SELECTED TOPICS ON IMMIGRATION:

How to Obtain Permission to Work in Canada, Changes to the Independent Category and Investor Category

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A. IntroductionA. Introduction

In order to work in Canada, a person must be a Canadian citizen, permanent resident or fall within one of the exemptions set out in the *Immigration Regulations*. If he or she does not, then he or she must first obtain an Employment Authorization before working in Canada.

B. ExemptionsB. Exemptions

The *Immigration Regulations* provide that certain activities can be carried out without having to obtain an Employment Authorization. Examples of applicants who may benefit from such exemptions are employees attending meetings with their fellow employees in Canada, some performing artists, certain employees of foreign news companies, representatives of a business carrying on activities outside Canada coming to Canada for a short time for the purpose of selling goods or services for that business and trainees with a Canadian parent or subsidiary corporation, where the trainee will not be actively engaged in the production of goods and services. Restrictions apply to some of these categories. The first step that a prospective foreign employee should therefore take prior to engaging in employment in Canada is to check whether he or she falls within one of these exemptions.

C. General RulesC. General Rules

An Employment Authorization shall not be issued by an immigration officer if, in his or her opinion, the employment of the person in Canada will adversely affect employment opportunities for Canadian citizens or permanent residents in Canada. The way to ensure that this requirement is complied with, is through an "Employment Validation" which will be discussed in greater detail below. Notwithstanding this rule, if a person is coming to work in Canada pursuant to an international agreement between Canada and one or more foreign countries, he or she may be granted permission to do so. The most widely used agreements in this regard are the North American Fee Trade Agreement and the General Agreement on Trade and Services.

II. THE NORTH AMERICAN FREE TRADE AGREEMENTII. THE NORTH AMERICAN FREE TRADE AGREEMENT

The purpose of the North American Free Trade Agreement ("NAFTA") is to facilitate the movement of goods, services and people amongst the three signatory countries (Canada, U.S.A. and Mexico). Although NAFTA does not facilitate permanent settlement in a signatory country, some of its provisions permit the foreign worker to remain in Canada for lengthy periods of time.

It is important to remember that NAFTA applies only to the **citizens** of Canada, United States and Mexico. NAFTA does not apply to green card holders. This means that an employee of a U.S. company who is not a U.S. citizen but is, for example, a British citizen who is employed in the U.S., may not avail himself of NAFTA in order to enter Canada for the purposes of employment.

If a potential applicant is successful and obtains an Employment Authorization pursuant to one of the NAFTA categories, an initial Employment Authorization is granted for one year. Applications for an Employment Authorization under NAFTA may be made at a port of entry or at a Canadian Consulate or Embassy abroad.

NAFTA addresses the temporary entry of persons from one signatory country to another under four specific categories:

1. Business visitors;
2. Professionals;
3. Intra-company transferees; and
4. Traders/investors.

1. Business Visitors. Business Visitors

Business visitors are business people who engage in international business and who intend to carry on business activity in a signatory country, related to research and design, growth, manufacture and production, marketing, sales distribution, after-sales service and general service. They carry on their activities in Canada without an Employment Authorization. To be admitted as a Business Visitor, the applicant must be primarily remunerated outside of Canada.

2. Professionals. Professionals

Professionals are business people from other signatory countries entering Canada to provide pre-arranged services of a professional nature. In addition, professionals must be entering Canada to practice a profession which is identified in NAFTA and be qualified to work in the profession for which entry is sought. The profession itself and various qualifying requirements associated with it must be found in Appendix 1603.D.1. of NAFTA. Subject to certain conditions, an Employment Authorization obtained in this category may be renewed annually for as long as NAFTA remains in effect. However, at some point immigration may deem that the person no longer has the intention to remain in Canada on a temporary basis and require that person to either apply for permanent residence or leave Canada.

3. Intra-Company Transferees. Intra-Company Transferees

Intra-company transferees are business persons employed by an enterprise seeking to render services to a branch, parent, subsidiary or affiliate of that enterprise, in a managerial or executive capacity or in a manner that involves specialized knowledge. The business enterprise must be actively doing business in both countries. The applicant must have been employed continuously in a managerial or executive capacity or in a manner that involves specialized knowledge for one year in the previous three year period. Under this category, extensions of up to two years at a time may be granted. The total period of stay of a person employed in an executive or managerial capacity under NAFTA may not exceed seven years. The total period of stay for a person employed in a specialized knowledge position may not exceed five years.

