

When is a Canadian Work Permit Required?



Introduction

HR professionals are frequently asked whether a foreign national, who seeks to enter Canada for the purpose of performing a specific task on behalf of their Canadian company, will require a work permit. Although this question appears simple enough, it requires a detailed analysis of the relevant law. Even after such an analysis has been performed, the answer often remains elusive because the law relating to business visitors is so discretionary. Notwithstanding this fact, a detailed analysis should always be performed when considering the eligibility of a foreign national to enter as a business visitor.

Definition of "Work"

HR Professionals should begin by referring to the definition of "work" under Section 2 of the *Immigration and Refugee Protection Regulations* ("IRPR"), SOR/2002-227. According to Section 2, "work" means an activity for which wages are paid or commission is earned, or that is in direct competition with the activities of Canadian citizens or permanent residents in the Canadian labour market. Clearly, the payment (or non-payment) of compensation is not conclusive; activities performed for free can still be considered work if a Canadian citizen or permanent resident might otherwise be hired to carry them out.

Work Permit Exemptions

Even if a particular activity appears to fall under the definition of "work," it may still be possible to carry on that activity without the need for a work permit. Section 186 of the IRPR lists a number of exemptions from the work permit requirement:

- a. As a business visitor to Canada within the meaning of Section 187;
- b. As a foreign representative, if they are properly accredited by the Department of Foreign Affairs and International Trade and are in Canada to carry out official duties as a diplomatic agent, consular officer, representative or official of a country other than Canada, of the United Nations or any of its agencies or of any international organization of which Canada is a member;
- c. If the foreign national is a family member of a foreign representative in Canada who is accredited with diplomatic status by the Department of Foreign Affairs and International Trade and that Department has stated in

writing that it does not object to the foreign national working in Canada;

- d. As a member of the armed forces of a country that is a designated state for the purposes of the *Visiting Forces Act*, including a person who has been designated as a civilian component of those armed forces;
- e. As an officer of a foreign government sent, under an exchange agreement between Canada and one or more countries, to take up duties with a federal or provincial agency;

(e.1) As a cross-border maritime law enforcement officer designated by the United States under the Framework Agreement on Integrated Cross-Border Maritime Law Enforcement Operations between the Government of Canada and the Government of the United States of America, signed on May 26, 2009;

(e.2) As an in-flight security officer employed by a foreign government with which Canada has concluded an arrangement in respect of commercial passenger aircraft security;

- a. If they are a full-time student, on the campus of the university or college at which they are a full-time student, for the period for which they hold a study permit to study at that university or college;
- b. As a performing artist appearing alone or in a group in an artistic performance – other than a performance that is primarily for a film production or a television or radio broadcast – or as a member of the staff of such a performing artist or group who is integral to the artistic performance, if:
 - i. They are part of a foreign production or group, or are a guest artist in a Canadian production or group, performing a time-limited engagement, and
 - ii. They are not in an employment relationship with the organization or business in Canada that is contracting for their services;
- c. As a participant in sports activities or events, in Canada, either as an individual participant or as a member of a foreign-based team or Canadian amateur team;
- d. As an employee of a foreign news company for the purpose of reporting on events in Canada;
- e. As a guest speaker for the sole purpose of making a speech or delivering a paper at a dinner, graduation, convention or similar function, or as a commercial speaker or seminar leader delivering a seminar that lasts no longer than five days;
- f. As a member of the executive of a committee that is organizing a convention or meeting in Canada or as a member of the administrative support staff of such a committee;
- g. As a person who is responsible for assisting a congregation or group in the achievement of its spiritual goals and whose main duties are to preach doctrine, perform functions related to gatherings of the congregation or group or provide spiritual counselling;
- h. As a judge, referee or similar official at an international amateur sports competition, an international cultural or artistic event or competition or an animal or agricultural competition;
- i. As an examiner or evaluator of research proposals or university projects, programs or theses;
- j. As an expert who conducts surveys or analyses that are to be used as evidence before a federal or provincial regulatory body, a tribunal or a court of law or as an expert witness before such a body, tribunal or court of law;
- k. As a student in a health field, including as a medical elective or clinical clerk at a medical teaching institution in Canada, for the primary purpose of acquiring training, if they have written approval from the body that regulates that field;

