

Work Permits

When They Are Needed, How to Get One & How Long It Takes

By: R. Reis Pagtakhan

Aikins Law

p: 957-4640

f: 957-4278

e: rrp@aikins.com

and

Janice Harper

New Flyer Industries

p: 224-6412

f: 224-6620

e: Janice_Harper@newflyer.com

About the Authors

Reis Pagtakhan

Reis Pagtakhan is a lawyer with Aikins Law and practices primarily in the area of immigration and business law. His extensive experience includes assisting businesses obtain temporary entry to Canada and permanent residency for their executives, employees and contractors from all over the world.

Reis has lectured on and written papers on immigration law for the Law Society of Manitoba, the Manitoba Bar Association and the Community Legal Education Association of Manitoba. He has presented position papers before the Minister of Citizenship and Immigration and Immigration Department officials and has written articles on the law and legal issues for trade and industry publications as well as local ethnic newspapers in Winnipeg, Edmonton and Vancouver. He is currently a director of the Immigrant Centre Manitoba.

Reis received his Bachelor of Laws and Bachelor of Arts (Hons.) from the University of Manitoba.

Janice Harper

Janice Harper, VP, Human Resources of New Flyer Industries, joined New Flyer in 1998 as a Human Resources Coordinator. She is responsible for the People Function across the organization including sourcing and selection of talent, operational efficiency and effectiveness, staff relations/practices and employee communication. Her team is also responsible for safety, health, wellness and environmental, and organizational training and development. Prior to New Flyer, Janice spent ten years in recruitment/selection, disability management and industrial relations for Westfair Foods Ltd. in the Manitoba and NW Ontario Region.

Janice holds a Diploma in Creative Communications from Red River Community College and a Certificate in Human Resources Management from the University of Winnipeg. She is a Certified Human Resources Professional (CHRP), is pursuing the Human Resources Compensation Committee designation from the Director's College at McMaster University, and is currently completing her BA in Communications at the University of Winnipeg.

Table of Contents

A.	Introduction.....	1
B.	The Need for Advanced Planning	1
C.	How can one determine the immigration status a Foreign National will need to work in Canada?.....	1
1.	What will the Foreign National’s job duties and job title be in Canada?	2
2.	What is the National Occupational Classification?	2
D.	When is “work” really “work”?	2
E.	Does the Foreign National require a Work Permit?	3
F.	If a Work Permit is required, does the Foreign National need a Labour Market Opinion?.....	3
G.	If an LMO is needed, how do I go about obtaining one?	4
3.	How do I register with Employment Standards?	4
4.	What goes on in the Labour Market Opinion process?	5
H.	The time lines.....	6
1.	What is the relevance of a Foreign National’s country of citizenship to processing times?	6
2.	What is the relevance of a Foreign National’s country of permanent residency to processing times?.....	7

A. Introduction

Immigration issues arise **every time** an individual enters Canada for work. When the individual entering Canada is a Foreign National (not a Canadian citizen or a permanent resident), the ability of the Foreign National to work in Canada will depend on the application of a complex set of rules and regulations.

B. The Need for Advanced Planning

Before any Foreign National enters Canada to work, it is necessary to plan in advance. Advanced planning can avoid unpleasant immigration surprises including:

1. Delays in entering Canada;
2. Embarrassing refusals of entry for company executives, employees and contractors; and
3. Removal from Canada after entry.

These “surprises” can cause significant embarrassment. In certain circumstances, these problems can open the employer up to legal liabilities.

Case Study: The Need for Advanced Planning

Subsequent to the closing of an asset purchase transaction, a manufacturer realized that it needed to bring into Canada a number of U.S. employees who were working with the selling company. By the time the company realized this, some of the U.S. workers had already arrived in Canada without the relevant permits to work in Canada.

Solution:

In this case, it was determined that the Foreign Nationals could enter Canada pursuant to an expedited processing procedure. However, since the workers were needed in Canada immediately and since Work Permits cannot generally be issued by an office in Canada, the employees had to return to the Canada-U.S. border to make an application. Had this immigration issue been identified earlier, employees’ entry could have been facilitated earlier and they would not have had to go back to border for processing.

C. How can one determine the immigration status a Foreign National will need to work in Canada?

In order to determine the immigration status a Foreign National needs to work in Canada, the Foreign National’s job duties and job title *in Canada* must be identified. Citizenship and Immigration Canada only concerns itself with work a Foreign National will do while *physically present* in Canada. Work done outside of Canada is of no concern to them.

For instance, if a person works as an engineer in the U.S. but is entering Canada to work as a senior executive, it will be the senior executive position that will need to be analyzed.

