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PUBLICATION

CIC Issues Expanded Guidance on C12 Specialized Knowledge Intra-Company Transferees

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On June 9, 2014, Citizenship and Immigration Canada ("CIC") issued Operational Bulletin 575 ("OB 575"), which provides expanded guidance for intra-company transferee ("ICT") work permits issued to specialized knowledge workers under the general ICT (C12) category. This guidance, which is effective immediately, imposes a more rigorous definition of "specialized knowledge" as well as a mandatory wage requirement for some ICTs. However, OB 575 makes clear that this expanded guidance (at least with respect to the wage requirement) does not apply to specialized knowledge ICTs entering Canada pursuant to the North American Free Trade Agreement (NAFTA) or to any future or current Free Trade Agreements ("FTAs").

Stricter Interpretation of Specialized Knowledge

OB 575 justifies its more restrictive interpretation of specialized knowledge by referring to the General Agreement on Trade in Services ("GATS"), which currently provides for a stricter definition of specialized knowledge than the general C12 category. According to the GATS, a specialized knowledge worker must possess "knowledge at an advanced level of expertise" and "proprietary knowledge of the company's product, service, research, equipment, techniques or management."

In other words, an applicant is required to demonstrate, on a balance of probabilities, a high degree of **both** proprietary knowledge **and** advanced expertise. Proprietary knowledge alone, or advanced expertise alone, does not qualify the applicant under this exemption. This is a much higher standard than has traditionally been applied to the general ICT category (C12) or ICTs under the existing FTAs.

The following definitions now apply to the C12 category:

- **Proprietary knowledge** is company-specific expertise related to a company's product or services. It implies that the company has not divulged specifications that would allow other companies to duplicate the product or service.
- **Advanced proprietary knowledge** would require an applicant to demonstrate: (i) uncommon knowledge of the host firm's products or services and its application in international markets; or (ii) an advanced level of expertise or knowledge of the enterprise's processes and procedures such as its production, research, equipment, techniques or management.
- **An advanced level of expertise** is also required, which would require specialized knowledge gained through significant[1] and recent[2] experience with the organisation and used by the individual to contribute significantly to the employer's productivity.

In assessing such expertise or knowledge, immigration officers are also instructed to consider:

- Abilities that are unusual and different from those generally found in a particular industry and that cannot be easily transferred to another individual in the short-term;
- The knowledge or expertise must be highly unusual both within the industry and within the host firm;
- It must be of a nature such that the applicant's proprietary knowledge is critical to the business of the Canadian branch and a significant disruption of business would occur without the applicant's expertise;
- The applicant's proprietary knowledge of a particular business process or methods of operation must be unusual, not widespread across the organization, and not likely to be available in the Canadian labour market. For example, skill in implementing an off-the-shelf product would not, by itself, meet the standard of specialized knowledge; unless, for example, the product is new or being highly customized to the point of being a "new" product. In other words, an ICT applicant is more likely to have truly specialized knowledge if they directly contribute to the (re)development of a product, rather than to the implementation of a pre-existing product.

CIC considers specialized knowledge to be knowledge that is unique and uncommon; it will by definition be held by only a small number or small percentage of employees of a given firm. Specialized knowledge workers must therefore demonstrate that they are key personnel, not simply highly skilled.

These definitions (in particular the requirement of proprietary knowledge) are a cause for some concern. They closely resemble the overly restrictive definitions that were once applied by the United States Government when adjudicating the U.S. version of the specialized knowledge ICT category (the L-1B). However, the United States abandoned these restrictive definitions years ago and adopted a more reasonable interpretation that more closely resembles the threshold that applied to C12 ICT cases immediately prior to OB 575.

OB 575 also requires immigration officers to consider the following about the nature of the employment:

- ICT specialized knowledge workers must be clearly employed by, and under the direct and continuous supervision of, the host company;
- Given the nature of specialized knowledge, the worker will not normally require training at the host company related to the area of expertise; and

- As the specialized knowledge will not be readily available within the Canadian labour market, and cannot readily be transferred to another individual, a specialized knowledge worker must not receive specialized training by other employees such that this would lead to the displacement of Canadian workers.

This appears to be an attempt to restrict the use of the general ICT category (C12) by third party contractors who hire specialized knowledge workers for the sole purpose of placing them at their client sites, where they will essentially be de facto employees of those clients. This is admittedly consistent with what the United States has been doing in recent years.

OB 575 makes clear that certain bilateral agreements contain variations of the above definition of "specialized knowledge" which should be respected, while ensuring applicants in fact possess specialized knowledge. Immigration officers assessing applicants from Colombia and Peru, in particular, are advised to consult the Temporary Foreign Worker Manual for additional detail on the definitions of "specialized knowledge" captured in Canada's free trade agreements with those countries. Hopefully, the restrictive interpretations contained in OB 575 will not inadvertently result in stricter adjudications of ICT specialized knowledge cases that are based on the NAFTA or other FTAs.

Mandatory Wage Floor

According to OB 575, if a worker possesses the high standard of specialized knowledge that is uncommon in a particular industry as described above, then the salary or wage should be consistent with such a specialist. Such a specialist would typically receive an above average salary; therefore, a wage floor set at prevailing wage levels will establish a baseline for the assessment of an application.

OB 575 states that Immigration officers will determine the Canadian prevailing wage for the specific occupation and region of work by using Employment and Skills Development Canada (ESDC) "Working in Canada" website's tool to determine prevailing Canadian wage. It also clarifies that non-cash per diems (for example, hotel, transportation paid for by the employer) are not to be included in the calculation of the overall salary or wage. Only allowances compensated in monetary form and paid directly to the employee are to be included.

This expanded guidance is not dramatically different from the restrictive guidance that CIC had already provided in Operational Bulletin 316 ("OB 316"), which it published on July 4, 2011. However, the now-expired OB 316 stated at the time that salary was only one of a series of factors, which had to be taken into consideration as a whole in order to render a sound decision; immigration Officers were reminded that applications should not be refused on the basis of salary alone. OB 575 now appears to make the relevant prevailing wage an absolute requirement, which means that C12 specialized knowledge applications may be denied solely because the proposed wage falls below the prevailing wage.

OB 575 clarifies that the above policy with respect to a mandatory wage does not apply to specialized knowledge ICTs entering Canada pursuant to the NAFTA or to any future or current FTAs. Nevertheless, wage remains an important indicator of specialized knowledge in such

cases and should be taken into account as an important factor in an officer's overall assessment. In other words, although no prevailing wage requirement applies to specialized knowledge ICTs based on the NAFTA or another FTA, a proposed wage that is too far below the prevailing wage may cause an officer to question whether the proposed position really does involve specialized knowledge.

Conclusion

As mentioned above, the expanded guidance contained in OB 575 should not (at least in theory) affect the adjudication of ICT specialized knowledge applications that are based on the NAFTA or Canada's other FTAs. However, citizens of non-FTA countries can expect increased difficulties when applying for ICT work permits as specialized knowledge workers, under the general ICT (C12) category.

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[1] "Significant" is not defined as it is not always a meaningful indicator; however, as per the chapter FW 1, section 5.31, it states that "the longer the experience, the more likely the knowledge is indeed 'specialized.'"

[2] "Recent" is defined as within the last five years.