Egan Quarterly Alert: Canadian Immigration Updates

Following the overhaul of the program in June 2014, we continue to see significant changes to the Canadian Temporary Foreign Worker program. The continuous changes are making the program harder to navigate. Employers continue to be challenged to confirm that they are using the Temporary Foreign Worker program in cases of acute labour shortages. In order to keep you apprised of the most recent changes, we would like to provide you with some updates on current programs and some new initiatives. Specifically, we will discuss:

• Express Entry, three months in. What are we seeing and what are the likely trends going forward.
• The Immigrant Investor Venture Capital Pilot Program
• Canada’s newest Free Trade Agreement with South Korea
• Update on the new compliance initiatives under the International Mobility Program

Express Entry, three months in...

After much anticipation, the Government of Canada launched the new Express Entry system on January 1, 2015. Express entry is an electronic intake management system for the Canadian economic permanent residence streams, namely Federal Skilled Worker Program (“FSWP”), Federal Skilled Trades Program (“FSTP”), Canadian Experience Class (“CEC”) and the Express Entry Provincial Nominee Programs (“PNP”). Please note that many of the provinces have opted out of using Express Entry for the 2015 year.

Leading up to the launch of this new model, Citizenship and Immigration Canada (“CIC”) had advertised this program as a positive change and that it would create a more streamlined process to apply for Canadian permanent residence status. This is true for those applicants who have an offer of pre-arranged employment or a PNP nomination certificate.
Compared to the previous first in/first out application process, Express Entry now requires applicants who are interested in applying for PR to complete two processes. If an applicant is eligible to apply for PR under one of the above-noted streams, they are required to create an Express Entry profile which will allow them to submit an expression of interest in becoming a Canadian PR. Based on the applicant's skills and credentials, the applicant will be issued a Comprehensive Ranking Score (“CSR”) out of 1200 points. Of the 1200 points, 460-500 points consist of the 5 core Human Capital factors, specifically age, level of education, official language proficiency (first official language), official language proficiency (second official language), and Canadian work experience. An additional 100 points are allocated for the applicant's adaptability in Canada and the remaining 600 are awarded for a qualifying offer of arranged employment or provincial nomination.

As of March 2015, there have been six (6) draws. The first draw was on January 31, 2015. During this draw, CIC invited 779 candidates who had a minimum of 886 points to apply. The following three (3) draws issued a total of 2815 ITA's and the score dropped from 886 to 735. On March 20, 2015, for the first time since the launch of express entry, CIC issued ITA's to candidates who had a CSR score as low as 481. The fifth draw was the first time since the launch of the system that CIC issued ITA's to applicants who did not have a qualifying job offer (ie. LMO/LMIA based work permit) or a provincial nominee certificate. The sixth and most recent draw followed the same trend. On March 27, 2015, CIC issued 1637 ITA's to applicants who had a minimum score of 453. Based on the current trend, we are seeing the minimum CSR points decrease draw over draw. What does this mean? Applicants who have strong CSR points without a qualifying job offer or a provincial nominee certificate should consider creating the profile. The graph below illustrates the trends we are seeing:
Express Entry has created a level of uncertainty for employers who want to make their temporary foreign workers permanent, especially for those temporary foreign workers who have LMIA exempt work permits. What we do know is an applicant who has an LMO/LMIA based work permit or a PNP nomination certificate, will score at the higher end of the points spectrum and is likely to receive an invitation to apply for Canadian permanent residence status. If looking for long term retention, the dialogue of becoming a PR should start early. There may be certain situations where it may make sense to obtain an LMIA or file an Express Entry PNP application to support PR in order to provide a higher level of certainty.

With the new Express Entry system, there is now a Permanent LMIA option. Applying for a Permanent LMIA still requires the same rigorous recruitment process; however there is no requirement of a transition plan. Further, there is no $1,000.00 processing fee if the LMIA is for PR only. Many employers are now considering LMIA’s in order to support their employees through the permanent residence process. The risk in pursuing an LMIA is that the foreign national’s job is being advertised and there is a risk that the employer may find a qualified Canadian or permanent resident for the role.

If an applicant is issued an Invitation to Apply (“ITA”), the full permanent residence application system must be submitted within 60 days of issuance. CIC has committed to a target processing time of 6 months, as long as the application is complete. At the time the permanent residence application is submitted, efforts have to be made to obtain police clearance certificates and complete medicals.

Express Entry is a streamlined PR process for foreign nationals who have valid LMIA/LMO based work permits or a PNP certificate. For those foreign nationals who don’t, it is a waiting game. CIC continues to hold draws periodically and continues to pull applicants from the Express Entry pool.

The Immigrant Investor Venture Capital Pilot Program (“IIVC”)

In late 2014, CIC announced that it would be launching a pilot program in January 2015 which was designed to attract business immigrants who had the means to actively invest in the Canadian economy. Some argue that the IIVC program can be coined the millionaire migration program.

To be eligible under this program, an individual is required to make at least a $2 million investment in Canada over 15 years and are required to have a net worth of $10 if the investor has a Canadian Educational Credential (or foreign equivalent) or $50 million if there is no educational credential. In addition to having the financial means, the investor is required to meet certain language and education requirements as well as having proven business or investment experience. By investing into Canada, the prospective investor will acquire residency visas in Canada.

The IIVC program was opened in January 2015. As a result of not receiving a significant amount of applications, the IIVC program reopened on February 13, 2015. CIC will accept applications under this program until April 15, 2015 or until they have received 500 applicants. This category is only open for a short period of time. Those looking to invest in Canada should seek advice on what is required under this category.
Canada’s newest Free-Trade Agreement (“FTA”)

In September 2014, the Prime Minister of Canada, Stephen Harper and the President of South Korea, Park Geun-hye officially signed the Canada-Korea Free Trade Agreement (“CKFTA”). From an immigration perspective, there are a number of similarities to the NAFTA provisions; however there are some distinct differences. As a visa exempt country, CKFTA provides an expedited way for South Koreans to obtain authorization to work in Canada.

