

Immquest

“Qui bene interrogat bene docet” “He who questions well teaches well”

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Upcoming issues of Immquest will include updates and analysis of:

- Changes to the Foreign Worker Program
- Canadian Pardons
- The Impact of the Short-Form Census on Immigration Statistics Live-in Caregiver Program

The Labour Shortage Factor in LMO's

Cobus Kriek

Existing Sources of Authority and Comments

Pursuant to section 203(3) of the *Immigration and Refugee Protection Regulations*, the Department of Human Resources Development must provide an opinion that *shall* be based on 6 factors before a labour market opinion (LMO) is issued. One of these six factors is whether the employment of the foreign national is likely to fill a **labour shortage** [Reg 203 (3) (c)].

The challenge that immigration law practitioners face is that when an officer provides a negative LMO based on the “reason” that there is “no demonstrable shortage,” the decision is for the most part not accompanied by well-founded statistics. In this type of case, the claim to “no demonstrable shortage” by Service Canada is unfounded with no statistical basis.

No publically-available definition or national directive are available that define the term “labour shortage” with HRSDC Foreign Worker Section of Service Canada.

The Auditor General wrote the following in Chapter 2 of her Fall 2009 report¹ that was presented to Parliament (emphasis added):

2.99 However, we found that directives on how to assess whether employers meet some or all of the factors outlined in the Regulations are not clear or are incomplete; interpretations vary from one regional office to another and even within the same office. For example, directives on determining prevailing wages do not provide specific guidance and are not well understood by HRSDC officers. Furthermore, each regional office uses labour

¹ See online: Office of the Auditor General of Canada <http://www.oag-bvg.gc.ca/internet/English/parl_oag_200911_02_e_33203.html#hd5m>. Last visited on 19 September 2010.

market information differently to assess and determine prevailing wages. Also, until January 2009, directives on how to assess whether employers have made reasonable efforts to advertise job offers to Canadian citizens or permanent residents prior to requesting temporary foreign workers were not clear and did not provide criteria to perform such assessments. During the course of our audit, HRSDC has issued revised instructions aimed at clarifying employer requirements and providing clear and consistent evaluation criteria. We were also told by HRSDC officers that formal training was limited to an introductory course on how to assess applications for labour market opinions; it did not include reviews or updates of procedures. HRSDC officials informed us that from March 2009 to May 2009, using updated training material, national headquarters staff conducted training sessions in the regions.

2.100 Many of the files we reviewed lacked adequate documentation to support the opinion. There is no formal quality assurance system to ensure that opinions are consistent and compliant with the Act and Regulations. Toward the end of our audit, HRSDC initiated a project to develop a national quality assurance framework aimed at ensuring greater consistency of decisions across Canada.

This lack of detailed directives on developing LMO's has been mentioned in the ImmQuest Newsletter since December of 2005 (nearly 5 years ago). It seems as if the lack of directives also applies to the term "labour shortage" especially when this is used for a motivation in a negative LMO.

The excuse for not providing detailed directives was that all regions of Service Canada are so different it does not require standardized policy and interpretation of policy. Finally, the Auditor General agreed that this lack of policy regarding inconsistent interpretation is unacceptable. Standardized policy and implementation of this standard policy is required for procedural fairness.

During 2010, a request to leave to Federal Court was submitted in response to a decision by a Service Canada officer that claimed "no demonstrable shortage" exists, as a reason for negative LMO. The Department of Justice offered that a different officer would make a determination. Until this redetermination has been made by a different officer, that Federal Court Docket number cannot be published. Council for the Department of Justice obviously

realised that there is no sufficient reason to withstand the test in Federal Court.

Tip: Based on the lack of formal definitions of what a demonstrable shortage is within the directives of Service Canada, the lack of well-developed reasons for decisions and possible lack of sufficient facts to support denials, it is believed that a leave to appeal to Federal Court would be successful in many cases where "no demonstrable shortage" is used as a "reason" for a negative LMO. Practitioners are also advised to conduct detailed research on labour shortages and present well-researched findings in the LMO request as it will assist the decision maker to make an informed decision.

Given the uncertainties of the definition of "labour shortage", as well as the different possible interpretations in this policy vacuum, the objective of this article is to provide practical advice on how to research the term "labour shortage".

