

NORTHERN BORDER ISSUES AND CONSULAR PROCESSING

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US BOUND NAFTA PROCESSING A Summary and Comparison for Lawyers

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I. Introduction

Canadians planning to work in the United States enjoy temporary admission categories and simplified procedures under the *North American Free Trade Agreement* ("NAFTA") not available to most other nationals. For instance, instead of filing a petition at a Regional Service Center and waiting on average 6 to 10 weeks for approval and then sending the prospective employee to a US Consulate abroad for visa issuance, many Canadians are able to have their Trade NAFTA Professional requests or intra-corporate "L" petitions 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, can very often be finalized in a matter of a couple days.

In this article I review some of the NAFTA admission options available to Canadian new hires, transferee and assignees going to the US; I also outline the basic requirements and list the standard documentary evidence required for successful NAFTA processing. Although the focus of this article is on working in the United States temporarily, I touch upon the NAFTA Business Visitor provisions to the extent that they provide a means for a client to engage in activities that in the business world might be considered work. I will identify some of the drawbacks and benefits of these various NAFTA admission options and discuss some of the more complicated cases scenarios. Finally, I provide preparation techniques – practice tips that can make the difference between a client's simple and expedited NAFTA processing and an intimidating cross-border experience.

II. Useful Non-Immigrant Options Available to Canadians under the NAFTA

Below is a summary of useful immigration categories available to Canadians working temporarily in the United States. As each category has its own specific requirements, restrictions and advantages it is always important to consider every aspect of the individual employee's situation - his or her qualification, logistical restraints, as well as the company's joint future plans with the employee, before deciding how to proceed.

1. 'B-1' Business Visitor

A. Covering the Basics - Requirements and Documents

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. As the process for obtaining Business Visitor or "B-1" status, whether under

the NAFTA, the Visa Waiver Program or otherwise, is comparatively simple, many took what they considered the 'easy' option described above. To some extent, this practice continues today. However, US Immigration officials, wise to the situation, have increased their scrutiny of Business Visitor entries since 9/11. With questioning and, in some cases, investigation, Immigration Officials often uncover the real motive for an employee's proposed visit to the US. An increasingly common give away is a work document in a brief case or handbag. These days it is especially important that practitioners, clients and client employees have an understanding of what can and can not be done as a Business Visitor to the US.

A Business Visitor is a foreign national having 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.

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 the activity must relate to international business. As such, the principal place of business and the place where profits will primarily accrue should be in the foreign country. As well, 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 ("the Manual"). 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 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 U.S. (such as a merchant who takes orders for goods manufactured abroad);
- Negotiate contracts;
- Consult with business associates;
- Litigate;

- Participate in scientific, educational, professional or business conventions, conferences or seminars; or
- Undertake independent research.

The NAFTA has broadened the scope of permissible B-1 activities for Canadian citizens. Note that the NAFTA does **not** apply to Permanent Residents of Canada. The NAFTA provisions are cumulative and are thus available in addition to the normal B-1 provisions. The following list of permissible activities comes from Appendix 1603.A.1 of the NAFTA (Business Visitors):

- *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.
- *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.

In my office we recommend presenting some or all of the following documentation in support of a Business Visitor entry to the US:

- Letter of Support from the Canadian employer confirming duration of trip to the US, proposed activities, remuneration from a source outside of the US, continued employment outside of the US and a brief description of the employee's personal ties outside of the US;
- Letter of Invitation, Engagement or Enrollment from a US entity;
- Evidence of Canadian residence (Title Deed, Lease Agreement, Utility Bill with home address);
- Evidence of confirmed temporary accommodation arrangements;
- Original return airline ticket; and
- Valid Canadian passport.

B. Drawbacks to the B-1

The 'business' versus 'work' distinction is not a simple one. Practitioners need to be aware that there are a number of activities that may reasonably be interpreted as legitimate Business Visitor activities by some and as work by others. In these cases it is important to clearly articulate the case for a Business Visitor entry in the company letter of support or to consider the viability of obtaining Non-Immigrant status for the employee thereby allowing him or her to enter and re-enter the United States with a reasonable degree of certainty. Clearly the drawback of the B-1 is the uncertainty the many travelers face, quite literally, at the last minute, whether at the airport or border. There are numerous cases where an employee, not receiving direct payment from a US source, and spending a long period in the US, qualifies as a business visitor, yet US immigration sees the same individual traveling week after week and ultimately refuses entry insisting that he or she obtain work authorization.

C. Benefits of the B-1

The primary benefit of the B-1 is the ease and speed with which status can be obtained.

D. Complicated Cases

After Sales Services - Over the years, colleagues and I have spent a great deal of time considering the scope and the limits of the After Sales Services provisions of the NAFTA. The After Sales Services provisions are an exception to the general rule that those working in the US require work authorization. These provisions can therefore be a great asset where the beneficiary, usually an employee, 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.

In the After Sales Services scenario, a company employee can indeed work in the US without first securing a work authorization. That being said, there are a number of hurdles to achieving this goal. For instance, the employee must be performing '*services, pursuant to a warranty or other service contract incidental to the sale*'. In short, the initial contract of sale should contain a warranty or, at the very least, a reference to the provision of future services. This is not always the case. For example, I recently reviewed a corporate client's product contracts to determine After Sales Services viability, I found that only one of the company's many sales contract precedents referred to services. Unfortunately, it

specifically stated that the 'seller is under no obligation to provide services ...unless specifically agreed to'. Suffice it to say, this wording was not supportive.

If the original sales contract contains a service warranty clause or the client can provide you with a service contract that clearly references the original product sale, then the After Sales Services provisions may be your answer. However, more often than not, the service contract is insufficiently tied to the original sale. Additionally, the employee should be in a position to present this initial contract of sales when entering the US as well as the related service contract, or a copy of a warranty or service contract that specifically references the original sale. Even where such documentation is available, this may be a problem where the corporate client has confidentiality concerns that impede the employee's ability to bring a copy of the contractual documentation with him or her to the border.

1. 'TN' Trade NAFTA–Professional

A. Covering the Basics – Requirements and Documents

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. 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), intend to perform the duties of an approved profession and work for the appropriate entity. Some of the most common approved professionals we see in my office are the Computer Systems Analyst, the Engineer, the Accountant, the Graphics Designer and the 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 are also two instances where an applicant can qualify on the basis of experience alone. Applicants will typically be required to present documentation proving their education and experience as well as the suitability of the work offer in the United States.

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.