

**BRIEF TO THE STANDING COMMITTEE ON CITIZENSHIP AND IMMIGRATION  
43 ND PARLIAMENT 2nd SESSION**

**LABOUR MARKET IMPACT ASSESSMENTS**

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Submitted via e-mail to the Clerk of the Committee  
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Dear Ms. Zahid, Respected Committee Members

1. Thank you for the opportunity to make a written presentation about Labour Market Impact Assessments (LMIAs).

**BACKGROUND ABOUT AUTHOR**

2. I have been in the immigration industry for 19 years and I am a Regulated Canadian Immigration Consultant. I hold a post graduate degree in Economics, a three-year diploma in Export Management majoring in International Trade Law and a one-year diploma in Immigration (Seneca College, 2002). Therefore my formal education includes immigration law and economics.

3. Over the past 19 years I have conducted research into the LMIA process and published numerous articles about LMIAs. I am also the co-author of the only handbook written about LMIAs: *“Labour Market Impact Assessments, Compliance and Enforcement: A Practical Guide”* Published by Thompson Reuters in 2019.

4. In 2008 my firm represented an employer in an Arranged Employment Opinion (AEO). The AEO process does not exist anymore but it is essentially a LMIA without advertising. The AEO was refused and leave to appeal was requested. The Federal Court issued an order and

sent the matter back to a different officer<sup>1</sup>. **This was the first court order about an AEO/LMIA in Canadian history.** The nexus of the case was about the definition of genuineness. In 2008 the Immigration and Refugee Protection Regulation 82 (IRPR 82) stated that job offers must be genuine. IRPR 82 did not specify the definition of the word “genuine”. Then internal rules of Employment and Social Development (ESDC) stipulated that a “self-employed” employer cannot issue a genuine job offer. In the AEO submission it was argued that this internal policy is ultra vires the IRR 82. After the court order, the Immigration Refugee Protection Regulations 200 (5) were added to the existing regulations to define genuineness. Now IRPR2005 (5) stipulates the following:

***(5) A determination of whether an offer of employment is genuine shall be based on the following factors:***

***(a) whether the offer is made by an employer that is actively engaged in the business in respect of which the offer is made, unless the offer is made for employment as a live-in caregiver;***

***(b) whether the offer is consistent with the reasonable employment needs of the employer;***

***(c) whether the terms of the offer are terms that the employer is reasonably able to fulfil; and***

***(d) the past compliance of the employer, or any person who recruited the foreign national for the employer, with the federal or provincial laws that regulate employment, or the recruiting of employees, in the province in which it is intended that the foreign national work.***

## OBJECTIVE

5. The objective of this submission is to highlight the importance of the LMIA process to the Canadian immigration system **and** to explain shortcomings in the LMIA process.

## SCOPE

6. The presentation will be divided into 3 sections:
- a. Importance of LMIAs in selection decisions (how the LMIA is used)
  - b. Shortcomings in the current LMIA process
  - c. Six Suggestions

## IMPORTANCE OF LMIAs

7. In immigration policy there are two broad choices regarding the selection of skilled immigrants:
- a. The government decide which skilled immigrants is needed (through an occupation list or a points system); and
  - b. The employers (Industry) decide whom they need to employ (via the LMIA process).

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<sup>1</sup>Integrated Solutions Services Inc. v. Minister of Human Resources and Social Development, Federal Court Docket IMM-852-08

8. The selection philosophy of Immigration Refugee and Citizenship Canada (IRCC) is based on the notion that government knows which Immigrants (skills) are needed and that the choice made by employers (expressed via the LMIA process) are of less importance. Why ?

9. Up to November 2016 an immigrant with “Arranged Employment” would be provided 600 points (out a total of 1200 points). “Arranged Employment” is a job offer supported by an LMIA. In November 2016 IRCC decreased the value of arranged employment from 600 points to 50 points<sup>2</sup>. Therefore, the value of an employer provided job offer decreased from 50% to 4% of the total score of a skilled immigrant in the Express Entry System.

