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(Special Edition)

#00-S8

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The Vancouver Centre is funded by grants from the Social Sciences and Humanities Research Council of Canada, Citizenship & Immigration Canada, Simon Fraser University, the University of British Columbia and the University of Victoria. We also wish to acknowledge the financial support of the Metropolis partner agencies:

- Health Canada
- Human Resources Development Canada
- Department of Canadian Heritage
- Department of the Solicitor General of Canada
- Status of Women Canada
- Canada Mortgage and Housing Corporation
- Correctional Service of Canada
- Immigration & Refugee Board

Views expressed in this manuscript are those of the author(s) alone. For more information contact the Co-Directors of the Centre, Dr. Don DeVoretz, Department of Economics, SFU (e-mail: devoretz@sfu.ca) or Dr. David Ley, Department of Geography, UBC (e-mail: davidley@unixg.ubc.ca).

Canada's Temporary Foreign Worker Program: A New Design*

by

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* The views expressed in this paper are those of the authors and in no way represent the views of the Departments of Citizenship and Immigration Canada or Human Resources Development Canada, or the Government of Canada.

This paper was prepared for the Fourth International Metropolis Conference held in Washington, D.C., December 8 – 11, 1999, and presented at a workshop entitled *Trade Agreements and Migration*, organized by Don DeVoretz, Co-Director, Centre for Excellence: Immigration, Simon Fraser University, British Columbia. Copyediting services were provided S. Sydney Preston, Copy Editor for RIIM at Simon Fraser University.

Abstract: This paper reviews the evolution of the knowledge-based economy and with it the growth in the movement of foreign workers who often fill critical skill shortages, thus maintaining or enhancing a country's productivity. This increased movement of workers, both high and low skilled, presents challenges in terms of international trade agreements and a country's ability to manage the entry of foreign workers. The paper discusses the advantages and disadvantages of enshrining commitments on the movement of persons in international trade agreements, and how Canada's temporary foreign worker program can accommodate and facilitate the entry of needed foreign workers.

Key Words: foreign workers, foreign worker programs, international trade, temporary workers, trade agreements

Introduction

Canada's *Immigration Act and Regulations*, 1978, require anyone not a Canadian citizen or permanent resident to obtain an employment authorization (EA) if he or she intends to take part in employment activity while in Canada. This requirement was introduced at a time when countries with developed economies expected to meet all of their skilled labour needs from within their domestic labour markets. Job opportunities within the country were to be "protected" by government for citizens or permanent residents who were seeking employment. This protection typically took the form of some sort of labour market "testing" of the job the foreign worker sought to perform. A government officer formed an opinion as to whether there were qualified domestic job-seekers available to do the job, and ensured that the job offer included wages and working conditions appropriate within the context of that nation's labour market. In Canada, this test is known as "validation," and is performed by staff of Human Resources Development Canada (HRDC). The HRDC validation is conveyed to an immigration officer with Citizenship and Immigration Canada (CIC), responsible for issuing the EA.

The late 1970s were also a time when economic growth was still considered to be driven by traditional factors: resources, capital, hard technologies. It was only with the globalization of the economy in the 1980s, and the dominance of computerization and information technology as the modern means of production, that it became apparent that future economic growth would become increasingly dependent on the intelligence, education and skills of key workers (the so-called "knowledge economy" of Peter Drucker). With the rapid emergence of new competencies, companies in leading-edge sectors found it increasingly difficult to find all of the key knowledge workers they required from within the domestic labour market, and pressures emerged for the rules regarding the entry of foreign workers to be less restrictive and more facilitative. Trade agreements, which aimed to support economic growth through the liberalization of the movement of goods and capital, also began to address the movement of people, particularly service providers, skilled professionals and managers/executives. Globalization and increased competition for highly skilled workers has

led to a convergence between domestic labour market policies and international trade policies. In some cases, this has necessitated considerable economic restructuring and a shift in mindset.

