

ImmQuest

"Qui bene interrogat bene docet" "He who questions well teaches well"

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Challenges of Intercompany Transfer Policy

Cobus Kriek

Immigration and Refugee Protection Regulation indicates that foreign nationals can be transferred to Canada and obtain a work permit to work in Canada without a positive Labour Market Opinion from Service Canada, if these foreign workers can "create or maintain significant social, cultural or economic benefits or opportunities for Canadian citizens or permanent residents".

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Challenges of Intercompany Transfer Policy

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In paragraph 5.29 of Chapter FW of the Immigration Manual significant economic benefit is mentioned as a separate and distinct benefit from social and cultural benefits. In Paragraph 5.30 it is mentioned that “**Examples of indicators of 'significant benefit' include: general economic stimulus (such as job creation, development in a regional or remote setting or expansion of export markets for Canadian products and services) and advancement of Canadian industry (such as technological development, product or service innovation or differentiation, or opportunities for improving the skills of Canadians)**”. In paragraph 5.31 in Chapter FW 1 of the Immigration Manual it is mentioned that this policy was created for companies to “**improving the management effectiveness, expanding Canadian exports, and enhancing the competitiveness of Canadian entities in overseas markets.**” This implies that paragraph 5.30 and 5.31 is the definition of significant economic benefit, which is also defined as “**providing an important or notable contribution to the Canadian economy**”.

In **Section A and E** of paragraph 5.31 of the Immigration Manual also describes the general requirements of the foreign workers that must be met in order for a work permit to be issued under this Regulation. Some of these requirements include the following: The foreign worker must have worked at the foreign branch subsidiary for at least one year in the preceding three years in a similar position and are taking a position in an Executive, Senior Managerial or Specialized Knowledge Worker and the transfer must be for a temporary period only, etcetera. In **Section F** of paragraph 5.31 there is a slight change and it is indicated that the foreign worker “must be working in a similar position” which implies that the person must currently in a “similar position,” not just working in one of these positions for one year in the preceding three years.

There are challenges with this policy which could be grouped into four types:

Ottawa and merely indicated that this type of demand is within the right of the visa officer, referring to their duty to ensure that the foreign workers will comply to the conditions of the Act and the Regulations. In the April 2008 edition of Lexbase, it was written that Mr. Norm Hopkins (the Regional Policy Advisor of CIC in BC/Yukon) wrote the following in January 2007: “We should remember that provisions such as those for Intra-Co transferees **have been put in place to serve a facilitative function - they are not measures that are in place to exercise “control” where there is no suggestion of an attempt at circumvention or other mala fide intent.**” Mr. Hopkins, I believe, has the correct understanding, attitude and approach on this subject.

The **third challenge** is a rule/requirement of “similar position” that limits the potential of the intra company transferee policy and that is used to exert unnecessary control by visa officers. In addition to the conflicting and confusing requirement of being in a similar position for one year in the preceding three years (Section A and E of par 5.31) and the requirement of being in a similar position at present (which seem to be the way Section F of paragraph 5.31 is written), the requirement of a “similar position” is an enigma. CIC has confirmed that this requirement is based on the rules of the NAFTA intercompany transferee policy - what most people suspected. It should be mentioned, that generally speaking the concept of standardization of policy is a good concept and has merit. The “similar position” which is also listed in the Immigration Manual has the objective is to ensure that the foreign worker coming to Canada (being an Executive, Senior manager or Specialized Knowledge Worker) is actually coming to Canada to utilize special abilities associated with one of these types of positions in Canada after the arrival. Therefore, the logic of the rules in the Immigration Manual is that the “similar position” requirement is a safeguard to ensure that these special skills exist and will be utilized after arrival. At the first glance, this makes a lot of sense.

However the practical reality is that this requirement does not work in modern multinational organizations and in the modern economy of the 21st century. This is best illustrated with two examples:

- A Research and Development (R&D) Engineer that is working for a German automotive manufacturer, has played a leading role in the development of a thermoplastic wheel

cylinder as a replacement of the traditional steel wheel cylinder used in braking systems installed in the wheels of motor vehicles.. After developing and perfecting the product the manufacturer decides to establish a factory in Ontario. The R&D Engineer is chosen to become the plant manager as he is the expert with specialized knowledge in the product and recently completed a six months in-house course in the company’s manufacturing methodology. The visa officer will deny the application as the positions are not similar, even though specialized and the very advanced knowledge forms the foundation of the transfer. It would be easy to demonstrate how the appointment of this R&D Engineer will contribute to “significant economic” benefit.

