JANUARY 2012

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Blaneys on Immigration

This newsletter is designed to highlight new issues of importance in immigration related law. We hope you will find it interesting, and welcome your comments.

Feel free to contact any of the lawyers who wrote or are quoted in these articles for more information, or call the head of our Immigration Law Group, Ian Epstein at 416.593.3915 or iepstein@blaney.com.

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"Operational Bulletin 346 now specifically recognizes that time spent outside Canada during the period of the work permit may be recaptured."

CITIZENSHIP AND IMMIGRATION CANADA NOW ALLOWS RECAPTURED TIME FOR INTRACOMPANY TRANSFEREES

Henry J. Chang

On September 19, 2011, Citizenship and Immigration Canada ("CIC") published Operational Bulletin 346, which authorized the recapture of unused time that would otherwise count against the time limits that are normally imposed on foreign nationals working in Canada as intracompany transferees. This now allows intracompany transferees to extend their status beyond the normal seven- and five-year limits that would otherwise apply, if they have spent part of the time outside Canada during the validity period of their prior work permits.

According to Section 5.31 of the *Foreign Worker Manual* (which describes C12 intracompany transferees) and Appendix G (which describes NAFTA intracompany transferees), executive and managerial intracompany transferees are limited to a maximum stay of seven years and specialized knowledge intracompany transferees are limited to a maximum stay of five years; this parallels the time limits imposed on L-1A (executive and managerial) and L-1B (specialized knowledge) nonimmigrants in the United States. Once the limit has been reached, the foreign national must complete one year of full-time employment with the multinational organization outside of Canada before becoming eligible for a new seven- or five-year limit.

Unfortunately, most CIC and Canadian Border Services Agency officers calculate these time limits using the start and end dates shown on a foreign national's work permit. While this simplifies the task of calculating the time limits, it fails to acknowledge the fact that many intracompany transferees divide their time among one or more international offices. Some intracompany transferees continue to reside abroad and only travel to their company's Canadian offices when necessary. As a result, a foreign national who held a three-year work permit as an intracompany transferee, but who only spent four months each year physically in Canada, would still have the entire three-year period of the work permit counted against his or her total limit.

In the United States, exceptions to the seven- and five-year time limits imposed on L-1A and L-1B nonimmigrants are recognized in the Department of Homeland Security ("DHS") regulations, which are codified in Title 8 of the Code of Federal Regulations ("8 CFR"). According to 8 CFR 214.2(l)(12)(ii), the time limits do not apply to aliens who do not reside continually in the United States and whose employment in the

"'...documented time spent outside Canada can be 'recaptured' to allow the intracompany transferee five or seven full years of physical presence in Canada."'

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United States is seasonal, intermittent, or consists of an aggregate of six months or less per year. In addition, the limitations do not apply to aliens who reside abroad and regularly commute to the United States to engage in part-time employment.

Prior to Operational Bulletin 346, practitioners argued that the Canadian intracompany transferee category (at least in NAFTA cases) was intended to be reciprocal and that, since Canadians who entered the United States under L-1A or L-1B status would be entitled to recaptured time, foreign nationals should be entitled to the same treatment. However, such arguments often met with limited success.

Operational Bulletin 346 now specifically recognizes that time spent outside Canada during the period of the work permit may be recaptured. It states as follows:

> Normally, the duration of the work permit is used to calculate the maximum five or seven year time limit that an intracompany transferee is allowed to work in Canada. However, time spent outside Canada during the duration of the work permit can be recaptured. For example, if intracompany transferee senior managers have a work permit for one year and spend two 2-month stints over the course of the 12 months working in the U.S., then only 8 months would count against their seven-year limit as intracompany transferees. In summary, documented time spent outside Canada can be "recaptured" to allow the intracompany transferee five or seven full years of physical presence in Canada.

The guidance contained in Operational Bulletin 346 is not as complicated as 8 CFR 214.2(l)(12)(ii); it simply states that only time spent physically within Canada while under an intracompany transferee work permit will count towards the seven- or five-year limit. Even a foreign worker who spends eleven months out of each year physically in Canada is entitled to recapture one month each year. Under 8 CFR 214.2(l), an L-1 worker who spends the same amount of time in the United States is not entitled to any recaptured time.

Foreign workers with Canadian intracompany transferee work permits, who wish to take advantage of Operational Bulletin 346, should make sure that they maintain detailed records of all trips outside of Canada during the period of their work permits. ■

CITIZENSHIP AND IMMIGRATION CANADA ANNOUNCES EXCESSIVE DEMAND COST THRESHOLD FOR 2012

Henry J. Chang

Introduction

On December 30, 2011, Citizenship and Immigration Canada ("CIC") issued Operational Bulletin 373. Operational Bulletin 373 provides additional information relating to the Excessive Demand Cost Threshold (the "Demand Threshold") for 2012, which became effective on December 1, 2011.

The Demand Threshold is used to determine whether a foreign national should be barred from Canada based on health grounds. Although it may also be applied in the case of temporary res-

"*According to Clause 38(1)c of the* Immigration and Refugee Protection Act, *a foreign national is inadmissible on health grounds if their health condition might resonably be expected to cause excessive demand on health or social services.*"

idents (i.e. nonimmigrants), the Demand Threshold is most often applied when considering the admissibility of foreign nationals who are seeking permanent residence in Canada.

