

# BUSINESS IMMIGRATION

Introduction	125
Working in Canada	125
Work That is Work Permit Exempt	126
Work That Requires a Work Permit	128
TFWP	128
IMP	131
Applying for a Work Permit	133
Additional Considerations	134
International Mobility Workers Unit	134
International Students	134
Specific Programs	136
Country-Specific Programs	137
Employer Obligations Toward Foreign Nationals	137
Permanent Residents	139
Inadmissibility	139
Conclusion	140

*By Stéphane Duval and Shefali Tanna*



## BUSINESS IMMIGRATION

### Introduction

Business immigration and global mobility have become important factors to the growth of Canada and the Canadian economy with the federal government announcing ambitious plans to welcome more than 500,000 immigrants in 2025, steadily increasing by 50,000 immigrants per year over the next three years. This, combined with a recognized shortage of domestic skill sets, means more companies are relying on temporary foreign workers to address labour and/or skill shortages.

Canadian immigration law is made up of federal and provincial laws, associated regulations and ministerial instructions. Collectively, it governs the ability of individuals who are neither Canadian citizens nor permanent residents to be lawfully admitted to Canada either to visit, study, work or settle permanently.

The *Immigration and Refugee Protection Regulations* (Regulations) imposes a rigorous compliance regime that is designed to ensure Canadian employers respect the wage and working conditions of foreign nationals and impose serious penalties (including a period of ineligibility for hiring foreign nationals and penal charges) for non-compliance. Failure to respect any obligations could lead to serious consequences for a company, its directors and officers.

The *Immigration and Refugee Protection Act* (Act) sets out requirements for admission to Canada as an immigrant; refugees protection; enforcement and rights to appeal.

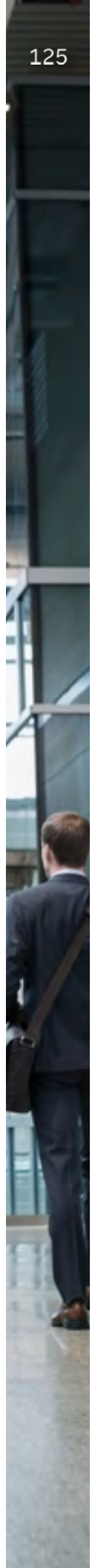
### Working in Canada

As a general principle, any foreign national who is neither a Canadian citizen nor a permanent resident of Canada cannot work in Canada unless authorized to do so. For Canadian immigration purposes, work is defined as an *activity for which wages are paid or commission is earned, or that is in direct competition with the activities of Canadian citizens or permanent residents in the Canadian labour market.*<sup>1</sup>

Determining whether there is a payment of a salary or commission in Canada is often a simple exercise; however, the absence of payment of a

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1 *Immigration and Refugee Protection Regulations* (SOR /2002-227), s. 1(1).



salary does not in itself void the requirement of a work permit. The second prong of the test: determining if there will be *direct competition with the activities of Canadian citizens or permanent residents in the Canadian labour market* is more difficult. In order to make this determination, immigration officers will analyze whether the foreign national will engage in an activity where Canadian citizens or permanent residents (“Canadians”) are available or if the foreign national’s position will compete with Canadian jobs. If so, the foreign national will be considered to be seeking to work in Canada and the officer will then determine whether: (i) a work permit is required; or (ii) if the work in question falls into one of the categories of work for which a work permit is not required (work permit exempt).

### **Work That is Work Permit Exempt**

Generally, foreign nationals entering Canada on business visits do not require work permits. Under Canadian immigration laws, a “business visitor” is defined as a foreign national who seeks to engage in international business activities in Canada without directly entering the Canadian labour market.<sup>2</sup>

In order for foreign nationals to be admitted into Canada as business visitors and benefit from any applicable work permit exemptions, they must meet the following criteria:

- There must be no intent to enter the Canadian labour market;
  - The foreign national is not directly entering the Canadian labour market if:
    - the primary source of remuneration for the business activities is outside Canada;
    - the principal place of business remains predominately outside Canada; and
    - the actual place of accrual of profits remains predominately outside Canada.<sup>3</sup>

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<sup>2</sup> *Immigration and Refugee Protection Regulations (SOR /2002-227)*, s. 187.

<sup>3</sup> *Immigration and Refugee Protection Regulations (SOR /2002-227)*, s. 187(3).



