

## WORKING YOUR WAY INTO CANADA

PAPER 4.1

# Loss of Employment and the Effect on Pending Permanent Residence Applications

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## **LOSS OF EMPLOYMENT AND THE EFFECT ON PENDING PERMANENT RESIDENCE APPLICATIONS**

I.	Introduction .....	1
II.	Background.....	1
III.	Canadian Experience Class .....	2
IV.	BC PNP .....	3
V.	Federal Skilled Workers .....	5
VI.	Conclusion.....	7

### **I. Introduction**

This paper seeks to address a situation that many foreign nationals now find themselves in with respect to the recent downturn in the economy. Specifically, this will attempt to address the effect of loss of Canadian employment for a foreign national, specifically with respect to the situation in which a foreign national has an application for Permanent Residence pending.

### **II. Background**

In 2008, C-50 and the Canadian Experience Class were introduced ushering in a new era with respect to Permanent Residence Application processing. Rather than foreign nationals submitting their application overseas, taking a number and waiting in line to be invited to the party, the order of those events was dramatically altered. Accordingly now, the system is inviting applicant “come on over, check us out and if you like what you see ... consider staying permanently.”

A number of positive effects flowed immediately from these changes. Foreign nationals are now able to come to Canada and to begin to establish themselves here sooner, and assuming all goes well, by the time they are Permanent Residents they are already firmly entrenched in the Canadian system. While this is made it somewhat difficult for those coming from countries that require Visas to travel here,<sup>1</sup> for individuals that that are citizens of Visa Exempt countries I believe that this has been an overwhelming success. Most importantly the time between when someone seeks to apply for Permanent Resident status in Canada and the time that they are here physically beginning their new Canadian life has been drastically reduced.

However, this shift has led to some unintended consequences when it comes to Temporary Resident - Workers in Canada and the effect of the loss of those individuals’ employment during the time in which they are applying for Permanent Status here in Canada. Below I seek to address, and hopefully

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<sup>1</sup> The paradox of setting up a system that seeks to attract Temporary Residents to apply for Permanent Residence, but not issuing visas based on the notion that they are going to stay long term is a topic that can be addressed in further depth in another forum.

offer some options on how to deal with some of the problems that arise in respect of three different application streams; Canadian Experience Class, Provincial Nominees (specific to BC) and Federal Skilled Workers.

### III. Canadian Experience Class

In considering the effects of termination or layoff for foreign nationals who are using the CEC class, there would appear to be little effect to the applicant who is applying through the CEC Stream. In essence once that applicant has legally obtained their 1950 hours qualifying Canadian work experience coupled with Canadian Studies, or alternatively the 3900 hours Canadian work experience with no Canadian educational experience, they are entitled to the program, assuming they can satisfy the other Medical/Criminal background checks. The Immigration and Refugee Protection Regulations, S.O.R./2002-227 (the “IRPR”) state:

87.1(1) For the purposes of subsection 12(2) of the Act, the Canadian experience class is prescribed as a class of persons who may become permanent residents on the basis of their experience in Canada and who intend to reside in a province other than the Province of Quebec.

#### Member of the class

(2) A foreign national is a member of the Canadian experience class if

- (a) they
  - (i) have acquired in Canada within the 24 months before the day on which their application for permanent residence is made at least 12 months of full-time work experience, or the equivalent in part-time work experience, in one or more occupations that are listed in Skill Type 0 Management Occupations or Skill Level A or B of the *National Occupational Classification* matrix, and have acquired that work experience after having obtained
    - (A) a diploma, degree or trade or apprenticeship credential issued on the completion of a program of full-time study or training of at least two years’ duration at a public, provincially recognized post-secondary educational or training institution in Canada,
    - (B) a diploma or trade or apprenticeship credential issued on the completion of a program of full-time study or training of at least two years’ duration at a private, Quebec post-secondary institution that operates under the same rules and regulations as public Quebec post-secondary institutions and that receives at least 50 per cent of its financing for its overall operations from government grants, subsidies or other assistance,
    - (C) a degree from a private, provincially recognized post-secondary educational institution in Canada issued on the completion of a program of full-time study of at least two years’ duration, or
    - (D) a graduate degree from a provincially recognized post-secondary educational institution in Canada issued on the completion of a program of full-time study of at least one year’s duration and within two years after obtaining a degree or diploma from an institution referred to in clause (A) or (C), or
  - (ii) have acquired in Canada within the 36 months before the day on which their application for permanent residence is made at least 24 months of full-time work experience, or the equivalent in part-time work experience, in one or more occupations that are listed in Skill Type 0 Management Occupations or Skill Level A or B of the *National Occupational Classification* matrix; and
- (b) they have had their proficiency assessed in the English or French language by an organization or institution designated under subsection (4), or have provided other evidence in writing of their proficiency in either language,

