



Matrixvisa Inc.

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Immigration Law

Minister of Human Resources and Skills Development
The Honourable Ms. Diane Finley, P.C., M.P.
140 Promenade du Portage
Gatineau
Quebec
K1A 0J9

14 August 2012

**POLICY ABOUT RETAINED EARNINGS AND AUTHENTICITY ('GENUINENESS')
OF JOB OFFERS USED IN IMMIGRATION AND WORK PERMIT CASES**

Dear Minister Finley

Background

1. As you are aware, your department is tasked with providing options about job offers made to foreign nationals. More specifically, Immigration and Refugee Protection Regulation 82 (2) (c) requires that Service Canada (SC) must provide an opinion about the authenticity ('genuineness') of indeterminate job offers made to Foreign Nationals, who intend to use the job offers in applications for permanent residence in the Federal Skilled Worker Class. Immigration and Refugee Protection Regulation 200 (5) requires Human Resources and Skills Development Canada (HRSDC) to assess whether the employer can reasonably fulfil the terms of a job offer and work permit. Pursuant to the authority given to HRSDC and SC in IRPR 82 (2) (c) and IRPR 200 (5), HRSDC has published in-house rules that provide Service Canada officers with guidance about the use of retained earnings when these opinions are made.

2. For many years, the Canadian immigration system placed emphasis on a "human resources model" whereby the government attempted to predict shortages in certain occupations and allow foreign nationals to apply in these occupations. In recent times, more emphasis is being placed on job offers. As a result, the opinions provided by SC, according to the policies and rules of HRSDC, are becoming increasingly important in our immigration system.

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Policy/Rules

3. A copy of these rules (in which guidance is provided to officers about the use of retained earnings) was obtained through the Access to Information Act and provided in Enclosure 3 (your file number A-2011-00268/KCB, dated 10 November 2011). It seemed to be an extract from the *Temporary Foreign Worker Manual*. Two pages are undated, some pages are dated 2010-06-03 and some pages dated 2011-03-11. The pages (Enclosure 3) are numbered on the bottom right from 1 to 15.

References are made to the following sections in the enclosed policy document by means of marking each reference in the policy with the term “Note 1”, “Note 2”, etc. The following is quoted from the policy document:

Note 1. “...that net income is greater than the cost of the salary offered in the AEO application....we proceed with the opinion”

Note 2. “Retained earnings are increased by the net income of profit a business generates and keeps it in business. So, in essence, the retained earnings indicate the accumulated profitability of the business over its existence”

Note 3. “If retained earnings are less than the cost of the additional salary, then we are to advise the employer that a negative opinion will be rendered unless they can substantiate their ability to meet the terms of the offer.”

Note 4. “....if retained earnings are less than the cost of the additional salary, then we are to advise the employer that a negative opinion will be rendered unless they can substantiate”

Nature of the Problem

4. There are serious errors with the enclosed policy about the use of retained earnings, as it shows a fundamental misunderstanding of how businesses operate in the modern world and it provides incorrect guidance to officers.

a. Please review the errors/shortcomings of this HRSDC policy (Enclosure 3) as described by Mr. Van Dyk, a Canadian chartered accountant (See Enclosure 1).

b. Please review the errors of the HRSDC policy (Enclosure 3) as described by Mr. Tajvidi, a Canadian certified management accountant (see Enclosure 2).

c. Essentially, Service Canada officers are trying to determine or predict the future of the ***net working capital***. Net working capital is the difference between current assets (which is cash inflows in one year or accounts receivable) and current liabilities (which must be paid in one year and includes salary, rent, etc.). If the current assets are more than current liabilities, the employer would have a positive working capital. According to the policy of HRSDC and SC, past financial performance in the tax return is solely used to make a future prediction of whether there will be positive net working capital when the foreign national will arrive. It seems as if Service Canada's decision makers are so focused on retained earnings in the T2 Tax Return that other relevant factors are being ignored. In other words, the fixation on the net working capital – as obtained from the most recent tax return – to determine the future ability to meet future obligations is totally wrong. This approach is flawed for 14 reasons (in addition to the expert opinions in Enclosure 1 and 2), namely:

- Taking the information about the retained profits from the T2 Tax Return does not make sense as the tax return includes tax deductible depreciation before profit is determined. The profit shown in a tax return is therefore less profit shown in the income statement as the profit is legally decreased due to the allowance of depreciation (i.e. claim of Cost Capital Allowance as a deductible from income to determine taxable income). The main purpose for devaluing assets is to create a reduction in the tax liability by reducing net income. Devaluation is not a true cash expense, but Service Canada does not seem to understand this.
- A “liquid” firm is one that easily meets its short-term obligations as they come due. Salary is just one of these obligations. Liquidity refers to the solvency of the firm's overall financial position, and the three measures of liquidity are: net working capital; current ratio; and the acid test ratio. Net working capital is the firm's ability to meet its short-term obligations such as salary. The current ratio is the current assets divided by current liabilities. A current ratio of two is commonly being referred to as acceptable. The acid test ratio is the same as the current ratio except that it excludes inventory, as some types of inventory can only be sold with credit or cannot be sold easily, such as partially completed products. Essentially, Service Canada's objective is to obtain retained profits from a T2 Tax Return and to project a future liquidity of the employer (as measured by net working capital, current ratio or the acid test ratio). When the liquidity of the firm (as described through one of the definitions) is used as one of many factors, the information should be extracted from its financial statements and not the T2 Tax Return.

- The rules of Service Canada do not request any information about the ability to finance short-term liabilities through techniques such as bank loans/lines of credit. If a company has a good credit rating and assets worth several million dollars with a positive cash flow, would a bank finance an annual salary of CAD55 000? I believe it would. However, it seems as if some HRSDC/SC officers believe the only source of finance is cash from retained profits. How does anyone in Canada obtain a bank loan to buy a house or car, pay for a vacation with a credit card or qualify for a study loan (all based on creditworthiness)?
- This conservative approach of Service Canada does not take into consideration the balance sheet and size of the employer's assets. Assets can be used as security to finance future liabilities such as salary.
- It does not assess the history of liquidity over a long period, only the tax returns from the previous financial year (especially if it was a 2009 tax return that would have figures from the only recession in 20 years).
- Income tax losses can be carried forward for 20 years. Businesses that are capital intensive might only show retained profits in the T2 Tax return after several years. It would appear that Service Canada policies do not take this into account. There are many capital intensive industries (listed on the TSX) that will not have retained earnings for many years. However, these types of companies will be able to pay salaries for many years to come and experience an increase in personnel and an increase in financial turnover.
- It does not take into consideration the employer's history of paying its creditors and vendors. Neither do the rules require officers, or even remind officers, to obtain an opinion from financial intermediaries such as creditors.
- It does not take into consideration the sales forecast. Sales forecast will lead to a pro-forma income statement and pro-forma balance sheet.
- The existing conservative approach of Service Canada does not include the analyses of payroll over many years. An analysis of the payroll trend of an employer might show a constant increase in payroll expenses. If this is the case, it should also be considered a positive factor in the analysis of the "affordability factor".

