

State Bar of Texas International Law Section

INTERNATIONAL NEWSLETTER

Summer/Fall, Volume 3, No. 2

ilstexas.org



The Texas Bar International Law Section
Recognizes the Tenth Anniversary of the adoption
of the United Nations Guiding Principles on
Business and Human Rights.



New Pathways for Employers and Temporary Foreign Workers in the Agriculture Sector

SERGIO R. KARAS

Barrister and Solicitor, Karas Immigration Law Professional Corporation

Background

Canada's agriculture sector requires access to the global workforce to meet consumer demands. This leads employers to rely on Temporary Foreign Workers (TFWs) to overcome shortages in general labour.¹ TFWs that work in agriculture are a part of critical infrastructure: They ensure food security and serve an essential function for Canadians' well-being.²

To remedy these labour shortages, employers can obtain work permits for TFWs through the *Temporary Foreign Worker Program (TFWP)*. Work permit applications for TFWs in agricultural sectors are processed on a priority basis, they are also exempt from travel restrictions because of their designation as essential workers.³ The *TFWP* has two streams: the *Seasonal Agricultural Worker Program (SAWP)*, and the *Agricultural Stream*. With multiple pathways available, employers should pursue a stream that suits their needs.

The *Agri-Food Pilot Program* is a new federal government initiative that provides an opportunity for agri-food workers to obtain permanent residency. It seeks to attract and retain experienced agri-food workers.⁴ If successful, this program can expand and allow Canadian agri-food industries to develop and meet their projected labour needs.



Preliminary Requirements

There are two criteria for employers that are unique to both the *SAWP* and the *Agricultural Stream*: production must be in a sector on the national commodity list, and the job must be in on-farm primary agriculture. The national commodity list includes the following sectors:⁵

National Commodity List:

- Apiary products
- Fruits, vegetables (including canning/processing of these products if grown on the farm)
- Mushrooms
- Flowers
- Nursery-grown trees including Christmas trees, greenhouses/nurseries
- Pedigreed canola seed
- Seed corn
- Grains
- Oil seeds
- Maple syrup
- Sod
- Tobacco
- Bovine
- Dairy
- Duck
- Horse

- Mink
- Poultry
- Sheep
- Swine

Primary agriculture is defined under the *Immigration and Refugee Protection Regulations (IRPR)*.⁶ It refers to work where the duties are performed within a farm, nursery, or greenhouse. It entails machinery operation, working with raw animal products, or working with plants. The products must be for market. The following table identifies the National Occupation Classification codes for jobs in on-farm primary agriculture:⁷

When hiring workers under the *TFWP*, a positive Labour Market Impact Assessment (LMIA) is required. The LMIA includes job offer details, it demonstrates that there are no Canadian workers or permanent residents available for the job, and shows that there is a need to hire foreign workers. A positive LMIA enables TFWs to apply for work permits under the *SAWP* and the *Agricultural Stream*.⁸

Employers must provide the same wages and benefits to TFWs that they provide to other employees in the same occupation. Unionized workers are to be paid at the established rate under the collective bargaining agreement. Employers must agree to review and adjust TFWs' wages to ensure that their rates meet or exceed those in the wage tables or the applicable minimum wage rate.⁹

In the past, an LMIA was valid for six months. As a temporary measure due to the rise in COVID-19 infection rates, an LMIA approved for 2021 is valid until December 15, 2021.¹⁰ New measures have been taken to process LMIA applications in a more flexible manner. Employers are no longer required to submit minor administrative changes unless they impact the LMIA's terms and conditions.¹¹ Primary agriculture occupations are exempt from LMIA processing fees.¹²

On-Farm Primary Agriculture

National Occupation Classification (NOC) Code	Occupation
0821	Managers in agriculture
0822	Managers in horticulture
8252	Agricultural Services contractors, farm supervisors and specialized livestock workers
8255	Contractors and supervisors, landscaping, grounds maintenance and horticulture services
8431	General farm workers
8432	Nursery and greenhouse workers
8611	Harvesting labourers

There are some costs that are required to be paid for by employers, such as TFWs' round-trip transportation, and transportation between housing and the work location. Employers are obligated to provide adequate, suitable, and affordable housing for TFWs. Housing for TFWs requires an official inspection within eight months before the LMIA application submission. Due to COVID-19, Housing Inspection Reports have greater flexibility when an employer can prove that the appropriate authority cannot conduct an inspection. If an employer lodges TFWs in commercial accommodations rated three stars or higher, a report is not required.¹⁵

Employers may also have to ensure that their intended hires are covered by a provincial or territorial workplace safety insurance provider. When TFWs work with pesticides or hazardous chemicals, employers must notify workers and provide free protective equipment, training, and supervision. The cost of protective equipment must be paid for by the employer.¹⁴

