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NAFTA PRACTICE POINTERS
- *A Discussion of Basic Requirements and More Advanced*
***Considerations* -**

PANEL: NAFTA – ALIVE AND KICKING?
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I. INTRODUCTION

Canadians doing business or working in the United States enjoy non-immigrant admission categories and simplified procedures not available to nationals of other countries pursuant to the *North American Free Trade Agreement* (NAFTA). In the world of business time is money and this time saving can be a godsend – particularly when a corporate client is anxiously awaiting the arrival of a new recruit or transferee or a small business person has secured his or her first major contract in the United States. Instead of filing a petition at a Regional Service Center, as is normally required, and waiting on average six (6) to ten (10) weeks for approval from the Bureau of Immigration and Citizenship Services (BICS), and then sending the prospective employee to a US Consulate abroad for visa issuance, under the NAFTA many Canadians are able to have their applications and petitions adjudicated at a border Port of Entry or airport Pre-Flight inspection facility only hours before departing for the United States. As such, the preparation and adjudication, that might otherwise take months, can very often be finalized in a matter of days.

While exempt from most visa requirements, Canadians do, of course, like other foreign nationals, require authorization to work in the United States. While the NAFTA does offer several advantages it does not *always* fit a client's requirements so it is important that the attorney have a competent understanding of other non-immigrant options not covered in this article. Moreover, even where a NAFTA option does fit it is important to remember that in the post-September 11th era, borders and airports have become increasingly security sensitive places. NAFTA-based entries to the United States must therefore be particularly well thought-out and carefully prepared in order to avoid last minute refusals and/or entry denials.

This article contains an overview of three (3) NAFTA-based entries categories available to Canadians who want to do business, work or relocate to the United States. I introduce each of these non-immigrant categories – the 'B' Business Visitor, the 'TN' or Trade NAFTA professional and the 'L' Intra-company transfer, with an overview of the basic requirements. There are also more advanced considerations that the attorney should be aware of in using the various US non-immigrant categories to his or her client's advantage. As such, in the second component of this article, I discuss some of the strategic and long-term considerations associated with each non-immigrant category. In the final component of this article I include a snapshot of the benefits and drawbacks generally associated with these non-immigrant categories as well as some practice pointers designed to make NAFTA-based entries to the US less stressful and more predictable for clients, client employees and attorneys alike.

II. THE 'B-1' BUSINESS VISITOR

1. Basics Requirements

In the past it was not uncommon for Canadians to say they were traveling to the United States to "visit with family or friends", on a "vacation" or simply for a "business meeting" irrespective of their actual intended activities in the US. To some extent, this attitude persists today. However, from the US government perspective, the events of 9/11 put to an end any tolerance for this former *status quo*. In the new age of security, the Bureau of Customs and Border Protection (CBP) norm is questioning and investigation designed to determine the nature of a traveler's proposed visit to the US. It is, therefore, especially important that attorneys, clients and employees have an accurate understanding of what can and can not be legitimately done as a Business Visitor in the US.

A Business Visitor is a foreign national who has a residence in a foreign country that he or she has no intention of abandoning. He or she is visiting the United States temporarily for business. Accordingly, the Business Visitor must be able to establish that he or she will:

- Maintain a foreign residence that has not been abandoned (i.e.: sold, rented to someone else, etc.);
- Enter the United States for a specific finite period of time; and
- Seek admission solely to engage in legitimate activities relating to business.¹

Generally speaking, US authorities rely on a distinction between ordinary work for hire and activities incidental to international commerce. In order for an activity to be considered a business activity (as opposed to “work”) the activity must relate to international business.² As such, the principal place of business and the place where profits will primarily accrue should be in the foreign country. Similarly, the foreign national’s salary should normally come from outside the United States.

The term “business” is defined in the US government’s Foreign Affairs Manual (also referred to as “the Manual” in this article). The Manual defines “business” as conventions, conferences, consultations and other legitimate activities of a commercial or professional nature not involving local employment or labor for hire. The Manual also says specifically that B-1 status is clearly available to a foreign national who is entering the United States to engage in commercial transactions that do not involve gainful employment in the US (such as a merchant who takes orders for goods manufactured abroad); negotiating contracts; consulting with business associates; litigating; participating in scientific, educational, professional or business conventions, conferences or seminars; or undertaking independent research.³

NAFTA Activities

The NAFTA has broadened the scope of permissible B-1 activities for Canadian citizens (although not for Canadian Permanent Residents).⁴ The NAFTA provisions are available in addition to the normal B-1 provisions discussed above. The NAFTA sets out the following additional permissible Business Visitors activities:⁵

Research and Design - Technical, scientific and statistical researchers conducting independent research or research for an enterprise located in the territory of another Party.

