

Major changes for specialized knowledge workers

Its not as easy for foreign workers and their employers to avoid the LMO process by claiming specialized skills

BACKGROUND

ON JUNE 9, 2014, the federal government published Operational Bulletin (OB) 575, which expands guidelines for immigration officers assessing work permit applications for Intra-Company Transferees with Specialized Knowledge. The OB provides direction to the officers as to how to evaluate the criteria under which those workers are granted work permits. The OB also makes it more difficult to use this exemption from the Labour Market Opinion (LMO) process as it now requires a higher threshold of advanced proprietary knowledge to qualify. Immigration lawyer Sergio Karas looks at the new scrutiny of foreign workers claiming specialized skills.

BY SERGIO KARAS

Following the federal government's scrutiny of the temporary foreign worker program, employers have increasingly looked at ways to bring temporary foreign workers to Canada while avoiding the cumbersome labour market opinion (LMO) process. One of the ways in which this is often done is by using the Intra-Company Transferee category, which allows the transfer of senior managerial and executive personnel — as well as Specialized Knowledge workers who comply with the prescribed criteria — who are performing services for an employer in Canada that is a related entity to their employer abroad. Intra-Company Transferees admitted under the Specialized Knowledge category are LMO exempt. Effective immediately, immigration officers are directed to use the new criteria under the OB to determine if the applicant possesses a high standard of specialized knowledge and is receiving wages that are consistent with the Canadian prevailing wage for that occupation.

Applicants must demonstrate knowledge and expertise

To have "specialized knowledge" and to meet the requirements of the new policy, an Intra-Company Transferee Specialized Knowledge applicant would be required to demonstrate a high degree of both proprietary knowledge and advanced expertise. Proprietary knowledge alone, or advanced expertise alone, does not qualify the applicant under this exemption. The onus is on the applicant to provide evidence that she meets this standard.

Documentary evidence to substantiate this expanded level of knowledge may include: a resume, reference letters, letter of support from the employer, job descriptions outlining the level of training acquired, years of experience in the field, degrees or certifications obtained that are related to the field of work, list of publications and awards received by the applicant, and a detailed description of the

work to be performed in Canada.

The new definition articulates the elements of "specialized knowledge" as:

- "Proprietary Knowledge" is company-specific expertise related to a company's product or services. It implies that the company has not divulged specifications that would allow other companies to duplicate the product or service.
- "Advanced proprietary knowledge" would require an applicant to demonstrate uncommon knowledge of the firm's products or services and its application in international markets, or an advanced level of expertise or knowl-

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edge of the enterprise's processes and procedures such as its production, research, equipment, techniques or management.

- "Advanced level of expertise" is also necessary, which would require specialized knowledge gained through significant and recent experience with the organization and used by the individual to contribute significantly to the employer's productivity. "Significant" is not defined and is not always a meaningful indicator but it relates to the length of the foreign worker's experience. "Recent" is defined as experience obtained within the last five years.

In assessing the "advanced level of expertise," officers must consider:

- Abilities that are unusual and different from those generally found in a particu-

lar industry and that cannot be easily transferred to another individual in the short-term.

- The knowledge or expertise must be highly unusual both within the industry and within the host firm.
- It must be of a nature such that the applicant's proprietary knowledge is critical to the business of the Canadian branch and a significant disruption of business would occur without the applicant's expertise.
- The applicant's proprietary knowledge of a particular business process or methods of operation must be unusual, not widespread across the organization, and not likely to be available in the Canadian labour market.

It must be noted that skill in implementing an off-the-shelf product would not, by itself, be considered to be specialized knowledge unless the product has suffered significant modifications to the point that it has become quite unique. So, for example, if an individual is very skilled at customizing a commonly available computer program that, by itself, would not be sufficient to qualify the person as a Specialized Knowledge worker. However, if the product is combined with other products to achieve a customized and unique solution that is proprietary to the employer, that may be considered as a qualifying degree of expertise.

The new criteria will require Specialized Knowledge to be "unique and uncommon," held by only a small number or small percentage of employees of a given enterprise. Under the new criteria, Specialized Knowledge workers must demonstrate they are key personnel, not simply highly skilled.

In addition, Specialized Knowledge workers will have to demonstrate:

- They are employed by and under the direct and continuous supervision of the host company.
- They will not normally require training



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at the host company related to the area of expertise.

- The specialized knowledge will not be readily available within the Canadian labour market, and cannot be readily transferred to another individual.

It must be noted that, where a treaty such as the NAFTA, Canada-Chile Free Trade Agreement, or Canada-Peru Free Trade Agreement provides a different definition of Specialized Knowledge, that definition will still apply.

Introduction of mandatory wage floor

A completely new element in the Specialized Knowledge category has been introduced. The policy now requires that the employee claiming to possess Specialized Knowledge be remunerated at a level commensurate with the position. In order to introduce some objectivity to the definition of a mandatory wage floor, the new criteria requires that the foreign worker should receive, as a minimum, the prevailing wage for the specific occupation and region of work as listed in the Employment and Skills Development Canada "Working in Canada" website tool to determine prevailing Canadian Wage. The tool can be found at http://www.jobbank.gc.ca/wage-outlook_search-

[eng.do?reportOption=wage](http://www.jobbank.gc.ca/wage-outlook_search-eng.do?reportOption=wage).

While the authorities have been using wage levels as an indication of specialization for some time, this is the first attempt to codify its use.

Non-cash payments such as hotel, transportation, and other benefits cannot be taken into consideration when evaluating the prevailing wage. Only allowances compensated in monetary form and paid directly to the employee can be included.

The mandatory wage policy does not apply to Specialized Knowledge workers entering Canada pursuant to the NAFTA or to other international free trade agreements. Nevertheless, officers must still consider

wages as an indicator of specialization in their overall assessment.

These important changes restrict the use of the Intra-Company Transferee Specialized Knowledge category and make it more difficult for employers to transfer technical personnel involved in Canadian projects. Changes to the Temporary Foreign Worker Program are ongoing and it is expected further restrictions may be introduced in the future. Given the evolving nature of the program, employers are encouraged to keep abreast of developments and follow specific cases to ensure applications are made based on current and timely analysis of existing policies and programs.

About the Author

SERGIO R. KARAS

Principal of Karas Immigration Law Professional Corporation, is a Certified Specialist in Canadian Citizenship and Immigration Law by the Law Society of Upper Canada. He is Past Chair of the Ontario Bar Association Citizenship and Immigration Section, Past Chair of the International Bar Association Immigration and Nationality Committee, and Editor of the Global Business Immigration Handbook, published by Carswell. He can be reached at (416) 506-1800 or karas@karas.ca.



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