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2022 FC 1091

Dana Levin (*Applicant*)

v.

The Minister of Public Safety and Emergency Preparedness (*Respondent*)

INDEXED AS: LEVIN V. CANADA (PUBLIC SAFETY AND EMERGENCY PREPAREDNESS)

Federal Court, Strickland J.—By videoconference, July 12; Ottawa, July 25, 2022.

Citizenship and Immigration — Status in Canada — Persons with Temporary Status — Application for judicial review of decision by Canada Border Services Agency (CBSA) Officer refusing applicant's application for work permit under Canada-United States-Mexico Agreement (CUSMA) — Applicant, American, accepted probationary, tenure-track assistant professor position at University of Windsor — Received five-year work permit when she entered Canada to begin work in June 2010 — Applicant not residing in Canada, having no desire to do so — In 2017, applicant promoted to tenured position — In 2015, 2018, applicant's work permit successfully renewed under North American Free Trade Agreement (NAFTA) *— In 2021, applicant applied for renewed work permit under new CUSMA agreement but CBSA officer, referencing section 3.7 of Immigration, Refugees and Citizenship Canada's (IRCC) International Mobility Program: Canada-United States-Mexico Agreement (CUSMA) guidelines (Guidelines) found that, because applicant was tenured, her employment was not considered "temporary" — Subsequently, applicant applied to renew work permit under CUSMA through IRCC's web portal, received IRCC's initial approval — Later, after applicant returned to port of entry to obtain work permit for which initial approval received, CBSA Officer refused her request — Whether Officer's decision refusing to issue work permit to applicant reasonable — At time decision rendered, applicant qualified as "professional" under CUSMA, met other requirements — Only issue before Officer related to concept of "temporary entry" — In rendering decision, Officer relied exclusively on Guidelines, s. 3.7; found that applicant's employment was not temporary; specifically found that because applicant was tenured, employment was not considered temporary — While administrative guidelines can be useful in indicating what constitutes reasonable interpretation of given legislative provision, they are not legally binding, are not intended to be either exhaustive or restrictive — Officer erred: by relying exclusively on Guidelines, s. 3.7 to make decision; in failing to also consider whether, pursuant to CUSMA, Art. 16.1, applicant sought "temporary entry" since she did not intend to establish permanent residence in Canada — Therefore, Officer fettered discretion by failing to also consider whether applicant intended to establish herself permanently in Canada, whether she complied with Canada's measures applicable to temporary entry — Officer's decision set aside, matter remitted to another CBSA officer for redetermination having regard to reasons herein — Application allowed.*

This was an application for judicial review of a decision rendered by an officer (Officer) of the

Canada Border Services Agency (CBSA) refusing the applicant's application for a work permit under the *Canada-United States-Mexico Agreement* (CUSMA).

The applicant is a citizen of the United States. In 2010, she accepted a probationary, tenure-track assistant professor position with the School of Social Work at the University of Windsor (University). That offer of employment was made following a positive Labour Market Impact Assessment (LMIA) submitted by the University. The applicant received a five-year work permit when she entered Canada to begin work in June 2010.The applicant does not reside in Canada, nor does she desire to do so. Windsor's proximity to Ann Arbor, Michigan, where she resides with her family, allows the applicant to commute to work to fulfill her teaching and other on-campus responsibilities.In 2015, the applicant applied to renew her work permit, in person, at the Ambassador Bridge port of entry. She was issued a three-year work permit as a professional under the *North American Free Trade Agreement* (NAFTA), the predecessor to CUSMA. In July 2017, the applicant was promoted to the position of tenured associate professor. In 2018, she again applied for a renewed work permit, as a professional under NAFTA, which was granted for another three-year period. On July 1, 2020, CUSMA came into force replacing NAFTA. On June 7, 2021, the applicant applied for a renewed work permit, in person, at the Ambassador Bridge port of entry. A CBSA officer noted that she had applied under CUSMA, in the professional category, but referencing section 3.7 of Immigration, Refugees and Citizenship Canada's (IRCC) guidelines — *International Mobility Program: Canada-United States-Mexico Agreement (CUSMA)* (Guidelines) found that, because the applicant was tenured, her employment was not considered "temporary". The officer advised the applicant that she would need to apply through the LMIA process for future work permits. She was issued an "Allowed to Leave" letter. The applicant returned to the Ambassador Bridge on June 10, 2021 to again apply for a renewal of her work permit but a CBSA officer again refused her application, referencing section 9 of the Guidelines. Upon returning home, the applicant applied to renew her work permit under CUSMA through IRCC's web portal. In July 2021, the applicant received a procedural fairness letter from IRCC raising concerns about misrepresentation and dual intent. This was responded to by her counsel by letter afterwards. The applicant received initial approval from IRCC on October 7, 2021. On October 8, 2021, the applicant returned to the Ambassador Bridge port of entry seeking the issuance of the work permit for which she received the IRCC initial approval but the Officer refused to issue a work permit for the same reasons as previously. In reaching this conclusion, the Officer relied on section 3.7 of the Guidelines and stated that the applicant would have to have the University sponsor her for permanent residence or apply and be approved for an LMIA.