#### 4.1.3

and have obtained proficiencies for their abilities to speak, listen, read and write that correspond to benchmarks, as referred to in Canadian Language Benchmarks 2000 for the English language and *Niveaux de compétence linguistique canadiens 2006* for the French language, of

- (i) in the case of a foreign national who has acquired work experience in one or more occupations that are listed in Skill Type 0 Management Occupations or Skill Level A of the *National Occupational Classification* matrix,
  - (A) 7 or higher for each of those abilities, or
  - (B) 6 for any one of those abilities, 7 or higher for any other two of those abilities and 8 or higher for the remaining ability, and
- (ii) in the case of a foreign national who has acquired work experience in one or more occupations that are listed in Skill Level B of the *National Occupational Classification* matrix,
  - (A) 5 or higher for each of those abilities, or
  - (B) 4 for any one of those abilities, 5 or higher for any other two of those abilities and 6 or higher for the remaining ability.

Note that unlike the wording contained in the *IRPR* with respect to the Foreign Skilled Worker program, there is no provision to address arranged employment, nor is there any language that requires an applicant to maintain their current employment status in Canada at the time of both application and visa issuance. In fact, in this regard, it is open for an applicant to obtain their work experience or mix of work/education experience and then to return home in order to make their application under the CEC class.

In discussing this matter specifically with the Canadian Visa Office in Buffalo, they confirmed that once an individual has cleared the benchmark of work experience or school/work experience, then loss of employment does not affect their entitlement to the class. Accordingly, an individual who has obtained the required work experience under the CEC, their entitlement to the program is **not** generally reviewed again at the visa issuance stage.

That being said, while the applicant may be entitled to the Class there is a section of the Act that may act to preclude their issuance of a Permanent Resident visa at the visa issuance stage. Specifically, s. 39 of the *Immigration and Refugee Protection Act*, S.C. 2001, c.27 (the “*IRPA*”) states:

A foreign national is inadmissible for financial reasons if they are or will be unable or unwilling to support themselves or any other person who is dependent on them, and have not satisfied an officer that adequate arrangements for care and support, other than those that involve social assistance, have been made.

In essence this section *might* allow a visa officer to determine, given the fact that an applicant has lost their employment, that the individual is no longer able to financially establish themselves in Canada and therefore refuse to issue the visa. Having conducted a search to determine whether this issue has ever received judicial treatment in the context of a Canadian Experience Class application, nothing showed up. That being said, I do not believe that it is impossible to imagine such a determination made by a Visa Officer.

## IV. BC PNP

The BC PNP nominated applicant that loses their job is faced with potential pitfalls at both the Provincial and Federal level. Starting with problems at the provincial level, if an individual has been nominated in the strategic occupations category, and they lose their job they face the risk of losing their nomination which could ultimately mean that they no longer have an avenue of Permanent Residence application available to them.

#### 4.1.4

When an individual receives their nomination under the PNP, should they then lose their employment at a later date, they are requested by the PNP to inform the office of this change. This request relates not only to the individual applicant, but also to the employer. While unable to find any legal requirement to in fact inform PNP of any change in employment status, I suggest that it is in fact good practice to do so.

In my office, with respect to our files in visa offices that have been processed through strategic occupations BC PNP nomination, we are frequently seeing requests to provide an updated employment confirmation letter from the applicants employer at the stage in which we are requested to provide the applicants passport for visa issuance. In fact, for files processed through Seattle specifically we are seeing this request for an Employment confirmation letter in all cases since early fall 2008. Assuming that the employer or applicant has not informed the PNP that they have lost their job it would be fair to assume that the PNP will find out when unable to produce the employment continuation letter to the visa office. At that time, the employers continued ability to access the PNP in future would certainly be called into question. Further there is some question as to whether failure to inform would constitute a misrepresentation.

