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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
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3 April 2012

**IMPLEMENTATION OF IMMIGRATION AND REFUGEE PROTECTION
REGULATION 203 (CREDENTIAL ASSESSMENTS IN LABOUR MARKET OPINION
REQUESTS)**

Dear Minister Finley

I wrote to your policy advisor Ms. Minsky during July 2011 about the ultra vires requirement by Service Canada demanding a credential assessment from a provincial regulator before issuing an LMO (See Enclosure 1 for my letter to Ms. Minsky).

The Director General of Foreign Workers Mr. Andrew Kenyon also indicated in his enclosed letter dated 8 August 2012, that this practice is ultra vires (Enclosure 2). As part of his clarification he provided a copy of a policy (rules) dated 25 Feb 2011 in which the policy is again confirmed that the requirement to demand credential assessments by provincial regulators before issuing a LMO, is ultra vires and that it may not be required as a pre-requisite to issue LMO's.

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Ms. Lisa Smith (lisa.smith@servicecanada.gc.ca, Tel 780-442-6785 Cel 780-982-5207) an employee of Service Canada in Edmonton has indicated to me in an email dated 28 November 2011 that SC can not yet implement this policy (See Enclosure 3) . She also indicated verbally during a phone call close to or on 7 November 2011 that Service Canada in AB, BC and SK will not implement this policy as ***“CIC is not ready to ensure that applicants have the required credentials to work in regulated occupations”*** or something to the effect. I asked her whom made this decision and her reply was that it was “someone at HRSDC HQ in Ottawa.” Subsequently I submitted a complaint to the Office of Client Satisfaction (December 2011). The Office of Client Satisfaction could not make progress and informed me nothing can be done to remedy the situation.

Another concern is that Service Canada was not aware that this policy as provided by Mr. Kenyon, even exist: When the policy was sent to SC in AB via email, I was informed by Ms. Lisa Smith that Service Canada in AB was not aware of this policy.

There is also a concern about the so-called “reason” for the refusal to implement the policy by the Service Canada Foreign Worker Section. In an email dated 1 November 2011 a visa officer required the approval from a provincial regulator before the work permit will be issued (Enclosure 4). In a letter dated 28 March 2012 from a Visa Office a visa officer again require the approval from a provincial regulator (Enclosure 5). Therefore CIC and the CBSA are already verifying that foreign nationals in regulated occupations have the authority to work in these regulated occupations. The reason provided to Ms. Lisa Smith, whom in turn, provided this “reason” to my office is being questioned. My concerns was expressed to her in my enclosed email dated 7 December 2012 (Enclosure 4). My concerns was also expressed to Ms Lisa Smith in an email dated 28 November 2011. Since this e-mail (4 months ago) my office has not received any feedback.

There are concerns when a federal organization is not aware of it’s own policy but the concerns increase when federal organizations refuse to implement federal law and it’s associated rules within a reasonable time. It has been more than 12 months (since 25 Feb 2011) since Mr.

Kenyon clarified the policy and clearly specified that credentials may not be demanded as a pre-requisite prior to a LMO being issued. The reason provided by SC why there is a continued requirement for credential assessments or approvals by provincial regulators (that is clearly ultra-vires), does not make sense as the enclosed examples clearly indicate that CIC is ensuring that foreign workers has the required credentials as provided by provincial regulators.

Please indicate when Service Canada in Western Canada will implement HRSDC Foreign Worker policy and federal regulation with regards to this issue.

Thank you for your time.

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

Enclosures

1. Letter to Ms. Minsky dated 21 August 2012
2. Letter from Mr. Andrew Kenyon dated 8 August 2012
3. Email by Ms. Lisa Smith dated 28 November 2011
4. E-mail to Office of Client satisfaction dated 13 December 2011
5. Letter from Visa officer requiring Credential assessment from a Provincial Regulator, dated 26 March 2012
6. Emailed dated 28 March 2012



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21 Aug 2011

**FOLLOW UP ON POLICY INQUIRY: IMPLIMENTATION OF IMMIGRATION AND
REFUGEE PROTECTION REGULATION 203**

Dear Ms Minsky

I made an inquiry to Mr. Phil Harwood on 5 July 2011; and followed up on that inquiry with you in an e-mail dated 21 July as well. Our telephonic discussion that same week has reference as well.

My office received the enclosed letter from Mr. Andrew Kenyon dated 12 July 2011, in which he referred to my letter dated 7 July 2011. It might be possible that Mr. Kenyon's letter is referring to my letter dated 5 July which is also the policy issue that is being addressed in this letter.