For example, the international movement of persons raises issues of health, security, and human rights that trade officials do not need to consider when dealing with goods. The validation test, which positions the HRDC officer as the “guardian” of the Canadian worker, leads to the officer exercising great caution in deciding to grant a validation, even though in the majority of cases the validation is eventually granted. We know, however, from extensive consultations with Canadian employers and sectoral organizations, that the recruitment of key skilled workers takes place within a highly competitive environment, and that these key workers are essential to taking advantage of business opportunities that are often time-sensitive. Delays in securing an employment authorization result in the loss of business opportunities, thus limiting the growth of the Canadian economy in strategic sectors.

In its recent Speech from the Throne, the Canadian government committed itself to “secur[ing] Canada’s leadership in the knowledge-based economy,” recognizing that:

[I]n the global, knowledge-based economy, the advantage goes to countries that are innovative, have high levels of productivity, quickly adopt the latest technology, invest in skills development for their citizens, and seek out new opportunities around the world.

The Prime Minister picked up on this theme in his response to the speech when he said: “We have to think globally. We have to brand Canada, at home and abroad, as a dynamic and skilled knowledge-based economy. And we must do these things faster than our global competitors – because speed wins!”

The Finance Minister contributed his own vision of the new economy in a November 2, 1999 presentation to the Standing Committee on Finance when he said:

Just as new areas of enterprise are being invented, so too are the staples of Canada’s 20th century industrial base being remade in the image of a new high-tech, value-added global economy. It is an economy where ideas are shared instantaneously. It is an economy where technological

innovation and intense competition are reshaping the marketplace and the rules that run it. It is an economy where challenge is as likely to come from the other side of the world as from the other side of town.

So, the commitment of the Canadian government to supporting its businesses in responding to globalization and the knowledge-dependence of the modern economy is clear.

It is unrealistic to set a goal of skills self-sufficiency in a rapidly changing economy such as Canada's. A similar conclusion was reached by the Australian Government in its 1995 "Report by the Committee of Inquiry into the Temporary Entry of Business People and Highly Skilled Specialists," commonly referred to as the "Roach Report." As was succinctly stated on page 2 of that report:

A country of Australia's size cannot expect to be completely self-sufficient at the leading edge of all skills in the area of key business personnel. When the world trade in services is based on different countries developing specified skills in different areas, it is not realistic for Australia to attempt to develop specialized skills in all areas.

While there are significant differences between the Australian and Canadian economies, this statement is generally applicable to Canada as well.

Although discussions regarding temporary foreign workers are generally framed in terms of highly skilled workers, the movement of temporary workers into Canada has always involved significant numbers of low-skilled workers as well. Any policy that would have the result of facilitating the recruitment of unskilled or semi-skilled workers into Canada from abroad, or of otherwise putting inappropriate downward pressure on Canadian wages and working conditions, would be unacceptable in our country with its relatively high levels of unemployment (as Canada has within a G-8 perspective).

The policy challenge, then, is to respond to the need for the facilitated movement of key workers while still maintaining the capacity to effectively manage the domestic labour market. Canada is attempting to address this challenge both through trade agreements with key economic partners and through a redesign of its Temporary Foreign Worker program.

International Trade Agreements and Foreign Workers

Under trade agreements to which Canada is a party (e.g. NAFTA, GATS), Canada has set aside the labour market test for certain categories of workers. In these specifically defined cases, the positive impacts of facilitating entry of temporary workers are seen as outweighing any negative impact(s) on the labour market. For example, the intra-company transferee category allows for facilitated entry of high-level workers such as managers. There are clearly positive benefits for these companies when their managers gain experience by working in another country, and benefits for domestic workers who may gain new knowledge and skills. As well, these companies are able to ensure that key workers have company-specific skills and knowledge that are often crucial to effective performance.

It is recognized that facilitated entry through trade agreements benefits businesses that operate around the globe with a high-skill workforce. This trend toward international migration of high-skill workers is becoming an increasingly important ingredient for a firm's competitiveness.

While facilitated entry under trade agreements carries benefits such as job creation and skill transfer to Canadians, it is not clear whether trade agreements are the best place to enshrine commitments on the movement of persons in all circumstances. From a labour market perspective, concerns arise about the potential loss of control over the national labour market that may result from liberalization. Labour market testing does allow regulators to control and monitor entrants to the labour market, safeguarding job opportunities, Canadian wage rates and working conditions. Removing any form of test can put Canadian jobs and labour standards at risk.

