Changes cause headaches for foreign worker application

Employer's application to Temporary Foreign Worker Program denied after interpretations of the 2014 changes made its application incomplete

BY SERGIO KARAS

BACKGROUND

RECENT CHANGES to the Temporary Foreign Worker Program (TFWP) have caused considerable difficulties to employers looking to hire temporary foreign workers. In June 2014, the federal government implemented significant modifications to the program and replaced Labour Market Opinions (LMOs) with a more complex regime of Labour Market Impact Assessments (LMIAs). The changes include a strict interpretation of advertising and compliance guidelines that employers must follow in order to avail themselves of the TFWP, increased scrutiny on reasonable efforts to hire Canadians, monitoring of wages and working conditions, and a consideration of proposed transition plans to eventually replace foreign workers with Canadians or permanent residents. The new TFWP regime has been the subject of recent litigation dealing with the interpretation of these guidelines.

The Federal Court has been called upon to decide the issue of when and under what conditions a Canadian employer can engage a temporary foreign worker for a vacant position. Specifically, when a labour market shortage exists in that position and the wages and working conditions meet the minimum standard, what reasonable efforts must be made by an employer to find a Canadian?

In *Ahmed v. Canada (Minister of Public Safety and Emergency Preparedness)*, the employer applicant, acting as manager for the company, sought to hire a temporary foreign worker in the position of marketing consultant. The employer submitted an application for an LMO to the Department of Employment and Social Development Canada (ESDC), on June 19, 2014. The employer was advised by the TFWP on July 11 that the application was rejected as an incorrect form was used, some fields were not completed, and the application lacked required documents. As the government implemented significant changes to the TFWP on June 20, 2014, replacing the LMO with the LMIA, the employer submitted a second application in July. However, shortly after, a TFWP officer informed them by email that their second application was rejected because it was incomplete and the required employer transition plan was apparently missing. The employer filed a subsequent LMIA application in October 2014, together with the employer's representative's submission advising the TFWP that the employer was publishing another job bank advertisement with a modified wage. A program officer conducted two telephone interviews with the employer and eventually refused the application, on the grounds that it did not demonstrate that the employer had made sufficient efforts to hire Canadians for the position and the employment of the foreign national was not likely to result in the filling of a labour shortage. Further, the officer found there was no demonstrable shortage of workers in the occupation for the geographical region indicated in the application, apparently relying on other evidence of research not disclosed to the applicant.

The employer sought judicial review of the decision, arguing that the application should have been processed in accordance with the law and regulations at the time it was submitted, and that the applicants had a "legitimate expectation" that it would be processed under the earlier version of the guidelines. Further, the employer contended that the conduct of the TFWP officer gave rise to promissory estoppel, as it was unfair for ESDC to change the guidelines and instructions on a continuing basis, specifically indicating that the prevailing wage for the occupation was increased after the application was submitted. The employer also objected to the application being refused because the advertisements were no longer available at the time of assessment, and because the officer apparently relied on extrinsic evidence concerning availability of labour without providing the applicant with an opportunity to refute it.

ESDC submitted that there was no procedural unfairness in applying published guidelines to assess the application. ESDC argued that the TFWP is a program of last resort to be used where no qualified Canadian or permanent resident is available to work, and the requirement for an employer to advertise for the position throughout the entire period during which the application is being assessed is justified. The objective in the guidelines is that a search for a qualified Canadian needs to continue until such time as the application is finally adjudicated. Therefore, since the officer applied the guidelines, the requirement of procedural fairness was met. Further, it was incumbent on the applicant to verify the prevailing wage for the position prior to publishing the advertisements. ESDC also argued that the employer did not demonstrate having made significant efforts to hire Canadians; did not demonstrate the degree to which the extensive qualifications sought were in fact necessary for the position; that there were inconsistencies regarding the required qualifications as published in the advertisements and those stated by the employer during the telephone interviews; and that there was no shortage of marketing consultants in the geographical area where the employer was located.

The Federal Court held that the applicable standard of review to determine whether the program officer had breached a procedural duty of fairness was an issue of law reviewable on a standard of correctness.

The court determined that the essential issues to be determined were whether the officer relied on policy requirements which were not in place at the time of the submission of the application, and whether the officer failed to provide an opportunity to reply to extrinsic documentary evidence.