My inquiry is related to the administration and implementation of Immigration and Refugee Protection Regulation 203 (3). Pursuant to IRPR 203 (3), an officer of SC/HRSDC must assess 6 factors before a LMO decision is rendered:

Quote

(3) An opinion provided by the Department of Human Resources and Skills Development with respect to the matters referred to in paragraph (1)(b) shall be based on the following factors:

- (a) *whether the employment of the foreign national is likely to result in **direct job creation or job retention for Canadian citizens or permanent residents**;*
- (b) *whether the employment of the foreign national is likely to result in the creation or transfer of skills and knowledge for the benefit of Canadian citizens or permanent residents;*
- (c) *whether the employment of the foreign national is likely to fill a **labour shortage**;*
- (d) *whether the **wages offered to the foreign national are consistent with the prevailing wage rate** for the occupation and whether the working conditions meet generally accepted Canadian standards;*
- (e) *whether the employer has made, or has agreed to make, **reasonable efforts to hire or train Canadian citizens or permanent residents**; and*
- (f) *whether the employment of the foreign national is likely to adversely affect the settlement of any labour dispute in progress or the employment of any person involved in the dispute.*

Unquote

Pursuant to Immigration and Refugee Protection Regulation 203, Service Canada must issue their opinion based on the above 6 factors only. Whether the foreign national has the required experience, has the appropriate education, whether the foreign national is medically admissible or if the applicant has authority from a province to work in a regulated occupation are issues of compliance that are being enforced by CIC or the CBSA and therefore not the responsibility of Service Canada.

According to IRPR 203 (3) Service Canada and Human Resources and Skills Development Canada, for example does not have the authority to refuse an LMO or AEO if the foreign national does not present evidence to the Service Canada Foreign Worker Section that he or she has approval from a provincial regulator to work in a regulated occupation.

In the Foreign Worker office of Service Canada in AB and SK, Service Canada officers demand to receive approval from provincial regulators for some occupations, but not all occupations, before issuing a positive LMO. For example in SK and AB my office was instructed to provide approval from the relevant regulator for electricians before the LMO would be issued. However in the case of Alberta, approval from the Association of Professional Engineers and Geoscientist of Alberta is not required by Service Canada. Except for the fact that these demands are not necessary to answer any one of the 6 factors they need to assess, and due to inconstancy within Service Canada regarding these demands; the process is becoming confusing.

My submission is that these demands/requirements by Service Canada officers to have received

approvals from certain provincial regulators (not all regulated professions) before an LMO will be approved, are ultra vires. The CBSA and CIC will verify compliance with experience needed (as mentioned in the LMO), education levels needed (As mentioned in the LMO), and will verify if the foreign national has obtained approval from a provincial regulator according to provincial laws regulating certain occupations. If my understanding is flawed, please correct me.

The questions about IRRP 230 (3) and demands by officers as described above are as follows

1. In **which provinces** is the policy followed by HRSDC and Service Canada that approvals by provincial regulators (of regulated occupations) must be provided in occupations that are regulated before a positive labour market opinion is issued?
2. For **which occupations** is it required to provide approval from a regulator that a foreign national may work in a specific occupation to Service Canada before a positive LMO may be issued by Service Canada?
3. Where can this policy be found and studied by myself or my clients (Canadian Employers)? Any reference to **publicly available rules or regulations will be beneficial**. If possible please also provide copies of the rules or regulations where this requirement is defined. A source of authority would therefore clarify the whole issue

Thank you for your time

Respectfully yours



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Enclosures

Letter by Mr Kenyon dated 12 August 2011



Mr. Jacobus Kriek
Matrixvisa Inc.
1150-10180 101 Street
Edmonton, Alberta
T5J 3S4

AUG 08 2011

Dear Mr. Kriek:

On behalf of the Honourable Diane Finley, I am pleased to respond to your recent letter, expressing concern regarding Human Resources and Skills Development Canada (HRSDC)/Service Canada's implementation of the amended section 91 of the *Immigration and Refugee Protection Act* (IRPA).

Effective August 2, 2011, employers who use the services of a paid third party representative to help them complete an application for a labour market opinion (LMO) or an arranged employment opinion (AEO) must demonstrate that their representatives are eligible to provide services under section 91 of the IRPA by submitting an Annex to the Appointment of Representative Form. The Annex is available through the following Temporary Foreign Worker Program's (TFWP) Web site, in Service Canada's electronic forms repository:
<http://www.servicecanada.gc.ca/cgi-bin/search/eforms/index.cgi?app=prfl&frm=emp5520&ln=eng>.