An additional concern relates to the permanence of commitments made under trade agreements. Because there are no sunset provisions in trade agreements, once liberalization is extended in a particular area(s), there is no way to remove a commitment from the agreement. The risk to the labour market is even greater when these commitments extend to cover even relatively low-skilled workers, as there is no easy mechanism to "turn off" an unforeseen movement of workers that threatens to undermine wages and working conditions.

In some respects, Canada's redesigned program for temporary workers allows for more flexibility than commitments made under current trade agreements. For example, under the Temporary Foreign Worker program: i) entry is not restricted by occupation; ii) duration of stay of the foreign worker varies according to firm needs; and iii) changes in occupation, number of workers and duration of stay can be made quickly, unlike commitments made in trade agreements.

Facilitating the temporary movement of workers via trade liberalization agreements implies that certain segments of the global labour market are deserving of different treatment than the rest, and that this treatment should be enshrined in relatively inflexible documents. Both of these concepts run counterintuitive to our concept of the modern labour market as an extremely dynamic and unpredictable entity. As Canada continues to expand the scope of its international trade agreements, care must be taken to monitor labour market effects such as the displacement of Canadian workers, the impact on wage rates and labour standards, and the absorptive capacity of the labour market. The economic benefits of facilitated entry provided under trade agreements must clearly outweigh any negative impacts.

Canada's Temporary Foreign Worker Program Redesign

To overcome the "Canadians first" emphasis of the 1978 Regulations, international trade agreements, notably the North American Free Trade Agreement (NAFTA) and the General Agreement on Trade in Services (GATS), have been effective at facilitating the movement of many workers (in 1998, almost 17,000 EAs were issued by Canada under the terms of these two agreements). As well, numerous small, specific exemptions to the general practices have been instituted. But for workers from countries not covered by an agreement, or workers falling outside of the definitions included in these agreements, the traditional labour market validation remains a prerequisite for the issuance of an EA. Thus, it was decided early on that Canada's TFW program needed to be made more facilitative not through the introduction of additional exemptions, but through a new program design with a fundamentally different approach.

HRDC and CIC program staff, working together, concluded that a new TFW program design must recognize the employer as a client, accept the legitimacy of foreign workers as part of a responsible human resource plan, and commit to providing service at a speed that will support the Canadian employer's efforts to operate effectively within the competitive global labour market. After an extensive consultation process with internal and external stakeholders, a detailed policy design has been finalized and approved by the Federal Cabinet. The main elements of this new design are as follows:

1. The Test of Net Economic Benefit

The two main complaints of the employer community about the current validation procedure are that:

- their obligation to make “reasonable efforts” to fill the job with a Canadian is unclear and varies from case to case; and
- the process fails to take into consideration the potentially positive outcomes of hiring a foreign worker.

Under the new TFW program design, the basis for the decision to issue an EA is the test of “net economic benefit” (NEB). While a detailed operational description of the NEB has not yet been completed, it is essentially composed of three elements:

1. One begins with the proposition that the fact that the employer has found it necessary to look outside the domestic labour market to fill a job opening in itself constitutes initial evidence that a need exists. This proposition can be refuted by the HRDC officer based on his or her knowledge of the labour market, but the onus no longer rests on the employer to establish the need. As Barbara Jordan, the Chair of the United States Commission on Immigration Reform once said, “[T]he [labour certification] system should be based on market forces. If an employer is willing to pay a premium to hire a foreign worker, that is the best evidence that the worker is needed”;
2. Then, the potential positive impacts of admitting the worker to perform the job offered are considered. Among the impacts that can lead to economic development and growth are:

- Retention or creation of permanent jobs;
 - Investment in infrastructure, or capital infusion;
 - Skills transfer, or other enhancement of human capital;
3. Then, the likelihood of these positive impacts being realized are balanced against the potential of negative impacts, i.e. those impacts that are currently considered under the validation test:
- Likelihood of displacement of Canadian job-seekers;
 - Possible downward pressure on Canadian wages and working conditions;
 - Possible interference with a labour dispute.

Thus, the Net Economic Benefit test addresses the concerns of employers while continuing to take into account the current criteria's concerns regarding possible negative impact on the domestic labour market. The NEB test clearly favours high-skilled over low-skilled workers, as the lower the skill level of the job in question, the less significant the positive impacts are likely to be, and the more likely that negative impacts will be realized.

