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**The International Transfer and Employment of Executives,
Managers and those with Specialized Knowledge to Canada
*-Mastering the Exemptions-***

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The International Transfer and Employment of Executives, Managers, and those with Specialized Knowledge to Canada

INDEX

- I. INTRODUCTION – THE BASIC REQUIREMENTS APPLICABLE TO ALL TEMPORARY WORKERS
- II. OVERVIEW OF CANADIAN EMPLOYMENT AUTHORIZATION POLICY AND PRACTICE
- III. THE INTRA-COMPANY EXECUTIVE TRANSFER
 1. GATS
 - A. Qualification
 - B. Duration and Extension of Authorization
 2. NORTH AMERICAN FREE TRADE AGREEMENT
 - A. Qualification
 - B. Duration and Extension of Authorization
 3. CODE E-15 EXEMPTION
 - A. Qualification
 - B. Duration and Extension of Authorization
- IV. COMPARATIVE ANALYSIS
 1. EXECUTIVES AND MANAGERS
 2. SPECIALIZED KNOWLEDGE
- V. ALTERNATIVE TRANSFER SOLUTIONS
 1. PROFESSIONAL PROVISIONS OF THE GATS AND THE NAFTA
 2. THE CODE E-19 EXEMPTION
- VI. CONCLUSION

I INTRODUCTION - THE BASIC REQUIREMENTS APPLICABLE TO ALL TEMPORARY WORKERS

The timely temporary transfer to, and employment of, a corporate executive, manager or employee with specialized knowledge in Canada may be crucial to your multinational corporate client. Due to the nature of the seniority of the role and his or her experience and education, obtaining Employment Authorizations for executives and senior managers is usually straightforward. However, because of the applicant's seniority and his or her importance to the corporate client, the expectations placed on the legal practitioner to ensure a problem – free and timely transfer may be enormous. On the other hand, the transfer of those who possess specialized knowledge is more technically difficult and, as such, it represents its own unique challenges.

When considering a transfer to Canada, it is always wise to review and ensure compliance with Citizenship and Immigration Canada's ("CIC") basic requirements:

Employment Authorization - The general rule contained in the legislative provisions is that no person, other than a Canadian citizen or permanent resident, shall engage or continue in employment without a valid and existing Employment Authorization. Moreover, an Immigration Officer shall not issue an Employment Authorization to a person if, in the Officer's opinion, the employment of such a person will adversely affect the employment opportunities for Canadian citizens or permanent residents.¹

Entry Visa - Applicants from a number of countries are required to obtain a Visitor Visa in addition to an Employment Authorization before arriving in Canada to work. Applicants from most European countries are visa exempt but, for example, Czech, Croatian, Romanian and Polish nationals must obtain a visitor visa prior to entering Canada.

Medical Examination - If, during the five-year period preceding the application, the applicant has lived in a country or area for more than six months that, in the opinion of the Ministry of Health, has a high incidence of serious communicable disease, the applicant may be required to undergo a medical examination.

Where the applicant is required to undergo a medical examination, there may result a delay in issuance of the Employment Authorization. In such instances, some practitioners will restrict the applicant's entry request in Canada to a period of less than six months so as to avoid the medical examination requirement. However, we recommend great caution in this approach, as the threat of spreading a communicable disease such as

¹ Subsection 20(1) of the *Immigration Act Regulations* ("Regulations").

Tuberculosis is real and serious. Compliance with medical requirements should always be treated responsibly.

Although the practitioner must in every instance ensure that entry and medical requirements are properly addressed, this paper focuses on the substantive requirements of obtaining an Employment Authorization. Before discussing the particulars of an intra - corporate transfer and the options available to those who do not fit within these parameters, it is necessary to have a basic understanding of Canadian Employment Authorization policy and the way that it plays out from a practical perspective.

- **OVERVIEW OF CANADIAN EMPLOYMENT AUTHORIZATION POLICY AND PRACTICE**

Citizenship and Immigration Canada's present employment authorization policy divides individuals seeking entry to Canada for business or work purposes into separate categories:

Employment Authorization Exemptions - Some types of temporary entry to Canada do not require Employment Authorization. For instance, diplomats, military personnel, some performing artists, buyers and sellers, and athletes, require neither job validations nor Employment Authorizations to enter Canada on a temporary basis.²

Job Validations - In theory, the majority of applicants for temporary entry to Canada are required to undergo a procedure commonly referred to as "Job Validation". In order to qualify for an Employment Authorization, applicants are first required to apply for a Foreign Worker Record (also known as a Job Validation) at Human Resources Development Canada ("HRDC").

