

CCCC Legal Seminar Series – Foreign Workers

中资企业协会 法律专题讲座 – 外国劳工

Edmond Luke and Jasmin Zeng, Fasken Martineau DuMoulin LLP

陆家骥 律师 曾航 律师 法铭德律师事务所

August 2014

Who We Are

本所简介

- **Fasken Martineau** is a leading international law firm with over 770 lawyers around the globe.
- 法铭德律师事务所是国际领先的律师事务所，世界范围内共有超过770位律师。
- **Chambers Global (2014)** ranks 71 of the firm's lawyers.
- 71位法铭德的律师荣登《钱伯斯环球指南 (2014)》。
- Energy, Aboriginal, Environment, Mining, Corporate/M&A, Banking & Finance, Litigation & Dispute Resolution, Employment & Labour, Intellectual Property, Information Technology, Public Private Partnerships (PPP) & Infrastructure, Real Estate, and Tax.
- 能源，原住民，环境，矿业，公司/并购，银行与金融，诉讼与纠纷解决，劳工与雇佣，知识产权，信息技术，基础建设及其项目融资，房地产，税收。

Overview

摘要

- Categories of Foreign Workers and Application Processes
 - Business Visitors
 - Intra-Company Transferees
 - Temporary Foreign Workers (LMIA-based)
- Benefits and Entitlements of Foreign Workers
- Tax Implications for Foreign Workers
- Application for Permanent Residency
- Family Members of Foreign Workers
- Establishing a Foreign Workers' Program in Your Company
- Application for Permanent Residency for Foreign Workers
- Tax Implications for Permanent Residents

Categories of Foreign Workers

外国劳工种类

- Business Visitors
 - partake in international business activities with no intent of entering the Canadian labour market
- Intra-Company Transferees (ICT)
 - transfer of executives, senior managers and specialized knowledge to the Canadian branch, subsidiary or affiliate of an international company
- Temporary Foreign Workers (TFW) (LMIA-based)
 - eligible foreign workers can work in Canada for an authorized period of time if employers are unable to find suitable Canadians/Permanent Residents

Business Visitors

商务访问

- Usually stay in Canada for a few days/weeks, but are able to stay up to 6 months
- Do not need a work permit
- Must apply for visitor/Temporary Resident Visa if from China
- Must show:
 - Visitor has no intent of entering the Canadian labour market/will not be gainfully employed by a Canadian employer during their time in Canada
 - Visitor is engaging in cross-border/international business activities of some sort
 - Visitor's main place of business and source of income and profits is outside Canada
 - Visitor plans to stay for less than 6 months

Business Visitors

商务访问

- Processing time:
 - Beijing/Shanghai – 13 days
 - Hong Kong – 6 days
 - These are current average times; actual times fluctuate widely
- When traveling to Canada, be prepared to present immigration officials with documentation that attests to their desired status in Canada, such as a letter of support from the parent company or letter of invitation from a Canadian company

Intra-Company Transferees (ICT)

公司内部调任 (ICT)

- Executives, senior managers and specialized knowledge workers
- Employers hiring ICTs are exempt from applying for a Labour Market Impact Assessment (LMIA) before applying for a work permit
- For a business enterprise that “is or will be doing business” in both Canada and the foreign country
- Applicant seeking to open a new office on behalf of their foreign enterprise may also qualify, if expected to support a managerial, executive or specialized knowledge worker

ICT – Length of Stay

公司内部调任 – 停留期限

- Initial work permit valid for at most 3 years
- Executives/senior managers may enter and work for a cumulative/max total of 7 years, specialized knowledge workers for up to 5 years
- Transferees entering into Canada to open or work in new office will be granted permits valid up to 1 year

ICT – Eligibility Criteria

公司内部调任 – 符合条件

- Must currently be employed by a company outside of Canada
- Must be clearly employed by, and under the direct and continuous supervision of, the host company
- Must have at least 1 year of experience within the last 3 years immediately prior to the transfer
- Must have worked as executive/senior manager or as a specialized knowledge worker and be entering Canada to assume a similar role, AND
- Must be transferred to a parent branch, subsidiary or affiliate of the foreign-based employer

