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PUBLICATION

Citizenship and Immigration Canada Publishes Ministerial Instructions Establishing the Start-Up Business Class

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Introduction

As previously reported, on January 24, 2013, the Minister of Citizenship, Immigration and Multiculturalism (the "Minister") announced that Citizenship and Immigration Canada ("CIC") would launch a Start-Up Visa Program to recruit innovative immigrant entrepreneurs who will create new jobs and spur economic growth.[1] On March 30, 2013, CIC published Ministerial Instructions (the "Instructions") in the Canada Gazette, which formally establish the new Start-Up Business Class.[2] CIC also published Chapter 27 of the *Overseas Processing Manual* ("OP 27"), which provides further details regarding the processing of such applications.[3] An overview of the Start-Up Business Class is provided below.

Start-Up Business Class Defined

Pursuant to Section 14.1 of the *Immigration and Refugee Protection Act* ("IRPA")[4], the Instructions establish the Start-Up Business Class as a subgroup of the broader Economic Class described in Subsection 12(2) of IRPA. According to Subsection 2(2) of the Instructions, foreign nationals are members of the Start-Up Business Class if they:

a. Have obtained a commitment from:

    i. One or more designated angel investor groups, confirming that they are collectively investing a total of at least $75,000CAD in a qualifying business; or

    ii. One or more designated venture capital funds, confirming that they are collectively investing a total of at least $200,000CAD in a qualifying business;

b. Have attained a level of proficiency of at least benchmark Level 5 in either English or French for the four language skill areas (reading, writing, listening, speaking), as set out in the *Canadian Language Benchmarks* and the *Niveaux de Compétence linguistique canadiens*, as demonstrated by the results of an evaluation conducted by an organization or institution designated by the Minister for the purpose of evaluating language proficiency under Subsection 74(3) of the *Immigration and Refugee Protection Regulations* ("IRPR")[5];

c. Have completed at least one year of post-secondary education during which the applicant was in good standing at the educational institution, whether or not the applicant obtained an educational credential; and

d. Have in the form of transferable and available funds, unencumbered by debts or other obligations, an amount that is equal to one half of the amount identified (in the most recent edition of the publication concerning low income cut-offs published annually by *Statistics Canada* under the Statistics Act for urban areas of residence of 500,000 or more) as the minimum amount of before-tax annual income necessary to support the foreign national and his or her family members.

According to Subsection 2(4) of the Instructions, no more than five foreign nationals may seek permanent residence as members of the Start-Up Business Class, pursuant to the same business venture.

Subsection 2(5) of the Instructions also clarifies that a foreign national will not be considered a member of the Start-Up Business Class if he or she intends to participate (or has participated) primarily for the purpose of acquiring a status or privilege under IRPA and not for the purpose of engaging in the business activity for which the commitment was intended.

Designated Angel Investor Groups and Venture Capital Funds

The Instructions list all of the entities that qualify as designated angel investor groups or venture capital funds, for the purposes of the Start-Up Business Class. The list of designated angel investor groups appears in Schedule 1, and includes the following entities:

a. Angel One Network Inc.;

b. First Angel Network Association; and

c. Golden Triangle Angel Network.

The list of designated venture capital funds appears in Schedule 2, and includes the following entities:

a. Advantage Growth (No.2) L.P.;

b. BDC Venture Capital;

c. Blackberry Partners Fund II LP (d.b.a. Relay Ventures Fund II);

d. Celtic House Venture Partners Fund III L.P.;

e. Celtic House Venture Partners Fund IV LP;

f. DRI Capital Inc.;

g. Golden Opportunities Fund Inc.;

h. INOVIA CAPITAL INC.;

i. New Brunswick Innovation Foundation Inc.;

j. Northwater Intellectual Property Fund;

k. OMERS Ventures Management Inc.;

l. Ontario SME Capital Corporation;

m. Panagea Ventures Fund III, LP;

n. PRIVEQ III Limited Partnership;

o. PRIVEQ IV Limited Partnership;

p. Quorum Investment Pool Limited Partnership;

q. Quorum Secured Equity Trust;

r. Rho Canada Ventures;

s. Summerhill Venture Partners Management Inc.;

t. Tandem Expansion Management Inc.;

u. Vanedge Capital Limited Partnership;

v. Version One Ventures;

w. Wellington Financial LP;

x. Westcap Mgt. Ltd.; and

y. Yaletown Venture Partners Inc.

