2019 Regulatory and Policy Developments in Canada's Temporary Foreign Worker Programs

APRIL 2020

ARHW/ADDPD &
Services Étoile Filante (SEF)

About

The Association for the Rights of Household & Farm Workers

The Association for the Rights of Household & Farm Workers (ADDPD/ARHW) is a non-profit community organization founded in 1975 and based in Montreal.

Our mission is to advance the rights of those who work at their employer's place of residence, many of whom are subject to employer-tied work permits imposed through Canada's immigration law. Through its legal action project *BREAK THE CHAINS*, associated research and education/advocacy activities, the ARHW currently fights for the abolition of state obstacles to migrant household and farm workers' fundamental right to freely change employers.

Services Étoile Filante

Services Étoile Filante is a charity organization created in 1993 in order to offer free education and training services on the rights of immigrant and migrant women workers facing high risks of abuse by employers, agencies and/or landlords in Canada. In addition of organizing education and training activities (including collective activities such as workshops, symposiums, forums and conferences), Services Étoile Filante also organizes fundraising activities to allow the completion of its mission.

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Table of Contents

A. Introduction / General Comments

Important changes to Canada's temporary labour migration programs were implemented in 2019, and more have been announced. This is a broad overview of four significant policy changes at the federal level; two that have been implemented and two that are still under development.

These are not exhaustive descriptions of the policy developments. Rather, they are meant to give migrant workers, and their allies, a general understanding of the changes occurring in the landscape of Canada's temporary labour migration programs.

Importantly, many of the issues identified cannot be credited to our organization, as they have been raised consistently by various migrant rights advocacy groups across Canada in policy submissions, reports, and statements to the media.

Furthermore, the mandate of the ARHW is preoccupied with the fundamental rights and freedoms of migrant workers, particularly their right to quit and change employers, as it is central to the meaningful exercise of many other rights. As such, the analysis presented in this document is shaped by a focus on meaningful labor mobility. It is possible that other, equally important, issues have escaped our attention.

B. New Programs / Policies

Open Work Permit for Vulnerable Workers

In May 2019, the federal government amended the *Immigration and Refugee Protection Regulations* (IRPR) to allow for open work permits to be issued if there are reasonable grounds to believe that the worker on an employer-specific work permit is experiencing or is at a risk of experiencing abuse within

the context of their employment. Abuse is defined in section 196. 2 of the Regulations (financial, psychological, sexual and physical).

Benefits:

- Provides workers who are in an exploitative or abusive employment situation (and who have a valid work permit) with an accessible and relatively quick process to change employers (open work permit fee is waived and applications are supposed to be processed within five business days).
- Standard of proof is low – "reasonable grounds to believe".
- Is available to workers who may have engaged in unauthorized work or who have not complied with a condition of their work permit.

Issues[1]:

- No quick appeal process to review refusals to issue the open work permit.
- Immigration officers have considerable discretion in deciding when to issue the open work permit and the duration of that work permit. The operational guidelines suggest 12 months, but it is still left to the discretion of the officer.
- This process is not available to workers who may have lost their status in Canada, even if it was caused by the fraudulent behaviour of the employer and/or of a third party.
- While the open work permit provides an avenue of exit for workers experiencing abuse, it does not address problems such as employer-driven repatriation or blacklisting (especially prevalent in the Seasonal Agricultural Workers Program (SAWP)). Without measures to address these practices, many workers will not be able to access the program.
- While applications are supposed to be processed on an urgent basis, five business days may be too long for many workers, especially those that are facing coercive removal strategies. An expedited process should be available in those situations (48-hour turnaround).

Some Areas for Improvement:

- Implementation of a quick appeal/review process.

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[1] These concerns were raised in a number of policy submissions by various groups. **See for example**: Migrant Workers Alliance for Change (MWAC), "Updated Submissions re Canada Gazette, Part I. Volume 152, Number 50: Regulations Amending the Immigration and Refugee Protection Regulations", January 31, 2019; Canadian Council for Refugees (CCR), "Comments on proposed regulatory changes: Open work permits for abused migrant workers"; The United Food and Commercial Workers International Union (UFCW), "Migrant workers discuss need for open work permits at Leamington consultation", April 22, 2019.

- Expedited processing option for workers vulnerable to coercive removal strategies (48-hour turnaround).

- 12 months should be established as the minimum length of any work permit issued in these situations.

- Permits should be available to workers who are out of status.

The Home Child Care Provider Pilot and Home Support Worker Pilot

In June 2019, the two caregiver pathways to permanent residency were removed from the Temporary Foreign Worker Program and moved over to the International Mobility Program. With these new pathways, care workers can apply for permanent residency after two years of Canadian work experience (which must be completed outside of Quebec).

