

## An HR Professional's Guide to U.S. and Canadian Work Permit Options: Part II

*For many companies, employing foreign nationals is an essential part of their business strategy. In this second part of a two-part series, two legal experts look at the options for foreign workers temporarily relocating to Canada.*

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¶25,527 [HRMM ¶20,503] In the first of this two-part paper, we reviewed the most useful admission options available for Canadian hires, transferees and business people entering the U.S. In this part, we consider the options available to foreign workers relocating to Canada.

In general, anyone other than a Canadian citizen or permanent resident must have a work permit to legally work in Canada. The Canadian Foreign Worker Program is jointly managed by Citizenship and Immigration Canada (CIC) and Human Resources and Skills Development Canada (HRSDC). In some circumstances, CIC immigration officers will only issue a work permit to a foreign national after a favourable labour market opinion has been issued by HRSDC.

The overview below summarizes the work permit categories available to key personnel relocating to Canada. When assessing the type of work permit to pursue, you must consider several important issues to ensure the best possible results. These issues include the impact the foreign

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national's qualifications and citizenship will have on the application, the best place for filing the application, and the foreign national's possible long-term interest in becoming a permanent resident. Additionally, as a criminal record may have an impact on a foreign national's admissibility to Canada, it is critical that you obtain from the foreign worker information concerning past criminal charges or convictions, if any, in advance of commencing the work permit process.

## **The Labour Market Opinion Route**

### ***Covering the Basics: Requirements and Documents***

HRSDC is the government department responsible for providing the labour market opinion. The department seeks to improve the Canadian labour market by ensuring that qualified foreign workers are admitted to work in Canada for jobs or vacancies that cannot readily be filled by Canadians or Canadian permanent residents.

Obtaining a work permit based on a favourable labour market opinion is, relatively speaking, the most onerous of the options available. This is due to the fact that an immigration officer must make his or her determination of a foreign worker's qualifications based, in part, on an opinion issued by HRSDC as to the economic effect of the foreign national's proposed employment on the Canadian labour market. Generally speaking, HRSDC will issue a positive opinion when it concludes that employment opportunities for Canadian citizens and permanent residents will not be adversely affected by the admission of the foreign worker and that the foreign worker is otherwise suitable for the job.

The regulatory test is whether or not temporary employment of the foreign national is likely to have a neutral or positive economic effect on the labour market in Canada. HRSDC officers consider the following factors:

- if the work is likely to result in direct job creation or job retention for Canadian citizens or permanent residents;
- if the work is likely to result in the creation or transfer of skills and knowledge for the benefit of Canadian citizens or permanent residents;
- if the work is likely to fill a labour shortage;
- if the wages and working conditions offered are sufficient to attract Canadian citizens and permanent residents and to retain them in that work;
- if the employer has made, or has agreed to make, reasonable efforts to hire or train Canadian citizens or permanent residents; and

- if the employment is likely to adversely affect the settlement of any labour disputes in progress or the employment of any person involved in the dispute.

The seniority and expertise required for the position, as well as the size of the salary that will accompany the position in Canada, are important considerations. In many instances, the Canadian employer is also required to advertise the job position in Canada, usually for two weeks in a national newspaper and/or local newspaper or trade journal, before HRSDC will issue an opinion. However, there are instances in which HRSDC concludes that it already has information to confirm a shortage of skilled workers in a particular field. If this is the case, the advertising requirement may be waived.

