

Response to proposed changes to rules for Intra-Company Transfers

Introduction

The signatory organizations to this document welcome the opportunity to offer our comments regarding the recently proposed changes to the rules governing intra-company transfers into Canada. Our respective organizations represent hundreds of employers from across Canada that regularly transfer employees within their companies.

Intra-company transfers (ICTs) are an important source of global talent for Canadian companies that have international operations and affiliates. ICTs contribute enormous value to Canada's economy. ICTs manage companies, create employment opportunities for Canadians and grow markets; they improve operational efficiencies and productivity and they impart a tremendous amount global knowledge and skills into the Canadian workforce. Canada is fortunate to have access to these highly skilled workers.

From surveys of Canadian businesses conducted by the Canadian Employee Relocation Council (CERC) about intra-company transfers, we are able to ascertain that the main reasons for ICTs are related to business development, special projects and career development. Government programs must facilitate the efficient and predictable movement of these key personnel.

According to industry survey data, international relocations are complex and they are expensive. In CERC's 2013 survey of Canadian business, an international move has an average cost of \$120,000. This is before tax equalization and repatriation costs are considered. Canadian companies do look to hire Canadian workers first, and will only resort to expensive foreign worker programs as a measure of last resort. There is simply no evidence to suggest that employers are using ICTs as a cheap alternative to hiring Canadian workers.

In our view the changes to ICTs as proposed by Citizenship and Immigration Canada (CIC) are unnecessary and ill conceived. The changes will significantly disrupt business planning and career development in many organizations. In addition, the changes convey a negative message to our trading partners that Canada does not live up to its international trading agreements covering the temporary entry of workers.

While the proposals may be part of the government's broader efforts to minimize the potential for abuse in the temporary foreign worker program, in the long term the proposals will severely damage the Canadian economy. From data provided by CIC, ICTs account for less than five per cent of the workers admitted under the temporary foreign worker program.

As detailed in the background paper developed by CIC, Canada allows the entry of foreign qualified ICTs by international enterprises for purposes of improving management effectiveness, expanding Canadian exports, and enhancing the competitiveness of Canadian enterprises in overseas markets. Canada also undertakes ICT commitments through its international trade agreements such as in the NAFTA and GATS. Since Canadian organizations are operating in global markets, adherence to these principles of mobility is critical. As noted above, not honouring commitments under our international agreements may have serious implications for Canada and for organizations that transfer Canadian expertise to international locations.

Businesses today rely on ICTs in order to develop enterprise wide expertise, to create centres of leadership excellence and strengthen global talent pools. Creating roadblocks for the expedient entry of these workers will only impede Canadian businesses from developing a truly global workforce, leading to a reduction in skilled jobs in Canada, decreased productivity, and constrained growth in the very skills our economy desperately needs to compete on the global stage.

Canada's skills challenges will only grow in scope and complexity. A report published by McKinsey Global Institute in 2012 predicts a global shortage of 40 million high skilled workers by 2020; 18 million of that shortage will fall in North America, including Canada. In that same report it is noted that foreign born workers accounted for 40% labour force growth in advanced economies. If Canada is to stay in front of the global competition for skills we must have world class systems that support mobility of those skilled workers.

Canada is already facing a skills gap across many industries and regions today, which are costing the Canadian economy billions of dollars in lost opportunities and productivity. Many of those skills gaps are particularly acute in industries requiring science, technology, engineering and mathematics skills.

This skills gap has been reported on recently by many of Canada's leading research bodies, including the Conference Board of Canada which, in a 2013 report, concludes the skills gap is costing Ontario's economy up to \$24 billion annually. According to a report published by CIBC World Markets, the largest skills shortages are in health care, the mining industry, advanced manufacturing and business services - sectors that are enjoying the some of the highest wage increases and lowest unemployment rates in Canada. These are the very skills that describe many of today's ICTs, and the skills Canada needs to compete.

Looking ahead, federal government data predicts there will continue to be shortages in specific industries. According to a report by the Canadian Occupational Projection System, most occupations affected will be in management, health care and business services.

An additional challenge for Canadian companies is the inherent difficulty of internal mobility in Canada. As noted in the 2012 CERC Mobility Survey, conducted by Ipsos Public Research, just two in ten Canadians are likely to accept relocation to another city in Canada for the purposes of employment.