Benefits:

- Pre-arrival assessment of eligibility for permanent residency.

- Introduction of occupational-specific work permits that allow care workers to change employers without needing a new Labour Market Impact Assessment (LMIA) or requesting a change in work permit conditions.

- Open work permits for spouses and study permits for dependants.

Issues:

- The work experience must be completed within 36 months. No extensions will be available on work permits.

- Access to permanent residency is still employment-dependant, which can put pressure on workers to remain in exploitative and/or abusive situations in order to accumulate the necessary work experience.

- Work permits only authorize work in the occupation of either home childcare provider OR home support worker. Care workers can only accumulate work experience in one of the two occupations.

- Prior to their arrival in Canada, applicants must demonstrate to an immigration officer that they can financially support themselves and their family members in Canada:

    - According to IRCC's operational instructions and guidelines, financial admissibility will be assessed on the worker's likelihood of access to funds, living arrangements, and current financial situation. For instance, the wages specified in the job offer might be taken into consideration. Workers who plan to reside with their employer might be assessed as having more flexibility to support themselves or their dependents. Immigration officers might also take into consideration the available funds that a worker

has at the time of their application. For more details, please refer to the operational guidelines published by IRCC: Pathways for Caregivers – Admissibility and Final Decision.[2]

- Increased upfront costs for workers[3]:
  - Under the previous pathways, employers were responsible for transportation costs. It would appear that care workers will now be responsible for those expenses, as the government webpage contains no indication to the contrary.
  - Permanent residency processing fees must be paid at the same time as the work permit fees ($550 for principal applicant, $550 for spouse and $150 per dependant child). This does not include the 'right of permanent residency fee' that must be paid before permanent residency is granted ($490 for principle applicant and $490 for spouse).
  - In addition to the work permit processing fee ($155), workers will now have to pay the open work permit holder fee ($100).
- No program for Quebec.
- The new pilot maintains the high education and English language requirements that were problematic with the 2014 – 2019 pathways.[4]

Some Areas for Improvement:

- Work permit

The introduction of the occupational-specific work permit should improve labour mobility for workers in the program. However, the strict separation of the sector into home support and childcare unnecessarily limits employment opportunities for care workers.[5] Permits should be issued, and permanent residency requirements altered, to allow workers to accumulate work experience in both home support and childcare. Broader work authorizations increase the number of employment opportunities for workers, which will be especially important for workers who take jobs in rural or isolated areas. Canada has

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[2] IRCC, Operational instructions and guidelines, "Home Child-Care Provider and Home Support Worker Pilot: Admissibility and final decision".

[3] **See** statements made by Kara Manso, organizer with Caregivers Action Centre (CAC) in the Toronto Star, "Foreign caregivers say changes aimed at helping them realized their immigration dreams come with a costly catch", July 10, 2019.

[4] Concerns about practical access to permanent residency in the 2014 – 2019 pathways were raised by many groups during the consultation process. **See for example**: Migrant Workers Centre (MWCBC), "Migrant Workers Centre: A Proposal for Improving Canada's Caregiver Program" at page 2; Migrant Workers Alliance for Change MWAC), "Permanent Status on Landing: Real reform for Caregivers" (Joint Submission), April 6, 2018 at page 4; Migrant Workers Rights (MWR) and Association for the Rights of Household Workers, "The Caregiver Program: Necessary reforms for the respect of migrant caregivers' fundamental rights in Canada" (Joint Submission), April 6, 2018 at page 10.

[5] Caregivers Action Centre (CAC), "Permanent Status on Landing: Real reform for Caregivers", April 6, 2018 at page 7.

shortages of both childcare and home support workers. Allowing care workers to gain experience in both occupations will encourage better integration of these workers into the Canadian economy.

- 36-month deadline

Once the care worker enters Canada, the countdown begins. The former Live-in Caregiver program originally required workers to complete 24-months of full-time paid work in Canada within three years of their arrival in Canada in order to be able to apply for permanent residency. It was acknowledged that this timeline was unfair since it did not offer workers much flexibility and did not account for time lost due to pregnancy, sick leave, vacation, a change of employers or unemployment. In 2011, the three-year deadline was increased to four years. It is peculiar that the government has reverted to the 36-month deadline.

- Increased financial cost

The pre-screening of applicants for permanent residency is advantageous since it addresses a common problem of the 2014 - 2019 pathways; many care workers completed the 24-months of Canadian work experience only to discover that they did not meet the other conditions for permanent residency (education and language). However, as the pre-assessment process requires care workers to apply for permanent residency before they even arrive in Canada, they are also required to pay the fees associated with that application before coming to work in Canada. A care worker who plans to eventually immigrate to Canada with her spouse and two dependent children will have to pay $1655 in processing fees just for the permanent residence application and work permit. This does not include biometric fees, assessment costs for foreign education credentials, language tests, right of permanent residency fees, medical examination costs, and the work permit and study permit fees for spouse and children.