- The activity of the foreign worker must be international in scope. Immigration, Refugees and Citizenship Canada (IRCC) offers the following extended definition of “Business Visitor” and provides a few examples: <sup>4</sup>
  - A business visitor is someone who comes to Canada for international business activities without directly entering the Canadian labour market.
  - Examples of this include someone who comes to Canada to meet people from companies doing business with their country; to observe site visits; because a Canadian company invited them for training in product use, sales, or other business transaction functions.
  - They don’t need a work permit to come to Canada. Business visitors must prove that their main source of income and their main place of business are outside Canada.

In addition, Canadian immigration authorities<sup>5</sup> have outlined specific situations in which work completed in Canada will be work permit exempt. These situations include, among others, foreign nationals travelling to Canada to:

- **Provide after sales/lease service:** Foreign nationals coming to repair and service specialized equipment, purchased or leased outside Canada, provided the service being performed was negotiated as part of the original or extended sales agreement, lease/rental agreement, warranty, or service contract are eligible for admission as a business visitor. Acceptable activities include repairing, servicing, setting up, testing and supervising work completed on commercial or industrial equipment (including computer software). Setting up services do not typically include hands-on installation performed by construction or building tradespeople.

This category includes foreign nationals who seek to enter Canada to supervise the installation of specialized machinery purchased or leased outside Canada or to supervise the dismantling of equipment or machinery purchased in Canada for relocation outside Canada.

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<sup>4</sup> <https://www.cic.gc.ca/english/helpcentre/answer.asp?qnum=434&top=16>.

<sup>5</sup> Immigration, Refugees and Citizenship Canada: Operational instructions and guidelines.



- **Act as trainers and trainees:** Foreign nationals entering Canada to provide familiarization or training services to prospective users or to maintenance staff of the establishment after installation of specialized equipment purchased or leased outside Canada has been completed are considered to be business visitors.
- **Provide intra-company training and installation activities:** Foreign nationals coming to provide training or to conduct the installation of equipment for a branch or subsidiary company of their foreign employer are considered to be business visitors. The same prohibition against hands-on building and construction work as for after-sales service applies.
- **Board of Directors' meetings:** Foreign nationals attending a meeting as a member of a board of directors may enter as a business visitor.
- **Short-term work conducted by highly skilled workers:** Foreign nationals who are highly skilled and whose occupation falls in Training, Education, Experience and Responsibilities (TEER) category 0 or 1 of the National Occupational Classification (NOC) may undertake work in Canada for 15 days once every six months or 30 days once every 12 months without a work permit.
- **Researchers:** Foreign nationals coming to perform research at the invitation of a publicly funded, degree granting Canadian post-secondary institution or affiliated research institution can come to Canada to work on that project for 120 days/four months, once a year, without a work permit.

### Work That Requires a Work Permit

As a general rule, work that is not work permit exempt requires a work permit under one of two programs in Canada: either the Temporary Foreign Worker Program (TFWP) or the International Mobility Program (IMP).

#### TFWP

##### *Regular Program*

The TFWP allows Canadian employers to hire foreign workers to fill temporary labour and skill shortages when qualified Canadian citizens or permanent residents are unavailable. This program is managed jointly by Employment and Social Development Canada (ESDC) and IRCC. Under



this program, employers must demonstrate that they have been unable to recruit Canadian citizens or permanent residents for the job.

Under the TFWP, employers must first obtain a positive Labour Market Impact Assessment (LMIA) in order for the foreign national to then apply for a work permit. An LMIA is a document issued by ESDC following a thorough assessment of Canada's labour market in order to determine whether or not Canadian citizens or permanent residents are available to undertake the type of work in question. In most cases, employers must advertise the position publicly for at least four weeks via a variety of enumerated methods so as to prove whether or not the employment of a foreign worker is likely to fill a labour shortage.

The application for an LMIA must also demonstrate that:

- the wages offered to a foreign worker are consistent with the prevailing wage rate for the occupation and region(s) where the worker will be employed and the working conditions offered to a foreign worker meet generally accepted Canadian standards;
- the employment of a foreign worker is likely to result in direct job creation or job retention for Canadian citizens or permanent residents;
- the employment of a foreign worker is likely to result in the creation or transfer of skills and knowledge for the benefit of Canadian citizens or permanent residents;
- the employer has made, or has agreed to make, reasonable efforts to hire or train Canadian citizens or permanent residents; and
- the employment of the foreign worker is not likely to adversely affect the settlement of any labour dispute in progress or the employment of any person involved in the dispute.<sup>6</sup>

If all the conditions are met, a positive LMIA decision will be issued and the foreign national will then be able to apply for a work permit either at the port of entry upon arrival, if he/she is from a visa-exempt country, or at the Canadian visa office in his/her country of citizenship or legal residence (see below, **Applying for a Work Permit**).