- It does not take into consideration how many full-time employees were being paid without lay-offs in the preceding years.
- The employment of a foreign national should result in increased income as that is the actual reason for the appointment of the foreign national in the first place: to make more profit. The future income that can be created by the appointment of a foreign national is not considered by Service Canada and not addressed in the latest rules.
- It does not take into account the factors that could result in zero or negative retained earnings (as shown) in the T2 Tax Return. For example, directors of an Incorporated company might have received the remaining profits as dividends or bonuses. Nothing would prevent the directors from placing the funds back into the corporation to fund a current liability such as salary.
- It does not take into account the number of years an employer has been in existence, which is one of the best measures of success.
- Incorporated employers can have zero profits for years of profits that are paid out as bonuses or dividends. The belief that an Incorporated business owner must show retained profits is a fallacy and shows a lack of understanding of how businesses operate in the modern world.

d. In an AEO refusal in November 2010 (which was later reversed), an officer stated the following to my client, a director of a major employer in the Prairies: “Service Canada is not able to determine the genuineness of the job offer.” (AEO refers to Arranged Employment Decisions). The said officer added: “The information provided has not yet demonstrated the business’s ability to sustain the additional payroll cost to be incurred with the hiring of the foreign national.” It should be added that the employer has been paying the foreign national a salary for two years in the low-skilled project, the employer has been in existence for 20 years, the employer has roughly 350 workers and has not missed a single wage payment to an employee in 20 years. The employer explained that the Service Canada officer mentioned that the T2 does not have enough retained earnings. The employer’s chartered accountant (CA) explained, inter alia, that the employer paid out the CAD250 000 profit of the previous year as bonuses to its shareholders, and that the employer had just been approved to obtain a CAD5 million loan for capital expansion. Would the employer, then, be able to afford a wage of CAD55 000? Any rational person would indicate that the employer can afford the CAD55 000 wage. The CA also explained the danger of relying on the T2 Tax Return as it includes depreciation that is not an actual cash expense but an allowable deduction to decrease taxable income. In this case, it showed Service Canada’s

seeming inability to understand the complexity of financial analyses; instead only focusing on retained earnings. There seemed to be a “checklist” approach rather than a thorough understanding of the critical issues of financial analyses and how businesses operate in the modern capitalist society.

e. During 2011 my client, a flight school in Alberta, requested an AEO for a flight instructor (and a qualified pilot). The SC officer requested T2 Tax Returns, and apparently, in the absence of sufficient retained earnings (the officer’s interpretation as verbally mentioned to the president of the company), the AEO request was refused. As part of the decision in which the refusal was communicated, the following reason was provided: “Service Canada is not able to determine the genuineness of the job offer. The information provided has not demonstrated the business’s ability to sustain the additional payroll cost to incur with the hiring of the foreign worker.” Subsequently, a request for leave to appeal an AEO refusal by SC was submitted (*Jayme Hepfner and Springbank Air Training College and Minister of HRSDC; Federal Court Docket IMM1545-11*). On 25 May 2011, a discontinuance was filed and the matter was settled after the Department of Justice suggested a reconsideration. Before the approval was issued, council of HRSDC (not the officer) in Ottawa asked several questions about the genuineness of the job offer, and not a single question had any relevance to retained earnings. It seemed as if the initial refusal, where retained earnings played a major role, was not based on sufficient facts and was completely ignored in the reconsideration. It therefore seems as if the narrow focus on retained earnings (as obtained from the T2 Tax Return) to determine the genuineness of job offers cannot withstand any scrutiny in a Federal Court.

Results of the Problem

5. Firstly, the refusal rate of Arranged Employment Decisions (AEOs) increased after the policy was published in 2010.

- a. 2009: 32,71% of AEOs were refused
- b. 2010: 45, 91% of AEOs were refused
- c. 2011: 45,73% of AEOs were refused

This shows an increase of 13% of refusals between 2009 and 2011, which is significant.

There are no statistics available for the refusal of LMOs for a lack of retained earnings.

6. The rules provided to officers (as mentioned in the extract from the *Temporary Foreign Worker Manual*, as provided in Enclosure 3) are clearly wrong. In the absence of officers being formally educated or trained in understanding and interpreting the financial information of

employers in Canada, the authenticity ('genuineness') of job offers cannot be accurately determined by the narrow focus on retained earnings.

Analysis of the Regulations

7. There are different methods to statutory interpretation that include the following:

- a) grammatical method
- b) systematic, logical approach
- c) purposive approach
- d) historical approach
- e) pragmatic approach

In some cases, a combination of approaches can be used to determine the meaning of a word. In the case of the meaning of the word "genuine" when SC provides an opinion about a job offer, it is relevant to refer to the last three methods or approaches.

- a. Purposive approach. In this approach the *ratio legis*, or the purpose of the rule, should be considered. What did the promulgator of the regulation intend to achieve? What was the intent of the Minister of Immigration in 2002 when the IRPR 82 (2) (c) was published about the genuineness of job offers? Was it the intent to ensure that only employers with retained earnings ('money-under-the-mattress' approach) can appoint someone/provide a job offer? Alternatively, was the intent to ensure that the employer can afford to pay the salary by any appropriate means? Logic would dictate that the latter interpretation applies.
- b. Historical approach. Under the historical method, author Pierre-Andre Cote mentions the following: "... it is common practice to establish a sort of legislative pedigree by consulting the enactment that it has replaced, repealed or amended, or the one that served as its inspiration." If the policy of the Family Business Job Offer (FBJO) is reviewed in paragraphs 1.18 (1) and (2) and 1.35 (inter alia) of the *Immigration Selection and Control Manual* from the pre-IRPA era, retained earnings is not mentioned as a pre-requisite. It is commonly known that AEO replaced the FBJO. Therefore, historically, retained earnings were not demanded within the FBJO, predecessor of the AEO.
- c. Pragmatic approach. In the pragmatic approach, the effects of a regulation or statute are considered. It is clear that the narrow focus on "retained earnings" to determine the genuineness of job offers in AEOs and even LMOs are not the intended effect of the IRPR 82 and IRRP 200. If the Minister of CIC (at the time of the publishing of the regulations during 2002 and 2011) had the intent to allow only employers with retained earnings ('money-under-

the-mattress') to receive positive opinions, it would have indicated that clearly. As explained above, the policy (or rules) in Enclosure 3 is based on the flawed assumption that retained earnings are the only method of financing a future short-term liability, the only source of cash flow and the only reason for the success of a business.

Given the arguments above, the expert opinions and the chosen three methods of interpretation, it should be clear that serious work is needed on the existing policy/rules about the genuineness of job offers.

Suggestions

8. The policy/rules provided to officers should be corrected to guide officers in the appropriate manner. This letter, along with the expert opinions cited, can be used as a guideline to correct the flawed policy/rules about retained earnings (provided in Enclosure 3).

9. The quotes mentioned in Paragraph 2 (notes 1, 2, 3 and 4) should also be removed.

10. Officers need to be educated in the fundamentals of financial analyses and related concepts pertaining to financing future short-term liabilities, net working capital, liquidity and cash flow.

11. It would be advisable to consider placing a condition on a permanent residence visa that was issued, based on an AEO, to work for a Canadian employer for 12 months after arrival in Canada. Obviously, such a policy should be implemented in consultation and close cooperation with CIC.

