or services, and have a work location in Canada. If the employer fails the genuineness assessment, the LMO or Work Permit application will be refused.

The following factors will be considered:

- whether the offer is made by an employer that is actively engaged in the business;
- whether the offer is consistent with the reasonable employment needs of the employer;
- whether the employer is reasonably able to fulfill the terms of the offer; and
- whether the employer, or any party which recruited the TFW for the employer, has complied with federal or provincial laws that regulate employment or the recruiting of employees, in the province where the TFW will be working. The focus is on employer convictions.

Employers who are new to the TFWP may be asked to complete an Employer Declaration (IMM 5658) which asks for corporate information and a description of the principal business activity. If an officer can not verify information (e.g., the employer is a start-up company or past genuineness assessments have not been conducted) and has concerns, the employer may be asked to provide prescribed documents.

2. STS Assessment

An employer’s compliance with previous LMO or Work Permit conditions will also be reviewed at the time of a new LMO request or Work Permit application or extension. The assessment will examine whether the employer, in the preceding two-year period, provided each of its TFWs with substantially the same wages, working conditions, and occupations as those set out in the original offer of employment. If not, the failure to comply must have been “justified” in accordance with prescribed factors.

The Government of Canada has confirmed that it will take into account the significance of the difference in wages, working conditions or occupations in conducting an STS assessment, and has emphasized that a negative assessment should reflect changes that are considered detrimental or disadvantageous to the TFW and/or would compromise TFWP integrity.

During these early stages of implementing the regulatory changes, STS assessments will be conducted primarily by Service Canada for LMO applications. CIC and CBSA officers will rarely conduct an assessment involving verification of wages paid unless information suggesting non-compliance emerges (e.g., a subsequent LMO refusal based on a failed STS assessment).

TWO-YEAR BAN FOR NON-COMPLIANCE

The legislation imposes a two-year prohibition from utilizing the TFWP for employers found to have failed an STS assessment. Communications with senior government officials suggest that in cases where the failure to comply is not justified, employers may be given an opportunity to implement corrective action, thereby avoiding the ban.

A list of banned employers is available on CIC’s website at www.cic.gc.ca/english/work/list.asp. The implications of being deemed an ineligible employer are that LMO applications will be refused and Work Permit applications made by TFWs wishing to work for the ineligible employer will also be refused. However, TFWs will be permitted to continue working for ineligible employers until

the Work Permit expires or the term of the employment agreement ends, whichever is earlier.

NEW LMO FORMS

Service Canada has released [new application forms](#) that are specific to each stream of worker under the TFWP. As of April 1, 2011, any LMO request received must be made using the new forms. When applying for an LMO, all new employers to the TFWP will be required to provide a copy of their municipal business license or permit. Note that all employers, whether returning or new, may be asked to provide documentation evidencing the genuineness of job offers and past compliance.

Employers are now asked:

- to confirm that they have provided all TFWs employed in the past five years with the wages, working conditions and employment

in an occupation that were substantially the same as set out in the original job offers

- to provide a rationale for the job offer being made to the TFW and how it will meet the employer's needs
- to declare that they will comply with the terms of the LMO (e.g., the wage, working conditions and occupation), that they will inform Service Canada of any subsequent changes to the terms and conditions of employment as stated on the LMO, and that they are compliant with and agree to continue to abide by all applicable federal/provincial/territorial laws that regulate the employment and the recruitment of TFWs
- if a representative is being appointed, to have the signature of the person signing on behalf of the employer witnessed by a third party

For further information regarding the above, or to discuss any other aspect of business immigration law, please contact any member of the Spectrum HR Law LLP Business Immigration practice group:

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