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Investor Visas and Trade Issues

NAFTA and the TN and E-1/E-2 Classifications

Harry Gee, Jr.

Materials prepared by:

Harry Gee, Jr.
James D. Cypert

Author contact information:
Harry Gee, Jr.
James D. Cypert
Harry Gee, Jr. & Associates, PLLC
5847 San Felipe Suite 2950
Houston, TX
hgee@harrygee.com
713-781-0071

1. North American Free Trade Agreement (NAFTA)
 - a. NAFTA went into effect on January 1, 1994.¹
 - b. Chapter 16 of NAFTA contains agreements between the U.S., Mexico, and Canada to facilitate the movement of people by allowing certain businesspersons from other member countries temporary entry.²
 - c. For U.S. immigration purposes, two important impacts of NAFTA were:
 - i. The creation of the Treaty National (TN) classification.³
 1. In 2013, the Department of Homeland Security (DHS) reported that there were 612,535 TN admissions to the U.S.⁴
 - ii. The expansion of the E-1/E-2 classifications to Mexican citizens.⁵
2. TN Classification
 - a. The TN classification allows Canadian and Mexican citizens to seek temporary entry to engage in certain business activities at a professional level.⁶ NAFTA Appendix 1603.D.1 lists the available professions and their corresponding educational/work experience criteria.⁷
 - b. Requirements for the TN classification:
 - i. Canadian or Mexican citizenship;⁸
 - ii. Offer of employment in one of the professional occupations listed in Appendix 1603.D.1 of NAFTA;⁹
 - iii. Degree and/or work experience that satisfies the requirements set forth in Appendix 1603.D.1 of NAFTA;¹⁰
 - iv. Seeking temporary entry to the U.S.¹¹
 - c. Duration – Individuals in the TN classification may be admitted for durations valid for up to 3 years.¹² The TN classification may be renewed indefinitely, but the individual must continue to satisfy NAFTA’s temporary entry requirement during subsequent admissions.¹³
 - d. NAFTA Strikebreaker Provisions – A Citizen of Canada or Mexico may not be admitted in TN status if the Secretary of Labor certifies that a labor dispute is in process where the alien is/will be employed and admission of the individual

¹ See North American Free Trade Agreement (NAFTA), Office of the United States Trade Representative *available at* <http://www.ustr.gov/trade-agreements/free-trade-agreements/north-american-free-trade-agreement-nafta> (last accessed August 31, 2014)

² NAFTA, Chapter Sixteen: Temporary Entry for Business Persons

³ NAFTA, Section D of Annex 1603

⁴ See Nonimmigrant Admissions to the United States: 2013, Department of Homeland Security *available at* http://www.dhs.gov/sites/default/files/publications/ois_ni_fr_2013.pdf (last accessed August 31, 2014)

⁵ NAFTA, Section B of Annex 1603. Note that while Section B also applies to Canadian citizens, the E-1/E-2 classification was already available to Canadian citizens through NAFTA’s precursor the Canada–United States Free Trade Agreement (FTA).

⁶ INA § 214(e)(2); 8 CFR § 214.6(d)(1)

⁷ NAFTA, Appendix 1603.D.1 of Chapter 16

⁸ 8 CFR § 214.6(d)(3)(i); 9 FAM 41.59 N4.3; IFM 15.5(f)(3)

⁹ 8 CFR § 214.6(d)(3)(ii); 9 FAM 41.59 N4.3; IFM 15.5(f)(3)

¹⁰ 8 CFR § 214.6(d)(3)(ii); 9 FAM 41.59 N4.3; IFM 15.5(f)(3)

¹¹ 8 CFR § 214.6(d)(1); 9 FAM 41.59 N5; IFM 15.5(f)(3)

¹² 8 CFR § 214.6(e); 9 FAM 41.59 N9; 73 FR 61332, 61334 (Oct. 16, 2008)

¹³ 9 FAM 41.59 N9; IFM 15.5(f)(7)(C)

would adversely affect the settlement of the labor dispute or the employment of anyone involved in the dispute.¹⁴

3. TN Procedural Variances for Canadian and Mexican Citizens

- a. Canadian citizens may apply for TN status with U.S. Customs and Border Protection (CBP) upon seeking admission at “Class A” ports of entry or preflight inspection.¹⁵
 - i. Since 2012, Canadian citizens may also file initial TN applications through USCIS using Form I-129.¹⁶ If approved, the individual may use the I-797 approval notice to facilitate admission at the port of entry or preflight inspection.
 - ii. CBP has recently announced that it is utilizing a checklist to process Canadian TN applications.¹⁷ This checklist will be provided to applicants in cases of denial, and should serve as a *de facto* Request for Additional Evidence by listing the documentation needed to overcome the denial during a future application.¹⁸
- b. Mexican citizens are required to apply for an initial TN visa (including biometrics) at a U.S. embassy or consulate.¹⁹ Once a TN visa is obtained, the visa recipient may seek admission from CBP at a port of entry or preflight inspection.²⁰
 - i. **Practice pointer:** Due to visa reciprocity, TN visas to Mexican citizens are issued for only one year.²¹ However, as noted above, TN status may be issued for up to 3 years. As a result, Mexican citizens can request a 3-year authorized stay from CBP upon entry. To assist CBP to issue the correct duration, the Department of State (DOS) has stated that consular posts should notate the visa with an individual’s period of requested employment.²² As these annotations are issued inconsistently in practice, it is recommended that legal counsel explicitly request the consular officer to make such an annotation and review all documents after issuance.

4. TN Options for Non-degreed Professionals

a. Management Consultants

¹⁴ 8 CFR § 214.6(k); 9 FAM 41.59 N8

¹⁵ 8 CFR § 214.6(d)(2); 9 FAM 41.59 N4.1

¹⁶ U.S. Citizen and Immigration Services, *TN NAFTA Professionals*, <http://www.uscis.gov/working-united-states/temporary-workers/tn-nafta-professionals>

¹⁷ Practice Alert: CBP Issued TN Classification Checklist to Field Offices *posted on* AILA Infonet 14051940 (May 19, 2014)

¹⁸ *Id.*

¹⁹ 8 CFR § 214.6(d)(1); 9 FAM 41.59 N4.2. Note on January 1, 2004 the Department of Homeland Security removed the numerical cap of 5,500 and labor condition application requirement for Mexican citizens for the TN classification. *See* 79 FR 7582 at 7583 (February 10, 2014). While this requirement has not been in effect for some time, the Department of State recently amended its regulations at 22 CFR § 41.59 to reflect this change. *See* 91 Interpreter Releases 273, 284 (February 17, 2014)

²⁰ 8 CFR § 214.6(d)(1)

²¹ *See* Reciprocity by Country, Department of State *available at* <http://travel.state.gov/content/visas/english/fees/reciprocity-by-country.html> (last accessed August 31, 2014)

²² *See* AILA Department of State Liaison Meeting, Mexico City *posted on* AILA InfoNet 12050245 (May 02, 2012); DOS Practice Alert: TN Annotation at CDJ *posted on* AILA InfoNet 12083060 (August 30, 2012)

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