ICT – Recent Legislative Changes

公司内部调任 – 最新法律变动

- Effective from June 9, 2014
- Mandatory wage floor
 - ICT must be paid salary above the prevailing wage levels
 - Employment and Skills Development Canada (ESDC) “**Working in Canada**” website’s **tool to determine prevailing Canadian wage**
- “Specialized knowledge” rigorously defined
 - Worker must possess high degrees of BOTH “proprietary knowledge” AND “advanced expertise”, usually acquired through long service

ICT – Recent Legislative Changes

公司内部调任 – 最新法律变动

- “Proprietary knowledge”
 - “proprietary knowledge of the company’s product, service, research, equipment, techniques or management”
 - Company-specific expertise, uncommon knowledge
 - Advanced level of expertise or knowledge of the enterprise’s process and procedures

ICT – Recent Legislative Changes

公司内部调任 – 最新法律变动

- “Advanced expertise”
 - **Specialized knowledge** gained through **significant** and **recent** experience with organization, and
 - Used by individual to contribute significantly to employer’s productivity
 - Specialized knowledge:
 - knowledge that is unique and uncommon, held only by a small number/percentage of employees
 - must be key personnel, not simply highly skilled
 - Significant:
 - the longer the experience, the more likely the knowledge is specialized
 - Recent: Within 5 years

ICT – Documents Required

公司内部调任 – 文件要求

- Proof of citizenship
- Outline of pre-arranged position in Canada, including:
 - Duration of stay
 - Description of employment as executive or specialized knowledge
- Proof of relationship between Canadian and foreign employers
- Proof of previous employment with the organization
 - Minimum 1 continuous year in the last 3 years
 - Similar position to the one being offered in Canada
- Processing time:
 - Beijing/Shanghai – 3 months
 - Hong Kong – 6 months

Temporary Foreign Workers (TFW)

临时外国劳工 (TFW)

- The TFW program largely focuses on both low-skilled and high-skilled positions (the two streams have somewhat different requirements)
- Should only be used as last resort to fill acute labour shortages; Canadians and PRs have first access to available jobs
- Engages 3 departments:
 - Service Canada
 - Citizenship and Immigration Canada (CIC)
 - Canada Border Services Agency (CBSA)

TFW – Steps of Hiring a TFW

临时外国劳工 – 聘请临时外劳的步骤

- Step 1: Employer determines if position requires a Labour Market Impact Assessment
- Step 2: Employer attempts to recruit a Canadian as required, and if unsuccessful applies for an LMIA from Service Canada
- Step 3: TFW completes and submits work permit application, processed by CIC at a Canadian Consulate responsible to the worker's place of citizenship
- Step 4: CBSA officer at port of entry issues work permit

TFW – Step 1: Determining if you require a Labour Market Impact Assessment (LMIA)

临时外国劳工 – 第一步：决定你是否需要劳动力市场影响评估（LMIA）

- LMIA: an assessment of the likely impact that the hiring of TFW may have on the Canadian labour market
 - Previously known as an LMO
 - Document from Service Canada that confirms the TFW will not negatively impact the Canadian labour market, and permits employer to hire TFW
- Unless the work category is exempt, employer must obtain positive LMIA before worker can apply for a work permit
 - Exempt categories include intra-company transferees and workers nominated by province for permanent residence

TFW – Step 2: Apply for an LMIA

临时外国劳工 – 第二步：申请劳动力市场影响评估

- If the TFW's position requires an LMIA, employer will be required to complete Application for LMIA and submit to the appropriate Service Canada Centre
- To obtain a positive LMIA, the employer must have made reasonable efforts to hire or train Canadian citizens or permanent residents first
- The Employer must provide a "Transition Plan" showing the steps it will take to move the position to a Canadian in the future
- Having to apply for the LMIA will usually delay the overall time frame for obtaining of work permit
- NOTE: a positive LMIA does not guarantee that a work permit will be issued to the TFW; CBSA is the final decision-maker

