

AVOIDING THE IMMIGRATION BLACKLIST

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With new immigration regulations coming into force on April 1, 2011, the criteria for assessing work permits have become more stringent. Foreign workers and their employers will now have to pass four new tests before a work permit will be issued. This is in addition to existing work permit criteria that was in place prior to April 1, 2011.

Test #1: Is the employer on the Employer Ineligibility website (the “Immigration Blacklist”)?

Beginning April 1, a list of employers who have violated certain immigration regulations will appear on the Immigration Blacklist. This list will be made public and employers on this list will be prohibited from hiring foreign workers for two years.

Test #2: Does the employee pass the “cumulative duration” test?

The new immigration regulations now impose a limit on the amount of time a foreign national can work in Canada. In general, if a foreign worker reaches works in Canada for four years, he or she will not be eligible to for another work permit for an additional four years.

While the four year limit is calculated cumulatively, gaps in employment (such as periods of unemployment, extended unpaid leave, maternity/parental leave, and medical leave that is not covered by employment contracts or agreements) will not count toward the cumulative duration.

The four year limit does not apply to all foreign workers. Some of the major exempt categories include executives, managers, professionals, and persons employed pursuant to international agreements (such as NAFTA).

These regulations are not retroactive. The four year calculation period begins on April 1, 2011 which means that the earliest date a foreign worker can reach the limit is April 1, 2015.

Test #3: Does the employer pass the “genuineness” test?

Another feature of the new regulations is that employers will now have to prove their job offers are genuine. In assessing “genuineness”, the following

will be considered:

1. Whether the employer is actively engaged in the business;
2. Whether the job being offered is consistent with the employer's employment needs;
3. Whether the employer can fulfill the terms and conditions of the job offer; and
4. Whether the employer, or any representative acting on behalf of the employer, is compliant with relevant federal-provincial/territorial employment and recruitment legislation.

The genuineness test will require employers to provide additional evidence on their business and business activities. Amongst the documents Citizenship and Immigration Canada will consider are Canada Revenue Agency filings.

Test #4: Does the employer pass the “substantially the same” test?

In cases where an employer hired a foreign worker in the two years prior to a new application being filed, an assessment will be made as to whether the employer provided “substantially the same” wages, working conditions and employment to their past or existing foreign workers as set out in the offers of employment to these foreign workers.

If it does not appear that the employer can pass the “substantially the same” test, employers can provide a “reasonable justification”. If a “reasonable justification” is accepted, this test will be passed. Examples of “reasonable justification” include:

1. Changes to federal or provincial laws;
2. Changes to a collective agreement;
3. A dramatic change in economic conditions;
4. Good faith employer error; and
5. An administrative accounting error.

Employers who do not pass the “substantially the same” test may be entered onto the Immigration Blacklist.