

# SISKINDS Immigration News

IMMIGRATION SOLUTIONS FOR A GLOBAL ECONOMY

Monthly Newsletter  
(May, 2004)

## ...On the U.S. Front



### **USCIS Announces New Procedures for H-1B since reaching its cap for fiscal year**

**2004:** As we all know, the temporary congressional mandate of 195,000 H-1B Visa allotment has since been reduced to its original numerical limitation ("cap") of 65,000 per fiscal year. While employers throughout the U.S. were hoping that Congress would extend the increased cap for H-1Bs, it was noted by the U.S. Citizenship & Immigration Service (USCIS) that the increased cap was just not being met. During fiscal year 2003, nearly 78,000 H-1Bs were left unused. For the first time, since the increase three (3) years ago, the cap was reached for fiscal year 2004. As such, USCIS is no longer processing any H-1B petitions for new employment until the 2005 fiscal year, commencing October 1, 2004.

It is worth noting that petitions for current H-1B workers do not count towards the congressionally mandated H-1B cap. (ie. extensions or change of employers).

Effective April 1, 2004, the USCIS will begin to accept H-1B Petitions for new employment for fiscal year 2005 with an employment start date of October 1, 2004 or later.

### **Spouses of L-1A Holders may apply for "Open-Market" Employment Authorization Document:**

The spouse and minor dependent children under the age of twenty one (21) of an L-1A Non Immigrant may accompany the L-1A non immigrant into the U.S. under the authority of L-2 Non Immigrant visas. Effective immediately, the spouse (but not children) of an L-1A holder who physically resides in the U.S., may make application for an open market Employment Authorization Document (EAD) in order to secure employment in the U.S. while accompanying the L-1A non immigrant. In this regard, an application for change of status and permission to accept employment must be made before the USCIS District offices having jurisdiction over the applicant's place of residence. Processing of the application is anticipated to take approximately ninety (90) days. Upon the issuance of the EAD, the applicant may immediately commence employment. In that the EAD is "open-market," a job offer from a U.S. employer is not necessary.

### **Employers must file Form I-9 Employment Eligibility Verification for all U.S. employees, inclusive of foreign employees:**

The Immigration Reform & Control Act made all U.S. employers responsible for verifying the employment eligibility and identity of all employees hired to work in the U.S. after November 6, 1986. To conform with the law, employers are required to complete Employment Eligibility Verification forms, known as Form I-9, for all employees, including U.S. citizens. Unlike tax forms, Form I-9 is not filed with the U.S. government. The requirement is for the employers to maintain I-9 records in its own files for three (3) years after the date of hire or one (1) year after the date the employee's employment is terminated, whichever is later. The Form I-9 must be made available for inspection by an authorized official of the Bureau of Immigration & Customs Enforcement, the Department of Labor and/or the Justice Department's Office of Special Counsel for Unfair Immigration-Related Employment Practices.



London Toronto Windsor

## ...On the Canadian front



**Employing a foreign worker:** “Work” is defined in the immigration regulations as an activity for which wages are paid or commission is earned, OR that competes directly with the activities of Canadian citizens or permanent residents in the Canadian labour market. Citizenship and Immigration Canada (CIC) and Human Resources Development Canada (HRDC) ensure that all foreign workers will support economic growth in Canada and create more opportunities for all Canadian job seekers. In this regard, some occupations require HRDC “Confirmation” or HRDC Labor Market Opinions, while others do not.

HRDC officers are vested with the authority to provide confirmation or a labour market opinion of certain occupations. In this regard, several factors are weighed in assessing the impact of hiring a foreign worker relative the Canadian labour market. Such factors include wages, working conditions, whether or not the skills and knowledge of the foreign worker will be transferred to Canadians and/or permanent residents and whether or not the foreign worker will likely create more employment opportunities for Canadians and/or permanent residents.

Some occupations **do not require** HRDC Confirmation. Such occupations are covered under International Agreements, such as GATS (General Agreement on Trades & Services) and NAFTA (North American Free Trade Agreement), Entrepreneurs, Company Transfers, Exchange Programs, Students Doing Co-Op, Certain Spouses, and Religious Work. Some occupations have also been provided national labour market opinions and as such, are not required to obtain individual HRDC Confirmation. Such occupations include Canadian Research Chairs, certain Skilled Workers and IT Workers.

**Not all “foreign workers” require a Temporary Work Permit:** Certain “Business Visitors” under the Immigration & Refugee Protection Act (IRPA) are exempt from the requirement of a Temporary Work Permit (TWP). An activity which does not really “take away” from opportunities for Canadian or permanent residents to gain employment or experience in the workplace is not considered to be “work.” In this regard, a TWP is not required. Such activity include After-sales service, Supervisors, Trainers and Employees of short term visitors.

**After-Sales Service** involves persons entering Canada for the purpose of repairing and servicing, supervising installers and setting up, as well as testing commercial or industrial equipment. **Supervisors** are persons who enter Canada to supervise the installation of specialized machinery purchased or leased outside Canada, or to supervise the dismantling of equipment or machinery purchased in Canada for relation outside of Canada. **Trainers** are persons entering into Canada to provide familiarization or training services to prospective users or to maintenance staff of the company after installation of the specialized equipment purchased or leased outside of Canada has been completed. **Employees of short term visitors** are persons employed in a personal capacity on a full time basis by short term temporary residents, such as a domestic servant, personal assistant or nanny (caregivers).

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