Respectfully yours



Cobus (Jacobus) Kriek on behalf of Matrixvisa Inc.
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Regulated Canadian Immigration Consultant (RCIC)

Member in Good Standing of ICCRC as required by the Section 91 (1) & (7) (a) Immigration and Refugee Protection Act of Canada

Bibliography

Cote, Pierre-Andre, 2011, *Interpretation of Legislation in Canada*, Carswell, Toronto, 4th edition.

Enclosures

1. Expert opinion by Mr Van Dyk, CA – dated 12 July 2011
2. Expert opinion by Mr Tajvidi, CGA – dated 29 May 2012
3. Copy of policy dated 6 March 2010 and 3 November 2011, HRSDC File Reference A-2011-00268 /KCB dated 10 November 2011



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July 12, 2012

Human Resources and Skills Development Canada
140 Promenade de Portage
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Dear Sir/Madam

Re: Retained Earnings Policy

My name is John Van Dyk and I am a qualified CA. I have been practicing as a CA for 23 years. I reviewed the enclosed policy of the use of Retaining Earnings in AEO requests (Access to Information request dated 10 November, 2011, File Number A-2011-002668/KCB). Pages 0003 to 0008 focuses on the test of genuineness of job offers for Arranged Employment Opinions (AEO) and pages 0009-0012 focus on the test of genuineness in Labour Market Opinions (LMOs). This policy has several shortcomings. The most important shortcoming is that it places an excessive reliance on retained earnings in the determination of the genuineness of job offers in AEOs and LMOs. My comments are as follows:

- a) It shows a fundamental misunderstanding about the functioning of finances of modern businesses with specific reference to the analyses of financial statements and financial information in tax returns with specific reference to the financing of a future liability such as salaries.
- b) There are several statements that provide improper guidance to officers such as:

“So in essence retained earnings indicate the accumulated profitability of the business for the period of its existence.”

This is too simplistic as retained earnings are not the only indicator of profitability. Many companies pay some or all of their excess profits out as dividends and/or bonuses to their shareholders resulting in little or no retained earnings but have been profitable when you consider dividends and bonuses as a component of profitability.

- c) It does not explain to officers important factors such as, future current liability, liquidity, capital cost allowance or amortization of capital assets and how these effect profit, net working capital etc.

- d) It does not include other crucial factors such as: the creditworthiness of the employer and the access it has to credit, the length of existence of the business, the number of employees that have received pay consistently over time, the access the business has to credit, value of assets to be used as security for loans, role of income tax losses and the impact on retained earnings, and the ability of the directors and/or shareholders to inject cash into a business with little or no retained earnings.
- e) It does not take into account that equity is also represented by amounts owing to shareholders and related parties. These amounts are typically reinvested dividends and/or bonuses that have been left in the company.

A more balanced approach (by mentioning all possible factors that could affect future net working capital) will ensure that officers receive the correct guidance to ensure that the genuineness of job offers can be determined more accurately.

Yours truly,

JOHN VAN DYK PROFESSIONAL CORPORATION

A handwritten signature in black ink, appearing to read 'John Van Dyk', with a stylized flourish at the end.

John Van Dyk, CA
JVD/jj

Farrokh Tajvidi, FCCA(UK), CGA, RCIC

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May 29, 2012

Mr. Cobus Kriek
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Opinion on Service Canada Directive - AEO instructions to access 'ability to pay'

My name is Farrokh Tajvidi. I am Certified General Accountant (CGA) with extensive experience in accounting, personal and corporate tax, and business consulting for small and medium size enterprises (SME). I am also a Regulated Canadian Immigration Consultant (RCIC) with focus on economic class immigrants.

I have reviewed Service Canada's directive on AEO instructions to assess 'ability to pay' obtained by Access to Information request dated November 10, 2011 file number A-2011-002668/KCB. Pages 1 and 2 explain the two-step process based on review of net income and retained earnings; pages 3 to 8 describe Genuineness of job offer: Employer-related factors under Section 3.4.1.1.2 for AEOs, and pages 9 to 13 focus on the Genuineness test as regards to LMOs, Section 3.5.2.

My comments are focused on the following regulations

- a. Immigration and Refugee Protection Regulation 200(5)(c), which states "whether the terms of the offer are terms that the employer is reasonably able to fulfill " and
- b. Reg 82 (2) (c) (ii) which states an officer of HRSDC must provide an opinion about the genuineness of a job offer

The two-step process for corporations and non-incorporated entities

This process mandates two simple tests: 1) if the Net Profit amount as shown by T2 Sch 125 of the previous year is greater than the cost of salary proceed with the opinion, otherwise 2) check the amount of the Retained Earnings on Balance Sheet as shown on the T2 Sch 100 and if this amount is less than the cost of salary then a negative opinion will be issued. It seems this process is starting on the wrong foot.

These tests place unrealistic and excessive reliance on the previous year net profit and the retained earnings. They are also non-conclusive as to the assessment of 'ability to pay' - profit is not all cash. Net profit is used for profitability comparisons in the same industry and in the stock market. The profit earnings ratio (P/E Ratio) is used to measure the profit earning capabilities of the company.

T2 Schedules 100 and 125 are part of the General Index of Financial Information (GIFI), which is basically uniform code of accounts, to group financial information provided by the management of the employer. Although the GIFI is for business purposes, and not for tax, it usually includes tax reliefs offered by CRA as well as other tax incentives such as accelerated Capital Cost Allowances (CCA is tax terminology for depreciation) that the employers are anxious to use as early as possible in order to lower the tax burden.

Profit V Cash

A lot of non-accountants, including some small business owners, may consider profit as the same as cash. In fact, profit includes both cash and non-cash items for the following reasons:

1. The adoption of Accrual Basis of accounting by all corporations and non-incorporated businesses is the main cause of difference between profit and cash. This standard requires that all expenses incurred must be matched with the income generated and reported in the same financial period irrespective of any receipts and payments of cash – in an extreme example you may have profit but no cash. To be able to assess cash and the ability to pay through the narrow window of the net profit means you have to see beyond numbers.

2. Accountants make adjustments and accrue expenses at the financial year end, such as professional (accounting or legal) fees, management bonuses, and reserves. These adjustments can have significant impact reducing net profit.
3. Employers do take advantage of tax incentives to reduce net profit (GIFI 125). During the last few years CRA has introduced accelerated CCA classes to encourage spending and economic growth. For example CCA Class 45 increased the rate from 30% to 45% if computer hardware and software is purchased after March 22, 2004 and before March 19, 2007. Later, a new Class 50 increased this rate to 55% for those purchases after March 19, 2007. Most recently further measures were introduced under Class 52 to write off 100% of computer hardware and software if bought between January 27, 2009 and February 1, 2011. To upgrade its computerized accounting and manufacturing system a medium-size business with annual revenue of a few million can well spend and write off \$200K, this amount can have significant impact on the net profit.
4. To say T2 Schedules 100 and 125 provide insight into the solvency of a business is merely inaccurate.

Retained Earnings / Deficit

5. Dividends are paid out of after-tax profit reducing the retained earnings for the year. But the reduced retained earnings is not a bad sign. The dividend amount alone signifies that there has been an excess of cash that the owners choose to withdraw since any immediate burden of cost of new hire would have surely affected such a decision. Also, the dividends received can be loaned back to the corporation.
6. The negative retained earnings or retained deficit can also help cash flow and the ability to pay. CRA allows them to be carried over to following years and set off against future profits. The loss carry-over results in not only paying less tax for the following year, but also prevents CRA from requiring payment of tax installments for that year (tax installments are calculated based on the profit of previous year).

