Volume 4, Issue 11
November 2008

ImmQuest

"Qui bene interrogat bene docet" "He who questions well teaches well"

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Please send your questions to *ImmQuest* care of Mario D. Bellissimo at mdb@obr-immigration.com. If you have any questions you would like asked of either Citizenship and Immigration Canada or the Canada Border Services Agency send it along and we will ask on your behalf.

Challenges of Intercompany Transfer Policy

Cobus Kriek

Immigration and Refugee Protection Regulation indicates that foreign nationals can be transferred to Canada and obtain a work permit to work in Canada without a positive Labour Market Opinion from Service Canada, if these foreign workers can "create or maintain significant social, cultural or economic benefits or opportunities for Canadian citizens or permanent residents".

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THOMSON CARSWELL

Challenges of Intercompany Transfer Policy

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In paragraph 5.29 of Chapter FW of the Immigration Manual significant economic benefit is mentioned as a separate and distinct benefit from social and cultural benefits. In Paragraph 5.30 it is mentioned that "**Examples of indicators of 'significant benefit' include: general economic stimulus (such as job creation, development in a regional or remote setting or expansion of export markets for Canadian products and services) and advancement of Canadian industry (such as technological development, product or service innovation or differentiation, or opportunities for improving the skills of Canadians**)". In paragraph 5.31 in Chapter FW 1 of the Immigration Manual it is mentioned that this policy was created for companies to "**improving the management effectiveness, expanding Canadian exports, and enhancing the competitiveness of Canadian entities in overseas markets.**" This implies that paragraph 5.30 and 5.31 is the definition of significant economic benefit, which is also defined as "**providing an important or notable contribution to the Canadian economy**".

In **Section A and E** of paragraph 5.31 of the Immigration Manual also describes the general requirements of the foreign workers that must be met in order for a work permit to be issued under this Regulation. Some of these requirements include the following: The foreign worker must have worked at the foreign branch subsidiary for at least one year in the preceding three years in a similar position and are taking a position in an Executive, Senior Managerial or Specialized Knowledge Worker and the transfer must be for a temporary period only, etcetera. In **Section F** of paragraph 5.31 there is a slight change and it is indicated that the foreign worker "must be working in a similar position" which implies that the person must currently in a "similar position," not just working in one of these positions for one year in the preceding three years.

There are challenges with this policy which could be grouped into four types:

- incorrect interpretations of the Immigration Manual (essentially an error in law),
- self developed rules outside the scope of the policy in the Immigration Manual,
- a requirement within the Immigration Manual of a 'similar position" that does not have actual benefit and
- the lack of an explanation of the meaning of "significant economic benefit".

The **first challenge** is very obvious and an incorrect interpretation of the intra company transferee policy: The Temporary Foreign Worker Unit in Vancouver requires that Specialized Knowledge Workers must have "propriety knowledge" although the Immigration Manual specifically indicates that this is not a requirement. This is based on a case that is less than 12 months old. It is also interesting that when these obvious errors in law were pointed out to a supervisor, the supervisor refused to intervene.

The **second challenge** is that some visa officers require foreign branches to state that the foreign worker "will return" to the overseas branch after a specific period such as two or three years. The required/forced statements that must be provided by the foreign/overseas branch are sometimes required with and sometimes without a time period – there seems to be no consistency. The sentence "will return" must be added or the officers will refuse the work permits or as it is so eloquently stated: "*Failure to provide the additional information may result in the refusal of your application*" The problems with these requirements are as follows:

- The requirements of a statement that the applicant "will return" could not be found in paragraph 5.31 of Chapter FW of the Immigration Manual.
- It is difficult for companies to know exactly with certainty what will happen three years from the date of application. It is not desirable that a government department prescribes how people can be transferred in a state of certainty or an exact time. Business is more dynamic.
- Some multinational companies have branches all over the world and employees might be transferred to other branches instead of back to the branch from where the transfer is taking place. These foreign workers might not necessarily return to the specific overseas branch where the applicant is currently working. This is due to changing demands of the industry in which the company works.
- Extensions are always possible (to a maximum of seven years) pursuant to the Immigration Manual, Chapter FW, paragraph 5.31 page 46. If extensions are possible, it is unclear why employers are being forced to state that foreign workers will return after a two or three year period (which is the same time period of the existing work permit being requested).
- A person only has to work for the foreign branch one year out of the preceding three years to be eligible for an inter-company transfer work permit and does not have to work for the foreign branch at present. How can these demands be met if the transferee is not even working for the parent company at present?
- It is unsure how the applicant may declare dual intent, if the employer is being forced to state that the foreign worker **will** return to the specific overseas branch after three years. It seems therefore as if this new "requirement" implies that the right to declare dual intent does not exist or may not be used in such a request.
- It is believed these types of "forced" statements, in some cases, might have as much value as forced confessions.
- Finally, from the media it has become clear that there will be an increasing importance placed on the role of foreign workers in the permanent immigration of skilled workers: i.e. work permit first and then permanent residence thereafter. This approach also has become a reality in the development of Canada Experience Class (CEC) whereby foreign workers can apply for permanent residence after working in Canada for two years. Therefore this strategic change is in a very stark contrast with visa officers that has a "controlling" attitude with self developed policies (of "must return") that seems to have the support of some officials within CIC (locally and abroad).

This new "policy" of forcing foreign branches to state that the foreign worker will return in two or three years was also questioned in writing. I heard some people label this attitude, a "policeman" attitude. A CIC officer, however, wrote back from

Ottawa and merely indicated that this type of demand is within the right of the visa officer, referring to their duty to ensure that the foreign workers will comply to the conditions of the Act and the Regulations. In the April 2008 edition of Lexbase, it was written that Mr. Norm Hopkins (the Regional Policy Advisor of CIC in BC/Yukon) wrote the following in January 2007: "*We should remember that provisions such as those for Intra-Co transferees* **have been put in place to serve a facilitative function - they are not measures that are in place to exercise "control" where there is no suggestion of an attempt at circumvention or other mala fide intent.**" Mr. Hopkins, I believe, has the correct understanding, attitude and approach on this subject.

The **third challenge** is a rule/requirement of "similar position" that limits the potential of the intra company transferee policy and that is used to exert unnecessary control by visa officers. In addition to the conflicting and confusing requirement of being in a similar position for one year in the preceding three years (Section A and E of par 5.31) and the requirement of being in a similar position at present (which seem to be the way Section F of paragraph 5.31 is written), the requirement of a "similar position" is an enigma. CIC has confirmed that this requirement is based on the rules of the NAFTA intercompany transferee policy - what most people suspected. It should be mentioned, that generally speaking the concept of standardization of policy is a good concept and has merit. The "similar position" which is also listed in the Immigration Manual has the objective is to ensure that the foreign worker coming to Canada (being an Executive, Senior manager or Specialized Knowledge Worker) is actually coming to Canada to utilize special abilities associated with one of these types of positions in Canada after the arrival. Therefore, the logic of the rules in the Immigration Manual is that the "similar position" requirement is a safeguard to ensure that these special skills exist and will be utilized after arrival. At the first glance, this makes a lot of sense.

However the practical reality is that this requirement does not work in modern multinational organizations and in the modern economy of the 21st century. This is best illustrated with two examples:

- A Research and Development (R&D) Engineer that is working for a German automotive manufacturer, has played a leading role in the development of a thermoplastic wheel cylinder as a replacement of the traditional steel wheel cylinder used in braking systems installed in the wheels of motor vehicles.. After developing and perfecting the product the manufacturer decides to establish a factory in Ontario. The R&D Engineer is chosen to become the plant manager as he is the expert with specialized knowledge in the product and recently completed a six months in-house course in the company's manufacturing methodology. The visa officer will deny the application as the positions are not similar, even though specialized and the very advanced knowledge forms the foundation of the transfer. It would be easy to demonstrate how the appointment of this R& D Engineer will contribute to "significant economic" benefit.
- A qualified Quantity Surveyor (Estimator or Building Costing Expert) is also a qualified Insurance Loss Adjuster was promoted to Branch Manager of a South African Insurance Loss Adjusting branch from Cape Town, South Africa, more than three years ago. Due to the operational methodology and the small size of the operations it is expected of a branch manager in South Africa to work as insurance loss adjusters in addition to managing the branch's loss adjusting and general operational matters. Employees from around the world approach this specific Branch Manager on technical related issues where insurance claims are made for damages to large buildings. The Canadian head office requires the branch manager to be transferred to Canada due to his/her specialized knowledge of loss adjusting of claims of damage to large buildings due to natural or man-made disasters such as terrorism. Essentially he/she would move from Branch Manager to Specialist Insurance Lost Adjuster (some would consider this a "downward" transfer. Under the existing policy this would not be possible, irrespective of the economic contribution of the foreign worker. In this case a letter about the specialized knowledge of the applicant was provided by one of the ex-Presidents of the Canadian Loss Adjuster Association – as an expert opinion. The visa officer initially denied the work permit as the positions where not "similar" although the applicant had very specialized and advanced knowledge which formed the foundation of the transfer.

It is suggested that a good immigration law practitioner would say: "Find another way such as a LMO" etcetera.

However the availability of alternative methods should not be used as an excuse not to analyze the inherent challenges and problems of existing policies.

The requirement of standardizing with NAFTA on the concept of "similar position" is probably also based on the old idea that people stay in one organization for 30 years within the same area of specialization and that people build a life within a single occupation. The reality is that people have multiple careers throughout their life and within one organization it is expected that people must be able to multitask and adapt to the ever changing business environment due to new technology, political changes, environmental changes, etcetera. This will become clear if one reads books such as "One Person/Multiple Careers: A New Model for Work/Life Success by Ms. Marci Alboher. The US Department of Labour reported in August 2006 that the average person born in the later years of the baby boom held 10.5 jobs from age 18 to age 40. Nearly three-fifths of these jobs were held from ages 18 to 25. Although it was not mentioned in the report it can reasonably assumed that many of these jobs are performed within one organization. A human resources consulting company in the USA mention the following on the website www.masteryworks.com. "*Seeing the entire system – what it takes to run your business – builds commitment and loyalty and gives individuals and managers the information they need to build and* **align their talents with the needs of your organization**. **Career mobility and advancement options** are key retention factors of an organization. If your people can see multiple options to grow and build their careers they'll stay with you and contribute fully". The emphasis is on core talents and the need of organizations for specific skills. These types of organizations tend to be "organic" and flexible instead of being rigid and mechanistic in their approach to human resources management. The Italian automotive manufacturer, Renault, mention the following on their website www.renault.com: "*Career mobility, a fundamental aspect of Renault's corporate philosophy, is applicable to all of the company's employees. It is one of the pillars of career development at Renault. . .. ... During this review, employee and manager discuss requests for* **transfer or other opportunities** *available within the company and communicate any desired change in career path to human resources and management. . ... As mobility must benefit both parties concerned, the common interest lies in an augmented capacity to fill jobs whilst making the best use of* **individuals' skills**. *As a core value for Renault, mobility is a corporate priority which is valid for all business lines and functions*".

It is clear that the world wide trend in human capital management are the focus on core skills and abilities, as well as the flexible use of these abilities where it is needed in multi national organizations. Even the Regulatory Impact Assessment of the Immigration and Refugee Protection Act and Regulations that was published in the Government Gazette mentions this flexible approach: "*The new regulations provide for the selection of Federal Skilled Worker based on a human capital approach for their flexible skills rather than intended occupation*" (Government Gazette, 14 June 2002, page 218, Part 2 Volume 136 Extra).

