The Challenges of Cross Border Mobility

July, 2012

This survey explores some of the legal and administrative challenges U.S. based organizations encounter when transferring employees between the U.S. and Canada and their experiences with frequent business travel between the two countries.
About the Canadian Employee Relocation Council

The Canadian Employee Relocation Council (CERC) is a not-for-profit organization dedicated to removing barriers that restrict mobility and deployment of human capital, which are vitally important to Canada’s future prosperity. Established in 1982, the Council represents the interests of its members on workforce mobility matters. Many of the Council’s members are listed in Canada’s Financial Post Top 500.

About the American Council on International Personnel

The American Council on International Personnel (ACIP) is a leading voice and resource for employers working worldwide to advance employment-based immigration of highly educated professionals. Founded in 1972, ACIP is a not-for-profit trade association representing over 220 of the world’s leading companies, universities, research institutions and organizations striving to ensure compliance with immigration policies so that they can employ the critical talent to remain competitive in the global economy.

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Introduction
The survey was developed in order to gather information about the legal and administrative challenges organizations encounter in transferring employees between Canada and the U.S. and experiences with frequent business travel between the two countries. The survey was sent by ACIP to its members based in the U.S. that have employees frequently travelling between Canada and the U.S.

Results from the survey will be used to develop and support the work of the business community in articulating constructive recommendations to the joint Canada / U.S “Beyond the Border Working Group” established by U.S. President Obama and Canadian Prime Minister Harper to improve trade relations between the two jurisdictions. The Beyond the Border Working Group is mandated to examine and make recommendations that will result in improved trade relations between Canada and the U.S., including the mobility of skilled workers.

A total of 27 organizations participated in the survey which was conducted from May 22 to June 28, 2012. All of those organizations participating in the survey have experience with the movement of personnel between Canada and the U.S. including intra-company transfers, new hires, short term assignments and frequent business travel.

Findings of the survey are consistent with a similar survey conducted by CERC in July 2011, in which total of 75 organizations participated.

Key Findings
Virtually all of the respondents, (96 per cent) say they have taken steps to ensure compliance with immigration laws on both sides of the border. This effort to comply includes retaining the services of external professional immigration services and in-house counsel. Although the survey was directed
towards identifying challenges in immigration policy and administrative processes controlling entry into either country, there were several comments from survey participants about the need to improve tax rules that are a very burdensome process for employers with cross border activity.

Despite having taken steps to ensure compliance in the management of their cross border transfers and travel, compliance with immigration regulations and differing rules between the two jurisdictions were identified as key challenges. This is a similar finding to the results of the CERC July 2011 survey.

A common theme throughout both surveys, and one supported extensively by comments from participants, is the inconsistency that exists in decision making between border officials. As one participant commented, “Currently, it depends on the time of day, the border you cross and which border official you get as to how they interpret the rules.” This situation creates frustration and unnecessary “red tape” in the efficient movement of personnel.

The majority (89 per cent) of participants also have employees that travel regularly between Canada and the U.S. for business purposes. In 82 per cent of cases they experience delays on occasion. With today’s highly sophisticated and integrated cross border supply chains, these delays can have serious implications on productivity, time sensitive projects and maintenance to critical operational equipment for firms in both countries.

When asked about training of officials, 88 per cent of respondents felt that officials lacked sufficient training and resources to effectively and expeditiously adjudicate applications of entry.

Almost two thirds (63%) of the companies has experience with the NAFTA professional (TN) occupations list. The overall consensus in responses as to
the effectiveness of the occupations list is that it is outdated and overly restrictive in today's economy. It is clear that occupations in new and emerging industries cannot be captured in the existing lists. There is a growing trend among many companies that rely on key industry experts who may not always possess a university degree. Participants offered many suggestions that could improve the occupations list, ranging from strategic marketing personnel to scientific technicians.

**Recommendations**

Key recommendations from participants, to facilitate more efficient cross border mobility of skilled workers, focused on the need for improved training of border staff; greater consistency in decision making among officials and improvement and modernization of the TN occupations list.

Several companies also highlighted the challenges with differing tax regulations between the two countries. There were also recommendations calling for better consistency around tax and immigration to streamline the process. The tax filing and withholding compliance requirements for business travellers to Canada were cited as a significant concern for U.S. based companies.
Employee Transfers and Assignments

Participants were asked, “In your experience what are the most significant challenges faced when transferring employees between Canada and the U.S.?”
(Ranked 1-5 where 1 is least challenging and 5 is most challenging)

- Differing rules between the two jurisdictions: 3.0
- Compliance with Immigration regulations: 2.9
- Understanding when a business visa as opposed to a work permit is required under the law: 2.6
- Access to reliable information on immigration requirements: 2.6

Verbatim Comments
Several comments were recorded about inconsistencies in decisions rendered by border personnel, and as one participant stated, “…The issue is not that we don’t understand the immigration requirements, it’s educating the border officers on the immigration requirements. In most cases, the information that the border officer provides to our employee is incorrect.”
Other comments noted the difficulties in “obtaining work visas for time sensitive projects.”
Tax rules and ensuring compliance with varying rules was also cited as very challenging. “Canada is imposing a “tax filing waiver” for business that is very difficult to manage.”
Compliance Issues

Virtually all of the participants, 96 per cent, have taken steps to ensure compliance with immigration laws on both sides of the border. Most of the companies have contracted specialized immigration services or have developed internal counsel and support specialists to manage the complexities of compliance. Several of the companies outlined the measures they have in place to ensure that employees have all the requisite documents to cross the border, including letters of employment and details for the business visit. One organization noted that a process is in place that will assess the type of visa/work permit required and that travel cannot take place until the assessment is complete.