- l. As a civil aviation inspector of a national aeronautical authority conducting inspections of the flight operation procedures or cabin safety of a commercial air carrier operating international flights;
- m. As an accredited representative or adviser participating in an aviation accident or incident investigation conducted under the *Canadian Transportation Accident Investigation and Safety Board Act*;
- n. As a member of a crew who is employed by a foreign company aboard a means of transportation that:
 - i. Is foreign-owned and not registered in Canada; and
 - ii. Is engaged primarily in international transportation;
- o. As a provider of emergency services, including medical services, for the protection or preservation of life or property;
- p. Until a decision is made on a pending work permit extension application, if they have remained in Canada after the expiry of their work permit and they have continued to comply with the conditions set out on the expired work permit, other than the expiry date;
- q. If they are the holder of a study permit and:
 - i. They are a full-time student enrolled at a designated learning institution;
 - ii. The program in which they are enrolled is a post-secondary academic, vocational or professional training program, or a vocational training program at the secondary level offered in Quebec, in each case, of a duration of six months or more that leads to a degree, diploma or certificate; and
 - iii. Although they are permitted to engage in full-time work during a regularly scheduled break between academic sessions, they work no more than twenty hours per week during a regular academic session; or
- r. If they are or were the holder of a study permit who has completed their program of study and:
 - i. They met the requirements set out in paragraph (v); and
 - ii. They applied for a work permit before the expiry of that study permit and a decision has not yet been made in respect of their application.

A detailed discussion of each of the above exemptions is outside the scope of this summary. However, the exemption most commonly encountered by HR professionals is Subsection 186(a), which relates to business visitors. Further details regarding the business visitor category appear below.

Definition of “Business Visitor”

Section 187 of the IRPR provides further details regarding the business visitor category. According to Subsection 187(1), a business visitor to Canada is a foreign national who is described in Subsection 187(2) or who seeks to engage in *international business activities in Canada without directly entering the Canadian labour market*. Subsection 187(2) provides specific examples of who is considered a business visitor:

- a. Foreign nationals purchasing Canadian goods or services for a foreign business or government, or receiving training or familiarization in respect of such goods or services;
- b. Foreign nationals receiving or giving training within a Canadian parent or subsidiary of the corporation that employs them outside Canada, if any production of goods or services that results from the training is incidental; and
- c. Foreign nationals representing a foreign business or government for the purpose of selling goods for that business or government, if the foreign national is not engaged in making sales to the general public in Canada.

According to Subsection 187(3), a foreign national seeks to engage in international business activities in Canada without directly entering the Canadian labour market only if:

- a. The primary source of remuneration for the business activities is outside Canada; and
- b. The principal place of business and actual place of accrual of profits remain predominately outside Canada.

The language contained in the IRPR is helpful, but still somewhat vague. For additional clarification, HR professionals should refer to the *Foreign Worker Manual* ("FWM"), which contains guidance published by Citizenship and Immigration Canada. The FWM provides the following general criteria for business visitors:

- a. There must be no intent to enter the Canadian labour market, that is, no gainful employment in Canada.
- b. The activity of the foreign worker must be international in scope, that is, there is the presumption of an underlying cross-border commercial activity (i.e. after sales service); and
- c. There is the presumption of a foreign employer:
 1. The primary source of the worker's remuneration remains outside Canada;
 2. The principal place of the worker's employer is located outside Canada; and
 3. The accrual of profits of the worker's employer is located outside Canada.

Specifically-Permitted Business Visitor Activities

The FWM also describes several specific activities, which are deemed to fall within the general criteria for business visitors:

Independent Research

A U.S. based company provides marine maps and computer software to commercial and private mariners, including sports fishermen. The U.S. company has no subsidiaries or affiliates in Canada. In order to do this, the company needs to send two of their employees along with a boat load of this equipment to circumnavigate the Lake of the Woods, take depth and other readings, and return to the U.S. with their findings. Their findings will in turn be used to produce the marine maps and computer software. Since there is no Canadian employer contracting for their services, and since the U.S. company will be the direct beneficiary of the foreign worker's efforts, business visitor criteria are satisfied.

After-Sales Service

After-sales services include those provided by persons repairing and servicing, supervising installers, and setting up and testing commercial or industrial equipment (including computer software). The phrase "setting up" does not include hands-on installation generally performed by construction or building trades (electricians, pipe fitters, etc.).

Section 187 also applies to persons seeking entry to repair or service specialized equipment, purchased or leased outside Canada, provided the service is being performed as part of the original or extended sales agreement, lease/rental agreement, warranty, or service contract. Service personnel coming to perform service work on equipment or machinery that is either out of warranty, or where no service contract exists, continue to require a work permit.