In addition to the fact that BC PNP will likely find out anyway, there are some practical efficiencies to informing BC PNP about a loss of employment of a nominated applicant. In speaking with BC PNP about the effects of the loss of employment on the nominee, I was surprised to find that the consensus was that a nomination certificate would not likely be removed, but rather there are actually some ways in which the BC PNP office may be able to assist. Specifically in cases in which you represent the applicant in such a case it would be appropriate to approach BC PNP and request an open employment letter so that the applicant would be able to obtain a new work permit for an alternate employer rather than being required to undergo a LMO application procedure, which at the time of writing was processing in approximately 8 weeks. In determining whether it would be appropriate to continue to "support" the nominee, BC PNP will consider the following circumstances:

- (1) Was the nominee terminated for cause or without cause?
- (2) How long had the nominee been working in the position/in Canada?
- (3) What are the general job prospects of the nominee and generally in that industry?

My understanding is that when an applicant who has been nominated under a BC PNP is found to be unemployed by the Visa Office, the office will contact BC PNP directly and seek instructions on whether they wish to continue to support the nomination and that this is not something in which representatives will be copied on or even be informed of. This ties in to why it may be in your clients best interest to be forthcoming to BC PNP when an applicant has lost their employment.

While this is a BC specific forum, and accordingly I have addressed how BC PNP may work in terms of loss of employment, it is important to address how the issue of loss of employment can be treated by the visa office in the case of a provincially nominated applicant, regardless of the nominating Province. It is important to start from the position that the Feds and Provinces have the ability to make agreements in which the Provinces have the right to put forth individuals that they believe will be beneficial to their province, as seen in s. 9 of the *IRPA*:

9(1) Where a province has, under a federal-provincial agreement, sole responsibility for the selection of a foreign national who intends to reside in that province as a permanent resident, the following provisions apply to that foreign national, unless the agreement provides otherwise:

However, the Feds always have the final say in issuance of the PR visa. This can be seen in the Act at subsection (a) wherein it states:

- (a) the foreign national, **unless inadmissible under this Act**, shall be granted permanent resident status if the foreign national meets the province's selection criteria;

#### 4.1.5

Accordingly, from time to time practitioners will be faced with the situation where an applicant has been nominated under the local Province's program only to be denied later in the visa process for inadmissibility. For instance it is permissible for a Visa Officer to refuse to issue a Visa to an applicant who is nominated pursuant to s. 87 of the IRPR:

- 87(1) For the purposes of subsection 12(2) of the Act, the provincial nominee class is hereby prescribed as a class of persons who may become permanent residents on the basis of their ability to become economically established in Canada.
- (2) A foreign national is a member of the provincial nominee class if
- (a) subject to subsection (5), they are named in a nomination certificate issued by the government of a province under a provincial nomination agreement between that province and the Minister; and
  - (b) they intend to reside in the province that has nominated them.
- (3) *If the fact that the foreign national is named in a certificate referred to in paragraph (2)(a) is not a sufficient indicator of whether they may become economically established in Canada and an officer has consulted the government that issued the certificate, the officer may substitute for the criteria set out in subsection (2) their evaluation of the likelihood of the ability of the foreign national to become economically established in Canada.*

In light of this language, it is interesting to review a recent decision of the Federal Court, *Wai v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 780 in which the Court upheld an Officer's decision not to issue a Visa to an applicant nominated by the MB PNP. In this case the applicant had been nominated under the Manitoba program in the "Family" stream. The individual had been unemployed for a significant period and showed little likelihood of becoming employed in the short term. In this case the visa officer decided, and the Court agreed, that there was likelihood that the individual would be able to establish himself financially and denied the visa.

The above case raises some serious questions as to whether there are varying "classes" of PNP nominations. In other words, will nominations issued under Provinces with "family" like streams (AB and MB come to mind) be treated with less deference than the traditional programs such as BC's Strategic Occupations stream? I believe that this is an area that we may see expand in the future.

## V. Federal Skilled Workers

In the fact pattern provided we are presented with a Foreign National that has been working in Canada for over a year under the Facilitated IT Workers category. Accordingly their ability to apply under the FSW is through 1 year legal employment/living in Canada. In assessing the effect of the loss of employment on this individual it is important to first determine whether the applicant requires 5 points for arranged Canadian Employment for the 67 points minimum.

If the individual does not require the arranged employment points (see s. 82 of the IRPR), the loss of employment is of no effect to the individual's Federal Skilled Worker application. The issue of whether the applicant is entitled to apply under the program will not be reviewed again. Once the CIO has made the positive decision to accept the application and refer same to the Visa Office, the decision is not able to be reviewed again.