10. On 2 January 2017, Immigration and Refugee Citizenship Canada (IRCC) was requested to provide the research on which the decision was made to radically decrease the value of a job offer supported by an LMIA<sup>3</sup>. The bureaucratic response was as follows: *“Express Entry is a competitive system that actively and purposefully issues invitations only to the candidates who are best positioned for economic success in Canada. Because invitations are issued on a ‘top down’ basis, elevating candidates with lower levels of human capital (by providing higher levels of points for arranged employment) necessarily results in fewer invitations to candidates with higher levels of human capital. In large enough numbers, these trade-offs have the potential to constitute a significant opportunity cost for Canada's economy”*. The decrease in the value of a LMIA was made on ideology. According to the Access to Information Request response, there was no research completed before the value of an LMIA was decreased and not a single industry was consulted either.

11. Selection via the current point system of Express Entry is deeply flawed. Why ? Based on the Express Entry System, a 30-year-old university lecturer in Dutch poetry with an honours degree and 3 years' work experience teaching Dutch Poetry has more points than an applicant with a bachelor's degree in electrical engineering, 35 years old with 10 years of work experience in electrical engine engineering. This simply does not make sense. From the inception of Express Entry in 2014 until the end of 2020, the assumption was that points reflects true value of an immigrant to Canada. Seventy thousand immigrants were allowed to emigrate to Canada every year via Express Entry without assessing their employability. One of the methods to determine someone's employability is the LMIA process.

12. From Dec 2016 until the March 2020 (at the start of the COVID pandemic), it was accepted that the points in Express Entry represent true value of an immigrant to Canada (with the associated low points value of a job offer supported by an LMIA). This approach was rarely questioned. Some in the media and politicians praised the Express Entry System. In an article that appeared in the Toronto Star on 12 Feb 2018 with the heading **“Having a job offer is no longer key to immigrating to Canada”**, the lack of a job offer supported by an LMIA in Express Entry was praised. It was the latest immigration mantra at the time: Ignore the needs of employers as expressed via LMIA's and increase the value of points based on a dubious point system.

13. Some criticism was made in media, but it did not have much of an effect. The government send a signal that it places a significantly less emphasis on the needs of employers and subsequently the value of a job offer was decreased radically (50% to 4% of the total score). Mr. Benjamin Tal (Deputy Chief Economist of CIBC or the Canadian Imperial Bank of Canada) wrote an article in the Globe and Mail dated 27 October 2018 named “Why a BA in history and a minor

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<sup>2</sup> Canada Gazette, Part I, Vol 150, No 46, 12 Nov 2016.

<sup>3</sup> Immigration, Refugees and Citizenship Canada, Access to Information Request: A-2016-38030 / TT

in plumbing should not be seen as a joke<sup>4</sup> In the article he wrote the following: ***“More than 20 percent of Canadians with either a college diploma or a bachelor’s degree are immigrants, and that share rises with the level of education. Half of all PhD holders in Canada are foreign-born. Yet the unemployment rate among immigrants with postsecondary education is notably higher than it is for Canadian-born individuals with similar education. The same can be said for earnings.”***

14. Not only did industry get frustrated with the policies that radically decrease the value of a job offer and the associated LMIA, but it probably also contributed to increased unemployment within Canada. In an Access to Information and Privacy (ATIP) requests, submitted to obtain the number of occupations for which Employment Insurance (EI) claims were submitted for 2019<sup>5</sup>. An ATIP request was also submitted to IRCC to determine how many immigrants were admitted via Express Entry without an LMIA (selection purely based in points) for 2019 in the same occupations<sup>6</sup>. The research showed that

- **27** Retail Trade Managers (NOC 0621) were admitted via Express Entry without job offers, while 18,930 number EI claims by retail managers were submitted during 2019. This number does not represent number of people that lost their jobs. If each person made 20 claims the number of people lost their jobs as Retail Trade Managers would be 496 persons.
- **41** Management Consultants (NOC 1122) were admitted via Express Entry without job offers, but 2,770 EI claims were made by Management Consultants. This number does not represent number of people that lost their jobs. If each person made 20 claims the number of Canadians that lost their jobs as Management Consultants would be **138 persons**.
- **40** University Professors (NOC 4011) were admitted via Express Entry without job offers, but 2,670 EI claims were made by University Professors. This number does not represent number of people that lost their jobs. If each person made 20 claims the number of Canadians that lost their jobs as University professors would be **133 persons**.

