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## Executive Transfers and Immigration



Canadian immigration rules are very complex and change frequently. For foreign companies who conduct businesses in Canada, they would often need to send some of their employees to Canada to perform various duties in Canada, including attending business meetings, trainings, after sales services and operations. For some of these activities in Canada a work permit may be required. The Canadian employer and foreign national may both face severe legal consequences when the required legal authorization to work in Canada is not obtained.

As a general rule, foreign nationals wishing to work in Canada, even on a temporary basis, must obtain authorization to work in Canada in the form of a work permit, unless the foreign nationals are admissible to Canada as business visitors or under a work permit exemption category.

## COVID-19 Pandemic – Travel Restrictions

During the COVID-19 pandemic, there were travel restrictions and quarantine requirements that may be applicable to travelers who are not fully vaccinated. Effective October 1, 2022, all COVID-19 entry restrictions, testing, quarantine and isolation requirements were removed.

## Temporary Business Visits

Business visitors engaged in international commercial activities in Canada, whose main source of income is from outside Canada and will not enter the Canadian labour market, may enter Canada as a business visitor without requiring a work permit. Further, the foreign national's country of citizenship will determine if a temporary resident visa is required to travel to Canada. Foreign nationals from a temporary

resident visa exempt country (e.g., the US, the UK, Australia, France, etc.) do not require a temporary resident visa to travel to Canada but do require an electronic travel authorization (eTA) to fly to Canada.

The most common activities allowed under this business visitor category are the following:

- Searching for potential clients or making a presentation to prospective customers
- Negotiating a contract with a Canadian client on behalf of a foreign company
- Attending coordination meetings with representatives of a Canadian company related to the US employer (subsidiary, parent or sister company, etc.), where some policies or activities common to both companies are discussed
- Attending the board of directors meetings of a Canadian company
- Participating in a business convention
- Certain other activities are explicitly considered as business activities by the Canadian immigration regulations and directives or under the *Canada-United States-Mexico Agreement (CUSMA)*.  
Examples of such activities are:

- Entering Canada to provide after-sales services
- Entering Canada to provide training to the employees of a Canadian company or to receive training from a Canadian company, where the foreign company and the Canadian company are affiliated entities, such as parent/subsidiary relationship

In assessing whether or not the foreign national could enter Canada as a business visitor, the other criteria to be considered include the source of remuneration of the employee, the employer's principal place of business, the duration and frequency of the intended business visits, and whether or not the employee would be performing hands-on work while in Canada. Short visits, however, will not systematically be considered as business visits, the key factors being: (i) the nature of the activity to be performed in Canada; and (ii) on behalf of which company (i.e., a foreign company or a Canadian company) the services will be provided.

While numerous cases will be crystal clear, in others, the employee's eligibility for admission as a business visitor will require a careful analysis and preparation of complete documentary evidence to support the request for entry into Canada as a business visitor.

## Work Permit Applications

When a foreign national performs work in Canada, a work permit is usually required. Work is defined in the *Immigration and Refugee Protection Regulations* as an activity for which wages are paid or commission is earned, or that is in direct competition with the activities of Canadian citizens or permanent residents in the Canadian labour market.

This means a foreign national may be considered by the Government of Canada as working in Canada even if the foreign national is not remunerated in Canada if the foreign national's activity in Canada may be in direct competition with activities of Canadian citizens or permanent residents in the Canadian labour market. In general, work permits are issued under two programs: 1) Temporary Foreign Worker Program where a labour market impact assessment is required; and 2) International

Mobility Program where a labour market impact assessment is not required. The work permit is either open without employment restrictions or closed with employment restrictions for the employer, occupation, and employment location.

## Labour Market Impact Assessment

In general, unless there is a Labour Market Impact Assessment (LMIA) exempt work permit category the employer in Canada must first obtain a positive LMIA opinion from Employment and Social Development Canada (ESDC). Prior to submitting a LMIA application, the employer must advertise the position while meeting ESDC's advertising criteria for at least four consecutive weeks and demonstrate that there are no qualified Canadian citizens or permanent residents for the advertised position.

The positive LMIA opinion confirms the genuineness of the job offer and the likelihood of its neutral or positive economic effect on the labour market in Canada. Further, the positive LMIA is issued only if the employer has provided all foreign employees the wages and terms of employment that were substantially the same as those set out in the original offer of employment.

- The LMIA opinion will be based on the following criteria:
- The job creation or job retention for Canadians expected from the foreign worker's contribution
- The transfer of skills and knowledge for the benefit of Canadians
- The labour shortage the work may likely address
- The wages and working conditions offered, in compliance with Canadian standards

- The efforts made to hire or train Canadians for the position
- Any labour dispute in progress in the company at the time
- Fulfillment of any commitments previously made by the employer

Particular attention needs to be provided to the recruitment efforts. Save certain exceptions, a positive LMIA is only issued once the employer has proved it has advertised the position by strictly following the guidelines issued by ESDC. “Reasonable efforts” do not suffice.