The applicant submitted that the Officer misapprehended the law and substituted a personal and subjective standard for evaluating whether she was a temporary worker under CUSMA.She submitted that "temporary entry" is defined in Article 16.1 of CUSMA as "entry into the territory of a Party by a business person of another Party without the intent to establish permanent residence". She contended that she meets this definition. The respondent submitted in particular that the applicant's argument was essentially that an officer has no discretion in deciding whether to allow a person to enter Canada under CUSMA and that this was incorrect. Rather, an officer must be satisfied that the nature of the applicant's employment is temporary. As such, it was reasonable for the Officer to find that the applicant does not hold temporary employment.

The issue was whether the Officer's decision to refuse to issue a work permit to the applicant was reasonable.

Held, the application should be allowed.

Subsection 30(1) of the *Immigration and Refugee Protection Act* (Act) states that a foreign national may only work in Canada if authorized under the Act. Subsection 30(1.1) states that an officer may, on application, authorize a foreign national to work in Canada if the foreign national meets the conditions set out in the *Immigration and Refugee Protection Regulations* (IRP Regulations). Paragraph 204(a) of the IRP Regulations states that a foreign national may apply for a work permit under an international agreement or arrangement. In this matter, the applicant applied for a work permit under such an agreement, CUSMA. Article 16.4(1) of CUSMA provides that "[e]ach Party shall grant temporary entry to a business person who is otherwise qualified for entry …" At the time

the decision was rendered, the applicant qualified as a “professional” under the CUSMA and met other requirements. The only issue before the Officer related to the concept of “temporary entry”. CUSMA defines “temporary entry” as “entry into the territory of a Party by a business person of another Party without the intent to establish permanent residence” (Article 16.1). Accordingly, Article 16.4, Grant of Temporary Entry, required the Officer to determine whether the applicant intended to establish permanent residence in Canada and whether she otherwise complied with Canada’s “measures applicable to temporary entry”. However, in rendering their decision, the Officer relied exclusively on section 3.7 of the Guidelines. The Officer found that the applicant’s employment was not temporary as she held a permanent, tenured position, she had been working at the University for 11 years, and was not employed elsewhere. The Officer specifically found that because the applicant was tenured, the employment was not considered temporary. The Officer erred by relying exclusively on section 3.7 of the Guidelines to make their decision and in failing to also consider whether, pursuant to Article 16.1 of CUSMA, the applicant sought “temporary entry” as she did not intend to establish permanent residence in Canada. While administrative guidelines can be useful in indicating what constitutes a reasonable interpretation of a given legislative provision, they are not legally binding and are not intended to be either exhaustive or restrictive. Officers can consider guidelines but will err if they treat them as binding or fail to also turn their minds to the specific circumstances of the case before them. Here, the Officer failed to assess whether the applicant had the intent of establishing permanent residence in Canada and whether she complied with Canadian measures applicable to temporary entry, as required by the Act and the IRP Regulations. In that regard, the Officer failed to consider information provided by the applicant. While the employment-related factors relied upon by the Officer may have properly assisted them in an assessment of whether the applicant intended to establish herself permanently in Canada and whether she complied with Canada’s measures applicable to temporary entry, in and of themselves they were not determinative. The Officer also erred in basing the refusal on the fact that the applicant did not meet the definition of temporary work under CUSMA. CUSMA does not define temporary work, only “temporary entry”.

