

A PRACTICAL GUIDE TO LABOUR MARKET OPINIONS AND ARRANGED EMPLOYMENT OPINIONS

1. Overview of the Service Canada's role

Service Canada ("SC") wears many hats under the HRSDC banner. However, for our interest Service Canada, through the Temporary Foreign Worker Program, is responsible for processing Labour Market Opinion ("LMO") and Arranged Employment Opinion ("AEO") applications and issuing opinions on same. Under R 203 of the Immigration and Refugee Protection Regulations ("IRPR"), SC is responsible for the issuance of Labour Market Opinions, and under R. 82 (2)(c), SC is responsible for issuing Arranged Employment Opinions.

SC assesses the employer's application on a case by case basis to make sure the prevailing wage rate and acceptable working conditions are being offered, and that the labour market will likely benefit from the hiring of a foreign worker. SC also pays particular attention to the recruitment efforts that the employer made in Canada

Unlike CIC, SC does not make available any "manuals" under which Officers are provided with the instruction on how to discharge their duties in regards to assessing LMO and AEO applications. We have filed an ATIP request for the production of any such manuals that may exist, but at the time of writing, we have not yet received any results in response to our inquiry. If, between now and the date of the conference, any such manuals become available, they will be made available to conference attendees. Until that time, the best reference that SC has made available is through the "Directives for Assessing Labour Market Opinions", which was most recently updated in January, 2010.¹

a. Mandate for Labour Market Opinions under IRPA Reg 203

R (203) provides the legislative framework under which CIC issues work authorization to non-LMO exempt foreign nationals. It refers to the work permit application made to a CIC officer and mandates that, upon reviewing same, an officer must determine, *on the basis of an opinion provided by HRSDC/Service Canada, whether the job offer is genuine and employment of a foreign worker is likely to have a neutral or positive effect on the Canadian labour market.* It is from this point that one starts a review of the criteria necessary for the issuance of that permit. Specifically, R 203 states:

203 (1) On application under Division 2 for a work permit made by a foreign national other than a foreign national referred to in subparagraphs 200(1)(c)(i) and (ii), an officer shall determine, on the basis of an opinion provided by the Department of Human

¹ http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/lmodir/lmodirtoc.shtml

Resources Development, if the job offer is genuine and if the employment of the foreign national is likely to have a neutral or positive effect on the labour market in Canada.

(2) The Department of Human Resources Development shall provide the opinion referred to in subsection (1) on the request of an officer or an employer or group of employers. A request may be made in respect of

- (a) an offer of employment to a foreign national; and
- (b) offers of employment made, or anticipated to be made, by an employer or group of employers.

(3) An opinion provided by the Department of Human Resources Development shall be based on the following factors:

- (a) whether the employment of the foreign national is likely to result in direct job creation or job retention for Canadian citizens or permanent residents;
- (b) whether the employment of the foreign national is likely to result in the creation or transfer of skills and knowledge for the benefit of Canadian citizens or permanent residents;
- (c) whether the employment of the foreign national is likely to fill a labour shortage;
- (d) whether the wages offered to the foreign national are consistent with the prevailing wage rate for the occupation and whether the working conditions meet generally accepted Canadian standards;
- (e) whether the employer has made, or has agreed to make, reasonable efforts to hire or train Canadian citizens or permanent residents; and
- (f) whether the employment of the foreign national is likely to adversely affect the settlement of any labour dispute in progress or the employment of any person involved in the dispute.

b. Mandate for Arranged Employment Opinions under IRPA Reg 82(2)(c)

Legislative authority for Arranged Employment Opinions is provided for under IRPR R. 82(2)(c).

82 (1) In this section, "arranged employment" means an offer of indeterminate employment in Canada.

(2) Ten points shall be awarded to a skilled worker for arranged employment in Canada in an occupation that is listed in Skill Type 0 Management Occupations or Skill Level A or B of the *National Occupational Classification* matrix if they are able to perform and are likely to accept and carry out the employment and

...

(c) the skilled worker does not intend to work in Canada before being issued a permanent resident visa and does not hold a work permit and

- (i) the employer has made an offer to employ the skilled worker on an indeterminate basis once the permanent resident visa is issued to the skilled worker, and
- (ii) an officer has approved that offer of employment based on an opinion provided to the officer by the Department of Human Resources Development at the request of the employer or an officer that
 - (A) the offer of employment is genuine,
 - (B) the employment is not part-time or seasonal employment, and

(C) the wages offered to the skilled worker are consistent with the prevailing wage rate for the occupation and the working conditions meet generally accepted Canadian standards...