4. Traders/Investors. Traders/Investors

(a) Traders(a) Traders

Under NAFTA, a trader is a business person from a signatory nation who is seeking temporary entry to another signatory nation in order to carry on substantial trade in goods and services, principally between Canada and one or both of the other signatories. Whether trade is substantial is determined by looking at both the volume of the trade conducted and the monetary value of the transaction. The position that a trader will assume in Canada must

be supervisory or executive or involve essential skills to the business.

(b) Investors(b) Investors

Investors are business persons who are seeking temporary entry to develop and direct the operations of an enterprise in which they have invested or are actively in the process of investing a substantial amount of capital. Investor status is not available to non-profit organizations.

III. THE GENERAL AGREEMENT ON TRADE IN SERVICES

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The General Agreement on Trade in Services (GATS) has been established to provide expedited and simplified procedures for admission to Canada for the purposes of business and/or employment for individuals from signatory countries. The GATS is useful for non-U.S. citizens who wish to enter the Canadian labour market. While GATS is a useful tool, it is generally far more restrictive than NAFTA.

GATS applies to citizens of a signatory nation who are residing in a signatory nation. The applicants do not have to be citizens **and** residents of the same country. They may be citizens of one country and residents of another, so long as both countries are signatory nations. (Permanent residents of signatory countries may be able to make an application for an Employment Authorization under GATS if their country of permanent residence has given formal notification that it accords the same rights to its permanent residents as it does to its citizens).

GATS only applies to certain service sectors: business services, communication services, constructions services, distribution services, environmental services, financial services, tourism and travel-related services, and transport services in service sectors covered under GATS.

There are three categories of persons that are covered under GATS. They are similar to their counterparts in NAFTA:

1. Business visitors;
2. Intra-company transferees; and

3. Professionals.

In comparison to NAFTA, GATS is more specific and narrow in its interpretation of the requirements as well as more restrictive with respect to the duration of time that an Employment Authorization may be granted.

1. Business Visitors. Business Visitors

A GATS business visitor must be entering Canada to conduct business meetings, negotiations or other types of business and must not be remunerated from outside of Canada. Unlike NAFTA, the definition of a business visitor under GATS is limited only to the sale of services. Business visitors under GATS must be seeking entry in order to attend business meetings, enter into negotiations to sell their services and/or to make business contacts. As with NAFTA business visitors, care must be taken to ensure that a GATS business visitor does not carry out duties which would in fact require an Employment Authorization.

2. Intra-Company Transferees. Intra-Company Transferees

The intra-company transferee provisions of GATS allow for the temporary entry into Canada of key personnel. Employment Authorizations under the intra-company provisions of GATS are granted for a period of 1 year. Extension of up to 2 years at a time may be granted. Under GATS, an intra-company transferee must have been employed for a period of not less than 1 year immediately prior to the date of the application in a position which is identical or similar to the position for which he or she seeks entry into Canada. The applicant must seek temporary entry to render services to a company which is engaged in **substantive** business operations in Canada and which is owned or controlled by or affiliated with the company which wishes to transfer the applicant. There are three types of intra-company transferees under GATS: executives, managers and specialists.

3. Professionals. Professionals

Under GATS, professionals may be able to enter Canada for a short term (maximum of three months). The professional is required to meet specific academic and professional credentials and qualifications. Under GATS, the occupations in which the professionals may be employed are limited, and the qualification requirements are stricter than those under NAFTA. Extensions are not

granted in this category.

IV. OTHER VALIDATION EXEMPT CATEGORIESIV. OTHER VALIDATION EXEMPT CATEGORIES

It is possible for a person who does not qualify under the exemptions referred to on page 1, NAFTA and/or GATS to still work in Canada without having to obtain an Employment Validation if, in the opinion of an immigration officer, his or her employment will create or maintain significant employment, benefits or opportunities for Canadian citizens or permanent residents. These exemptions have been codified and apply to citizens of any country. Some of the more important codified exemptions are as follows:

1. Code E15 - Intra-Company Transferees. Code E15 - Intra-Company Transferees

In order to qualify, a person must be employed by a parent, branch or subsidiary of a Canadian company which is located outside of Canada. The applicant's position with the Canadian company must be in a senior managerial or senior executive capacity. Code E15 does not apply to persons in lower managerial or supervisory positions. One of the advantages of using this category is that unlike NAFTA, there is no minimum period that the employee must have been employed with the transferring company prior to making the application. Moreover, an initial Employment Authorization under this category may be granted for 3 years, unlike NAFTA, where the Authorization is only granted for an initial maximum period of one year. For these reasons, a U.S. citizen who would qualify as an Intra-Company Transferee as an executive under NAFTA may be better served by the Code E15 exemption.