HRSDC/Service Canada takes its role in maintaining the integrity of the TFWP very seriously and requires that employers ensure that the third parties are authorized to represent them during the LMO/AEO application process. HRSDC/Service Canada will not process LMO/AEO applications in cases where the third party representative is not eligible to represent the employer as per section 91 of the IRPA. If employers wish to re-submit their applications, they must either use the services of an authorized representative, an unpaid representative, or apply without assistance.

In relation to your questions regarding subsection 203(3) of the *Immigration and Refugee Protection Regulations*, Service Canada officials assign a four-digit National Occupational Classification (NOC) code based on the description of job duties and the requirements listed on the application. NOCs for regulated occupations may require mandatory licensing/certification/registration and, in the event that the employer does not indicate such a requirement in the LMO application, Service Canada officials will inform the employer as a courtesy. This information assists Citizenship and Immigration Canada and the Canada Border Services Agency, who have the authority to assess the foreign national's ability to perform the job duties.

.../2

HRSDC/Service Canada issues opinions on the potential labour market impact of the entry of a temporary foreign worker without any notification from occupational regulatory bodies. I have enclosed, for your information, the national operational directive relating to regulated occupations (Annex A).

I hope that this information proves helpful. Thank you for taking the time to write.

Yours sincerely,

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

Andrew Kenyon
Director General
Temporary Foreign Worker Program
Skills and Employment Branch

Enclosure: 1

Temporary Foreign Worker Program Manual

Section 3.5.9 – Provincial/territorial/federal certification, licensing, or registration requirements of the job and regulated occupations

It is the Employer's responsibility to provide proper territorial/federal certification, licensing, or registration required for the position they are seeking to fill.

- Advisors may consult with professional groups as part of their assessment process.
- It is left to the Service Canada staff's discretion to determine if this field is required to be filled in. (Depending on the National Occupational Classification (NOC) assigned to the job title).

Regulated Occupations

What are regulated Occupations?

- Regulated occupations are those jobs that "require a special license or certification before you can begin work. Most regulated occupations require that you have specialized education and experience before receiving your licence."

Consideration #1: Assessment of Qualifications

- Labour Market Opinions (LMO) are assessed on factors in *IRPR 203(3)* regardless of any regulatory requirements that are associated with the occupation/position.
- **The employer is responsible to ensure the selected applicant is/will be meeting the requirements of the position, including any licensing/certification requirements.**
- Citizenship and Immigration Canada (CIC) / Canada Border Services Agency (CBSA) assesses the foreign national's qualifications with reference to the characteristics of the job/position to be filled.

Consideration #2: Duration of Employment Period

- The duration of employment on the LMO is labour market-based. It cannot be set to accommodate time necessary to meet the regulatory requirements.
- The discretion that HRSDC/SC can exercise in regard to the LMO's duration of employment relates to the likely impact this job offer will have on the Canadian labour market.

Consideration #3: Flagging a Regulated Occupation to CIC

- As per box 48 of the LMO application (EMP 5239), the employer is asked to indicate if the occupation is subject to any regulatory requirements.
- Occupational regulatory requirements are to be noted in the "Notes to CIC" section of the LMO confirmation.

Temporary Foreign Worker Program Manual

Consideration #4: Regulatory Requirements not Identified by Employer in LMO Application

- Ensure that the employer has not forgotten to identify occupational regulatory requirements.
- Verify with LMI to ensure whether or not the occupation is subject to any regulatory requirements.
- When the employers seem to be unaware that the occupation is regulated, Service Canada staff will contact them to ensure that they are aware that the occupation is regulated, particularly if the requirement is mandatory in the province/territory (e.g. licensing requirements are always mandatory while certification requirements can be voluntary).

What do the expected changes mean for Foreign Worker Officers?

- LMO applications are assessed as usual as per factors in IRPR 203(3). **Regulated occupations will continue to be flagged to CIC through *Notes to CIC*.**
- **Assessments of LMO's are conducted without any notification from occupational regulatory bodies.**
- The duration of employment determined on the LMO is not varied on the basis of any occupational regulatory conditions.
- The employer is made aware of regulatory requirements if not identified in LMO application and directed to the regulatory body.

CIC/CBSA and the employer can directly seek information from the regulatory body.