The assumption that a "similar position "will ensure that specialized and advanced knowledge or management skills exist before the transfer and be used after the transfer, is also flawed in another way: It assumes that a foreign worker can only manage a certain function of a multi national company **in Canada**, although the foreign worker has had previous management experience in a similar management position **outside Canada (before the transfer).** Here follow three examples

- If the R&D Engineer mentioned above was promoted to the R&D Manager in Canada based on his specialized knowledge, a work permit would be denied under the program.
- Recently I had a discussion about this policy with a CIC policy advisor in Canada. To demonstrate my point I asked him if, after being in this advisory capacity for several years, with an obvious passion for his work, with excellent people skills, etcetera, would he be able to take a Program Manager position at a foreign visa post? He laughed as he knew where I was going with my question, but he still said "yes". I then said: 'How can you manage a foreign visa post **outside Canada** without any previous management experience **in Canada**?" We both knew the answer: being ready for a management position in another country requires more than just management experience in the country of origin, but could include having enough specialized knowledge, previous project management experience, management training , inherent leadership skills, etcetera.
- In practice I have seen a foreign worker holding a MBA specialization in Financial Management and an Honours

Degree in Financial Management working in Canada as a specialized knowledge worker in the financial analyses of after market machinery parts of very specialized earth moving equipment. After being here for more than a year the multinational employer wanted to promote the foreign worker (specialized knowledge worker) to a newly established management position in charge of these type of financial analysts and associated positions of technical sales specialists as she was the most suitable person due to (inter alia) her specialized knowledge of the subject and her double management degrees in this area of financial analyses. An extension (renewal) of her work permit based on inter company transferee policy would not be possible as she did not work as a "Senior Manager" in the overseas branch before coming to Canada.

It would be far more sensible to require that the Canadian Employer **must demonstrate how this specialized and advanced knowledge (or management skills) will provide a significant economic**. The requirement and need for a "similar position" is not as sensible as one might believe. It provides a false sense of security and does not guarantee that the foreign worker will contribute to "significant economic benefit". It is actually counterproductive towards the actual intent of the policy.

The **fourth challenge** is that the term "significant economic benefit" is not well defined. For this reason and the fact that prominence is given to issues like "similar position", the contribution to "significant economic benefit" is not the focus of the test by visa officers. "Significant economic benefit" should be defined in-depth and should include more than the existing limited explanation which was mentioned in the introduction.

Ms. Althea Williams (Manager of Foreign Worker Policy of HRSDC Foreign Workers Section in Ottawa) wrote a good explanation of "significant economic benefit" in the context of self employed (C10 & C11 Exempt codes) and this was captured in Lexbase (July/Aug 2008, Volume 19, Issue 7/8). She mentioned six factors in her discussion of significant economic benefit of which five factors will be mentioned here: "*There are several indicators of economic benefits that can result from the work of a foreign national which would lead an officer to conclude that the test for significant benefit could be met. The following list provides some indicators of economic benefit that could apply to situations that are purely economic. This list is not intended to be all inclusive but merely to provide examples of indicators that could be meritorious. Other factors may have compelling merit despite the fact that they are not listed. Depending upon the nature of and the circumstances surrounding a particular situation some of the factors enumerated below could be given more weight than others. Some may not apply at all.*

1. **General Economic Stimulus**: *an assessment of the direct impact of a foreign national's employment on the general economic stimulus in* **Canada** *which can be taken to mean one or more of the following:* **a)** *job creation or retention at competitive wage rates and working conditions;* **b)** *facilitation of sustainable economic development in a regional or remote setting;* **c)** *secondary benefit accruing to other related industries such as contracts for goods and services granted to suppliers;* **d)** *projects or initiatives that promote or contribute to the long-term sustainable growth and economic stability of Canada or a community in Canada;* **e)** *prospects for improving the productivity of Canadians; f) the degree to which export markets for Canadian products and services will be expanded;* **g)** *enhanced infrastructure projects such as the expansion of an existing business or the establishment of a new division;* **h)** *prospects for future business opportunities for Canada such as the investment in a relatively small business with a view to pursuing additional business ventures;* **i)** *increased tax revenue.(2nd factor is removed) ;*

