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PUBLICATION

Citizenship and Immigration Canada Now Allows Recaptured Time for Intracompany Transferees

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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 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.