Once HRSDC has issued a positive labour opinion, you can file an application for a work permit at a Canadian visa office outside of Canada or, if the foreign worker is a national of a visa-exempt country, he or she can present the application at a Canadian port of entry. The following standard documentation included in an HRSDC-confirmed work permit application is as follows:

- an Application for Work Permit (Form 1295);
- a copy of HRSDC's positive labour market opinion;
- a letter from the employing company that describes its business activity, the job position the employee is required to fill, the anticipated length of employment and the salary;
- a legal letter that sets out the provisions for issuing a work permit pursuant to the *Immigration and Refugee Protection Act* (IRPA) and its regulations, addresses how these IRPA requirements have been met and why issuing a work permit is appropriate, and includes a request for any additional visas that may be required, such as a temporary resident visa;
- a copy of the employee's résumé and education certificates, if available;
- a copy of the employee's valid passport;
- two passport-sized photographs of the employee (if a temporary resident visa is also required); and
- the application processing fee (which stood at \$150 in April 2005).

### ***Drawbacks to the Labour Market Opinion Work Permit Process***

The labour market opinion work permit process has several drawbacks. First, it usually takes about three to four weeks for HRSDC to issue its opinion letter (and note that recent backlogs in the system are making the process considerably longer in Ontario). Until the HRSDC opinion is

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issued, the work permit application cannot be processed. Second, if advertising is required as a prerequisite to an HRSDC opinion, the process can become costly and time-consuming for the employer. For one thing, all résumés received in response to the advertisement must be reviewed, considered and distinguished from the qualifications possessed by the intended foreign worker. Third, HRSDC has not published formal guidelines that provide insight into the evaluation of labour market factors, making the process seem unpredictable to those who are unfamiliar with it.

### ***Benefits of the Labour Market Opinion Work Permit Process***

The labour market opinion route is especially useful in two situations. First, it is useful in situations that involve a newly hired skilled foreign worker. Second, it is useful in situations that involve a senior employee who was recently hired (i.e., hired within the previous year) at a related office outside of Canada and who is to be transferred to, or required to perform services periodically in, Canada for the company.

## **Exemption C-12: The “Intra-Company Transferee” Route**

### ***Covering the Basics: Requirements and Documents***

Given the onerous requirements of the HRSDC labour market opinion, it is fortunate that the Foreign Worker Manual published by Citizenship and Immigration Canada contemplates work permits in a number of categories deemed “exempt” from the HRSDC-issued labour market opinion. One of the most commonly used “exemptions” is the “intra-company transferee” category. The intra-company transfer category allows for a work permit to be issued to a foreign worker who has been employed in a senior management/executive or “specialized knowledge” position with a parent, subsidiary or joint venture company of the Canadian company, outside of Canada, for at least 12 months in the three years preceding the application.

The position to be filled in Canada by the transferring foreign national must be at the senior management or executive level or require specialized knowledge of the company’s products, services, processes and/or procedures. This knowledge must be acquired from the foreign worker’s prior employment at the transferring company. A work permit application filed on behalf of a transferring senior manager or executive may initially be issued for up to three years. Renewals may be issued in one-year increments for an indefinite period.

Initially, a work permit for a “specialized knowledge” employee will only be issued for a one-year term. Renewals may be issued in one-year increments for an additional two-year period only. That is, the total em-

ployment in Canada for a “specialized knowledge” employee, as provided for under exemption C-12, is a maximum of three years.

The work permit application may be filed at a Canadian visa office or, if the foreign worker is a national from a visa-exempt country, it may be presented at a Canadian port of entry. The documentation required in support of the C-12 intra-company work permit application typically includes:

- an Application for Work Permit (Form 1295);
- a letter of support from the employing company that describes the company’s business, the corporate relationship it maintains with the transferring company, the job position the employee is required to fill in Canada, the employee’s prior work experience in a senior management/ executive or “specialized knowledge” position at the company abroad, the anticipated length of employment and salary;
- a legal letter that sets out the provisions for issuing a work permit pursuant to IRPA and its regulations and the Foreign Worker Manual, addresses how these IRPA and Foreign Worker Manual requirements have been met and why issuing a work permit is appropriate, and includes a request for any additional visas that may be required, such as a temporary resident visa;
- a copy of the Canadian company’s incorporation documentation;
- a copy of the foreign (transferring) company’s incorporation information;
- a letter from the company’s corporate counsel confirming the corporate relationship between the Canadian company and transferring company;
- a corporate brochure (if available);
- a copy of the foreign national’s résumé and education certificates (if available);
- a copy of the foreign national’s valid passport;
- proof that the foreign national has been on the company payroll outside of Canada for at least 12 months in the preceding three-year period;
- two passport-sized photographs of the employee (if a temporary resident visa is also required); and
- the application processing fee (which stood at \$150 in April 2005).

