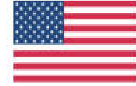
SISKINDS
Immigration News
IMMIGRATION SOLUTIONS FOR A GLOBAL ECONOMY

Monthly Newsletter

(June, 2004)



…On the U.S. Front

Business Visitors "do's and don't's": The demand for increased market share and the requirement to transact business on an international scale is of paramount importance to global businesses and business-persons. The ability to do so with limited restrictions at our borders is therefore more important than ever. For most companies, key personnel, whether management or technical, are often called upon on short notice to travel to either a U.S. affiliate office or to a client site. Though the nature of the business visit should be the determining factor for the type of visa to obtain, in most cases, the expediency in issuance of the visa is the driving factor. It is important to note that B-1 Business visitors may be admitted for the purpose of *engaging* in business transactions and not for the purpose of *being employed* within the United States.

"Engaging in business transactions" includes buying or selling which does not involve gainful employment in the U.S., negotiating contracts, consulting with business associates, attending business meetings, litigation, participating in scientific education, professional or business conventions, conferences or seminars or undertaking independent research. "Being employed" includes being remunerated by a U.S. source and/or partaking in an activity that competes directly with the U.S. labor market. If the remuneration is from a U.S. source and/or the business visit takes away the employment opportunity of a U.S. citizen and/or Resident Alien, the business visitor will be denied entry. Moreover, it is very important to be honest when disclosing the nature of the visit to an Immigration Officer. Given the events of 9/11, misrepresentation could lead to serious consequences. In the most extreme cases, if it is determined that the business visitor has misrepresented, he/she could be detained, placed under exclusion proceedings, and eventually, barred from any future entries into the U.S. It is therefore of critical importance to arm your employees with sufficient documentation respecting the nature of their proposed activities in the United States and their ties to the foreign employer and country of residence.

TN status for technicians - who qualifies under the new rules? On January 1, 1994, the North American Free Trade Agreement (NAFTA) replaced the United States-Canada Free Trade Agreement (CFTA) and as a result, created the TN (Trade NAFTA) category (which replaces the TC (Trade Canada) category). The objective of the TN category was to foster the expedient transfer of workers between Canada, U.S. or Mexico for a short term period for the purpose of providing a "quick fix" to employers who are short on personnel in a particular occupation. The TN category is only available to applicants who seek entry to engage in one of the sixty three (63) professions listed in the NAFTA Schedule of Occupations.

In order for an applicant to qualify for TN status under the NAFTA, the applicant must be a citizen of either Canada, the U.S. or Mexico, and must not have permanent intent in the U.S. Most professions require the applicant to possess either a Bachelor's Degree or professional certification / licensure in the profession (ie. CPA). One of the professions that do not require either a Bachelor's Degree or professional certification / licensure is that of Scientific Technologists / Technicians. Canadian citizens entering into the U.S. in the capacity of a Scientific Technologist / Technician must possess CIS accepted theoretical knowledge in the specified scientific or engineering discipline. Such disciplines include agricultural sciences, astronomy, biology, chemistry, engineering, forestry, geology, geophysics, meteorology or physics. The employment capacity must involve deficiency assessment, analysis and problem solving. Acceptable evidence of "theoretical knowledge" of the discipline was once in the form of either education or practical experience since the CIS regulations were silent upon the issue. However, CIS officials have recently decreed that it will accept nothing less than a two (2) year Diploma from a Canadian college – serving to confirm educational background in the specified engineering discipline.

London : Toronto : Windsor

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…On the Canadian front

HRDC Labor Market Opinions (LMO)! What is it? How can a Canadian Employer obtain it and how can it be avoided? In our May newsletter, we provided the definition of "work" pursuant to Canadian Immigration legislation and the requirement of obtaining an HRDC LMO when employing a foreign worker. The purpose of an HRDC LMO is to establish that there are no ready, willing and able Canadian Citizens and/or Permanent Residents to accept the position offered to the foreign worker.

An HRDC LMO is not easily obtained and often times, could be discouraging. Essentially, a Canadian Employer must test the Canadian labor market and provide evidence to the local HRDC officer that it cannot locate a qualified Canadian citizen or Landed Immigrant to fill the position which it seeks to fill. In doing so, a Canadian Employer may be required to place advertisements within local newspapers of general circulation, as well as the HRDC job bank. Should a qualified Canadian be located, the HRDC LMO would be denied. In making the application before the HRDC, the Canadian Employer must disclose the proffered wage (at least the minimum wage for the profession), the foreign worker's working conditions, the impact of the foreign worker upon creation of employment to Canadians, or loss of employment to Canadians in the event the Canadian Employer is not granted a positive HRDC LMO. The aforementioned is only but a portion of the information to be provided to the HRDC.

Immigration officers are often reluctant to issue a work permit to a foreign worker without the assurance from HRDC that the impact of the foreign worker on Canada's larbour market is likely to have a neutral or positive effect. Most exemptions from the need for a positive HRDC LMO are very specific and clearly defined, such as those provided in International Agreements. International Agreements have been established for the purpose of transferring foreign personnel between Canada and its respective counterpart countries. The admission of foreign workers under these agreements are determined to be a benefit to the Canadian economy and serves to meet other objectives aimed at foreign policy, culture, trade and commerce. As such, the requirement by the Canadian Employer to test the labor market prior to the employment of the foreign worker is not required. To this end, to avoid the requirement of obtaining an HRDC LMO, a Canadian Employer may look to the provisions of various international trade agreements. Such agreements include the General Agreement on Trades in Services (GATS), the North American Free Trade Agreement (NAFTA), the Canada Chile Free Trade Agreement (CCFTA) and the Scientific & Technical Cooperation Agreement between Canada and Germany, to name but a few.

Now that the foreign worker has been granted a Temporary Work Permit to be employed by the Canadian Employer, how can the foreign worker be employed by the Canadian Employer on a permanent basis? In June, 2002, the Ministry of Citizenship & Immigration Canada (CIC) established new regulations aimed at identifying immigrants who will be able to provide a significant economic benefit to Canada. The classification of such immigrants was placed under the Federal Skilled Worker (FSW) program. As such, the determination of an applicant's qualification for Canadian Permanent Residence under the new regulations is heavily dependent upon the applicant's employment experience and educational background. In order to qualify under the Federal Skilled Worker Classification, applicants are granted "units of assessment points" based upon a combination of education, employment experience, occupation, linguistic ability and other statutory considerations. The minimum units of assessment under the new regulations in order to qualify is sixty seven (67). Additional units of assessment are granted to the foreign worker in the event he/she possesses a valid TWP at the time of application and has been offered a permanent position with the Canadian Employer. This notwithstanding, the employment of the foreign worker is deemed "at-will" employment and does not restrict the Canadian Employer from terminating his/her services for cause.

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