

Immigration Issues Pertaining to Volunteers

We are currently updating our Volunteer Application Form. It is my understanding that individuals without "legal status" should not be considered as volunteers and organizations may engage only volunteers who are "in status" (i.e. landed immigrants, visitor/student visa) or have the legal authority to be in Canada. If this is the case, at what point is a volunteer applicant's "status" determined? Should there be a question on the application form? Or is this determined during the interview/screening process? What would be the correct wording of such a question/enquiry? If you are unable to assist with this question, I would certainly appreciate some further direction as to where clarification may be found. Thanks.

Part 1 Summary

Q: It is my understanding that individuals without "legal status" should not be considered as volunteers and organizations may engage only volunteers who are "in status" (i.e. landed immigrants, visitor/student visa) or have the legal authority to be in Canada.

A: Citizenship and Immigration Canada (“CIC”) at 1-888-242-2100 may be contacted to discuss an organization’s responsibility in this regard. A CIC representative contacted at 1-888-242-2100 stated that although persons physically present in Canada must have legal status to be in Canada, there is no legal obligation for an organization to report an illegal immigrant to CIC or for an organization recruiting volunteers to inquire if the applicant has legal status in Canada. Note that this is the case only if the volunteer activity does not qualify as ‘work’. An organization will not face a fine for offering a volunteer position to an illegal immigrant, but may face a fine for employing an illegal immigrant or having the volunteer perform ‘work’.

However, the CIC representative advised that organizations should ask volunteer applicants if they have ‘valid status’ or ‘legal status’ to be in Canada. The CIC representative also stated that organizations should not offer a volunteer position to a person without legal status to be in Canada, because this would encourage the person to remain in Canada without legal status. The organization should instead encourage the person to take steps to obtain legal status to be in Canada.

Q: If this is the case, at what point is a volunteer applicant's "status" determined?

A: The legal status of a volunteer applicant may be established prior to offering a volunteer position to the individual.

Q: Should there be a question on the application form? Or is this determined during the interview/screening process?

A: The inquiry may occur at the application stage or during the interview, prior to an offer being extended.

Q: What would be the correct wording of such a question/enquiry?

A: It is important to ask the question in a manner which complies with human rights legislation. Note that discrimination in employment is prohibited under the Ontario Human Rights Code (the “*Code*”). The *Code* does not explicitly prohibit discrimination in volunteer activities, but the Ontario Human Rights Commission (“**OHRC**”) website states that the definition of employment “may even include volunteer work”.¹ It is therefore recommended that the *Code* be followed when designing volunteer screening methods. Questions should not be asked about: (i) landed immigrant status, permanent residency, naturalization or refugee status; (ii) place of birth; (iii) Social Insurance Number (which may contain information about an applicant's place of origin or immigration status); (iv) the “community” a person belongs to; or (v) membership in organizations such as cultural or ethnic associations.²

The OHRC website advises that an employment application may include the following question³:

Are you legally eligible to work in Canada? Yes No

This question may be modified for a volunteer application to read as follows:

Do you have legal status in Canada? Yes No

Part 2 Analysis

I. Legal Status in Canada

Individuals with legal status in Canada include: (i) Canadian citizens (by birth or naturalization); (ii) permanent residents (people with “landed immigrant” status who have been granted the right to live in Canada permanently by immigration authorities, but do not have Canadian citizenship); and (iii) non-permanent residents (people from another country who live in Canada and have work, student or Minister's permits, or who are claiming refugee status in Canada).

Citizenship and Immigration Canada (“**CIC**”) at **1-888-242-2100** may be contacted for advice regarding the duties of an organization with respect to volunteer applicants who are non-permanent residents. A CIC representative contacted at **1-888-242-2100** stated that although persons physically present in Canada must have legal status to be in Canada, there is no legal obligation for an organization recruiting volunteers to inquire if the applicant has legal status in Canada, provided that the volunteer activity does not qualify

as ‘work’. There is also no obligation for an organization to report an illegal immigrant to CIC, nor will the organization face a fine for offering a volunteer position to an illegal immigrant. An organization may, however, face a fine for employing an illegal immigrant or having the volunteer do ‘work’.