More examples could be quoted to demonstrate the concept that LMIA’s could prevent the Express Entry process to make unemployment worse in certain occupations in certain parts of the country.

## SHORTCOMINGS IN THE LMIA PROCESS

15. There are many good things that should be mentioned about LMIA’s:

- a. ESDC/SC developed a new online LMIA application process. This works extremely well, decrease errors in applications, takes less time, issues file numbers of pending applications within seconds, etc. This is an innovative process and ESDC should be praised for developing this new system

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<sup>4</sup> <https://www.theglobeandmail.com/opinion/article-why-a-ba-in-history-and-a-minor-in-plumbing-should-not-be-seen-as-a/>

<sup>5</sup> ESDC ATIP file A-2019-03961/SS dated 9 Nov 2020

<sup>6</sup> IRCC ATIP, CR-20-0695 OPP-DART-202-10897\_COPR FSW with no job offer

- b. The Global Talents Stream LMIA allows ESDC/SC to issue LMIA to Information Technology workers quickly without advertising. The Global Talent Stream is an example of a policy decision in the right direction as it recognizes the urgent need for some skilled immigrants.
- c. In Emergencies Employment and Social Development Canada/Service Canada (ESDC/SC) is able to issue LMIA within a very short period. Management of Service offices in Vancouver/Edmonton and Toronto respond very quick to emergency requests.

16. However, the LMIA process has challenges

- a. Policies remain hidden and inaccessible to employers. Here is a list of hidden policies that is not available to the public. Officers are provided with approximately 476 pages of internal policies (named Notices, Directives or Policies). The following internal policies are only accessible via the Access to Information Act, and they are not available on the ESDC website for employers to study<sup>7</sup>.
  - Quality Monitoring Framework for the Labour Market Impact Assessment under the Temporary Foreign Worker Program (18 December 2017)
  - Transition Plans for High-Wage Occupations (2 November 2017)
  - Directive on Priority Processing (10 Business Day Speed of Service) (2 November 2017)
  - Notice - Transitioning to NOC 2011 (2 November 2017)
  - Directive on Wage Assessment (2 November 2017)
  - Owner Operator Definition (29 Aug 2017)
  - Notice: Alberta Pilot Project: Refuse to Process Certain High or low Wage Occupations in the Province of Alberta (19 April 2017)
  - Directive on Employer Ineligibility for the Temporary Foreign Worker Program (18 April 2017)
  - Inspections Directive (18 April 2017)
  - Directive on Global Assessment of the Seven Labour Market Factors (3 April 2017)
  - Directive on Employer and Third-Party Profiles in Foreign Worker System (3 April 2017)
  - Assessing Prevailing Wage Rates for Ski and Snowboard Instructor Positions in Western Provinces (31 March 2017)
  - Assessing Records of Employment (27 March 2017)
  - Directive on Classification of Occupations (27 March 2017)
  - Directive on Refusal to Process Above the Cap (25 March 2017)
  - Policy: Alberta Pilot Project - Refuse to Process Low-wage Occupations in the Accommodation and Food Services and Retail Trade Sectors in Areas of High Unemployment in Alberta (9 March 2017)
  - Policy: Alberta Pilot Project - Refuse to Process Certain High-wage Occupations in the Province of Alberta (9 March 2017)
  - Notice - Interim Measure: Waiving Recruitment for Foreign Vessels in Canadian Waters (2 March 2017)
  - Directive on Transfer of Skills and Knowledge (27 Feb 2017)

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<sup>7</sup> ESDC Access to Information Request A-2017-00127 undated