Growth, Manufacture and Production - Harvester owner supervising a harvesting crew admitted under applicable law. Purchasing and production management personnel conducting commercial transactions for an enterprise located in the territory of another Party.

Marketing - Market researchers and analysts conducting independent research or analysis or research or analysis for an enterprise located in the territory of another Party. Trade fair and promotional personnel attending a trade convention.

¹ *Immigration Nationality Act* (INA)§101(a)(15)(B)

² Code of Federal Regulations Title 22: (22CFR)§41.31(b)(1)

³ 9 Foreign Affairs Manual

⁴ Code of Federal Regulations Title 8: Aliens and Nationality (8CFR)§214.2(b)(4)

⁵ 8CFR§214.2(b)(4); NAFTA Appendix 1603.A.1

Sales - Sales representatives and agents taking orders or negotiating contracts for goods or services for an enterprise located in the territory of another Party but not delivering goods or providing services. Buyers purchasing for an enterprise located in the territory of another Party.

Distribution - Transportation operators transporting goods or passengers to the territory of a Party from the territory of another Party or loading and transporting goods or passengers from the territory of a Party, with no unloading in that territory, to the territory of another Party. With respect to temporary entry into the territory of the United States, Canadian customs brokers performing brokerage duties relating to the export of goods from the territory of the United States to or through the territory of Canada. With respect to temporary entry into the territory of Canada, United States customs brokers performing brokerage duties relating to the export of goods from the territory of Canada to or through the territory of the United States. Customs brokers providing consulting services regarding the facilitation of the import or export of goods.

After-Sales Service - Installers, repair and maintenance personnel, and supervisors, possessing specialized knowledge essential to a seller's contractual obligation, performing services or training workers to perform services, pursuant to a warranty or other service contract incidental to the sale of commercial or industrial equipment or machinery, including computer software, purchased from an enterprise located outside the territory of the Party into which temporary entry is sought, during the life of the warranty or service agreement.

General Service - Professionals engaging in a business activity at a professional level in a profession set out in Appendix 1603.D.1. Management and supervisory personnel engaging in a commercial transaction for an enterprise located in the territory of another Party. Financial services personnel (insurers, bankers or investment brokers) engaging in commercial transactions for an enterprise located in the territory of another Party. Public relations and advertising personnel consulting with business associates, or attending or participating in conventions. Tourism personnel (tour and travel agents, tour guides or tour operators) attending or participating in conventions or conducting a tour that has begun in the territory of another Party. Tour bus operators entering the territory of a Party: with a group of passengers on a bus tour that has begun in, and will return to, the territory of another Party; to meet a group of passengers on a bus tour that will end, and the predominant portion of which will take place, in the territory of another Party; or with a group of passengers on a bus tour to be unloaded in the territory of the Party into which temporary entry is sought, and returning with no passengers or reloading with the group for transportation to the territory of another Party. Translators or interpreters performing services as employees of an enterprise located in the territory of another Party.

Canadians with B-1 status do not require a visa and are therefore not required to attend at a US Consulate abroad before entering the United States. Business Visitors are admitted to the United States for the amount of time reasonable to complete their schedule.⁶ The maximum period of stay is one (1) year.⁷ In the absence of documentation to the contrary, Canadians are often admitted by default for a period of six (6) months.⁸ Of course, foreign nationals wishing to enter the US bear the burden of

⁶ INA§214(a)(2)(A)

⁷ 8CFR§214.2(b)

⁸ 8CFR§214.2(b)(2)

proving that they are eligible for the desired status and not subject to the grounds of inadmissibility under any provision of the law.