Geographical Nature of a Labour Shortage

Regulation 203 and the Directives of Service Canada do not mention the geographical area with regards to the shortage in the labour supply. It is silent as to whether it is

- the Employment Insurance district where the employer is located
- the province where the employer is located
- the whole of Canada

Therefore, the term "labour shortage" could imply a local (EI district), province-wide or country-wide shortage of labour within a specific skill set.

Tips: The immigration practitioner should obtain as much information as possible (local, provincial and national) about specific shortages of a specific skill set and use that skilfully in the request for a LMO. It seems as if some Service Canada officers consider the local or regional trends to be very important as many officers demand regional advertising (advertising in the newspapers of where the job is located). Therefore, research about labour shortages should be focused on the immediate vicinity of the location of the vacant job. However, provincial shortages could also be beneficial.

Employment Insurance Beneficiaries

The number of EI claimants in a specific NOC code might be an indicator of a certain degree of labour shortage or oversupply of skills in a specific NOC. At first glance, the hypothesis might be that a high number of EI beneficiaries might indicate that there is not a shortage in a specific NOC code. There has been at least one Service Canada officer that has said there are too many EI beneficiaries in a specific town and provided negative opinion as a result. However, if an officer would rely on EI figures, it could result in wrong conclusions. Why? – the answer lies with the flexible skills and porous nature of the labour market and the motivation of people claiming EI.

The internal directives of Service Canada are also silent about flexible skills. In the publication, *Ontario Guide to Using Labour Market Information*², the following is mentioned:

The boundaries between individual labour markets are, at times, fairly porous. This means that workers may flow from one labour market to another. Continuing with the examples from above, it could be that a truck driver returns to school in order to become a teacher and thus forms part of the labour supply in the teaching profession. Or, a real estate agent abandons a local labour market search and instead moves across the country in order to secure employment. The amount of mobility existing across labour markets depends upon such factors as: the degree of similarities between occupations (in terms of job requirements and requisite skills); the costs of job search; the geographic disparities between regions; and demographic characteristics that may affect one's decision to move a significant distance (e.g., the presence of children, a working spouse, etc.).

A hypothetical example can be used to illustrate the dangers in using the number of EI beneficiaries, also illuminating the porous nature of labour markets: Joe is a warehouse worker and lost his job and is claiming EI. This means that Joe is contributing to a higher unemployment rate in that NOC code. If there is a high unemployment rate in that NOC code, logic would indicate it could result in a negative LMO as there are too many job seekers in the NOC Code. However, Joe might not want to go back to being a warehouse worker and Joe might want to become a truck driver. Therefore, Joe is continuing to claim EI benefits

until such time that he could qualify for a retraining plan offered by Service Canada. Maybe Joe is a recent father and is just using this opportunity to get benefits to stay with the baby, or perhaps the job is too far from Joe's residence which might prompt him to move and would mean that the children would be disrupted from their school routine. It is assumed that a high unemployment rate (based on EI statistics) will result in a low job vacancy rate. However, this inverse relationship might not always exist as explained. The possible assumption that a high unemployment rate equates to "no demonstrable shortage" is therefore flawed as it could be assumed by the opinion maker that all EI claimants are perfectly ethical, logical and rational by taking the first available job in the NOC Code for which they claimed benefits. These practical examples illustrate that such logic is not always correct.

Tip: Obtain detailed statistics of the number of EI beneficiaries for a specific NOC from HRSDC at this address:

Jackie Holden

Director, Access to Information and Privacy/Human Resources and Skills Development Canada/Service Canada

140 Promenade du Portage
Gatineau, Quebec K1A 0J9

Canada

Fax: (819) 934-8871

Access requests must be submitted on form TBC 350-57

In the publication, *Guide to Using Labour Market Information in Ontario*³, the following is written:

Another distinguishing feature of the labour market is the diversity in the characteristics of the service being traded. Workers differ along numerous dimensions, including skills, abilities, work experience, educational background, work attitudes and motivations. Similarly, employers and the jobs they offer differ according to such attributes as the nature and complexity of work, fringe benefits, working environment, promotional opportunities, and quality of employment relations. Clearly, it is challenging to describe something as a "market" when, to some extent, each worker and job is unique.

Therefore, a high number of EI beneficiaries does not mean there is an oversupply of job seekers in a specific NOC. Take, for example, an employer searching for a heavy duty mechanic

³ *Ibid* at 5.