The court cited with approval the decision in *Frankie's Burgers Lougheed Inc. v. Canada (Minister of Employment and Social Development)* where the chief justice of the Federal Court held:

"In the context of applications by employers for LMOs, a consideration of the relevant factors that should be assessed in determining those requirements suggests that those requirements are relatively low. This is because, (i) the structure of the LMO

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assessment process is far from judicial in nature, (ii) unsuccessful applicants can simply submit another application *(Maysch v. Canada (Citizenship and Immigration), 2010 FC 1253, at para 30; Li v Canada (Citizenship and Immigration)*, 2012 FC 484, at para 31 [Li]), and (iii) refusals of LMO requests do not have a substantial adverse impact on employers, in the sense of carrying 'grave,' 'permanent,' or 'profound' consequences."

The court held that, in assessing an LMIA, the degree of procedural fairness owed to an applicant is relatively low.

The court also held that, notwithstanding the fact that the program officer employed "standard language" in its decision to refuse the application, the officer found that the applicants did not demonstrate sufficient efforts to hire Canadians and that the employment of the foreign national was not going to result in filling a labour shortage. Although the applicant argued that the reasons for refusal were confusing, the "adequacy" of reasons is not a stand-alone basis by which to quash a decision.

The court also held that the argument presented by the applicant that procedural fairness was breached by continually changing the guidelines and forms had no merit. The applicant failed to demonstrate how those changes impacted the assessment by the officer. The court held that it was impossible to find that there was a breach of procedural fairness if the applicant did not, at the very least, indicate how those changes had tangible consequences in the circumstances of the case.

With regards to the discrepancy in the prevailing wage, which had changed between the dates of the initial LMO application and the last LMIA application, the court cited with approval the comments made in *Frankie's Burgers*, where it was held that:

"The Guidelines make it very clear that employers are expected to at least meet the minimum recruitment efforts required for lower skilled occupations before they apply for an LMO. This is an entirely reasonable position, as ESDC officers need to be able to assess requests for LMOs at a point in time. There is nothing unreasonable about taking the position that such time is when the application is submitted. The fact that ongoing recruitment efforts are also required simply ensures that employers will continue to endeavour to find Canadian citizens or permanent residents to fill the vacant positions until a positive LMO is issued."

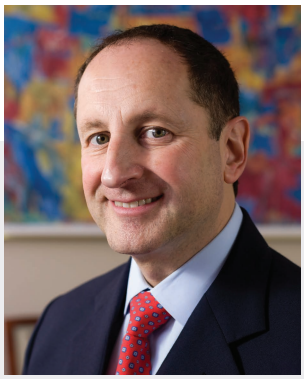
Since the employer had the obligation to demonstrate that it had made sufficient efforts to hire Canadian citizens or permanent residents for the position up until the time in which a positive LMIA would be issued, it would be contrary to the regulatory intent to find that a LMIA applicant would not have to ensure that the wage advertised met the prevailing wage for the occupation. Although the court recognized that the timeline in respect of the prevailing wage changes was problematic in this case, a number of other factors led the decision-maker to a finding of lack of credibility, and that outweighed the issue of procedural fairness. Even if the matter would have been remitted back to the TFWP by the court, the ultimate decision would not have changed. Therefore, the application for judicial review was dismissed.

Tips for employers

The facts of this case highlight the many difficulties encountered by employers when attempting to hire foreign workers and applying for LMIAs. Policy and application form changes have become the norm rather than the exception in the program. It is imperative that employers document their efforts to advertise the position and attempt to hire Canadian citizens or permanent residents in a very thorough and deliberate manner, paying close attention to changes in wages, working conditions and ensuring advertising all positions consistently and extensively in the labour market.

For more information see:

- *Ahmed v. Canada (Minister of Employment and Social Development)*, 2016 CarswellNat 463 (F.C.).
- *Kanes v. Canada (Minister of Employment & Immigration)*, 1993 CarswellNat 158 (Fed. T.D.).
- *Baker v. Canada (Minister of Citizenship & Immigration)*, 1999 CarswellNat 1124 (S.C.C.).
- *Bendahmane v. Canada (Minister of Employment & Immigration)*, 1989 CarswellNat 45 (Fed. C.A.).
- *Mount Sinai Hospital Center v. Quebec (Minister of Health & Social Services)*, 2001 CarswellQue 1272 (S.C.C.).
- *Frankie's Burgers Lougheed Inc. v. Canada (Minister of Employment and Social Development)*, 2015 CarswellNat 107 (F.C.).
- *N.L.N.U. v. Newfoundland & Labrador (Treasury Board)*, 2011 CarswellNfld 414 (S.C.C.).



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