The usefulness of AEO's has diminished somewhat since the restructuring of the Federal Skilled Worker program as the effect of the restructuring is such that only a limited number of occupations are eligible to apply for Permanent Residence from outside of Canada without first having obtained some education or work experience in Canada. Accordingly those applicants with work experience in that list of 38 occupations are a group that still may benefit practically from an AEO if they fall short of the required 67 points for selection under the Federal Skilled Worker Program. For those individuals an Arranged Employment Opinion from SC will provide the applicant with an additional 10 selection points. This may mean the difference between a successful and an unsuccessful application at the visa office processing stage.

The AEO is alive and well in the case of family businesses that wish to support a family member abroad with a FSW application. In such a case, the fact that the arranged employment may not be fulfilled for a few years during which time the FSW application is processed is less important than assisting a family member to immigrate from abroad. However, as a practitioner you should be aware that this is an area that is open for abuse by fraud.

Religious workers that are working in Canada without a work permit, pursuant to R 186 (l), are another group who may benefit from AEO's in order to support a permanent residence application. From a strict review of the legislation, these individuals should probably not be entitled to an AEO as they are working in Canada and as can be seen in the language of R 82(2)(c), which states "the skilled worker does not intend to work in Canada before being issued a permanent resident visa and does not hold a work permit ". However, in practice I am told that many practitioners are able to get AEO's for these workers. This may have to do with the fact that Religious workers working in Canada pursuant to R. 186(l) are not issued work permits, even though they are permitted to work in Canada.

Finally, there is one last situation that may prove useful for an individual to obtain an AEO in support of a Permanent Residence application. Where an individual is in Canada pursuant to a current work permit and employment but that current employer can not guarantee indeterminate employment, an AEO would be of assistance in the individual's Permanent Residence application. However, from a reading of R 82(2)(c), which states "the skilled worker does not intend to work in Canada before being issued a permanent resident visa and does not hold a work permit ", it would seem that an individual who is working in Canada under a work permit can not get an AEO from another employer. However, this does not seem to be enforced in this manner. The manual, OP6 deals with this situation and seems to suggest that such an individual is able to obtain an AEO in this circumstance.

c. The Service Canada offices for the BC/Yukon Region

i. *Office and Personnel structure*

The BC/Yukon region is served by the Service Canada Temporary Foreign Worker Program office in Vancouver. While the region is administratively broken into 4 districts (Lower Mainland, Vancouver Island, Thompson Okanogan & Northern BC/Yukon), they are all served from a centralized office in Vancouver:

Service Canada
Employer Services
1400-300 W. Georgia St.
Vancouver, BC
V6B 6G3

Toll Free – (888) 246-7712
Local – (604) 687-7803

General Fax - (604) 666-8920

Within the Vancouver office there are approximately 45 full time staff consisting of the following:

- Clerical Staff – 6 full time clerical staff attend to creating new files received by mail/fax or by uploading from the online portal, general mail room operations, mail matching, data entry for files received by fax or mail and file distribution to the SC officers.
- Officers – Approximately 35 full time officers whose sole purpose is to assess Labour Market Opinion application files and render decisions on same.
- Team Leaders – 4 full time Team Leaders attend to officer workload management and to working with officers to ensure the decisions are being appropriately arrived at by officers. Through monitoring officers, Team Leaders are responsible to ensure that officers' decisions are within the framework as provided by Regional Business Expertise Consultants in the Region. Currently the Team Leaders in Vancouver are:
 - Michael Au;
 - Dale Gill;
 - Sogel Alavi; and
 - Beverly Bennett.

- Operations Manager – 1 full time individual, currently Kerry O’Neil, who is responsible for the operations of the Vancouver centre and the staff therein.

ii. *Statistics – Information to be provided at conference*

2. The 6 Factors in the Labour Market Opinion determination in Regulation 203(3)

a. Job Creation or retention;

(a) whether the employment of the foreign national is likely to result in direct job creation or job retention for Canadian citizens or permanent residents;

SC, in assessing an application for an LMO, may take into account the effect of the job offer to a foreign national and whether same will result in job creation or retention of Canadian jobs. This is a useful factor to consider as the creation or retention of Canadian jobs is a very powerful tool in any application. Accordingly, in assessing the position available to a foreign worker it is important to consider where, structurally, the foreign worker’s position fits into the Canadian company. In this regard, this factor will likely be present more often in positions at the O & A, and to a lesser degree B, NOC’s. In such cases, job creation or retention can consist of as little as one Canadian position. That being said, the greater the number of Canadian positions that will be created or retained, the greater the weight that will be afforded.

