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Our Business Immigration Team, led by BD&P partner Rita Tripathy, assists clients, both individual and corporate, in a complete range of immigration issues, including bringing foreign nationals to work in Canada and transferring individuals to the United States. Immigration laws, regulations and procedures undergo regular changes and BD&P’s Business Immigration Team can help clients’ navigate the system and find solutions that best suit their needs.

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- Obtaining work permits in Canada, the U.S. and other jurisdictions
- Obtaining U.S. non-immigrant visas
- Securing Canadian temporary resident visas and study permits
- Extending Canadian and U.S. visa permits
- Acquiring and maintaining Canadian permanent residence status
 - Preparing Alberta Immigrant Nominee Program, Canadian Experience Class and Federal Skilled Worker Class applications
- Acquiring and maintaining U.S. permanent residence status
- Facilitating intra-company cross-border transfers
- Obtaining Canadian citizenship and Certificates of Citizenship
- Sponsorship of family members

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Employee Options For Permanent Residency In Canada

Introduction

Whether one is an employer seeking to hire or retain a valued foreign worker, or a current or potential employee hoping to pursue a career in Canada; there are three main options for obtaining Permanent Residency status: the Alberta Immigrant Nomination Program, the Canadian Experience Class and the Federal Skilled Worker Class. It is important to consider the detailed requirements of each program before making an application.

In October of 2009, proposed changes to the Canadian Temporary Foreign Worker program were announced. These changes will limit a Temporary Foreign Worker to only being able to work in Canada for a combined term of 4 years. Upon the expiry of the 4 years, the Temporary Foreign Worker would not be authorized to work in Canada for another 6 years. There are some limited exceptions including NAFTA. However, the message employers should take from this is that it is important to consider long-term needs and apply for Permanent Residence if the employee is needed beyond 4 years.

Each of these methods is aimed at attracting immigrants with a combination of education, training and work experience in their chosen field. Many applicants are already working in Canada with Temporary Foreign Worker status, and it is often easier to apply for Permanent Residence after being employed as a Temporary Foreign Worker.

In general, applicants to each program must be planning to work in occupations included in the federal government's National Occupation Classification (NOC) system, under Skill Level 0, A or B.¹ Skill Level 0 includes occupations that usually require a university degree or professional designation and must be at the senior or middle management level. Skill Level A includes other occupations that usually require a university degree but not necessarily at the management level. Skill Level B includes occupations that usually require two to three years of post-secondary education and skilled trades that require apprenticeship training.

Alberta Immigrant Nominee Program

The Alberta Immigrant Nominee Program ("AINP") is a provincial program whereby the Province of Alberta can effectively select candidates eligible for Permanent Residency.

Employers must sponsor applications from skilled and semi-skilled workers and recent graduates from a post-secondary institution. Candidates must have accepted permanent, full-time employment with the employer and meet certain criteria specific to their worker category. Apprentices are not eligible for the AINP.

Employers must prove the candidate's position meets provincial employment and wage standards, and does not conflict with collective bargaining agreements. The employer and candidate must provide a current copy of the employment contract, work permits and current and previous labour market opinions from the federal government.

An employee would apply under the Skilled Worker Category, which is intended for skilled occupations for which formal education and/or specialized training is required. Once the AINP has processed the employee's application and deemed the employee suitable to be a permanent resident due to the benefit the employee will bring to Alberta, the Province can then nominate the employee for Permanent Residence. It effectively places the decision making process in the hands of the Province rather than the national immigration authority, Citizenship and Immigration Canada ("CIC"). This is so in that once a person is nominated by a province, the application to CIC for Permanent Residency is essentially an administrative step, subject to having a clear police check and medical examination.

It is possible for employees to include their family members (spouse or common-law spouse and any dependent children) in the AINP and Permanent Residency applications.

This provincial government program has in the recent past stood out as one of the best options for skilled workers in Alberta because,

if approved, candidates' permanent residence applications (and those of their spouses and dependent children) will be fast-tracked through CIC.

Skilled and semi-skilled workers and international graduates from Canadian institutions who have job offers or are currently working in Alberta can apply, with the help of their employer. The AINP also targets self-employed farmers from other countries who are willing to make a \$500,000 investment in a farm. The AINP Strategic Recruitment stream targets engineers, designers and drafters and those certified in high-demand trades in foreign countries by inviting them to participate.

Semi-skilled workers in such fields as food and beverage processing, hotel and lodging, manufacturing and long-haul trucking could also be eligible to apply through the AINP.