2. More Advance Considerations

There are some fundamentally grey areas relating to the B category. The distinction between who can enter the United States as a Business Visitor and who needs work authorization, and accordingly is determined to be entering the US to perform “skilled or unskilled labor”, is blurred. The US position is that Business Visitors engage in activities to trade goods, provide services or pursue investment activities, but not “work”. A Business Visitor in the United States performs legitimate activities other than skilled or unskilled labor. As Business Visitors cannot engage in employment or “work”, they cannot receive a salary from a U.S source for activities undertaken during their stay. In short, the permissible activities that I have identified above are not exclusive; the question of eligibility hinges on the difference “business” versus “work”. But this distinction is not a simple one.

There are also specific types of activities that are classifiable as B-1 such as after sales services, either NAFTA or non-NAFTA based. The after sales services provisions can be a great asset where the applicant lacks formal education and is therefore not eligible for a TN, lacks experience with the company precluding L eligibility, and/or his or her services are needed on short notice in the US. There are other examples, construction workers coming to the United States for purposes of supervising or training other workers engaged in building or construction work can also be admitted in B-1 status.⁹ There are also certain situations where a foreign national’s employment *is* permitted in the United States pursuant to B-1 status. A good example is the personal or domestic servant of a US citizen residing abroad or temporarily assigned to the United States.¹⁰

3. Practice Pointers

The primary benefit of B-1 status, particularly for Canadians, is the ease and speed with which it can be obtained. Clearly the drawback of the B-1 is the last minute uncertainty the many travelers face at the airport or border.

The Immigration and Nationality Act (the Act) provides that unless specifically exempted every applicant for admission is presumed to be an intending immigrant – it is therefore the attorney’s role to assist the client in providing sufficient information and documentation to the contrary.¹¹ Additionally, as there are a number of activities that may reasonably be interpreted as legitimate Business Visitor activities by some and as work by others, it is extremely important to clearly articulate the case for each Business Visitor entry. As such, I recommend providing the applicant with a letter and accompanying supporting documentation clearly setting out both the applicant’s ties to Canada (employment, family and home) and the purpose of the applicant’s intended temporary travel to the US. I usually advise the applicant to have this material readily available for presentation at the time of entry. In some case, I advise the applicant not to present the materials at the onset of questioning but rather to wait to see if in fact the Officer wishes to review such materials. In this latter scenario, I always advise the applicant to immediately present the materials upon request. In every instance I advise the applicant that his or her response to the questions must be honest and straightforward.

Where the B-1 case is marginal the attorney should also advise the client of other non-immigrant options. In this manner the attorney provides the client with the information that it needs to assess the

⁹ 8CFR§214.2(b)(5)

¹⁰ See generally 9FAM§41.31, Notes 6,6,1-6.9.

¹¹ INA§214(b)

associated risks and costs. If another non-immigrant option is available thereby allowing the applicant to enter and re-enter the United States with a reasonable degree of certainty the additional effort and cost may be well worth it.

III. THE 'TN' TRADE NAFTA PROFESSIONAL

1. Basic Requirements

Perhaps the best quick fix immigration tool is TN (or Trade NAFTA – Professional) status. Canadians apply at an airport Pre-flight inspection facility or a border Port-of-Entry.¹² TN preparation can be done in a matter of days – in some cases hours – and adjudication can often take less than an hour. To qualify the applicant must have the required professional credentials (education and/or experience) and intend to perform the duties of an approved profession. Some of the most common approved professionals are the Computer Systems Analyst, the Engineer, the Accountant, the Graphics Designer and the Management Consultant. The NAFTA contains a complete list of the approved professions and outlines the education, credentials and experience requirements for each.¹³

Typically a Bachelor 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 are also some instances where an applicant can qualify on the basis of experience alone and there are some categories, such as the Accountant, where a state or provincial license will suffice. Applicants will typically be required to present documentation proving their educational and experience as well as the suitability of the work 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 period for admission is limited to a maximum of one (1) year.¹⁴ Upon admission, the Canadian citizen TN status-holder is issued an I-94 Arrival/Departure Card. The duration of stay is set out in the I-94 Card. Presentation of the I-94 Card permits re-entry; it should ideally be marked “multiple entry” in order to facilitate re-entry to the US.¹⁵ I often counsel applicants to request that the I-94 be stamped “multiple entry” where it is not the matter of course.

Canadians with TN or derivative status do not require a visa and are therefore not required to attend at a US Consulate abroad before entering the United States.¹⁶ Note however, that a non-visa exempt accompanying family member will require a visa endorsement from the US Consulate in order to enter in derivative status.