- A qualified Quantity Surveyor (Estimator or Building Costing Expert) is also a qualified Insurance Loss Adjuster was promoted to Branch Manager of a South African Insurance Loss Adjusting branch from Cape Town, South Africa, more than three years ago. Due to the operational methodology and the small size of the operations it is expected of a branch manager in South Africa to work as insurance loss adjusters in addition to managing the branch’s loss adjusting and general operational matters. Employees from around the world approach this specific Branch Manager on technical related issues where insurance claims are made for damages to large buildings. The Canadian head office requires the branch manager to be transferred to Canada due to his/her specialized knowledge of loss adjusting of claims of damage to large buildings due to natural or man-made disasters such as terrorism. Essentially he/she would move from Branch Manager to Specialist Insurance Lost Adjuster (some would consider this a “downward” transfer. Under the existing policy this would not be possible, irrespective of the economic contribution of the foreign worker. In this case a letter about the specialized knowledge of the applicant was provided by one of the ex-Presidents of the Canadian Loss Adjuster Association – as an expert opinion. The visa officer initially denied the work permit as the positions where not “similar” although the applicant had very specialized and advanced knowledge which formed the foundation of the transfer.

It is suggested that a good immigration law practitioner would say: “Find another way such as a LMO” etcetera.

Degree in Financial Management working in Canada as a specialized knowledge worker in the financial analyses of after market machinery parts of very specialized earth moving equipment. After being here for more than a year the multinational employer wanted to promote the foreign worker (specialized knowledge worker) to a newly established management position in charge of these type of financial analysts and associated positions of technical sales specialists as she was the most suitable person due to (inter alia) her specialized knowledge of the subject and her double management degrees in this area of financial analyses. An extension (renewal) of her work permit based on inter company transferee policy would not be possible as she did not work as a "Senior Manager" in the overseas branch before coming to Canada.

It would be far more sensible to require that the Canadian Employer **must demonstrate how this specialized and advanced knowledge (or management skills) will provide a significant economic**. The requirement and need for a "similar position" is not as sensible as one might believe. It provides a false sense of security and does not guarantee that the foreign worker will contribute to "significant economic benefit". It is actually counter-productive towards the actual intent of the policy.

The **fourth challenge** is that the term "significant economic benefit" is not well defined. For this reason and the fact that prominence is given to issues like "similar position", the contribution to "significant economic benefit" is not the focus of the test by visa officers. "Significant economic benefit" should be defined in-depth and should include more than the existing limited explanation which was mentioned in the introduction.

Ms. Althea Williams (Manager of Foreign Worker Policy of HRSDC Foreign Workers Section in Ottawa) wrote a good explanation of "significant economic benefit" in the context of self employed (C10 & C11 Exempt codes) and this was captured in Lexbase (July/Aug 2008, Volume 19, Issue 7/8). She mentioned six factors in her discussion of significant economic benefit of which five factors will be mentioned here: "There are several indicators of economic benefits that can result from the work of a foreign national which would lead an officer to conclude that the test for significant benefit could be met. The following list provides some indicators of economic benefit that could apply to situations that are

purely economic. This list is not intended to be all inclusive but merely to provide examples of indicators that could be meritorious. Other factors may have compelling merit despite the fact that they are not listed. Depending upon the nature of and the circumstances surrounding a particular situation some of the factors enumerated below could be given more weight than others. Some may not apply at all.

1. General Economic Stimulus: an assessment of the direct impact of a foreign national's employment on the general economic stimulus in **Canada** which can be taken to mean one or more of the following: **a)** job creation or retention at competitive wage rates and working conditions; **b)** facilitation of sustainable economic development in a regional or remote setting; **c)** secondary benefit accruing to other related industries such as contracts for goods and services granted to suppliers; **d)** projects or initiatives that promote or contribute to the long-term sustainable growth and economic stability of Canada or a community in Canada; **e)** prospects for improving the productivity of Canadians; **f)** the degree to which export markets for Canadian products and services will be expanded; **g)** enhanced infrastructure projects such as the expansion of an existing business or the establishment of a new division; **h)** prospects for future business opportunities for Canada such as the investment in a relatively small business with a view to pursuing additional business ventures; **i)** increased tax revenue. (2nd factor is removed);

3. Advancement of Canadian Industry: an assessment of the direct impact of a foreign national's employment on: **a)** technological development; **b)** product or service innovation; **c)** product or service differentiation; **d)** opportunities for improving the skills of Canadians.

4. Competition within Canada: an assessment of the direct impact of a foreign national's employment on competition within any industry or sector in Canada;

5. Competition in World Markets: an assessment of the direct impact of a foreign national's employment on Canada's ability to compete in world markets or raise the profile of Canada in a particular sector.

6. Savings to Tax Payers: an assessment of financial savings to municipal, provincial, or federal government departments, such as in cases involving training where a government department would be faced with travel expenses in sending employees to a foreign locale

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