Canadian Experience Class

The Canadian Experience Class (the "CEC") is aimed at applicants who are temporary foreign workers or foreign students who have graduated in Canada. The rationale is that these candidates have the qualities to make a successful transition from temporary to permanent residence, namely their familiarity with Canadian society which will enable the candidate to contribute to the Canadian economy. This program was introduced in 2008 to address inefficiencies in the Federal Skilled Worker program. Temporary Foreign Workers who have knowledge of English or French and qualifying work experience can apply through this program, directly to the CIC. Specifically, CIC has set out these specific minimum requirements of the candidate, mandating that he/she:

1. has plans to live outside of Quebec;
2. be either a temporary foreign worker with at least two years of full-time skilled work experience (no C level 0, A, or B) (not clear?) or a foreign graduated from a Canadian post-secondary institution with at least one year of full-time skilled work experience in Canada;

3. has gained experience in Canada; and
4. must apply while working in Canada or within one year of leaving one's job in Canada.

The assessment of the candidate is based on the candidate's work experience, ability in English or French, and where applicable, the nature of the education attained in Canada.

Part-time work experience can fulfill the requirements for work experience.

The application form requires information about the candidate's education, occupation, family members and requires photos of the applicant and family. The applicant's background information is also required, including information about family members, association with any organizations and addresses where the applicant has lived since age 18.

As with the AINP process, the applicant must provide proof of legal status in Canada and a copy of his or her passport. Candidates must also provide police clearance for each country (except Canada) in which they and each family member over age 18 have lived since reaching the age of 18.

Federal Skilled Worker Class

The Federal Skilled Worker (the "FSW") class is the oldest of the permanent residency application programs and the one with the longest application processing time. It now exists primarily for those applicants who do not fit into the other programs.

Applicants must have at least one continuous year of full-time, paid work experience in Canada, or the equivalent in part-time continuous employment within the last 10 years. As with the other programs, work experience must be in Skill Level 0, A or B.

The distinguishing feature of the FSW class is the points system. Applicants are awarded points based on education, language ability, work experience, age, arranged employment in Canada, and adaptability. Each factor is given a certain

points allocation, for a maximum of 100 points. Applicants require at least 67 points to pass and must demonstrate proficiency in English or French.

There is a minimum funds requirement for FSW applications, but applicants with arranged employment in Canada are exempt. The application forms for the FSW program require the same information as outlined above for the CEC program.

Processing Times

Processing times for Permanent Residence applications can be lengthy. The main advantage of the AINP is speed, as applications are fast-tracked through the federal government. The AINP web site states that processing time for the Employer-Driven stream for skilled workers in Alberta is up to 11 months. Strategic recruitment of compulsory trades and engineering occupations is estimated to take 5 months. The entire process (including review by CIC) takes approximately 18 months.

Processing times are not yet available for the CEC program because it is new. Applications are now sent to the Buffalo, New York visa office. A representative from that office estimates that 80% of CEC applications will be finalized within eight months and anecdotal evidence suggest this to be the case; however, this is not guaranteed. If an individual qualifies for both the CEC and AINP, the CEC route may be preferable in that the current timing is supposed to be as short as 8 months.

Current processing times are also not available for Federal Skilled Worker applications received after February 26, 2008, as volume is not sufficient for an assessment. Applications are now sent to the processing centre in Sydney, Nova Scotia. Before February 2008, applicants living in Canada sent their applications to Buffalo, New York, where 80 per cent of applications were finalized in 24 months.

Footnotes

¹For more information about the NOC, please see <http://www5.hrsdc.gc.ca/NOC/English/NOC/2006/Welcome.aspx>.

U.S. Immigration Options

There are a number of options available for Canadian employers intending to send their Canadian employees to work in the United States (the “US”). The type of status to secure for the employee depends on the purpose of the visit and the training and education of the employee. The purpose of this article is to explore the options available when such a move of employees is contemplated.

- **B1 – Business Visitor** – This is the simplest type of status to obtain, but it is limited with respect to the types of activities permitted. For instance, a B1 will allow the Canadian employee to enter the US to set up initial “business operations”, negotiate contracts and consult with business associates and clients. The B1 is intended for short-term visits, with a maximum duration of 6 months at a time. The Canadian employee must also remain on Canadian payroll at all times.

In order to obtain a B1, Canadian citizens can simply request one at the point of entry (such as a border crossing or at the airport). The more times the employee enters the US, the greater scrutiny of his or her purpose of entry. It is therefore highly recommended that the employee carry a letter from the employer setting out the purpose of the visit to the US, and preferably a copy of the contract with the US customer.