There are also instances where, even in the NOC C & D positions, retention or creation can result form positive opinions to NOC C & D workers. This can happen as a result of Canadian business seeking to expand to service new contracts or areas of service where an employer seeks to take on additional streams of work, but is unable to fully staff that work with Canadians. In such cases, it may be appropriate to submit to SC, by way of example, that this additional stream of work can only be successfully taken on by hiring 5 foreign workers but that as a result, new employment can be created for 25 Canadians.

b. Creation or transfer of skills and knowledge;

(b) whether the employment of the foreign national is likely to result in the creation or transfer of skills and knowledge for the benefit of Canadian citizens or permanent residents;

This factor is more difficult to quantify than others such as Wage Rate or Recruitment Efforts. That being said, if a job offer can logically result in a transfer of job skills or knowledge from the foreign worker to incumbent employees, it is useful as a secondary factor to consider.

Traditionally, this factor can be argued in support of a positive opinion in the situation where an employer can demonstrate that a foreign worker with a particular skill set is integral to the business and that hiring him or her will result in the transfer of skills to the Canadian staff or create jobs, then choosing that individual over a qualified Canadian or permanent resident may be acceptable.

As a practical consideration, if you are going to rely on transfer of skills and knowledge as a factor be prepared to provide detailed proof of training programs and to provide other evidence to show how the knowledge transfer will occur. This may have to be extremely detailed.

c. Filling a Labour Shortage

(c) whether the employment of the foreign national is likely to fill a labour shortage;

Generally this factor can be weighed in conjunction with the requirement to undertake *bona fides* recruitment efforts, as those efforts will highlight any labour shortage. The Regulations deal with this separately but in practice, officers generally consider this factor in conjunction with the requirement to undertake *bona fides* recruitment efforts.

d. Market Wages

(d) whether the wages offered to the foreign national are consistent with the prevailing wage rate for the occupation and whether the working conditions meet generally accepted Canadian standards;

This factor, along with showing appropriate recruitment efforts have been undertaken, is the most important factor to satisfy in order to succeed in a LMO application.

All LMO applications require employers to indicate the salary or wages that the foreign worker is being offered. The wages offered must be “fixed”. In this regard, a wage can be based upon an annual salary or alternatively, an hourly rate for a specified number of hours per pay period. This precludes the use of pay that is based on commission or piecemeal work. Further, if an employer wishes to use an hourly wage rate, the number of hours per pay period can not fluctuate based on an employer’s work load. Finally, associated with wages, any

benefit that is offered to Canadian employees must also be offered to the foreign worker.

In order for an LMO application to be successful, an SC Officer must review the wages that an employer offers and compare them to wages paid to Canadians and permanent residents in the same occupation and geographical area based on objective labour market information. A job offer **will not** be confirmed if an employer offers wages below rates paid to Canadians in the occupation and region where the foreign worker will be employed.

For employers with a unionized workforce market wages are generally easy to quantify, as the collective agreement sets the rate of pay. In most instances an SC officer will defer to the wage rate agreed to in the collective agreement. That being said, I have come across one situation in which a not-for-profit employer with a unionized workforce sought to fill an empty position with a foreign worker. In that situation, the wage hourly wage rate agreed to in the collective agreement was below all of the published average wage rates for that position in other not-for-profit employers in the local area. In this case, we were required to offer the foreign worker more than the other employees in that classification and to enter into a memorandum of understanding with the union to that effect.

Note that it is possible to obtain a Labour Market Opinion for an unpaid position (or positions that carry only a small stipend). In assessing the potential effect on the Canadian labour market for an unpaid position, an SC officer will consider whether:

- The position fit within their business line.
- The employer would benefit most from the employment (Primary benefits should flow to the worker rather than to the employer.).
- The employer would use unpaid foreign labour as a source of inexpensive or free labour, or to perform work that Canadian citizens and permanent residents may otherwise be paid to do.
- The position (even though unpaid) might interest Canadians or permanent residents.
- The employer tried to recruit Canadians.
- The position is a standard internship for the occupation.
- Professional or licensing bodies endorsed the placement.
- The position was subject to a competitive process.