In conclusion, by relying exclusively on section 3.7 of the Guidelines and on factors related to the nature of the applicant’s employment at the University, the Officer effectively fettered their discretion by failing to also consider whether the applicant intended to establish herself permanently in Canada and whether she complied with Canada’s measures applicable to temporary entry. The decision was therefore not justified in light of the factual and legal constraints that bore on it. The decision was set aside and the matter was remitted to another Canada Border Services officer for redetermination having regard to these reasons. [Judgment, #2]

STATUTES AND REGULATIONS CITED

Immigration and Refugee Protection Act, S.C. 2001, c. 27, s. 30(1),(1.1).

Immigration and Refugee Protection Regulations, SOR/2002-227, s. 204(a).

TREATIES AND OTHER INSTRUMENTS CITED

North American Free Trade Agreement Between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America, December 17, 1992, [1994] Can. T.S. No. 2.

Protocol replacing the North American Free Trade Agreement with the Agreement between Canada, the United States of America, and the United Mexican States, July 1, 2020, [2020] Can. T.S. No. 5, as amended by the *Protocol of Amendment to the Agreement Between the United States of America, the United Mexican States*, and Canada, July 1, 2020, [2020] Can. T.S. No. 6, Arts. 16.1, 16.4(1), Annex 16-A.

CASES CITED

APPLIED:

Canada (Minister of Citizenship and Immigration) v. Vavilov, 2019 SCC 65, [2019] 4 S.C.R. 653; *Lunyamila v. Canada (Public Safety and Emergency Preparedness)*, 2018 FCA 22, [2018] 3 F.C.R. 674.

REFERRED TO:

Santiago v. Canada (Public Safety and Emergency Preparedness), 2017 FC 91, [2018] 1 F.C.R. 166; *Kanthasamy v. Canada (Citizenship and Immigration*), 2015 SCC 61, [2015] 3 S.C.R. 909; *Gordon v. Canada (Attorney General)*, 2016 FC 643, [2016] G.S.T.C. 60; *Canadian Reformed Church of Cloverdale B.C. v. Canada (Employment and Social Development*), 2015 FC 1075, [2015] F.C.J. No. 1089 (QL); *Marcom Resources Ltd. v. Canada (Employment, Workforce Development and Labour*), 2020 FC 182, [2020] F.C.J. No. 155 (QL); *Castle Building Group Ltd. v. Canada (National Revenue)*, 2021 FC 947, 2021 D.T.C. 5105; *Lewis v. Canada (Public Safety and Emergency Preparedness),* 2017 FCA 130, [2018] 2 F.C.R. 229.

AUTHORS CITED

Immigration, Refugees and Citizenship Canada. *International Mobility Program: Canada-United States-Mexico Agreement (CUSMA)*.

APPLICATION for judicial review of a decision rendered by an officer of the Canada Border Services Agency refusing the applicant's application for a work permit under the *Canada-United States-Mexico Agreement*. Application allowed.

APPEARANCES

Randall Cohn for applicant

Hilla Aharon for respondent.

SOLICITORS OF RECORD

Edelmann & Co. Law Offices, Vancouver, for applicant.

Deputy Attorney General of Canada for respondent.

The following are the reasons for judgment and judgment rendered in English by

STRICKLAND J.:

[1] This is an application for judicial review of a decision rendered by an officer (Officer) of the Canada Border Services Agency (CBSA), refusing the applicant's application for a work permit under the *Canada-United States-Mexico Agreement* (CUSMA)[1].

[2] For the reasons set out below, this application for judicial review is granted.

Background

[1] *Protocol replacing the North American Free Trade Agreement with the Agreement between Canada, the United States of America, and the United Mexican States*, July 1, 2020, [2020] Can. T.S. No. 5, as amended by the *Protocol of Amendment to the Agreement Between the United States of America, the United Mexican States, and Canada*, July 1, 2020, [2020] Can. T.S. No. 6.

[3] The applicant, Dr. Dana Levin, is a citizen of the United States. In 2010, she accepted a probationary, tenure-track assistant professor position with the School of Social Work at the University of Windsor (University). That offer of employment was made following a positive Labour Market Impact Assessment (LMIA) submitted by the University. The applicant received a five-year work permit when she entered Canada to begin work in June 2010.