1. What will the Foreign National’s job duties and job title be in Canada?

The first place to start is the employer’s job description for the position in Canada. Once the job duties and job title are identified, these need to be “translated” them into language that Citizenship and Immigration Canada will understand. This brings us to the National Occupational Classification.

2. What is the National Occupational Classification?

The National Occupational Classification (or NOC) is a publication issued by Human Resources and Skills Development Canada that sets out job descriptions for virtually all occupations in Canada. Job descriptions in the NOC are somewhat generic and are often not identical to an employer’s internal job description.

Since job descriptions in the NOC may differ from internal company job descriptions, it is necessary to compare these with a number of NOC job descriptions (or NOC Codes) to find the NOC Code which is the most analogous. This is necessary in order to convince Citizenship and Immigration Canada or the Canada Border Services Agency that the employee falls within a certain category.

D. When is “work” really “work”?

Once a Foreign National’s job duties in Canada are determined, the next question is whether the Foreign National will be engaging in “work”. Under section 2 of *the Immigration and Refugee Protection Regulations* SOR /2002-227 (“IRP Reg.”), “work” means:

“an activity for which wages are paid or commission is earned, or that is in direct competition with the activities of Canadian citizens or permanent residents in the Canadian labour market.”

It is important to note that a Foreign National may be engaging in “work” even if no remuneration is received if the activity is in “direct competition” with individuals in the Canadian labour market.

Case Study: Working without remuneration

An engineering firm identified a Foreign National they wanted to hire as an engineer. Because of the nature of the Foreign National’s immigration issues, it would take a number of weeks to obtain a work permit to allow the Foreign National to legally work in Canada.

The engineering firm suggested that the Foreign National, who was in Canada as a visitor, “volunteer” for them while the Work Permit was being processed. The job that the Foreign National was going to “volunteer” for was as an engineer – the same position that he was going to be hired for.

Solution:

Because engineers are normally paid, the firm was advised NOT to allow the Foreign National to volunteer since he would be in “direct competition” with persons in the Canadian labour market. The Foreign National did not volunteer and did not work until after getting a Work Permit.

If a Foreign National will be “working”, the next question is: Does he/she need a Work Permit?

E. Does the Foreign National require a Work Permit?

If a Foreign National will be engaging in “work”, it is likely that the Foreign National will need written authorization to work in Canada. This written authorization is known as a Work Permit¹.

While most Foreign Nationals working in Canada require a Work Permit, Citizenship and Immigration Canada has a list of occupations which are exempt from the necessity to obtain a Work Permit². This list includes (but is not limited to) U.S. and Mexican after-sales service personnel³, certain performing artists⁴, certain guest speakers⁵, and intra-company trainees and trainers⁶.

Case Study: After Sales-Service

A manufacturer needed repair work done on industrial equipment that they purchased from a U.S. company. The equipment was still under warranty and the warranty set out that employees of the U.S. manufacturer would carry out repair duties.

Solution:

Under the North American Free Trade Agreement or NAFTA, U.S. citizens coming to Canada to do warranty work on industrial equipment purchased outside of Canada can enter to carry out that work as long as the work is done within the warranty period or an extension same. The workers entered Canada and performed the repairs.

F. If a Work Permit is required, does the Foreign National need a Labour Market Opinion?

If a Work Permit is needed, chances are that the employer will need to obtain a Labour Market Opinion or LMO. A LMO is an opinion issued by Human Resources and Skills Development Canada through their service delivery arm, Service Canada, which allows an employer to hire a Foreign National.

¹ S. 196 of the IRP Reg.

² SS. 186 and 187 of the IRP Reg.

³ North American Free Trade Agreement, Appendix 1603.A.1.

⁴ S.186(g) of the IRP Reg.

⁵ S, 186(j) of the IRP Reg.

⁶ S. 187(2)(b) of the IRP Reg.

There are a number of occupations that do not need LMOs. The list of LMO exempt occupations include (but is not limited to) certain professionals under trade treaties (such as NAFTA)⁷, intra-company transferees, emergency repair personal and persons that bring a significant benefit to Canada⁸.

Case Study: The NAFTA Engineer

An engineering firm was looking to recruit a number of U.S. engineers for projects in Canada. Initially, firm's research led them to the conclusion that they needed to go through the LMO process first. At that time, the processing of LMOs were taking months.

The engineering firm was advised that LMOs are typically done on a "first in, first out" basis and, as a result, could not be sped up. When asked why a Work Permit under the NAFTA professional category of engineer was not considered, the engineering firm indicated they were not aware of this process.