2. Improved Service to Employers

For large employers with needs for a significant number of temporary foreign workers, or for employers in sectors where explosive growth means acute or persistent shortages of key skilled workers, the practice of having the labour market impact of each worker sought assessed individually can be frustrating. Under the new TFW program design, HRDC can negotiate agreements with employers or sectoral organizations that will apply to a large number of workers.

a) Employer Agreements

There may be situations where an employer knows that the business is going to require a substantial number of foreign workers (e.g. due to plans for expansion or the introduction of a new product line). There might also be situations where an HRDC counselor notices a significant number of validation requests coming from one employer. Rather than address each request for a foreign worker individually, the employer might choose to approach HRDC, or

the counselor might decide to contact the employer, to discuss these needs comprehensively in the context of the employer's business plan and the skills profile of the domestic labour market.

The HRDC foreign worker officer will consider the requests for foreign workers as they relate to opportunities that will be created for Canadian workers, for skills transfers and other training opportunities, and for the net economic benefit and growth that will result. The foreign worker officer can also consider whether the firm is relying on foreign workers unduly (e.g. demonstrating a long-term reliance on foreign workers as a primary source of new hires, or employing foreign workers at wages that are unacceptably low by Canadian standards). If the officer concludes that the firm's plans will result in a net economic benefit to Canada, he or she will validate, as a block, the job offers for which the employer intends to use foreign workers. This validation will be evidenced by a written agreement between HRDC and the employer. The written agreement will set out both the jobs validated and the employer's undertakings relating to training and career development for staff and Canadian job seekers. Examples of employers' undertakings would include:

- training for staff;
- creation of new positions that can be staffed by Canadians;
- developing a new training course (say, with a Community College) to address the skill shortage that necessitated the hiring of the foreign worker(s)

Future utilization by the employer of the TFW program will take into account HRDC's experience with the firm and its compliance with prior agreements.

b) Sectoral Agreements

There might be situations where a number of employers in an industrial sector face the same skills shortages due to growth in that sector, demographic factors, or the introduction of a new technology. In cases where there are a small number of large employers dominating a sector, this situation might best be addressed by a series of firm-specific agreements or a multi-firm agreement. There may, however, be other cases where the affected sector is dominated by many small firms, where due to the number of firms or the lack of administrative

capacity within each firm, the process of putting in place firm-specific agreements would be impractical. In this case, the preferred response might be to make agreements with key employers and/or other suitable representatives who can speak on behalf of the entire sector.

Sectoral representatives will typically initiate the process by approaching foreign worker officers to seek consideration under an agreement. An agreement could address a sector on a national basis, but it could just as easily be limited to a specific geographic region where limited mobility within an occupational labour market makes such limitation appropriate.

c) Occupations List

An Occupations List would be used in situations where there is a shortage in a certain occupation that cuts across sectors and firms as well as geographic regions. The list would be developed in consultation with industry, provinces and other relevant partners and could be limited to a specific geographic region. Occupations would be placed on the list in such a way that the balance between facilitation and employment opportunities for Canadians is maintained. All occupations on the list would be subject to a sunset provision.

Improvements to program design cannot by themselves address all elements of a functionally efficient TFW program. Information, and immediate communication of that information, are the foundations upon which the program can servicing legitimate employer requests at the speed required to allow them to compete effectively, while continuing to provide appropriate protection against fraudulent employers and downward pressures on the Canadian wage structure.

3. Pilot Projects

The TFW program redesign was also informed through the testing of innovative approaches/pilot projects. For example, the software development workers pilot project, introduced in May 1997, expedites the process for workers in certain software development occupations by allowing EAs to be issued for job offers fitting within generic job descriptions deemed by HRDC labour market economists to be in severe shortage across the country.

Using this national labour market opinion, employers are no longer required to make their own case that workers with these skill sets are in demand, and that employment opportunities for Canadians will not be adversely affected. HRDC officials no longer need to conduct a case-by-case review of each job offer. An external evaluation of the pilot revealed a positive impact on user firms and no downward pressure on wages. Our next step is to re-evaluate the continued need for key software workers and to transform the process into an approach that fits with the redesign, such as a sectoral agreement.

