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In a time when international business is difficult, we look closer to home for U.S., and Texas, relations with Canada and Mexico.



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THE STATE BAR OF TEXAS

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The administration of Mexican President Andrés Manuel López Obrador has been implementing its energy policy pursuant to its campaign promises. This policy includes a number of new energy initiatives, many of which prioritize the Mexican state-owned energy companies. However, the policy leaves new opportunities for the private sector, such as, public-private partnerships in power projects with the CFE, LNG, procurement opportunities in the midstream and downstream sectors, and possible future PEMEX farmouts.

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CONTINENT POST-PANDEMIC

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2020's mostly negative news overshadowed some positive developments in the North American economy, particularly the ratification of the United-States-Mexico-Canada Agreement ("USMCA") that replaces a 25-year-old NAFTA. The new USMCA framework adds an extra layer of complexity to other significant recent developments, including Mexico's 2012 General Law on Climate Change and its 2013 Energy Reform. The article discusses these major legal moving parts, how they may interact, and the resulting challenges and opportunities for legal practitioners, all against the backdrop of a struggling global economy and a new U.S. administration. The article takes the view that with the right guidance from lawyers and policymakers, post-COVID North America may be more robust and equitable than it was before.

This author gives a special thanks to the scholars at Rice University Baker Institute Center for the United States and Mexico for many of its insights that are incorporated in this article. Energy Control and the Mexican Ministry of Energy issued two regulations that have significantly shifted renewable energy policy in Mexico and changed the rules of the game for solar and wind projects. This article will discuss the two newly enacted regulations as well as the response and remedies available to private parties.

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CANADA: THE START-UP VISA PROGRAM
FOR ENTREPRENEURS

By Sergio R. Karas, B.A., J.D.

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Canada: The Start-Up VISA Program for Entrepreneurs

BY SERGIO R. KARAS, B.A., J.D.

In 2013 Canada launched the Start Up Visa Program (“the program”) to attract technology entrepreneurs with the know-how and ideas to establish new business ventures supported by capital pools of incubators and angel investors. The program was almost immediately popular because the foreign entrepreneur, and immediate family members, receives permanent residency regardless of the ultimate success of the business venture. Since its initial establishment, several hundred entrepreneurs have been granted permanent residency. The number of applications under the program has increased steadily, although the program remains relatively small compared to other immigration categories. Although the program is generally successful in recruiting foreign talent, it is often criticized for its complexity and cumbersome process. In the remainder of this article, I discuss the major components of this program in order to clarify the contours of its requirements.

PROGRAM OVERVIEW

The program is part of the Economic Class immigration category established by section 12(2) of Canada’s *Immigration and Refugee Protection Act* (“IRPA”).¹ Under subsection 14.1(1) of the IRPA, the Minister of Citizenship and Immigration may issue instructions creating a class of permanent



residents as part of the Economic Class. Pursuant to that authority, the Minister established the Start-Up Visa Program and issued the *Ministerial Instructions Respecting the Start-up Business Class, 2017*.² The Ministerial Instructions have been incorporated into sections 98.01 to 99 of the *Immigration and Refugee Protection Regulations* (“IRPR”).³

The Ministerial Instructions define the Start-Up Business Class as a class of foreign nationals who have the ability to become economically established in Canada and meet the following qualifications: (i) have obtained a commitment from either a designated business incubator, a designated angel investor group, or a designated venture

capital fund; (ii) have attained a certain level of language proficiency; (iii) have a certain amount of transferable and available funds; and (iv) have a qualifying business. Failure to meet these requirements results in a refusal of an application.⁴

The program aims to attract immigrant entrepreneurs with the skill and potential to build high-growth businesses, capable of innovation and job-creation, that can compete on a global scale. Applicants under the program can apply either as a single entrepreneur or as an entrepreneurial team of up to five members.⁵

SUPPORT OF A DESIGNATED ORGANIZATION

A designated organization⁶ is a business group that has been approved to invest in or support possible start-ups. It can be an angel investor group, a venture capital fund, or an incubator.