The CIC representative advised that organizations should ask volunteer applicants if they have ‘valid status’ or ‘legal status’ to be in Canada. The CIC representative also stated that organizations should not offer a volunteer position to a person without legal status to be in Canada, because this would encourage the person to remain in Canada without legal status. The organization should instead encourage the person to take steps to obtain legal status to be in Canada.

II. Volunteer Activity vs. ‘Work’

a. Volunteer activity that qualifies as ‘work’

‘Work’ is defined by CIC as “an activity for which wages or commission is earned, or that competes directly with activities of Canadian citizens or permanent residents in the Canadian Labour Market.” Under the second part of this definition, volunteer activity may qualify as ‘work’. A volunteer activity that may qualify as ‘work’ is cleaning up after the Toronto Santa Claus Parade, as this is work that would otherwise be available to a Canadian citizen or permanent resident.

If the volunteer activity qualifies as ‘work’, a Canadian citizen or permanent resident is qualified to perform the volunteer activity, but a non-permanent resident may need a work permit, and therefore an inquiry as to the legal status of the applicant may be necessary.

If the volunteer activity qualifies as ‘work’, an opinion from Human Resources and Social Development Canada (“**HRSDC**”) may or may not be required. An HRSDC confirmation determines whether the ‘work’ will have a positive or negative impact on the labour market in Canada. An HRSDC confirmation is issued if the ‘work’ meets Canadian labour standards and if Canadian citizens and permanent residents are not available to fill the position.

b. Pure Volunteer Activity

Volunteer activity is not ‘work’ if the activity performed by the non-permanent resident: (i) is incidental to their purpose of being in the country; (ii) is unremunerated and without the expectation of being remunerated; and (iii) is not a job which competes directly with activities of Canadian citizens or permanent residents in the Canadian labour market.

Examples of volunteer activities which are not ‘work’ are acting as a ‘big brother’ or ‘big sister’ or answering telephones at a crisis centre. Note that volunteer activity that is performed on a part-time rather than a full-time basis is more likely to be an activity that is incidental to the volunteer’s purpose for being in the country. Unscheduled or

informally scheduled volunteer activity is also indicative of an activity that is incidental to the volunteer's purpose for being in the country.

III. Determination of Legal Status

An organization offering a volunteer position may inquire about the legal status of the volunteer applicant. A question may be included in the volunteer application or may be asked during the subsequent interview prior to an offer being made.

It is important to ask the question in a manner which complies with human rights legislation. Note that discrimination in employment is prohibited under the Ontario Human Rights Code (the "*Code*"). The *Code* does not explicitly prohibit discrimination in volunteer activities, but the Ontario Human Rights Commission ("**OHRC**") website states that the definition of employment "may even include volunteer work". It is therefore recommended that the *Code* be followed when designing volunteer screening methods. Questions should not be asked about: (i) landed immigrant status, permanent residency, naturalization or refugee status; (ii) place of birth; (iii) Social Insurance Number (which may contain information about an applicant's place of origin or immigration status); (iv) the "community" a person belongs to; or (v) membership in organizations such as cultural or ethnic associations.

The OHRC website advises that an employment application may include the following question:

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For a full description of the duties of employers under the *Ontario Human Rights Code* and to view a sample employment application, see "**Human Rights at Work 2008 - Third Edition**", Appendix D, at <http://www.ohrc.on.ca>.