### ***Drawbacks to the C-12 Intra-Company Transfer Category***

The Foreign Worker Manual defines senior managers and executives as “only those persons whose positions are defined as Senior Managers who plan, organize direct or control a business.” Thus, the C-12 intra-

company transfer exemption is not available to people whose positions more closely resemble middle management.

In addition, the “specialized knowledge” threshold is high. Upon presentation of the application at the port of entry, the foreign worker may encounter difficulty in satisfying the immigration officer that he or she occupies a “specialized knowledge” position. You should therefore consider processing these types of applications at a Canadian visa office before the foreign national departs for Canada.

### ***Benefits to the C-12 Intra-Company Transfer Category***

The most significant benefit to using this category is that no HRSDC labour market opinion is required. As well, senior managers and executives can benefit from an expeditious application process when the application is filed at a Canadian port of entry, from the initial three-year validity period and from generous renewals.

### **Exemption C-10: “Significant Benefit To Canada” Category**

#### ***Covering the Basics: Requirements and Documents***

Another category for bringing workers to Canada without a labour market opinion from HRSDC is the “significant benefit” category. A foreign worker is exempt from the HRSDC labour market opinion process if, in the opinion of an immigration officer, the employment will create or maintain significant social, cultural or economic benefits or opportunities for Canadian citizens or permanent residents. To qualify in this category, the facts must be clear and compelling.

While not clearly spelled out in the Foreign Workers Manual, some of the factors an immigration officer may consider when assessing an application under this category include whether or not the person is internationally renowned, whether or not the person’s presence in Canada is crucial to a high-profile event and whether or not the circumstances are such that the person’s entry into Canada is urgent. Pursuant to the significant benefit category, a work permit can be initially issued for up to three years.

The documentation required to apply for this type of work permit typically includes:

- an Application for Work Permit (Form 1295);
- a letter of support from the employing company that describes its business activity, the job position the employee is required to fill in Canada, why the employment of the foreign national in Canada will significantly benefit Canada, the anticipated length of employment and salary;

- a legal letter that sets out the provisions for issuing a work permit pursuant to IRPA and its regulations and the Foreign Worker Manual, addresses how the requirements of the IRPA and Foreign Worker Manual have been met and why issuing a work permit is appropriate, and includes a request for any additional visas that may be required, such as a temporary resident visa;
- any additional evidence to support a finding that the foreign national's employment will result in a social, cultural or economic benefit to Canada;
- a copy of the foreign national's résumé and education certificates, awards, etc. (if available);
- a copy of the foreign national's valid passport;
- two passport-sized photographs of the employee (if a temporary resident visa is also required); and
- the application processing fee (which stood at \$150 in April 2005).

### ***Drawbacks to C-10 Significant Benefit to Canada Category***

The criteria for defining a "significant benefit" to Canada are extremely vague. Neither the IRPA regulations nor the Foreign Worker Manual establishes specific guidelines or defines criteria for acquiring a work permit on this basis. The Canadian immigration officer, therefore, has wide discretion to approve or deny a work permit on the basis that the foreign worker's employment will or will not create or maintain significant employment benefits or other opportunities for Canadian citizens or permanent residents. As a result, approvals of this type of work permit are limited. We therefore recommend that this application category be used only in exceptional circumstances.

### ***Benefits of the C-10 Significant Benefit to Canada Category***

This category's main advantage is that it bypasses the HRSDC labour market opinion application process, thus decreasing processing times and often increasing the prospect of approval.