7. Any new business usually incurs losses and accumulates retained deficit. This is especially true for capital intensive industries with heavy depreciation expense. Notwithstanding the negative operating loss, businesses use all available financial resources and keep growing.

Cash Flow Statement

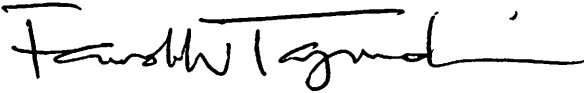
8. Management of cash is of paramount importance to businesses operating as a 'going-concern'. Financial managers check business pulse on a daily basis. The test is to check daily cash, A/R (accounts receivable) and A/P (accounts payable). They consistently monitor the liquidity situation by preparing cash flow reports to ensure their ability to pay their immediate expenses and other debts. The daily concern of any business is to ensure the healthy flow of cash.
9. In larger companies Cash Flow Statement is part of the package of financial report to the Board of the Directors. It signifies the efficiency by which cash is generated and how it is acquired and spent. Accountants provide this report to show how cash at the beginning of the year is reconciled with cash balance at the year end. The report considers three main factors affecting changes in cash position: a) cash generated by operations, that is cash component of profit; b) sources of finance (looking at the structure, equity finance, debt finance from owners and bankers, and the leverage between the two); and c) investments (capital expenditures in plant and equipment, in other entities, in human resources acquiring specialist to increase income, negotiating debt capital with lower interest cost, etc.).
10. Banks are happy to lend money on healthy cash flows. They look at the ability to generate cash, but not profit. They consider profit to be on paper and cash to be in hand. Banks usually assess management's ability to generate cash and require documented cash flow projections for at least three future consecutive years. Loan specialists look at the capital structure, sources of finance, credit history, management's behaviour, and past compliances. Employers usually do their own cost-benefit analysis for any expansion or project expenditure to be undertaken.

11. In difficult times, just as governments survive several years on deficit balance until external pressures are mitigated, so do companies.

Directives for 'ability to pay'

In assessing 'ability to pay' Service Canada directives need to go beyond the profitability test and seek professional opinion from designated accountants or other specialists, who are better equipped to use the liquidity tests and other financial ratios, to measure the financial health of the AEO applicants.

Yours truly,

A handwritten signature in black ink, appearing to read 'Farrokh Tajvidi', with a horizontal line above it.

Farrokh Tajvidi, CGA, RCIC



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NOV 10 2011

Our file - Notre référence
A-2011-00268 / KCB

Mr. Jacobus Kriek
Matrixvisa Inc.

Dear Mr. Kriek:

This is in response to your request submitted under the *Access to Information Act*, received at Human Resources and Skills Development Canada on October 11, 2011, and which reads as follows:

"It is requested that copies of all instructions about the use of retained earnings from Tax Returns during the determination of the genuineness of job offers in Arranged Employment Opinion requests.

This request includes emails sent from the following staff at the Multi Stream of Specialization (a Temporary Foreign Worker Unit of Service Canada in St-Johns New Brunswick) - Service Canada Centre # 1877.

Ms. Giselle Pelletier-Baker Team Leader

Gisele.Pelletierbaker@servicecanada.gc.ca

Mr. Tony Whitaker Expertise Consultant, tony.whitaker@servicecanada.gc.ca

Ms. Carolyne Stephenson, Manager Program Expertise

carolyne.stephenson@servicecanada.gc.ca

This is not a request about case specific emails or instructions, but rather emails and other forms of instructions of a general nature about the use of retained earnings from tax returns of employer that is used by officers when they make decisions about the genuineness of job offers in AEO's at the above mentioned New Brunswick office. From January 1, 2008 to the present (Oct 07, 2011)."

.../2

Enclosed is a copy of the records you have requested. Please note that the documents are released in their entirety.

You are entitled to complain to the Information Commissioner concerning the processing of your request within 60 days of the receipt of this notice. In the event you decide to avail yourself of this right, your notice of complaint should be sent to the following address:

Information Commissioner of Canada
Place de Ville, Tower B
112 Kent Street, 22nd Floor
Ottawa, Ontario
K1A 1H3

Should you have any questions concerning the processing of your request, do not hesitate to contact Karyna Beauchamp at 819-953-2522.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'J Holden', written in a cursive style.

Jackie Holden
Director
Access to Information and Privacy

Enclosures

Ability to pay

A directive will be developed for the LMO reg changes that are coming in April 2011. It is our understanding the LMO directive will very closely resemble (if not be the same as) the following AEO draft instructions to assess 'ability to pay'.

How it works:

When the employer is a corporation, there is a two-step process:

First, we are to look at the business income (annual financial performance). To this end, we are to consider the net income on schedule 125 at the bottom of the T-2. CRA defines net income in two distinct ways: 1) for business purposes and 2) for tax declaration purposes. We are interested in the former (for business purposes) since we want to consider the business' ability realize a profit **before any tax credits or deductions come into play.**

Second, if schedule 125 indicates that net income is greater than the cost of the salary offered in the AEO application (and any other FWs in relation to previous confirmations, either LMO or AEO based, not yet commencing employment), we proceed with the opinion. Even strong companies have bad years, so if the ability to pay isn't supported by schedule 125, we are to request a schedule 100, i.e. balance sheet to look at retained earnings/deficiency (financial health), last line. Retained earnings is the amount that the employer's assets (what it owns) exceed its liabilities (what it owes). Retained earnings are increased by the net income (profit) a business generates and keeps in the business. So, in essence, the retained earnings indicate the accumulated profitability of the business over its existence.

If retained earnings are less than the cost of the additional salary, then we are to advise the employer that a negative opinion will be rendered unless they can substantiate their ability to meet the terms of the offer via a rationale supported by additional documentation (i.e. new service contracts, increased sales, etc.).

Please note if the employer is unable to provide schedule 125 or schedule 100, they must provide a reason. If the reason provided is acceptable, we can accept alternative documents such as their own balance sheet and financial statement, which must be signed by an accountant **licensed/certified by one of the three occupational regulatory bodies (CA: Chartered Accountants, CGA: Certified General Accountant, CMA: Certified Management Accountant).** In this document we can look at the shareholders' equity/deficiency and net income/loss.

If the employer hasn't filled an income tax return, we need to ask why this wasn't done, when they will file and how long it will take as we need the most recent return. (i.e. How do they plan on financing growth, if this is the reason for needing the foreign worker).

Other considerations:

In the event that the FW already works for the employer on a temporary basis at the time when the AEO application is being assessed, then it would not be necessary to consider the additional salary cost of the FW to the employer - **UNLESS** s/he is being paid a salary that is different from that listed in the AEO application. This should be verified through documentation (i.e. pay stubs or T4).

In the event of attrition, officers are to consider the salary of the individual leaving the job to which the AEO relates. In this situation the officer should ask but not request documentation to verify the salary cost of the individual leaving the job.

When the employer is not a corporation (sole proprietorship or partnership), there is also a two step process:

First, we are look at the business net income/loss on the T2125 - Part 5. Similar to the assessment for corporations, if the net income is greater than the additional salary cost in the AEO application (and any other FWs in relation to previous confirmations, either LMO or AEO based, not yet commencing employment), we proceed with the opinion.