2. Code E19 - Significant Benefit for Canada. Code E19 - Significant Benefit for Canada

The *Immigration Regulations* empower visa officers to use discretion in issuing Employment Authorizations without the necessity of obtaining Employment Validations to people whose employment would create or maintain significant benefits or opportunities for Canadian citizens or permanent residents. Under this category each case is assessed on its own merits and the officer reviewing the case is given wide latitude and discretion in making a determination as to whether a particular proposed activity would in fact create or maintain significant benefits or opportunities to Canadian citizens and permanent residents. Job creation is most often cited as a example of a "significant benefit to Canada." This category is useful where NAFTA, GATS or the exemptions

discussed on pages 1 and 2 do not apply.

3. Code E99 - Reciprocal Employment Opportunities of Canadians Abroad. Code E99 - Reciprocal Employment Opportunities of Canadians Abroad

Code E99 may be used for what is known as a Reciprocal Transfer. Under this exemption, a person may obtain an Employment Authorization without having to obtain an Employment Validation if it can be established that reciprocal employment opportunities for Canadians exist in the jurisdiction from which the person is coming. Note that if the reciprocating country offers employment opportunities to spouses, Canada will likewise consider an application by the spouse to work in Canada.

V. COMPUTER SOFTWARE SPECIALISTS/PILOT PROJECTV. COMPUTER SOFTWARE SPECIALISTS/PILOT PROJECT

A new pilot project has recently been implemented by the Department of Human Resources Development Canada ("HRDC"). Under this new project, certain computer software programmers who would otherwise require an Employment Validation no longer have to do so. This new project has been implemented in light of the shortage of several categories of computer software professionals in Canada. This category may be useful in transferring non-U.S. citizens who are computer systems analysts to Canada, who are not entitled to apply under NAFTA.

VI. EMPLOYMENT VALIDATIONSVI. EMPLOYMENT VALIDATIONS

If an applicant is not exempt from having to obtain an Employment Authorization or does not qualify under NAFTA or GATS, he/she must first obtain an Employment Validation from HRDC. This application is made by the employer, not the applicant. If the application is successful, the employee can then apply for an Employment Authorization, which is then generally not difficult to obtain.

To obtain an Employment Validation, the employer must essentially demonstrate that employment opportunities for Canadians or landed immigrants will not be adversely affected. In other words, the employer must demonstrate that there are no Canadians or landed immigrants who can fill the position. Advertising the position is sometimes, but not always, required. Generally speaking,

Employment Validations are difficult to obtain and other options should be explored before pursuing this category.

VII. MAJOR CHANGES TO THE INDEPENDENT APPLICANT CATEGORY.VII. MAJOR CHANGES TO THE INDEPENDENT APPLICANT CATEGORY.

The most common way for someone to become a landed immigrant in Canada is under the independent applicant category. Under this category, a person is assessed and given units (or points) of assessment based on factors such as education, age, experience in the intended occupation, arranged employment (if any) and language ability in English and French. In addition, extra points are given to potential applicants who have close relatives in Canada such as children, parents, grandparents, siblings, uncles, aunts, nephews and nieces.

To be successful in an application under this category, an applicant must obtain 70 points. Up to 10 points may be given by an immigration officer for "personal suitability", which is a subjective determination by an immigration officer as to how a prospective applicant and/or his or her dependents may adapt and establish themselves in Canada. The applicant's occupation must be on the General Occupations List (GOL) which is a list of occupations which are "open" for the purposes of applying for immigration to Canada in the independent applicant category.

Whether an applicant had the proper credentials to qualify under one of those "open" occupations, was formerly determined by a job classification system known as the Canadian Classification and Dictionary of Occupations (CCDO). On May 1, 1997, the independent immigrant assessment criteria were changed by Citizenship and Immigration Canada. The CCDO has been replaced with a new classification system known as the National Occupational Classification (NOC). This change has significant practical consequences, which will be outlined below.

Points for work experience are now being awarded for occupations which are described in the NOC. The General Occupations List has been changed to accommodate the shift from the CCDO to the NOC. As a result of the change from the CCDO to the NOC, the General Occupations List has been reduced. With the advent of the NOC, it is estimated that approximately 1,000 occupations have been removed from the General Occupations List.

Under the new rules, an applicant must be able to perform the job duties as described in the NOC and possess educational and other requirements for the intended occupation as set out in the NOC. In order for a potential independent applicant to be successful, he or she will still be required to have an intention of pursuing an occupation which is listed on the General Occupations List and to

have at least one year of work experience in that occupation. The requirements to pass an immigration medical examination and a security clearance remain in effect. Under the NOC, there are greater requirements for certification and licensing which may be required in order to meet the qualification requirements in order to be assessed in an intended occupation.