The recent changes to the Temporary Foreign Worker Program (TFWP) along with suspension of the Accelerated Labour Market Opinion (ALMO) process have now made it extremely difficult, time consuming and costly to business to acquire the skills needed for mission critical projects. These recent program changes, together with the potential changes to ICT rules, are out of step with the efforts of other government departments, such as International Trade, that are negotiating ambitious agreements and treaties with other countries to provide for more open movement of business persons. If Canada restricts movement of ICTs into Canada, it can be fully expected our trading partners will implement similar limits, negatively impacting Canadian organizations that are building international markets and developing a global workforce.

The proposed changes to the ICT category, combined with costly delays and uncertainty (employers now have to wait an average of 12-14 weeks for decisions relating to Labour Market Opinion applications) may force companies to consider other alternatives to intra-company transfers, with the potential to move key business development and high value add jobs outside of Canada. This is particularly acute in the Information Technology industry where unemployment rates are hovering at two percent.

Implementation of these measures will remove the very tools businesses need to operate, tools that not only deliver efficiency and certainty, but ultimately productivity. The rules around ICTs must be flexible and accommodating to the rapid change and increasing demands that business face in the global marketplace.

Detailed Comments

Following are our detailed comments in response to the CIC background paper on the proposed changes to ICTs. Business comments are *noted in italics*.

Current Provisions for ICTs

Key requirements that CIC considers in assessing ICT applications include:

- Relationship between the Canadian and foreign employer
 - The Canadian and foreign enterprises must be legal entities that have a parent, subsidiary, branch or affiliate business relationship.
 - Both the Canadian and foreign companies must be, or will be doing business (i.e. regularly, systematically, and continuously providing goods and/or services by a parent, branch, subsidiary, or affiliate in Canada and the foreign country).
 - ***Business response:*** *Agree with this requirement*

- Relationship between the employer and temporary foreign worker
 - An employer-employee relationship must exist with the Canadian entity to which they are being transferred. The essential element in determining this relationship is the right of the employer to order and control the employee in the performance of their work.
 - ***Business response:*** *Agree with this requirement*

- Transferring to a position in an executive, senior managerial, or specialized knowledge capacity
 - Must have worked continuously outside Canada (full-time, not accumulated part-time) for at least one year within the previous three years in a similar position for the company that plans to transfer them to Canada.
 - ***Business response:*** *While we agree in general terms with this provision, it may not be the most practical solution. Given the global shortage of key personnel it is common practice for many companies today to hire skilled workers and executive level staff from other 'competing' organizations, particularly on a global level. A more practical solution may be to ensure that the employee is currently employed by the company transferring them to Canada. Further clarity of this may solution can be found in the provisions of NAFTA Chapter 16 as follows:*

“Section C - Intra-Company Transferees

1. Each Party shall grant temporary entry and provide confirming documentation to a business person employed by an enterprise who seeks to render services to that enterprise or a subsidiary or affiliate thereof, in a capacity that is managerial, executive or involves specialized knowledge, provided that the business person otherwise complies with existing immigration measures applicable to temporary entry. A Party may require the business person to have been employed continuously by the enterprise for one year within the three-year period immediately preceding the date of the application for admission.” (Emphasis added)

Specialized Knowledge Workers

Specialized knowledge is unusual and different from that generally found in a particular industry. The knowledge need not be proprietary or unique, but it should be uncommon:

Business response: *The individual company is in the best position to determine specialized knowledge. This should be the starting point in the determination, particularly if the employer is a participant in a Trusted Employer Program for ICTs, (as proposed later in this submission).*

- Some characteristics of a worker who has specialized knowledge are:
 - critical to the well-being of the enterprise; **Business response:** *Agreed*
 - uniquely qualified to contribute to the Canadian employer's knowledge of foreign operating conditions; **Business response:** *Agreed*
 - valuable to the employer's competitiveness in the market place; **Business response:** *Agreed*
 - a former key employee abroad in significant assignments which have enhanced the employer's productivity, competitiveness, image, or financial position. **Business response:** *Agreed*

In addition we are of the view that additional contemporary characteristics could also include:

 - *key employee to developing global competencies of the employer's overall workforce;*
 - *vital knowledge / leadership brought into the Canadian employer.*

- Characteristics of specialized knowledge include:
 - business process or method operation that is unusual; **Business response:** *Agreed*
 - not generally available and of complexity that is not easily transferable; **Business response:** *Agreed*
 - gained through extensive prior experience with the employer. (**Business response:** *this provision should be expanded to include "similar employer in the same or similar area of business operations")*