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<sup>6</sup> *Immigration of Refugee Protection Regulation (SOR /2002-227), s. 187.*



### *Global Talent Stream*

The Government of Canada recognized the importance of attracting highly skilled individuals that can contribute to the Canadian economy, especially where there is a lack of domestic talent in certain areas.

One way the Government of Canada has demonstrated its commitment to attracting the best talent is through the creation and launch of the Global Talent Stream (GTS). The GTS offers timely, responsive and predictable client-focused-service to help employers access highly skilled global talent to expand their workforce in Canada and be competitive on a global scale.

The GTS is divided into two categories:

- Category A is for employers who have been referred by a designated referral partner and who seek to hire unique and specialized talent in an area of specialization to help the employer scale up and grow;
- Category B is for employers who seek to hire highly skilled workers in a position listed on the Global Talent Occupations List, which is a list of professions that have been determined by the Government of Canada to be in demand and for which there is insufficient domestic labour supply.

To qualify for processing under the GTS, in addition to meeting the category requirements, the employer must work with ESDC to develop a Labour Market Benefits Plan that demonstrates its commitment to activities that will have lasting, positive impacts on the Canadian labour market (e.g., job creation, skills and training investments, growth of revenue, etc.). The GTS has no minimal recruitment requirement, but the employer will be asked to describe any efforts to recruit Canadians and permanent residents.

Under either category of the GTS program, employers will usually see their LMIA application processed expeditiously (i.e., on average within two weeks).

### *Simplified Process for Certain Occupations in Québec*

For employers seeking to hire foreign nationals to work in Québec, certain occupations are eligible for processing under a facilitated LMIA process that exempts employers from conducting and demonstrating



their recruitment efforts, similar to the GTS. The list of occupations is established by region and are updated yearly. The simplified process allows employers to receive LMIA's on an accelerated basis, provided that the potential foreign national employees meet the requirements of the occupations in question.

## IMP

The IMP allows employers to hire a foreign national and support an application for a work permit without first obtaining an LMIA. The IMP has various categories, which are based on: public policies, international agreements or arrangements (e.g., *Canada-United States-Mexico Agreement* (CUSMA, formerly known as NAFTA), *Comprehensive Economic and Trade Agreement* (CETA), *Canada-U.K. Trade Continuity Agreement* (Canada-U.K. TCA), *General Agreement on Trade in Services* (GATS), etc.), Canadian interests, permanent residence applicants in Canada, etc.

Some of the categories of work permit under the IMP include:

- **Intra-company transferees:** This category allows multinational companies either with operations in Canada, or those who are seeking to set up Canadian operations, to temporarily transfer qualified employees to Canada for the purpose of improving management effectiveness, expanding Canadian activities, and enhancing the competitiveness of Canadian entities. Eligible foreign nationals must be currently employed outside of Canada (by a related enterprise) for at least 12 months in the past three years and be seeking to work at a Canadian parent, subsidiary, branch, or affiliate of the foreign enterprise in an executive, senior managerial or specialized knowledge capacity.<sup>7</sup>
- **Professionals:** This category facilitates the issuance of a work permit to foreign nationals to occupy certain professions specifically provided for in various International Free Trade Agreements such as CUSMA, CETA, CPTPP and Canada-U.K. TCA, among others. The foreign national can apply for a Canadian work permit as long as they can prove they meet the defined requirements of the occupation and demonstrate the existence of a Canadian job offer in that occupation.

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<sup>7</sup> <https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/temporary-residents/foreign-workers/exemption-codes/intra-company-transferees/canadian-interests-significant-benefit-general-requirements-r205-exemption-code-c12.html>.





