

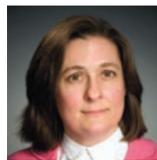
Focus

IMMIGRATION



Don't overstay your welcome in the U.S.

'Unlawful presence' rule now applies to Canadians



Eileen Martin

Those who have been unlawfully present in the United States for between six months and one year are required after exiting to remain outside the country for three years, and in the case of a full year or more of unlawful presence are subject to a 10-year bar to re-entry. Those rules have rarely applied to Canadians — until now.

If a traveller is given a document reflecting a set period of stay in the United States and he or she remains longer than permitted, unlawful presence is accrued. This applies to those with a work permit (E, TN, L-1, H-1B and O-1), and to visitors (those provided F-1 student or J-1 exchange visitor status with authorized periods of stay of "duration of status" are not addressed in this article, since their violations fall under a different section of law). Once 181 days of unlawful presence have accrued, without any intervening cause, inadmissibility arises — either a three-year bar to re-entry, or 10 years.

Canadians who visit the U.S. are generally visa-exempt and admitted for six months minus a day, with no documents given to reflect their entry date or date of expiration of legal status. This is different than the rules for non-immigrants from other countries. The difference has previously shielded Canadians from the unlawful-presence bars,

but with new technology allowing the U.S. Department of Homeland Security (USDHS) to better track visitors' entries and exits, Canadians need to be aware and cautious of the changes.

Unlawful presence begins on the day after one's status expires, or on the day that the USDHS identifies that one's status has expired due to a denial of an extension, or denial of a change of status.

Over the past two years, some ports of entry began implementing the bar against Canadian visitors without warning. Other ports of entry continued to consider Canadian visitors exempt. This resulted in individuals being denied admission in one location, but permitted to enter elsewhere. The inconsistency has caused great frustration and expense to travellers. For example, one young woman who was found subject to the bar at one port of entry was subsequently prevented from getting her green card, based on that decision. While she waited out the three years until her green card would be issued, another port of entry admitted her as a visitor on multiple occasions, with the understanding that the bar did not apply to her.

It appears this opinion and uncertainty on this issue has been removed. The good news is that travellers can be sure what to expect. The bad news is that an entire group of people must change their expectations and plans on the basis of a penalty being newly applied.

From a practical perspective, anyone who enters the U.S. without being documented, given an I-94 and remaining more than the permitted time should now assess whether their period of accrued unlawful presence is now subject to the bar. **Status, Page 15**

Focus IMMIGRATION

New program targets globe's entrepreneurs

DONALEE MOULTON

Immigration Minister Jason Kenney wants the world's entrepreneurs to know that Canada is open for business, rolling out the welcome mat with the new Start-Up Visa Program.

The initiative is designed to attract potential entrepreneurs as permanent residents by linking them with private sector organizations that have experience working with start-ups and can provide the necessary resources for a company to get off the ground.

The focus on start-ups makes strategic sense, according to Citizenship and Immigration Canada (CIC). "Innovation and entrepreneurship are important drivers of the Canadian economy. That is why the government of Canada looked to target a new type of immigrant entrepreneur who has the potential to build innovative companies that can compete on a global scale and create jobs for Canadians," said CIC spokesperson Philippe Couvrette in Ottawa.

Two elements are essential to the program, which opened for applications April 1. First, investors are needed. CIC worked with two umbrella organizations, Canada's Venture Capital and Private Equity Association and the National Angel Capital Organization, to identify and designate the venture capital funds and angel

investor groups that can participate in the program. Immigrant entrepreneurs hoping to launch businesses in Canada and attain permanent resident status will need the support of some of these participating investors.

Then, of course, the entrepreneurs themselves are needed. In addition to securing a significant investment commitment from one of the designated Canadian investor groups, applicants must also demonstrate language proficiency and have at least one year of education at a post-secondary institution.