[4] The applicant does not reside in Canada, nor does she desire to do so. Windsor's proximity to Ann Arbor, Michigan, where she resides with her family, allows the applicant to commute to work to fulfill her teaching and other on-campus responsibilities.

[5] In 2015, the applicant applied to renew her work permit, in person, at the Ambassador Bridge port of entry. She was issued a three-year work permit as a professional under the *North American Free Trade Agreement* [*Between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America*, December 17, 1992, [1994] Can. T.S. No. 2] (NAFTA), the predecessor to CUSMA. Presumably, this work permit was issued on the basis that it was LMIA-exempt.

[6] In July 2017, the applicant was promoted to the position of tenured associate professor. In 2018, she again applied for a renewed work permit, as a professional under NAFTA, which was granted for another three-year period.

[7] On July 1, 2020, CUSMA came into force, replacing NAFTA.

[8] On June 7, 2021, the applicant applied for a renewed work permit, in person, at the Ambassador Bridge port of entry. A CBSA officer noted that she had applied under CUSMA, in the professional category, but referencing section 3.7 of Immigration, Refugees and Citizenship Canada's (IRCC) Guidelines — *International Mobility Program: Canada-United States-Mexico Agreement (CUSMA)* (Guidelines) found that, because the applicant is tenured, her employment was not considered "temporary". The officer advised the applicant that she would need to apply through the LMIA process for future work permits. She was issued an "Allowed to Leave" letter.

[9] The applicant then sought advice from human resources personnel at the University, whom the applicant states advised her that if she applied for a work permit online, she might qualify for "implied status" and, therefore, be able to work and be paid while her application was being considered. Before doing so, she returned to the Ambassador Bridge on June 10, 2021 to again apply for a renewal of her work permit, explaining her circumstances, including the advice she had received from an immigration lawyer. A CBSA officer again refused her application, referencing section 9 of the Guidelines, and advised the applicant to apply for permanent residency. A second "Allowed to Leave" letter was issued. The applicant advised the officer that she would probably apply online. Upon returning home, the applicant applied to renew her work permit under CUSMA through IRCC's web portal.

[10] On July 14, 2021, the applicant received a procedural fairness letter from IRCC raising concerns about misrepresentation and dual intent. This was responded to by her counsel by letter of September 27, 2021.

[11] The applicant received initial approval from IRCC on October 7, 2021. On October 8, 2021, the applicant returned to the Ambassador Bridge port of entry seeking the issuance of the work permit for which she received the IRCC initial approval. The Officer refused to issue a work permit. The applicant seeks judicial review of this decision.

Decision under review

[12] While the certified tribunal record (CTR) contains both the Global Case Management System entries and file note entries of the first two officers, who refused the applicant work permits on June 7 and 10, 2021, with respect to the decision under review, the CTR contains only the "Notes to file for ATL on October 8, 2021" prepared by the Officer. The notes to file comprise the reasons for the decision.

[13] The Officer set out background history for the application and refused to issue a work permit to the applicant. The Officer stated that because the applicant's employment with the University is tenured, her employment is not considered to be "temporary" and therefore did not support her application. In reaching this conclusion, the Officer relied on section 3.7 of the Guidelines.

[14] The Officer stated that the applicant has a tenured position, has been working full-time at the University for 11 years, and is not employed elsewhere. The Officer stated that the applicant's first work permit issued in 2010 for a period of five years under the LMIA stream would have been considered "temporary work", but that after its expiration in 2015, the applicant's employment was no longer "temporary". The Officer referred to the submission by the applicant's counsel that the applicant's employment at the University meets the definition of "temporary work" under CUSMA because even though she works full-time in Canada, she resides in the United States. The Officer rejected this submission, stating that counsel "hand-selected specific words under CUSMA to try to make it appear" that the applicant's employment is "temporary".

[15] The Officer stated that the applicant would have to have the University sponsor her for permanent residence or apply and be approved for an LMIA.

Issue and standard of review

[16] The sole issue in this application for judicial review is whether the Officer's decision to refuse to issue a work permit to the applicant was reasonable.

[17] The parties submit, and I agree, that the Officer's decision is subject to review on the reasonableness standard (*Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653 (*Vavilov*), at paragraphs 10, 23 and 25). On judicial review, the reviewing court asks whether the decision bears the hallmarks of reasonableness—justification, transparency and intelligibility—and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision (*Vavilov*, at paragraph 99).