The CKFTA supports admission to Canada of individuals who are engaging in permissible business activities. The list of permissible business activities is similar to NAFTA; however, the after-sales service provision under the CKFTA also includes after-lease services. After-lease services are aimed towards intellectual property and the exchange of science and technology between the two countries.

Another significant difference between NAFTA and CKFTA is the difference in professionals. CKFTA has more of a focus on science and technology. Professionals under CKFTA are broken into two different groups, specifically independent professionals and contract service suppliers. Contract Service suppliers includes employees of an enterprise that are engaged in the supply of a contracted service as an employee of an enterprise. A contract service provider is designated professional who is seeking a work permit to perform a pre-arranged services contract. Independent professionals are self-employed professionals who are seeking to perform services as part of a contract granted by an enterprise or a service consumer.

A number of professionals from NAFTA are not included under CKFTA, lawyers, however different professionals have are included under CKFTA. Many of the additions are in the scientific fields, specifically, Biologists, Geoscientists and Physical Scientists. The added professionals are reflective of the fact that the FTA is focused on creating trade between South Korea and Canada in the fields of science and technology.

The third significant difference between NAFTA and CKFTA is the intra-company transferee category. This category creates a category of a management trainee under professional development. This category allows employees who have a Bachelor’s degree or a professional license to obtain an LMIA exempt work permit. The purpose of this category is to broaden the employee’s knowledge of the company in preparation for a senior leadership position within the company. This category appears to be different from the specialised knowledge or managerial categories as it does not appear that the employee is required to have specialised knowledge or be in a managerial role; rather they need to be a management-in-training. This category is arguably broad and could create opportunities for younger employees to take up an assignment in Canada.

**IMP Compliance Updates**

In the last few months, CIC has implemented some new initiatives which are designed to improve the integrity of the Immigration Mobility Program (“IMP”) and support a more robust compliance scheme for LMIA exempt work permits. IMP was created following the overhaul of the temporary foreign worker program in June 2014 and encompasses LMIA-exempt work permit categories, such as intra-company transferees.

Effective February 21, 2015, CIC introduced a new process and fees for most employer specific LMIA exempt categories. This process will allow CIC to have more oversight over employers and will allow CIC to monitor employers’ use of the program and compliance with the same. The new measures are designed to ensure the genuineness of the offer of employment. The new requirements require the completion of an additional form and the payment of a $230.00 employer compliance fee. The form and fee must be submitted prior to applying for a Canadian work permit. The new form is intended to replace the job offer letter and includes four (4) undertakings from the employer with respect to compliance. The new system is designed to ensure that employers, irrespective of whether they are hiring LMIA exempt foreign nationals or not, will face the same level of scrutiny with respect to compliance. Non-compliant employers could face an administrative monetary penalty, a ban from hiring foreign workers and in serious cases, criminal investigation and prosecution. As an employer, you do not want to be tomorrow’s headline. Ensure that you are being compliant with the program and seek advice about retaining the appropriate documents for a compliance audit.

**Proposed Compliance Measures**

Following reforms to the Temporary Foreign Worker Program introduced in June 2014, the Government of Canada published a discussion paper providing an overview of proposed employer compliance measures. Until these proposed measures come into effect, the Canadian government felt that existing measures - i.e., a 2-year ban from hiring a temporary foreign worker (“TFW”), being publicly named an ineligible employer, and the revocation of LMIA and work permits associated with the employer - were either too severe or not severe enough in some circumstances, and thus
disproportionate. Moreover, the Canadian government felt the current measures did not adequately address the issue that some employers gain a financial benefit by failing to comply, such as where a TFW is underpaid, thus giving the employer an unfair advantage over its competitors.

The Canadian government will introduce a range of bans from one, two, five, and ten years, and will introduce administrative monetary penalties, or AMPs, ranging from $500 to $100,000 per incident. Bans and AMPs will be imposed depending on the type of violation, the gravity of the violation, the employer's history of violations, and the size of the employer (i.e., individual, small business, or large corporation).

The reception to these proposed measures have generally been that of concern. On the one hand, a more responsive compliance framework was welcome. However, the proposed measures will hold employers of temporary foreign workers to an absolute liability standard, offering no means of defending or justifying a violation. Moreover, critics have pointed out that the bans and AMPs are more severe when put beside comparable Canadian regulatory regimes such as those under the Canada Pension Plan, Employment Insurance, Old Age Security, and the National Energy Board, which also have AMPs, but where exemptions may be available, or the maximum amounts are well below $100,000 per violation.

As compliance audits under the current measures are increasing, and as the implementation of the new measures is expected soon, it is incumbent upon employers of TFWs to review their current policies with a view to creating an or auditing their immigration compliance program. An effective program prevents and detects violations, monitors compliance, immediately responds to any anticipated or detected violations, and continuously improves on policies, processes and mechanisms in place for the management of its TFWs. Moreover, having an effective program offers an employer the benefit of a lower AMP and/or ban duration.

Conclusion

Over the last year we have seen some significant changes to the Canadian temporary foreign worker program. As the program becomes more difficult to navigate, we would recommend starting the discussions around workforce planning early, especially as it relates to the long-term retention of temporary foreign workers. Further, as we continue to see increased scrutiny and focus on compliance, it is important that an employer's immigration records are accurate, complete and up to date. These discussions are important to have within your organization so that the risks of non-compliance are understood.