

# Restrictive U.S. immigration good for Canada tech sector

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Canada's tech sector is experiencing a boom — and some of that may be attributable to the current immigration policies of the United States. While talented individuals are happy to go to the U.S. to obtain their advanced education in technology-related fields, many are choosing to leave after obtaining their degree, or being driven out due to restrictive U.S. employment authorization options for tech workers.

The signs of impending U.S. brain drain are there, one of the most obvious being the commitment by large international tech companies to expand their Canadian base rather than investing further in the U.S. In 2019 alone, Intel Corp., Uber Technologies Inc., Salesforce.com, and Microsoft Corp. all heightened their commitment to the Canadian market, promising new jobs and new operations in the coming years.

The result could be an explosion of immigration to Canada by high-

skilled foreign-born tech sector professionals, attracted by Canada's abundant opportunities and welcoming tech-related immigration policies — including a greater chance of being able to stay long term than afforded by the U.S. immigration system.

U.S. policies are becoming ever more constrictive. Many policy changes and proposals over the past two years have or would make hiring or obtaining a job as a highly skilled foreign tech worker in the U.S. harder than ever — and immigrating to or remaining in the U.S. less appealing to high-skilled talent. These include a pending proposal to remove H-4 dependent spouses (of H-1B visa holders) from the class of aliens eligible for employment authorization. This proposal caused a coalition of business and tech advocacy groups representing giants such as Apple, Microsoft and Google to urge the Trump administration to continue to allow employment authorization for spouses of H-1B visa holders.

As noted in a letter sent by the group to the director of U.S. Citizenship and Immigration Services (USCIS), the group encouraged the USCIS “to maintain the program given its importance to the business community and to the American economy,” since other countries permit employment by spouses of similarly positioned workers. Removing this opportunity for H-1B spouses would result, they argue, in a large loss of skilled labor, as workers would be more likely to choose opportunities in other countries that allow their spouses to pursue career opportunities and/or provide a supplemental income to the family.

Continuing this trend of restrictive U.S. policies could dramatically impact major U.S. tech hubs, which rely heavily on foreign-born talent. According to the 2019 update to a Silicon Valley Competitiveness and Immigration Project report, 60 per cent of the STEM (science, technology, engineering and mathematics) workers with a bachelor's (or higher) degree were born outside the U.S., while 46 per cent of these workers in New York City were born outside

the U.S.

Few options exist under the current U.S. immigration system. For U.S. employers still wishing or needing to hire foreign workers, visa options (and challenges) typically include:

#### Trade National status (Canadians and Mexicans only)

This visa option exists only under the North American Free Trade Agreement and its future iteration, the United States-Mexico-Canada Agreement (USMCA, signed on Nov. 30, 2018, but not yet ratified). Under these agreements, Canadian and Mexican citizens can enter, live and work in the U.S. if approved for status based on their professional work for a U.S. company, in one of 63 job categories. However, most of these do not relate to professionals in technology industry occupations.

The only occupations that clearly relate to the tech industry are computer systems analyst, engineer and graphic designer. While increasing the jobs list was initially anticipated to be part of the new USMCA, push-back (largely from the U.S.) — and even a push toward contracting the jobs list, in line with President Trump's "America First" policies — resulted in everyone taking a hands-off approach and agreeing to just keep things the way they have been, despite 25 years of development in technology and its associated high-skill occupations.

#### H-1B Specialty Occupation visas

These visas are available to professionals from any country and are therefore highly sought after. Unfortunately, the U.S. severely limits the number of these visas it hands out each year. Only a total of 85,000 are available, which includes 20,000 earmarked for professionals who have been awarded an advanced degree from a U.S. institution. With hundreds of thousands of new applications typically submitted within the first week of the filing period, this means that the odds are not in any given petitioner's favor.

#### O-1 Extraordinary Ability visas

These visas are also available to people from all over the world, but require that beneficiaries either have a major internationally recognized award in their field (we're talking Nobel Prize, here) or that they meet several other categories demonstrating extraordinary ability (such as lesser nationally or internationally recognized awards, high salary compared to others, published material about them and their work, having been a judge of the work of others in their field, etc.).

This visa is available for individuals in technology fields but is not specifically designed for technology professionals. Rather, it is available to individuals with a demonstrated record of sustained national or international acclaim in the sciences, arts, education, business or athletics. These visas are difficult to obtain, and only meant for people who are truly and very clearly extraordinary in their field.

#### L-1 Intracompany Transferee visas

These are available to executives, managers and specialized knowledge workers who have worked for at least one out of the most recent three years for a business outside the U.S. with a related entity (parent, subsidiary, affiliate or branch) in the U.S. The work must have been full-time for the one year outside the U.S., and employees

must meet strict requirements to demonstrate that their duties are executive in nature, they have been managing people or a function, or that they possess knowledge of proprietary information, including company products, processes, procedures, or similar.

While it may be simple to show the required employment outside the U.S. and qualifying corporate relationship between the foreign and U.S. employers, demonstrating the required level of executive, managerial or specialized knowledge expertise meriting approval is often difficult, as applicants are held to an increasingly high standard, as with other visa types.

While the door is still open to U.S. tech sector workers, nothing is actively being done to adapt laws or policies to create a welcoming environment in the U.S. As a result, the U.S. may find itself unwittingly short-handed as savvy tech workers find better short- and long-term options and opportunities elsewhere.

Elizabeth M. Klarin, counsel with Lippes Mathias Wexler Friedman LLP, has more than 15 years of immigration experience assisting clients with the full spectrum of U.S. immigration matters. She represents clients from around the globe across virtually every industry, as well as individuals seeking strategic immigration options and solutions.

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