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Immigration Law and International Recruitment

Minister of Employment, Workforce Development and Labour, Hon MaryAnn Mihychuk

Attention: Chief of Staff, Mr Matthew Mitschke

Attention: Director Operations/Policy advisor, Ms Leah Van Houten

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Tel: 819-654-5611

Copy: **Mr Bernie Derible**, Director Issues Management and Deputy Director Chief of Staff at Office of Immigration Refugee Citizenship Canada (IRCC)

Copy: **Ms Janet Goulding**, Director General Temporary Foreign Worker Directorate, Skills and Employment Branch, Employment and Social Development Canada.

Copy: **Ms. Janet Kradyen**, Canadian Agricultural Human Resource Council

19 September 2016

SEEKING CLARIFICATION ABOUT POLICY WITHIN ESDC FOREIGN WORKER PROGRAM: EMPLOYMENT REQUIREMENTS OF THE NOC WITH AGRICULTURE EXAMPLE

Dear Mr. Mitschke and Ms. Van Houten

In paragraph 52 (a) in my letter dated 18 Aug 2016 reference was made about an LMIA policy problem within ESDC: Employment Requirements of the National Occupation Classification (NOC). The objective of this letter is to seek clarification on this issue through 4 questions.

My office has twice requested ESDC for the policy (rules) that guides officers when they make decisions about Employment Requirements of the NOC. In the Access to Information Request (ATIP) release provided in **Enclosure 2** ESDC has indicated that “no records exists.”

In a second ATIP request provided in **Enclosure 2**, ESDC responded with more information about how officer's view Employment Requirements of the NOC in actual cases. This ATIP, once again, shows that ESDC has no formal policy to guide officers when decisions are being made about the employment requirements of the NOC. **Enclosure 2** is a document where officers ask questions

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about employment requirements of the NOC in specific LMIA requests and received answers from advisors/experts/Business Expertise Advisors) officers within ESDC.

On page 3 of **Enclosure 3**, the following question was asked by Service Canada officer Claire Giudreau:

QUOTE

Question on 5 May 2014

1. Is the requirement reasonable or excessive for our program ?
2. If the reason is considered excessive, would it be considered reasonable/appropriate to educate the employer for next time but allow the LMO this time because the communication of this issue was not made appropriately clear to employer on the last application ? SEE ATTACHED for additional details

Answer on 4 June 2104 by Business Expertise Consultant

1. In reviewing the requirements under NOC 8253 Farm Supervisors and Specialized Live Stock Workers, the information provided does not include that the requirement for an employee to provide their own horse and tack is a reasonable requirement.

In reviewing the employers previous LMO (XXXXXXXXXX) the advertising submitted as well as the information provided in the application, the employer did not include the requirement as a necessary or common practice for this position.

2. Update recruitment requirements were implemented on 2013-06-15. Provisions do not exist within policy that permits officers to "educate" an employer whom has failed advertising requirements. In order to waive requirement requirements, the instance would have to fall under the policy that deals with specific recruitment variations. It was clearly documented in the System File notes in most refusals XXXXXXXX that the employer was informed that the requirements for purchasing a horse and tack was excessive.

UNQUOTE

This refusal is unacceptable as there is no legal justification for such a refusal. At many Canadian feedlots all employees own their own horse and tack, even though the Employment Requirement of NOC 8253 (**See enclosure 4**) does not list this as a requirement.

Questions

1. If ESDC has a policy on the application of the Employment Requirements of the NOC (with legal grounds), please provide my office with a clear policy that guides officers how to

assess the Employment Requirements of the NOC. If it does not exist please inform us accordingly.

2. According to ESDC, is the Employment Requirements that applicants must comply with a Federal or Provincial matter ?

Please see **Enclosure 5** for the Alberta Provincial Requirements for NOC 8253 (within a swine farming environment). It is mentioned that applicants must be "interested to work with pigs and be willing to work hard" as an actual requirement, which does not exist in the Federal NOC (**Enclosure 4**). If an employer lists these 2 requirements in the advertisement as a requirement, the existing approach (not based on policy) of ESDC would be to refuse the LMIA as these 2 requirements are not listed in the Employment Requirements of the NOC (Federal classification system). Many other similar examples can be quoted where the Employment Requirements of federal and provincial occupations differ. No legal argument could be found why employers must follow the Employment Requirements of the NOC (Federally).

3. If it is a federal matter (according to ESDC) whereby the Employment Requirement of the NOC (federal) is enforced by ESDC, what is the legal grounds for enforcing the (federal) Employment Requirements of the NOC in advertising and LMIA decisions ?
4. Why has ESDC not listed their LMIA policy about the Employment Requirements of the NOC on the website of ESDC for employers to read and follow ?

Comments

The research in the article (See **Enclosure 1**) has shown that the Employment Requirements of all positions are provincial matters and not under the control of the federal government (i.e. Federal NOC).

In **Enclosure 5** the online advertising requirements for LMIAs are provided. No reference is made about the compliance of the Employment Requirements of the NOC (Federal). However it is used to "catch" employers that have exceeded the Employment Requirements of the NOC and used to refuse LMIA applications. In **Enclosure 6** the advertising guidelines are listed but the Employment Requirements of the NOC are not provided/mentioned.