2. More Advanced Considerations

Who can the TN status holder work for in the US? The regulations are surprisingly accommodating. The TN status holder can work for a US company, his or her Canadian or Mexican employer or be filling a contract for services between a Canadian or Mexican company and a US Company.¹⁷ The TN requires that professionals fit into pre-determined professional categories and that they meet very specific pre-determined educational and experience requirements.¹⁸ While many of the TN

¹² INA§214(e), 8CFR 214.6(e)(2)

¹³ 8CFR§214.6(c), NAFTA Appendix 1603.D.1

¹⁴ 8CFR§214.6(f)(1)-(2)

¹⁵ 8CFR§214.6(g)

¹⁶ 8CFR§214.6(e)(2)

¹⁷ 8CFR§214.6(e)(3)(ii)

¹⁸ 8CFR§214.6(b)(d)

professional categories are fairly self-explanatory, some are not. I have identified some of the more complicated professional categories below:

The Management Consultant

The educational requirement for a Management Consultant is a Bachelor degree or five (5) years of experience in consulting or a related field. The Management Consultant is one of only two TN professionals not required to have a post-secondary education. As such it seems that many Canadians without formal education try to “squeeze” in as Management Consultants. As a result of this perceived abuse, the Management Consultant category is well known for attracting BCBP scrutiny.

The Computer Systems Analyst

It is extremely important that the attorney carefully consider the duties, past and present, of the employee before assuming that he or she will satisfy the TN requirements of a Computer Systems Analyst (CSA).

With respect to the educational requirements, in today’s market, it is common to see computer professionals who are either self-taught or who have accumulated a number of industry respected certifications over their career. Yet, in order to qualify as a Computer Systems Analyst under the NAFTA, the applicant must have a Bachelor degree (now usually interpreted as required to be in a related field) or a post-secondary diploma (interpreted as having a minimum of two (2) years duration) and three years of experience.

In short, even if the applicant’s duties fit neatly within one of the pre-determined professionals categories one may still find that his or her educational background does not. It has been many years since the TN educational requirements were agreed upon, and in the time that has passed the industry has evolved. As such the requirements do not always reflect current industry norms.

The Scientific Technician/Technologist

There are two main areas of concern for this category. First, because there is no post-secondary education requirement, it is difficult to prove the applicant’s requisite knowledge. The knowledge required is vague: “theoretical knowledge of the discipline” and “an ability to solve practical problems in the discipline, or the ability to apply principles of the discipline to basic or applied research”.¹⁹ Second, the Scientific Technician cannot work independently. He or she must work in direct support of a designated professional.²⁰

Generally speaking, the TN was not intended to assist all professionals; for example, Business Management, Marketing and Human Resources positions are not included; the TN does not lend itself to Managers either. The TN simply was not intended to cover a number of individuals that we normally consider professionals. Regarding the duties of approved professionals, the definitions of the duties can be out of sync with contemporary business norms.

3. Practice Pointers

The main benefit of the TN is that it can be quickly and easily obtained, thereby allowing last minute work in the US. The main drawback of the TN is that successful applicants are pigeon-holed into specific professional categories; these categories, in turn, tend to be narrowly defined as are their prerequisite educational requirements.

¹⁹ NAFTA Appendix 1603.D.1

²⁰ NAFTA Appendix 1603.D.1

Management Consultant

If a Management Consultant is without a degree, his or her experience is likely to be very carefully reviewed. In addition to the standard documentation, for experienced-based Management Consultants, I always document the required five (5) years of experience in consulting or in the related field. Such documentation typically includes letters of reference or recommendation from prior employers. If the applicant is self-employed, the documentation might alternatively consist of letters from existing or former clients that attest to the type of related services that the applicant has provided.

The key to putting together a successful TN Management Consultant application is to start with an understanding of the duties of a Management Consultant and to ensure the best possible fit with the applicant's duties. A Management Consultant is someone who "provides services which are directed toward improving the managerial, operating, and economic performance of private or public entities...."²¹ Generally speaking, Consultants are not "hand-on" and are not involved in the "day-to-day" operations of a company.²² Rather they look objectively at the company's activities to identify areas of improvement.²³ In doing so, they "advise" and "recommend" courses of action. The Dictionary of Occupational Titles (DOT) is particularly helpful in preparing TN applications; the Occupational Outlook Handbook (OOH) is also a sound resource. Irrespective of the source, the key to success is not only to reference accepted consulting duties but to clearly explain and detail the applicant's responsibilities in this language.