- Directive on Job Creation or Retention (27 Feb 2017)
- Handling Incomplete Applications (21 Feb 2017)
- Processing an LMIA with an Employer Compliance Review (30 Jan 2017)
- Inspections Directive (30 January 2017)
- Directive on the LMIA Validity Period (30 Jan 2017)
- Directive on Recruitment and Advertising Requirements (26 Jan 2017)
- Policy: Definition of Employer (Interim) (23 Dec 2016)
- Directive on Primary Agriculture (18 November 2016)
- Directive on Employer Ineligibility for The Temporary Foreign Worker Program (11 Nov 2016)
- Changing or Replacing Names on a Positive Labour Market Impact Assessment (LMIA) (2 November 2016)
- Directive on Labour Dispute (2 November 2016)
- Directive on Language Requirements (2 November 2016)
- Directive on Assessing In-Home Caregiver Applications (2 November 2016)
- Refusal to Process an LMIA application for a Previous Revocation (2 Nov 2016)
- Directive on Refusal to Process: Over 6% Unemployment: Accommodations and Food Services, and Retail Trades Sectors, Specified NOC D Occupations (2 November 2016)
- Policy: Cap on Low-wage Positions (6 Oct 2016)
- Policy: Intelligence and Action (INTACT) (1 Aug 2016)
- Policy: Ministerial Instructions to Refuse to Process Caregiver Applications with a Mandatory Live-in Requirement (9 July 2016)
- Policy: Administrative Monetary Penalties Payment and Collection (27 June 2016)
- Policy: Ministerial Instructions - Suspensions and Revocations (3 June 2016)
- Policy: Language of Work (17 May 2016)
- Policy: Disclosure of Personal Information (13 May 2016)
- Policy: Collection, Retention and Disposition of Personal Information (13 May 2016)
- Policy: Temporary Foreign Worker Program Streams (12 May 2016)
- Notice on Waiving an Employer from Meeting the TFWP's Minimum Advertising Requirements (12 May 2016)
- Policy: Location of Work (4 May 2016)
- Policy: Refusal to Process Applications from Employers Who Have Had Labour Market Impact Assessments Revoked in the Past Two Years (4 May 2016)
- Targeted Underrepresented Groups - Older Workers (28 April 2016)
- Policy: Compensation (26 April 2016)
- Policy: Employer Inspection and Determination of Consequences (25 April 2016)
- Policy: Global Assessment of the Labour Market (21 April 2016)
- Policy: Ministerial Instructions to Refuse to Process Labour Market Impact Assessment Applications (5 April 2016)
- Policy: Job Creation or Retention (29 March 2016)
- Policy: Labour Shortage (29 March 2016)

- Policy: Refuse to Process Lower-skilled Occupations in the Accommodation and Food Services and Retail Trade Sectors in Areas of High Unemployment (22 March 2016)
- Policy: Voluntary Disclosure for the Temporary Foreign Worker Program (8 March 2016)
- Policy: Employer Authorization for Representatives during Post Labour Market Impact Assessment Activities (4 March 2016)
- Policy: Procedural Fairness (25 Feb 2016)
- Policy: Employer Ineligibility for the Temporary Foreign Worker Program (25 Feb 2016)
- Policy: Labour Market Impact Assessment Validity (18 Feb 2016)
- Policy: Employer Compliance Reviews (11 Sept 2015)
- Policy: Cancelling an LMIA decision (9 Sept 2015)
- Policy: Labour Market Impact Assessment processing for employers that have been found non-compliant under a previous employer compliance review (17 July 2015)
- Policy: Duration of Employment on the Labour Market Impact Assessment (3 June 2015)
- Policy: Working Conditions (17 May 2015)
- Concession Booth Owners/Operators with Major Touring Productions (15 Nov 2013)
- Directive on Classification of Occupations (no date)
- Assessing Positions in Meat Processing (no date)

The public does not know when these policies are updated or when new policies are published.

