Filipiniana News – May 2011
RHYME & REASON

LCP and the TFW Four-Year Limit

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In September last year, I wrote about the recent changes to the Temporary Foreign Worker (TFW) regulations as they affect live-in caregivers. One of the most controversial provisions was that limiting the duration of work for temporary foreign workers to a total period of four years. After seeking clarification with Citizenship and Immigration Canada (CIC), policy officials assured that the four-year limit is not meant to apply to Live-in Caregiver Program (LCP) participants and that operational guidelines confirming this will be released prior to the effectivity of the new regulations.

On 1 April 2011, or on the day that the new TFW guidelines took effect, CIC released Operational Bulletin (OB) 275-C which is meant to serve as a guide for CIC and CBSA staff on the implementation of recent regulatory changes to the TFW program.

OB 275-C states that since the new TFW regulations took effect on 1 April 2011, this is also the date when the clock starts ticking towards the four-year limit. Therefore, work permit refusals arising from the inability to meet the four-year limit will only start on 1 April 2015.

It may be recalled that the TFW regulations provide exceptions to the four-year limit if:

- the foreign national intends to perform work that would create or maintain significant social, cultural or economic benefits or opportunities for Canadian citizens/PRs or
- the foreign national intends to perform work pursuant to an international agreement between Canada and one or more countries, including an agreement concerning seasonal agricultural workers.

OB 275-C clarified these exceptions by listing the work permit categories that are exempt from the four-year limit. The exceptions include permanent resident applicants from within Canada through the inland spousal sponsorship, humanitarian and compassionate, and LCP routes. This means that work performed under open work permits issued to live-in caregivers who have been granted approval in principle after having completed two years of full time live-in caregiving work, does not count towards the four-year limit.

However, it is noted that OB 275-C also states that work performed while on implied status will be counted towards the four-year limit. Therefore, fears have been expressed that LCP participants who have submitted their permanent residence applications but who have not yet received approval in principle when their work permits expire (hence on implied status), may still be caught by the four-year limit. This fear is reinforced by the fact that the processing times for the first stage approval of LCP permanent residence

applications have been getting longer (currently at 13-14 months from receipt of application).

Although it will be up to CIC to clarify this particular issue, and eventually for the courts to interpret if the matter is litigated, my own take would be as follows:

First of all, open work permits issued to LCP participants once their permanent residence applications are granted approval in principle, are clearly exempt from the four-year limit. So it should not matter whether the LCP applicants have worked more than the four-year limit under valid work permits and on implied status prior to the issuance of their open work permits. What should matter is that they have not violated the terms of their temporary resident status and are considered members of the live-in caregiver class.

Second, OB 275-C states that that cumulative limit only counts actual work performed in Canada. Those periods when the caregiver did not work (either because they were terminated, left an abusive employer, went on vacation, got sick, etc.) will not be counted towards the four-year limit. So if the caregiver submitted the permanent residence and open work permit applications soon after completing the 24 months required, it is highly unlikely that the four-year limit will have been used up by the time that an approval in principle and concomitant LCP open work permit are granted (unless of course, the first stage processing has reached 24 months, heaven forbid!).

Third, if the work performed on implied status (that was mainly due to the lengthy processing delays) is counted towards the four-year limit, then it contradicts not only the exception granted to LCP participants but also the regulatory change extending the period within which they can complete the 24-month live-in caregiving requirement (extended from the previous 3 years to the present 4 years).

Hence, the basic principles of fairness and natural justice clearly favor exempting LCP participants from the four-year limit as long as they have submitted their permanent residence applications on or before the end of the four-year period.

That having been said, it is clear that this exception does not resolve the many issues and challenges still faced by LCP participants. Thankfully, the CIC Minister has taken a proactive stance in not only listening to the many concerns of LCP participants and implementing measures to address some of them, but also by intervening in cases where the only remedy is the Minister's grant of an exemption from certain requirements or inadmissibilities, on humanitarian and compassionate grounds.

However, it is undeniable that despite best efforts and good intentions which led to these changes, systemic issues of abuse and exploitation, prolonged family separation, poverty, deskilling and racial discrimination, continue to plague the LCP and its participants.

It is therefore hoped that the newly-elected government will prioritize measures which will confront these systemic issues head-on, not only for the benefit of long-suffering

caregivers, but also towards ensuring that Canada adheres to its avowed commitment to human rights, equality and justice for all.