There does not need to be a US entity or US premises in order for Canadian employees to get B1 status for entrance to the US.

- **L1 – Intra-company Transferee** – Once there is a business operation established in the US (including business premises), the company can consider sending Canadian employees to the new US “affiliate or subsidiary” under the L1 visa. The L1 (which is further divided into L-1A for managers and executives, and L-1B for employees with “specialized knowledge”) is geared towards companies looking to expand into the US (and those with operations already in the US). With the L1, employees can engage in a more active role in commencing operations and managing the business.

The L1 application (with supporting documentation) must be prepared in advance and is approved at the port of entry. For a new US company, an initial permit would be granted for one year and can then be extended for up to 3 years at a time, to a maximum of 7 years for managerial or executive level employees or to a maximum of 5 years for specialized knowledge employees.

After the 5 or 7 years has expired, the employee can reapply if he/she leaves the US for one year. Alternatively, the employee may wish to apply for an employee-sponsored green card during the initial 5 or 7 years. For managerial or executive level employees this is relatively straight forward, and involves filing a petition at USCIS. The process can take 1-2 years. However, for specialized knowledge employees, a “Labour Certification” must be obtained prior to applying for the

green card. This is akin to the Canadian Labour Market Opinion, and is required to show that there are no US citizens or permanent residents available to do the job in question. Certain fairly onerous advertising requirements have to be met before the Labour Certification is granted.

There must be a US entity to sponsor the application and this US entity must have physical premises in the US. This can be as simple as a US sublease set up within a customer's office.

Additional requirements for the L1 include:

- (i) the employee must qualify as a manager/executive (L1-A) or "specialized knowledge" (L1-B) employee, and
- (ii) the employee must have been employed by the Canadian entity for at least one out of the previous three years.

There is no absolute requirement that US employees also be hired, although this is seen as a plus.

- **H1-B Status** – To qualify for H1-B status, the foreign national employee must be hired for a "specialty occupation". A specialty occupation typically requires the minimum of a Bachelor's Degree in order to qualify for the position. H1-B status is a good option if there is a shortage of a particular skill in the US; an employer needs global market expertise ie.

employers may require an H1-B professional to bring special expertise in market trends or distribution that enable US business to compete in the Canadian market; or if there is a temporary shortage of a particular type of professional (for example there may be a shortage of physical therapists or nurses). H1-B status has a cap of 6 years. H1-B status must be obtained in advance as opposed to the port of entry.

- **TN Status** – TN status is for Canadians (and Mexicans) engaged in activities at a professional level. TN status is similar to the H-1B status. TN status is granted for three years, and is then extendable in three year increments. The number of renewals is unlimited. TN status can be obtained at the border crossing as opposed to the advance application for H1-B.

TN status can be applied for if the employee is working in one of the 63 professions listed in NAFTA. Please note that the employee must be working in the profession to which his/her university degree relates. For example an employee with an accounting degree would not qualify as a professional accountant if he/she is working in Human Resources. The bulk of the professions under TN status require university degrees. There are two exceptions to requiring a degree, the positions of Management Consultant and Scientific Technologist.

a) Management Consultant:

A Management Consultant needs to prove he/she has 5 years experience in the relevant field and cannot be an employee of the company; rather must be retained as an independent contractor.

b) Scientific Technologist:

The scientific technologist must be supporting one of the Scientific professionals listed in NAFTA. This means that he/she must be supervised day to day by the professional, and the purpose of his/her employment in the US must be to assist the professional.

TN employees must be sponsored by the US entity.

- **E-Visa Status** – For larger companies where there is a significant investment into the US business operation, there is also the E-Visa category. It can also be used by companies that have a substantial amount of trade with the US.

Essentially for a company to obtain E-visa status one needs to demonstrate that the company has an "active investment" (i.e. an irrevocable commitment of funds invested) in the US and that that investment is substantial or alternatively, that the company has a certain amount of ongoing cross border trade with the US.

The advantage of the E-visa status is that for all employees in the future, there is no concern about whether the employees qualify under TN status. Also, the employees can enter where they do not qualify under the L1 status as an intracompany transfer (i.e. employees who have been employed for less than one year).

The disadvantage of the E-Visa process is that it is time-intensive at the front end in terms of preparing a package of information. Unlike the other categories referred to above, the application has to be sent to a US Consulate in Canada and cannot be filed at the border. One can expect an E-visa package to be reviewed within 10-14 weeks of being submitted. As part of the application process the employees must attend for a personal interview at the US consulate in Vancouver or Toronto.