There is a mandatory recruitment period where employers must attempt to hire Canadian citizens and permanent

residents before offering jobs to TFWs. Employers need to advertise on the national Job Bank or its provincial counterpart. Advertisements must be listed for a minimum of 14 days, and for the three-month period, before submitting an LMIA application. Employers do not have to re-advertise vacant positions during an LMIA application for a replacement worker if the replacement is in the same Job Bank economic region and occupation.¹⁵

Advertisement requirements were updated because of the economic impact of COVID-19. Job offers posted before March 15, 2020 may need to be re-advertised for an additional two consecutive weeks. Service Canada will contact employers to re-advertise.¹⁶

The Seasonal Agriculture Worker Program (SAWP)

For eligibility under the *SAWP*, there is a distinct requirement that TFWs must be Mexican citizens or citizens of a participating Caribbean country (Anguilla, Antigua and Barbuda, Barbados,

Dominica, Grenada, Jamaica, Montserrat, St. Kitts-Nevis, St. Lucia, St. Vincent and the Grenadines, Trinidad and Tobago). Canada has bilateral agreements with participating countries that inform how the SAWP operates. The roles of participating governments include recruitment and selection, ensuring that required worker documents are available, and the designation of representatives that will assist TFWs in Canada.¹⁷

Participating governments ensure that the workers selected for their job pools meet all the program requirements. The conditions include farming experience, age of 18 or older, citizenship in a participating country, and the ability to satisfy Canadian immigration law and the laws of their home country.¹⁸ Employers cannot use private recruiters to select workers.¹⁹

SAWP employers can recover some of the round-trip transportation costs for TFWs through payroll deductions, except in British Columbia. The standard employment contract specifies the amount that employers can deduct. If an SAWP employer re-applies for TFWs' replacements, they are exempt from the requirement that their housing inspection report be from within eight months.²⁰

Employers are required to have all TFWs register for provincial or territorial health insurance as soon as they are eligible for it. When hiring Mexican TFWs, insurance payments are submitted to Great West Life Assurance Company, and these costs are recoverable through payroll deductions. Employers can get assistance for these deductions from participating government liaison officers.²¹

Employers are not required to re-advertise vacant positions when submitting transfer LMIA applications if they or the transferring employer have a positive LMIA for the current season and the region and occupation are the same.²²

Any informal transfer of employees contravenes the *Immigration and Refugee Protection Act (IRPA)* and risks a maximum fine of \$50,000 and two years' imprisonment.²³

An emergency order made under the *Quarantine Act*²⁴ requires a mandatory 14-day quarantine period for every person entering Canada, with limited exceptions.²⁵ To calculate deductions for SAWP workers during the quarantine period, a week is considered to be six working days, with at least five hours per day and one day of rest.²⁶ In addition to the minimum 240 hours of pay specified in SAWP contracts, employers must provide regular pay and benefits during the quarantine period.²⁷ The quarantine period does not count towards work duration for LMIA applications.²⁸

Employment and Social Development Canada (ESDC) provides standard employment contracts, with formats for either Mexican²⁹ or Caribbean³⁰ TFWs. This contract is non-modifiable; its purpose is to specify the rights and obligations of all parties. A copy of the contract in English, French, or Spanish must be supplied to the worker and signed on their first day of work.³¹

The Agricultural Stream

TFWs can be hired for up to 24 months under the *Agricultural Stream*. With this program, employers draft the employment contracts themselves.³² Governments are not parties to these agreements, as compared to contracts under the SAWP. The *Agricultural Stream* is favourable to employers who wish for greater control in the recruitment process and the employment agreement.

Wage deductions are available to employers that supply on-farm or off-site housing at \$30 per week from TFWs' wages unless the applicable labour standards require a lower amount.

Private health insurance for TFWs must be paid for by their employers. This period begins on the workers' arrival in Canada and lasts until their provincial or territorial health insurance plans are active.³³

When employers use recruiters or third parties for new hires, the cost cannot be deducted from TFWs' wages.³⁴ After an employer completes the mandatory recruitment and advertisement efforts, they are ready to apply for an LMIA. The application must be submitted to the Service Canada Centre responsible for the program, or to the centre that processes applications for the employment location.³⁵

A public policy was introduced by Immigration, Refugees and Citizenship Canada (IRCC), that allows TFWs in Canada to change jobs before the final decision on their work permit applications. Priority processing is available when an employer provides written notice to Service Canada that their TFWs are in Canada and that they wish to benefit from IRCC's COVID-19 Temporary Public Policy.³⁶

Temporary Foreign Worker Program (TFWP) Compliance

ESDC closely monitors employers' compliance with their obligations toward TFWs. These obligations are set out in the *IRPR*, the *IRPA*, and the LMIA. Once an employer applies for a new LMIA, they may be subject to a compliance review. A review will investigate the employer's previous LMIA, and if they provided workers substantially the same wages, working conditions, and occupation as referenced in the documents.³⁷

There is a general rule that all records associated with compliance for hiring and employing TFWs must be kept for at least six years. These records may be required as proof of compliance

during an inspection or review. If errors or noncompliance are discovered, an employer must act to remedy them and then inform ESDC.³⁸ Notice for inspections is not always provided. When selected, employers are informed of the reason, authorization, and type of inspection. The specific compliance conditions that are to be demonstrated will be explained.

