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Immigration Law and International Recruitment

Office of the Minister of ESDC
Attention Chief Of Staff, Mr Gerrit Niewoudt
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15 November 2014

**CONCERNS ABOUT HIDDEN AND ERRONEOUS POLICIES WITH REGARDS TO
LABOUR MARKET IMPACT ASSESSMENTS**

Dear Mr. Niewoudt

1. I am writing to you to express my concern about the trend within ESDC, Foreign Worker Section, not to have clear policies on Labour Market Impact Assessments (LMIAs) that is available to the public. Currently some of the hidden policies are only discovered through multiple Access to Information Act Requests. In many cases the existence of certain policies are only discovered months or years after the policy take effect. I suspect that, in some cases, policies are never discovered and it remains hidden to employers. There are multiple hidden policies that employers are not aware of when they prepare to apply for the very expensive LMIAs (\$1000 per LMIA the application). The results of hidden policies are as follows:

- a. It contributes to a higher number of LMIA refusals. Essentially the lack of clear policy and the inability to correct erroneous policies is killing the goose (LMIA process) that lays the golden eggs (highly skilled immigrants to Canada). The LMIA process protects jobs for Canadians efficiently. The first 4 months of this year the refusal rate for Labour Market Opinions (LMOs) in New Brunswick was **72 percent for the Federal Skilled Worker Class and 68 percent for applications in the Federal Skilled Trades Class**. See *Enclosure 1* for a copy of an Access to Information Act Request.
 - b. In some provinces Nomination Certificates (Provincial Nominee Class) are being used as an alternative/substitute for an LMIA. This has resulted in large increases in applications within the Provincial Nominee Class and resulted in very long processing times: in BC within the past six months the number of applicants increased by eighty percent compared to the same time during 2013. In BC the waiting period increased from 2 months in 2013 to 8 months at present. Ontario's quota for the Provincial Nominee Class was filled by
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September 2014 and will not accept any more applications. Similar statistics can be quoted from other provinces where LMIA are not a pre-requisite to enter the Provincial Nominee Class. Many applicants/foreign nationals could have used the Federal Skilled Trades Class (for example) as this class is not overloaded with applications. Accessible and clear LMIA policies will ensure that employers understand the requirements; increase the approval rate and ensure that the Provincial Nominee Class is not “over-subscribed.” Employers that really need the provincial programs can not use it as available quotas are being taken up by applicants that could have qualified for other immigration classes such as the Federal Skilled Trades Class of the Federal Skilled Worker Class.

- c. The Federal Government is preparing for the **Express Entry** model of immigration and (from the limited information that is available), a high premium will be placed on applicants with validated job offers by Service Canada. It is easy to see the problem that is developing here, as employers will not be able to appoint the immigrants that they need (in specific areas of Canada / specific experience etc.). Express Entry could possibly not receive enough applicants with validated job offers (by Service Canada). This was a very real possibility mentioned by Ms. Christie (from CIC) at CAPIC National Education Conference held in Calgary on 7 and 8 November 2014.
 - d. It is procedurally unfair to have hidden rules. Employers need to know what is expected of them. That is also a basic principle of the Canadian legal system.
2. The following examples of hidden policies can be quoted:
- a. Hidden policy about conditions employers must comply with as well as the documentary evidence that must be provided to demonstrate compliance. ESDC refused twice to release the conditions. See my letter to the Minister of ESDC in ***Enclosure 2***. The Office of the Information Commissioner is now investigating this complaint. See ***Enclosure 3*** for a letter from the Office of the Information Commissioner.
 - b. Hidden policy on Recruitment dated 20 Sept 2013. See ***Enclosure 4*** for all **32 pages** that is provided to Service Canada officers. In ***Enclosure 5***, the policies that employers can see on the Internet show only **3 pages**. The difference is clear. Apparently the policy about recruitment was updated recently but we have not yet obtained a copy of this updated policy (if it exists).
 - c. Hidden Policies on Transition Plans. See ***Enclosure 6*** for the 10 pages given to officers. In ***Enclosure 7***, the 3 pages policies that employers can see on the Internet about Transition Plans are provided.
 - d. Hidden Policies on Inspection of Work Places. We have not yet obtained a copy of this hidden policy (if it exists).
 - e. Hidden policies on Labour Shortage was written by the Western Territories as ESDC HQ could not write a policy in a decade. See ***Enclosure 8*** for the 10 pages possibly given to officers about how to assess labour shortage in the Western Territories. Employers are unaware of how this factor is assessed for LMIAs by Service Canada officers. Research has shown that different offices in different parts of the country use different definitions
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for “labour shortage”, which is a contributory factor to the current chaos in LMIA policies.

- f. The complete Foreign Worker Program Manual (more than 700 pages) is not available to employers. This was discussed with a senior policy advisor at the office of Minister Kenny on 6 Sept 2013 during a personal meeting. This problem was also explained in a letter sent to the Minister of EWDC’ Senior Policy Advisor in Aug 2013. It is now a year later and the issue is not yet resolved.
- g. Some employers are being told that they can only apply for LMIA within a 90-day period before the expiry of the work permits. This rule is not available to employers. The result is that advertising for LMIA must be repeated (in some cases) at a high cost to the employers.

There are many more examples that can be quoted, but this will give you an idea of what employers are facing when they apply for LMIAs.

3. There is also a serious problem with regards to the policy of Retained Earnings that was described in the enclosed letter dated 14 August 2012. See *Enclosure 9*. I received a letter confirming receipt (See *Enclosure 10*). It was also discussed with the Minister’s Senior Policy Advisor on 6 Sept 2013. This matter was also litigated in Federal Court in 2012 (Jayme Hepfner Springbank Air Training College v Minister of HRSDC, Federal Docket IMM1545-11), but presently LMIA refusals are still being issued by Service Canada in New Brunswick due to a “lack of retained earnings”. The matter was also discussed with the Senior Policy Advisor from the officer of the Minister of ESDC on 6 Sept 2013. In our letter dated 14 August 2012 the problem was explained, solution identified and two expert opinions were also provided. With very minor changes that letter could have been changed into a policy. However after two years, this problem is not yet resolved.

4. It is requested that the policies about LMIAs be released to the public (in its entirety) so that employers can get a clear understanding of their responsibilities or obligations. It is also requested that the erroneous policies of retained earnings be corrected. If Canada is trying to attract the best and the brightest labour force, the current LMIA policy problems should be fixed as a matter of urgency.

Respectfully yours

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Enclosures

1. LMIA refusal rate in New Brunswick. ESDC file number A-2014-00094 dated 12 June 2104
2. Hidden Rules about Employment Conditions dated 8 January 2014
3. Letter from the Office of the Information Commissioner. File reference 3213-01980 dated 18 March 2013
4. Hidden Rules about advertising. ESDC File number A-2014-00222 /HJK dated 7 Aug 2014
5. Rules about advertising taken from the website of ESDC
6. Hidden Rules about Transition Plans ESDC File number A-2014-00370/CL dated 16 Sept 2014
7. Rules about Transition Plans taken from the website of ESDC
8. Hidden Rules about Labour Shortage ESDC File Number A -2013-00629/HJK dated 6 Feb 2014.
9. Letter to The Minister of HRSDC about Retained Earnings date 14 Aug 2014
10. Letter from HRSDC dated 19 Oct 2012

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