Once ESDC has issued a positive LMIA, the prospective employee may then submit their work permit application to Immigration, Refugees and Citizenship Canada. When the prospective employee is a citizen of a visa-exempt country, the work permit application may be processed at the port of entry upon arrival in Canada.

*The prospective employee who is from a visa-exempt country would need an eTA to fly to Canada.*

If the employment location is in Quebec, consent from the Quebec Ministry of Immigration (MIFI) is usually required and a separate application for a Quebec Acceptance Certificate is required. The LMIA will be issued jointly by ESDC and MIFI along with the Quebec Acceptance Certificate.

Obtaining a positive LMIA can be difficult as the onus is on the employer to demonstrate that there is a genuine need to hire a foreign worker for the position.

## Labour Market Impact Assessment Exemptions

LMIA's are not required in every case. There are several exemptions available through the *Immigration and Refugee Protection Regulations* and under provisions of international agreements, such as the *Canada-United States-Mexico Agreement* (CUSMA), *General Agreement on Trade in Services* (GATS), *Comprehensive and Progressive Agreement for Trans-Pacific Partnership* (CPTPP), and *Canada-European Union Comprehensive Economic and Trade Agreement* (CETA). In most cases, these applications are the most expeditious and preferred options.

### CUSMA Provisions for Foreign Workers

Entry under CUSMA is limited to citizens of the United States and Mexico, who may take advantage of the LMIA exemptions designed for professionals, intra-company transferees, traders and investors. The CUSMA does not apply to permanent residents of the United States or Mexico.

Please note the criteria for entry to Canada, the required documentations and the length of the permitted stay in Canada will vary from category to category and depends on the applicant's proposed activity in Canada. For instance, CUSMA intra-company transferees who fill a senior managerial position may stay in Canada up to seven years whereas intra-company transferees who possess specialized knowledge may stay up to five, with limited exceptions.

### General Agreement on Trade in Services (GATS) - Intra-Company Transferee Work Permit

Canada currently has free trade agreements with the United States, Mexico, Chile, Peru, Colombia, Korea, Panama, the EU, the UK,

Australia, New Zealand, and Japan and these free trade agreements have special provisions for work permit applications and a LMIA is not required. This means global mobility of skilled workers and employees are now more convenient than before.

If Canada does not have a free trade agreement with a designated country, then the General Agreement on Trade in Services (GATS) could be used to facilitate temporary transfer of employees from an overseas office to work in Canada on a temporary basis when specific requirements are met. The general requirements are the employee is currently employed by a multi-national company and seeking entry to work in a parent, a subsidiary, a branch or an affiliate of that enterprise; are being transferred to a position in an executive, senior managerial or specialized knowledge capacity and have been employed continuously by the company that plans to transfer them outside of Canada in a similar full-time position for at least one year in the three year period immediately preceding the date of the initial work permit application.

### **Other LMIA Exemptions**

Several other LMIA-exempt categories are provided based on Canadian interests. These are intended to facilitate entry to Canada by foreign workers whose employment will have significant economic, cultural or social benefits for citizens or permanent residents of Canada, or will create reciprocal employment for Canadians in other countries. As an example, spouses and common-law partners of temporary skilled workers or students will be eligible for an “open” work permit, authorizing them to work for any employer in Canada without employment restrictions. French speakers working outside Quebec are also eligible for an LMIA-exempt work permit.

The documents required for these applications vary based on the work permit category and the applicant’s personal situation.

## **Permanent Residence**

A temporary resident in Canada may at one point wish to obtain permanent resident status. There are different categories to immigrate to Canada as a permanent resident. In general, dependent children who are under 22 years of age and are single may accompany the parents to Canada and be included in the parents’ permanent resident applications.

*One of the most common categories to immigrate to Canada as a permanent resident is through the economic class where a job offer from a Canadian employer is not mandatory.*

The economic class consists of three programs; namely, the Canadian Experience Class, the Federal Skilled Worker Program, and the Federal Skilled Trades Program.

Since January 2015, a new case management system called Express Entry has been implemented in Canada to better manage the flow of skilled applicants for permanent residence based on their ability to successfully settle and participate in Canada’s economy under the economic class. Foreign nationals who are interested to immigrate to Canada under the Canadian Experience Class, the Federal Skilled Worker Program, or the Federal Skilled Trades Program would need to create an online Express Entry profile. Candidates with the highest Express Entry CRS score within the online Express Entry pool may receive an invitation to apply for permanent residence.

The Government of Canada has announced in 2023 they would have the ability to issue invitations to apply based on occupation, education or language instead of the highest Express Entry CRS score. The Express Entry system applies to applicants intending to settle in any province, except Quebec. The Government of Canada is currently aiming to process Express Entry applications within six months. Other categories are currently taking two years or more.

Quebec has its own selection process for permanent residents. In addition, various provincial programs are available for business people (such as the self-employed, entrepreneurs or investors) as well as skilled workers.

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