Angel investor groups are made up of members who invest their own capital in start-ups, usually in exchange for equity. Angel investor groups help their members in a variety of ways, which can include identifying investment opportunities, pooling their capital, and standardizing the investment process for angel investors.

Venture capital funds raise and manage capital to place equity investments in start-ups with high growth potential. Venture capital funds support start-ups through their investment and can also provide operational experience, technical knowledge, networks, and mentorship.

Business incubators are private organizations that help start-ups grow by offering a range of services, which include physical space and facilities, capital, business mentoring, and networking connections.⁷

Applicants need to obtain a letter of support from one or more of the designated organizations to be eligible for the program. The organization will also send a commitment certificate directly to Immigration, Refugees and Citizenship Canada ("IRCC"). If the organization is an angel investor, it must confirm that it will invest at least \$75,000 in the start-up. If the organization is a venture capital fund, it must confirm that it will invest at least \$200,000. If the organization is an incubator, it must confirm that the applicant's business is currently participating in or has been accepted into its business incubator program. To obtain a letter of support, applicants must contact the designated organization

directly and convince them that they have a business idea that is worth supporting.

As a further requirement, a visa officer must be satisfied that an applicant's primary purpose is engaging in the business activity for which the commitment was intended and not for the purpose of acquiring a status or privilege under the IRPA.⁸

QUALIFYING BUSINESS

A qualifying business means a business that meets the following criteria:

- At the time the applicant obtains the commitment from a designated organization:
 - Each applicant holds 10% or more of the voting rights attached to all the shares of the corporation; and
 - The applicant(s) and the designated organization hold more than 50% of the total voting rights attached to all the shares of the corporation outstanding at that time.
- At the time the applicant receives permanent residence:
 - The applicant provides active and ongoing management of that business from within Canada;
 - An essential part of the operations of the business takes place in Canada; and
 - The business is incorporated in Canada.

LANGUAGE REQUIREMENT:

The ability to communicate in English or French is necessary for a business to be successful in Canada. Therefore, to be eligible for the program an applicant must meet a minimum level of the Canadian Language Benchmark ("CLB") in either English or French. If the minimum language skills are not met, the application will be rejected.

SETTLEMENT FUNDS IN CANADA

To be eligible under the program, the applicants must prove that they have enough funds to support themselves and their dependants after they arrive in Canada. These funds can not be borrowed. The amount that is required depends on the size of the family and is updated annually.⁹

MEDICAL AND CRIMINAL BACKGROUND CHECKS

In order to obtain permanent resident status under the program, applicants and their dependants must pass a medical examination. If they pose a danger to Canada's public health, or if their condition would cause too great a demand on health or social services in Canada, their application will be refused. In addition to the medical examination, applicants and all dependants over the age of 18 years, must provide police certificates from each country where they have lived for 6 months or more since the age of 18 to determine that they are not criminally inadmissible.

PEER REVIEW

A peer review is an independent assessment of a commitment by a panel of experts convened by the industry association that represents the lead designated entity on the commitment certificate.¹⁰ The goal of the process is to make sure that the activities of the designated organization and the applicant are in line with industry standards and to protect against fraud.¹¹ The peer review examines the level of due diligence that was performed by the designated organization and ensures that the company has been or will be incorporated in Canada; the business ownership has been verified and satisfies program requirements; the designated organization has considered the viability of the proposed business model, assessed the business venture's management team and verified the ownership of the intellectual property; the focus of the business is on a high-growth potential product and/or service; and the business incubator applicants are validly accepted into an incubator program.

