

**TRAPS AND PITFALLS TO U.S.
ASSIGNMENTS AND RELOCATIONS – WHAT
HR NEEDS TO KNOW**

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US NON-IMMIGRANT VISAS B-1, TN's, L-1A/L-1B, H-1B Options

A Summary for HR Professionals

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B-1, TNs, L-1A/L-1B, H-1B Options**

Introduction

The North American Free Trade Agreement (NAFTA) was implemented on January 1, 1994. It was intended to provide for the freer movement of goods, services and investments as well as business persons between Canada, the U.S. and Mexico. Chapter 16 of the NAFTA, entitled "Temporary Entry of Business Persons", provides for the facilitated temporary entry of business persons who are citizens of one country into the other two countries, and it contains the reciprocal commitments of each party to the agreement.

This article will focus on NAFTA applications filed by Canadian citizens at U.S. ports of entry. It should be noted, that, although business persons who are citizens of Mexico also are entitled to the benefits of the NAFTA, they do not enjoy the same facilitated access to the U.S., as do Canadians. For example, Mexican citizens require issuance of a visa to enter the U.S. as well as advance approval of petitions.

The NAFTA Categories

The NAFTA provisions contain four categories of business persons seeking admission on a temporary basis:

1. Business Visitors admitted as B-1s;
2. Treaty Traders and Investors admitted as E-1s and E-2s;
3. Intra-company Transferees admitted as L-1s; and
4. Professionals admitted as TNs.

This article will not deal with the topic of E visas. A final category of interest to people seeking temporary employment authorizations in the US is the H-1B. This work permit is not issued under NAFTA. It is available to citizens of all countries and will be addressed briefly in this paper.

B-1 Business Visitors

General Principles – Business vs. Employment

B-1 business visitors may be admitted for the purpose of engaging in business, but not for the purpose of being employed. Employment is local skilled or unskilled work for hire. Activities of a commercial or professional nature that are not employment are permitted under B-1 Business Visitor status. Such activities include, but are not limited to: attending conventions, conferences, consultations, negotiations, and meetings; engaging in activities appropriate to a member of a board of directors of a U.S. corporation; and conducting litigation. Activities that constitute "employment" in violation of B-1 status are much harder to define and more fact-driven. Key factors include whether the business person's activities are

directed by a foreign employer; whether profits from the business activities will accrue abroad; whether services rendered in the U.S. are incidental to international trade or contracts; and whether the source of remuneration is from the U.S. source or from abroad.

To qualify as a non-immigrant visitor for business, an individual must prove if he or she:

- Intends to leave the U.S. at the end of the temporary stay;
- Has made adequate financial arrangements to carry out the purpose of the visit and to thereafter depart the U.S.
- Maintains an unabandoned foreign residence;
- Is entering the U.S. for a period of specifically limited duration;
- Is seeking admission solely to engage in legitimate activities relating to business;
- Will leave the U.S. upon completion of the temporary visit. The period projected for the visit must be consistent with its stated purpose.

In addition to the general B-1 permissible activities, a business visitor is permitted to enter the U.S. pursuant to the NAFTA if the purpose of the visit is in one of the following areas:

- Research and Design – technical, scientific and statistical researchers.
- Growth, Manufacture and Production – harvester owner supervising a harvesting crew; purchasing and production management personnel.
- Marketing – Market researchers and analysts; trade fair and promotion personnel.
- Sales – sales representatives and agents negotiating contracts; buyers.

- **Distribution** – transportation operators; customs brokers.
- **After-Sales Service** – installers, repair and maintenance personnel, and supervisors, possessing specialized knowledge essential to the seller's contractual obligations.
- **General Service** – professionals, management, financial services, public relations, and tourism personnel.

All of these additional purposes require clear evidence to gain admission. After-sales service and general service require particular care in presentation. To gain U.S. admission, Canadians seeking status as Business Visitors should present proof of citizenship and letter from the foreign employer explaining the purpose of the visit.

Intra-Company Transferees admitted as L-1s

The L-1 is the non-immigration 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; however Canadians may take advantage of simplified provisions under the 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 Regional Service Center process, the petition approval period is reduced from 6-8 weeks to a matter of a few hours.

For an individual L Petition, the employee must have been employed full-time 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. You must also establish 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.