Other elements used in assessment of specialized knowledge include:

- Occupation - what level is the position's National Occupational Classification (NOC)?
Business response: *The National Occupational Classification is one tool but it often lags developments in business and new occupations and therefore is not always a reliable tool. Consider advances in technology and mobile computing that are regularly creating new occupations.*
- Education - is a diploma or degree required for the position sought?
Business response: *This is not always the best indicator of specialized knowledge particularly today where technology skills are in great demand. In addition, although the individual may have a degree it may be totally unrelated to occupation for which entry is being sought.*
- Experience - how many years of experience does the TFW have with the foreign company? how many years of experience does the TFW have in the industry?
Business response: *Years of experience are not always the most appropriate proxy in determining specialized knowledge, particularly in new industries (examples...cloud computing / three dimensional printing), and rapidly changing industries such as health care research and pharmaceutical industries, and mobile technology.*
- Salary - does the TFW's salary – when considered along with years of experience – support the claim?

Business response: Salary could be one proxy, but not on its own. Other factors must be considered, and it should reside with the employer to determine level of specialized knowledge for ICTs

- Training - what level of training is needed for a position that requires specialized knowledge?

Business response: Training would likely be in the context of the organization / and or the Canadian marketplace.

- Supporting documentation - documents to prove the claim of specialized knowledge: an outline of why specialized knowledge applies, a resumé, reference letters or letters of support from the company.

Business response: Agreed

Following are comments in regard to the ‘potential changes under consideration’ as outlined by CIC

1. **Wage indicator** – the average Canadian wage for the occupation/location is currently used as a significant indicator of specialized knowledge. Options could include increasing the wage or creating a minimum salary level regardless of category to reflect the positions of executive/senior manager/specialized knowledge.

Business response: If a minimum salary level is to be created, industry specific information / data should be relied upon as a determinant. In many industries extensive salary surveys are conducted to determine competitive wage rates. These surveys are far more accurate and reliable than data gathered and aggregated by Service Canada.

Establishing minimum wages is problematic for many industries as there are so many elements that determine the appropriate compensation for a given role within a profession including an individual’s skill and experience. As an alternative to this proposal, companies could be asked to confirm adherence to an industry wage standard and that ICTs fall within those ranges, based on levels of skill and experience. Creating artificial minimums may result in companies being forced to pay a premium for ICTs compared to Canadian workers, which disrupts domestic wage levels.

2. **Experience** – in reference to both “related” (job specific) and/or company experience, potential to reference a minimum number of years of related work (e.g. 5 years) or company experience (e.g. 3 years) as an indicator for consideration in the determination of specialized knowledge.

Business response: Within professional occupations, engineering for example, industry experience would be a good proxy. Company experience may be appropriate, but not in all cases and will often vary by industry.

There is a variety of proprietary, company specific expertise and knowledge that can be garnered in a 12 month period. Limiting organizations that want to utilize best practice or developments on a certain technology from bringing that expertise to Canada, without achieving the 3 or 5 year threshold as proposed, will ultimately limit the job market for Canadians.

The concern with experience is how ‘related’ work/ experience can be objectively evaluated. Skills and knowledge for the ‘hot skills’ and those in high demand tend to move very quickly. And, for many industries such as IT and mobile communications, having 5 years company experience or 3 years in a company is a very long time.

While we appreciate that length of service can generally be a good indicator of specialization, the pace of innovation in the information technology sector is greater than in many other industries and, as a result, specialized experience with certain new technologies can only be acquired in a much shorter timeframe. Put another way, someone may have specialized experience with new technology that didn't exist a year or two ago.

Similarly, if a new technology has only emerged in the past year or two, there will likely and logically only be a finite number of individuals who will have specialized experience with that technology. Moreover, in some cases they may only have been hired by their company within that timeframe. Consequently, the length of their employment with their current employer may not be an accurate measure of the degree of specialization with the technology in question.

A much more practical would be for the employer to determine the requisite experience for the position.

- 3. Extent of specialized knowledge workers** –limiting the proportion of the Canadian company workforce that could be considered as specialized knowledge ICTs, or the number of specialized knowledge ICTs that could be assigned to a single work project.

