



**Beyond the border:**  
Immigration update -  
February 2022

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## INTRODUCTION

Hiring international talent? The Stewart McKelvey Immigration team has the experience necessary to help get your talent on the ground in a timely and compliant manner. Team members have the experience needed to counsel and assist clients who bring international business travelers, professionals or skilled workers to Canada through the necessary employment-based immigration processes.

We are pleased to present the eighth installment of *Beyond the Border*, a publication for employers aiming to provide the latest information and analysis on new immigration programs and immigration-related issues.

In this issue, insight is provided into the new, **permanent Atlantic Immigration Program**, aimed to fill labour shortages with international talent while supporting permanent settlement in the region, as well as the **recruitment tracking process, advertising variations** and **compliance inspections** as part of the **Labour Market Impact Assessment** program.

Should you have any questions, or would like to learn more about the topics discussed, please contact a member of our [Immigration Group](#).

## THE ATLANTIC IMMIGRATION PROGRAM – NOW A PERMANENT PATHWAY FOR IMMIGRATION

[Sara Espinal Henao](#); Halifax

The Atlantic Immigration Pilot Program has finally become a permanent immigration pathway. Designated employers in Atlantic Canada will be able to continue using the program to fill labour shortages with international talent while supporting permanent settlement in the region. The Government of Canada announced this decision on December 17, 2021, and the program became a permanent fixture of Canada's immigration landscape effective January 1, 2022, changing its name to the Atlantic Immigration Program ("AIP"). The Government of Canada will welcome 6,000 newcomers to Atlantic Canada per year using this pathway.

The decision to transition this program into a permanent immigration option is hardly surprising in light of its proven track record. Launched in 2017 as part of the Atlantic Growth Strategy, the Pilot was widely successful at both attracting and retaining talent, bringing almost 10,000 newcomers to the region. By 2019, only two years after its launch, the Pilot had already reached 78 per cent of its immigration target, approving 91 per cent of all AIP applications received, and bringing 5,590 newcomers. As of May 2021, AIP employers had collectively made over 9,200 job offers in various sectors, from manufacturing to health care, welcoming over 8,000 foreign nationals and their families to the region.

While the Pilot version of this now permanent immigration pathway officially closed on December 31, 2021, Immigration, Refugees and Citizenship Canada ("IRCC") continues to accept applications under the Pilot from those with a valid provincial endorsement until March 5, 2022. Candidates with valid endorsements under the permanent version will be able to submit applications under the new program starting March 6, 2022.

To meet varying labour market and skill level needs, this immigration pathway remains available for skilled workers and international graduates, depending on the individual's job offer, work experience, and educational credentials. However, while remaining largely unchanged from its previous iteration, the AIP now includes a few noteworthy amendments to its process and eligibility criteria for both foreign nationals and the designated employers who seek to employ them.

### Important changes for employers

#### *A new designation process*

Like its Pilot counterpart, the AIP operates with an employer-driven model. Employers will need to be designated under the new program by an Atlantic province to be able to use it to hire foreign talent. Previously designated employers under the Pilot version will also need to reapply

for designation with their respective province. To date, new processes for designation under the program have already entered into effect in [Nova Scotia](#), [Prince Edward Island](#), and [Newfoundland and Labrador](#).

#### *Onboarding training now required*

While each province has its own guidelines for designation, all employers will now be required to take mandatory onboarding training and intercultural competency training before their first endorsement application under the program can be approved.

Onboarding training is expected to cover information about the Canadian immigration system and the AIP, and is intended to provide employers with a comprehensive overview of their roles and responsibilities under the program. Similarly, international competency training will include education on how to overcome implicit bias in hiring and managing employees, as part of the employer's commitment to establishing a welcoming workplace environment. Training service providers are now available at each province to facilitate this process.

#### *A Dedicated Service Channel*

To facilitate communication with the government, designated employers under the program will have access to enhanced employer support services through a Dedicated Service Channel. Through this Channel, they will be able to receive timely support from program officers on applications submitted under the program. Provinces will refer employers to the Channel after their first endorsement, and will be available to employers for up to a year after they have successfully endorsed their first candidate under the program.

### **Important changes for foreign nationals**

#### *A modernized application process*

At the federal level, the permanent residence application process for the AIP will be modernized with an online application option. This much welcomed digital submission option will eliminate the need to mail out applications for permanent residence on paper, potentially improving processing times and allowing the applicant to obtain immediate confirmation of receipt of their application once it is submitted.