The *Regulations* provide the bases for reviewing whether Canadian citizens and permanent residents will suffer adverse effects as a result of the presence of a foreign worker in Canada.³ If they are positively assessed, applicants are then in a position to apply for Employment Authorizations at a processing post.

Job Validation Exemptions - Applicants may fall within the purview of one of the exemptions from the Job Validation process. The sources are found in treaties such as the *General Agreement on Trade in Services* ("GATS"), and the *North American Free Trade Agreement* ("NAFTA"), the regulatory provisions of Canada's *Immigration Act*, and government policy such as the Software Workers Development Project.

² Section 19 of the *Regulations* sets out the applicable definitions. However, as most of you are not likely to encounter a significant number of these individuals, they are not discussed in this paper.

³ Section 20(3) of the *Immigration Act Regulations*.

While the two-step Job Validation to Employment Authorization procedure is considered the norm, the Job Validation process can be cumbersome and time consuming and, therefore, where possible it should be avoided. The key to a legal practitioner's success is an ability to employ the system in an inverse manner. That is, the exemptions to the requirement to Job Validation should be applied as often as possible; the system can be governed by the exceptions rather than the rule.

This paper focuses on the alternatives to the Job Validation process available to employers that seek to transfer managers, executives and those with specialized knowledge to Canada. The purpose of this discussion is to present a comparative analysis of the various exemptions because identifying the appropriate exemption for your client means that you can best ensure the problem-free and timely entries to Canada.

III. THE INTRA-COMPANY EXECUTIVE TRANSFER

The vast majority of executives, managers, and specialists qualify under the various intra-corporate transfer provisions. To this end, the *GATS*, *NAFTA* and the regulatory exemptions all contemplate the entry of intra-company transferees.

1. GATS

The *General Agreement on Trade in Services*, *GATS*, promulgated on January 1, 1995, is one of three components of the Agreement Establishing the World Trade Organization. It provides expedited and simplified entry procedures for admission to Canada for business purposes and employment for individuals from over 120 countries.

A. Qualification

Intra-company provisions under the *GATS* significantly expand the accessibility to the Canadian labor market of key personnel from abroad. An "intra-company transferee" is a person who:

- (a.) is both a citizen and a resident a *GATS* member nation;
- (b.) has been employed by the transferring corporation in a similar position for a period of not less than one year immediately prior to the date of the application⁴; and
- (c.) seeks temporary entry to a member nation in order to render services to the same company which:
- (d.) is engaged in substantive business operations in Canada, or

⁴ Note that in contrast, the intra-company transferee provisions of the *NAFTA* requires that the one-year of experience be obtained **within the three-year period** immediately preceding the applicant's transfer to Canada.

- (e.) is constituted in Canada, engaged in substantive business operations in Canada and owned, or controlled, by or affiliated to a foreign company undertaking business in Canada; and
- (f.) falls within the following segment of the labour market:
 - Business Services
 - Communications Services
 - Construction Services
 - Distribution Services
 - Environmental Services
 - Financial Services
 - Tourism and Travel Related Services
 - Transport Services

It is important to ensure that the specific occupational services that your client engages in are enumerated. For example: legal, accounting and engineering personnel are found under the Business Services section, while Communication Services has the largest listing of computer related services.

The *GATS* sets out three specifically defined types of foreign workers who may qualify, as follows:

- senior executives;
- senior managers; and
- specialists.

An applicant's title may at first sight appear to qualify him or her for temporary status pursuant to the *GATS*. It is, however, the applicant's actual responsibilities in his or her employment that are considered by immigration officials when making the determination whether or not he or she is indeed a Senior Executive or Manager.

To determine whether the applicant is an Executive consider whether she or he is primarily responsible for the direct management of the company, establishing its goals and policies, or for a major component or function of it, and has discretionary decision making powers subject to minimal or no supervision. If the answer is yes to one or more of these, the applicant may qualify under the *GATS* provisions.

GATS "specialists" possess an advanced knowledge of expertise and proprietary knowledge of the enterprise's product, service, research, equipment, techniques, or management. To qualify under the specialized knowledge provisions, the Canadian enterprise must demonstrate that the foreign worker possesses an advanced level of knowledge and expertise of a nature so as to be critical to the wellbeing of the enterprise in Canada. This knowledge must not be readily available in Canada.

B. Duration and Extension of Authorization

The maximum period of issuance of the first Employment Authorization under the intra-company transferee category is one year. Up to two subsequent extensions may be obtained for a total stay of no more than three years. However, for Executives and Managers, immigration officials have discretionary power to extend an individual's temporary status in Canada pursuant to section 20(5)(e)(i) of the *Regulations* if doing so would be in the interests of Canada.