The Canadian Bar Association wrote about the same lack of transparency in their report entitled “Express Entry and The Temporary Foreign Worker Program” in April 2016 and recommended that the government: “Publish compliance manuals, guidelines and operational instructions provided to officers so employers can understand the compliance standard to be met.”<sup>8</sup>

The results of hidden policies are as follows:

- It contributes to a higher number of LMIA refusals. Essentially the lack of clear policy and the inability to correct erroneous policies is killing the goose (LMIA process) that lays the golden eggs (highly skilled immigrants to Canada). The LMIA process protects jobs for Canadians efficiently.
- It is procedurally unfair to have hidden rules. Employers need to know what is expected of them in all cases. There no logical reason to hide policies from employers.
- In some provinces Nomination Certificates (Provincial Nominee Class) are being used as an alternative/substitute for an LMIA. This has resulted in large increases in applications within the Provincial Nominee Class and

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<sup>8</sup> Canadian Bar Association report: Express Entry System and the Temporary Foreign Worker Program, April 2016, page 5 <https://www.cba.org/CMSPages/GetFile.aspx?guid=1b44ed97-2e72-4b9d-848a-901b148ba604>

resulted in very long processing times in some cases. Many applicants/foreign nationals could use the federal immigration classes such as the Federal Skills Trades Class (for as this class is not overloaded with applications). Accessible and clear LMIA policies will ensure that employers understand the requirements; increase the approval rate and ensure that the Provincial Nominee Class is not “over-subscribed.” Employers that really need the provincial programs cannot use it as available quotas are being taken up by applicants that could have qualified for other immigration classes such as the Federal Skilled Trades Class of the Federal Skilled Worker Class. In Ontario the Provincial Nominee Program cannot accommodate all applicants. There are simply too many applications for the quota given to the province. Clear LMIA policies and an increased value of an LMIA in the federal system would entice Ontario employers of foreign nationals to use more LMIA and Federal immigration classes

- d. There is not a standard address or e-mail address that employers or representative can send LMIA policy inquiries. ESDC has a report line and is available to the public to make anonymous complaints and tips (both an online tool and a mailing address). Sadly, the same level of enthusiasm to help employers to understand the policies or ask questions about LMIA policies does not exist. Immigration Refugees Citizenship Canada has a dedicated e-mail where representatives can send policy inquiries: [IRCC.ImmigrationRepresentatives-Representantsimmigration.IRCC@cic.gc.ca](mailto:IRCC.ImmigrationRepresentatives-Representantsimmigration.IRCC@cic.gc.ca)
- b. Officers, team leaders and managers sometimes ignore ESDC’s LMIA policies and Federal Court decisions, e.g.: An LMIA application for a sushi chef<sup>9</sup> was submitted after advertisements were placed on 10 different websites while only 3 advertisements are required. Therefore, the employer went overboard and advertised extensively.

Employers are also required to complete a “job match” before an application for a LMIA is submitted. Canadians with a profile on the government website [www.jobbank.gc.ca](http://www.jobbank.gc.ca) are assigned a certain number of stars by artificial intelligence. The maximum number of stars are five. Canadians with a certain number of stars must be invited to apply for the vacancy. For positions which the wage is below the provincial wage, employers are required to invite anyone with 2 stars or more (the maximum is 5 stars). The employer did invite 10 Canadians with 2 stars or more. However, the employer did not invite 6 applicants with 2 stars or more as the employer explained that the 6 Canadians did not have sushi experience.

Days before the LMIA refusal the Federal Court made a decision on a Judicial Review for an LMIA refusal<sup>10</sup>. In this case the employer did not complete a job match on the [jobbank.gc.ca](http://www.jobbank.gc.ca) at all. The case was refused but the decision set aside by the Federal Court on 3 Feb 2020. Associate Chief Justice Gagné held that the employer’s efforts must be reasonable and just to refuse an LMIA request due to a lack of using the job match, is unreasonable.

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<sup>9</sup> LMIA 8555095

<sup>10</sup> Marcom Resources Ltd and Minister of ESDC, Federal Court Docket IMM-2914-19.



Despite the employers' extensive efforts to find Canadians the officer refused the case as 6 applicants were rejected (not invited) due to zero sushi experience. The team leader and manager clearly stated that Service Canada officers do not have to follow Federal Court decisions. They stated that they only have to follow case law if the cases are absorbed and referred to within their internal hidden LMIA policies. A review of the 476 pages of LMIA policies showed no reference made to any court decisions anyway. By ignoring relevant case law, the team leader and manager believe they are above the law. There are 2 primary sources of law in Canada: Case law and Legislation. Both are primary sources for Canadian law. Case law is made up of the written decisions of judges in court cases and tribunals. Case law comes from all levels of courts in Canada<sup>11</sup>.