#### *Modified language and education requirements*

One of the appeals of the Atlantic Immigration Pilot Program was its lower language and education requirements compared to most other immigration pathways at federal and provincial levels. Secondary level education was sufficient for the purpose of applying under the Pilot's high-skilled and intermediate-skilled streams. Similarly, the Pilot only required that the applicant show a minimum level of Canadian Language Benchmark 4 to meet language proficiency requirements.

While still comparatively more lenient vis-à-vis other programs, the language and education requirements for certain occupations has been strengthened under the new program. Candidates with National Occupational Classifications (“NOC”) 0, A or B job offers will now need to show minimum language level of Canadian Language Benchmark 5. Similarly, candidates with NOC 0 or A job offers will now need to show a minimum one-year Canadian post-secondary program credential, or equivalency, demonstrated by an Educational Credential Assessment.

*Expanded eligibility period for work experience*

Despite somewhat increasing education and language requirements for some prospective applicants, the new program proves to be more lenient than its Pilot version regarding what will count as eligible work experience. The previous version counted only work experience obtained over the three years preceding the date of submission of an application. The new program expands the period of eligible work experience to five years. This shift is expected to expand the talent pool that employers would be able to recruit from.

*Flexible work experience*

In addition to extending the period of eligibility for qualifying work experience, the new program shows a more flexible approach to employment in the health care sector, carving out an exemption to the general rule that job offers must be at the same skill level, or higher, as the qualifying work experience. Down-skilling will be allowed for sector-specific job offers that fall under NOC 3413 (nurse aides, orderlies and patient service associates) and NOC 4412 (home health care workers). Eligible candidates will be able to use related work experience gained in higher skilled positions, as practical or registered nurses. This flexibility would allow candidates with work experience in high-skilled health care occupations to access the program with a job offer in the health care sector at the intermediate-skill level, and aims to help the Atlantic region respond to labour market needs in this chronically in-demand sector.

Undoubtedly, the re-launch of AIP as a permanent pathway for immigration is a welcomed development by Canadian employers and newcomers alike, signaling a promising and enduring future for immigration to the region. If you are interested in exploring the AIP as an avenue for immigration or to fill your local labour demands, please contact a member of our immigration team and we would be happy to assist.

## LMIA RECRUITMENT TRACKING

[Brendan Sheridan](#); Halifax

Employers applying for Labour Market Impact Assessment (“LMIA”) applications generally must complete advertising and recruitment as part of this application. The minimum advertising requirements for LMIA applications require that employers advertise for at least four weeks using at least three different methods in the three-month period directly before applying for the LMIA. The purpose of this advertising and recruitment is to determine whether there are any suitably qualified Canadian citizens or permanent residents available to fill the position.

When completing the recruitment portion of the LMIA, employers must review all applications received from Canadians and permanent residents to determine whether any of the candidates meet the requirements for the position. This requires that the employer reviews and tracks all applications received and keeps notes on the applicant’s suitability including their qualifications, whether they were interviewed, and why they were or were not suitable for the position. The results of the recruitment must be provided as part of the LMIA application submitted to Service Canada. The employer must also keep records of their recruitment and advertising efforts for a minimum of six years after completing the LMIA as required by Service Canada.

As recruitment forms an integral role in the LMIA process, it is important that employers are properly recording their recruitment efforts and retaining this information. We recommend that employers prepare a chart to track this information as it will help demonstrate that all recruitment requirements were properly completed. We also recommend that employers begin reviewing applications as they are received to avoid any delays that could be caused by waiting until the required advertising period is completed to begin this review. An example of the recruitment tracking chart is provided below.

Recruitment Chart			
Candidate #	Interviewed?	Qualifications	Comments on Suitability for Position

## LMIA ADVERTISING EXEMPTIONS

[Brendan Sheridan](#); Halifax

The majority of foreign nationals coming to work in Canada require a work permit to provide their services with limited exceptions. While there are a number of pathways that employers and applicants can use to facilitate the work permit application, the primary pathway is through a Labour Market Impact Assessment (“LMIA”) application. In fact, LMIA’s are often considered the default route for foreign nationals to obtain a work permit.

To obtain an LMIA-based work permit, the employer of the foreign national will first have to apply to Service Canada / Employment and Social Development Canada for an LMIA. Once a positive decision is obtained on this application, the foreign national can then use the LMIA approval to apply for their work permit.

In most cases, to apply for the LMIA, the employer is required to undergo a 4-week advertising period with strict requirements on the content of the advertisement and places that it can be posted. This advertising and subsequent recruitment must be completed before the LMIA application is submitted to Service Canada for processing. The purpose of the 4-week advertising period is to demonstrate that the employer was unable to find suitably qualified Canadian citizens or permanent residents for the job. Only when it is demonstrated that hiring the foreign national will result in a positive or neutral impact on the Canadian labour market will the employer be approved to hire a foreign worker in that role and receive a positive LMIA decision.