The fees that care workers must pay before they even arrive in Canada are unreasonable given that (1) most care workers come from countries where the average annual income for a family is less than $10,000 CAD, and (2) care workers in Canada and around the world are persistently underpaid. It is widely acknowledged that there is a serious problem with the amount of debt (often recruitment related) that care workers take on in order to come to Canada. The increased financial cost of entering Canada through the new pathways will likely be financed through loans, increasing the amount of debt that care workers will have to work off once they arrive in Canada. By treating care workers like all the other 'economic class' applicants eligible for permanent residency, the government has failed to consider the unique, and often precarious, financial situation of these workers.

C. Announced / Upcoming Changes

Occupation-Specific Work Permit

In June 2019, the IRCC and Employment and Social Development Canada (ESDC) posted an open call for submissions from interested parties regarding a proposal to amend the *Immigration and Refugee Protection Regulations* to allow for the issuance of occupation-specific work permits in the Primary Agriculture Stream and Low-wage Stream of the Temporary Foreign Worker Program. While this proposed permit would allow workers to move between jobs without having to apply for a new work permit each time, every job offer accepted by the worker would require an approved LMIA. **No further information or developments have been made public at this date.**

Benefits:

- A clear admission from the government that the employer-specific work permit prevents workers from changing employers and creates a power imbalance that favours the employer and fosters conditions for the abuse and exploitation of the worker.

Issues[6]:

- By continuing to require an LMIA in order for workers to change jobs, the proposed regulations do not truly create an occupation-specific work permit, nor enhance labour mobility. These proposed regulations largely create opportunities for employers to fill in job vacancies without needing to go through another LMIA process.

- It is unclear how this occupation-specific work permit would apply to workers in the SAWP, who are theoretically permitted to transfer between employers but must first seek the approval of the current employer, the foreign government official, and ESDC.

- The occupation-specific work permit should use a broad description to identify the occupation in which a migrant worker can be employed - i.e. Primary Agriculture, or Care Work - rather than a narrow NOC code. This is necessary because work that is substantially identical is often listed under a variety of narrow NOC codes. It is often the case that identical jobs are coded inconsistently. Using a narrow NOC code as an identifier will artificially constrain the scope of an occupation specific work permit, and therefore unnecessarily restrict the labour mobility of migrant workers.

- IRCC and ESDC proposed a designated time period where workers would not be permitted to change jobs (i.e. two months after a new employment contract). This is most likely to address concerns of employers who feel that the financial cost invested in hiring a foreign worker entitles them to hold the worker. See for example this submission by employer representatives.[7] Limiting or constraining the ability of a worker to change employment based on the financial interests of the employer runs contrary to the long-standing principles of the Canadian legal system.[8]

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[6] Please note that the following points are largely drawn from the statement on policy priorities issued jointly by many migrant worker support and advocacy organizations. **See** MWAC et al., "Temporary Foreign Workers Program in Canada, Migrant Workers Priorities 2019", May 19, 2019 at page 8 – 9.

[7] Ontario Federation of Agriculture (OFA), "OFA letter of support for CFA's Temporary Foreign Worker Program Working Group Comments on Occupation-Specific Work Permits", July 19, 2019 at page 2.

[8] Association for the Rights of Household and Farm Workers (ARHW) and La Chaire de recherche du Canada sur les dynamiques migratoires mondiales, "Re: Canada Gazette, Part I, Volume 153, Number 25: Introducing occupation specific work permits under the Temporary Foreign Worker Program (TFWP), June 22, 2019" (Joint Submission), July 19, 2019 at page 3.

Agri-Food Immigration Pilot

Announced in the March 2019 budget, this three-year pilot will provide pathways to permanent residency for workers in the agri-food sector. The pilot is a collaboration between Agriculture and Agri-food Canada and ESDC.

The pilot will be open to workers who have 12 months of full-time, non-seasonal Canadian work experience in the Temporary Foreign Worker Program, in an eligible occupation, such as processing meat products, raising livestock, growing mushrooms or greenhouse crops. To be eligible to participate in the pilot, candidates must have:

- a Canadian Language Benchmark level 4 in English or French;
- an education at high school level or greater (Canadian equivalency); and
- an indeterminate job offer for full-time, non-seasonal work in Canada, outside of Quebec, at or above the prevailing wage.