Applicable Law

According to Clause 38(1)(c) of the *Immigration and Refugee Protection Act* [1], a foreign national is inadmissible on health grounds if their health condition might reasonably be expected to cause excessive demand on health or social services. The term "excessive demand" is defined in Subsection 1(1) of the *Immigration and Refugee Protection Regulations* [2] ("IRPR") as:

a) A demand on health services or social services for which the anticipated costs would likely exceed average Canadian per capita health services and social services costs over a period of five consecutive years immediately following the most recent medical examination required by the IRPR, unless there is evidence that significant costs are likely to be incurred beyond that period, in which case the period is no more than ten consecutive years; or

b) A demand on health services or social services that would add to existing waiting lists and would increase the rate of mortality and morbidity in Canada as a result of an inability to provide timely services to Canadian citizens or permanent residents.

However, according to R38(2), the excessive demand ground of inadmissibility does not apply in the case of a foreign national who:

a) Is a member of the Family Class (a spouse, common-law partner or child of a sponsor who is seeking permanent residence);

b) Has applied for permanent residence as a Convention refugee or a person in similar circumstances; or

c) Is a protected person.

The above individuals may not be barred from Canada based on excessive demand. However, the Demand Threshold is relevant to all other foreign nationals seeking both temporary resident and permanent resident status.

Initially, the Canadian Institute for Health Information ("CIHI") aggregate that represented average Canadian per capita health expenditure was used as the Demand Threshold. However, CIC's Health Branch felt that the CIHI figure did not completely cover expenditures for certain social services. In January 2003, a supplementary amount was identified to account for the missing per capita expenditures, and this amount was combined with the CIHI figure to calculate the Demand Threshold.

Application

The 2012 Demand Threshold has been set at $6,141.00CAD per year, and is effective as of December 1, 2011. As the definition of excessive demand describes costs incurred over a period of five consecutive years, the annual figure is normally multiplied by five and then compared to the expected medical costs of the foreign national during that period. This results in a legislated 2012 Demand Threshold of $30,705.00CAD ($6,141.00CAD x 5) over five years. ■

[1] S.C. 2001, c. 27.
[2] SOR/2002-227.

"The proposed regulatory change would allow spouses and dependent children of U.S. citizens to apply for a provisional immigrant waiver of the unlawful presence bars while they are still in the United States."

UNITED STATES CITIZENSHIP AND IMMIGRATION PROPOSES REGULATORY CHANGE TO PERMIT PROCESSING OF UNLAWFUL PRESENCE WAIVERS

Henry J .Chang

On January 6, 2012, the Department of Homeland Security ("DHS") announced that it was proposing a regulatory change that would allow spouses and children of U.S. citizens, who are in the United States but need an immigrant waiver of the unlawful presence bar, to apply for the waiver within the United States. On January 9, 2012, DHS published a Notice of Intent relating to these proposed changes, in the Federal Register.

Under the *Immigration and Nationality Act* [1] ("INA"), certain grounds of inadmissibility can bar aliens from being admitted to the United States or from obtaining an immigrant visa. However, the Secretary of DHS, through United States Citizenship and Immigration Services ("USCIS"), may waive some of those grounds.

Currently, aliens who are immediate relatives of U.S. citizens, applying for immigrant visas at consular posts, must apply for immigrant waivers while outside the United States, after a finding of inadmissibility is made by a consular officer in connection with their immigrant visa applications. As a result, U.S. citizen petitioners are often separated from their immediate relatives for extended periods.

The proposed regulatory change would allow spouses and dependent children of U.S. citizens to apply for a provisional immigrant waiver of the unlawful presence bars while they are still in the United States. If the provisional waiver is granted, the foreign national will then leave the United States and apply for an immigrant visa at a consular post abroad. If the alien is otherwise eligible for the immigrant visa, the consular officer may then approve the issuance of the visa so that the alien may enter the United States as a permanent resident.

There are two unlawful presence bars described under INA §212(a)(9)(B)(i). According to INA §212(a)(9)(B)(i)(I), an alien who was unlawfully present in the United States for *more than 180 days but less than one year*, and who then departs voluntarily from the United States before the commencement of removal proceedings, will be inadmissible *for three years* from the date of departure. According to INA §212(a)(9)(B)(i)(II), an alien who was unlawfully present *for one year or more* and then departs before, during, or after removal proceedings, will be inadmissible *for ten years* from the date of the departure.

The provisional waiver would only apply to the three- and ten-year unlawful bars mentioned above. Aliens who require immigrant waivers for one or more additional grounds of inadmissibility, such as fraud or willful misrepresentation or certain criminal offenses in conjunction with their immigrant visa applications, must continue to request those waivers while outside of the United States in accordance with existing procedures.

According to INA §212(a)(9)(B)(v), an immigrant waiver of the unlawful presence bars is currently available in the case of a spouse, son or daughter of a United States citizen, or of an alien lawfully admitted for permanent residence. However, the

[1] Pub. L. No. 82-414, Ch. 477, 66 Stat. 163.

alien must establish that the refusal to grant the waiver would result in extreme hardship to the alien's U.S. citizen or lawfully resident spouse or parent. The proposed regulatory change would not modify the standard for assessing eligibility for unlawful presence waivers; it would only change the timing of when such a waiver could be obtained.

DHS also intends to limit who may participate in the provisional waiver program to immediate relatives who can demonstrate extreme hardship to a *U.S. citizen spouse or parent*. Immediate relatives who can demonstrate extreme hardship to a *U.S. permanent resident spouse or parent* may still qualify for a normal immigrant waiver but are not eligible to seek a provisional waiver under this program.

This provisional waiver process would not alter the requirement that an alien depart from the United States to apply for an immigrant visa. An alien who receives a provisional waiver of the unlawful presence bar would not gain the benefit of such waiver unless he or she departs from the United States. This is intended to prevent such aliens from seeking permanent residence from within the United States by means of adjustment of status.

While these are only proposed changes, they represent a step in the right direction for immediate relatives of United States citizens who have incurred an unlawful presence bar due a prior overstay. ■

EXPECT THE BEST

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