2. NORTH AMERICAN FREE TRADE AGREEMENT

The *North American Free Trade Agreement*, which came into force on January 1, 1994, was negotiated by the three member states to the agreement: Canada, the United States and Mexico. Only US and Mexican citizens may avail themselves of the expanded and simplified *NAFTA* provisions allowing for temporary entry to Canada.

A. Qualification

Pursuant to the *NAFTA*, intra-company transferees are business persons employed by an enterprise seeking to render services to a branch, parent, or subsidiary or affiliate of that enterprise, in a:

- managerial capacity; or
- executive capacity; or
- manner that involves specialized knowledge.

"Executives" are those who direct the management of the organization or a major component or function of the organization that establishes the goals and policies of the organization, component or function. They generally exercise a wide latitude of discretion in decision-making, and receive only general supervision or direction from higher level executives, the board of directors, or stockholders of the business enterprise.

"Managers" that qualify pursuant to the *NAFTA* may oversee and direct the organization, a department, division, a function or a component thereof. They often provide supervision to personnel and may have the authority to hire, fire, and make recommendations for persons under their control.

Those possessing "specialized knowledge" with respect to the Canadian enterprise's product, service, research, equipment, technique, management, and/or other interest and application in international markets may qualify under this last category. Specialized knowledge may also refer to an advanced level of knowledge or expertise in the organization's processes and procedures.

If an applicant is to qualify under the *NAFTA*, the legal practitioner must also ensure that the business enterprise is actually doing business in both countries. Moreover, applicants must have been employed continuously in a senior

executive or managerial capacity or one involving “specialized knowledge” for one year in the previous three-year period.

B. Duration and Extension of Authorization

Employment Authorizations pursuant to the *NAFTA* may be issued at the Port of Entry and have an initial maximum duration of three years. Extensions can be granted for duration of up to two years at a time, assuming that the individual continues to comply with the substantive requirements for the intra-company transferee.

The intra-company transferee category is the only *NAFTA* category to have a cap placed on the total duration of employment. The total period of stay for a person in the executive or managerial capacity may not exceed seven years. The total period of stay for a person employed in a position requiring specialized knowledge may not exceed five years.

3. CODE E-15 EXEMPTION

This intra-company transferee category is the least restrictive of the intra company transferee categories under both the *GATS* and the *NAFTA* relating to senior executives and managers as described above. There are however, no provisions for employees with specialized knowledge.

A. Qualification

A branch, subsidiary or parent of a Canadian company located outside of Canada must employ persons seeking entry to Canada pursuant to this exemption in a senior managerial or executive capacity. The company in Canada must be of a permanent and continuous nature and not a vehicle by which the intra-company transferee may gain access to Canada.

Persons seeking entry to Canada pursuant to the E-15 exemption must be acting in a senior executive or managerial capacity in the foreign-related company prior to the transfer to the Canadian branch, subsidiary, or parent corporation. Unlike both the *GATS* and the *NAFTA*, the applicant is not required by policy to be acting in the senior executive or managerial capacity for a minimum duration prior to entry to Canada.

B. Duration and Extension of Authorization

An Employment Authorization issued under this category may be valid for an initial period of a maximum of three years. This more generous initial duration may improve an executive or manager’s ability to obtain Canadian health insurance coverage, depending on the province of residence, for him or herself and the family during their temporary stay in Canada.

Subsequent extensions, of a one-year duration, may be obtained. General policy provides that the total stay should not exceed five years. This policy, however, can easily be overcome in appropriate circumstances.

IV. COMPARITIVE ANALYSIS

Like the *NAFTA*, the *GATS* adds to but does not replace the general provisions of the *Immigration Act* and *Regulations* pertaining to Foreign Workers.

1. Executives and Managers

For executives and managers the *GATS* and *NAFTA* provisions are in many respects similar but because the *GATS* provisions apply to individuals from more than 120 member states, they have much broader application. However, the treaty-based entries are for the most part trumped because the E-15 exemption does not require the applicant to be acting in the executive or senior managerial capacity for a minimum of time prior to entry to Canada. In this respect, the E-15 exemption is more facilitative than its *GATS* and *NAFTA* counterparts. Moreover, the E-15 issuance and extension durations are more generous.

Practically speaking, where U.S or Mexican executive or manager is concerned, the only likely benefit of the *NAFTA* is likely to be the possibility of expedited processing at a border Port of Entry or airport Pre-flight Inspection facility.

