Comment on Draft Regulations under the *Ontario Immigration Act, 2015*

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Submitted to: Ministry of Citizenship and Immigration

Submitted by: Ontario Bar Association

ONTARIO BAR ASSOCIATION
A Branch of the Canadian Bar Association

L'ASSOCIATION DU BARREAU DE L'ONTARIO
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Introduction

The Ontario Bar Association ("OBA") appreciates the opportunity to make this submission to the Ministry of Citizenship and Immigration on consultations for regulations proposed under the *Ontario Immigration Act, 2015*, and in particular the proposed regulation titled "General." All provision references in this submission refer to the proposed General Regulation.

About the OBA

Founded in 1907, the OBA is the largest legal advocacy organization in the province, representing approximately 16,000 lawyers, judges, law professors, and students in Ontario. OBA members are on the frontlines of our justice system in no fewer than 40 different sections and in every region of the province. In addition to providing legal education for its members, the OBA assists legislators and other decision-makers with several policy initiatives each year – both in the interest of the profession and in the interest of the public.

This submission was formulated by the OBA's Citizenship and Immigration Law Section, which has approximately 300 members who represent virtually every stakeholder in the immigration system. These include those applying for skilled worker, permanent residence, refugee and citizenship status; spouses of Canadian citizens; and corporations and other Canadian employers who participate in skilled and temporary worker programs.

Comments

As indicated in our two previous submissions to the Ministry on earlier drafts of the Regulation, our members are committed to the success of the Ontario Immigrant Nominee Program ("OINP"). We all seek the same efficient, effective, transparent regime, supported by the expeditious processing of applications, to attract new employers and individuals to Ontario.

We appreciate the opportunity to have met with the Ministry to discuss the draft General Regulation, and offer the following comments based on our members' knowledge of the applicable legal principles and practical experience.

1. **Definition of "eligible Canadian institution."** Section 1 defines "eligible Canadian institution" as "a Canadian university or college listed as such on the Ministry's website, as the list is amended from time to time." In our view, the Ministry should consider harmonizing the definition with the definition applied by Immigration, Refugees and Citizenship Canada ("IRCC") to support the issuance of a post-graduate work permit.

   Of particular consequence are the IRCC provisions relating to schools outside of Quebec, which require that applicants have graduated from a

- public post-secondary school, such as a college, trade/technical school or university (or CEGEP in Quebec); or
- Canadian private school that can legally award degrees under provincial law (for example, Bachelors, Masters or Doctorate degree) but only if you are enrolled in a study program leading to a degree as authorized by the province.

In our view, differences between the federal and provincial sets of requirements should be harmonized to reduce confusion for applicants.

2. **Definition of "full-time."** Section 1 defines "full-time" as

(a) in respect of an employment position, a position that requires no fewer than 1,560 hours of paid work in a 12-month period and no fewer than 30 hours of paid work per week in a 12-month period,

(b) in relation to a program of study, a program that leads to an educational credential and requires at least 15 hours of instruction per week during the academic year, including any period of training in the workplace that forms part of the course of instruction.

With respect to paragraph (a), the Ministry should consider adding "or equivalent" to harmonize with federal requirements. In particular, we suggest additional flexibility with respect to the "30 hours of paid work per week" requirement. In our experience, it is not uncommon for some employees to be required to work 20 hours one week and 40 hours the next.

With respect to paragraph (b), the Ministry should consider specifically indicating whether online studies are acceptable for the purposes of the hours of instruction, given the increasing popularity of online instruction.

3. **Meaning of "connection to Ontario."** Section 4(1)2 requires that for an employment position to be approved, the employer's business must be "connected to Ontario and the anticipated employment activities related to the position must occur in Ontario."

In our view, there is a lack of certainty as to the meaning of "connected," and this ambiguity will likely cause the provision to be applied inconsistently, leading to confusion and delay. Moreover, the wording of this provision appears overly narrow and may have the effect of excluding some applicants that ought not be excluded. In particular, we question whether the provision captures the reality of the modern-day work environment, which allows an individual to live and work full-time in Ontario for an employer whose physical presence is based in a different province (for example, a sales representative who works out of a home office for a large corporation). It could be argued that the "connection" to Ontario in this

case is through the full-time employee, who lives and works in Ontario and sells a product to customers in Ontario.

We recommend that the meaning of this provision, and in particular the term "connected," be defined in order to provide greater guidance and certainty for applicants.

4. **Meaning of "indefinite duration."** Section 4(1)5 requires that for an employment position to be approved, the position must have an "indefinite duration." The phrase "indefinite duration" imports specific meaning and obligations in the employment law context, which in our experience makes employers apprehensive in making offers of indefinite duration. We suggest that the Ministry consider amending the provision to refer to "permanent" employment.

