New Regulations Governing Filing of Immigration Applications in Canada: Common-Sense Approach or Quota System in Disguise?

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Introduction: the problem of 'visa post shopping'

Prior to 28 June 2002, and under the previous Immigration Act[1] and Immigration Regulations,[2] persons seeking permanent residence in Canada could file their applications at any Canadian visa post abroad. This practice was extremely common, as many applicants and their lawyers sought to avoid long processing delays typical of visa posts located in populous countries such as China, India and Pakistan, where processing times run into several years. In addition, many nationals of those countries were working in Europe, the Persian Gulf area or in the United States, while others were simply without status. Applicants often tried to determine which visa posts would process their applications in the shortest time frame, a practice that became popularly known as 'visa post shopping'. Under the Immigration Act, visa officers had no authority to disqualify an applicant based solely on his/her lack of status in the country where the application was filed.

Further, the previous Immigration Regulations allowed visa officers discretion to waive interviews for qualified candidates, and although individuals who filed their applications for permanent residence in Canadian visa posts other than those primarily responsible for their geographical area were routinely interviewed, those who were unable to attend could make a request in writing, accompanied by payment of a C$100 fee to transfer their file to another visa post where the interview could take place at a later date, thus keeping their application in process. Applicants often engaged in risk-assessment analysis to determine the likelihood of their interviews being 'waived' and their ability to obtain travel visas if required to attend them.

As officials became concerned about the ability of visa posts to assess applications for permanent residence, particularly in the light of high levels of fraud at certain visa posts and security issues that became paramount after 11 September 2001, pressure mounted in policy-making circles to curtail

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severely the scope of 'visa post shopping'. The Immigration and Refugee Protection Act[3] and its corresponding Immigration and Refugee Protection Act Regulations[4] came into effect on 28 June 2002, imposing, among other requirements, more stringent selection criteria for skilled workers and business class immigrants, and making significant changes to the application process. One specific regulatory provision, section 11 of the Regulations, was directed at addressing the problem of 'visa post shopping', but difficulties in implementation and lack of resources delayed its enforcement until 1 May 2003.[5] Its effects are far-reaching and have made a major impact on applicants and their lawyers, creating serious strategic problems for those who have no legal status in their country of current residence.

Notwithstanding the delay in the implementation of section 11 of the Regulations, another controversial policy change took effect immediately with the coming into force of the new regulatory regime, as visa posts were directed to discontinue the practice of transferring files at the applicant's request on payment of a file transfer fee.[6] The impact of this policy change has been substantial for many applicants who have been called to attend selection interviews at various Canadian visa posts located in the United States for applications filed prior to 28 June 2002, and have been denied the required entry visas as a result of increased vigilance by US consular officials after 11 September 2001.

Section 11: a quota system in disguise?

As of 1 May 2003, all Canadian visa posts abroad have implemented section 11 of the Immigration and Refugee Protection Act Regulations, which specifies where applications for either permanent residence or temporary permits (work, study or visitor) can be filed. Section 11 reads as follows:

'**11. (1) Place of application for permanent resident visa** – an application for a permanent resident visa – other than an application for a permanent resident visa made under Part 8 – must be made to the immigration office that serves:

(a) the country where the applicant is residing, if the applicant has been lawfully admitted to that country for a period of at least one year; or

(b) the applicant's country of nationality or, if the applicant is stateless, their country of habitual residence other than a country in which they are residing without having been lawfully admitted.

(2) Place of application for temporary resident visa, work permit or study permit – an application for a temporary resident visa – or an application for a work permit or study permit that under these Regulations must be made outside of Canada – must be made to the immigration office that serves:

(a) the country in which the applicant is present and has been lawfully admitted; or

(b) the applicant's country of nationality or, if the applicant is stateless, their country of habitual residence other than a country in which they are residing without having been lawfully admitted.'

Citizenship and Immigration Canada (CIC) officials contend that section 11 is aimed at routing applications to the local or territorial visa offices best able to assess them, with a view to enhancing the integrity of the immigration delivery programme and improving the quality of client service.[7] CIC officials have also argued that section 11 will allow, in the long term, a restructuring of the visa-processing network to meet geographical visa demands.