2. Specialized Knowledge

For those possessing specialized knowledge, the *GATS* requirement that the applicant possess "an advanced level of expertise" in certain aspects of the enterprise is a relatively higher threshold. In contrast, the *NAFTA* requires advanced expertise only if the transferee's application is based on knowledge of the Canadian enterprise's process and procedures. Under the *NAFTA*, if the application is based on the transferee's knowledge of the Canadian enterprise's product, service, research, equipment, techniques, management or other interests, the transferee's knowledge need only meet the standard of the "specialized knowledge".

Given that the *GATS* threshold of an "advanced level of expertise" is considerably higher than the "specialized knowledge" requirement of the *NAFTA*, an examination of the applicant's knowledge in relation to the Canadian employer's need is required. Note also that this specialized knowledge may apply to "other interests" of the Canadian enterprise under the *NAFTA* but not under the *GATS*.

Consider, in addition, that in contrast to the *NAFTA* provisions, admittance under the *GATS* specialized knowledge provisions does not discharge the applicant or the Canadian employer from the responsibility of ensuring that any Canadian licensing, registration, or certification requirements are met before the commencement of employment.

In short, wherever possible, executives and manager intra-company transferees should first make an application under the E-15 exemption. If the applicant is a specialized knowledge intra-company transferee and holds U.S. or Mexican citizenship, the strategic practitioner will utilize the *NAFTA*. If the applicant is not an U.S. or Mexican citizen, the practitioner will resort to the *GATS* provisions.

V. ALTERNATIVE TRANSFER SOLUTIONS

There are inevitably, instances where a top executive is a lateral hire, or otherwise does not meet the requirements of the intra - corporate provisions, or where the employee to be transferred is unlikely to meet the specialized knowledge threshold. In these situations the legal practitioner should consider other possible routes to obtaining Employment Authorization before resorting to the Job Validation process. The alternatives below are illustrative but not comprehensive.

1. Professional Provisions of the *GATS* and The *NAFTA*

Both the *GATS* and the *NAFTA* contain provisions designed to facilitate the temporary employment of professional in Canada. The *GATS* provisions limit the entry in terms of industry sector, licensing compliance and duration and as such do not meaningfully expand access to Canada. The comparable provisions of the *NAFTA* represent a more significant expansion of Canada's employment policy toward temporary foreign workers.

To qualify under the *NAFTA* professional category, the applicant must be coming to Canada to provide professional level services in their field of qualification. Professionals include, but are not limited to, Accountants, Engineers, Economists, Management Consultants, and various medical and scientific occupations. In most cases, a professional is defined as an individual possessing a baccalaureate degree.

The professional provisions could aid a lateral hire executive. For instance, an engineer may enter Canada as a professional to be an executive in an enterprise provided that in the performance of his or her duties as an executive the engineer would be required to employ engineering knowledge necessary to carry out his or her responsibilities.

Likewise, an employee who is unlikely to meet the specialized knowledge threshold but possesses the educational requirements (and licensing in the case of the *GATS*, and will be performing the duties of an approved professional may be able to take advantage of either the *GATS* or *NAFTA* professional provisions.

2. The Code E-19 Exemption

The *Immigration Act Regulations* provide an exemption for those whose employment will provide a “significant benefit” to Canada pursuant to the Code E-19 exemption from Job Validation. This category, which was designed for applicants who do not fall squarely within the more specific exemption codes in the *Regulations* may therefore be of assistance to the applicant who does not qualify under any of the previously discussed categories of entry.

Immigration Officers will use this category where the admission of persons seeking entry to Canada will create or maintain a significant benefit or opportunity to Canadians not related to employment. Immigration Officers will consider whether the benefits and opportunities offered to Canadian citizens or permanent residents by the applicant’s admission to Canada are “significant” in nature.

Given the wide latitude given to Immigration officers under the Immigration Manual, the E-19 regulatory-based exemption has wide potential application.

V. CONCLUSION

The strategic practitioner will first ascertain whether the applicant fits within any of the treaty, regulatory or policy -based exemptions, and will only resort to the Job Validation process once he or she is certain that there is no feasible alternative.

For executives and managers, the E-15 exemption provides perhaps the most flexible and comprehensive manner of securing Employment Authorization. For employees who possess specialized knowledge, the determination is more subjective taking into account the applicant’s nationality, the extent of his or her knowledge and the duration of time spent working for the company abroad.

These assessments are crucial to the process of obtaining a Canadian Employment Authorization, which involves the examination of the individual’s circumstances and a close evaluation of the regulatory and treaty-based provisions most beneficial to their particular circumstances.