3. **Advancement of Canadian Industry**: *an assessment of the direct impact of a foreign national's employment on:* **a)** *technological development;* **b)** *product or service innovation;* **c)** *product or service differentiation;* **d)** *opportunities for improving the skills of Canadians.*

4. **Competition within Canada**: *an assessment of the direct impact of a foreign national's employment on competition within any industry or sector in Canada;*

5. **Competition in World Markets**: *an assessment of the direct impact of a foreign national's employment on Canada's ability to compete in world markets or raise the profile of Canada in a particular sector.*

6. **Savings to Tax Payers**: *an assessment of financial savings to municipal, provincial, or federal government departments, such as in cases involving training where a government department would be faced with travel expenses in sending employees to a foreign locale*

unless a foreign national was able to enter Canada to provide the training. Responsibility of Foreign Nationals: Foreign national applicants should address each of the relevant factors that apply to their situation and provide supporting documentation when submitting an application for consideration."

There are other factors with an indirect link to the economy, where the appointment of a foreign worker could have a "significant economic benefit" in an indirect manner. Some of these factors could include the following:

- Environmental factors with a link to the economy. For example, the contribution of a foreign worker to the economy by decreasing harmful emissions, the use of natural resources generate energy in a environmental friendly manner, or contributions in recycling could all have significant economic benefits.
- Social factors with a link to the economy: Decreasing certain crimes such as software piracy could contribute towards significant economic benefit as well.
- Health factors with a link to the economy: Improving the health of Canadians can also make a significant contribution to the economy in certain situations. Here is a strange example to demonstrate a point: The US government has found that a minimum of $3.6 billion would be saved in the USA if breastfeeding were increased from current levels (64 percent of mothers feeding in hospital periods and 29 percent mother feeding up to 6 months) to those recommended by the U.S. Surgeon General (75 and 50 percent respectively). If a foreign worker can contribute to solving such a medical problem with this type of significant economic benefit, then this type of contribution should be considered under "significant economic benefit".

CIC should consider including some of these thoughts in an in-depth explanation of "significant economic benefit" in the Chapter FW of the Immigration Manual as that is the essence of Regulation 205. References should be made to the definitions of the courts in *Chhibber v. Canada (Minister of Citizenship & Immigration)* (July 23, 1998), Doc. IMM-2937-97, 1998 CarswellNat 1410, [1998] F.C.J. No. 1082 (Fed. T.D.) in which there as some discussion about *significant benefit*; and *Pourkazemi v. Canada (Minister of Citizenship & Immigration)* (1998), [1998] F.C.J. No. 1665, 1998 CarswellNat 2296, 161 F.T.R. 62 (Fed. T.D.), [1998] F.C.J. No. 1665, in which *significant economic benefit* was discussed.

The emphasis of IRPR 205 is about the contribution of intra company transferees to the significant economic benefit of Canada. In order to reap the benefits of this policy the following needs to be considered:

- Remove the requirement of "similar position" and replace it with a clause "demonstrate how the specialized knowledge or management skills will contribute to significant economic benefit".
- Keep a requirement that a foreign worker must have specialized or advanced knowledge or have Senior or Executive Management experience, but allow movement between specialized knowledge worker and Senior or Executive management positions at the time of the transfer or extension of the work permit.
- Provide a more in-depth discussion (provision of guidelines) of what the meaning is of the term "significant economic benefit."
- Provide a guideline in the Immigration Manual that a requirement that the foreign workers must return (within or without a certain time period) is not required.
- Provide guidelines to supervisors what they need to do when obvious errors occur in the use of this policy.
- Discuss the role of facilitation versus control in the policy. Support this attitude of facilitation with training and guidance.
- Correct the discrepancy between Section A&E and Section F of paragraph 5.31 of Chapter FW1.

Canada should attempt to attract the best and the brightest to our country and amending this policy by CIC will make an important contribution to achieving this objective.

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