When the Immigration and Refugee Protection Act and the Regulations came into effect on 28 June 2002, CIC officials decided that, as an interim, transitional measure, section 11 would be implemented as follows:

- full-service visa offices would continue receiving and processing permanent residence and temporary residence applications, irrespective of the applicants' place of residence or nationality;
- other visa offices handling only temporary resident visas and student and work permits would also continue to receive and process such applications regardless of the country in which the applicants were present or their nationality.

There were, however, two other major changes fully implemented at that time:

(1) visa offices were no longer required to transfer applications for permanent or temporary entry to Canada on the request of the applicant, and officers *could* transfer files only if that transfer would enhance programme integrity; and

(2) applicants in the business class (entrepreneurs, investors and self-employed) were no longer required to submit their applications to specialised offices known as Business Immigration Centres, which ceased to exist as of 28 June 2002.

After the transitional period ended, section 11 of the Regulations came into effect on 1 May 2003, changing the way the applications are filed. The impact of its implementation has been primarily on permanent residence applicants in the 'Economic Class' (skilled workers) including federal and Quebec skilled workers, individuals selected as 'provincial nominees' under the various federal-provincial immigration accords, 'Business Class' including investors, entrepreneurs and self-employed persons, and 'Family Class' applicants sponsored by family members such as spouses and children.

Only applications for permanent residence received as of 1 May 2003 are affected by the new regulatory regime and all applicants must submit their applications to the visa office responsible for either the country where they are residing, if the applicant has been lawfully admitted to that country for at least one year, or the applicant's country of nationality, or if the applicant is stateless, their country of habitual residence other than a country where they are residing without having been lawfully admitted.

There has been no impact on applications for temporary residence visas, which include visitors, students and temporary foreign workers. While section 11 also specifies that an application for a temporary residence visa must be made outside Canada to the immigration office that serves the country in which the applicant is present and has been lawfully admitted or the applicant's country of nationality, the Government decided that 'all offices serve all countries', effectively continuing to allow filings at all visa posts as under the previous legislation. However, while applications for temporary status can continue to be submitted at any Canadian visa office, as a general rule, applicants who submit them to an office other than that serving their country of habitual residence are generally interviewed. This can pose serious problems if an entry visa is required for the country where the interview will take place, and can result in the refusal of an application if the applicant does not attend as scheduled.

Unlike other immigrant-receiving nations, Canada has no country of origin quotas for permanent residence, but rather 'global immigration targets' that are determined or adjusted annually by the Minister of Citizenship and Immigration.[8] Obviously, this has been a politically motivated decision to maintain the appearance of neutrality and objectivity in the assessment of all applicants. However, critics have often charged that the lack of resources allocated to certain visa offices in heavy demand posts such as Beijing, New Delhi and Islamabad, which are responsible for large or populous geographical areas and where application processing takes several years, amounts to a '*de facto* quota system', as the top three immigrant-producing countries are the People's Republic of China, India and Pakistan. This lack of resources has significantly increased processing times at those visa posts.[9]

The advent of section 11 ushers in a new era for this 'quota in disguise', as CIC has failed to increase staff levels and allocate more resources to backlogged visa posts, while at the same time forcing many applicants who are without status in their current countries of residence to submit applications to those very same overworked posts. Unless CIC dramatically increases resource allocation to those posts, processing may come to a virtual standstill if current trends continue, taking into consideration the understandable emphasis that must now be placed on necessary but lengthy security background checks.

New file transfer policy: an attempt to end 'visa post shopping'?

A measure that came into effect on 28 June 2002 has imposed a heavy toll on candidates who had filed their applications under the previous legislation at visa posts other than those responsible for their geographical area. Although they invariably submitted their applications prior to the new regulatory regime, they face the problem of being unable to attend interviews. For example, many applicants from China, India and Pakistan directed their applications to the Canadian High Commission in London, United Kingdom, or to the Regional Processing Centre in Buffalo, NY, United States, and due to increased security measures they now find it impossible to obtain the appropriate travel visas, yet they can no longer request a file transfer to another visa post, as a result of the new file transfer policy.

