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CANADA BEGINS NEW PROGRAM FOR HOLDERS OF U.S. H-1B VISAS – AND THEY REALLY DO MEAN H-1B VISAS, NOT H-1B STATUS, ALTHOUGH FAMILY MEMBERS NEED NOT HAVE ANY KIND OF H-4

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Update: on July 18, 2023, IRCC posted an announcement that the cap of 10,000 applications for the new program had been reached on July 17 and the program was closed. So the below post may be only of theoretical interest unless Canada reopens the program at a later date.

In a previous blog post, I described a new Canadian program for holders of H-1B visas, and flagged the issue that the initial announcement of the program and backgrounder issued by Immigration, Refugees and Citizenship Canada (IRCC) referred to "H-1B specialty occupation visa holders in the US" in such a way as to suggest that an actual H-1B visa stamp was necessary. As I explained in that post, there are multiple circumstances under which one can be in valid H-1B status, but not possess an H-1B visa stamp as such, such as in the event of a change of status or extension of stay. At the time, it was unclear whether this seeming requirement for a visa stamp was merely an imprecision in language. There were also other issues left open by the announcement.

IRCC has now published the application guidance for the new program, and has also posted the underlying temporary public policy established under section 25.2 of the Immigration and Refugee Protection Act. (The temporary public policy is dated June 23, but was only made public on its effective date of July 16.) Unfortunately, it appears from the temporary public policy and the application guidance that IRCC will indeed be requiring principal applicants for an open work permit under the new program to have an H-1B visa stamp, and not merely H-1B status, as well as reside in the United States. The good news is

that there is no similar requirement that dependents of principal applicants have either H-4 visas or H-4 status, and indeed some family members who could not qualify for H-4 status will be eligible for the new program.

Part 1, section 1(iii.) of the temporary public policy specifies as one of the conditions to be met that an applicant for a work permit under the policy "holds an H-1B (Specialty Occupations category) visa issued by the United States of America that was valid at the time the work permit application referred to in (i) was submitted". This reference to a visa, like the one in the original IRCC announcement, could potentially be read as ambiguous, but the application guidance specifies that a visa is a separate document required in addition to an H-1B approval notice and potentially Form I-94. The guidance states:
To apply, you'll need
• **a copy of your current H-1B visa**
• **Form I-797/I797B, Notice of Action**
o This is a letter from the US government confirming your H-1B application was approved.
• **proof that you live in the US, such as**
o Form I-94, Arrival/Departure Record
o a recent utility bill
o an income tax report
o any document that proves you live in the US

The separate bullet point for "a copy of your current H-1B visa" implies that neither the Notice of Action showing approval of an H-1B application, nor a Form I-94, will suffice without the visa. It is not clear why IRCC has imposed this requirement, but it appears that they have done so.

One piece of good news, however, is that there is no similar requirement for family members of principal H-1B applicants. Indeed, not only are family members of principal applicants not required to have an H-4 visa stamp, they are not even required to have H-4 status, or be eligible for H-4 status. As long as they are a family member of an approved principal applicant under the definition contained in subsection 1(3) of the Immigration and Refugee Protection Regulations (IRPR), and reside in the United States, that is sufficient.

The definition of a family member under subsection 1(3) of the IRPR is somewhat broader than the definition of a family member for H-4 purposes under U.S. law. The IRPR definition includes "the spouse or common-law

partner of the person" (here, of the principal applicant); "a dependent child of the person or of the person's spouse or common-law partner"; or "a dependent child of a dependent child" of the person or the spouse or common-law partner. Thus, common-law partners of H-1B visa holders, children of common-law partners of H-1B visa holders, and some dependent grandchildren of H-1B visa holders and their spouses or common-law partners may be eligible for the new Canadian program although they would not be eligible for H-4 status.

Moreover, the definition of a child for these purposes does not cut off at age 21, as it does for H-4 purposes under INA 101(b)(1), 8 U.S.C. 1101(b)(1). Rather, under section 2 of the IRPR, a dependent child includes one who "is less than 22 years of age and is not a spouse or common-law partner, or . . . is 22 years of age or older and has depended substantially on the financial support of the parent since before attaining the age of 22 years and is unable to be financially self-supporting due to a physical or mental condition." Thus, some 21-year-old children or disabled older children of H-1Bs, who would not be eligible for H-4 status, may be eligible for the new Canadian program, even if they have had to change to some other nonimmigrant status or are stuck in limbo as derivative beneficiaries of long-pending applications for adjustment of status, as long as they reside in the United States.

Another open question I had raised in my prior blog post was how IRCC was going to allocate the 10,000 available numbers for principal applicants under the new program. Now that the effective date has passed without any announcement of a lottery or similar allocation mechanism, it appears that IRCC is simply going to allocate the numbers to the first 10,000 approved applications.

A third open question at the time of the announcement resulted from language on an IRCC guidance page for high-skilled workers that suggested applicants might want to consider the new program if "your US work visa is expiring soon". Fortunately, however, nothing in the temporary public policy or the application guidance indicates that any particular date of H-1B expiration is required. The guidance page notwithstanding, even someone with, say, two and a half years left out of an H-1B petition and visa with three years validity, should qualify for the new program.

The new Canadian program has attracted significant positive media attention, which has understandably focused on the broader picture rather than details

such as the distinction between H-1B visas and H-1B status. I do not mean to suggest, by highlighting this seemingly arbitrary distinction, that it should overshadow the other positive aspects of the program, or the implications that the program has for U.S. immigration policy. And it is good to see that IRCC will not be requiring dependent family members to meet U.S. requirements for an H-4 in order to benefit from the new program. But it would be even better if IRCC could remove the arbitrary exclusion of those who have changed status to H-1B or otherwise lack a valid H-1B visa, and open up the temporary program to H-1B nonimmigrants who reside in the United States in H-1B status even if they do not have H-1B visa stamps.