Several of the companies also noted they have immigration counsel or specialists on both sides of the border.

Participants were asked “When dealing with work permits, visas and immigration requirements how difficult do you find these compliance processes to manage?”

While 22 per cent responded that compliance processes are not difficult to manage, the majority of participants responded expressing varying levels of difficulty, ranging from somewhat difficult, to difficult. Participants were also provided with an opportunity to comment on this question.

Verbatim Comments

One respondent notes, “It depends on the level of the employee. More senior employees are easier to manage because more visa options are available. Obtaining work visas for early career employees (who are valuable because they show potential and have acquired special knowledge through training rotations with our overseas affiliates) is more challenging.”

“We experience more difficulty for US work permit entries into Canada than Canadians entering the US.”
Cross Border Travel
Eighty nine per cent of respondents also have employees that regularly travel between Canada and the U.S. for business purposes.

Border Delays
The majority of respondents (82%) report delays on occasion when employees are crossing the border.

Participants were asked, “What reasons most often cause delays in processing entry into Canada and/ or the U.S.?”

a. Inconsistent decision making by inspectors 82 %
b. Incomplete paperwork /documentation 9%
c. Lack of clear guidelines from government agencies on entry provisions and requirements 46 %
d. All of the above 14%

It was noted that the interpretation of laws will vary based on the size of the port of entry, indicating inconsistencies in decision making.

Participants were asked “In your experience do you feel that inspectors and border officials have sufficient training and resources to effectively and expeditiously adjudicate applications of entry?”

The majority of respondents (88%) said inspectors and border officials lack training and resources. The most cited concern was inconsistency of decisions between officers and ports of entry. It was also noted that at smaller ports of entry the officers are “not as comfortable with the laws as the officers at the larger POEs.”
Verbatim Comments:

“Some examples; 1) About a month ago a Canadian employee was turned away at the point of entry. Officer told him he needed a work permit to conduct training for 5 days. 2) A US employee traveling to Canada was turned away for no apparent reason. The employee claims he overheard the agent say he wasn't "letting anyone in tonight" before he even spoke with the employee.”

“I think there are plenty of resources available to the inspectors; however I do not believe they are trained to use them. Often times a simple phone call to the employer or attorney of record can clarify and/or resolve the situation.”

NAFTA Occupations List

Almost two thirds (63%) of the participating organizations have transferring and or temporary entry employees in occupations that are not listed in the NAFTA Professional (TN) occupation list, which makes it difficult for companies to meet business objectives.

Comments about this situation and the challenges with the existing list indicate the current challenges of using a list that has not been updated to reflect the realities of today’s modern economy and labour markets. Respondents are clear that the list is outdated vis-a-vis the types of occupations in today’s economy. Participants were asked to identify any definitions, categories or classifications that can be clarified, and or modernized in the NAFTA Professional (TN) occupation list? Suggestions to modernize the current list of occupations included:

- Sales and Marketing Managers
- Finance (not accounting)
- Hotel Management (without degrees)
- Maintenance Workers (highly skilled)
- Purchasing / Procurement
Technicians (service staff not under supervision of Professional Engineer)
Management Consultants
Computer Systems Analysts / Software Architects/ Software Engineers
Scientific Technicians

Suggestions also included the need to recognize occupations that require specialized industry knowledge and training rather than the requirement to have a university or college degree. General management and senior executives with industry expertise were specifically noted as challenging.

Verbatim Comments

"NAFTA encompasses the most common category of employees we have (engineers), but it would be nice at one point to see a relaxation of the education requirements for TNs to allow for a combination of experience and education to still qualify as we commonly have Canadian employees with a 2 or 3 year degree from Canada that are not eligible for TNs due to not having a BS level degree."

"It would be beneficial to have clarification in the Managerial category, i.e., if you have an Engineering Degree and you are working as an Engineering Manager, then you still qualify for the TN rather than the interpretation that a Manager is not one of the occupations."

"We have Sales or Managerial staff that can't use the TN visa because their educational background doesn't fit any of the categories. TN is only good for specialists but it would be nice to use the TN for general business staff (again, sales or managers)."
**Recommendations for improvement**

Participants were invited to provide any further suggestions the Canadian and U.S. governments could take to improve the processes that facilitate cross border mobility of skilled workers.

There were several themes throughout the responses that support the need for improved training of staff, both in terms of customer service and application of the regulations. Several respondents noted the need for staff to treat employees that are travelling on legitimate business with “respect”. Clearly employers want greater consistency in decision making among border officials; improved training and an update to the classifications and professions that are included in the NAFTA list of occupations.

There were also recommendations calling for better consistency around tax and immigration to streamline the process. The tax filing and withholding compliance requirements for business travellers to Canada were cited as a significant concern for US based companies.

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**Verbatim Comments**

“…rules just need to be consistent and border officers need to be better trained to evaluate a case but not interrogate the individual…”

“The tax waiver issue is something Canada Revenue is starting to investigate and fine companies for noncompliance this will be a big issue for companies with frequent business travelers…”

“More uniform training of inspectors and standardization of checklist so all follow the same procedures.”
“Consistency between border posts in terms of understanding of NAFTA and the regulations.”

“Like the renewability of the TN visa, it would be appreciated if the Canadian work permit could be renewed for an indefinite number of terms.”