Solution:

After further discussion, it was determined that all of the engineers qualified under the NAFTA. Because NAFTA professionals do not require LMOs and can apply for work permit upon entry to Canada, the engineering firm was able to avoid waiting months in favour of same day processing at the airport.

G. If an LMO is needed, how do I go about obtaining one?

In Manitoba, obtaining an LMO requires two separate applications be filed. The first step is to file an application with Employment Standards for permission to hire a foreign worker. The second step is to file an application with Service Canada for a Labour Market Opinion.

3. How do I register with Employment Standards?

Registration with Employment Standards is under the *Worker Recruitment and Protection Act, S.M. 2008, c.23* ("WRAPA"). While registration is relatively straight forward, the implications of filing such an application can be serious. Under WRAPA, the employer undertakes to ensure the following:

1. That the employer will not, directly or indirectly, recover from the Foreign National any costs it incurred in recruiting the Foreign National⁹.
2. That it will provide Employment Standards with information set out in the legislation¹⁰.

⁷ S.204 of the IRP Reg.

⁸ S. 205 of the IRP Reg.

⁹ S. 16(1) of the WRAPA

¹⁰ Worker Recruitment and Protection Regulation s.14(1)

3. That the Foreign National will not be charged a fee, either directly or indirectly, for finding employment with the employer. This includes any and all charges a third party (such as a recruiter) may charge to the Foreign Worker¹¹.
4. That it will not reduce the Foreign National's wages, or reduce or eliminate any other benefit or term or condition of employment that the employer undertakes to provide as a result of participating in the recruitment of a foreign worker¹².

Once approval is received from Employment Standards, an application for an LMO can be filed.

Case Study: Finding a NOC description that matches the actual job duties

We were requested to assist a client in obtaining a work permit for an employee whose LMO was refused because the client was not paying the "prevailing wage" for the occupation. Under the law, in order to hire a Foreign National pursuant to a LMO, an employer must pay the "prevailing wage" – a wage at or above the average for the position in the local area.

The client came to us and indicated that they could not pay the rate that Service Canada was requesting because of their collective agreement and asked for our help.

Solution:

Immediately upon being retained, we asked the client to provide us with the detailed job description they initially submitted. When we reviewed the job description against possible NOC codes, we came up with two possible NOC codes then asked the client for comment.

The client confirmed that they had both types of positions within their company but the Foreign National would be working in the lower skilled NOC code. As a result, he was paid less.

We reviewed the client's application to Employment Standards and found that the client did not include a NOC code in their submission. The province of Manitoba chose the higher skilled NOC code in their certificate and when the certificate was submitted to Service Canada, this triggered Service Canada to assess the wages at the higher skilled occupation. We resubmitted an application to the province with the correct NOC code. This resulted in a lower prevailing wage determination made by Service Canada. The LMO was eventually approved.

4. What goes on in the Labour Market Opinion process?

Once Employment Standards approves the application, a LMO application can be filed. The job description determines the minimum recruiting steps employers must undertake before applying¹³.

¹¹ S. 15(4) of the WRAPA

¹² S. 17 of the WRAPA

In order to be successful, the employer will have to establish (amongst other things) that it is not an ineligible employer, the job offer and company is genuine, the employment of the Foreign National is likely to have neutral or positive effect on the labour market, the employer has complied with all laws regarding agreements with certain previous foreign workers, and the Foreign National is not prohibited from obtaining a work permit due to accumulating too much previous work in Canada¹⁴.

H. The time lines

Over the past few years, the time lines for obtaining approval at Employment Standards and Service Canada has been measured in weeks. Currently, the process in Manitoba takes about 4 to 7 weeks.

Where processing times differ is in the Work Permit process. Depending on a Foreign National's citizenship, residency, and job in Canada, processing times can vary from minutes to over 3 years.

1. What is the relevance of a Foreign National's country of citizenship to processing times?

Citizens from most industrialized nations (e.g., the USA, Australia, New Zealand, Japan, South Korea, countries of the E.U.) do not require Temporary Resident Visas (formerly known as Visitor Visas) before entering Canada¹⁵. As a result, these citizens can travel to Canada with only a passport. In many cases, citizens of these countries can apply for and obtain Work Permits upon arrival in Canada¹⁶. The processing times for work permits upon arrival is measured in minutes.

In contrast, citizens of many non-E.U. as well as citizens from many developing nations and Middle Eastern countries typically require Temporary Resident Visas before coming to Canada. If a Foreign National needs a Temporary Resident Visa to enter Canada, that person must apply for and obtain a Temporary Resident Visa along with a Work Visa before traveling to Canada¹⁷. The process to obtain Temporary Resident Visas differs amongst Canadian offices. Some offices provide same day in-person service, some provide mail-in service, some require appointments, and others do not issue Temporary Resident Visas at all.