- **Francophone mobility:** French-speaking foreign nationals whose language of habitual use is French and who have been recruited to work in any position in any skill level outside of Québec can apply for and obtain a work permit.
- **Spouses of skilled work permit holders:** Spouses/common-law partners of foreign nationals who hold Canadian work permits that were issued for more than six months and that authorize them to work in a high-skilled occupation (TEER 0, 1, 2 or 3) can obtain open, i.e., non-employer specific, work permits valid for a concurrent duration to their spouse's permit.
- **Emergency repairs or repair personnel for out-of-warranty equipment:** In situations where a repair must be completed urgently in order to prevent the disruption of employment of Canadian citizens or permanent residents regardless of whether the equipment is under warranty — and for which specialized knowledge is required and for which there is no Canadian commercial presence by the company that manufactured the equipment being repaired — a short-term work permit can be obtained (usually 30 days or less).
- **Post-graduation work permit:** Foreign nationals in Canada who have continuously studied full time in Canada pursuant to a valid study permit and have completed a program of study that is at least eight months in duration at a designated learning institution, are eligible for an open work permit under certain conditions.
- **Reciprocal employment:** Foreign workers can take up employment in Canada when Canadian citizens and permanent residents have availed themselves to similar reciprocal opportunities abroad. Entry under reciprocal provisions should result in a neutral labour market impact.
- **International Experience Canada:** The Canadian government has signed bilateral, reciprocal agreements and made arrangements with 36 countries and territories nationalities to facilitate the movement of their youth between countries for the purpose of cultural exchange. These agreements allow foreign nationals between 18 and 30 or 35 years old (depending on the country) to obtain a work permit for a limited period of time in order to travel or work anywhere in Canada (Working Holiday Program) or for a specific employer (International Co-op Program and Young Professional Program).



- **Bridging open work permit:** Foreign nationals currently in Canada (but outside of Québec) with a valid status as a worker set to expire within four months and who have submitted an application for permanent resident status may be eligible for bridging open work permits so they may continue working and living in Canada pending the adjudication of their application.
- **Québec selection certificate holders currently in Québec:** Foreign nationals who are currently in Québec with valid status as a worker may obtain a work permit valid for up to two years with a Québec-based employer on the basis of their Québec selection certificate obtained through the Québec permanent skilled worker program.
- **Post-doctoral PhD fellows and award recipients:** Foreign nationals appointed to a time-limited position with an accompanying stipend or a salary to compensate for periods of teaching, advanced study and/or research may be issued temporary work permits. Applicants must have completed, or be expecting to complete shortly, their doctorate and be working in a field related to that in which they earned, or are earning, their PhD. Academic research award recipients who are supported by their own country or institution and invited by Canadian institutions to conduct research activities in Canada may also be eligible for a work permit under this category.

### **Applying for a Work Permit**

The work permit can be applied for once an LMIA is issued (if required), or when the Canadian employer provides the foreign worker with the proof of submission of an offer of employment under the employer portal and proof of payment of the employer compliance fee.

With either document in hand, the foreign worker can apply for their work permit upon entry into Canada, if eligible, or at a visa office abroad, depending on their country of citizenship.

### **Foreign Nationals Who do not Require Visas**

A foreign national who is a citizen of a visa-exempt country can apply for a work permit at the port of entry (Canadian land border or any major international airport). All visa-exempt applicants, except certain individuals, including U.S. citizens, will require an Electronic Travel Authorization (eTA) in order to travel to Canada by air.



On June 6, 2023, 13 countries were added to the eTA program. Travellers from these countries who have either held a Canadian visa in the last 10 years or who currently hold a valid United States non-immigrant visa can now apply for an eTA instead of a visa when travelling to Canada by air.

### ***Foreign Nationals Who Require Visas***

Foreign nationals who require a visa to enter Canada must apply for their work permit at a visa office abroad. This can be done electronically or on paper, in certain circumstances. While there is a general list of documents to be provided in support of an application for a work permit, each local visa office has its own specific requirements, and it is important to review them before submitting the application. A personal interview might also be required in exceptional circumstances. The application must be submitted at the visa office responsible for the foreign nationals' country of citizenship or their country of current legal residence.

### **Additional Considerations**

Foreign nationals who have resided in certain countries for six months or more in the 12 months preceding the date of the application, or who seek to work in a job in which public health must be protected (such as health care, children, etc.), will require a medical examination prior to their admission into Canada. Medical exams must be completed by an IRCC authorized Panel Physician.

### **International Mobility Workers Unit**

Employers seeking to hire visa-exempt foreign nationals under one of the IMP categories may seek to have their application pre-adjudicated by the International Mobility Workers Unit, an in-country service available to visa-exempt nationals not currently in Canada.