When an employer approaches counsel for assistance with a Labour Market Opinion application, one of the first things that I am often asked is what the chances of success are. While it is always impossible to predict this with any real sense of accuracy, my first step is to ascertain whether the recruitment efforts undertaken to date are sufficient and also to ascertain whether the wage rate offered is within the prevailing wage rate. In order to do this I generally use

a number of sources. The SC directives provide an appendix listing the following sources:

- **Labour Market Information site:** <http://www.labourmarketinformation.ca/> - this site provides detailed labour market information at the local level and links to provincial and territorial labour market information web pages.
- **Job Futures:** <http://www.jobfutures.ca/> - Job Futures provides nationwide labour market information, including wages ranges. Occupations can be searched alphabetically and by NOC code. The site links to regional Job Futures sites from the following page: <http://www.jobfutures.ca/en/provincial.shtml>. The breadth and depth of information on these sites vary.
- **Sector Councils:** <http://www.councils.org> - The Alliance of Sector Councils is a coordinating body formed of some 29 sector councils. Sector councils bring together representatives from business, labour, education and other professional groups to analyze and address sector-wide human resource issues. The site has a members' directory which allows visitors to search by sector of activity, and it links to sector council Web sites. Information on the individual sector council Web sites varies.
- **Government of Canada's Sector Council Program**
http://www.hrsdc.gc.ca/eng/hip/hrp/corporate/init_sector.shtml - This site provides a link to national industry profiles. It allows searches by keyword, the Standard Industrial Classification (SIC) codes, and North American Industrial Classification System (NAICS) codes. Each profile includes human resources information including industry trends, pay levels and benefits. Data on this Web site is accurate, but not always complete.

Of the suggested sites, I find the Labour Market Information Site is not only the easiest to use as it allows you to search not only by NOC codes, but also by geographical area. Most importantly, I also find that this is the starting point for most SC Officers. Accordingly, if the employer's wage offered is not at least within the range (low to high), and preferably above the listed average, you can anticipate problems with the application.

In addition to the sites listed above, many professional bodies undertake annual salary surveys, or have access to other salary information for individuals employed in that field and can be of assistance. I have in the past contacted APEGGA for an Engineer's LMO application in Alberta and they were able to provide me with very detailed wage information based upon what area (geographically and area of practice) an Engineer was working in.

e. Recruitment Efforts

(e) whether the employer has made, or has agreed to make, reasonable efforts to hire or train Canadian citizens or permanent residents; and

In January 2009, SC replaced the old "Occupations Under Pressure" list with a national directive to ensure "minimum" levels of recruitment for Labour Market Opinion applications. The level of minimum recruitment that is required under this directive depends upon the NOC Classification of the job offer.

NOC 0 and A Occupations - Employers will have conducted the minimum advertising efforts required if they:

- Conduct similar recruitment activities consistent with the practice within the occupation (e.g., advertise on recognized Internet job sites, in journals, newsletters or national newspapers or by consulting unions or professional associations); **or**
- Advertise on the National Job Bank (or the equivalent in Saskatchewan or the Northwest Territories) for a minimum of fourteen (14) calendar days, during the three (3) months prior to applying for a LMO.

NOC B Occupations - Employers will have conducted the minimum advertising efforts required if they:

- Advertise on the National Job Bank (or the equivalent in Saskatchewan or the Northwest Territories) for a minimum of fourteen (14) calendar days, during the three (3) months prior to applying for a LMO; **and**
- Conduct similar recruitment activities consistent with the practice within the occupation (e.g., advertise on recognized Internet job sites, in journals, newsletters or national newspapers or by consulting unions or professional associations).

The advertisement must include the company operating name, business address, wage range (i.e. an accurate range of wages being offered to Canadians and permanent residents) and reference to any benefits packages being offered. The wage range must always include the prevailing wage for the position.

As you can see from the above the NOC O/A and the NOC B advertising directives are similar however the NOC B directive requires advertising in the National Job Bank and other advertising, as would be appropriate in the industry. Additionally, any advertisement for a NOC B position requires the employer to list the company's operating name, business address, wage and benefits

As with both the NOC O/A and the NOC B advertising directive, employers are "encouraged" to conduct ongoing recruitment efforts, including communities that face barriers to employment (Aboriginal Peoples, older workers, immigrants/newcomers, people with disabilities and youth).

NOC C and D Occupations - Employers will have conducted the minimum advertising efforts required if they:

- Advertise on the National Job Bank (or the equivalent in Saskatchewan or the Northwest Territories) for a minimum of fourteen (14) calendar days, during the three (3) months prior to applying for a LMO; **and**

- Conduct recruitment activities consistent with the practice in the occupation. The employer should advertise for the equivalent of 14 days, choosing one or more of the following options:
 - advertise in newspapers, e.g., a weekly ad during two-three weeks in journals, newsletters, national/regional newspapers, ethnic newspapers/newsletters or free local newspapers;
 - advertise in the community, e.g., posting ads for two-three weeks in local stores, community resource centres, churches, or local regional employment centres;
 - advertise on Internet sites e.g., posting during 14 days/two weeks on recognized Internet job sites (union, community resource centres or ethnic sites).