Business response: *While we agree that companies should not be permitted to staff entire projects that require specialized knowledge with foreign labour and ultimately not build capability in Canada, there is also a balance to be recognized that those skills may not always be available within the Canadian labour force.*

- 4. Third-party work site** – potential to impose limitations on ICTs assigned to third- party work sites.

Business response: *This proposal is particularly harsh and there appears to be no pressing reason to implement such a limit. There is limited evidence that employers are abusing the ICTs to fulfill such projects, to the detriment of the Canadian workforce. Many companies have very large scale and complex projects where client demands require extensive global expertise from the industry or the company's foreign affiliates.*

Limitations may result in a negative overall impact on the Canadian economy. Many companies that have Canadian based clients are engaged to bring global expertise to fulfill new business products, requiring skills that are in short supply in the Canadian labour market. Imposing this limitation will have the adverse effect of companies considering other alternatives, including the movement of work (e.g. product development) to offshore locations.

A better alternative would be to consider placing limits on the amount of time an ICT may enter Canada to perform work at a third party work site, similar to the model in place in the United Kingdom, which streams ICTs into the following categories:

- 1. Short term staff – limited to 12 months*
- 2. Long term staff – limited to 3 years (with possible 2 year extension)*
- 3. Graduate trainees*
- 4. Skills transfer*

Questions for discussion

In response to the specific questions posed in the CIC paper we canvassed member organizations on their use of the program. Below is a sample of some of the comments received from members who were unable to attend the consultation meeting on August 14.

1. How is your enterprise currently using the ICT provisions?

“At this time, all assignees in Canada within our global organization are ICTs.”

“We use ICTs to fill key Executive/Leadership positions; in addition to Developmental roles for individuals identified as having potential through our global Talent Management approach.”

“This category is critical to our company, industry and the EPC business within Canada.”

“70% of the experts that we bring to Canada in support of major projects qualify within this category.”

“Typically, it is our Clients that demand global company specific experience and knowledge, which is often the basis of the award of the project to our company, and the resulting employment of Canadians on these projects.”

2. What would be the impact of the potential changes on your enterprise?

“In relation to creating minimum wage levels arbitrarily and imposing limitations on the proportion of ICTs on a project, this could have significant impact and potentially cost the company future work and employment opportunities for thousands of Canadian employees. Industry surveys are a far more accurate and reliable source.”

“The potential changes may affect the transfer of individuals which our organization identifies as “Emerging Potential” within the global organization. They may not have the years of job-specific or company experience that will qualify them to be considered as an ICT for entry into Canada, thereby limiting our global talent management approach.”

3. What other factors could assist the assessment of specialized knowledge workers?

“To continue to focus on specialized knowledge with respect to industry, policies, practices, SOPs, industry-specific regulations, products, strategy, etc. look to these factors rather than to arbitrary measures from CIC.”

“Placing restrictions on a company’s access to global expertise will only serve to limit Canada's ability to compete internationally and win projects, resulting in lost economic opportunities as well as costing many Canadian jobs.”

Concluding Comments

The proposals being considered to amend the current rules regarding intra-company transfers will have a negative impact on the Canadian economy. They will remove efficiency and predictability from the system and impose significant barriers for employers. At the same time these changes will very likely result in Canada's trading partners taking similar steps to restrict Canadian firms transferring key employees on international assignments.

If the proposed changes are to move forward, the business community strongly recommends the implementation of a 'Trusted Employer Program' for the administration of ICTs. Such a program would pre-clear approved employers participating in the program. The program would be funded by participating employers and deliver efficiencies in government administration, while providing business with the consistency and predictability needed to compete in international markets.

The principles for operation of the Trusted Employer Program are contained in Appendix I attached.

APPENDIX I

Proposed General Principles for the operation of a Trusted Employer Program (TEP)

Access to skilled workers is vitally important Canadian business and the national economy. Intra-company transfers of foreign workers between Canadian based organizations with international operations play a significant role in ensuring Canadian employers have access to the very best talent in order to fulfill organizational objectives. Those workers may be in roles specific to Executives, Senior Managers and Specialized Knowledge Workers. Only citizens of those countries that Canada has negotiated agreements to facilitate the temporary entry of foreign workers would be covered in this program.

Objective:

To develop a timely, predictable and efficient program that streamlines processing of ICTs for compliant employers, who demonstrate adherence to a specific level of conduct in order to participate in the program. Precedents for a program that of this nature exist in North American programs such as FAST; TSA “known shippers”; CBP “trusted travelers” and in the United Kingdom under the Migrant Worker Sponsorship Program.

