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Immigration Law and International Recruitment

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25 September 2025

ERRORS IN POLICY ABOUT GENUINENESS OF JOB OFFERS USED IN LMIAs

Dear Mr Groen

The essence of this letter was already sent to the Minister in 2012 and this letter is a follow-up on the same issue. It is now 13 years later and the issue has not yet been resolved.

Hopefully this issue can be resolved without litigation.

Background

1. As you are aware Immigration and Refugee Protection Regulation RPR 200 (5) stipulates the following:

“ (5) A determination of whether an offer of employment is genuine shall be based on the following factors

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

2. ESDC provided guidance to officers is about the use of retained earnings) is published online¹. The policy is quoted here

“C. Ability to fulfill terms of the job offerAll employers, except private household employers

Based on your history with the TFWP, you don’t need to submit any of these documents if:

- **your most recent LMIA decision was positive, and**
- **this positive LMIA was issued in the past 2 years**

If you don’t meet the conditions above, you need to submit the most recently assessed, processed or issued CRA document that applies to you:

- **T2SCH100 Balance sheet information – Schedule 100 and T2SCH125 Income statement information – Schedule 125 (for corporations)**
- **T2042 Statement of farming activities (for self-employed farmer or a partner in a farming business)**
- **T2125 Statement of business or professional activities (for sole proprietorships)**
- **T3010 Registered charity information return (for registered charities)**
- **T5013SCH1 Net income (loss) for income tax purposes – Schedule 1 (for partnerships)”**

Wrong Words in Departmental Rules

IRPR 200 (5) refers to "Genuineness of Job offer “

ESDC changed “Genuineness” into “Legitimacy” in it’s policies which is not correct.

¹ <https://www.canada.ca/en/employment-social-development/services/foreign-workers/business-legitimacy.html>

Genuineness is defined as the quality of truly being what something is said to be; authenticity: "the uneven appearance of the grain confirms the genuineness of the leather."

Legitimacy is defined as conformity to the law or to rules: "he has undermined the legitimacy of the criminal justice system."

These concepts are not synonyms and should not be used interchangeably.

Nature of the Problem

3. About 1-2 months ago employers were guided to provide "other evidence" of the ability to pay the wage. That guideline was removed and now the policy just focus on retained earnings in the Schedule 100 and 125. This narrow focus shows that the author of the policy does not understand how business work and does not understand fundamental issue about financial management.

4. Essentially the ability to pay the wage in the future requires a basic understanding of accounting terminology. 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 policy 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.

5. This approach is flawed for 14 reasons (in addition to the expert opinions in Enclosure 1 and 2), namely:

- a. Relying on 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.

- b. 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.
- c. 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)?
- d. 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.
- e. 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).
- f. 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.
- g. 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.

- h. It does not take into consideration the sales forecast. Sales forecast will lead to a pro- forma income statement and pro-forma balance sheet.
- i. 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”.
- j. It does not take into consideration how many full-time employees were being paid without lay-offs in the preceding years.
- k. 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.
- l. 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.
- m. 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.
- n. 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.
- o. In an Arranged Employment Opinion (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, 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

- p. 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.

Analysis of the Regulations

7. There are different methods to statutory interpretation that include the following:²
- 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 Service Canada provides an opinion about a job offer, it is relevant to refer to the last three methods or approaches.

² Pierre- Andree Coté, The Interpretation of Legislation in Canada, Carswell, 4th edition

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." In this instance previous departmental rules served as a guideline. Two months employers were able to provide alternative evidence of the ability to pay the wage.

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 LMIA's are not the intended effect of the IRPR IRRP 200 (5). If parliament (at the time of the publishing of the regulations during 2002) had the intent to allow only employers with retained earnings ('money-under-the-mattress') to receive positive opinions, it would have indicated that clearly.

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.

9. 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.

Respectfully yours

Cobus Kriek

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Enclosures

1. Expert opinion by Mr Van Dyk, CA – dated 12 July 2011
2. Expert opinion by Mr Tajvidi, CGA – dated 29 May 2012



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July 12, 2012

Human Resources and Skills Development Canada
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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



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May 29, 2012

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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

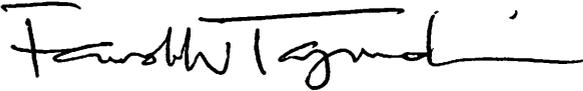
8. Management of cash is of paramount importance to businesses operating as a 'going-concern'. Financial managers check business pulse on a daily basis. The test is to check daily cash, A/R (accounts receivable) and A/P (accounts payable). They consistently monitor the liquidity situation by preparing 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', written over a horizontal line.

Farrokh Tajvidi, CGA, RCIC