Service contracts must have been negotiated as part of the original sales or lease/rental agreements or be an extension of the original agreement. Service

contracts negotiated with third parties after the signing of the sales or lease/rental agreement are not covered by this exemption. If, however, the original sales agreement indicates that a third company has been or will be contracted to service the equipment, Section 187 applies. Where the work is not covered under a warranty, a work permit is required.

Intra-Company Training and Installation Activities

When a person is coming to provide training or installation of equipment for a branch or subsidiary company, they are considered to be business visitors. The same prohibition against hands-on building and construction work described in the context of after-sales service also applies here. The foreign national should maintain his or her position in the home branch and not be paid by the Canadian branch, other than reimbursement for expenses. This provision may also apply to a trainer or specialized installer under an after-sales contract by the foreign branch (with the same conditions applying), as long as the service is provided company-wide and not just for the Canadian office.

Board of Directors' Meetings

A person attending a meeting as a member of a board of directors may enter as a business visitor. While board members may be well-remunerated for their advice and expertise, they are considered business visitors under Section 187. This is because there is a great deal of international mobility in this activity and there is no real direct entry into the Canadian labour market.

Employees of Short-term Temporary Residents

Persons employed in a personal capacity on a full-time basis by short term temporary residents, for example as a domestic servant, personal assistant or nanny (caregiver), would generally meet the business visitor criteria in Subsection 187(3), and may enter as such. If the visiting employer extends their stay in Canada, such that their employee is no longer considered to be working predominantly outside Canada, or their employee's primary source of remuneration can no longer be considered to be outside Canada, then that personal employee is no longer considered to be a business visitor and may be required to seek a work permit and a Labour Market Opinion to continue working. A stay of longer than six months would normally be found to exceed the threshold required by Subsection 187(3).

Employees of Foreign Companies Contracting Canadian Companies

There are situations where foreign companies contract Canadian companies to provide services for them in foreign jurisdictions. It is not uncommon, where distances are great, that the foreign company will send one or more of their employees to Canada to ensure that the Canadian company is doing the job they contracted to do in a manner that meets the approval of the foreign company. Sometimes, these foreign nationals may be in Canada for up to two years. These foreign nationals may qualify as business visitors.

Business Visitors under the North American Free Trade Agreement ("NAFTA")

Business visitor provisions also appear in the NAFTA and apply to citizens of the United States and Mexico. The following general requirements apply to NAFTA business visitors:

- a. Citizenship of the United States or Mexico;

- b. Business activities as described in Appendix 1603.A.1;
- c. Activities are international in scope;
- d. No intent to enter the Canadian labour market;
- e. The primary source of remuneration remains outside Canada;
- f. The principal place of business remains outside Canada; and
- g. Compliance with existing immigration/admissibility requirements for temporary entry.

The NAFTA business visitor category is limited to the specifically-permitted activities that appear in Appendix 1603.A.1. Appendix 1603.A.1 includes activities of a commercial nature, which reflect the components of a business cycle:

- a. Research and Design – Technical, scientific and statistical researchers conducting independent research or research for an enterprise located in the United States or Mexico.
- b. Growth, Manufacture and Production – A harvester owner supervising a harvesting crew authorized to enter Canada under applicable law and purchasing/production management personnel conducting commercial transactions for an enterprise located in the United States or Mexico.
- c. Marketing – Market researchers and analysts conducting research or analysis, whether independently or for an enterprise located in the United States or Mexico. Trade fair and promotional personnel attending a trade convention are also included.
- d. Sales – Sales representatives and agents taking orders or negotiating contracts for goods or services for an enterprise located in the United States or Mexico, but not delivering goods or providing services. This is permitted or not? If permitted???? also includes buyers who are purchasing for an enterprise located in the United States or Mexico.
- e. Distribution – Transportation operators transporting goods or passengers to Canada from the United States or Mexico, or loading and transporting goods or passengers from Canada, with no unloading in Canada, to the United States or Mexico. This provision also includes United States customs brokers entering Canada to perform brokerage duties relating to the export of goods from Canada to or through the United States and customs brokers providing consulting services regarding the facilitation of the import or export of goods.
- f. After-Sales Service – Installers, repair and maintenance personnel, and supervisors, possessing specialized knowledge essential to a seller's contractual obligation, performing services or training workers to perform services, pursuant to a warranty or other service contract incidental to the sale of commercial or industrial equipment or machinery, including computer software, purchased from an enterprise located outside Canada, during the life of the warranty or service agreement. This provision is actually narrower than the general provision for business visitors under Section 187 because:
 1. It requires personnel to possess "specialized knowledge," which is a very high degree of knowledge only given to an already skilled person through extensive training; and
 2. It applies only to sales agreements (the Section 187 includes both sales and lease agreements).
- g. General Service – This provision applies to:
 1. Professionals engaging in a business activity at a professional level in a profession set out in Appendix 1603.D.1 (<http://www.americanlaw.com/1603d1.html>);
 2. Management and supervisory personnel engaging in a commercial transaction for an enterprise located in the United States or Mexico;
 3. Financial services personnel (insurers, bankers or investment brokers) engaging in commercial transactions for an enterprise located in the United

States or Mexico; and

4. Public relations and advertising personnel consulting with business associates, or attending or participating in conventions.