TFW – Steps 3, 4: Work Permit

临时外国劳工 – 第三/四步：工作许可

- If you would like to work in Canada but are not a citizen or permanent resident, must apply for work permit
- Workers from some countries (including China) are also required to apply for Temporary Resident Visa
- LMIA exempt TFW (who do not need an entry visa) can apply at any Canadian port of entry
- TFW with positive LMIAs can apply before entering at a Canadian Consulate. TFWs who do not need entry visas may apply at the Port of Entry on coming to Canada
- TFW may be denied a work permit or entry into Canada if the CBSA determines that TFW does not meet the qualifications required by the LMIA or is otherwise inadmissible to Canada
 - Worker may be inadmissible due to criminal convictions, medical conditions or prior entry refusals

TFW – Duration of Stay

临时外国劳工 – 停留期限

- Maximum duration a TFW can work in Canada is being reduced from the current 4 years to likely 2 years (subject to some exemptions)
- Duration of work permit for TFW is being reduced from 2 years to 1 year for low-skilled positions; employers will have to reapply after the first year

Benefits and Entitlements of Foreign Workers – Medical

外国劳工的福利 – 医疗

- To qualify for coverage with BC's Medical Services Plan (MSP), work permit must be valid for 6 or more months
- Will receive health coverage after a maximum of 3 months waiting period (balance of month in which you became BC resident + 2 months)
- MSP covers basic healthcare needs like visiting doctor or hospital, but does not include expenses such as dentistry, optometry or ambulance services
- Until the worker is eligible for provincial health insurance coverage, some employers provide medical coverage. This is required for some low-skilled streams but not for high-skilled streams
- Extensions of work permits should be obtained early to avoid potential disruption in MSP coverage

Benefits and Entitlements of Foreign Workers – Employment Insurance

外国劳工的福利 – 就业保险

- EI must be deducted from an individual's remuneration if the individual is employed in Canada and receiving insurable earnings
- Employer is responsible for withholding and remitting the individual and employer portions to the tax authorities
- Depending on the length of time employed and the region worked in, foreign workers may be eligible for EI when unemployed for the balance of his/her work permit

Benefits and Entitlements of Foreign Workers – Pension

外国劳工的福利 – 养老

- Every person over the age of 18, who work in Canada outside of Quebec and earns more than a minimum amount (\$3,500 per year) must contribute to the Canada Pension Plan (CPP).
- Residency is not require for coverage under the CPP
- Employee transferred into Canada who reports to work or receives payment from an establishment of the employer in Canada is covered by CPP
- Employer is responsible for withholding and remitting the individual and matching employer portion of CPP contribution to the tax authorities

Tax Implications for Foreign Workers

外国劳工的税负

- There are no clear rules on when an individual becomes a resident
- Whether an individual becomes a resident for tax purposes depends on:
 - Long-term or permanent employment
 - Acquiring a dwelling place
 - Moving one's family into the country
 - Establishing residential and social ties
 - Intent to remain in Canada
- Employee:
 - Non-residents are subject to Canadian federal income tax on Canadian source income only
 - Note: an individual may be deemed a resident taxpayer if he/she is present in Canada for more than 183 days in a calendar year
- Employer:
 - s.153(1)(g) of Income Tax Act: required withholding from payment of fees, commissions, or other amounts paid or allocated to non-resident person "in respect of" services provided in Canada

Family Members of Foreign Workers

外国劳工的家庭成员

- Accompanying spouse and children (or other immediate family members) will need to obtain immigration documentation
- Worker's spouse or common-law partner who wants to work in Canada must apply for their own work permit
- High-skilled worker's spouse or common-law partner may be able to apply for an "open" work permit that lets them accept any job with any employer, depending on the skill level of the job