As of February 22, 2011, most posts in the Americas processed Work Permit applications in 1 to 2 months. Currently, the worst post in the world is the Canadian Consulate in Chandigarh, India which

¹³ Government of Canada. *Temporary Foreign Worker Program Minimum Advertising Requirements*, online: Human Resources and Skills Development Canada

www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/communications/advertrecruitment.shtml

¹⁴ SS. 200, 203 to 208 of the IRP Reg.

¹⁵ S. 190 of the IRP Reg.

¹⁶ S.198 of the IRP Reg.

¹⁷ SS. 197-199 of the IRP Reg.

takes 3 or more years for some applications¹⁸. As a result, before applying you should consult the relevant Canadian Mission to determine their timing and procedures.

Case Study: The Significance of the “Citizenship Question” in processing times and options

A U.S. company wanted to have its employees enter Canada for a variety of business purposes. While the individuals seeking entry to Canada had similar skill sets, the individuals were citizens of Japan, India, and The People’s Republic of China. The issue was how to get these employees into Canada in the shortest possible time frame.

Solution:

Because of the nature of the client’s business, Work Permits were not necessary for the employees. However, because Temporary Resident Visas are necessary for citizens of India and The People’s Republic of China and not for citizens or Japan, the recommendation was that the Japanese personnel enter Canada first for matters needing immediate attention.

2. What is the relevance of a Foreign National’s country of permanent residency to processing times?

The importance of this question is that it will normally identify:

1. whether a Temporary Resident Visa is needed for a specific individual; and
2. whether an immigration medical must be conducted before admission will be granted to Canada.

Usually, a citizenship is determinative of whether a Foreign National needs a Temporary Resident Visa to enter Canada. However, there is one major exception. Permanent residents of the United States do not need Temporary Resident Visas to enter Canada no matter what their citizenship¹⁹.

As to whether an immigration medical is needed, Citizenship and Immigration Canada places certain countries on a “Designated Country/Territory List” to determine whether medicals are needed for residents of that country prior to entry²⁰. If a Foreign National is seeking entry to Canada for more than six months and has resided or sojourned, at any time during the one year period immediately preceding the date of seeking entry, for six consecutive months, in a designated country/territory, then he or she is required to undergo an immigration medical examination²¹. In addition, Foreign Nationals seeking to

¹⁸ Government of Canada. *Processing times for temporary work permit applications processed by visa offices outside of Canada*, online: Citizenship and Immigration Canada www.cic.gc.ca/english/information/times/temp/workers.asp

¹⁹ S.190(1)(c) of the IRP Reg.

²⁰ Government of Canada. *Designated country/territory list*, online: Citizenship and Immigration Canada www.cic.gc.ca/english/information/medical/dcl.asp

²¹ S. 30(1)(c) of the IRP Reg.

enter Canada to take up positions in which the protection of public health is essential (i.e. health care workers, certain individuals working with children, certain agricultural workers), may also need to pass a medical examination²².

If your employee needs to undergo an immigration medical, you should be prepared for a delay of a number of weeks or months before your employee would be granted entry to Canada. The reason for this is that a medical exam must first be conducted on the individual and the results of the exam must be analyzed. Typically, this involves setting up an appointment with a Citizenship and Immigration Canada accredited physician in the foreign country (a.k.a. Designated Medical Practitioner) and then awaiting the analysis of the results.

Case Study: When a needed immigration medical is not needed

A multi-national firm wanted to obtain a Work Permit for one of their foreign executives. The executive was needed in Canada immediately and was a citizen of a country whose citizens do not require Temporary Resident Visas.

At first, this matter seemed straightforward; however, for the past 3 years, the executive lived in a country on the Designated Country/Territory List. While the company wanted the executive to be in Canada for three years, the executive, while not opposed to the three years, wanted to “try Canada on for size” before making the three year commitment. At this stage, no contract was signed.

Solution:

Since the executive had not come to a firm conclusion as to the length of his service in Canada, applying for a 3 year Work Permit was not appropriate. As a result, we applied for a Work Permit for a period of six months to allow the company and executive to analyze their situation.

Since the executive was seeking entry to Canada for no more than 6 months, he was not required to undergo an immigration medical. Because he was a citizen of a country which Canada permits port of entry processing, he could enter Canada immediately. As a result, our problem was solved.

After obtaining the Work Permit, the company was advised that should the executive seek to remain in Canada past the initial six months, an Application for an Extension of the Work Permit would have to be filed with Citizenship and Immigration Canada.

²² S. 30(1)(b) of the IRP Reg.