Computer Systems Analyst

Be aware that Computer Programmers; Computer Scientists, Web Designers and a host of other IT professionals do not automatically meet the requirements of the TN Computer Systems Analyst. In the world of TNs, the Computer Systems Analyst is a specific profession with specific educational and experience requirements and anticipated duties. For example, Programmers are not generally considered Computer Systems Analysts.

With respect to the Computer Systems Analyst's duties, I always review and very carefully reference the corresponding DOT or OOH description(s). With respect to the education, although not actually spelt out in the NAFTA, practically speaking, Computer Systems Analysts are expected to have related education. So, part of the attorney's job is to assess the applicant's degree or diploma to ascertain whether it is sufficiently related. This task is not always easy. In the years since the NAFTA was enacted the IT industry has evolved dramatically. This is not the case for the corresponding NAFTA provisions. While an applicant with a completely unrelated Bachelor degree who learned the profession on the job probably will not succeed, it is the attorney's role to see that the applicant with an arguably related degree is presented in the most compelling manner possible. As such, I usually request a copy of the applicant's transcripts. Where supportive, I will include a copy with the relevant courses highlighted in my submission package.

Scientific Technician/Technologist

I have found that the best approach is to document the applicant's theoretical knowledge. Of course, the extent to which the attorney is able to assist the company in setting out the employee's knowledge in their letter of support may also be crucial. Note the US government position to the effect that "theoretical knowledge should have been acquired through the successful completion of at least two

²¹ Dictionary of Occupational Titles

²² Dictionary of Occupational Titles

²³ Dictionary of Occupational Titles

years of training in a relevant educational program”.²⁴ As such, although not impossible, one can anticipate difficulty in proving this aspect of qualification where the applicant lacks sufficient formal education.

With respect to the “in support of” requirement, the trick here is to identify the professional in the company letter of support, evidence his or her professional credentials and then set out the applicant’s reporting relationship to the professional. In terms of documentation, I provide a copy of the professional’s degree and, where possible, designation. I might also include pre-existing documentation evidencing the company’s reporting structure.

With respect to all TN applications, while degrees from Canadian and Mexican educational institutions do not require an educational evaluation of US equivalency, all others do.²⁵ Where applicable, I therefore recommend that the attorney immediately notify his or her client as obtaining an evaluation as it may add unanticipated time to the application preparation period. In addition, when making the request for an evaluation to the evaluation assessment service, be sure to specify that the evaluation must be based on the client’s education alone. For TN purposes, the assessment should not include *any* experienced-based education. Additionally, note that in instances where the applicant has a Master Degree from a US or Canadian educational institution, as the Bachelor degree is the basis for admission, the foreign Bachelor degree should still be evaluated. All educational documentation should be in English. If not, the attorney should ensure that it is accompanied by a certified translation. Finally, although not consistently required, where uncertain of a specific airport of border practice, I recommend that the client bring *original* degrees and certifications.

As an additional word of caution, note that at least in theory the TN is renewable indefinitely; however satisfying the intent requirement may become an issue with each repeat TN extension or renewal. TN applicants must be prepared to demonstrate to an inspecting BCBP Officer that the proposed entry is for a temporary period, having a reasonable, finite end that does not equate to permanent residence.²⁶ This tension between the ability to renew indefinitely and the requirement that the status holder demonstrate a reasonable, finite end to the proposed period of stay can result in uncertainty for multiple repeat TN applicants.

Note additionally that the TN is not considered a good launching pad for US permanent residence or the “Green Card”. Specifically, the federal regulations at the foundation of the TN NAFTA provisions do not provide for “dual intent” of TN status holder.²⁷ Unlike the H-1B and the L-1 status holder, the TN status holder must demonstrate that his or her entry to the US does not equate to permanent residence; as such where the TN holder is the beneficiary of an approved I-140 Immigrant Worker Petition he or she may have difficulty in reapplying or reentering the United States. Should BCBP determine the applicant has abandoned his or her temporary intent the TN-based admission may be refused. In such instances, the attorney should therefore incorporate a consideration of the applicant’s H-1B eligibility, as well as the associated logistics, into the client’s long-term strategy. Of course, it may also be necessary to consider other non-immigrant options.

