CHANGES TO CANADIAN IMMIGRATION LAW: A FOREIGN LEGAL COUNSEL'S PERSPECTIVE

by Howard D. Greenberg and Nan Berezowski[*]

I. INTRODUCTION

On February 21, 2001, the Immigration and Refugee Protection Act[1] was introduced in the Canadian Parliament and has, in a relatively short period of time, passed two readings in the House of Commons. It is presently under active consideration by the Standing Committee responsible for immigration matters and is expected that the legislation will receive Royal Assent by the summer of 2001.

II. GENERAL COMMENTS ABOUT THE LEGISLATION

This new Immigration Bill is the most comprehensive change in immigration law in 25 years. It is considered as "Framework Legislation" that sets out the principles and components of the immigration program. There are wide and considerable regulation making powers which will address matters relating to defining who can immigrate to Canada, how immigration officials can exercise their powers and the actual procedures for processing and handling applications. The legislation creates considerable regulation making powers and therefore cannot be, in and of itself, a satisfactory guide to understanding Canadian immigration law. Unfortunately, the various regulatory provisions, which must accompany this legislation, have not been published at this time.

III. CONSIDERATION OF KEY CHANGES IN THE LEGISLATION

Notwithstanding the absence of detailed regulations, there are specific areas of interest and concern, which should be noted by U.S. attorneys in providing preliminary advice to their clients. Although this article will highlight some of these areas, it should be noted that the Immigration Bill has not been proclaimed into law and there remains considerable debate about whether provisions should and will be further amended.

A. Redefining Family Rights and Obligations

The legislation seeks to define various rights and privileges of family members to both reflect modern realities of a family unit and who should be included in an application as a member of the family.

1. Children—Under the new legislation, there will be a redefinition of accompanying family member to include a child of the principal applicant or accompanying spouse who is under 22 years of age. This is important in terms of determining which family members are included in the application for permanent residence and equally as important in defining which children can accompany parents to Canada under temporary status as accompanying dependents, particularly where an older child may not be pursuing higher education. It should be noted that currently, there is no provision for the issuance of an Employment Authorization to an accompanying

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[*] This article supplements "New Directions In Canadian Immigration Law: Opening the Doors for Temporary Entry," 2 *Immigration & Nationality Law Handbook* 633 (1999-00 ed.); "Canadian Immigration and Computer Professional: A North American Perspective," 2 *Immigration & Nationality Law Handbook* 475 (1996-97 ed.); and "Importing Computer Professionals into the Year 2000: A Canadian Perspective," 2 *Immigration & Nationality Law Handbook* 510 (1998-99 ed.).

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[1] The Immigration and Refugee Protection Act, C-11, 1st Session, 37th Parliament, 49-50 Elizabeth II, 2001.

child. This may result in hardship to an older child from being unable to obtain the appropriate authorization to be employed in Canada.

2. ***Expansion of Definition of Spouse***—A common law partner will be permitted to be included in an application provided he or she has been *cohabiting in a conjugal relationship* with the principal applicant for at least one year. This definition of spouse would include opposite sex and same sex relationships. Required proof of cohabitation should be described here, if known.

3. ***Employment Authorizations***—for Common Law Spouses: Common law spouses will be included under the Spousal Employment Authorization program, making them eligible for an Employment Authorization without having to obtain job validation from Human Resources Development Canada. Simply stated, common law spouses will enjoy the same rights as married spouses to unencumbered access to undertake employment.

B. In Canada Landing Class

The new legislation provides the authority to create an "in Canada landing class" for spouses, common law partners and their dependent children. In circumstances where it can be demonstrated that the relationship is genuine and entry to Canada was not obtained through misrepresentation, applications for landing will be processed in Canada rather than at the Area Processing Center in Buffalo, New York.

C. Exemption From Inadmissibility for Medical Inadmissibility

Currently, the sponsorship of a spouse who is determined to be an excessive demand on health and social services would likely be refused. Under the new legislation, a medical condition will not be relevant to the approval of a sponsorship application.

D. Maintaining Status During Absences from Canada

There is probably no area of immigration law that has caused greater confusion than the application of the rules for maintaining or losing permanent resident status. Currently, an applicant is deemed to lose such status if the absence from Canada in any 12-month period is more than 183 days. This is a presumption that can be challenged by the permanent resident by presenting evidence of attachment to Canada and the temporary nature of the absence from Canada. The new legislation will replace the 183 days rule with the two out of five-year ru scribed below.