## **INTERNATIONAL AGREEMENTS**

Canada has entered into several agreements with foreign countries allowing for nationals of such signatory countries to work in Canada in specific circumstances pursuant to the international agreement. The two international agreements most widely used by foreign nationals with employment opportunities in Canada are the *North American Free Trade Agreement* (NAFTA) and the *General Agreement on Trades in Services* (GATS).

## **The TN or “Trade NAFTA-Professional” Category**

### ***Covering the Basics: Requirements and Documents***

As indicated in the first part of this paper, NAFTA permits an American, Canadian or Mexican citizen who is a professional or intra-company transferee to obtain authorization to work in the U.S., Canada or Mexico — provided he or she satisfies the requisite criteria. The professional category permits certain professionals to enter Canada to engage in their profession on a temporary basis. A list of qualifying professional occupations and the required credentials for each occupation is set out in Appendix 1603.D.1 of NAFTA.

Only U.S. and Mexican citizens who are entering Canada to fill a professional position listed in Appendix 1603.D.1 and who can demonstrate that they possess the required credentials for that occupation are eligible for a Canadian work permit pursuant to NAFTA. Listed professions include occupations commonly considered professional, such as lawyers, accountants and engineers, as well as some occupations that do not require bachelor's degrees, such as computer systems analysts, management consultants and scientific technicians/technologists.

The U.S. or Mexican foreign applicant may present his or her application for processing at a Canadian port of entry. The work permit will initially be issued for a maximum of one year. However, renewals may be obtained on an annual basis for an unlimited period.

When applying for a professional work permit pursuant to NAFTA, the intended employee should give the immigration officer his or her original education certificates and reference letters to review. Immigration officers do not typically keep documents filed in support of an application for a NAFTA professional work permit, so the applicant does not need to worry about relinquishing his or her original documents when presenting the application.

The standard documentation to accompany this application includes:

- a letter from the employing company that describes its business activity, the professional nature of the position the employee is required to fill, the duties to be performed in Canada, the anticipated start date, the duration of employment (it cannot be greater than 12 months) and the salary;
- a legal letter that sets out the provisions for issuing a work permit pursuant to the IRPA and its regulations and addresses how the IRPA requirements have been met;
- a copy of the employee's résumé;
- original education certificates;



- reference letters (if available);
- the employee's valid passport or, alternatively, a citizenship card and one piece of picture identification; and
- the application processing fee (which stood at \$150 in April 2005).

### ***Drawbacks to the NAFTA Professional Category***

The drawbacks of the NAFTA professional category for applicants seeking entry to Canada are identical to those outlined in Part I of this article with respect to sending a Canadian to the U.S. with a TN status. To reiterate, the main drawback of the TN category is that applicants must be pigeonholed into one of 63 predetermined professional categories that tend to be narrowly defined. The TN does not cover many employees who we would normally consider to be professionals, such as business management, marketing and human resources professionals. In short, the TN is simply not useful to most managers.

### ***Benefits of the TN Professional Category***

There are considerable benefits of the NAFTA professional category. Work permits can be issued quite quickly at the Canadian port of entry. The criteria for approval are relatively clear, and the opportunity for an immigration officer to impose his or her own subjective opinion is minimal. This category is also beneficial to applicants who do not meet the one-year prior work experience test necessary for intra-company transferees, but who do have the prescribed education for the intended occupation. As well, work permits can be renewed under this category.

## **The NAFTA "Intra-Company Transferee" Category**

### ***Covering the Basics: Requirements and Documents***

The documentation required in support of the NAFTA intra-company transferee is, for the most part, the same as that outlined in the L-1 intra-company transfer (see Part I of this article, HRMC March 2005) and the C-12 intra-company transfer (see above). Note, however, that the definitions of senior manager/executive and "specialized knowledge" employee are slightly broader under NAFTA.