There are many benefits of L intra-corporate status; the main ones being the L can be a quick and effective way to bring an employee to the United States; unlike the H-1B, the beneficiary's employment is not subject to geographical limitations within the United States. The L-1A can be issued for a total of up to 7 years, the L-1B for specialized knowledge personnel for five years. Both provide a route to US Permanent Residence. Moreover, effective January 16, 2002, the Immigration and Nationality Act was amended to permit the employment of some L-1 intra-company transferee spouses. Unlike most other US non-immigration categories, the spouses of L-1A status holders are now permitted to work in the US. For clarity, this is not the case for the spouse of an L-1B, TN or H-1B Specialty Occupation status holder.

The main drawback of the L is that it is of no help to new hires regardless of their seniority and/or value to your company. Note additionally, that the L is presently under political attack and legislation proposed in the US Congress could result in restrictive changes to the L intra-corporate transferee category. Educational requirements, limitation and duration reductions, and an annual cap of 35,000 are among the curtailing changes being considered. It is too early to know if any of these proposed changes will be enacted into law or whether they will affect Canadians availing themselves of the NAFTA L provisions to work in the US.

Smaller Canadian companies may have difficulty gaining access to the United States. These companies are typically small, privately held affairs and as a result they may have difficulty establishing the company's long term financial stability and the ability to sustain the Canadian operation while promoting operations in the United States, particularly if the company is sending a key personnel member.

An issue for small companies as well as large is opening a new US office. There are special requirements where an applicant is coming to the US to manage a new US office. The key here is to show that the new office will be able to sustain a manager or executive transferee within one year of approval of the petition.

Documentation must be provided to convince the reviewing officer that the US office and operations are legitimate and will be viable within a reasonable period of time is essential. The initial L work permit will be issued for one year only. Renewal of the work permit will depend on the company's ability in the preceding year to fulfill its projections in commencing business in the United States.

Documents Required for L-1 Admission

Below is a basic list of documents required in support of the L petition. Note that additional documents are required for small offices and new offices.

- Letter of support from the US Company;
- completed and signed Form I-129 and L Supplement;
- Copy of the Canadian corporate Information (Articles of Incorporation and Common Share Certificates);
- Copy of US Corporate information (Certificate of Incorporation and Common Share Certificates);
- Financial statements for both companies
- Corporate brochures;
- The Beneficiary's Canadian passport;
- Requisite filing fee in the amount of US\$185.00; and
- Completed and signed Form G-28.

TN Professionals

Eligible Professions

In order to qualify for TN status, the intended U.S. activity must be in a profession listed in Appendix 1603.D.1 (see attached Exhibit A) and the applicant must possess the required credentials to be considered a professional.

In most but not all of the listed professions, a Baccalaureate (bachelor's) degree or better is usually required (the term "Licenciatura" refers to the Mexican equivalent of a bachelor's degree.) Although not specifically stated in Appendix 1603.D.1, US Immigration expects the degree to be clearly relevant to the proposed position. In other words, an alien with a bachelor degree in English will usually not qualify as a computer systems analyst. However, an alien with a mathematics degree should be able to qualify for TN status as a computer systems analyst, since it can usually be shown that systems analysis requires the application of mathematics principles.

The list of eligible professions also includes occupations which do not necessarily require a bachelor's degree as a minimum requirement. Some professions require a post-secondary diploma plus several years of experience. The term "Post Secondary Diploma" means a credential issued, on completion of two or more years of post secondary education, by an accredited academic institution in Canada or the United States. The term "Post Secondary Certificate" should be ignored, since it refers to Mexico's equivalent of a post secondary diploma. As in the case of an alien's formal education, if work experience is required it must be shown to

be relevant to the proposed position. It should be noted that if a foreign (non-North American) degree is relied upon; a credentials evaluation should be obtained confirming the equivalency of the degree to a U.S. degree. However, a post-secondary diploma must have been obtained in North America and a foreign diploma will not be an equivalent.

Some of the more complex TN occupations are:

- Scientific Technician

A business person in this category must be seeking temporary entry for work in direct support of professionals in agricultural sciences, astronomy, biology, chemistry, engineering, forestry, geology, geophysics, meteorology or physics.

The five principles used by US Immigration authorities in assessing eligibility under the Scientific Technician occupation:

1. Individuals for whom scientific technicians/technologists wish to provide direct support must qualify as a professional in their own right in one of the following fields: agricultural sciences, astronomy, biology, chemistry, engineering, forestry, geology, geophysics, meteorology, or physics.
2. A general offer of employment by such a professional is not sufficient, by itself, to qualify for admission as a Scientific Technician or Technologist. The offer must demonstrate that the work of the scientific technician or technologist will be interrelated

with that of the supervisory professional. That is, the work of the scientific technician or technologist must be managed, coordinated and reviewed by the professional supervisor, and must also provide input to the supervisory professional's own work.