E. The Permanent Resident Card

One of the most common reasons for bei sent from Canada is the need to assume an : ment on behalf of a Canadian employer. An grant's status is ordinarily preserved by acqu Returning Resident Permit from a local immi center prior to departure or at a consulate bassy once outside Canada.

The new legislation will eliminate the Re Resident Permit. All permanent residents ' issued a Permanent Resident Card (status doc and be permitted to reenter Canada only if t manent resident has complied with the fo residency obligations:[2]

- The Two Out of Five-Year Rule: A nent resident maintains immigrant sta a five-year period if he or she h: physically resident in Canada for at l days (two years).[3] Simply stated, i tion officials will examine the five- riod preceding the date of reentry to and ask the question: "Has the in been absent from Canada for more th years?"
- If there are more than three years of the status may be lost unless the imr official is satisfied that humanita compassionate considerations, inclu best interests of a child directly af the determination, exist to justify t tion of immigrant status.[4]
- Lastly, this rule has a peculiar p which provides that the immigratic has the discretion to determine wh immigrant will meet the two-year r years have not passed since the gr permanent resident status. In other w officer speculates on the immigra pects of being physically present i to determine if the two-year rule ca fied.

It should be noted that this rule is subj tain exemptions:

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[2] §31.

[3] §28(2)

[4] §28(2)(c)

- If the permanent resident is employed full-time by a Canadian employer and is absent from Canada on behalf of that employer, the time spent outside Canada will not be counted toward a period of absence from Canada. A major issue of concern is that Canadian employees may join the local payroll of the affiliated Canadian company abroad, and, therefore, not enjoy the benefit of this exemption as they will not be receiving remuneration from a Canadian source. The anticipated regulations will clarify this issue, as it is unclear that the Immigration Department intended this result.
- If the permanent resident is the spouse or a child of a Canadian citizen, the loss of status rule will not apply.
- If the permanent resident is a spouse accompanying a permanent resident who is employed full-time by a Canadian employer and is absent from Canada on behalf of that employer, the loss of status rule will not apply.[5,6]

F. Selection Criteria for Skilled Workers

Canada admits approximately 230,000 immigrants each year, with future forecasts showing an increase to approximately 250,000 immigrants. Of this number approximately one-half are selected under the Skilled Worker Category based on their age, education, occupation demand, work experience, language capability, and personal suitability. A point value is given to each of these criteria. For immigrants making application in this category, this Bill sets the legislative framework to permit:

- Moving away from an occupation-based model to one focused on flexible and transferable skills. The current selection system screens an applicant on his or her intended occupation and the demand in Canada for the particular occupation. The proposed system will look at the applicant's overall qualifications—his or her current labor market position will not be the key factor.
- Assigning more weight to education.
- Increasing the relative weight of having knowledge of an official language, but ensuring that language is not a bar to admission.

The changes are expected to be introduced by way of regulation shortly after proclamation of the new legislation. It is expected that the pass mark, or the point assessment required to qualify for an immigrant visa, will be set with a view to encourage a higher level of immigration in the future.

G. In Canada Landing Class for Foreign Workers

At present, most foreign workers in Canada must submit an application for permanent resident status at a Canadian consulate or embassy such as the Area Processing Center in Buffalo, New York. Under the new legislation, in circumstances where foreign workers have employment validations issued by Human Resources Development Canada, their applications for permanent resident status may be submitted within Canada. The regulations have not been introduced at this time and there is still considerable discussion as to the final criteria.

H. Expanding the Penalties for Misrepresentation

1. The legislation is viewed as a "get tough" approach to immigration. It is, therefore, not surprising that there are subtle changes, which U.S. attorneys should be aware of in advising their clients:

   a. *Misrepresentation*—If a foreign national (non-permanent resident of Canada) directly or indirectly misrepresents or withholds a material fact relating to a relevant matter that induces or could induce an error in the administration of the Act, he or she may be determined to be inadmissible to Canada for a period of two years. This provision could result in a misrepresentation determination for failing to disclose a medical condition or criminality issue, even in circumstances where the issue was not raised by immigration. It is unclear at this time as to how strictly this provision will be applied.[7]

   b. *Counseling Misrepresentation*—A new provision has been added, which makes it an offense to knowingly counsel, induce, aid, or attempt to counsel any person to directly or indirectly misrepresent or withhold material facts relating to a relevant matter that induces or could induce an error in the administration of the Act. Human Resource professionals,

[5] §28(2).