² Ontario, Ministry of Training, Colleges and Universities, *Guide to Using Labour Market Information in Ontario* (Toronto: Ontario Labour Market Information and Research Unit, 2005) at 6.

(NOC 7312) that is an expert in turbo-chargers versus a generally-trained heavy duty mechanic. In the absence of a detailed description of the unique skill set required, Service Canada officers will assume that all jobs in a specific NOC code are homogenous.

It is possible that the employer could not find a Canadian Citizen or permanent resident with these special abilities, but EI statistics or other economic indicators from this specific NOC code could be used to support a negative opinion through an erroneous claim of “no demonstrable shortage”.

Tip: If an employer is searching for an employee with highly specialized skills, it is important to describe this requirement in detail in form EMP 5239 and to also discuss this in detail in the submission letter.

Vacancy Rates

The second and most accurate indicator of “labour shortage” is vacancy rates. These vacancy rates are published by some agencies in some provinces, such as Alberta. Navigate to <http://calgaryeconomicdevelopment.com> (Research and Publications) where excellent statistics are provided to the public as an example of regional organization that provides actionable statistics.

On a provincial level, the following section has also produced vacancy rates in the past:

Alberta Employment and Immigration
Data Development and Evaluation Branch,
Yvonne McFadzen, *Executive Director*
2nd fl Labour Building
10808 - 99 Avenue
Edmonton, AB
T5K 0G5
Fax: 780 422-5070

Vacancy rates by this section were formulated as follows:

(Number of Job Vacancies Unfilled for Four Months or Longer)
divided by (Number Currently Employed) plus (Number of Job
Vacancies Unfilled for Four Months or Longer)

In other provinces labour market research is conducted by:

Labour Market Information and Research Unit
Helen Cranley, *Manager*

Research and Planning Branch

Ministry of Training, Colleges and Universities

900 Bay Street, Mowat Block, 17th Floor Toronto ON M7A 1L2

Fax: 416-326-0601

However, this unit does not calculate any vacancy rates for the Province of Ontario.

Ministry of Advanced Education and Labour Market
Development

Kerry Young, *Director*

Labour Market and Immigration Division

Strategic Information Branch

Labour Market forecasting and Analyses

PO Box 9190,

Stn Prov Govt,

Victoria BC, V8W9E6

Fax: 250 387-4788

Labour Relations and Workplace Safety

Economic / Labour Market Information and Analysis

Lorraine Beckman, *Director*

15th Floor,

1945 Hamilton Street,

Regina,

SK, S4P 2C8

Fax: (306) 787-5870

Tip: Obtain the contact details of the organization in the province where regular LMO's are being submitted. These organizations might have a wealth of information about shortages. Research findings could be published online, obtained through direct requests or be obtained through the provincial Access of Information legislation. With the available information it seems as if (in the case of Ontario) vacancy rates are not being developed by provincial agencies. Therefore, any claims by Service Canada that “no demonstrable shortage” exists for specific occupations in the province of Ontario cannot be made on the bases of vacancy rates, but rather on EI information, other economic indicators or possibly unsupported by any indicator.

Workplace and Employee Survey

Between 1971 and 1978, Statistics Canada conducted the Job Vacancy Survey as part of the Workplace and Employee Survey (WES). This survey was conducted twice a month by mail and

through employer interviews, representing approximately 90% of employment in Canada. It was designed to allow estimates of the number of vacancies for detailed occupations and thus to provide useful information for manpower programs aimed at reducing the amount of mismatch in the labour market. The survey was discontinued after 1978.

More recently (1999 and 2005), Statistics Canada developed Workplace Employee Survey (WES). Smith⁴ describes WES as follows:

The WES collects information from employers about filling vacant positions. The questions specifically ask the number of jobs that have remained vacant for four months or longer, what type of position it is, and the reasons for the vacancies. The WES also collects information on the number of new hires for the previous year, the type of position of new hires, why employees left their positions and how vacant positions are usually filled (from within or outside of the company). The most recent WES was completed in 1999 and again in 2005. The latest results can be viewed here: <http://www.statcan.gc.ca/pub/71-585-x/71-585-x2008001-eng.htm>.