While proof of advertisement is required in most LMIA applications, there are limited exemptions or variations to the 4-week advertisement requirement. These variations allow employers to apply to Service Canada for the LMIA with different levels of advertisements – sometimes less time advertising or no advertising at all. Employers relying on a variation to the LMIA advertising and recruitment requirement must be prepared to explain how the company and position qualify for this variation.

These variations to the advertising requirements are specified classes and are based on specific requirements related to the position, the required work or the employer.

### **Variations to minimum advertising requirements for LMIA applications**

This article will briefly outline a few of the more frequently used variations to the advertising requirements below. The variations to minimum advertising requirements for LMIA applications that employers can consider when exploring the LMIA route include, but are not limited to:



1. **Entertainment sector:** While there are a number of ways for foreign nationals working in the entertainment sector to receive authorization to work in Canada, an LMIA application is one means to facilitate their entry.

This variation to the minimum advertising requirements is limited to positions within the entertainment sector where the worker is generally hired for a very limited number of days, in a set location and on very short notice. Employers qualifying for this variation to the minimum advertising requirements do not need to advertise or recruit for the position that they are seeking to fill, but the employer must demonstrate how the position qualifies for this exemption.

While the variation requires that the position is for a limited number of days and is needed on very short notice, there is no set threshold on what qualifies for these requirements. Instead, Service Canada will use their judgement to determine if the position qualifies for this advertising variation. Key actors, artists, singers, musicians, film and television crews for short productions, or commercials and more may be able to benefit from this variation to speed up the LMIA process.

2. **Primary agriculture positions:** There are a number of LMIA routes that could be used when hiring foreign workers in agriculture positions. These include the Agricultural LMIA, the Seasonal Agricultural LMIA or simply hiring workers in primary agriculture positions through a high-wage or low-wage LMIA.

Employers that are hiring foreign nationals to work in primary agriculture positions through a high-wage or low-wage LMIA are eligible for a variation to the minimum advertising requirements. Specifically, a qualifying LMIA application only needs to show that the advertisements were posted on Canada's national [Job Bank](#) and at least one additional method for a minimum of 14 calendar days during the 3-month period prior to the employer applying for an LMIA.

To qualify for this advertisement variation, the employer has to demonstrate that the workers will work in "primary agriculture" and that the company has complied with the advertising requirements in the LMIA stream they are applying through (i.e.: high-wage, or low-wage LMIA). A primary agriculture position must meet the below requirements to qualify:

- a. be performed within the boundaries of a farm, nursery or greenhouse;
- b. involve at least one activity, such as:
  - operation of agricultural machinery;
  - boarding, care, breeding, or other handling of animals, other than fish, for the purpose of obtaining raw animal products for market; or

- collection, handling and assessment of those raw products, or the planting, care, harvesting or preparation of crops, trees, sod or other plants for market;
  - c. be consistent with one of these National Occupational Classification codes: 0821 (ex: farm managers), 0822 (ex: greenhouse nursery managers), 8252 (ex: farm supervisors), 8255 (ex: greenhouse supervisors), 8431 (ex: general farm workers), 8432 (ex: greenhouse nursery workers), and 8611 (harvest labourers).
3. **Positions for a short duration:** Employers may also benefit from an LMIA advertising variation for positions that are of a very short duration. This advertising variation is allowed in very limited circumstances and waives the advertising and recruitment requirement for employers.

To qualify for the advertising variation for short duration positions, employers must demonstrate the following:

- a. the employer needs to hire a foreign worker on short notice,
- b. the position being filled is available for a short duration (30 days or less);
- c. the job will no longer exist after the foreign worker leaves;
- d. there is no opportunity for the employer to train a Canadian or a permanent resident because the position requires specialized and/or proprietary knowledge to ensure the safe and efficient provision or operation of machinery or equipment.

If the employer can meet each of the above requirements then they may qualify for this variation to the minimum advertising requirements and can submit their LMIA application without needing to advertise or recruit for the position.

4. **Specialized service technicians or service providers:** Where employers need a foreign worker for a limited time because the work requires specialized or proprietary knowledge and experience, they may qualify for the specialized service technician or service provider LMIA advertising variation. This variation to the advertising requirements removes the requirement for the employer to advertise or recruit for the position prior to submitting their LMIA application.