3. The scientific technician or technologist's theoretical knowledge should have been acquired through the successful completion of at least two years of training in a relevant educational program. Such training may be documented by presentation of a diploma, a certificate, or a transcript accompanied by evidence of relevant work experience.
4. U.S. authorities will rely on the Department of Labor's Occupational Outlook Handbook to establish whether proposed job functions are consistent with those of a scientific or engineering technician or technologist. Scientific technicians or technologists should not be admitted to perform job functions that are primarily associated with other job title.
5. Not admissible as scientific technicians or technologists are persons intending to do work that is normally done by the construction trades (welders, boiler makers, carpenters, electricians, etc.), even where these trades are specialized to a particular industry (e.g., aircraft, power distribution, etc.)

- Medical Laboratory Technician

A business person in this category must be seeking temporary entry to perform in a laboratory chemical, biological, haematological,

immunologic, microscopic or bacteriological tests and analyses for diagnosis, treatment, or prevention of diseases.

The requirement that the alien perform laboratory tests in specific fields suggests that other medical technicians such as ultrasound technicians or ECG technicians may not qualify. However, such adjudications will be made on a case-by-case basis.

- **Management Consultants**

Management consultants provide services which are directed toward improving the managerial, operating, and economic performance of public and private entities by analyzing and resolving strategic and operating problems and thereby improving the entity's goals, objectives, policies, strategies, administration, organization, and operation.

Management consultants are usually independent contractors or employees of consulting firms under contracts to U.S. entities. They may be salaried employees of the U.S. entities to which they are providing services only when they are not assuming existing positions or filling newly created positions. As a salaried employee of such a U.S. entity, they may only fill supernumerary temporary positions. On the other hand, if the employer is a U.S. management consulting firm, the employee may be coming temporarily to fill a permanent position.

- **Computer Systems Analysts**

The computer systems analyst category does not include programmers. A systems analyst is an information specialist who analyzes how data

processing can be applied to the specific needs of users and who designs and implements computer-based processing systems. Systems analysts study the organization itself to identify its information needs and design computer systems, which meet those needs. Although the systems analyst will do some programming, the TN category has not been expanded to include programmers.

- Hotel Managers

Hotel manager is the only profession which requires a specific educational degree. A post secondary diploma in hotel or restaurant management plus 3 years of experience in the field will also qualify. Even an alien with an MBA in marketing and hotel management experience would be disqualified from this option.

- Managerial and Executive Positions

This group includes executives and managers who seek to enter in order to run businesses at various levels and who may have degrees in liberal arts, business, commerce, sciences, etc. The TN schedule does not list either "Executive" or "Manager", specifically. TN applicants seeking admission to manage financial operations, who do not otherwise qualify for L-1A status, should be presented as economists or accountants where possible.

To gain TN admission for applicants who are managers in an industry, focus on the necessary technical or scientific component of the position, not the managerial component, and use the classification that corresponds with their

technical or scientific degree, e.g., engineering or chemistry. This is particularly important when a position such as Engineering Sales Manager actually requires an engineering degree. The key to a successful application is to explain that it is not the title, e.g., "Vice President", that counts, that rather, it is the actual professional duties to performed by the individual that establish eligibility for the TN.

The Issue of Licensing

Where licensure is required, the applicant must show licensure in the state in which he or she intends to work.

Self-Employment Prohibited

NAFTA expressly prohibits the establishment of a business or practice in the United States in which the professional will be self-employed. However, this does not mean that a person who holds ownership interest in a company was actually engaged in self-employment as long as the alien is not the sole or controlling shareholder or owner of the business, he or she will not be "self-employed" for the purposes of TN eligibility.

Work Stoppage or Labor Dispute Bars TN Eligibility

If the Department of Labor certifies that the proposed place of employment of the TN applicant is the subject of a work stoppage or labor dispute involving a work stoppage and the temporary entry of an alien may adversely affect either the settlement of the dispute or the employment of a person involved in the dispute, the application may be refused.

Maximum Period of Stay

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 the TN is a temporary work permit, i.e. the employee must intend to return to Canada at the end of the work assignment. Therefore satisfying the 'temporary intent' requirement may become an issue with repeat extensions or renewals. As well, because of it is a 'temporary intent' permit; the TN is not a good launching pad for US permanent residence aka the "Green Card".