Second, if T2125 Part 5 Net Income is less than the additional salary costs, then we are to request a balance sheet, signed by an accountant **licensed/certified by one of the three occupational regulatory bodies (CA:Chartered Accountants, CGA: Certified General Accountant, CMA: Certified Management Accountant)**. In this document we can look at the Owner's equity/deficiency. Similar to the assessment for corporations, if retained earnings are less than the cost of the additional salary, then we are to advise the employer that a negative opinion will be rendered unless they can substantiate their ability to meet the terms of the offer via a rationale supported by additional documentation (i.e. new service contracts, increased sales, etc.).

The *Other Considerations* for corporations also apply to non-corporations.

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Section 3.4.1.1.2 – Genuineness of job offer: Employer-related factors

The following sections will describe the factors to consider in assessing the genuineness of the offer of employment when looking at it from the employer-side of the equation. These directives are provided to help clarify the context and circumstances surrounding the offer of employment, which in turn, provide the tools to permit TFWP Officers to better assess the genuineness factor.

Business location

It does not include the mere presence of an agent or office in Canada. A company with no employees, which exists in name only, and is established merely for facilitating the entry of a skilled worker, would not qualify. Additionally, companies that do not have an office set up on Canadian soil would not qualify for an AEO.

Ability to honour terms of job offer

When determining if the employer can successfully sustain the foreign worker's salary, Officers are to look at the number of AEO requests for the past 24 months and the total of the salaries that were offered for each of these requests. Should the amount of all these salaries be more than the amount listed on the T4 Summary block 14, the Officer must request from the employer the business's income tax return (T1, T2 etc.). The provided financial documentation must be able to prove that the company has the ability to indeterminately sustain the offered salary of the foreign worker.

Type of business entities

Employer-employee relationship

In most cases, the employer making a request must already have a minimum one full-time employee in the business for at least one year – hence an employer/employee relationship is required for the applicant wishing to apply for an AEO. This is necessary to verify that the employer can demonstrate the ability to offer a stable employment situation that has some reasonable chance of allowing an immigrant to become economically established in Canada. If an employer is a self-employed person (in a partnership or on his own) then his ability to offer stable employment requires the employer to demonstrate another form of proof that he can provide stable employment.

The existence of an employer/employee relationship is not determined by HRSDC/Service Canada but by the CRA. As long as CRA collects EI/CPP premiums through remittances made by the employer, there is an employer/employee relationship. Specifically, note that employers that have a minimum of one employee on payroll (not including themselves), should receive the PD7A forms on remittances. However, CRA has indicated that some self-employed individuals, although they should not, could at times receive this form. Since self-employed individuals do not pay EI premiums, the EI premiums box (on the PD7A) will be blank. If this is the case, Service Canada FWP Officers could conclude that the business might not have a minimum of one employee on their payroll.

Additionally, TFWP Officers can review the T4 Summary of Remuneration Paid to determine if the business has been employing a minimum of one employee over the last period of 12 months. Note, however, that this step is only to be taken when the Officer has doubt concerning the likelihood that the offer of employment will materialize into the employment of the foreign national.

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HRSDC does not recommend that this procedure be administered to businesses that are already well-known or established. All things considered, if the employer is unable to satisfy the Officer that it can offer stable employment, a negative AEO should be issued.

To summarize:

- a. Should the EI premiums box (PD7A) be blank and should boxes 18 and 19 on the T4 Summary of Remuneration Paid also be blank, there is reason to doubt the genuineness of the offer of employment. In all likelihood, this employer is self-employed and is not meeting our standard of employing a minimum of one employee for a twelve month period.
- b. Should the EI premiums box (PD7A) be blank, the T4 Summary of Remuneration Paid boxes (either 18 or 19) contain numbers and the employer submitted copies of her/his PD7As covering the previous 12 months, the Officer must clarify, with this employer, the apparent inconsistencies in the information provided.
- c. Should the EI premiums box, on the PD7A, contain numbers, and the employer submitted copies of her/his PD7As covering the previous 12 months, the Officer can conclude that this employer is genuine and meeting the requirements.

Non-profit organizations

An employer can be either an organisation which operates for profit as well as a non profit organisation such as a charitable/religious organisation, a non governmental organisation or a public/academic institution. As it is the case for employers which operate for profit, non profit organisations must already employ full-time permanent employees in order to be eligible employers for an AEO. The CRA maintains a directory of registered charities that could be accessed on the Internet. As earlier discussed, a positive AEO is based on the assumption that the Foreign National will become successfully established in Canada, therefore they will not have to rely on public assistance programs to support their settlement. Charitable organizations eligible to make a request for an AEO are those who are involved in providing services such as assistance of public worship and the administration of programs providing food, clothing and/or shelter. Not eligible are non-profit organizations whose members are engaged solely in activities aimed at their own spiritual growth.

Please note that in the case of non profit organizations, it might not be possible for some employers such as charitable organizations to provide copies of PD7As and T4 Summary of deductions. In such cases, the TFWP Officers will have to determine to what extent the non-profit organization is well-established by considering how long the organisation has been in existence; if it is well-known in the community; if it is registered with CRA; and if it has employed workers in the past.

Example:

The following represents two situations where HRSDC can and cannot provide a positive AEO:

An AEO can be approved:

1. A religious organization requests an AEO for a religious worker, whose main duties include the assistance at services of public worship and the administration of programs providing food, clothing and/or shelter.

An AEO cannot be approved:

2. A religious organization requests an AEO for a religious worker, whose main tasks are limited to fulfilling

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their own spiritual well-being.

Employer of record as opposed to placement agencies and similar firms

It is essential that the assessment of genuineness be linked directly to the employer of record, that is to say, the employer who will enter into an employer-employee relationship with the workers and will pay the worker's salary. While a placement agency may act as an intermediary, referring workers to employers, it cannot be considered the employer of record.

There is only one instance where a placement agency and other similar firms can be considered an employer of record: when the firm needs to meet its own human resource requirements in support of its business operations (e.g. a placement agency interested in hiring qualified human resource recruiters or general managers).

While placement agencies or similar firms (head-hunter agencies, temporary help agencies, and employment brokers) cannot be considered the employer of record in most instances, nonetheless they can play an acceptable "third party" role when representing an employer and ensuring on its behalf that all the administrative requirements for the AEO request are met.

Minimum number of years in operation and number of employees

As mentioned earlier, among the first steps involved in assessing the genuineness of the job offer is the verification that the employer has been in business for at least one year and has had a minimum of one employee. This can be verified by ensuring that the employer:

- a. has a valid business address and phone number (TFWP Officers should use <http://www.canada411.ca> to validate the employer's name and phone number that appears on the application);
- b. has a valid business number issued by the CRA, and a website or email address (if applicable);
- c. has provided copies of CRA remittance forms (PD7A) and copy of CRA T4 "Summary of remuneration paid" showing that the business paid source deductions for at least one full-time employee over the past 12 months (the T4 Summary must show EI premiums paid for both the employee (block #18) and the employer (block #19) – this information is required to demonstrate that CRA has deemed them to be not just a business but also an employer of record, for at least one person, for the last 12 months);
- d. evidence to support that the business has been in operation in Canada for at least one year (e.g. business licenses spanning more than 12 months or current commercial lease agreement); **or**
- e. if the business is not well-known or established, and/or the business has not employed anyone over the previous year and/or has not been in operation for at least one year, nonetheless an Officer has reason to believe that the employer is an established organization. It is expected to be a rare occasion that a confirmation would be issued in these circumstances. Because of the rarity of this occasion, Officers should discuss with his/her regional supervisor in the region and reach an agreement before confirming.