Qualifying Business

According to Subsection 7(1) of the Instructions, a “qualifying business” includes a corporation incorporated in and carrying on business in Canada if, at the time the commitment is made by the designated angel investor group or venture capital fund:

a. The applicant holds at least 10% of the voting rights attached to all outstanding shares of the corporation; and

b. No person or entities, other than qualified participants, hold 50% or more of the voting rights attached to all outstanding shares of the corporation.

The term “qualified participant” includes: (a) the applicant in respect of the business; (b) a foreign national who has been issued a permanent resident visa as a member of the Start-Up Business Class in respect of the business; (c) a designated angel investor group; or (d) a designated venture capital fund.

Subsection 7(2) clarifies that a business that is not incorporated at the time of the commitment is still considered a qualifying business if the incorporation is conditional upon the issuance of a permanent resident visa to one or more applicants in respect of that business.

Form of Commitment

OP 27 describes a “commitment” as an agreement between the applicant and the investing entity to establish and incorporate a qualifying business in Canada. Proof and details of this agreement must be submitted by the designated angel investor group or venture capital fund directly to CIC in the form of a completed Commitment Certificate.

A Commitment Certificate is a document which records important information regarding the agreement between the applicant and the investing entity. The purpose of the Commitment Certificate is to summarize pertinent details of the commitment between the investing entity and the applicant for the purposes of the application for permanent residence.

The Commitment Certificate must be sent directly to CIC by the designated angel investor group or venture capital fund. The applicant will also receive a letter of support from the designated entity, which he or she will submit with the application. Upon receipt of the application, CIC will verify that the corresponding Commitment Certificate has been received from the designated investing entity, and that it is still valid.

As stated in Subsection 2(4) of the Instructions, no more than five foreign nationals may be considered members of the Start-Up Business Class in respect of the same business. Accordingly, the Commitment Certificate issued by the designated angel investor group or venture capital fund may not identify more than five applicants.

If two or more applicants seek permanent residence based on the same business, the commitment may be conditional on the issuance of permanent residence to one or more applicants who may be considered essential to the project. An essential person is a foreign national who is considered, by the investing entity, to be essential to the business being established under the program.

A section in the Commitment Certificate will identify which applicants in a group are deemed to be “essential.” If the application for an essential person is refused for any reason, all other applications related to that commitment will also be refused.

There is no limit to the number of designated entities that can support a commitment. However, when there are multiple designated entities acting in syndication, only one Commitment Certificate will be issued containing all the details and requirements of all participating designated entities. The syndicate will choose a lead designated entity that will be responsible for compiling and submitting the Commitment Certificate.

Peer Review of Commitments

According to Section 11 of the Instructions, an immigration officer may request that a commitment in respect of a qualifying business be independently assessed by a peer review panel established by an industry association representing the type of entity making the commitment. For example, if a designated angel investor group made the commitment, the National Angel Capital Organization would be responsible for establishing the peer review panel. Similarly, if a designated venture capital fund had made the commitment, Canada’s Venture Capital and Private Equity Association would be responsible for establishing the peer review.

Although a peer review may be initiated if the immigration officer is of the opinion that such an assessment would assist in making a decision, it may also be made on a random basis. A peer review panel will only verify if the investing entity has conducted the proper checks and investigations according to industry standards, and will not give a judgment on the wisdom or feasibility of the proposal. Assessments must be considered by the immigration officer when making his or her decision but will not be considered binding on the officer.

Minimum Language Proficiency

As stated in Section 2(2) of the Instructions, applicants under the Start-Up Business Class must establish a level of proficiency of at least benchmark Level 5, in either English or French. Language proficiency must be demonstrated through an evaluation conducted by an approved organization or institution.