Relevant Legislation

> *Immigration and Refugee Protection Regulations*, SOR/2002-227 (IRP Regulations)

International agreements or arrangements

204 A work permit may be issued under section 200 to a foreign national who intends to perform work under

> **(a)** an agreement or arrangement between Canada and the government of a foreign state or an international organization, other than an agreement or arrangement concerning seasonal agricultural workers[.]

Agreement between Canada, the United States of America, and the United Mexican States (Canada-United States-Mexico Agreement)

Chapter 16—Temporary entry for business persons

Article 16.1: Definitions

For the purposes of this Chapter:

business person means a citizen of a Party who is engaged in trade in goods, the supply of services or the conduct of investment activities;

…

temporary entry means entry into the territory of a Party by a business person of another Party without the intent to establish permanent residence.

…

Article 16.4: Grant of Temporary Entry

1. Each Party shall grant temporary entry to a business person who is otherwise qualified for entry under its measures relating to public health and safety and national security, in accordance with this Chapter, including Annex 16-A (Temporary Entry for Business Persons).

…

Annex 16-A

TEMPORARY ENTRY FOR BUSINESS PERSONS

…

Section D: Professionals

1. Each Party shall grant temporary entry and provide confirming documentation to a business person seeking to engage in a business activity at a professional level in a profession set out in Appendix 2, if the business person otherwise complies with the Party's measures applicable to temporary entry, on presentation of:

> (a) proof of citizenship of a Party; and
>
> (b) documentation demonstrating that the business person will be so engaged and describing the purpose of entry.

Analysis

Applicant's position

[18] The applicant submits that the Officer misapprehended the law and substituted a personal and subjective standard for evaluating whether she is a temporary worker under CUSMA.

[19] She submits that "temporary entry" is defined in Article 16.1 of CUSMA as "entry into the territory of a Party by a business person of another Party without the intent to establish permanent residence". She contends that she meets this definition, as she explicitly is not trying to establish permanent residence in Canada, or to circumvent normal immigration procedures. Further, she argues that the Officer improperly relied on her tenured position, the length of her employment, her salary, and the fact that she does not have another career in refusing her work permit application. She says that such factors are not enumerated in CUSMA or any other body of law. She submits that the Officer's decision is based on a misreading of Articles 16.1 and 16.4 of CUSMA and sections 1.10 and 3.7 of the Guidelines.

[20] The applicant adds that the Officer's decision was a direct reversal of IRCC's decision, rendered only days earlier, granting initial approval of her work permit application. While the applicant acknowledges that the Officer was not bound by IRCC's decision, she submits that the Officer failed to explain the basis for the different conclusion (*Santiago v. Canada (Public Safety and Emergency Preparedness*), 2017 FC 91, [2018] 1 F.C.R. 166, at paragraphs 34–37).

Respondent's position

[21] The respondent submits that the applicant's argument is essentially that an officer has no discretion in deciding whether to allow a person to enter Canada under CUSMA and that this is incorrect. Rather, an officer must be satisfied that the nature of the applicant's employment is temporary. As such, it was reasonable for the Officer to find that the applicant does not hold temporary employment. She has been employed by the University for 11 years, first as a probationary, tenure-track full-time professor and, following a promotion in 2017, as a tenured full-time professor.

[22] The respondent adds that IRCC's initial approval of the applicant's work permit application did not guarantee nor authorize her entry into Canada, noting that it is the CBSA that has the responsibility to make a final decision to issue a work permit and allow a foreign national to enter Canada and that this is indicated on the IRCC initial approval.

Analysis

[23] Subsection 30(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA) states that a foreign national may only work in Canada if authorized under the IRPA. Subsection 30(1.1) states that an officer may, on application, authorize a foreign national to work in Canada if the foreign national meets the conditions set out in the IRP Regulations. Paragraph 204(a) of the IRP Regulations states that a foreign national may apply for a work permit under an international agreement or arrangement.