The *Citizenship and Immigration Manual*[10] details the new file transfer policy as follows:

> 'Visa offices are *not* required to transfer applications for permanent or temporary entry to Canada upon the request of an applicant or their designated representative. Visa offices should transfer files *only* if that transfer would enhance program integrity. Conversely, visa offices should refuse to transfer files if such a transfer diminishes program integrity. The onus is on the applicant to demonstrate that the transfer of their file would not compromise the integrity of the application evaluation process.

Program integrity includes issues such as ability to effectively evaluate documents, knowledge of local security and criminality environments or familiarity with business practices and procedures.

Other factors may be taken into account when evaluating the impact of file transfer on the program integrity of visa programs.

As part of program integrity considerations, officers should also be mindful that the intent of R11 is to ensure that as much as possible, visa applications are reviewed by the offices with the local knowledge and expertise necessary to conduct an effective case review.

While regulations define where an application must be submitted, they do not stipulate where an application must be processed. At times, visa offices may independently decide that issues of program integrity merit the transfer of an application to another mission. In these cases, the visa office should immediately inform the applicant of the file transfer. When transferring files, visa offices should be mindful of the resource implications for the receiving visa office.

Visa officers should ensure that when transferring a file to another office that the reasons for that transfer are clearly documented.

There are no fees applicable to file transfer requests.'

Despite difficulties in obtaining travel visas for interviews, and notwithstanding the fact that all applicants affected filed their applications prior to the effective date of the new legislation, some even several years in advance, Canadian visa officers have applied the new policy, refusing to transfer files except in the very limited circumstances permitted by the new guidelines. Many of the applicants affected have been forced to abandon their applications, with the consequent loss of filing fees, legal fees and processing time, and most importantly, losing the advantage of having their requests considered under the more lenient selection criteria found in the previous legislation.

Conclusion

While the practice of 'visa post shopping' was problematic and caused justifiable concerns about high levels of document fraud and public security, applicants were previously able to determine which visa posts were most suited to their needs. Now that section 11 of the Immigration and Refugee Protection Act Regulations has come into effect, together with significant changes in file transfer policy, applicants must be more cautious than ever to ensure that they meet all requirements prior to submission of their applications, or risk speedy refusal. Applicants who choose to file at a visa post not responsible for their country of citizenship must consider whether they have been legally admitted to their country of current residence for at least 12 months, before filing their requests for permanent residence.

Those who have interviews pending in posts located in countries requiring travel visas must ensure they are able to obtain them, or risk abandoning their applications, with the consequent financial losses and missed opportunity costs.

The new file transfer policy effectively ends 'visa post shopping', but has had serious unintended consequences, and will add workload to already backlogged processing posts overseas. CIC must immediately restructure its immigration programme delivery network to compensate for the increased intake at some visa posts and the corresponding decrease in others to ensure application processing within reasonable time frames. ■

Notes

* The author's comments and opinions are general and are not to be interpreted as legal advice or with respect to any specific situation.

1 RSC 1985, c I-2.

2 SOR/78-172 as amended.

3 SC 2001, c 27, effective 28 June 2002.

4 SOR/2002 – 227, effective 28 June 2002.

5 *Citizenship and Immigration Manual*, Chapter OP-1 Procedures, para 5.16.

6 *Ibid*, para 5.17.

7 See Immigration and Refugee Protection Act Regulation, Regulatory Impact Analysis Statement, *Canada Gazette*, Part 1, Vol 135, No 50, 15 December 2001, pp 4482 and 4483.

8 See, eg 'Pursuing Canada's Commitment to Immigration – The Immigration Plan for 2002', www.cic.gc.ca.

9 Eg the Canadian Embassy in Beijing's website publicises an average processing time of 48 months for skilled workers and business class applications and the Canadian High Commission in New Delhi admits in its website that it is 'currently unable to predict times for interview of Skilled Worker applicants' (*sic*).

10 *Citizenship and Immigration Manual*, Chapter OP-1 Procedures, para 5.16 – file transfers.