### **International Students**

International students may be authorized to work off campus if they meet the following requirements:

- they have a specific notation on their work permit stating “may accept employment on or off campus if meeting eligibility criteria as per R186(F), (V) or (W). Must cease working if no longer meeting these criteria.”



- they are a full time student at a designated learning institution (DLI);
- they are enrolled in a post-secondary academic, vocational or professional training program (or, if in Québec: a secondary-level vocational training program);
- their study program is at least six months long and leads to a degree, diploma or certificate;
- they have started studying; and
- they have a social insurance number (SIN).

If they are a part time student, they are only authorized to work off campus if they are studying part time because they are in the last semester of their study program and don't need a full course load to complete their program and they were a full time student in their program in Canada, up until their last semester.

Generally, students are authorized to work off campus during term time up to 20 hours per week, and on a full time basis during regular breaks.

However, in July 2023, the Government of Canada expanded this work authorization. Therefore, if international students are authorized to work off campus, and if they applied for a study permit (or extension) on or before October 7, 2022, they are authorized to work off campus during term time on a full time basis until December 31, 2023 if they currently hold a valid study permit, or if their study permit has expired, but they have maintained their status and are studying at a DLI full time (or part-time if it's the final academic semester), or if they have been approved for a study permit, but haven't arrived in Canada yet. They retain their authorization to work off campus on a full time basis during regularly scheduled breaks.

There are additional situations to be considered on a case-by-case basis.

This policy allows international students to fill critical gaps in the labour market by expanding opportunities for them to gain more substantial local work experience, while continuing to pursue their studies full time.



## Specific Programs

### *Tech Talent Strategy*

The Government of Canada has developed policies designed to support the next generation of innovative industrial activities by aligning immigration tools with industrial priorities essential to supporting Canada's future prosperity.

### *Innovation Stream of the International Mobility Program*

IRCC will create a new exemption from the LMIA process under the IMP to help high-growth employers and talented workers support Canada's innovation priorities and high-tech industries by the end of 2023.

There will be two categories:

- employer-specific work permits valid for up to five years for workers destined to work for a company identified by the Government of Canada as contributing to the country's industrial innovation goals;
- open work permits valid for up to five years for highly skilled workers in select in-demand occupations.

This new program is groundbreaking as currently the maximum period of validity of a work permit is three years. This extended work permit offers employers and foreign nationals greater certainty and stability.

### *Open Work Permits for H-1B Visa Holders*

The second program is the streamlined process for H-1B specialty occupation visa holders and their accompanying family members in the U.S. to apply for a Canadian open work permit. This program seeks to offer a flexible and adaptive alternative to the difficulties that H-1B visa holders experience in the U.S. in extending their stay beyond six years and the long wait times, sometimes of over 10 years, required to obtain permanent residency. This program has multiple benefits: Canadian employers now have access to an expanded talent pool and foreign nationals in highly skilled roles have the opportunity to gain competitive Canadian work experience.

Approved applicants will receive an open work permit valid for up to three years and their spouses and dependants will also be eligible to apply for the required documents valid for a concurrent duration.



This is a pilot program that opened on July 16, 2023, and was closed on July 17, 2023, as the cap of 10,000 applications was reached. Only principal applicants, and not their accompanying family members, were counted toward the application cap, demonstrating the popularity of the program. Given this, another similar program may be launched again in the future.

### **Country-Specific Programs**

Canada regularly expresses support for foreign nationals residing in countries affected by natural disasters or political instability and/or changes. This has been evidenced by programs initiated to support Afghan Citizens fleeing the Taliban, programs for Hong Kong nationals and individuals affected by the civil disruptions in Sudan among others.

These programs often facilitate the issuance of Canadian work authorizations to foreign nationals, allowing them to temporarily settle in Canada and continue their lives until either the situation normalizes in their country of nationality, or they apply to stabilize their status in Canada.

For employers, this means that there is a constant flow of foreign nationals with unique expertise in industries that may not be as well developed, or well staffed in Canada, entering the Canadian labour market, for the benefit of all.

### **Employer Obligations Toward Foreign Nationals**

Canadian employers of foreign nationals are expected to meet rigorous compliance requirements regarding the foreign workers in their employ. It is essential that Canadian employers:

- **Hire a foreign worker with the requisite authorization:** The law prohibits any employer from hiring a foreign national who does not possess the requisite work authorization. It also places the onus on the employer to verify the status of every foreign national that it employs. In other words, should the employer fail to exercise due diligence in determining whether employment is authorized, the employer will be deemed to have known that it is not authorized. It is critical to verify the status of any foreign worker before making an offer of employment.