To qualify for this advertising variation, employers must demonstrate:

- a. the work requires a specialist who has proprietary knowledge or experience related to the work;
- b. the duration of the work in Canada is limited; and

- c. there is no opportunity for Canadians or permanent residents to be trained.

As the name suggests, this advertising variation is primarily for foreign nationals who need to enter Canada to provide service on machinery or equipment in use in the country. Employers may avail themselves of this advertising variation in the following situations (although the examples are not an exhaustive list):

- a. service is required for equipment manufactured outside of Canada and the original equipment manufacturer does not have Canadian licensees that can do the work;
  - b. the services that need to be performed require a worker that has proprietary knowledge, experience or tools from the original equipment manufacturer and this skillset is unavailable in Canada; or
  - c. service is required for equipment that is so old that customized parts have to be manufactured or new parts reconfigured by an original equipment manufacturer approved technician.
5. **Warranty work:** While there are a number of pathways that employers and foreign nationals can consider when entering Canada to provide warranty work on equipment and machinery, including work permit exemptions and LMIA-exempt work permit options, there is also an LMIA advertising variation available. The variation to the minimum advertising requirements for warranty work waives the advertising and recruitment requirements for the LMIA application.

To qualify for this advertising exemption, employers must show that the work involves installation, inspection or repair of equipment and the terms of the warranty require the work to be completed by the equipment manufacturer's designated skilled workers.

While the advertising variations discussed above do allow employers to limit the advertising and recruitment activities they must undertake in certain instances, it is important to understand that the LMIA application and subsequent work permit application(s) do take time to be processed. These processing times vary but can range from several weeks to several months. As such, it is important to plan ahead should a foreign worker need to come to Canada to work.

A final note is that when it comes to the actual work permit application (after the LMIA approval is received), certain workers may be able to apply for their work permit at the border on entry to Canada. This could help expedite the process of having a worker enter Canada.

### **Conclusion**

The various variations to the minimum advertising requirements for LMIAs available to employers demonstrates the government's understanding that not all positions can or will be filled by Canadian citizens or permanent residents. It is not only the duration of the work that needs to be completed, but also the nature of the work, the urgency of the work and industry of

the work that help determine whether an employer can complete an LMIA application for a foreign national with an advertising variation. There are various other advertising variations available, but the options outlined above are the most widely applicable.

If you are interested in exploring the LMIA-based work permit as an avenue for immigration or to fill your local labour demands, please contact a member of our immigration team and we would be happy to assist.

## EMPLOYERS OF FOREIGN NATIONALS: LMIA COMPLIANCE INSPECTIONS

[Brittany Trafford](#); Fredericton

There are many advantages to employing temporary foreign workers (“TFW”) in Canada to address labour gaps and skills shortages, but employers who undertake this role are also subject to additional requirements. When supporting the individual’s work permit, employers must be careful to fully understand the obligations of the program they are using.

The commitments made when employing a TFW vary based on the program used. If supporting the TFW in applying for a work permit with their company, the employer has signed off on an undertaking to fulfill the duties under the program. The most common program employers use in Canada is the Temporary Foreign Worker Program, controlled by Service Canada / Employment and Social Development Canada (“ESDC”). This program requires that the employer obtains a positive Labour Market Impact Assessment (“LMIA”) prior to the TFW obtaining an “employer-specific” permit authorizing their work in Canada for the employer.

In this article we will review the ESDC inspection process under the LMIA program, including the consequences of non-compliance. Our past articles touch on [Compliance Obligations](#) and [Compliance Tips](#), which employers will also find helpful.

### Initiating an employer compliance inspection

Once a positive LMIA is obtained, ESDC has the right to perform a compliance review or audit of the employer with respect to the program. These reviews can be triggered in a number of ways: 1) random selection; 2) suspicion of non-compliance; or 3) past non-compliance. Since the COVID-19 pandemic started in 2020, an inspection may also happen when a worker is or was subject to requirements under the *Emergencies Act* or the *Quarantine Act* or a communicable disease has been found at the worksite. This additional trigger for an audit is a response to the increased employer obligations to help keep the public and TFWs safe during the pandemic.

When initiating an inspection, the employer will be contacted by ESDC and will normally be asked to provide details and documentation relevant to the work of a single or multiple TFWs. The review may focus on one LMIA or several if the employer has more than one.

Normally, a deadline will be given to the employer by which the information must be provided to the inspector. It is important to take such inquiries seriously and work to meet the deadlines as gathering the details can take time.

ESDC can review an employer in relation to a TFW hired under the LMIA for up to six years which is why keeping records as required under the program is so important. Having

documentation easily accessible can make your responses easier and can also prove compliance.