Examples relating to (e)

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1. A new company was created to take advantage of a significant investment project. Though the company has not been in operation for a full year, because the company has been awarded a contract to ensure a successful start, HRSDC can, in all likelihood, be confident that this employer will provide indeterminate employment to a foreign national.
2. A company has been known to operate for many years in a community, however, for a particular reason (i.e., natural disasters, avian flu, mad cow disease or else), was not in operation for a certain period of time, and accordingly had no employees on the payroll for that specific period. Nevertheless, because of the company's positive reputation and the fact that it will resume operations and conduct business as usual, HRSDC can, in all likelihood, be confident that this employer will provide indeterminate employment to a foreign national.
3. A charitable or religious organisation that would never be in a position to provide PD7As but that is well-known in the community and the Officer is confident that it would be in a position to provide for the settlement of the foreign national. Such a situation would not result in an additional burden to social assistance programs.

The TFWP Officer has the responsibility to contact the employer to ensure that the information, provided at the time the application is assessed by HRSDC/Service Canada, is still accurate. As part of the direct call to the employer (see 7.2.2.) it is particularly important to confirm the address, considering that HRSDC/Service Canada will send a letter to this employer providing the result of the assessment, and possibly the document the employer needs to forward to the applicant (and the third party where applicable). If the information provided on the application does not allow the TFWP Officer to contact the employer by phone, HRSDC/Service Canada can write to the employer and insist he/she provide an employer contact phone number (NOT a third party contact number).

In the context of this call to the employer, it might be appropriate to remind the employer that the letter offering employment to the foreign national represents a commitment to hire the person for an indeterminate period. The request for an AEO is not simply a means of interviewing the foreign national without any commitment to hire the person.

Validating the supporting documents

When looking at PD7As and T4 Summaries submitted by the employer, the business number on each must be verified with the business number that was given by the employer on the application to ensure that they are actually for the company that is offering the foreign worker the position and not for another company owner by the employer.

All documents submitted by the employer should be examined to determine if they are actually providing the information they are intended to provide, whether they were tampered with, or whether they are acceptable substitutes to the normal documents that are requested.

Should a TFWP Officer doubt the validity of any supporting document, s/he should ask the employer to send in others.

Employer Reasonable Able To Fulfill Terms of Employment

Relationship between the number of previous requests for AEOs and the employer's workforce size

The offer of employment cannot be assessed without considering the context of the business operation. As a basic principle, HRSDC/Service Canada must be in a position to determine

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whether the job will offer a reasonable employment opportunity allowing the immigrant to become successfully established in Canada immediately upon arrival. It is therefore not unreasonable to establish a link between the number of AEO requests received from a given employer over the previous 24 months and that employer's current size (number of employees).

TFWP Officers should be thorough and practice due diligence when the same employer has requested a number of AEO applications in the previous two years. In such situations, TFWP Officers must assess the appropriateness and genuineness of these additional applications. Considering the fact that such cases require a more in-depth assessment, they should be discussed with a regional consultant or supervisor for advice and final review.

Cases that would require particular attention involve repeated AEO users for example, when the cumulative number of requests for AEOs over the last 24 months, from a given employer, corresponds to more employees or a significant differentiation in comparison to the employer's current payroll (as per the T4 Summary). In cases where the Officer deems it necessary, the employer can be required to demonstrate that the business has the ability to meet the additional payroll costs (e.g. if new hires are only replacing employees leaving as per the RoE issued, if a business plan exists that is related to an expansion of the business). If the employer cannot provide an argument to satisfy the TFWP Officer that all new salary costs will not adversely affect the business' operations, the request cannot be considered genuine.

Example

Situation where a TFWP officer can provide a negative AEO:

A handwritten T4 Summary is included with the application and indicates ten employees, yet the total employment income is shown as \$49,000 and total remittances to CRA as \$9,500 (total of CPP, EI and income tax for both the employee and employer contributions). The offer of employment included with the application is for a production supervisor with a salary of \$50,000. Since this amount is more than the employment income of all employees in 2002, HRSDC/Service Canada can consider this offer of employment as not genuine if not substantiated further by the employer.

Reasonable Employment Needs

Reasons associated with the hiring of a new employee

The decision to hire an employee is not a simple question in itself and usually depends on several variables. Before reaching that decision, the employer will have estimated that the additional labour costs involved in paying a new worker is more than compensated by the increase in expected revenues associated with a higher level of production. From a simple human resource requirement model, one can assume that an employer will require a new employee to either:

- fill a position created by attrition (e.g. to replace a person leaving as a result of a retirement, a resignation or a transfer), or
- to fill a new employment opportunity created by growth in the business operations.

The absence of any of these two conditions raises doubts to the genuineness of the proposed job offer. An employer should easily be able to explain which of these two basic reasons underlies their current request for an additional worker. Conversely, a TFWP Officer may have reasonable doubts as to the existence of a real job opening if an employer is unable to make a link between the request for a worker and the state of their business operations. Questioning the employer on this factor will allow the Officer to consider to what extent the employer-stated reasons underlying

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the need to hire a new employee is consistent with standard human resource management practices. *COULD REQUEST NEW CONTRACT DETAILS*

Recruitment practices

It is usually good management practice to ensure that before hiring a full-time employee in a permanent job, an employer would first review applications of potential candidates or consider other recruitment practices (e.g. review of curriculum vitae only, oral interview over the phone or face to face). While recruitment practices may vary by employer according to size and/or industrial sector, from basic phone interviews to sophisticated cognitive skill assessments, it is usually unlikely that an employer would be prepared to offer a permanent job to someone they would have never contacted. This situation might not be impossible but the TFWP Officer should confirm with the employer that it is common practice in the context of his company. It may be that the recruitment function is contracted outside of the firm and that the employer totally relies on the expertise of the recruitment firm to conduct the selection of new employees. If the employer, however, has never met or discussed the offer of employment with the foreign national and it is not considered a usual practice for similar companies in this sector, the TFWP Officer should carefully consider this fact in addition to the other factors before confirming the genuineness of the offer. Please note that we are not assessing whether the employer has attempted to hire Canadian citizens (as per LMO policy). Rather, we are assessing that the employer has made an attempt to communicate with his/her potential employee.

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Section 3.5.2 – Genuineness

The new regulations provide a degree of clarity with respect to the assessment of the genuineness of an employer's job offer, and how this will be considered when assessing a labour market opinion (LMO) application. The following four factors will be assessed to determine the genuineness of the employer's job offer:

1. an employer's active engagement in the business in respect of which the offer is being made;
2. an employer's reasonable employment need;
3. an employer's ability to fulfil the terms of the job offer; and,
4. an employer's or third party's compliance with federal and provincial employment and recruitment legislation in the province in which the temporary foreign worker (TFW) will work.