If the individual definitely requires the arranged employment points, or if it is a close point total and there can be some question as to work experience points or education points, it is extremely important to take immediate steps to obtain the arranged employment points from alternate source as soon as possible. In this regard it is important to remember s. 77 of the IRPR, in regard to the fact that an applicant must not only meet the points threshold "at the time an application for a permanent resident visa is made as well as at the time the visa is issued."

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In the past, such an applicant may have months, and in certain visa offices years, to provide proof of alternate employment due to long processing times. However, under the new regime, Federal Skilled Worker applications have been designated priority processing once they are referred to the visa office from the CIO, the time to provide proof of alternate Arranged Employment has been greatly diminished. Specifically it is important to note Operational Bulletin 120 that puts Visa offices under strict instructions to process FSW applications within 120 days without extensions. Further it goes on to instruct that if an applicant is unable to provide necessary documentation/proof in the processing time, the Visa office is instructed to reject the application and no longer is it required to request the missing information. The effect of this Operational Bulletin is why it is so important to immediately begin seeking alternate employment for applicants that require Arranged Employment points.

Practically there are a few points to be aware of in this regard, especially considering Service Canada processing time. In a perfect world, such an applicant would be able to find an alternate employer willing, and having already attended to the background work such as local recruitment, to offer alternate employment. Even in such a perfect case, the applicant would be facing 8 weeks processing time at Service Canada for a new LMO based on current processing times.

In discussing this situation with Service Canada, they describe such an individual as “out of status.” This is obviously confusing from a practitioner’s point of view as they are not out of status in the classic sense. Rather they are unable to work under their current work authorization; however their status in Canada as a Temporary resident is not extinguished. Regardless, in such a situation Service Canada has confirmed that it would be appropriate to request urgent processing for an applicant. I would suggest counsel use the Service Canada terminology of “Out of Status” on correspondence requesting urgent processing. In such a case, and assuming that the proper recruitment efforts had taken place, a positive Labour Market Opinion could be issued within approximately 48 hours.

While it is not directly related to the topic of this paper, that being the effect of the application at the Visa Office stage, obviously it is important to remember that once the applicant has the new LMO they must obtain a new work authorization in order to actually begin their new employment. Remember that there are options for obtaining a new work permit faster than the current processing time (over 80 days at publishing). Specifically, if the applicant is from a country that does not require a visa, they are able to flagpole at the US border. Alternatively one can apply to CPC Vegreville’s new employer unit for a drastically reduced processing time.

In some cases applicants will not be able to obtain alternate arranged employment within the new processing times. In such a case, it would be appropriate to inform the Visa post of the loss of employment and to request positive substituted evaluation<sup>2</sup> under s. 76(3) of the IRPR. This section reads:

76(3) Whether or not the skilled worker has been awarded the minimum number of required points referred to in subsection (2), *an officer may substitute for the criteria set out in paragraph (1)(a) their evaluation of the likelihood of the ability of the skilled worker to become economically established in Canada if the number of points awarded is not a sufficient indicator of whether the skilled worker may become economically established in Canada.*

Such a case may present itself where the applicant has substantial savings and is able to prove an ability to establish oneself without continued employment. However, as a practical point, if you are going to request positive substitution of evaluation under this section, it is extremely important to provide any substantiating documentation with your request. This is particularly crucial now given, as stated above, OB 120 imposes strict timelines on visa offices. Accordingly, it is imperative that counsel

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2 See *Choi v. Canada (Minister of Citizenship and Immigration)*, [2008] F.C.J. No. 734 for discussion on positive substituted evaluation. For a troubling decision resulting in negative substituted evaluation, see *Roohi v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 1408.

#### 4.1.7

provides supporting documentation at the time positive substituted evaluation is requested as it is unlikely that the timelines imposed will allow a visa officer to come back to counsel with a request for supporting documentation.

Finally, in discussing this topic with other practitioners, it was suggested that if the individual found themselves having qualified under an alternate stream such as CEC, that it would be appropriate to request that the current FSW stream application be processed under the alternate stream. In discussing this possibility with Program Manager in Buffalo, I was informed that this would not be possible, but rather that the applicant could withdraw the FSW application and reapply under CEC.

## **VI. Conclusion**

With the change in the nature of Immigration programs in Canada, specifically with respect to the fact that processing times are drastically shorter due to the change in the nature of the application streams, counsel must react swiftly and decisively when their clients lose their Canadian employment. In some cases the loss of employment will have no effect on their clients' applications, however in some it will detrimentally affect their ability to process through to permanent residence and in other cases there will be alternate measures that can be taken, but must be done so with speed and efficiency.