Changes will be also be made by ESDC Canada to benefit meat processor employers who support temporary foreign workers transitioning to permanent residency. This includes issuing a 2-year LMIA to employers using the Agri-Food Immigration Pilot or other existing pathways to permanent residence for temporary foreign workers in the same occupations and industries that are eligible for the pilot. Furthermore, adjustments will also be made to the way the limit ("cap") on low-wage temporary foreign workers is calculated, taking into account efforts made by employers to help workers obtain permanent residence. In order to be eligible, meat processor employers will have to outline their plans to support the temporary foreign worker in obtaining permanent residency. Unionized meat processors will require a letter of support from the union. Non-unionized meat processors will have to meet additional requirements to ensure the labour market and migrant workers are protected. A tri-partite working group will be formed immediately to develop these requirements.

Details on how individuals may apply for permanent residence through this pilot will be available in early 2020.

Benefits:

- Offers a pathway to permanent residency for occupations that were largely excluded.
- The 12-month work experience requirement is shorter than the 24 months required for the caregiver pathways.

Issues:

- It is not landed status on arrival.
- Does not apply to SAWP workers, who are kept in a state of permanent temporariness.

- If access to permanent residency is dependant on sponsorship from a particular employer, this opens the door for abuse and exploitation, as has been the experience in provincial nomination programs.

- Language and education benchmarks may make the program inaccessible for many workers.

- A maximum of 2,750 principal applicants will be accepted for processing each year.

    - There will be **annual limits** on the number of applications that will be processed for **each occupation.**

        - For example, only 50 applications made on the basis of an eligible job offer as a farm supervisor or specialized livestock worker will be accepted each year.

- No indicator on how this will interact with the proposal for occupation-specific work permits.

- No program for Quebec.

D. Conclusion

A recurring theme in many of the policy developments that took place in 2018 - 2019 is the recognition by the government that employer-specific work permits severely limit workers' labour mobility in a manner that creates conditions under which risks of abuse are higher. The open work permit for vulnerable workers, the work permit issued under the new caregiver pilots, and the proposed occupation-specific work permit all indicate a move, at least on paper, towards improved labour mobility for workers. However, it will be important that these reforms translate into the ability of workers to *meaningfully* exercise their right to change employers. This means that administrative barriers should be removed (i.e. no requirement that the new employer hold a valid LMIA), occupations should be broadly defined, and adequate support mechanisms should be implemented (i.e. policies that address language barriers, protect workers from reprisals and assistance with job-matching[9]).

The announcement of the Agri-Food Immigration Pilot is a step in the right direction since it provides access to permanent residency to workers who have been traditionally excluded from permanent immigration. However, it is not landed status on arrival and it is still employer/employment-based access. Experiences with past reiterations of the caregiver pathways and provincial nominee programs have shown that employer/employment-based access to permanent residency facilitates the abuse and exploitation of workers. Finally, the program does not provide access to SAWP workers, despite the fact that those workers have been coming to Canada to fill persistent and long-term labour shortages for decades. Keeping workers in a state of permanent temporariness maintains their vulnerability to reprisals from employers in the form of removal from the country and blacklisting. Canada needs to move to a system of permanent immigration for all workers, on the principle that landed status is a necessary condition for the meaningful exercise of many fundamental rights, including but not limited

[9] UFCW, "United Food and Commercial Workers Union (UFCW CANADA) Comments on Introducing Occupation-Specific Work Permits Under the Temporary Foreign Worker Program Published in Canada Gazette, Part I, Volume 153, Number 25: Government Notices", July 19, 2019 at page 2.

to: the right to access justice, the right to refuse unsafe or dangerous work, the right to collective bargaining, and the right to equal protection under the law.

Finally, the recent improvements in temporary foreign worker policy do not extend to an important but oft-forgotten segment of migrant workers. For instance, certain foreign representatives of a diplomatic mission, consular post or international organization are permitted to hire a foreign care worker without going through the Caregiver Program. Those care workers are not issued a work permit, but rather are given permission to work in Canada pursuant to paragraph 186(b) of the *Immigration and Refugee Protection Regulations.* These workers cannot change employers without the express consent of the Office of Protocol[10] and are required to leave Canada upon termination of their employment contract, at the end of the employer's posting or after seven years (whichever is earliest). While in 2013, the Office of Protocol increased oversight of these workers in the wake of troublesome reports of abuse and exploitation,[11] no improvements have been implemented that would increase their labour mobility or provide them with access to permanent residency. Future advocacy efforts should ensure that these workers are not left behind as Canada continues (hopefully) to move towards freer and less precarious temporary labour migration programs.

[10] Part of the Department of Foreign Affairs, Trade and Development (DFATD).

[11] National Post, "Ottawa cracking down on foreign diplomats who force domestic workers into 'involuntary servitude'", June 13, 2014.