Inspections can occur in either a paper-based format or on-site. During an inspection, ESDC will interview the employer and ask relevant questions based on the conditions set out in the LMIA. Employees may be questioned based on these conditions and asked about their treatment. During on-site investigations, ESDC officers may copy documents, take photographs, and make recordings to support their findings. They have the authority to access employers' electronic devices to examine relevant information.

The Agri-Food Pilot

Canada is one of the few net exporters of agri-food products in the world, which provides an opportunity to seize a significant share of the global market and achieve multi billion-dollar export targets by 2025.³⁹ The *Agri-Food Pilot* provides opportunities for experienced TFWs to obtain permanent residency through a limited number of annual spaces.

Eligible industries include meat product manufacturing, greenhouse, nursery and floriculture production, mushroom production, and animal production. The workers must be experienced and employed in non-seasonal positions.⁴⁰ Valid work experience requires one year of full-time work in an eligible occupation in Canada within the past three years.⁴¹

Applications for this program are processed on a first-come, first-served

Agri-Food Pilot Program

National Occupation Classification (NOC) code	Occupations	Annual Number of Accepted Applicants
6331 9462	Retail butchers Industrial butchers	1470
8252	Farm supervisors and specialized livestock workers	50
8431	General farm workers	200
8611	Harvesting labourers	300
9617	Food processing labourers	730

basis. It must be noted that there are quotas associated with each occupation in the following chart:⁴²

To gain entry under the program, a worker must meet or exceed the language and educational requirements. Eligible workers require Canadian Language Benchmarks Level 4 in reading, writing, speaking, and listening. The minimum educational requirements are a Canadian high school diploma or an equivalent educational credential assessment report.⁴³

In addition, workers may have to demonstrate sufficient settlement funds. They must be able to prove that they can support themselves and any family members, whether the family will join them in Canada or not. This requirement is met by providing official letters from the financial institution where workers' funds are deposited. Settlement funds are calculated in proportion to family size.⁴⁴

Workers already in Canada must maintain temporary resident status until permanent residency is granted.⁴⁵ On approval, workers will receive a

Confirmation of Permanent Residence in the mail, containing their photo and identification information. A permanent resident visa counterfoil attached to the passport will also be sent, for citizens of countries that require it prior to travel to Canada.⁴⁶ TFWs already in Canada will be contacted by IRCC for a subsequent interview with an officer. The interview ensures that the worker has valid documents, and they will be asked questions to verify that they meet the terms for immigration.

There are free pre-arrival services available to TFWs that inform on life and work in the country. For instance, *Active Engagement and Integration Project* has in-person services in China, which are made available globally online. It delivers general information about life in Canada, needs assessments, and referrals to community services.⁴⁷ *Canada InfoNet* offers online services to help immigrants prepare for work, providing an opportunity to connect with mentors that have experience in their sector.⁴⁸

COVID-19 Compliance

Updates to the *IRPR* include steep penalties for employers that prevent workers from complying with orders or regulations under the *Quarantine Act* or the *Emergencies Act*.⁴⁹ Non-compliance that is discovered through inspections may lead to fines of \$1,000 to \$100,000 for each violation. Fines are capped at a maximum \$1 million annually. Employers may also be banned from the *TFWP* from 1 to 10 years, depending on the violation. For the most serious violations, an LMIA may be revoked and permanent program bans may be issued.⁵⁰

The emergency order made under the *Quarantine Act* on April 14, 2020, implements measures to combat the spread of COVID-19, which include the mandatory 14-day quarantine period.⁵¹ The Federal Government will pay employers \$1,500 for each worker, to help ease the financial burdens that result from the quarantine period. This support program will remain in place until the *Quarantine Act* is no longer in force.⁵²

Measures have been taken to protect primary producers through the *Emergency On-Farm Support Fund*. It was launched to address COVID-19 outbreaks on farms and to boost protections for TFWs. This initiative supports employers' immediate needs in relation to mandatory changes for ensuring the health and safety of workers and to limit the spread of COVID-19.⁵³ The fund provides up to \$100,000 for emergency response activities. The intake period closed February 26, 2021, and disbursements were to be paid out by March 31, 2021.⁵⁴ To be eligible, employers must confirm in writing that they comply with the *Quarantine Act*.⁵⁵

The impact of COVID-19 has altered the hiring process for TFWs. New opportunities have been made available through the *SAWP* and the *Agricultural Stream*. These opportunities come with

increased protections for workers, but also strict obligations for employers who must have a thorough understanding of the updated *IRPR* to navigate the changes affecting their businesses. ■