IV. THE ‘L-1’ INTRA-COMPANY TRANSFER

1. Basics Requirements

²⁴ (then) INS Field Guidance Memo dated November 7, 2002

²⁵ 8CFR§214.6(d)(2)(ii)

²⁶ 8CFR§214.6(b)

²⁷ INA§214(b)

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 a related company in the United States. L-1 status is available to nationals of other countries; but Canadians may take advantage of simplified provisions under the NAFTA. The main advantage of the NAFTA L-1 is that it can be applied for at an airport Pre-Flight inspection facility or at a border Port-of-Entry. In avoiding the Regional Service Center process, the petition approval period is reduced from six (6) to eight (8) weeks (assuming the absence of premium processing) to a matter of a few hours.

In order to qualify, the client petitioner must establish that the employee beneficiary 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 (1) year within the previous three (3) years.²⁸ The attorney must also establish that the beneficiary 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.

The L-1A can be issued for a total of up to seven (7) years; the L-1B can be issued for a total of up to five (5) years. The initial period of admission is a maximum of three (3) years in either case.²⁹ Spouses and unmarried minor children can be admitted in L-2 status for the same term as the L-1 A/B holder.

Canadians with L-1A or L-1B or derivative status do not require a visa and are therefore not required to attend at a US Consulate abroad before entering the United States.³⁰ Note however that a non-visa exempt accompanying family member will still require a visa from the US Consulate in order to enter the US in derivative status.

2. More Advance Considerations

Managers

The definition of managerial capacity requires that the employee be assigned within the organization primarily to manage the organization, or a department, sub-division or component of the organization; supervise and control the work of other supervisory, professional, or managerial employees or manage an essential function within the organization or a department or subdivision of the organization. The employee should also have the authority to hire and fire or recommend these (as well as other personnel actions) and exercise discretion over the day-to-day operations of the activity or function for which he or she has authority.³¹ Note that a first-line supervisor is not considered to be acting in a managerial capacity simply because of his or her supervisory duties and that it will be necessary to document that the employees being supervised are professionals.³² However, the regulations do not require that a manager necessarily manage other people; in certain cases it is appropriate that the attorney argue that the beneficiary manages an essential function of the organization.

Executives

Executives are required to have primary responsibility for the directing the management of the organization of a major component or function of the organization; establish the goals and policies of the organization, component or function; exercise wide latitude in discretionary decision-making; and

²⁸ 8CFR§214.2(l)(1)(i)

²⁹ INA§214(c)(2)(D)(ii); 8CFR§214.2(l)(15)(ii)

³⁰ 8CFR§214.6(e)(2)

³¹ 8CFR§214.2(l)(1)(ii)(B)(2)

³² 8CFR§214.2(l)(1)(ii)(B)

receive only general supervision or direction from higher level executives, the board of directors and stockholders.³³

Specialized Knowledge Employee

Over the past many years the definitions of “specialized knowledge” has been a bone of contention. The regulations define the term to mean specialized knowledge possessed by an individual of the petitioning organization’s product, service, research, equipment, techniques, management, or other interests and its application in international markets, or an advanced level of knowledge or expertise of the organization’s processes and procedures.³⁴ It is therefore critical that the attorney’s submission letter and the company letter of support clearly link the individuals’ specialized knowledge to the organization; it is not sufficient that the beneficiary have advanced industry or market knowledge.

Spouses

Effective January 16, 2002, the *Immigration and Nationality Act* was amended to permit the employment of L-1 intra-company transferee spouses.³⁵ Unlike most other US non-immigrant categories, the spouses of L-1 status holders are permitted to work in the US. By comparison, in the absences of independent qualification, the spouses of TN and H-1B Specialty Occupation status holder’s are not permitted to work. Spouses of L-1 holders require approval of an Employment Authorization Document (EAD) before working. This benefit does not extend to the L-1 status holder’s children.³⁶

Changes to the ‘L’ Intra- Company Transfer Rules

In recent years there has been a political back lash against the L category – due to a growing sense that the category is open for abuse. Perhaps in response, on December 8, 2004, US President Bush signed into law a bill that reforms the intra-company ‘L’ non-immigrant category. The new law which aims largely to prevent L-1 holders from being “outsourced” places restrictions on the work location of certain L-1B “specialized knowledge” intra-company transfers. The law also now mandates that the Department of Homeland Security maintain statistics for L-1B petitions and created a new fee of USD\$500 called a “Fraud Prevention and Detection Fee”. It is unlikely that this is the last of the legislative efforts to limit the L-1. Educational requirements, duration reductions, and an annul cap of 35,000 are among the possible curtailing changes that have gained support. It is therefore particularly important that the attorney stays abreast of legislative changes in this area.