Service Canada staff must assess all four genuineness factors. An employer's failure to satisfy any of these four factors would result in a negative LMO based on genuineness and the remaining factors under section 203 (e.g. the six labour market factors and the substantially the same assessment) will not be assessed.

If all four genuineness factors receive a positive assessment, Service Canada staff is to proceed to assess the remaining factors under section 203 (e.g. the six labour market factors and substantially the same).

3.5.2.1 Two-levelled approach to assessing Genuineness

To ensure that genuineness assessments strike a balance between improved program integrity and efficiency in processing applications, two levels of assessments will be used.

Each genuineness factor will be evaluated separately based on information provided in the LMO application (including attestations) and a follow-up conversation with the employer (level 1 assessment). As part of the level 1 assessment, every LMO application will be reviewed against the following five criteria to determine if any of the genuineness factors require the employer to submit additional documentation in support of a level 2 assessment:

- The employer's most recent previous LMO or Arranged Employment Opinion (AEO) was negative as a result of either a **genuineness** or **substantially the same (STS)** assessment.
- **Employer compliance review (ECR)** or **Monitoring Initiative** findings revealed that the employer failed to comply with program requirements.
- The employer was subject to an LMO **revocation** since their last application (for reasons other than an unintentional error).
- The employer is, or has been, the subject of a serious **complaint, infraction or investigation** (including credible media reports).
- The third-party is on the due diligence list.

These criteria should only trigger a level-2 assessment of the genuineness factor that relates specifically to the issue. All other factors should be assessed based on information provided in

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the application. For instance, if a credible media report suggests that an employer has been charged with a workplace safety infraction, Service Canada would ask the employer to provide proof of their compliance with federal and provincial employment legislation (genuineness factor d). The remaining factors would be assessed based on attestations and information provided in the application unless other risk indicators were present that would cause Service Canada staff to question the other elements of genuineness.

An employer's refusal to submit documentation when required or requested will result in a negative opinion on genuineness, which would lead to a negative LMO.

3.5.2.2 R200(5)(a) whether the offer is made by an employer, other than an employer of a live-in caregiver, that is actively engaged in the business in respect of which the offer is made

The assessment of this criterion is important to ensure that the offer of employment is coming from an employer that legally exists and operates a business relating to the job offer made to the TFW. The employer should have an operating/functioning business, providing either a good or service related to the job offer made to the TFW and must have a work location in Canada where the TFW could work.

Assessing actively engaged

Employers will be required to describe their main business activities on their LMO application form (box 18). This information will be used to assess whether the employer is actively engaged in a business that relates to the offer made to the TFW.

Additionally, all employers that are new to the program (e.g. have never applied for an LMO or AEO before) will be subject to a level-2 assessment of this factor and will be required to submit a copy of their business license/permit at the time of application to substantiate that they are actively engaged in their business. Since not all municipalities require a business license/permit to operate, new employers may also submit specified Canada Revenue Agency (CRA) documentation (T4 Summary, T2 schedules 100/125, T2125), business contract(s) for work in Canada or an attestation by a lawyer, notary public or chartered accountant. Information such as business name, number, address and type of business should be checked for consistency with information provided on/with the application, including the employer's description of their business activities.

For returning employers, Service Canada staff should check the employer profile to ensure that the business activities described by the employer on their current application do not deviate substantially from the ones listed in past applications. If there is a significant difference, staff should ask for an explanation on how the principal business activities have changed through a follow-up conversation. This would normally be sufficient to make an assessment of this genuineness factor. Only in the rarest of cases (e.g. there is a reason to doubt the employer is lawfully in business, the type of business activities has changed significantly without a reasonable explanation or the employer is using a third-party on the due diligence list) would Service Canada conduct a level 2 assessment of this factor for returning employers. If one of these indicators exists, Service Canada staff would request a business license/permit. If a business license is not required in the municipality in which the business operates, they can submit a business contract(s) for work in Canada or an attestation by a lawyer, notary public or chartered accountant.

However, should Service Canada also have a legitimate reason to conduct a level 2 assessment of the employer's ability to fulfil (e.g. the employer is known to have recently declared

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bankruptcy), CRA documentation should be requested instead, including: a T4 Summary of Remuneration paid, and schedules 100 and 125 of their CRA T2 Corporation Income Tax Return (if the business is incorporated) or if they are not incorporated, CRA's T2125 Statement of Business or Professional Activities. In either case, information such as the business name, number, address and type should be checked for consistency with the information on file and information provided with the application.

3.5.2.3 R200(5)(b) whether the offer is consistent with the reasonable employment needs of the employer

Employers will need to prove that the job offer is consistent with their reasonable employment needs. This means that the job offered matches the general type of work that is reasonably and usually part of employment in that business/sector and whether the business is experiencing growth or attrition, conditions that would normally require the hiring of a new employee.

Assessing reasonable employment need

Because there is no documentation that could reasonably substantiate an employer's employment needs, this genuineness factor always receives a Level 1 assessment.

On the LMO application, employers will be required to provide a rationale for the job offer they are making to the TFW and explain how this meets their employment needs. Service Canada staff must consider the type of business the employer is engaged in (as described in box 18), the rationale provided and the type of occupation requested when assessing this factor.

When questions arise concerning the legitimacy of the employment needs, staff are encouraged to clarify the employer's rationale by phone or by requesting a more detailed explanation in writing.

3.5.2.4 R200(5)(c) whether the terms of the offer are terms that the employer is reasonably able to fulfil

Employers must demonstrate that they are reasonably able to fulfil all of the terms of employment. This means being capable of providing, for the duration of the work permit, full-time work in line with the job description and acceptable employment standards. It includes not only the employer's ability to pay required salaries and benefits, but also their ability to meet other programmatic requirements such as providing return airfare and interim medical coverage under the National Occupational Classification (NOC) C and D pilot project.

Assessing ability to fulfil

For a Level 1 assessment, Service Canada staff will rely on signed attestations by employers which confirm the employer's commitment to fulfilling the terms of the job offer. These attestations vary by program stream, but may include the following:

- I will provide any temporary foreign worker employed by me with wages, working conditions and employment in an occupation that are substantially the same as the wages, working conditions, and occupations as described in the LMO confirmation letter and annex.
- I will pay full transportation costs for the worker to travel from his/her country of residence (or from his/her residence in Canada) to the location of work in Canada and for the return to the

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country of residence (as stipulated in employment contract) and will not recoup, directly or indirectly, any of these costs from the worker.

- I will provide medical coverage until the temporary foreign worker is eligible for provincial/territorial health care insurance coverage (where applicable).
- I am in good standing with the applicable workers compensation program and I will register the temporary foreign worker under the appropriate provincial/territorial workers compensation / workplace safety insurance plans where available or purchase a personal for free, on-the-job-injury or illness insurance that provides the temporary foreign worker with an equivalent protection to the one offered by the applicable provincial law.

A level-2 assessment of this factor would not be triggered unless there was a clear reason for doubting the employer's ability to meet this requirement and the required documentation could assist Service Canada staff's assessment of this criterion. For example, if, due to financial constraints, an employer had failed to provide return airfare to a NOC D worker as promised on a previous LMO, a level-2 assessment would be warranted in order to better determine the employer's capacity to meet this requirement for the current LMO application. Alternatively, if the employer neglected to meet this requirement because they failed to understand their obligations, but subsequently remunerated the employee and attested to meeting this requirement in the future, a level-2 assessment of this factor would not be appropriate because the submission of financial documentation would not address the reason for the employer's previous non-compliance with programmatic conditions.