### ***Drawbacks to the NAFTA Intra-Company Transferee Category***

While the definition of senior manager/executive under NAFTA may be less restrictive than that under the C-12 intra-company transferee — thus allowing work permits to be issued to middle-level managers — NAFTA provides for a maximum of seven years of employment as an

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intra-company transferee. The C-12 category, on the other hand, allows senior managers and executives to obtain unlimited annual renewals of their work permits.

### ***Benefits of the NAFTA Intra-Company Transferee Category***

As is the case with the NAFTA professional category, the NAFTA intra-company transferee category is an extremely fast and effective way for an American or Mexican citizen to obtain a Canadian work permit. With respect to intra-company transferees possessing specialized knowledge, the NAFTA provisions relating to duration are more generous than the three-year maximum stay provided for under the C12 intra-company transferee category. The NAFTA provisions permit a total stay in Canada of up to five years.

## **The GATS “Professional” Category**

### ***Covering the Basics: Requirements and Documents***

In order to qualify under GATS as a professional, the foreign national must be a citizen of, and be living in, a member country. GATS defines a professional as “a person who seeks to engage, as part of a services contract obtained by [a company in another member nation] in an activity at a professional level in a profession set out in Appendix [C] provided that the person possesses the necessary academic credentials and professional qualifications which have been duly recognized, where appropriate, by the professional association in Canada.” The eligible GATS professions are as follows:

- in group 1, engineers, agronomists, architects, forestry professionals, geomatics professionals and land surveyors; and
- in group 2, legal consultants, urban planners and senior computer specialists.

To obtain a work permit, the foreign national must have either a license from the province in which he or she will be working or documentation from an appropriate professional association in Canada recognizing his or her academic credentials and professional qualifications. A work permit to enter as a professional under GATS can be obtained by applying through a visa office or, for citizens of member countries that are visa-exempt, at a port of entry. A GATS professional work permit may be issued for a maximum period of three months.

The documentation provided in support of a GATS professional-based work permit typically includes:

- an Application for Work Permit (Form 1295);

- a letter from the employing company that describes its business activity, the service agreement between the Canadian company and GATS member service provider, the professional nature of the job position the employee is required to fill, the duties to be performed in Canada, the anticipated start date, the duration of employment (no greater than three months) and the salary;
- a copy of the service contract;
- a letter from the appropriate Canadian professional licensing association confirming the employee's professional qualifications;
- a legal letter that sets out the provisions for issuing a work permit pursuant to the IRPA and its regulations and addresses how the IRPA requirements have been met;
- a copy of the employee's résumé;
- a copy of the employee's qualifying education and professional certificates;
- reference letters (if available);
- a copy of the employee's valid passport; and
- the application processing fee (which stood at \$150 in April 2005).

### ***Drawbacks to the GATS Professional Category***

The GATS professional category is not used very frequently, given its restrictions and limitations. Specifically, a work permit under this category is available to very few professional occupations. As well, the requirement that the professional's qualifications be recognized by the appropriate professional association in Canada prior to the filing of the work permit application is onerous. Additionally, issuing a GATS professional work permit depends on the existence of a service contract between the GATS member service provider and the Canadian service consumer. Finally, GATS professional-based work permits are issued for a very limited length of time (three months) and cannot be renewed or extended.

### ***Benefits of the GATS Professional Category***

The most valuable feature of the GATS is simply that a foreign national can qualify for an entry permit under its provisions without a labour market opinion from HRSDC. As well, while the GATS professional category is available for far fewer occupations than those available under the NAFTA professional category, it does have a much broader application than NAFTA because it applies to individuals from more than 122 member nations. However, where U.S. and Mexican nationals are concerned, the better course of action is to apply pursuant to NAFTA.