According to OP27, the results of such an evaluation are considered conclusive evidence of the applicant's proficiency in the official languages of Canada; immigration officers may not consider other evidence of language ability. At the present time, the following are considered designated language testing organizations:

a. Paragon Testing Enterprises Inc. and the University of British Columbia administer the Canadian English Language Proficiency Index Program (“CELPIP”). CELPIP offers the “CELPIP-General (CELPIP-G)” and “CELPIP-Academic (CELPIPA)”; only the CELPIP-G is accepted for CIC purposes.

b. Cambridge ESOL, IDP Australia, and the British Council administer the International English Language Testing System (“IELTS”). IELTS offers “General Training” and “Academic” options; only the “General Training” tests are accepted for CIC purposes.

c. The Paris Chamber of Commerce (*Chambre de commerce et d'industrie de Paris*) administers the Test d'évaluation du français (“TEF”).

Education Requirements

As stated in Subsection 2(2) of the Instructions, an applicant must have completed at least one year of post-secondary education while he or she was in good standing at the educational institution. OP 27 clarifies that distance learning post-secondary institutions are also eligible for consideration.

According to OP 27, proof of education should be in the form of transcripts and a letter of good standing, or certificate or diploma or degree. Immigration officers will review the documentation provided by the applicant in order to determine the following:

a. Has the applicant completed at least one year of post-secondary study? The requirement is met based on the standards that exist in the country of study. For example, a technical credit may be the equivalent to a high school diploma in Canada but in the country of study it is considered to be post-secondary.

b. Was the applicant in good standing while he or she was in attendance at the post-secondary educational institution? Applicants are considered in good standing based on criteria established by the educational institution. For example, the institution could have a policy which states that a person is not in good standing if they have an unpaid debt such as tuition fees or if they have not returned books to the library.

As stated in Subsection 2(2) of the Instructions, it is not necessary for the applicant to obtain any diploma, degree or trade or apprenticeship credential as a result of having completed at least one year of post-secondary study.

Settlement Funds

As mentioned in Subsection 2(2) of the Instructions, the applicant must clearly demonstrate that he or she has sufficient and available settlement funds. These funds must be available, transferable, and unencumbered by debts or other obligations.

According to OP 27, immigration officers must be satisfied that the applicant has at his or her disposal (with sufficient liquidity and with the ability to transfer those assets) the necessary threshold of funds to support his or her establishment in Canada upon arrival. These settlement funds must meet the requirements at the time that the application is made, as well as when the application is finalized.

The amount of funds is assessed according to the applicant’s family size using 50% of Statistics Canada’s most current low income cut-off for urban areas having populations of 500,000 or

more. At the present time, applicants must possess funds that are equal to or greater than the amount listed below for each family size:

Number of Family Members	Funds Required
1	$11,115CAD
2	$13,837CAD
3	$17,011CAD
4	$20,654CAD
5	$23,425CAD
6	$26,419CAD
7 or more	$29,414CAD

Substituted Evaluation

Section 12 of the Instructions authorizes immigration officers to substitute their own evaluation, if they believe that the requirements described in Subsection 2(2) are not a sufficient indicator of whether the applicant will become economically established in Canada. All substituted evaluation decisions require the written concurrence of a second immigration officer.

Although very discretionary, substituted evaluation permits an immigration officer to approve an applicant even if he or she is unable to satisfy one or more requirements of the Start-Up Business Class, other than the requirement of a commitment from a designated angel investor group or venture capital fund. For example, an otherwise eligible applicant who does not possess sufficient language proficiency, post-secondary education, or available funds may still be approved under substituted evaluation.

Annual Numerical Limits and Program Duration

As the Start-Up Business Class is a pilot program established under Section 14.1 of IRPA, no more than 2,750 applications may be processed per year. Although the Instructions do not specifically mention a numerical limitation, by statute, the Start-Up Business Class may not exceed this annual limit.

Section 14.1 of IRPA also limits the duration of the pilot program to five years, commencing on the day on which the Instruction becomes effective; no amendment to or renewal of an instruction may extend the five-year period. As the Start-Up Business Class began accepting applications on April 1, 2013, it will sunset on April 1, 2018. However, if the pilot program proves successful, the Canadian Government may amend IRPA to permanently establish the Start-Up Business Class before this date.

[1] http://www.blaney.com/articles/citizenship-immigration-canada-announces-start-visa-program.
[2] http://gazette.gc.ca/rp-pr/p1/2013/2013-03-30/html/notice-avis-eng.html.
[3] http://www.cic.gc.ca/english/resources/manuals/ip/ip13-eng.pdf.
[4] S.C. 2001, c.27.
[5] SOR/2002-227.