Labour Market Opinion Tips For Alberta Employers



A Labour Market Opinion (“LMO”) is an opinion provided by Service Canada that a particular job offer to a potential worker outside Canada is genuine. Essentially, the LMO is an acknowledgment that an employer cannot find suitable Canadian/permanent residents to fill certain jobs and that entry of workers into Canada to fill these jobs will either have a neutral or a positive effect on the Canadian labour market.

When applying for an LMO an employer must demonstrate that:

- efforts were made to recruit and/or train willing and available Canadian/permanent residents,
- wages offered are consistent with the prevailing wage rate paid to Canadians in the same occupation in the region,
- working conditions meet the current provincial labour market standards, and
- there are potential benefits on the labour market.

The first consideration by an employer is a determination of whether an exemption from obtaining an LMO applies to the particular

circumstances of the employer. If there is an exemption, an employer would apply to the Temporary Foreign Worker Unit for an opinion that there is an available LMO exemption (such as the NAFTA, Intra-Company Transfer and Business Visitor exemptions).

If no LMO exemptions are available, Alberta employers will want to keep in mind the following information and suggestions:

- Apply as early as possible. The current processing time is 8 to 10 weeks.
- There are no longer extension applications available for LMOs. This is very important to remember with incumbent temporary foreign workers. Employers must advertise and meet the recruiting standards even though they have an incumbent employee suitable for the job. Even where employers have legal counsel, it is not unusual to be contacted directly by Service Canada. Employers need to be wary of giving the impression that they are just going through the motions of recruiting and not seriously addressing filling the occupation with someone other than the incumbent employee.

- Employers need to be aware that in January 2009, new national minimum requirements were introduced for recruitment for all LMO applications. Essentially, the lower-skilled the occupation the more stringent the recruitment requirements.
- Employers must be prepared to show documented proof that they have met the advertising requirements and recruiting efforts.
- The wage rate being offered must be the prevailing wage, which is identified as the average hourly wage for the occupation in the specified geographic area. The requirement to offer the average wage often presents a dilemma to employers as they are required to offer an entry level foreign worker a higher wage than they may be paying similar more experienced Canadian workers. Benefits that are offered to Canadian citizens or Permanent Residents must be extended to temporary foreign workers as well.

Employer Sponsored Green Cards For U.S. Employees

Employers may want to consider Employer Sponsored Green Cards for their L-1A (intra-company transfers) employees where they expect to require an employee to work in the US for greater than 7 years. An L-1A status employee must leave the US by the end of his/her 7th year. The guidelines for the employer-sponsored first preference green card petition (intra-company management transferee) is similar, although not identical, to the L-1A visa criteria (see article in this edition). For an employee to qualify for this employment-based permanent residence, it must be shown that:

- (1) he/she held a *management* position with the parent company in Canada for at least one full year within the three years prior to his/her transfer to the US,
- (2) that he/she is now holding a management / executive position at the US company, and
- (3) the Canadian company and the US employer are related through common ownership (at least 50% common ownership).

To meet the qualifications of a *management* position, the immigration service ordinarily looks to whether the individual employee in question actually manages the work of subordinates. However, even if the individual does not directly manage people, managing a specific product line or project can be sufficient provided one can show that the individual has some discretionary authority to direct and coordinate the project / product line. Organizational charts as well as detailed job descriptions must be submitted to demonstrate that the employee's position in Canada and the US were and are in fact at the management level.

Once the three qualifications described above are established, the second step of the green card process (the adjustment-of-status), requires that the employee undergo an FBI criminal background check and a medical exam. If the employee has ever been arrested, pled guilty or no contest, or was convicted of a criminal offence anywhere in the world, there may be issues that have to be addressed.

The best option for employers if there may be issues in gathering a green card is to look into this employment-based first preference (management-transferee) green card option for the employee. Once an employment-based petition is approved, the individual applies for the green card. If the employee is in the United States, the processing of the green card is done by filing an application to adjust status. Under the US quota system, there is currently no backlog for this first-preference category, which means that the employee will not have to wait several years to become eligible to submit an adjustment-of-status application. Any other employment-based green card category is presently severely backlogged, meaning that there are delays of between 4 to 10 years before the green card application process can be finalized. This delay could create problems with an employee's L-1 status, since he/she will have to leave the US by the end of the 7th year in L-1A status, unless he/she has filed an adjustment-of-status application by that deadline.