In the first survey⁵ from 1999, information was collected from 6,351 business locations and 24,597 employees, representing response rates of 94 percent and 83 percent, respectively. Job vacancies were defined as jobs: 1) which were vacant for the entire survey day; 2) which employers tried to fill within four weeks prior to survey day (by advertising, contacting Canada Manpower Centres, interviewing walk-ins, etc.); 3) which were available immediately; and 4) which were available to persons outside the firm. By definition, the following job openings were excluded: 1) those that had a future starting date and thus were not immediately available; 2) those for which no recruiting action was undertaken or recruiting action stopped four weeks prior to the reference day; 3) those that could be filled immediately from employers' or unions' waiting lists and thus were not vacant for the entire reference day; and 4) those that were open only to employees of the firm (either working or on temporary layoff). The vacancy rates⁶ were only available in the following groups:

a) Managers

- b) Professionals
- c) Technical/Trades
- d) Marketing/Sales
- e) Clerical/Administrative
- f) Production workers with no trade/certification
- g) Other

Therefore, it does not provide a clear answer for a vacancy rate for a specific NOC in specific area but shortages in broader occupational groups.

Survey of Labour and Income Dynamics

The Survey of Labour and Income Dynamics (SLID) could provide some valuable insight into labour market shortages. SLID, as a longitudinal survey, interviews the same people from one year to the next for a period of six years. It covers several subjects but also the following:⁷

- labour market activity (major activity during the year; employment/unemployment spells (start and end dates, duration; weekly labour force status; total weeks of employment, unemployment and inactivity by year; multiple job-holding spells; work absence spells);
- jobless periods (job search during spell; dates of search spells; desire for employment; reason for not looking);
- absences from work (absence dates; reason; paid or unpaid).

The most recent SLID can be obtained by navigating to www.statcan.gc.ca and searching with the keyword "SLID".

Canadian Occupational Projection System

Human Resources and Skills Development Canada develops projections of future labour demand and labour supply by broad skill level and by occupation, using the models of the Canadian Occupational Projection System (COPS). The COPS program results can be accessed here <http://www23.hrsdc.gc.ca/w.2lc.4m.2@-eng.jsp>. On the website of COPS, a search for a specific NOC can be made and fascinating results can be obtained.

Human Resources and Skills Development Canada
Publications Centre

⁴ Kim C. Smith, *Tourism Human Resource Development Strategies in British Columbia: An In-Depth Look at the Sources and Types of Information that Need to be Acquired* (2004), [unpublished] at 9. Online: < <http://www.go2hr.ca/Portals/0/reports/Final%20Report%20-%20go2%20Tourism%20Data.pdf>>.

⁵ Canada, "Which Firms Have High Job Vacancy Rates in Canada?" by René Morissette and Xuelin Zhang (Ottawa: Statistics Canada, 2001).

⁶ *Ibid* at 6.

⁷ *Supra* note 4 at 103.

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 Gatineau, Quebec, Canada
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 Facsimile: (819) 953-7260
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The challenge is that COPS information is a few years old, however, results from 12 months ago are not available.

Labour Force Survey

Smith (2004) describes the Labour Force Survey (LFS) as follows:⁸

The LFS is provided by statistics Canada. The main objective of the LFS is to divide the working-age population into three mutually exclusive classifications - employed, unemployed, and not in the labour force - and to provide descriptive and explanatory data on each of these. LFS data are used to produce the well known unemployment rate as well as other standard labour market indicators such as the employment rate and the participation rate. The LFS also provides employment estimates by industry, occupation, public and private sector, hours worked and much more, all cross-classifiable by a variety of demographic characteristics. Estimates are produced for Canada, the provinces, and a large number of sub-provincial regions. For employees, wage rates (since 1997), union status, job permanency and workplace size are also produced.

It can be found by navigating to www.statcan.gc.ca and searching for “LFS”.

CANSIM Tables

CANSIM is the online resource for Statistic Canada’s socio-economic statistics. Data can be searched by subject, text, table number, series number and survey number. The information is organized into 23 general subject areas. A full list of CANSIM tables are available in the CANSIM Table Directory on the website of Statistics Canada⁹. Two examples of relevant tables are as follows (however, there are many more):¹⁰

- 282-0047 Labour force survey estimates (LFS), duration of unemployment by sex and age group, monthly

- 281-0025 Employment (SEPH), seasonally adjusted, for all employees for selected industries classified using the North American Industry Classification System (NAICS), monthly.