The advertisement must include the company operating name, business address, wage range (i.e. an accurate range of wages being offered to Canadians and permanent residents) and reference to any benefits packages being offered. The wage range must always include the prevailing wage for the position.

It is important to note that with respect to any of the advertising directives noted above, an SC Officer may require alternative or additional recruitment efforts (i.e., increased duration or broader advertisement) if, they believe that additional efforts would yield qualified Canadian citizens or permanent residents who are available to work in the occupation and region. This provides SC Officers with a wide degree of discretion to demand additional advertising. That being said, since the national minimum advertising directives were launched last January (and amended last summer), I have not had too many applications in which I have been required to advertise in addition to the minimum.

Where an employer advertises for a job and receives applications for the position, it is useful to present this information to SC in an LMO application in an organized manner. Number of applicants, whether they were interviewed, and reasons that they did not meet the requirements for the job should be provided to SC in a concise manner. Additionally, proof of advertisement should be presented in a clear manner, including ad proofs, receipts for paid advertisements, job bank screen prints (although this information is available internally to SC). Finally, it is suggested by SC that records of employer's efforts should be kept for a minimum of six years.

Exceptions to the Advertising Requirements

There are certain situations where recruitment efforts are not required. These do change from time to time, as has been threatened with the IT category, and so you should check on the SC website for specifics of each.² Examples of some of these exceptions include:

² http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/lmodir/variation.shtml

- The work requires a “specialist” familiar with the overall operation to do the work on a regular basis. The duration of the work must be limited and infrequent and there must exist no opportunity to train Canadians.
- The position offered is for an Academic.³
- The position offered is covered by the IT specialists category. This was originally a pilot project that provided a blanket LMO for 7 qualifying IT jobs.⁴ SC has been saying that this category will be replaced soon for the last two years. However there is reason to believe that this will in fact happen sooner rather than later.
- The work entails installation, inspection or repair of equipment, and the terms of the warranty require the work to be performed by skilled workers designated by the manufacturer.
- The position is for a specific occupation in the entertainment sector where a worker is often hired for a very limited number of days, in a specific location, and on very short notice (e.g., boxers, bar bands, DJ's, musicians, singers, film directors and first assistant directors for feature films and commercials, key actors, artists, film or television crew for short productions and commercials, etc.).
- The owner/operator of a Canadian business. The owner/operator must demonstrate that he is integral to the day-to-day operation of the business and will be actively involved in business processes/service delivery in Canada. In such instances, greater consideration should be given to demonstration by the applicant (owner/operator) that such temporary entry will result in the creation or retention of employment opportunities for Canadians and permanent residents and/or skills transfer to Canadians and permanent residents. Unfortunately this section has not been uniformly interpreted across all SC regions. It would seem that the BC/Yukon region takes an extremely restrictive view of this exemption to advertising.
- The employer wishes to support the immigration of a foreign worker who graduated from a recognized post-secondary Canadian institution and holds an open work permit. Although this category has largely become useless with the advent of the Canadian Experience Class and the long term post graduate open work permits now available.

³ http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/academic.shtml

⁴ http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/infotech.shtml

f. Affect on Labour Disputes

(f) whether the employment of the foreign national is likely to adversely affect the settlement of any labour dispute in progress or the employment of any person involved in the dispute.

SC rightfully notes that a labour dispute is not just limited to a strike. Rather, a variety of situations may constitute a labour dispute including: work stoppage, strikes, refusal to work, picketing, refusal to serve customers, a slowdown of work, demonstrations, withdrawal of services, strategic shutdown of premises, and lockouts. Note that SC does not seem to make a clear differentiation between a legal work stoppage and a wildcat strike for example (where a union is not in a legal position to strike having not concluded a legal strike vote). That being said, a grievance between a union and an employer does not necessarily constitute a labour dispute, since many collective agreements contain provisions that allow their members to submit grievances against their employer to the union, and to have them dealt with in arbitration.

SC states that “employers are prohibited from using foreign workers to circumvent a legal work stoppage or to influence the outcome of a labour dispute. Therefore, if the entry of a foreign worker could reasonably be expected to affect the course or the outcome of a labour dispute, a negative labour market opinion must be issued.” It is somewhat difficult to say with any certainty how employing certain foreign workers would interfere with a Labour dispute. For instance it would likely not interfere with a labour dispute to bring in a new manager who is not involved with the labour dispute whatsoever. That being said, the practical effect in my experience has been that SC is loath to issue ANY LMO’s during a labour dispute, regardless of how removed the individual position may be from the dispute itself.