## The GATS “Intra-Company Transferee” Category

### ***Covering the Basics: Requirements and Documents***

The GATS intra-company transfer requirements are virtually identical to those of intra-company transferees under NAFTA. GATS defines intra-company transferees as “persons of another [member nation] who have been employed for a period of not less than one year and who seek temporary entry in order to render services to (i) the same [company] which is engaged in substantive business operations in Canada or (ii) a [company] constituted in Canada and engaged in substantive business operations in Canada which is owned by, or controlled by, or affiliated with, the aforementioned company.” Therefore, a foreign national seeking a work permit as an intra-company transferee under GATS must establish the following:

- that the foreign national is a citizen of a member nation or a permanent resident in a member nation that formally recognizes permanent residents as having the same rights as its citizens;
- that a qualifying relationship exists between the Canadian company and the company located abroad, that the Canadian company is a parent, subsidiary or affiliate of the company located abroad, and that the companies here and abroad are engaged in substantive business operations (i.e., they are large enough in both locations to support executive or managerial functions);
- that the foreign national has at least one continuous year of employment with the company located abroad *immediately* prior to the application for a work permit (as compared to the NAFTA requirement of one year of employment within the three-year period preceding the application);
- that the applicant’s prior employment abroad and proposed employment in Canada is in a managerial, executive or “specialized knowledge” capacity; and
- that the Canadian company is in a service sector covered by GATS.

GATS intra-company transferees can apply for a work permit at a visa office or, if they are nationals of a visa-exempt country, at a port of entry. The work permit is granted at the time of entry and is valid for one year. An extension of up to two years is permitted.

The documentation typically required for a GATS intra-company work permit includes:

- an Application for Work Permit (Form 1295);
- a letter of support from the Canadian employing company that describes its business activities, the corporate relationship it maintains with the

foreign member nation enterprise, the job position the employee is required to fill in Canada, the employee's prior work experience in a senior management/executive or "specialized knowledge" position at the company abroad within the 12-month period immediately preceding the filing of the work permit application, the anticipated length of employment and salary;

- a legal letter that sets out the provisions for issuing a work permit pursuant to the IRPA and its regulations and the Foreign Worker Manual, addresses how the IRPA and Foreign Worker Manual requirements have been met and why issuing a work permit is appropriate, and includes a request for additional visas that may be required, such as a temporary resident visa;
- a copy of the Canadian company's corporate information;
- a copy of the GATS transferring company's corporate information;
- a letter from the company's corporate counsel confirming the corporate relationship between the Canadian company and transferring company;
- a corporate brochure (if available);
- a copy of the foreign national's résumé and education certificates (if available);
- a copy of the foreign national's valid passport;
- proof that the foreign national has been on the company payroll outside of Canada for at least 12 months in the preceding one-year period;
- two passport-sized photographs of the employee (if a temporary resident visa is also required); and
- the application processing fee (which stood at \$150 in April 2005).

### ***Drawbacks to the GATS Intra-Company Transferee Category***

The GATS intra-company transferee category is limited in that it requires both the foreign and Canadian enterprises to be engaged in a specific service sector (listed in Appendix 5-C of GATS). Neither NAFTA nor the C-12 intra-company transfer categories have such requirements. Also, in contrast to the NAFTA and C-12 intra-company transfer categories, work permits issued to senior manager and executives pursuant to GATS may only be issued for a maximum initial period of one year, and can only be renewed for a maximum additional period of three years.

### ***Benefits of the GATS Intra-Company Transferee Category***

As the benefits of the C-12 intra-company transfer category far exceed those of the GATS intra-company transfer category and as an applicant qualifying for a work permit pursuant to the GATS intra-company transfer

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category would also qualify as an intra-company transferee under the C-12 intra-company transfer category, the latter work permit category should always be pursued as an alternative to the GATS.

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In today's environment of security sensitivity, it is extremely important that both U.S. and Canadian immigration petitions and applications be prepared thoroughly and carefully. By being aware of the various work permit options available, you are in a position to assess and implement the strategies and options best suited to your company. Similarly, by focusing on the supporting documentation required by these options, you can best ensure smooth processing of work authorizations.