[24] In this matter, the applicant applied for a work permit under such an agreement, CUSMA. Article 16.4(1) of CUSMA provides that "[e]ach Party shall grant temporary entry to a business person who is otherwise qualified for entry under its measures relating to public health and safety and national security, in accordance with this

Chapter, including Annex 16-A (Temporary Entry for Business Persons)". The relevant provision of Annex 16-A, Section D: Professionals, Article 1, adds that each Party shall grant temporary entry and provide confirming documentation to a business person if they otherwise comply with the Party's measures applicable to temporary entry, on presentation of: (a) proof of citizenship of a Party; and (b) proof of employment.

[25] It is not contested that at the time the decision was rendered, the applicant qualified as a "professional" under the CUSMA, complied with Canadian measures relating to public health and national security, and possessed proof of citizenship and proof of employment. The only issue before the Officer related to the concept of "temporary entry".

[26] CUSMA defines "temporary entry" as "entry into the territory of a Party by a business person of another Party without the intent to establish permanent residence" (Article 16.1). Beyond this, CUSMA does not specify any considerations applicable to a determination of whether a business person is seeking to temporarily enter a Party's territory.

[27] Accordingly, in my view, Article 16.4, Grant of Temporary Entry, required the Officer to determine whether the applicant intended to establish permanent residence in Canada and whether she otherwise complied with Canada's "measures applicable to temporary entry".

[28] However, in rendering their decision, the Officer relied exclusively on section 3.7 of the Guidelines which states:

> **3.7 How long can a work permit be issued and can it be extended?**
>
> Initial work permits can be granted for durations of up to three years.
>
> Extensions can also be issued in increments of up to three years with no limit on the number of extensions providing the individual continues to comply with the requirements for professionals.
>
> Officers must be satisfied that the employment is still "temporary" and that the applicant is not using CUSMA entry as a means of circumventing normal immigration procedures.

[29] Section 1.10 of the Guidelines concerns definitions and interpretations. This does not define temporary, temporary work or temporary entry. It does, however, include a note that points out that "temporary entry" means entry "without the intent to establish permanent residence"—which reflects the definition of "temporary entry" as found in Article 16.1 of CUSMA and Article 16.4, Grant of Temporary Entry. Section 1.10 of the Guidelines also contemplates work in both temporary and permanent positions:

> Note: Temporary entry means entry into the territory of a Party by a business person of another Party without the intent to establish permanent residence. This definition is consistent with Canadian immigration law. It is sufficiently flexible to respond to the needs of business persons and it recognizes that the concept of temporary entry cannot, in most situations, be based simply on a specific time limitation. The definition is not to be perceived as being open-ended, nor as a mechanism to circumvent procedures applicable to permanent residence.
>
> Like many temporary workers, temporary workers authorized to enter Canada under the CUSMA are allowed to work temporarily either in a temporary or permanent position. The

CUSMA cannot be used, however, as a means to remain in Canada indefinitely**.** (Emphasis added.)

[30] The Guidelines also contain a section dealing specifically with the application of temporary entry under CUSMA (Article 16) for university, college and seminary teachers. Such persons can obtain a document authorizing employment to undertake a temporary appointment at a university by simply presenting at the port of entry a letter from the employer describing the "temporary appointment". A person entering to be "employed temporarily" as a university teacher can carry out the range of duties normally associated with that position.

[31] That section of the Guidelines also includes the following:

5. Does the CUSMA facilitate permanent admission to Canada, the U.S. or Mexico?

No. The immigration chapter of the CUSMA covers temporary entry only.

6. What is "temporary entry"?

The CUSMA defines "**temporary entry**" as "...entry without the intent to establish permanent residence." This definition is consistent with immigration law. It is adaptable to individual circumstances and it recognizes that the concept of temporary entry cannot be based simply on a specific time limitation.

The definition does not allow for open-ended temporary entry. The provisions of the CUSMA cannot be used as a mechanism to circumvent procedures applicable to permanent employment nor as a means to establish de facto permanent residence.

Upon arrival at a POE, a work permit may be granted for the length of the contract up to a maximum of twelve months. If the appointment is for a period greater than twelve months, a renewal of the work permit must later be requested and obtained. (A person who is in possession of a valid work permit is eligible to apply for a renewed work permit, and should apply at least one month before the expiry of the work permit. An application can be downloaded from IRCC's website or from the Call Centre.

Multiple renewals will not be approved routinely even though a lengthy appointment might have been indicated at the time of arrival in Canada. The longer the duration of temporary stay, the greater the onus will be on the individual, especially when requesting an extension of status, to satisfy an officer of temporary intent.