If it is determined that a level-2 assessment of this factor is warranted, the employer will be asked to submit one or more of the following documents, which provide information on the operating income and profits of a business:

- **T4 Summary of Remuneration paid** – provides a summary of employment income paid out by the employer in the previous taxation year. The absolute amount of income paid (see line 14 of the T4 – Employment Income) will reveal the general size of the employer, which gives an indication of whether that employer can easily absorb the salary to be paid a TFW. For instance, an employer that paid out millions of salary dollars the previous year would normally be able to absorb an additional worker; one that paid out \$100,000 in income the previous year and wishes to hire additional workers should have their financials scrutinized further. In these cases, staff will also look at T2, T1/T2125, where applicable.
- **T2 schedule 100/125 (if employer is a corporation)** – provides information on operating income and profits of a business. As a general rule, operating income and/or retained earnings (profits) should be great enough to support TFWP-related financial obligations including: the salary listed on the current application and any other salary in relation to previous confirmations, either LMO or AEO, for TFWs that have not yet commenced employment. Operating income is listed on line 9970 of schedule 125. Should that line not be listed, Service Canada must obtain this information by adding lines 9369 and 9899. Retained earnings (profits) are listed on line 3829 of the schedule 100.
- **T2125/equivalent financial statement (if sole proprietorship or partnership)** provides information on the operating income of the business. Operating income is listed in Part 5, line 9369 of the T2125. Again, if the net income is at least as great as the additional salary cost in the LMO application (and any other TFW's in relation to previous confirmations, either LMO or AEO based, not yet commencing employment), an opinion can be rendered.

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- **Workers' compensation clearance letter** – declares that the employer is registered with the appropriate workers' compensation board and has an account in good standing. This would only be asked for when there is an indication that the employer did not comply with programmatic requirements to register their workers in the provincial workers' compensation scheme in provinces where it is not mandatory. If this registration is mandatory under provincial legislation, then the employer would be failing to comply with *IRPR 200(5)(d)* detailed in section 3.5.2.5.
- **Business contracts** – business contracts could substantiate the capacity for future earnings, particularly for employers whose CRA documents do not support their ability to fulfil financial obligations. For example, an employer may have had financial difficulties in the previous taxation year, yet they can demonstrate the capacity for future earnings due to an increase in business. Service Canada staff should ensure that the business contract is at least as long as the job offer to the TFW and that the financial terms are sufficient to pay the TFW (at least as much as the salary and benefits offered to the TFW, and that of any others who have been previously approved but have not commenced work) and to meet other programmatic requirements (e.g. interim health insurance).
- **an attestation by a lawyer, notary public or chartered accountant** – would attest to the fact that the employer is in good financial standing and will be able to continue to adhere to his/her financial obligations to the TFW (template to be provided to the employer).

3.5.2.5 the past compliance of the employer, or any person who recruited the foreign national for the employer, with the federal or provincial laws that regulate employment, or the recruiting of employees, in the province in which it is intended that the foreign national work

Under this genuineness factor, employers must meet two separate conditions:

1. Employers must be compliant with all federal/provincial employment legislation in the province(s) where the TFW will work; and
2. Employers must ensure that they and their recruiters have been and continue to be compliant with all federal/provincial legislation governing the recruitment of workers in the province(s) where the TFW will work.

These laws include, for instance, Manitoba's *Worker Recruitment and Protection Act (WRAPA)* and Alberta's *Fair Trade Act* (for a complete list, refer to Annex A).

Assessing compliance

Under a level-1 assessment, Service Canada staff will rely on signed attestations by employers confirming the past and continued compliance, of themselves or any person who recruited TFWs on their behalf, with the federal or provincial laws that regulate employment or recruitment:

- I am in good standing with the applicable workers compensation program and I will register the temporary foreign worker under the appropriate provincial/territorial workers compensation / workplace safety insurance plans where available or purchase a personal for free, on-the-job-injury or illness insurance that provides the temporary foreign worker with an equivalent protection to the one offered by the applicable provincial law.

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- I am compliant with, and agree to continue to abide by, the relevant federal/provincial/territorial laws that regulate employment in the occupation specified and, if applicable, the terms of any collective agreement in place. I recognize that any terms of the attached contract of employment less favourable to the worker than the standards stipulated in the relevant labour standards act are null and void;
- I am compliant with, and agree to continue to abide by provincial and federal legislation related to recruitment applicable in the jurisdiction where the position is located. All recruitment done or that will be done on my behalf by a third party, was or will be done in compliance with federal and provincial laws governing recruitment. I am aware that I will be held responsible for the actions of any person who recruited temporary foreign workers on my behalf.

Service Canada would not conduct a level-2 assessment of this factor unless the employer's profile on Foreign Worker System (FWS) (or other information such as a credible media source, a report from a provincial authority, or the presence of the employer's recruiter on the due diligence list indicates the employer's or recruiter's failure to comply with applicable legislation. If it is determined that a level-2 assessment of this factor is warranted, the employer will be asked to submit one or more of the following documents:

- **Workers' compensation clearance letter** – declares that the employer is registered with the workers' compensation board and has an account in good standing.
- **Other appropriate provincial documentation** – for example, if the employer/third party has been reviewed for employment/recruitment violations and cleared by the provincial labour board or ministry of labour, this could be used to substantiate the employer's compliance with employment/recruitment legislation.

Employers using a third party recruiter that has been fined or flagged by the province for non-compliance with applicable recruitment legislation will receive a negative opinion on this genuineness factor.

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Relevant Federal and Provincial/Territorial Laws

1) Relevant federal legislation includes, but not limited to, the following:

- *Immigration and Refugee Protection Act (IRPA)* - <http://laws.justice.gc.ca/en/l-2.5/index.html>
- *CIC: Cracking Down on Crooked Consultants Act* - <http://www.cic.gc.ca/english/departement/media/backgrounders/2010/2010-06-08.asp>

2) Relevant provincial legislation includes, but not limited to, the following:

- *Alberta: Fair Trading Act* - <http://www.servicealberta.ca/1049.cfm>
- *Manitoba: Worker Recruitment and Protection Act (WRPA)* - <http://web2.gov.mb.ca/laws/statutes/2008/c02308e.php>
- *Ontario: Employment Protection for Foreign Nationals Act (Live-in Caregivers and Others)* - http://www.e-laws.gov.on.ca/html/statutes/english/eiaws_statutes_09e32_e.htm
- *Quebec: the Quebec government pre-published a regulation "Règlement sur les consultants en immigration" that would require any representative filing an application to its provincial immigration program to fulfil certain criteria (including having an office in Quebec) and be registered with the government* - http://www2.publicationsduquebec.gouv.qc.ca/dynamicSearch/telecharge.php?type=2&file=/1_0_2/10_2.html
- *Nova Scotia: the Government of Nova Scotia is developing new legislation to regulate the employment of temporary foreign workers* - <http://www.gov.ns.ca/lwd/employmentrights/ConsultationTemporaryForeignWorkers.asp>

3) Any other federal and provincial/territorial legislation related to employment standards or occupational health and safety.