Documents Required

The standard documents the applicant should have to apply for TN admission are:

- A letter from the company – describing its business, a description of the professional nature of employee's job, the anticipated length of employment, the salary, duties to be performed in the US. If the employee will be paid by the Canadian office and maintain Canadian residence this should also be stated in the letter;
- A legal letter setting out TN status requirements, satisfaction of same, and the appropriateness of issuance – this material can also be incorporated into the company letter;
- A copy of the employee's university degree and / or diploma – if the degree was attained outside of Canada or the US, it must be evaluated by a credential evaluation organization to ensure that it is equivalent to a Canadian or US degree / diploma. If there is any issue as to the relatedness of the degree or diploma also include a transcript and highlight the related course;
- A valid Canadian passport; and

- The US\$85.00 processing fee.

If the applicant is going to the US to perform services for a US company, either a related company or under a contract between the Canadian and US companies, there are two additional documents to consider:

- A letter from US company confirming the need for the employee, the professional requirements of the assignment, and the location and duration of the assignment; and
- A copy of the contract with the US Company.

Note that some Ports of Entry and Pre-Flight Inspection offices require original (not photocopied) degrees and certificates

H-1B Specialty Occupation

Although not exclusively category for Canadian, H-1B status has, up until now, been a valuable tool of last resort. H-1B petitions are filed on behalf of professionals or specialty occupation. It is available for people who hold at least a Bachelors degree or the equivalent in specialized field of knowledge relating to their employment. The actual position being offered must require the services of a professional or specialist. Examples of job classifications that may qualify for H-1B status are engineers, journalists and some business professionals. The key criterion of the h-1B is that there is a US employer offering employment. It is not available to a Canadian employer wishing to send an employee to the United States.

As stated above, the h-1B "has been" a valuable tool. The biggest drawback of the B-1B classification is that it is subject to a yearly quota. The quota has, for the past few years been 65,000 visas. The fiscal year runs from October. The quota for 2005 was reached on the first day of the fiscal year! Consequently, unless

there is an increase in the quota, the H-1B will not be a viable option for working in the United States.

Closing Remarks.

As time has elapsed from the implementation of NAFTA in 1994, many officers became less and less concerned with achieving its stated goal of the "facilitated" entry of business persons. Scrutiny at the border has become more intense. Furthermore, the generally heightened enforcement and zero tolerance attitudes resulting from the events of September 11, 2001 did not help, although the legal NAFTA practice and procedure themselves have not changed. All of this means that thorough preparation, presentation and documentation are essential when seeking to enter the US as a businessperson.

NAFTA Professional Job Series List—Eligible for TN status

PROFESSION	MINIMUM EDUCATION REQUIREMENTS AND ALTERNATIVE CREDENTIALS
Accountant	Baccalaureate or Licenciatura Degree; or C.P.A, C.A., C.G.A., or C.M.A.
Architect	Baccalaureate or Licenciatura Degree; or state/provincial license
Computer Systems Analyst	Baccalaureate or Licenciatura Degree; or Post-Secondary Diploma or Post Secondary Certificate and three years experience
Disaster Relief Insurance Claims Adjuster (Claims Adjuster employed by an insurance company located in the territory of a Party, or an independent claims adjuster)	Baccalaureate or Licenciatura Degree and successful completion of training in the appropriate areas of insurance adjustment pertaining to disaster relief claims; or three years experience in claims adjustment and successful completion of training in the appropriate areas of insurance adjustment pertaining to disaster relief claims
Economist	Baccalaureate or Licenciatura Degree
Engineer	Baccalaureate or Licenciatura Degree; or state/provincial license
Forester	Baccalaureate or Licenciatura Degree; or state/provincial license
Graphic Designer	Baccalaureate or Licenciatura Degree; or post-secondary diploma and three years experience
Hotel Manager	Baccalaureate or Licenciatura Degree in hotel/restaurant management; or post-secondary diploma or post-secondary certificate in hotel/restaurant management and three years experience in hotel/restaurant management
Industrial Designer	Baccalaureate or Licenciatura Degree; or post-secondary diploma or post-secondary certificate, and three years experience
Interior Designer	Baccalaureate or Licenciatura Degree; or post-secondary diploma or post-secondary certificate, and three years experience
Land Surveyor	Baccalaureate or Licenciatura Degree or state/provincial/federal license
Landscape Architect	Baccalaureate or Licenciatura Degree