Under the *Ontario Human Rights Code*, questions about a prohibited ground of discrimination may be asked during the interview stage, and the answers may be relied upon to make an employment offer, if the organization is hiring for a special program or if the organization qualifies as a special interest organization. An example of a special interest organization is a charity registered under the *Income Tax Act* which acts as a philanthropic organization performing acts of benevolence.⁴

¹ " "Employment" is not defined in the *Code* but the Commission takes a broad and liberal approach to this term. It includes full-time and part-time employment, contract work, temporary staff from agencies, probationary periods and may even include volunteer work." [Ontario Human Rights Commission, **Hiring? A Human Rights Guide** at <http://www.ohrc.on.ca/en/resources/Guides/hiring?page=hiring-FREEDOM.html>]

² Ontario Human Rights Commission, **Human Rights at Work 2008 - Third Edition**, Section IV, 4, (b) (ii) at

http://www.ohrc.on.ca/en/resources/Policies/atwork?page=atwork-IV_.html#Heading1573

³ Ontario Human Rights Commission, **Human Rights at Work 2008 - Third Edition**, Appendix “D”, Sample application for employment at

http://www.ohrc.on.ca/en/resources/Policies/atwork?page=atwork-VII_.html#Heading4601

4 Ontario Human Rights Commission, **Human Rights at Work 2008 - Third Edition**, Section IV, 5, (d) (ii) at

http://www.ohrc.on.ca/en/resources/Policies/atwork?page=atwork-IV_.html#Heading1709

“ii) Hiring based on Code grounds if a special employment exemption applies:

When an exemption under section 24 applies, an employer can hire persons based on specific *Code* grounds, as long as the requirement is reasonable and bona fide based on the nature of the job. In such situations, it would be appropriate to ask relevant questions on a job application or in an interview.

Example: *A social service organization serving people who are deaf, deafened or hard of hearing may be allowed to prefer a community liaison officer who has a hearing disability.*

The employer is allowed to ask questions relating to *Code* grounds in an interview, and to rely on them in making hiring decisions, if it meets the criteria for one of the following exemptions:

Special interest organization: Subsection 24(1)(a) allows certain special interest organizations to prefer hiring people based on their membership in certain groups. Special interest organizations might include:

religious organizations that follow a particular system of faith and worship, such as a church or religious order

philanthropic organizations that perform acts of benevolence, including organizations that are registered as charities under the federal *Income Tax Act*

educational organizations such as schools, colleges and other institutions that offer instruction and training of a moral, religious, vocational, intellectual or physical nature

fraternal organizations formed for mutual aid or benefit but not for profit

social organizations providing social or cultural benefits (for example, a cultural club serving a particular ethnic group).

For an organization to qualify for the exemption, it must also meet the following conditions:

be primarily engaged in serving the interests of persons identified by their race, ancestry, place of origin, colour, ethnic origin, creed, sex, age, marital status or disability

employs only, or gives preference in employment to, persons identified by their race, ancestry, place of origin, colour, ethnic origin, creed, sex, age, marital status or disability

the qualification must be reasonable and *bona fide* because of the nature of the job.

If these conditions are met, it may be permissible to hire someone who is identified or preferred based on a ground in the *Code*.

Example: *A denominational school is hiring teachers and caretaking staff. Questions about religious membership would be permitted if the job involves teaching religious values to students. So such questions would be allowed for teachers, but not for the caretaking staff.*

Reasonable and bona fide link to *Code* grounds such as age or sex: Subsection 24(1)(b) allows discrimination in employment when the grounds of age, sex, record of offences or marital status are reasonable and *bona fide* qualifications because of the nature of the job.

Example: *A women's shelter advertises for support counsellors to women experiencing violence and states that applications will only be accepted from women. In this situation, the nature of the work would mean that gender could be a reasonable and bona fide requirement of the job.*

Individual hiring for self, spouse or child who is "ill, aged or infirm": Subsection 24(1)(c) allows an individual to discriminate based on all prohibited grounds listed in section 5, if the primary duty of the job is to attend to the medical or personal needs of the person, of an ill child or an aged, infirm or ill spouse or other relative.

Example: *A man hires a male live-in caregiver for his father who has severe disabilities. Despite receiving applications from several qualified women, his father would prefer a male attendant and this has been taken into account in the hiring process. This is permissible.*