5. **Meaning of "rationally connected."** Section 4(1)7 requires that the employment position be "rationally connected" to the employer's business. We understand that the purpose of the provision is to ensure that the position logically relates to the employer's line of work or business, but in our view the phrase "rational connection" – which has a specific legal meaning in certain contexts – introduces uncertainty. We would recommend using "reasonably" instead of "rationally," or simply omitting the word altogether and requiring that the employment position be "connected" to the employer's business.

6. **Where recruitment is not required:** In approving an employment position, section 4(1)13 states that "if the director determines it is necessary, the employer must have made reasonable but unsuccessful efforts to fill the position with a Canadian citizen or permanent resident." In our view, this provision is overly vague about when and in what situations the director's discretion will be exercised. In particular, there should be further clarity around what recruitment efforts will be accepted as reasonable, which would provide increased certainty for applicants and guidance to the director.

7. **Canadian Language Benchmark.** We raised the question previously whether section 7.4 should reference Canadian Language Benchmark 4, rather than Canadian Language Benchmark 7, and we understand that the Ministry intends to amend the provision to this effect.

8. **Settlement funds.** For applicants to the in-demand skills category, section 7.5 requires that the applicant show adequate funds "equal to one-half of the minimum necessary income applicable for the applicant and his or her family members" (also known as settlement funds). We note that the IRCC does not require an applicant to demonstrate settlement funds where he or she is already working in Canada and is pursuing immigration based on Canadian work experience. We understand from our meeting that the Ministry has made a

deliberate choice in this respect to diverge from federal requirements in this respect, but we nevertheless recommend in the interest of consistency that there be a provincial exception to the settlement funds requirement where an applicant is already in Canada and working.

9. **Educational requirements for Human Capital and French-Speaking Skilled Workers streams.** Sections 10.7 and 11.6 require applicants to have "obtained a post-secondary degree from a Canadian institution authorized to issue such a degree, or equivalent credential from another jurisdiction that is supported by an educational credential assessment report…." Current program requirements for the Human Capital and French-Speaking Skills Workers streams require a Bachelor's degree, which we feel can be interpreted more narrowly. We recommend that sections 10.7 and 11.6 be clarified to indicate whether they are intended to contemplate more expansive educational requirements.

10. **Implied status.** Section 12.6, which applies to the skilled trades stream, requires that "at the time of making an application, the applicant must be lawfully residing in Ontario and hold a valid work permit." In contrast, we note that s. 7(1)2, which applies to the in-demand skills stream, requires that the applicant be "lawfully residing and working in Ontario."

    In our view, s. 12.6 should be amended to require that the applicant be "lawfully residing and working in Ontario." Moreover, both ss. 7(1)2 and 12.6 should specifically include applicants under implied status (that is, temporary residents who have applied for an extension to their authorized stay pursuant to the *Immigration and Refugee Protection Regulations*[1]).

11. **Administrative penalties.** The OBA has previously provided comments on the use of administrative monetary penalties in the Ontario justice system, and in particular under the *Ontario Immigration Act, 2015* and proposed regulations.[2] We are pleased to note that the Ministry has provided in the current regulatory proposal for a defence for representatives acting honestly and reasonably. However, we still have some concern with respect to the administrative penalties proposed in the Regulation.

    Section 20 requires that the penalty be calculated on the basis of the following formula:

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[1] SOR/2002-227, s. 183(5).
[2] See, for example, OBA submission to the Standing Committee on Justice Policy on Bill 49, the *Ontario Immigration Act, 2015*, April 16, 2015, as well as the OBA's submission to the Ministry of Citizenship, Immigration and International Trade regarding Phase 2 Regulations under the *Ontario Immigration Act, 2015*, January 29, 2016.

($2,000 x A x B) + C

The value "A" represents the total number of administrative penalties that have been imposed against the person or body in the previous 10 years (or, if none, the number 1). The value "B" represents the number of applicants if the contravention involves applications of multiple persons or bodies. The value "C" represents "the monetary amount that the person or body has received at any time in connection with the contravention."

With respect to "C", we are concerned that there is currently not enough guidance for the director or for persons/bodies subject to penalty regarding what constitutes a "connection with the contravention." Moreover, we remain concerned with the proposed calculation of the administrative penalties, which could arguably result in disproportionate penalties. In particular, it would be technically possible for a person with no previous contraventions to incur a higher penalty than one with multiple previous contraventions or multiple involved applications, if the monetary amount "connected with the contravention" is high enough. We question whether this is the desired result or if the formula should be reevaluated.

Conclusion

Once again, the OBA appreciates the opportunity to comment on the Regulation and provide input that reflects our legal experience working with employers and candidates who use the OINP and other immigration programs. We would be pleased to discuss our comments further and answer any questions you may have. We look forward to participating in continued consultations and efforts to improve the success of this important program.