7. Does the CUSMA allow temporary entry to undertake a temporary appointment in a permanent position?

Yes. Many temporary foreign workers in general are authorized to work temporarily in a permanent position that, for one reason or another, is temporarily vacant.

8. Is the LMIA procedure for temporary and permanent employment affected by the CUSMA?

The procedures which apply to permanent employment are unaffected by the CUSMA. The advertising procedure required as part of the LMIA process continues for permanent appointments.

On the other hand, the CUSMA prohibits, as a condition for temporary entry, "...prior approval procedures, petitions, labour certification tests, or other procedures of similar effect." Service Canada labour certification is, therefore, prohibited for a temporary appointment. A hiring (advertising) process which is independent of a labour certification

test or other procedure of similar effect is permissible for a temporary appointment under the CUSMA.

A university can institute a “Canadians-first” hiring policy and not be in conflict with provisions of Chapter 16 or any other provisions of the CUSMA. The university would simply be exerting its prerogative as an employer.

Should a decision be made, though, to offer a temporary appointment to a teacher who is a U.S. or Mexican citizen, then that person’s entry to Canada and authorization to work will be facilitated through the provisions of Chapter 16 of the CUSMA.

9. What happens when a university wishes to turn a temporary appointment under the CUSMA into a permanent appointment?

The university must offer the person permanent/indeterminate employment. The applicant can then apply for permanent residence, and benefit from receiving points for ‘arranged employment’. If they qualify as a skilled worker permanent resident, then a permanent residence visa will be issued.

10. What immigration procedures apply to American or Mexican teachers coming to Canada to undertake temporary appointments?

Teachers require work permits to teach temporarily in Canada at a university, college or seminary. An American or Mexican citizen can apply for a work permit at a Canadian POE and must provide the following documentation:

a. evidence of citizenship (passport or birth certificate);

b. a letter or signed contract from the institution providing full details of the temporary appointment including:

- the nature of the position offered;
- arrangements for remuneration;
- educational qualifications required; and
- the duration of the appointment.

While not mandatory, for the purpose of further facilitating entry at the border, it is recommended that the letter or contract specify that “the offer of employment is for a temporary appointment consistent with the terms of the Canada-United States-Mexico Agreement”;

c. evidence that the applicant holds at least a baccalaureate degree.

Applicants must, as well, be able to satisfy an immigration officer of general compliance with the requirements of the *Immigration and Refugee Protection Act* and Regulations, e.g., be in good health and have no criminal record.

[32] Relying solely on section 3.7 of the Guidelines, the Officer found that the applicant’s employment was not temporary as she held a permanent, tenured position, she had been working at the University for 11 years, and was not employed elsewhere. The Officer specifically found that because the applicant was “tenured, the employment is not considered ‘temporary’”. The Officer also stated that although the applicant was approved for a work permit, the “work permit was refused due to the fact that the person does not meet the definition of temporary work under CUSMA”.

[33] In my view, the Officer erred by relying exclusively on section 3.7 of the Guidelines to make their decision and in failing to also consider whether, pursuant to Article 16.1 of CUSMA, the applicant sought “temporary entry” as she did not intend to establish permanent residence in Canada.

[34] The Officer noted that:

- the applicant has resided only in the United States for the last 11 years while working in Canada at the University;

- she has been issued work permits consecutively from 2010 to 2021;

- because the applicant is tenured her employment is not considered “temporary” for the purposes of a work permit issued under CUSMA; and

- she did not apply for an LMIA because the University did not want to pay for it.

[35] It is beyond debate that while administrative guidelines can be useful in indicating what constitutes a reasonable interpretation of a given legislative provision, they are not legally binding and are not intended to be either exhaustive or restrictive. Officers can consider guidelines but will err if they treat them as binding or fail to also turn their minds to the specific circumstances of the case before them (see, for example, *Kanthasamy v. Canada (Citizenship and Immigration*), 2015 SCC 61, [2015] 3 S.C.R. 909, at paragraph 32; *Gordon v. Canada (Attorney General)*, 2016 FC 643, [2016] G.S.T.C. 60, at paragraph 29; *Canadian Reformed Church of Cloverdale B.C. v. Canada (Employment and Social Development*), 2015 FC 1075, at paragraphs 10–12; *Marcom Resources Ltd. v. Canada (Employment, Workforce Development and Labour*), 2020 FC 182, at paragraphs 27–28; *Castle Building Group Ltd. v. Canada (National Revenue)*, 2021 FC 947, 2021 D.T.C. 5105, at paragraph 33).