The spousal pilot that was begun in October 1998 is designed to assess the impact on the labour market of allowing spouses of highly skilled workers to work in Canada without labour market testing. Most countries, including the U.S., do not extend the right to work to spouses by virtue of being a spouse (but do allow spouses to qualify for work in their own right). An independent evaluation of the pilot will assist us in determining whether spousal employment rights constitute a competitive advantage and whether it should become a permanent feature of the temporary foreign worker program.

Challenges to Successful Implementation

1. Effectiveness

Canada's departments of CIC and HRDC are currently working closely with their TFW program officers and managers to ensure that the new approach is implemented effectively. The NAFTA and the GATS allow eligible workers to apply for EAs at a Port of Entry, and the job offers are not subject to labour market testing. As such, these agreements are efficient, but inflexible. The new TFW program still requires a labour market test in most cases, and many workers still must apply at Missions abroad.

Canada is confident that, through the introduction of the NEB test, the use of tools that support multi-case validation and with enhanced communication between CIC and HRDC, we can maintain the flexibility to manage the program and respond to changes in the global labour market and employer's needs, while operating at a pace that will meet employers' demands. The economic benefits that key foreign workers can bring to Canada are

only realized when employers' recruitment efforts are not thwarted by overly slow decision-making processes.

CIC and HRDC are confident that with proper client education, staff training, and improved communication and data capture systems, the new TFW program will succeed at combining flexibility, quality decision-making, and efficiency.

2. Low-skilled Workers and International Trade Negotiations

There are pressures from developing countries for better access to the labour markets of developed countries for their low-skilled workers. This growing pressure challenges Canada and other developed countries to consider what is an appropriate balance between the social merits of opening their labour markets in this way, and the downward pressure on domestic wage rates (and ultimately employment rates) for low-skilled domestic workers that can result from such liberalized entry. Low-skilled workers tend to have less labour market mobility than highly skilled workers do because their skill sets are less transferable across various occupations. Once displaced, they will likely have a more difficult time finding new work. Low-skilled foreign workers are more likely to compete with unemployed Canadian workers for "entry-level" job opportunities. While Canada believes greater liberalization is a worthy and worthwhile goal, a totally borderless labour market is not yet a realistic or desirable objective.

Thus far, Canada has managed the low-skill movement through a highly regulated program for the temporary entry of low-skill agricultural workers. Seasonal agricultural worker programs permit the entry into Canada of low-skill agricultural workers during peak periods of planting and harvesting when the supply of Canadian workers is not sufficient. Under the GATS, Canada has an exemption from Most Favoured Nation treatment for its seasonal agricultural worker programs.

The temporary foreign worker program, although designed principally to expedite the entry of highly skilled workers, can also accommodate certain low-skill occupations in demand in Canada. We believe this can best be done on a managed (rather than generic) basis, through government-to-government negotiations involving all of the relevant stakeholders.

The seasonal agricultural worker programs mentioned above are the best examples of this approach.

Conclusion

Canada is committed to removing bureaucratic blockages to the recruitment and entry of needed temporary foreign workers. At the same time, we also remain committed to maintaining the capacity to manage the entry of foreign workers into Canada so that the interests of the Canadian labour force are not undermined. We believe the new TFW program design, complimented by Canada's continuing participation in international trade agreements, achieves both these goals. TFW program changes should result in decisions that are more consistent and predictable for employers, while providing the officers with the flexibility they need to make sensible decisions and to deliver these decisions on a timely basis.

Canada has spent much of the last decade reviewing its values and priorities and restructuring its programs and organizations to adapt to a knowledge-based economy. Trade agreements have had a significant impact on liberalizing the movement of goods and services. This next round of WTO/GATS negotiations promises increased liberalization and still more adaptation.

Further liberalization will have to take account of existing programs and commitments, as well as the government's broader trade objectives, to ensure that Canada benefits from its temporary foreign worker policies. In the meantime, we believe the redesigned temporary foreign worker program is flexible enough to respond to the needs of a rapidly changing economy and to efficiently accommodate employer requests for workers with critical skills who do not fall under existing trade agreements.

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