Becoming A



Eligibility for Becoming a Canadian Citizen

To be eligible to become a Canadian citizen, an employee must meet these requirements:

- (a) Be at least 18 years old
- (b) Have achieved permanent resident status in Canada
- (c) Have lived in Canada for at least three years (1,095 days) out of the four years (1,460 days) preceding the application and have been a permanent resident for a minimum of 2 years
- (d) Have language abilities in either English or French at a level sufficient for communication, the proficiency of which is examined in the citizenship test
- (e) Be free of a criminal history, the prohibitions being set out by Citizenship & Immigration Canada
- (f) Have knowledge of Canada, including knowledge on the rights and responsibilities of citizens, Canadian social and cultural history, Canadian politics and Canadian physical and political geography, all of which is tested in the citizenship test. Applicants between the ages of 18 and 54 must take the citizenship test. The Government has very recently introduced a new and updated citizenship study guide which new immigrants will begin receiving over the next several months. The Citizenship and Immigration Minister has stated that the goal of the new guide is to foster a sense of cohesion, of a common past, shared values and obligations. We can expect further updates on the citizenship process in the future.

Residency Requirements

The trickiest issue on Citizenship Applications is the meeting of the Residence Requirement.

An applicant for citizenship must have lived in Canada for at least three years (1,095 days) out of the four years (1,460 days) preceding his/her application.

Only the four years prior to the citizenship application are considered and only half-credit (a half day for every day of residency) is given for time lived in Canada prior to becoming a permanent resident. Given this fact, an applicant is unable to meet the residence requirements for citizenship without a minimum of two years as a permanent resident.

An application will be returned if there has not been at least three years of "basic residence" which is the minimum time required to be eligible for a grant of citizenship (1,095 days). Absences from Canada are not necessarily counted against the applicant in the determination of basic residence. However, if an applicant has fewer than three years (1,095 days) of physical presence within the three years of basic residence, then the application is left to the discretion of the citizenship judge who will evaluate the nature of the applicant's residence in Canada. If an applicant has fewer than 1,095 days of physical presence in Canada, the application process will take longer and may be refused by a citizenship judge.

This means that an applicant who obtains permanent residence and plans on seeking citizenship must be cautious of the number of days he/she is absent from Canada.

Canadian Citizen



It is important to note that time spent serving a sentence for an offence in Canada cannot count towards residence for the purpose of becoming a Canadian citizen, although there are a few exceptions.

Applicants must know that that merely meeting the minimum time to maintain Permanent Resident status, two out of the last five years, is not sufficient to apply for citizenship.

Lastly, as the calculation required to determine whether one meets the residency requirements can be quite complicated, a Residence Calculator has been posted on the Citizenship and Immigration Canada website at www.cic.gc.ca

Recent Announcement

An announcement was made on October 9, 2009, by Immigration and Multiculturalism Minister Jason Kenney announcing proposed changes to the Canadian Temporary Foreign Worker program. The motive behind these changes appears to be an effort to ensure that the Temporary Foreign Worker Program is fair and acceptable. Essentially, the proposed changes anticipated to be in place by the end of December 2009, are as follows:

1. The limitation of a Temporary Foreign Worker to a work period in Canada of a combined term of four years. After these four years the Temporary Foreign Worker would not be eligible to work in Canada for another six years. This is an important consideration for employers in addressing their long-term needs and in considering permanent residency for employees.
2. A two-year prohibition on employers hiring Temporary Foreign Workers where the employer has provided significantly different wages, working conditions, or occupations to those that were initially offered to a Temporary Foreign Worker. In addition to this prohibition, the employer's identity will be posted on the Citizenship and Immigration Canada website.
3. More stringent standards to show the genuineness of a job offer. Specifically the proposed changes will clarify the process and provide specific factors to be considered in assessing the genuineness of an offer. This would include ensuring that the employer complies with federal and provincial labour laws.

BD&P and Habitat for Humanity

Habitat Calgary works in partnership with low-income families and the community to build hope through the construction of simple, decent and affordable homes for Calgary's families in need. BD&P has partnered with Habitat for Humanity Calgary since 2002 to help address the crisis in affordable housing in our city. Together, we have built a relationship of which we are immensely proud.

BD&P is very excited about its 2009 build — its 7th build with Habitat for Humanity Calgary. BD&P will fund the building costs and provide significant volunteer labour and resources for one half of a duplex in the Elgin area in Southeast Calgary. Staff at BD&P joined the prospective new homeowner on VIP or Framing day on October 17, 2009 and made significant headway. The structure will be home before they know it, to a single mom and her 4 young daughters who are anxiously awaiting the move to their new home.



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