- **Ensure ongoing compliance with the foreign national's declared terms of employment:** When hiring a foreign worker, Canadian employers set out the terms of employment both to the foreign worker and to the Government of Canada. These must be respected in precisely the same way as they would for a Canadian employee. However, in cases of foreign workers, any changes to the terms of employment — including minor changes such as an increase in salary or a change in the number of hours worked — may need to be reported to Canadian authorities prior to this change taking place (depending upon the work permit category and the delta of change). Audits of employers that currently have or have had (audits can be retroactive six years) foreign workers in their employ are routine occurrences.
- **Avoid any form of misrepresentation:** Canadian law prohibits any person, including an employer, from communicating either directly or indirectly, information that is false or misleading, or making any erroneous representation that could lead to Canadian immigration law or regulations being administered incorrectly. Therefore, it is important that any statement, form, or document produced by an employer is accurate and true, including but not limited to the offer of employment, any forms, or communications exchanged with officers.
- **Ensure proper contract terms:** Conclude employment contracts with foreign nationals setting out the terms of employment prior to the submission of an offer of employment in the employer portal (IMP) or, on or before the first day of work of the foreign national that is during the period of employment for which the work permit is issued to them if the work permit is obtained pursuant to an LMIA.
- **Be aware of provincial and federal laws:** Comply with all federal or provincial laws that regulate the employment or recruitment of employees, including foreign nationals, in the province in which the foreign national works. The recruitment and licensing requirements vary province by province and must be assessed independently.

The consequences of non-compliance in any form on the part of the Canadian employer could be significant. Employers found non-compliant are subject to:

- warnings;
- administrative monetary penalties ranging from C\$500 to C\$100,000 per violation, up to a maximum of C\$1 million over one year, per employer;



- a ban of one, two, five or 10 years, or permanent bans for the most serious violations from all forms of foreign worker programs;
- the publication of the employer's name and address on a public website with details of the violation(s) and/or consequence(s); and/or
- the suspension or revocation of previously issued LMIAs.

Furthermore, depending on the nature of the breach, companies, directors, and officers can also be sentenced to a fine of up to C\$50,000 or C\$100,000 and imprisonment for a term of up to two or five years.

### **Permanent Residents**

Many programs currently exist for foreign workers to settle permanently in Canada. Some of these are point-based systems that factor in personal, professional, education and other qualities in addition to any time spent in Canada as a foreign worker, while other programs are based on family reunification. Additionally, as immigration is jointly managed by the federal government and provinces and territories, additional options exist at the provincial level that are tailored to the needs of each province.

Permanent residents can, like any Canadian citizen, work and live in Canada, subject to certain obligations imposed upon them, most importantly, a residency obligation. Under the current legislation, the residency obligation requires any permanent resident to be physically present in Canada for at least 730 days in any five-year period, failing which they may lose their permanent resident status. Certain exceptions to this obligation exist.

### **Inadmissibility**

Foreign nationals can be considered criminally inadmissible to Canada for having been convicted of an offence inside or outside of Canada that constitutes an offence under Canadian law. Individuals who are inadmissible to Canada may be denied entry to the country regardless of the purpose of their trip. In certain cases, this inadmissibility can be overcome via an application for a temporary resident permit, which is granted on a discretionary basis where an urgent need to travel to Canada can be established.

In some circumstances, individuals who are inadmissible to Canada may be eligible for criminal rehabilitation, which overcomes criminal inadmissibility permanently.





## Conclusion

Prior to hiring a foreign national, whether temporarily or permanently, employers should ensure they are cognizant of their rights and obligations. Employers' actions are regulated from the start of the recruitment process and remain in effect throughout the hiring process and until the time of termination. Furthermore, employers are required to maintain records of all documents relating to the recruitment, hiring, employment and termination of a foreign worker for six years from the first day of employment for which a work permit was issued. The consequences of any breach of the applicable federal and provincial laws could drastically affect both the employer and its business.

The rules and regulations governing both permanent and temporary entry to Canada are complex and ever changing. It is therefore prudent for any company having, or wishing to establish, a commercial presence in Canada to become familiar with Canadian immigration laws.

### FOR MORE INFORMATION, PLEASE CONTACT:

#### Stéphane Duval

[sduval@mtiplus.ca](mailto:sduval@mtiplus.ca)

416-601-7801

514-397-4284

