

The New Cross-border Landscape



BY NAN BEREZOWSKI

Canadian transferees have several options available for quick and easy entry into the United States. Berezowski outlines the options, updates the procedures to reflect the new security-conscious mindset, and offers suggestions for creating a company process for immigration.

Canadians relocating to the United States enjoy immigration admission categories and simplified procedures not available to other nationals. They also are exempt from most visa requirements. However, like other foreign nationals, they do require authorization to work in the United States.

The good news is that when hiring a Canadian national or relocating an employee from a Canadian office to a U.S. office, there often are easier and faster immigration routes available. Some of the options available to Canadians are not well known in the United States and as a result may come as a welcomed surprise to local attorneys, HR managers, and expatriates alike. These options tend to be quicker than more traditional service center processing.

The typical process includes filing a petition at a regional service center, as is normally required, waiting an

average of six to 10 weeks for approval from the Immigration and Naturalization Service (INS), and then sending the prospective employee to a U.S. Consulate abroad for visa issuance. Many Canadian citizens are able to have their petition adjudicated at a border port of entry or airport pre-flight inspection facility only hours before departing for the United States. The result, that might otherwise take months, often can be finalized in a couple of days.

In a Security-conscious Era

In the post-September 11 era, borders and airports have become increasingly security sensitive places. Although this new reality certainly is not directed at corporate travelers, as a result of heightened security, border and pre-flight immigration processing, while still fast and relatively uncomplicated, now does require especially thorough preparation, organization, and presentation.

In the year since September 11, 2001, American and Canadian legislators have reacted swiftly. President George W. Bush has pledged to reorganize INS, and immigration authorities are under pressure to be extremely cautious and careful. Both countries have taken the issue of border security very seriously.

To this end, the United States and Canada recently negotiated a 30-point Border Declaration that will see the implementation of a number of security measures, ranging from the biometric tracking of Canadian passport photos to the routine registration and fingerprinting of certain nationals over the next few years. The Border

Declaration also contemplates the increased sharing of information between U.S. and Canadian authorities. Border teams centered in the Buffalo, NY-Niagara Falls, Ontario, Canada, region already have implemented intelligence-sharing systems.

The new security sensitive environment and the 30-point Border Declaration has led to changes in cross-border inspection procedures at many U.S.-Canada airports and borders. Canadians, Canadian permanent residents, and others seeking to travel to the United States from Canada now routinely face more rigorous scrutiny when they are interviewed by INS officials. Those being interviewed also can expect longer interviews and tougher questioning. They also should expect increased scrutiny of their documentation and more regular background checks.

In this environment of security sensitivity, it is extremely important for the immigration petitions and applications to be prepared thoroughly and carefully.

The following 10 points are examples of initiatives that go a long way to ensuring smooth cross-border

immigration processing:

Set the corporate policy and ensure that the HR department has charge of the process. Request that managers and employees communicate with HR well in advance of the relocation or assignment so that everyone understands what is required. This also will allow sufficient time to determine exactly what supporting documentation is needed and to locate this documentation—authorities now are more likely than ever to request original documents, transcripts, and reference letters.

Provide the employee with a questionnaire. Provide a questionnaire to the recruit or transferee to complete. The questionnaire should ask the information necessary to start the immigration process (the purpose and duration of the assignment and the activities to be carried out). It also should include questions—and answers—about criminality (including incidents that may have occurred years ago) in order to determine eligibility. Other problematic issues such as prior refusals also should be addressed. The HR manager should keep a copy of the completed ques-

tionnaire in the employee's file for future reference.

Request basic supporting documentation at the onset of the immigration process. This will aid in determining the type of non-immigrant status and the time it will take to obtain the visa. It always is good to ask for a copy of the passport data page and all visas and endorsements; a résumé (including a description of present and past employment); and copies of degrees, diplomas, and certificates.

Obtain information from the employee's new manager. Where the HR manager does not have information about the intended duties, or information essential to determining the proper category for U.S. entry, obtain this information from the employee's anticipated supervisor. Supervisors usually are familiar with the anticipated assignment and, with a little encouragement, can provide valuable information.

Determine the best-suited non-immigrant status, i.e., TN, L-1A/B, H-1B. With the basic information and documentation provided by the employee and supervisor, it usually is possible to determine what

Non-immigrant Visa Options for Canadians

Below are three of the most useful immigration categories available to Canadians relocating to the United States. As each category has its own specific requirements, restrictions, and advantages, it always is important to consider every aspect of the individual employee's situation—his or her qualification, logistical restraints, and future plans—before deciding how to proceed.

Trade NAFTA-Professional (TN).

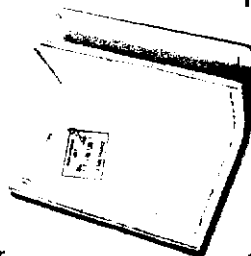
Perhaps the best quick-fix immigration tool is the TN status. Canadians apply at an airport pre-flight inspection facility or a border port of entry. TN preparation can be done in a matter of days, and adjudication often can take less than an hour. To qualify, the recruit or transferee must have the required professional credentials (education and/or experience) and intend to perform the duties of an approved profession. Some of the most commonly used approved professional categories are computer systems analyst, engineer, accountant, graphics designer, and management consultant.