United States and Mexican citizens are not required to seek entry as business visitors under the NAFTA. They are permitted to seek entry under either the NAFTA business visitor provision or the general provision for business visitors contained in R187, whichever is more favourable.

Business Visitors under the Canada Chile Free Trade Agreement ("CCFTA")

The CCFTA contains business visitor provisions that are very similar to the NAFTA. However, the specifically-permitted CCFTA business visitor activities instead appear at Appendix K-03.I.1. Appendix K-03.I.1 is similar to Appendix 1603.A.1 of the NAFTA but does not include the following activities:

- a. Harvester owners under "Growth, Manufacture and Production";
- b. Transportation operators under "Distribution";
- c. Canadian and American brokers under "Distribution"; and
- d. Tour bus operators under "General Service."

As in the case of the NAFTA, Chilean citizens are not required to seek entry as business visitors under the CCFTA. They are permitted to seek entry under either the CCFTA business visitor provision or the general provision for business visitors contained in Section 187, whichever is more favourable.

Business Visitors under the Canada-Peru Free Trade Agreement ("Peru FTA")

The Peru FTA also contains business visitor provisions that are very similar to Appendix 1603.A.1 of the NAFTA. However, the specifically-permitted Peru FTA business activities instead appear in Appendix 1203.A.1. Appendix 1203.A.1 differs from Appendix 1603.A.1 of the NAFTA in the following manner:

- a. The addition of "Meetings and Consultations" to the categories of Business Visitors;
- b. The inclusion of after-lease servicing in addition to after-sales servicing; and
- c. Under General Service, the addition of:
 1. Cook personnel (cooks and assistants) attending or participating in gastronomic events or exhibitions, or consulting with business associates;
 2. Information and communication technology service providers attending meetings, seminars or conferences, or engaged in consultations with business associates; and
 3. Franchise traders and developers who seek to offer their services.

Peruvian citizens are not required to seek entry as business visitors under the Peru FTA. They are permitted to seek entry under either the Peru FTA business visitor provision or the general provision for business visitors contained in Section 187, whichever is more favourable.

Business Visitors under the Canada-Colombia Free Trade Agreement ("Colombia FTA")

The business visitor provisions contained in the Colombia FTA are essentially identical to those contained in the Peru FTA. The list of specifically-permitted business activities appears in Appendix 1203.A.

Colombian citizens are not required to seek entry as business visitors under the Colombia FTA. Instead, they are permitted to seek entry under either the Colombia FTA business visitor provision or the general provision for business visitors contained

in Section 187, whichever is more favourable.

Business Visitors under the General Agreement on Trade in Services ("GATS")

In order to qualify under GATS, the foreign national must be a citizen of a World Trade Organization Member nation; citizens of observer nations are not eligible. The foreign national may also qualify if he or she is a permanent resident of a Member nation that has given formal notification that its permanent residents have the same rights as its citizens; at present, Australia and New Zealand have given such notification.

Permissible activities for business visitors under GATS are restricted to sales and marketing, negotiation of commercial transactions, and the establishment of a commercial presence. In order to qualify under GATS, the alien must also work in one of the following service sectors: (a) business, (b) communications, (c) construction, (d) distribution, (e) environment, (f) finance, (g) tourism and travel, and (h) transport. A detailed list of GATS service sectors appears here:

<http://www.americanlaw.com/cdngatssectors.html>.

As a general rule, the GATS business visitor provisions tend to be more restrictive than the general provision for business visitors contained in R187. As a result, they are not frequently used to support business visitor entries to Canada.

Conclusion

Where the proposed activity falls within one of the specifically-permitted activities mentioned above, it will be considered a business visitor activity. However, in many cases, the proposed activity will not be an exact match. As a result, there remains a great deal of discretion on the part of the immigration officer. Wherever possible, HR professionals should attempt to argue that their fact situation is analogous to one of these specifically-permitted activities.

Article by Blaney McMurtry LLP