An example of how the changes have substantively affected applicants, is the situation that relates to executive secretaries. Whereas an executive secretary under the CCDO had a reasonable chance of being successful in an application for landed immigrant status, assuming other requirements were met, with the more stringent requirements under the NOC, this person would likely no longer qualify.

VIII. THE NEW PROPOSED INVESTOR CATEGORYVIII. THE NEW PROPOSED INVESTOR CATEGORY

From its inception in 1986, the Immigrant Investor Program (the "Program") has had a rather turbulent history, including a moratorium on fund approval from November 1994 to July 1996. The Program's objective is to promote economic development in all regions of Canada by allowing experienced business persons to immigrate to Canada by virtue of investing substantial capital into small to medium sized enterprises. Prior to July 1, 1996, investors were able to invest into an eligible business directly, or indirectly by investing into a fund that pooled the investors' money and then invested it into several eligible businesses. The Program is continuously being modified in order to adapt to the changes in the marketplace, federal and provincial priorities and public opinion.

A potential immigrant who has successfully operated, controlled or directed a business and who has a net worth accumulated by his or her own endeavors of a minimum of $500,000.00, may be eligible to become a landed immigrant in Canada by virtue of this Program. A potential applicant will be expected to make an irrevocable investment of the required amount in an approved investment offering, subject to the applicant being granted landed immigrant status. A potential applicant in this category must commit a minimum capital investment which will create or maintain employment for Canadian citizens or permanent residents, other than the investor and the investor's dependents. Invested capital is locked in for 5 years. Presently, the investments are to be made in provincially and federally approved venture capital funds, which are being monitored by Citizenship and Immigration Canada ("CIC"). Under the current regulations, the minimum

investments required under this program are $250,000.00 in Newfoundland, New Brunswick, Prince Edward Island, Manitoba, Saskatchewan, Nova Scotia and the Territories, and $350,000.00 in Quebec, Ontario, Alberta and British Columbia. These investments are not guaranteed. An investment of $500,000.00, which has a third-party guarantee of return of funds after the 5 year holding period is available as well. In order to be able to make such an investment, an applicant must have a net worth of a minimum of $700,000.00 dollars.

At the present time, the Program is in an interim phase (Interim Program), whereby investments are made only in government administered venture capital funds. Privately administered funds and businesses are barred from accepting new funds from investors. Citizenship and Immigration Canada implemented the Interim Phase after a lengthy moratorium (November 1994 to July 1996) was imposed on the Program in order to re-evaluate its effectiveness. The Interim Program commenced on July 1, 1996. It was scheduled to end on June 30, 1997, but has been extended to December 31, 1997.

Under the proposed changes to the Program (the "Proposed Program), the above-mentioned minimum capital investment amounts will be increased by $100,000.00 for each of the above-mentioned provinces. The minimum investment period will remain 5 years. Fund approval shall remain a shared provincial and federal endeavor. The $500,000.00 third party guaranteed investment would be eliminated, but third party guarantees for the $350,000.00 and $450,000.00 investments would become available. Unlike under the Interim Program, the funds will no longer consist of a pool of investment venture capital, but will act as conduits, investing on behalf of the investors in various eligible businesses selected by the potential applicant. The investors shall invest in a fund that is approved by a province, and that is either a corporation controlled by the province, a federally or provincially incorporated trust company or a corporation that is a member of the Investment Dealers Association of Canada. The maximum size of an eligible business will increase by 15 million dollars, from 35 million to 50 million.

The proposed changes to the Program will delegate to the Provinces the power and the flexibility to devise the goals and to direct the investments toward their selected priorities, by allowing up to 40 percent of the investments to be made in exclusively provincially selected projects and will allow the provinces to add investment requirements to the federally established standards. This would be a significant change, as the Interim Program's investments were to be made in Canadian controlled businesses, which meant that the capital, although invested in an Ontario fund, could be invested in

businesses outside of Ontario.

At this point, it is not certain whether these proposed changes will come into effect in their present form, or at all. The proposed changes to the Program were scheduled to come into effect on July 1, 1997. This date has been changed, and the Interim Program has been extended to December 31, 1997, due to the necessity for further consultations with the provinces and various interest groups. Certain provinces have already formally objected to the proposed changes, as they are of the opinion that the Proposed Program does not adequately address the needs of the individual provinces.