Typically a bachelor's degree is required but there are

instances, depending on the particular profession, where a successful applicant might have a combination of a two year post-secondary diploma or certificate and three years of related experience. There also are some instances where an applicant can qualify on the basis of experience alone. Applicants typically will be required to present documentation proving their education and experience as well as the suitability of the employment offer in the United States.

There is no limit to the total period of stay in the United States allowed under the TN category but the initial period for admission is limited to a maximum of one year. However, satisfying the temporary intent requirement may become an issue with repeat extensions and renewals. As well, the TN is not a good launching pad for permanent residence or a green card.

L-1 Intra-corporate Transfer. The L-1 is the non-immigrant status that allows companies to temporarily transfer executives and managers (L-1A) and those having "specialized knowledge" (L-1B) to affiliates or subsidiaries in the United States. L-1 status is available to all nationals;



status best suits the employee's credentials and the company's objectives. Assistance from legal counsel may be necessary to determine the category of entry, to assist in preparing the necessary paperwork, and/or to resolve any "red-flag" issues.

Prepare and review the employee's petition or application. It is important that both the HR manager and the employee carefully review the attorney's draft submissions for accuracy. The employee should notify the HR manager of any amendments or additions to the submission or incorrect information. It is imperative that both the HR manager and the employee are satisfied with everything said in the application package.

Caution against common pitfalls. Common pitfalls include arriving at the airport or border at the last minute; assuming that the requirements applicable to a friend or colleague also will apply in the situation at hand; being unprepared for the interview with airport pre-flight inspection or border authorities; and antagonizing immigration authorities. Instead, employees should remain calm and request an opportu-

nity to address the officer's concerns.

Prepare the employee for his or her interview with U.S. immigration officials. This step is important as it helps the employee gain an understanding of the questions that may be asked of him or her and how to best respond. It also provides an overview of the application and interview process. Preparing the employee will reduce anxiety and increase the chances of a successful INS interview.

Stress the importance of truth and integrity throughout the immigration process. Caution against misrepresenting any aspect of the immigration process to authorities. This is particularly important in the post-September 11, information-sharing, security-sensitive climate.

Follow up with the employee post-immigration. Following up helps gauge trends in the application process. It also is the time to obtain final copies of documents. The I-94 Arrival/Departure card is given to the employee at the airport or border; for some Canadians it is the only indicator of the validity period of the employee's lawful U.S. status. The Canadian hire also should be

brought into the employer's existing I-9 compliance program immediately on arrival in the United States.

Canadians can work in the United States with relative ease. As such, HR managers should be confident in their ability to make strategic relocation decisions and meet strict timelines. It also is true that, since September 11, cross-border travel has become more difficult; however, with proper planning and preparation an employer still can avail itself of the options available to Canadians that allow for simplified and expedited work status in the United States. Implementing simple procedures on a day-to-day basis and developing a corporate strategy will minimize the difficulties encountered by employees at airports and borders. ■



Nan Berezowski is an executive member of American Immigration Lawyers Association (Canada Chapter), past executive member of the Citizenship & Immigration section of the Ontario Bar Association, and co-author of a leading legal text on citizenship law. She can be reached at 416/850-5112 or e-mail nberezowski@canadaUSvisas.com.

however, Canadians may take advantage of simplified provisions under the North American Free Trade Agreement (NAFTA). Their main advantage is that they can apply at an airport pre-flight inspection facility or at a border port of entry. Again, in avoiding the INS regional service center process, the petition approval period is reduced from six to eight weeks to a matter of hours.

In order to qualify, normally one must establish that the employee has worked in an executive, managerial, or specialized knowledge capacity outside the United States in a full-time capacity for the foreign parent, branch, affiliate, or subsidiary for at least one year within the previous three years. It also must be established that he or she is entering the United States to work for the same company or a parent, affiliate, or subsidiary in an executive, managerial, or specialized knowledge capacity.

Canadians with L-1A or L-1B status do not require a visa and, therefore, are not required to attend a U.S. Consulate abroad before entering the United States. Moreover, executives and managers who qualify for L-1A status, whether under NAFTA or the regular procedures, are subsequently in a position to qualify for U.S. permanent residence under advantageous priority provisions.

H-1B Specialty Occupation. Although not exclusively a category for Canadians, H-1B status is nonetheless a

valuable tool of last resort. H-1B petitions are filed on behalf of professionals. Professionals are people who hold at least a bachelor's degree or the equivalent in a specialized field of knowledge relating to their employment, where holding such a degree ordinarily is considered a prerequisite to entering the field. The actual position being offered must require the services of a professional. Examples of job classifications that may qualify for H-1B status are engineers, accountants, chemists, computer professionals, and some business professionals.

The application process involves three steps. First, the Labor Condition Attestation (LCA) must be filed with the U.S. Department of Labor. Once the LCA is certified, the U.S. employer must file an H-1B petition with an INS regional service center. Service centers typically take six to eight weeks to adjudicate H-1B petitions. Most beneficiaries then must obtain the requisite H-1B visa endorsement at a U.S. Consulate abroad. Canadians are exempt from this third step and are, therefore, eligible to work in the United States two to three weeks before other immigrants.

The above overview is intended to identify the most popular options available to HR managers responsible for the relocation of a Canadian employee or recruit to the United States. But it is always important that each case be assessed fully. ■