[6] §40(1)

[7] §40(1).

often times guided by their legal counsel, must therefore be careful to ensure that the advice provided to applicants/employees seeking an employment authorization is accurate and fairly reflects the activities that will be undertaken. For example, it would be a contravention of this provision to counsel an employee to submit an application as a business visitor when, in fact, the employee will be carrying on employment duties in Canada.

c. *Offense Outside of Canada*—The Bill provides that an act or omission that would be a contravention of the Bill if committed in Canada is, if committed outside Canada, an offense. Accordingly, misrepresentations made to a Canadian visa officer or in respect of aiding foreign nationals outside Canada may be a contravention in Canada.[8]

2. General Offenses—Employing Nonauthorized Persons

   Due Diligence Obligation: A person who fails to exercise due diligence to determine whether employment is authorized under the Act is *deemed* to know that it is not authorized. In order to avoid this liability, it is necessary to show that all due diligence was exercised to prevent the unauthorized employment. Of particular concern to attorneys and HR professionals are situations where there is a merger or purchase of an existing business with employees who may possess temporary status attached to the former employer, or, of greater concern, fail to present any appropriate employment status.

   Clearly, there is an obligation, as a part of any corporate due diligence, to ensure that employees are authorized for employment and that the appropriate evidence is contained in the employee file. Attorneys and HR professionals must ask the right questions at the outset.

IV. CONCLUSION

As noted at the outset of this article, the new Immigration and Refugee Protection Act has not been proclaimed into law, nor have the accompanying regulations been published. The final stages could see significant changes as interested parties continue to make their views known to the Minister of Citizenship and Immigration. It is clear, however, that attorneys and their clients must practice greater diligence to ensure both compliance with the legislation and that full advantage has been taken of the favorable application approval criteria, procedures, and processes.

[8] §135.

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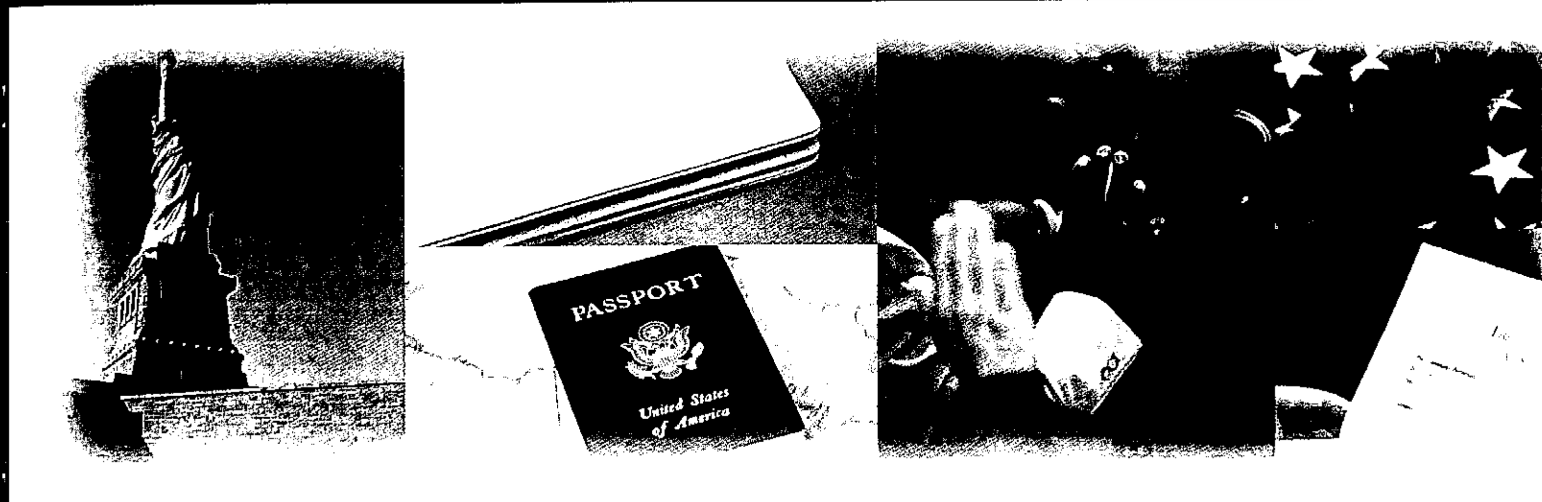

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