Business visitors or foreign workers?

The blurry line in Canadian immigration law

BY SERGIO KARAS

BACKGROUND

Canada's Immigration and Refugee Protection Act (IRPA) and its regulations have been in effect since 2002 and provide more flexibility to hire foreign workers than previous immigration legislation.
However, employers should plan carefully when considering international relocations to avoid the pitfalls that may lead to a violation of the immigration legislation, including misunderstanding the difference between a simple business visit and performing work in Canada.

When a Canadian employer hires someone from another country or transfers them from an international office to come to Canada, the worker may be authorized to work in Canada without a permit or may be required to obtain one. Without determining the worker's situation, there's a risk the worker could be prevented from working or expelled from the country.

The first step in determining whether a work permit is needed is to consider the nature of the activities to be performed by the foreign worker. "Work" is defined in the regulations as an activity for which wages or commission are earned or that competes directly with Canadian citizens or permanent residents in the labour market.

If a foreign worker performs an activity that will result in receiving remuneration, they will be engaging in work. This includes salary or wages, commissions, receipts for fulfilling a service contract or any other situation where foreign nationals receive payments for the performance of services.

Even if the foreign worker does not receive remuneration, the activities performed may still constitute work if there appears to be an element of competition with the local labour force.

To determine which activities could be considered work, the employer should consider the following questions:

- Will the foreign worker be doing something a Canadian or permanent resident should have the opportunity to do?
- Will the foreign worker be engaging in a business activity that is competitive in the marketplace?

The answer to these questions is not always obvious. Some examples of work include:

- Technical personnel coming to Canada to repair machinery or equipment, even if they are paid outside of Canada by the third-party contractor.
- A foreigner who intends to engage in self-employment, either directly or by receiving commissions or payment for services.

On the other hand, the following activities are not considered to be work:

- Volunteer work for which a person would not normally be paid, such as activities for charitable or religious institutions.
- Helping a friend or family member with housework or childcare in the home.
- Attending meetings on behalf of a foreign employer to discuss products and services or take orders and specifications for a manufacturer abroad.

The Federal Court defined what work was in *Juneja v. Canada*, where the worker entered Canada with a study permit, which prohibited his employment unless authorized. He was found to be working at an automobile dealership in Edmonton, subsequently declared inadmissible to Canada and ordered to leave the country. The worker did not dispute that he didn't have a work permit, but he contended that his activity did not constitute work because he was not being paid for it, and he was only keeping track of his time in case he received the authorization to work in Canada. The evidence showed that the employer had agreed to pay him $8 per hour retroactively for the time he had spent performing his services at the dealership should he receive his work permit.

> An element of competition with the local labour force may constitute work.

The Federal Court entertained the question of whether a contingent arrangement to pay a wage for work performed meets the legal definition of work and found the worker had an expectation of future payment and the dealership had at least a conditional, and perhaps an absolute, legal obligation to pay for the work he performed. This activity was of a character for which wages are paid or anticipated.

The court further held that, even if the worker was correct in arguing that the definition of work sets an absolute standard not fulfilled by a conditional arrangement for payment, his conduct was still caught by the second part of the definition — the performance of an activity in direct competition with the activities of Canadians and permanent residents in the labour market. His employment directly competed with others who were legally entitled to work in Canada, whether a wage was paid or not. The court rejected his contention that the second part of the definition of work applied only to self-employed persons and held that the definition contains no such qualification.

Further, the court also referred to the regulatory impact analysis statement published with the regulations in the Citizenship and Immigration Department guidelines, indicating the definition of work included unpaid employment undertaken for the purposes of obtaining work experience, such as an internship or practicum normally done by a student.

In contrast, in *Ozawa v. Canada (Minister of Citizenship and Immigration)*, the worker was a hair stylist who was also a shareholder and director of a hair salon incorporated in British Columbia. He came to Canada on a working holiday visa and overstayed his permit twice, but he was granted restoration on both occasions. He returned to Canada on a visitor visa and was found working at the hair salon without authorization. An inadmissibility report was issued against him. He left Canada voluntarily and applied for a work permit, which was refused because he had overstayed his previous permits twice. The court held that since Ozawa was granted restoration for his working holiday permit, it had the legal effect of curing any previous breach.

The court ruled that the case was distinguishable from *Juneja*, in which there was a contingent wage agreement that was absent in *Ozawa*. It was not clear whether the worker was an employee, but it was clear that he was a shareholder and a director. The court held that the definition of work did not capture the normal activities of shareholders or directors, where they are not paid wages or commissions for these activities. It further ruled that as soon as a shareholder or director provides services to the corporation, those activities are outside the normal role of a shareholder or director and the person will fall under the second part of the definition of work — they will be in direct competition with Canadian citizens and permanent residents.

The Federal Court had to consider where the line between visit and work is crossed in *Petinglay v. Canada (Public Safety and Emergency Preparedness)*. The worker came to Can-

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ada as a live-in caregiver. Her sister worked in a liquor store, which was managed by the sister's husband and owned by her father-in-law. Rosalyn Petinglay would visit her sister in the store and sometimes operate the cash register when her sister took short breaks. The Canada Border Security Agency (CBSA) found Petinglay behind the cash register. When CBSA representatives made a purchase from her, the receipt showed that her name was registered in the system.

It was determined that the first part of the definition of work did not apply to Petinglay as she did not receive any compensation, had not been asked or directed to work and was not supervised or required to attend at any particular time. The second part of the test required a determination of whether the activity was in direct competition with the activities of Canadian citizens or permanent residents in the labour market. Petinglay argued that she did not provide assistance to any customer, she came and went as she pleased, her hours were not tracked, no one was called in to replace her if she did not come in and the company did not hire anyone to replace her after she stopped going to the store. She claimed that her name was registered in the cash register as it was required to prevent fraud. The court held that Petinglay's activities did not constitute work. It was undisputed that her activities did not fall under the first part of the definition of work. She did not meet the second part of the definition either because: it was a large store that had at least 10 to 20 employees on the floor at a time; she helped her sister occasionally; she did not prevent other staff members from performing their activities; when she operated the cash register, there were other employees present; and she did not provide any sales assistance to customers.

Restoration of status cures past work without a permit. In *Tiangha v. Canada (Citizenship and Immigration)*, Ephraim Tiangha came to Canada under the Live-in Caregiver Program. After his employer passed away, he found it difficult to find a new job. In the interim, his father became gravely ill and, to support his medical expenses, Tiangha started working without a permit. Before leaving for his father's funeral, he found a new job as a caregiver and secured a work permit, too. However, upon his return, his new prospective employer had also passed away. He again started working without a permit until he found a caregiver job and he was granted a new work permit. He applied for permanent resident status, but it was refused because he was found to have worked in Canada without authorization. Tiangha argued that, as he had received a new work permit, that cured his previous inadmissibility for having worked without authorization. The court agreed and relied on *Ozawa*, where the restoration of temporary resident status had the legal effect of curing any breach of the original temporary resident visa and held that the new work permit cured the previous breach.

The legislation and regulatory framework along with existing case law dealing with the definition of work help us understand the importance of assessing specific situations and obtaining a work permit for employment or for an activity before an individual performs any services, paid or not, for which a Canadian citizen or permanent resident could be employed.

For more information, see:

- *Juneja v. Canada*, 2007 FC 301 (F.C.).
- *Ozawa v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 444 (F.C.).
- *Petinglay v. Canada (Public Safety and Emergency Preparedness)*, 2019 FC 1371 (F.C.).
- *Tiangha v. Canada (Citizenship and Immigration)*, 2013 FC 2011 (F.C.).

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