- c. When Service Canada Officers make decisions on LMIA requests, all seven labour market factors listed in s. 203(3) of the Immigration and Refugee Protection Regulations must be evaluated. The factors are as follows:
- whether the employment of the foreign national will or is likely to result in direct job creation or job retention for Canadian citizens or permanent residents;
  - whether the employment of the foreign national will or is likely to result in the development or transfer of skills and knowledge for the benefit of Canadian citizens or permanent residents;
  - whether the employment of the foreign national is likely to fill a labour shortage;
  - whether the wages offered to the foreign national are consistent with the prevailing wage rate for the occupation and whether the working conditions meet generally accepted Canadian standards;
  - whether the employer will hire or train Canadian citizens or permanent residents or has made, or has agreed to make, reasonable efforts to do so;
  - whether the employment of the foreign national is likely to adversely affect the settlement of any labour dispute in progress or the employment of any person involved in the dispute; and
  - whether the employer has fulfilled or has made reasonable efforts to fulfill any commitments made, in the context of any assessment that was previously provided under subsection (2), with respect to the matters referred to in paragraphs (a), (b) and (e).

These factors are conjunctive in nature therefore, officers must assess all seven factors before rendering a decision. When the Regulations were promulgated in the Canada Gazette on 14 June 2014, the government identified two (2) factors that, on their own, can be used to refuse an LMIA request (i.e., render a negative decision):

- Wages and working conditions are not sufficient to attract or retain Canadian jobseekers; and

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<sup>11</sup> <https://library.law.utoronto.ca/step-2-primary-sources-law-canadian-case-law-0>

- The LMIA may not be used as a strike breaker or somehow interfere with a labour dispute.

Therefore these 2 factors are the only two factors that can be used in isolation to refuse an LMIA request. If none of these two factors have been breached, the officer must assess all seven factors before rendering a decision. Officers are also provided with the following guidance in a policy named Directive on Classification of Occupations: **“The Officer should not base their entire assessment of the labour market factors exclusively on the outcome of one factor. However, the following two factors, if assessed to be negative, will generally result in a negative overall assessment of the foreign national's labour market impact due to the high risk of adverse effects”** Despite this clear direction from the Government Gazette and the Internal policies Service Canada often ignores this and use 1 single factor to refuse an application, contrary to the intention of the law maker and internal policies of ESDC. This is exactly what happened in the case the above-mentioned sushi chef.

## SIX SUGGESTIONS

17. **Publish all LMIA Policies.** Employment and Social Development Canada (ESDC) should publish all of its LMIA directives to employers to allow them to understand the rules.
18. **Weight of LMIA in Immigration Points.** Industry (employers) should be given more power and influence to make selection decisions in determining the need for economic immigrants. In other words, **more weight should be given to a job offer supported by an LMIA** (arranged employment) when points are awarded in Express Entry to determine the value of an immigrant.
19. **Visa Officer should Recognize the Needs of Employers.** Employers Express their needs for immigrants via job offers supported by LMIA's. Visa officers are given almost unlimited authority with Immigration and Refugee protection Regulation 179 (b) **“An officer shall issue a temporary resident visa to a foreign national if, following an examination, it is established that the foreign national... (b) will leave Canada by the end of the period authorized for their stay under Division 2”** Therefore the regulations allows officers to ignore the needs of employers expressed by the LMIAs. In the work permit process, less emphasis should be placed on “Ties to Country of Citizenship” and more on the need of the foreign worker at the workplace. Currently “Ties to country of Citizenship” trumps the needs of employers as expressed by LMIAs during work permit applications.
20. **E-mail address for Policy Inquiries.** ESDC should provide an e-mail address where representatives can send LMIA policy inquiries.
21. **Federal Court.** A list of all federal court decisions should be included ESDC's policies. Officers should also be trained and instructed to respect the decisions from Federal Court.
22. **All Factors** Officers should be instructed to make LMIA decisions in a balanced manner while considering all factors of the LMIA process and not isolated factors to try to refuse LMIA applications.