Other Reports

Industry reports can be provided on a national, provincial or municipal/city level.

A few examples of websites that could contain labour shortage information are shown here:

- British Columbia Statistics: <http://www.bcstats.gov.bc.ca/>
- Canadian Federation of Business: <http://www.cfib-fcei.ca/english/index.html>
- Conference board: <http://www.conferenceboard.ca/>
- <http://www.workingincanada.gc.ca/>
- Industry Canada www.ic.gc.ca

In some cases, unions will also provide letters about labour shortages. Tip: Do not contact the union directly but instead request feedback through the employer.

It is possible that certain provincial or national industry sector reports might mention vacancy rates as well. Navigate to www.councils.org to identify the appropriate council.

Practitioner Research

The immigration practitioner can also develop a small questionnaire and call several businesses within the area to obtain their feedback. A typical questionnaire could include the following categories: name, telephone, appointment, name of business, nature of business, etc; or the following questions: Do you experience shortages of welders? How long have you been advertising? How long does each appointee stay/retention problems? etc.

Conclusion

Conducting research about labour shortages is complex and difficult. It will also take months and possibly years to become an expert. Due to the complexity of the issue, immigration practitioners are advised not to accept refusals based on unsupported claims of “no demonstrable shortages”. In the case of refusal,

⁸ *Supra* note 4 at 15-16.

⁹ See online: Statistics Canada <<http://cansim2.statcan.gc.ca>>.

¹⁰ *Supra* note 4 at 107.

request reasons from managers and obtain file notes through Access to Information requests.

Cobus (Jacobus) Kriek

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Practice Update: Changes to Ontario PNP

Dear Colleagues,

I received the following message from Opportunities Ontario (the Ontario PNP) about recent changes. I think it is self explanatory and I pass it on for your reference:

I am writing to let you know, in your capacity as the Chair of the Citizenship and Immigration Section of the Ontario Bar Association (OBA), that on September 14, 2010, the Hon. Erik Hoskins, Ontario's Minister of Citizenship and Immigration announced changes to Opportunities Ontario: Provincial Nominee Program. The changes allow international students graduating from a publicly-funded Ontario university's Master's program to qualify for an Ontario nomination for permanent resident status without a job offer. New language proficiency, residency and settlement funds criteria have been introduced for applicants in this new program stream.

This announcement communicated a change that was unveiled on the program web site (www.ontarioimmigration.ca/en/pnp/index.htm) on June 14, 2010. This builds on the April 21, 2010 program enhancement that allowed international students graduating from publicly-funded Ontario universities with a PhD to qualify for an Ontario nomination and permanent residence without a job offer.

We have an interest to ensure that immigration practitioners within OBA are aware of this enhancement and I thank you in advance for your help in informing OBA members of this change to the program. A brief overview of this change follows this message, for ease of reference.

BACKGROUND:

What are the new criteria for Masters graduates?

International students who graduated or will soon be graduating from a Master's program from one of Ontario's publicly funded universities, can now apply to Opportunities Ontario for nomination as a permanent resident, under the International Student Category's Pilot Masters Graduate Stream.

In order to apply to Opportunities Ontario as an international Masters graduate in Ontario, students must:

- Intend to live and work in Ontario.
- Have graduated from an existing Master's program at an eligible publicly funded university in Ontario.
- Have completed a minimum of one academic year degree program, while studying on a full-time basis.
- Apply within two years of the date on which their Master's degree was granted, or, during the last semester of completing their degree.
- Currently be residing in Ontario.
- Have legal status in Canada (i.e. study permit, work permit, temporary resident visa)
- Demonstrate high official language proficiency (For English language proficiency – IELTS – General test with a minimum band score of 7 or higher) (For French language proficiency – TEF – with a minimum score of 5 or higher).
- Demonstrate a minimum level of savings/income to support themselves and their dependants (currently \$11,086 for a single person)
- Demonstrate at least one year of residence in Ontario in the past two years.
- Not have return obligations under Canadian International Development Agency grants or home country scholarships.

Technical Details to Note:

- There is a non-refundable processing fee of \$1,500 per application.
- There is a new application form and guide to aid applicants and their representatives, as they prepare their application