

Management Alert



Canadian Government Applies Strict Scrutiny to Intra-Company Transfer Work Permit Applications for Specialized Knowledge Employees

By Pavan Dhillon, Jason E. Burritt and Michelle Gergerian

The following alert is directed to organizations with a presence in Canada or who anticipate the need to place talent at a Canadian work site.

Seyfarth Shaw's Global Mobility Practice hosts attorneys licensed to practice in the UK, Canada, and Germany. The group has the capability to assist clients with obtaining work and residence visas for over 70 jurisdictions around the world. If we can assist you in placing talent, please call your Seyfarth attorney. We will be happy to help you.

Effective immediately, Citizenship and Immigration Canada (CIC) has introduced a new, more rigorous definition of "specialized knowledge" affecting the Intra-Company Transfer work permit category for specialized knowledge workers. The new policy directive clearly articulates that specialized knowledge workers must be employed by and under the direct and continuous supervision of the host Canadian entity. The policy directive stresses the impact of the salary offered to specialized knowledge employees by introducing a mandatory minimum wage requirement for intra-company transferees not entering Canada under a Free Trade Agreement. The policy with respect to wage does NOT apply to those entering Canada pursuant to the North American Free Trade Agreement (NAFTA) or to any future or current Free Trade Agreements (FTAs).

The Intra-Company Transferee - Specialized Knowledge Category

The Intra-Company Transfer work permit category facilitates the temporary transfer of a foreign employee to a qualifying related entity in Canada based on that employee's specialized knowledge. The "transfer" often does not require relocation to Canada but, rather, allows a foreign employee to frequently travel to Canada for a specific project or assignment.

The New Standard: Proprietary Knowledge AND Advanced Level of Expertise

Specialized knowledge employees must possess BOTH "proprietary knowledge of the company's product, service, research, equipment, techniques or management" that is both unique and specialized in addition to an advanced level of expertise. Proprietary knowledge or advanced level of expertise alone is no longer sufficient to qualify under this category.

Definitions and Implications

Proprietary knowledge is defined as "company-specific expertise related to a company's product or services," which implies that the knowledge has not been divulged in a manner allowing other companies to duplicate the product or service. **Advanced proprietary knowledge** is defined as "uncommon knowledge of the host Canadian entity's products or services and its application in international markets; or an advanced level of expertise or knowledge of the enterprise's processes and procedures such as its production, research, equipment, techniques or management."

Advanced level of expertise requires specialized knowledge gained through significant and recent experience with the organization and used by the individual to contribute significantly to the employer's productivity. **Significant expertise**

is not defined, however the “longer the experience, the more likely the knowledge is indeed ‘specialized.’” Sufficient experience must have been accrued within the last five years to be considered **recent expertise**.

There are important implications stemming from the rigorous new standard and Canadian immigration officers will therefore consider the following in making an assessment under this category:

- The specialized knowledge is unusual, unique and uncommon as compared to that generally found in a particular industry, but also to the host Canadian entity;
- The specialized knowledge must only be held by a small number or small percentage of employees of a given firm;
- The specialized knowledge cannot be transferred easily or in the short-term; the specialized knowledge employee will not normally require training at the Canadian entity to perform his or her job duties related to the area of expertise, and any training must not lead to the displacement of Canadian workers;
- The specialized knowledge is so critical to the business of the Canadian entity that the failure to transfer the specialized knowledge employee will result in significant disruption of business in Canada; and,
- Specialized knowledge workers must be key personnel and not simply highly skilled professionals. The worker must be clearly employed by and under the direct and continuous supervision of the Canadian entity while in Canada. Specialized knowledge workers must be key personnel and not simply highly skilled professionals. The worker must be clearly employed by and under the direct and continuous supervision of the Canadian entity while in Canada.

In addition, CIC clarified its position regarding proprietary knowledge over a particular business process or methodology. The process and methodology cannot be widespread across the multi-national company and cannot be available in the Canadian labour market. For example, a specialized knowledge employee being transferred to assist with implementation of a product will only meet the new standard if that implementation must be highly customized or if it relates to a new product rather than an “off-the-shelf” product. The applicant’s knowledge will be more likely to be deemed specialized if he or she was directly involved in the development (or re-development) of a product or methodology as opposed to implementing an existing product.

The Mandatory Wage Floor

Canadian immigration officers will now consider salary or wage when assessing Intra-Company Transfer work permit applications for specialized knowledge employees. The wage should be consistent with that of a specialist in the field and therefore would generally receive an above-average salary. To create an objective standard, CIC now adopts a “Mandatory Wage Floor” set at the prevailing wage for the position. The prevailing wage is based on the specific occupation and region where the individual will ultimately perform work and it is determined by statistics and research assessed by Employment and Skills Development Canada. Monetary allowances paid directly to the specialized knowledge employee are included in the wage. Non-cash per diems, such as hotel, transportation and incidental travel expenses, will not be included in the calculation.

Although Canadian immigration officers will not apply the wage floor test to specialized knowledge employees applying under NAFTA or another Free Trade Agreement intra-company transfer provisions, officers will consider wage as an important indicator of specialized knowledge in the overall assessment.

Seyfarth Shaw’s Canadian Immigration Team can assist you and your employees to ensure that sufficient evidence is submitted in support of applications filed under these new guidelines. We urge you to contact our office well in advance of an employee’s intended travel to Canada in order to confirm that he or she is eligible under this category.

Pavan Dhillon is counsel in the Immigration practice group in Seyfarth’s New York office, *Jason E. Burritt* is a partner in Seyfarth’s Washington D.C. office and *Michelle Gergerian* is an associate in the firm’s Boston office. If you would like further information, please contact your Seyfarth Shaw LLP attorney, Pavan Dhillon at pdhillon@seyfarth.com, Jason E. Burritt at jburritt@seyfarth.com, or Michelle Gergerian at mgergerian@seyfarth.com.

www.seyfarth.com

Attorney Advertising. This Management Alert is a periodical publication of Seyfarth Shaw LLP and should not be construed as legal advice or a legal opinion on any specific facts or circumstances. The contents are intended for general information purposes only, and you are urged to consult a lawyer concerning your own situation and any specific legal questions you may have. Any tax information or written tax advice contained herein (including any attachments) is not intended to be and cannot be used by any taxpayer for the purpose of avoiding tax penalties that may be imposed on the taxpayer. (The foregoing legend has been affixed pursuant to U.S. Treasury Regulations governing tax practice.)

Seyfarth Shaw LLP Management Alert | June 11, 2014

©2014 Seyfarth Shaw LLP. All rights reserved. “Seyfarth Shaw” refers to Seyfarth Shaw LLP (an Illinois limited liability partnership). Prior results do not guarantee a similar outcome.