Together, it is a winning combination for the investor, the entrepreneur — and Canada, said Couvrette. "It will provide Canadian private sector organizations with access to a broad range of entrepreneurs — including the world's best and brightest — in whose ideas they may wish to invest. At the same time, the program will provide immigrant entrepreneurs with valuable assistance in navigating the Canadian business environment, which can be a challenge for newcomers," he said.

"By providing sought-after immigrant entrepreneurs with permanent residency and immediate access to a wide range of business partners, Canada will position itself as a destination of choice for start-ups."

Lawyers will want to look closely at the intent and the

The price of admission

Canada's welcome mat for innovative entrepreneurs unfurls only if certain financial criteria are met. An applicant must have:

- A minimum investment of \$200,000 if the money comes from a designated Canadian venture capital fund;
- At least a \$75,000 investment if the funding comes from a designated Canadian angel investor group;
- Sufficient funds to cover living expenses prior to earning an income.

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The main advantage of this program over the investor programs is that talented individuals who have great ideas but who are not funding the proposed venture themselves cannot qualify as investors. However, these are people that Canada should want to attract.

Henry Chang
Blaney McMurtry

nuances of the new immigration initiative. "The main advantage of this program over the investor programs is that talented individuals who have great ideas but who are not funding the proposed venture themselves cannot qualify as investors. However, these are people that Canada should want to attract," said Henry Chang, a partner with Blaney McMurtry in Toronto.

"The Start-Up Visa Program may not necessarily affect existing businesses because the program is intended to allow key people who are creating start-up businesses to come to Canada to develop those businesses here," he added.

Chang uses the example of a young and unfunded Mark Zuckerberg coming to Canada to start Facebook. The technology whiz has a great idea but no money to invest in the venture himself. As a result, he can't qualify as an investor. Instead, Canadian venture capital companies

can opt to invest in his idea because they believe in it. Yet they still require the entrepreneur to live in Canada to build Facebook and make it a profitable business.

"This program allows the next Mark Zuckerberg to gain permanent status here to develop the business in which Canadian venture capital companies have agreed to invest," said Chang.

Lawyers will have a role to play with respect to both investors and entrepreneurs. Technology, IP and commercial lawyers will be required to draft and review agreements relating to the venture. Immigration lawyers will be needed to lend a hand to foreign nationals who qualify under the visa program so they can seek permanent status here.

To protect against fraud and ensure that investments are legitimate, the Start-Up Visa Program also includes peer review panels, operated by the umbrella investor organizations, which will examine deals between designated entities and immigrant entrepreneurs, with clients on both sides able to turn to their lawyers for support. Peer reviews will occur in two situations: when a visa officer has questions or concerns about a deal, and on a random sample basis.

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Status: Canadians could be barred for 10 years

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presence may have exceeded 180 days on any one trip. The days counted are consecutive, not in the aggregate. If on a single trip to the U.S. since April 1, 1996, a Canadian visitor overstayed by more than six months, they may find they suddenly have an admissibility issue that has never previously been a problem.

There are two possible fixes. A waiver application can be filed that has a filing fee of \$545 and an adjudication time of about six months. However, since waiving the bar would undermine its punitive purpose, the likelihood of approval is not high.

The other possible remedy is an appearance before an immigration judge. These proceedings can take a long time, even years, before the full case is heard, and there is significant uncertainty over the result. While there are appeal opportunities in the event of an

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Hodgson Russ

unfavorable decision, the individual must remain outside of the U.S. for the duration of the proceedings. Especially with the three-year bar, in most instances it would be more efficacious to wait out the bar and re-apply for admission once the three years are up.

Canadian visitors need to exercise caution in planning long-term visits to the U.S. Further, those with past periods of overstay in the U.S. need to be aware that, despite years of reprieve, those violations may prevent future visits to the U.S. in ways that they did not before.

Eileen Martin, a partner at Hodgson Russ, has more than 16 years of experience in U.S. immigration law, six of which have been as a licensed foreign legal consultant as designated by Ontario.

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