1. Principles for the Program

- a. The program must provide for more efficient movement of ICTs moving between countries with which Canada has international agreements on rules temporary entry
- b. Diligence of employment criteria; i.e. industry experience, skills and knowledge including requisite academic qualifications, must reside with the employer
- c. The program must be widely available to employers, regardless of size, industry or geographic location
- d. The program must remove the adjudication of employment status and eligibility away from individual ports of entry into a stream that provides employers with certainty and efficiency
- e. The program must not undermine existing programs that deny admission on grounds of security, legal status or criminal offence convictions.
- f. The program should allow for consistency of application and interpretation.

2. Benefits of the program

Such a program will deliver greater efficiencies in the processing of applications and deliver significant productivity improvements for the business community providing greater certainty in the mobility of operation critical personnel and other key employees. Main benefits of the proposed TEP are:

- a. Allows business to focus on productivity and innovation during a time of intense global competition from outside North America.

- b. Creates processing efficiencies for both employers and governments and frees up resources available for other priorities such as enforcement, anti-fraud efforts and higher-risk areas of the immigration program.
- c. Streamlines the adjudication process by eliminating unnecessary and redundant documentary requirements by port of entry officials, who would no longer be required to validate selected visa categories of an applicant or traveler from an employer participating in the program.
- d. Produces faster, more predictable decisions for employers, and greater efficiencies in the system.
- e. Improves adjudications by pre-approving.
 - i. Employer Bona Fides: Has the employer proven it meets the legal requirements for sponsorship?
 - ii. Job Criteria: Has the employer proven that the position in question qualifies for the ICT?
 - iii. Qualifying relationship between the employer and foreign worker exists.
 - iv. Worker's Credentials: Has the employer proven the foreign national's qualifications for the position?

3. Program Administration

- a. Employers will file a Trusted Employer designation request and supporting business bona fides with a Trusted Employer Unit (TEU) established by CIC. Participation is limited to those companies that demonstrate that have exemplary records of compliance.
- b. How an employer provides evidence of eligibility:
 - I. The employer has been in operation for at least one year.
 - II. Evidence of registration with Canada Revenue Agency.
 - III. Business license and articles of incorporation/ partnership.
 - IV. Has not been subject to conviction / penalty for immigration laws in the previous 24 month period.
 - V. Other attestations, including assumption of liability, subject to enforcement measures under immigration laws.
- vi. Proof that a relationship with the foreign employer exists as one of the following:
 - a) A legal affiliate of the business
 - b) A branch or operating division
 - c) Parent of the other legal entity
 - d) A subsidiary
- vii. Agrees to submit an annual report of program use.
- viii. Agrees to random audits.
- ix. Agrees to zero tolerance for TEP program violations.

4. Application
 - a. Employer requests pre-designation of the job criteria for specific positions, this will include information about its use of foreign nationals to fulfill business needs and any required criteria related to the credentials for the occupations filed.
 - b. The employer will provide an estimate of the number of employees that are covered by the program on an annual basis. This could be modeled on the UK program for sponsorship of migrant workers
 - c. The TEU will review the employer's organizational structure, finances and history of compliance with respect to immigration laws
 - d. A reasonable registration fee will apply to offset program costs.
 - e. The Designation application will be processed within 15 business days.
 - f. TEU issues (or denies, denials subject to one appeal/refilling) Trusted Employer Designation.
 - g. Employees from designated Trusted Employers, within the occupations and visas covered in the designation, present themselves at the port of entry. Subject to security screening those employees are permitted entry without further adjudication of their occupational/employment credentials.
 - h. The Designation is valid for a five year period, subject to audit by the TEU / CIC
 - i. The TEU is required to issue an annual report of the program's progress including the number of Trusted Employers participating in the program, the number of applications filed and other statistics deemed appropriate.

5. Employer Suspension from the Program for Noncompliance
 - a. A Trusted Employer would be suspended for any subsequent material in violation of the Trusted Employer Program.
 - b. An employer will automatically be removed from the Trusted Employer pilot program if the employer ceases to exist or operate as a legitimate ongoing business.

Conclusion

The establishment of a Trusted Employer Program has the potential to deliver significant cost benefits to designated employers and government agencies. It would provide an effective model for the efficient deployment of key personnel and business travelers between Canada and our trading partners.