Visa officers who request an independent assessment are not bound by it.¹² If visa officers do not rely on the peer review for their decision, there is no obligation to bring the peer review to the attention of the applicant.¹³

The aim of the peer review process is to examine whether the designated organization conducted due diligence in accepting the applicant's proposal, and not to examine the conduct or intentions of the applicant. Therefore, the visa officer need not invite the applicant to attend the peer review.¹⁴

TEMPORARY WORK PERMIT

While waiting for permanent resident status under the program, applicants may apply for a Temporary Work Permit. This enables applicants to come to

Canada and start building businesses. To be eligible for a temporary work permit, applicants must: plan to live in a province or territory other than Quebec; pay the Employer Compliance Fee; have received a letter of support from a designated entity indicating that they are essential and that there are urgent business reasons for them to come to Canada early; and have sufficient funds to meet the Low-Income Cut-Off ("LICO") for their family for 52 weeks.¹⁵

Once applicants are in possession of a valid work permit, they must engage in business development and activities in Canada.¹⁶

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Applicants with a valid work permit must engage in business development and activities in Canada.

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CONCLUSION

The program targets entrepreneurs who want and have the ability to establish high-growth businesses in Canada. Applicants cannot use the program for the purposes of acquiring immigration status or privilege under the Act. However, once an application has been approved and applicants have received permanent resident status, the failure of the start-up business will not affect

their status. This is a marked departure from previous immigrant entrepreneur programs that made permanent residency conditional upon the success of the enterprise and the fulfilment of conditions that included job creation for Canadians and the achievement of financial targets. It is recognized that not all business ventures are successful.¹⁸ Nevertheless, a visa officer must be satisfied that an applicant's participation in an agreement or arrangement in respect of a commitment is primarily for the purpose of engaging in the business activity for which the commitment was intended and not for the purpose of acquiring a status or privilege under the IRPA. The program capitalizes on the availability of private capital pools to launch technology ventures, on the desire of foreign entrepreneurs to establish their business in Canada as a launch pad for global growth, and on the difficult and slow processing of entrepreneur applications in other countries, notably the United States. Although the program still requires refinement and a better understanding of the success of enterprises approved under the program, it is an option that has increased Canada's appeal to many foreign entrepreneurs deciding on a business location.



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Endnotes

- 1 S.C. 2001, c. 27.
- 2 (2017) C Caz I, 3523.
- 3 SOR/2002-227.
- 4 Bui v. Canada (Minister of Citizenship and Immigration) [2019] F.C.J. No. 417; Nguyen v. Canada (Minister of Citizenship and Immigration) [2019] F.C.J. No. 420].
- 5 If there is more than one applicant, every applicant must submit their own application separately. No application will be processed until all the applications have been received by IRCC.
- 6 A list of designated organizations can be accessed here: <https://www.canada.ca/en/immigration-refugees-citizenship/services/immigrate-canada/start-visa/designated-organizations.html>.
- 7 <https://www.canada.ca/en/services/immigration-citizenship/helpcentre/glossary.html>.
- 8 Supra, Nguyen at para. 5.
- 9 <https://www.canada.ca/en/immigration-refugees-citizenship/services/immigrate-canada/start-visa/eligibility.html#money>.
- 10 <https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/permanent-residence/economic-classes/start-business/peer-reviews.html>.
- 11 Supra, Bui para. 31.
- 12 Supra, IRPR s. 90.09(1)(4).
- 13 See Kwan v. Canada (Minister of Citizenship and Immigration) [2019] F.C.J. No. 86, where the peer review was neither relied upon by the visa officer nor was it disclosed. See also, Mourato Lopez v. Canada (Minister of Citizenship and Immigration) [2019] F.C.J. No. 502.
- 14 Supra, Bui para. 36.
- 15 <https://www.canada.ca/en/immigration-refugees-citizenship/services/immigrate-canada/start-visa/work-permits.html#6.2>.
- 16 Supra, Kwan where the applicant stayed in Canada for only a week after receiving her work permit. The court held that as the applicant was not actively engaged with the business venture, it could be concluded that she was not committed to the business and was instead primarily seeking immigration status.
- 17 Supra, Bui at para. 42.
- 18 <https://www.cic.gc.ca/english/helpcentre/answer.asp?qnum=657>.