Clarification is important as our office will seek relieve in Federal Court if a LMIA refusal in the future is based on a federal NOC and not the reasonable needs of employers (i.e. a provincial matter) in the absence of an explanation from ESDC that includes the legal grounds for such a requirement. The Department of Justice has previously settled judicial reviews of LMIA refusals on behalf of the Minister of ESDC claiming that it is in the interest of economic use of judicial resources not to litigate a specific matter. It is hoped that a policy clarification from ESDC can prevent future litigation on this policy issue and not to waste judicial recourse (valuable tax payers money).

The agriculture industry has a shortage of 59 000 people but ESDC and Service Canada and sometimes officers using dubious policies and frivolous unwritten rules to refuse LMIA applications for agriculture workers that is desperately needed in Canada.

To make matters worse many ATIP requests for LMIA policies are being redacted. Employers are forced to play a guessing game and only learn through refusals what the secret/hidden LMIA policies really are.

In Saskatchewan most employers we work with use the Provincial Nominee Program as they are not prepared to apply for LMIAs due to the excessive requirements of the LMIA process and the tendency of officers to refuse LMIA applications for any technicality they can find. Employers in MB, AB and BC have less options in the provincial nominee programs and must use the LMIA process.

Suggestion

If a LMIA policy is written about this issue eventually it should also be intra-vires the law, i.e. have a proper legal authority. Such a policy should **also** be made available to employers not remain secret or hidden to employers.

Coordination/Relevant Background

In Express Entry, 745 University Professors and Lecturers (NOC 4011) were provided with permanent residence visas (Jan 2015 to July 2016) according to an Express Entry presentation by IRCC during August 2016. We believe the majority of the 745 immigrants probably obtained enough points without validated job offers (supported by LMIA or Provincial Certificates of Nomination). Strictly speaking a person with a Phd in Chewa (small tribe in Malawi) or a Phd in ancient Egyptian hieroglyphics could have enough points to emigrate under Express Entry due to their perceived human capital value in the Express Entry system, but without any or very limited employment opportunities in Canada. It is understood that the Express Entry System is under the control of IRCC and not ESDC.

However employers that has identified foreign nationals to work for Canadian employers after extensive advertising in Canada are sometimes refused based on dubious LMIA policies either which does not exist or remains hidden to employers.

IRCC is throwing the doors of immigration open and allow 745 University Professors and Lecturers into the country (we assume most without job offers) but ESDC is refusing LMIA and preventing immigrants to work for employers in desperate need based on LMIA policies that is either secret, hidden or nonsensical.

In April 2016 Minister McCullam spoke at the Canadian Bar Association conference that was held in Vancouver. He mentioned that he wants to increase the performance of Express Entry and make it a more powerful tool in immigration. It is a commendable objective, but it cannot be done in isolation and without the support from ESDC.

An excellent example (on an officer level) that demonstrates the lack of coordination on a tactical/lower level between 2 federal departments as well the negative attitude that permeates within IRCC took place in when a foreign national applied for a work permit to work as an agriculture supervisor: A Saskatchewan grain farmer (growing canola and wheat) applied for an LMIA. The advertising and the LMIA required 2 years of relevant farm supervisory experience. The employer interviewed the foreign national and made a job offer. At the Canadian High Commission in Pretoria the visa officer refused the case as the foreign national had experience in different commodities and therefore the experience was seen as "not relevant". The officer refused the opinion of the farmer. The farmer has to advertise and resubmit the LMIA. The foreign national had to reapply for the work permit and only arrived only 8 months later.

The most recent indictment of the Federal Immigration system (Express Entry and it's predecessors) appeared in the Ottawa Citizen on 19 Sept 2016. (**Enclosure 7**). Many examples of foreign trained skilled workers that cannot find work for various reasons were provided. A root cause analyses will show that none of the immigrants came with the support of a LMIA but they were awarded a permanent residence visa based on policies of IRCC - where the bureaucrats decide which immigrants are valuable for Canada (based on a points system or occupation list). Both are failed strategies. Our company represented dozens of doctors in work permit applications over the past 14 years with the support of LMIAs (LMOs). None of these clients were ever unemployed.

Canada does not need Phd 's in ancient Egyptian hieroglyphics based on their "Human Capital" value as defined in Express Entry, only to be unemployed after arrival. Canada needs to get skilled immigrants to vacant jobs fast with an efficient LMIA process with well trained officers that play a facilitative role based on sensible and transparent LMIA policies. A paradigm shift needs to take place in strategic thinking and coordination. The LMIA process could be hen that lays the golden eggs for skilled immigration to Canada.

We are looking forward to your response about the 4 policy questions.

Respectfully yours

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Enclosures

1. Article about Employment Requirements of the NOC
2. ESDC ATIP file A-2015-00344/NL dated 2 Nov 2015
3. ESDC ATIP file A-2016-00466/WM dated 29 Aug 2016
4. Description of NOC 8253 (Federally)

5. Description of NOC 8253 (Alberta)
6. Online Advertising guidelines from ESDC for LMIA's
7. Article from Ottawa Citizen dated 19 Sept 2016: "Skilled Immigrants Wasting their Talents in Canada"