Lawyer (including Notary in the province of Quebec)	L.L.B., J.D., L.L.L., B.C.L., or Licenciatura degree (five years); or membership in a state/provincial bar
Librarian	M.L.S. or B.L.S. (for which another Baccalaureate or Licenciatura degree was prerequisite)
Management Consultant	Baccalaureate or Licenciatura Degree; or equivalent professional experience as established by statement or professional credential attesting to five years experience as a management consultant , or five years experience in a field of specialty related to the consulting agreement
Mathematician (including statistician)	Baccalaureate or Licenciatura Degree
Range Manager/Range Conservationist	Baccalaureate or Licenciatura Degree
Research Assistant (working in a post-secondary educational institution)	Baccalaureate or Licenciatura Degree
Scientific Technician/ Technologist	Possession of (a) theoretical knowledge of any of the following disciplines: agricultural sciences, astronomy, biology, chemistry, engineering, forestry, geology, geophysics, meteorology, or physics; and (b) the ability to solve practical problems in any of those disciplines, or the ability to apply principles of any of those disciplines to basic or applied research
Social Worker	Baccalaureate or Licenciatura Degree
Sylviculturist (including forestry)	Baccalaureate or Licenciatura Degree
Technical Publications Writer	Baccalaureate or Licenciatura Degree, or post-secondary diploma or post-secondary certificate, and three years experience
Urban Planner (including Geographer)	Baccalaureate or Licenciatura Degree
Vocational Counselor	Baccalaureate or Licenciatura Degree

MEDICAL/ALLIED PROFESSIONALS

Dentist	D.D.S., D.M.D., Doctor en Odontologia or Doctor en Cirugia Dental or state/provincial license
Dietitian	Baccalaureate or Licenciatura Degree; or

	state/provincial license
Medical Laboratory Technologist (Canada)/Medical Technologist (Mexico and the United States)	Baccalaureate or Licenciatura Degree; or post secondary diploma or post secondary certificate, and three years experience
Nutritionist	Baccalaureate or Licenciatura Degree
Occupational Therapist	Baccalaureate or Licenciatura Degree; or state provincial license
Pharmacist	Baccalaureate or Licenciatura Degree; or state provincial license
Physician (teaching or research only)	M.D., Doctor en Medicina; or state/provincial license
Physiotherapist/Physical Therapist	Baccalaureate or Licenciatura Degree; or state/provincial license
Psychologist	State/provincial license; or Licenciatura degree
Recreational Therapist	Baccalaureate or Licenciatura Degree
Registered Nurse	State/provincial license or Licenciatura degree
Veterinarian	D.V.M., D.M.V., or Doctor en Veterinaria; or state/provincial license
SCIENTIST	
Agricultural (Agronomist)	Baccalaureate or Licenciatura Degree
Animal Breeder	Baccalaureate or Licenciatura Degree
Animal Scientist	Baccalaureate or Licenciatura Degree
Apiculturist	Baccalaureate or Licenciatura Degree
Astronomer	Baccalaureate or Licenciatura Degree
Biochemist	Baccalaureate or Licenciatura Degree
Chemist	Baccalaureate or Licenciatura Degree
Dairy Scientist	Baccalaureate or Licenciatura

	Degree
Entomologist	Baccalaureate or Licenciatura Degree
Epidemiologist	Baccalaureate or Licenciatura Degree
Geneticist	Baccalaureate or Licenciatura Degree
Geochemist	Baccalaureate or Licenciatura Degree
Geophysicist (including Oceanographer in Mexico and the United States)	Baccalaureate or Licenciatura Degree
Horticulturist	Baccalaureate or Licenciatura Degree
Meteorologist	Baccalaureate or Licenciatura Degree
Pharmacologist	Baccalaureate or Licenciatura Degree
Physicist (including Oceanographer in Canada)	Baccalaureate or Licenciatura Degree
Plant Breeder	Baccalaureate or Licenciatura Degree
Poultry Scientist	Baccalaureate or Licenciatura Degree
Soil Scientist	Baccalaureate or Licenciatura Degree
Zoologist	Baccalaureate or Licenciatura Degree
TEACHER	
College	Baccalaureate or Licenciatura Degree
Seminary	Baccalaureate or Licenciatura Degree
University	Baccalaureate or Licenciatura Degree

Please note: the "Licenciatura" is a Mexican degree qualification. The applicable degree qualification for Canadians is the Baccalaureate (a.k.a. B.A or B. Sc.)