[36] In my view, the Officer failed to assess whether the applicant had the intent of establishing permanent residence in Canada and whether she complied with Canadian measures applicable to temporary entry, as required by the IRPA and the IRP Regulations. In that regard, the Officer failed to consider the information provided by the applicant, such as the fact that she resides exclusively in the United States with her family and commutes to work when needed; she has spent only around 400 days in Canada in the last relevant five-year period; and, significantly, her explanation that she has no intention—as demonstrated over the last 11 years—of residing in Canada, either temporarily or permanently.

[37] While the employment-related factors relied upon by the Officer may have properly assisted them in an assessment of whether the applicant intended to establish herself permanently in Canada and whether she complies with Canada’s measures applicable to temporary entry, in and of themselves they are not determinative.

[38] The Officer also erred in basing the refusal on the fact that the applicant “does not meet the definition of temporary work under CUSMA”. CUSMA does not define temporary work, only “temporary entry”—which is concerned with the applicant’s intent to establish permanent residence.

[39] In conclusion, by relying exclusively on section 3.7 of the Guidelines and on factors related to the nature of the applicant's employment at the University, the Officer effectively fettered their discretion by failing to also consider whether the applicant intended to establish herself permanently in Canada and whether she complies with Canada's measures applicable to temporary entry. The decision is therefore not justified in light of the factual and legal constraints that bore on it (*Vavilov*, at paragraph 105).

[40] That said, had the Officer done so, it may well have been open to them to have also concluded that the indeterminate nature of the applicant's work meant that her permanent teaching position was not of a temporary duration and that her individual circumstances, cross-border commuting, did not alleviate that concern. Indeed, it is unclear to me, based on the record before me, whether CUSMA was intended to apply to someone in the applicant's circumstances.

Certified Questions

[41] The applicant in this matter proposes the following questions for certification:

i. Can a citizen of the United States or Mexico who resides in the United States and works in an indeterminate position in Canada benefit from an LMIA exemption under CUSMA Article 16.4?

ii. Must a foreign national who otherwise qualifies for an LMIA exemption under CUSMA Article 16.4 demonstrate that their employment is temporary in order to meet the test for temporary entry?

[42] In order for this Court to certify a question of general importance, it must be a serious question that is dispositive of the matter, that transcends the interests of the parties, and raises an issue of broad significance or general importance (*Lewis v. Canada (Public Safety and Emergency Preparedness),* 2017 FCA 130, [2018] 2 F.C.R. 229, at paragraph 36).

[43] The Federal Court of Appeal in *Lunyamila v. Canada (Public Safety and Emergency Preparedness)*, 2018 FCA 22, [2018] 3 F.C.R. 674, revisited the criteria that must be met for certification of a proposed question [at paragraph 46]:

> This Court recently reiterated in *Lewis v. Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 130, [2018] 2 F.C.R. 229, at paragraph 36, the criteria for certification. The question must be a serious question that is dispositive of the appeal, transcends the interests of the parties and raises an issue of broad significance or general importance. This means that the question must have been dealt with by the Federal Court and must arise from the case itself rather than merely from the way in which the Federal Court disposed of the application. An issue that need not be decided cannot ground a properly certified question (*Lai v. Canada (Public Safety and Emergency Preparedness)*, 2015 FCA 21, 29 Imm. L.R. (4th) 211, at paragraph 10). Nor will a question that is in the nature of a reference or whose answer turns on the unique facts of the case be properly certified (*Mudrak v. Canada (Citizenship and Immigration)*, 2016 FCA 178, 485 N.R. 186, at paragraphs 15, 35).

[44] Given that the proposed questions were not dealt with in my reasons, certification is not appropriate.

THIS COURT'S JUDGMENT is that

1. The application for judicial review is granted;

2. The decision is set aside and the matter shall be remitted to another Canada Border Services officer for redetermination, having regard to these reasons;

3. There shall be no order as to costs; and

4. The proposed questions are not certified.