3. Practice Pointers

There are many benefits of L-1 status obtained pursuant to the NAFTA. The L-1 can be a quick and effective way to bring a Canadian employee to the United States. Unlike H-1B “Specialty Occupation” status the L-1 holder’s employment is not presently subject to a yearly quota and there are no geographical limitations within the United States as to where the employee can work. The main drawback of the L-1 is that it is of no help to new hires regardless of their seniority and/or value to the client company.

It is important to recognize that the L-1 category is not available in situations where the foreign business ceases operations in the home country and seeks to transfer all its operations to the United States. For clarity, the company abroad *must* remain active. Small companies that transfer employees

³³ 8CFR214.2(l)(1)(ii)(C)(4)

³⁴ 8CFR214.2(l)(1)(ii)(D)

³⁵ INA§214(c)(2)(E)

³⁶ INA§214(c)(2)(E)

to a US location must show that the foreign company is still operating and generating business. This requirement makes one-person operations, difficult, albeit not impossible, under the L-1 category.

There are also special provisions applicable in a new office scenario and imposed upon the first-time L-1 employee coming to the US to manage a new US office.³⁷ A new office is defined as an organization that has been doing business in the United States through a parent, branch, affiliate or subsidiary for less than one (1) year.³⁸ In these cases, I recommend that the client provide additional supporting documentation including proof of the US premise, such as a copy of the leasehold agreement and photographs of the premises and a business plan. In new office scenarios the petition is approved for an initial period of only one (1) year.³⁹ As additional evidence of the start-up activities will be required to extend the petition duration beyond the initial one (1) year, the attorney should advise the client accordingly at the onset of the process.⁴⁰ In this manner the employee can best accumulate the evidence to be required.

There is no requirement that the L-1 status holder maintain a foreign residence and as such the intent issues associated with the TN do not apply in the L-1 situation.⁴¹ Additionally, Executives and Managers who qualify for L-1A status, whether under the NAFTA, or the regular provisions, are subsequently in a position to qualify for US permanent residence under an advantageous and abbreviated process. The L-1A is therefore a good route to US permanent residence.

CLOSING REMARKS

This article is intended as an overview of the basic requirements and a discussion of three (3) of the most commonly used NAFTA-based US non-immigrant categories available to Canadians. Each of these non-immigrant categories has its own specific set of requirements, considerations and advantages and disadvantages but as NAFTA-based entries share simplified procedural advantages. It is of course always important to consider every aspect of the individual applicant or beneficiary's situation – his or her qualification, logistical restraints – as well as his or her and the company's future joint future plans, before deciding how to proceed whether under the NAFTA or otherwise.

When contemplating a routine NAFTA-based application it is important to understand that the scope of a client's US immigration needs can easily extend beyond the parameters of the NAFTA. For instance, in the case of a straight forward L-1A intra-company transfer of a Senior Manager, the application process might well be preceding smoothly until the employee requests that his or her spouse work in the United States during the family's stay. The required employment authorization can not however be processed at an airport or border; it must be approved before the spouse can work in the US. The NAFTA-based transfer now necessitates advice on US immigration law proper. Similarly, when advising on L intra-company transfer strategies for a large company, it would be a disservice to the client not to offer advice about the blanket L program. When contemplating the NAFTA and its requirements it is also incumbent on each of us to ensure that we have the appropriate licensing, insurance and experience to provide the full complement of US immigration law advice and service required.

³⁷ 8CFR214.2(l)(3)(v)and(vi)

³⁸ 8CFR214.2(l)(1)(ii)(F)

³⁹ 8CFR214.2(l)(3)(v)and(vi)

⁴⁰ 8CFR214.2(l)(14)(ii)(A-E)

⁴¹ 8CFR214.2(l)(16)

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