Establishing Foreign Workers' Program in Your Company

建立公司内部的外劳方案

- Recent legislative changes have created a more rigorous regime for employers of TFWs
 1. Record keeping obligations
 - Compliance review can now go back 6 years
 2. More stringent compliance requirements
 - Employers have to be careful not to modify the position, wages or working conditions of foreign workers without prior approval of ESDA
 3. New condition imposed on employers
 - Employers have to be prepared to demonstrate that they have complied with the employment contract and have met any conditions imposed at the time an LMO/LMIA was approved
 4. Substantially increased inspection authority
 - The government has the authority to conduct inspections to verify employer compliance and does not need a warrant to enter premises

Establishing Foreign Workers' Program in Your Company

建立公司内部的外劳方案

- Offers of employment and employment contracts must be carefully drafted
 - Transferred employees and foreign hires should be required to sign employment contract during the hiring process to govern the employment relationship
 - Employment contracts should be made conditional on the worker obtaining a work permit and maintain valid status to work in Canada

Application for Permanent Residency for Foreign Workers

外国劳工申请永久居民

- Canada Experience Class
- Provincial Nominee Program
- Federal Skilled Worker Program
- Express Entry System (New)

Application for Permanent Residency – Canada Experience Class

申请永久居民 – 加拿大经验类

- Criteria:
 - TFW working in “skilled” occupations can apply after working in Canada for 12 months in the previous 3 years
 - Proficiency in English or French
 - Plan to settle outside of Quebec
- Simplest immigration option from employer’s perspective → employers only required to provide detailed references letter
- Annual cap on applications → employers and TFWs should move quickly
 - As of May 1, 2014, there is an overall cap of 8,000, which would be the last acceptable applications under the current system before EE launches in January 2015
- Processing time: 13 months

Application for Permanent Residency – Provincial Nominee Program

申请永久居民 – 省提名项目

- Operated by the Province of BC in partnership with CIC
- The BC PNP:
 - The Skills Immigration category of the BC PNP is an employer-driven immigration program designed to help BC business attract and retain skilled international workers and students to meet HR needs
 - If employer and employee meet eligibility criteria, can submit joint application to the PNP
 - If joint application is approved, employee can then apply for PR in the higher-priority Provincial Nominee Class
- Processing time: 14-24 months

Application for Permanent Residency – Federal Skilled Worker Program

申请永久居民 – 联邦技术移民项目

- Criteria:
 - TFW who have at least 1 year of continuous experience working in a designated single occupation in Canada within the last 10 years, and arranged employment or a job offer
 - Workers who score 67/100 points as required by CIC can apply
 - Points are assessed for age, education, work experience and English or French ability
 - There is an annual cap on the number of applications that will be accepted each year
- more extensive documentation and time consuming compared to CEC, but can consider if not eligible for CEC program
- Processing time: 8 – 21 months

Application for Permanent Residency – Express Entry System

申请永久居民 – 快速通道系统

- Starting January 1, 2015
- New immigration system for applicants applying as skilled foreign worker – Express Entry System
 - Step 1: submit Express Entry form online:
 - candidates who meet eligibility criteria for at least one of the federal programs or the Skilled Workers stream of PNP will apply separately into EE pool and be assigned a points score
 - Step 2: CIC will invite highest ranked candidates and those with job offers or provincial nominations to apply for Permanent Residence under FSWP, FSTP, CEC or portion of PNP
- No application caps
- Processing time: 6 months

Tax Implications for Permanent Residents

永久居民的税负

- Permanent resident v. tax resident
- Permanent residents generally pay taxes on incomes from sources both inside and outside Canada
- Foreign taxes paid on income derived from sources outside of Canada may be deductible

Contact Information

联络信息

Edmond Luke

陆家骥 合伙人律师

+1-604-631-4829

eluke@fasken.com



Jasmin Zeng

曾航 律师

+1-604-631-3209

jzeng@fasken.com



Fasken Martineau DuMoulin LLP
2900 – 550 Burrard Street,
Vancouver, BC, Canada V6C 0A3