### **LMIA compliance**

No matter what compelled the inspection, the basis for the review is to ensure the employer is acting in compliance with all requirements of the program and those set out in *Immigration and Refugee Protection Regulations* (“IRPR”). These differ slightly depending on whether the LMIA was a “High Wage” or “Low Wage” application.

The inspector will ensure that the employer is: meeting the conditions set out in the offer of employment; complying with federal and provincial employment and recruiting laws; engaged in the same business as was used to hire the TFW; and making efforts to provide an abuse-free workplace and providing adequate housing (if applicable).

A key focus of the inspector will be that the employer can prove that they are providing working conditions that are “mainly the same but not less favourable than those in the employment offer.” This includes ensuring that the TFW is employed in the same job as stated in the offer and that their wages remain substantially the same and not lower. Certainly, a decrease in wages would constitute non-compliance. Employers must also remember that even a substantial wage increase could be seen as “non-compliance” because it is a deviation from the approved LMIA conditions. This is because the LMIA was based on proving a labour gap for the role as advertised (including the wage rate). Employers must also be mindful that substantial shift in the duties of a TFW could result in non-compliance even if the title of the job remains constant.

The inspector will also seek to ensure that the employer is meeting any commitments made when completing the LMIA application. Specifically, they will review the steps taken to comply with the transition plan that the employer outlined in a high-wage LMIA and will ensure commitments such as hiring or training Canadians or permanent residents, or transferring skills, have been completed. Strong records of all efforts to complete these steps will be essential in a compliance review.

As a result of the COVID-19 pandemic, the inspector will also ensure that the employer has helped to prevent the spread of COVID-19 and protected the TFW from contracting COVID-19. Reviews may include an inspection of the living quarters if these are provided and proof that the TFW was paid during their quarantine period if applicable.

### **Powers of an inspector**

The inspector has many powers during the review process. These include being able to request information and copies of documentation and may include conducting site visits (with or without notice) and interviewing TFWs.

The inspector may: take photos; recordings; examine any documents related to the LMIA approval and IRPR, and request access to computers and electronic devices. The inspectors may also communicate with other authorities during the course of the inspection.

### **Outcomes and penalties**

Upon the completion of a compliance inspection, the employer will be notified that either the review is satisfactory or that there are potential non-compliance issues. If there is a finding of non-compliance, the employer will be given the opportunity to justify its shortcomings, mistakes or deviations from the requirements.

If the justifications are not acceptable to the inspector, a Notice of Preliminary Finding will be issued to the employer. If this is the case, there will still be a final opportunity to respond to this notice within strict timelines: within 30 days or only 5 days if the issues relate to COVID-19 pandemic requirements. Should this happen, it is important that the employer meet the deadline or be approved for an extension.

If there are violations, the final assessment will be issued as a Notice of Final Determination which will explain the conditions violated and related consequences.

Penalties depend on the nature of the non-compliance but can include: a warning, fines between \$100,000 per violation to a maximum of \$1 million per year; publication of the business name and address on the Immigration Refugee and Citizenship Canada website; and suspension or revocation of LMIAs already issued. For the most egregious violators, a permanent ban on hiring TFWs can be issued meaning that they will no longer be able to use the LMIA or LMIA-exempt processes to hire a TFW.

### **Conclusion**

Non-compliance can have severe consequences to business reputation as well as financial impacts. Severe violations can also mean loss of TFWs supporting your workforce and an inability to use the programs in the future.

It is important to be upfront during a compliance review and answer all questions carefully. If you have concerns about compliance we would encourage you to consult with a lawyer before an audit even begins and certainly prior to responding to an inspection.

The best way to stay compliant is to make sure that the requirements are well understood *before* using the program. The undertakings made when signing government paperwork should not be taken lightly. It is also essential that people in the company who are making human resources decisions (including managers) know the requirements of the program and the potential extra concerns of employing TFWs especially as it relates to changing any conditions of employment.

Our immigration team is happy to discuss the employer requirements of LMIA's and LMIA-exempt programs with you so that you can feel confident using the programs. We are also able to provide advice if you are currently under inspection or have concerns about your compliance.

## **FURTHER INFORMATION**

This publication is intended to provide brief informational summaries only of legal developments and topics of general interest, and does not constitute legal advice or create a solicitor-client relationship. This publication should not be relied upon as a substitute for consultation with a lawyer with respect to the reader's specific circumstances. Each legal or regulatory situation is different and requires review of the relevant facts and applicable law. If you have specific questions related to this publication or its application to you, please contact our [immigration team](#). Due to the rapidly changing nature of the law, Stewart McKelvey is not responsible for informing you of future legal developments.