HUMAN RESOURCES MANAGEMENT IN CANADA

Feature Article

An HR Professional's Guide to U.S. and Canadian Work Permit Options: Part I

For many companies, employing foreign nationals is an essential part of their business strategy. Therefore, human resources professionals must understand the work permit categories available to employees relocating to the United States or coming to Canada. In this first part of a two-part series, two legal experts look at the options available for Canadian workers temporarily relocating to the United States.

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¶25,526 [HRMM ¶20,502] Every year, thousands of Canadians relocate to the United States for employment purposes, and more than a hundred thousand foreign workers enter Canada to temporarily work here for Canadian employers. Because the employment of foreign nationals may be an essential part of your company's business strategy, it is important for you as a human resources professional to understand the various work permit categories available to employees relocating to the United States or coming to Canada.

In order to use U.S. non-immigrant work visa categories and the Canadian work permit provisions to your company's advantage, you must be aware of their respective nuances. Moreover, in the post-September 11th era, borders and airports have become increasingly security-sensitive so that, more than ever, border and pre-flight immigration processing requires strong strategy, preparation and presentation.

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In the first of this two-part paper, we review the most useful options available for Canadian hires, transferees and business people entering the U.S. We summarize the most useful immigration categories available to Canadians who are temporarily assigned or relocated to the United States under the *North American Free Trade Agreement* (NAFTA). Because each category has its own specific requirements, restrictions and advantages, you should consider every aspect of the individual employee's situation — his or her qualifications, logistical restraints and future plans with the company — before deciding how to proceed.

The TN or "Trade NAFTA-Professional" Category

Covering the Basics: Requirements and Documents

Perhaps the best quick-fix immigration tool is the status or category referred to as TN (or Trade NAFTA-Professional). Canadians can apply for TN status at an airport pre-flight inspection facility or at 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 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 common approved professionals are computer systems analysts, engineers, accountants, graphics designers and management consultants. The NAFTA contains a list of approved professions — and outlines the education, credential and experience requirments for each — in Appendix 1603.D.1.

A bachelor's degree is usually required, but, depending on the particular profession, an applicant with a two-year post-secondary diploma or certificate and three years of related experience might be successful. In some instances, an applicant can even 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 employment offer in the United States.

The regulations are surprisingly accommodating when it comes to the employers for whom a TN status holder can work in the U.S. The TN status holder can work for a U.S. company, work for his or her Canadian or Mexican employer, or fill a contract for services between a Canadian or Mexican company and a U.S. company.

Although a TN applicant must be able to demonstrate that he or she has no intention of pursuing permanent employment in the U.S., the total length of stay in the United States allowed under the TN category is unlimited. That said, the length of each admission period is set at a maximum of one year, and satisfying the requirement that the work is intended

to be temporary may become an issue with repeat extensions or renewals. As well, because of the "temporary intent" requirement, the TN is not a good launching pad for acquiring permanent U.S. residence — the "green card."

To apply for TN status, an applicant needs the following standard documents:

- a letter from the company describing the company's business, the professional nature of the employee's job, the anticipated length of employment, the salary and the duties to be performed in the U.S (and if the employee is to 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, how these requirements have been met, and why issuing TN status is appropriate (and this legal information may also be incorporated into the company letter);
- a copy of the employee's university degree and/or diploma, although it should be noted that some ports of entry and pre-flight inspection offices have recently required original degrees and certificates (and if the degree/diploma was attained outside of Canada or the U.S., it must be assessed by a "credential evaluation" organization to ensure its equivalency to a Canadian or an American degree/diploma; and if the relatedness of the degree/diploma is likely to be an issue, it would be wise to include a transcript and highlight the related courses);
- a valid Canadian passport; and
- the processing fee (which stood at US$56 in March 2005).

If the applicant is going to the U.S. to perform services for an American company — either for a related company or under a contract between the Canadian and U.S. companies — additional documentation is typically required:

- a letter from the U.S. company confirming the need for the employee, the professional requirements of the assignment, and the location and duration of the assignment; and/or
- a copy of the contract with the U.S. company.

Drawbacks to the TN Category

The main drawback of the TN category is that applicants must be pigeonholed into one of 63 predetermined professional categories that tend to be narrowly defined. As such, the TN does not cover many employees who we would normally consider to be professionals, such as business management, marketing and human resources professionals. In short, the TN is simply not useful to most managers. If a manager is going

to a related company in the U.S., you should consider the "L" category; if a manager is going to an unrelated company, you might find the "H-1B" category is more appropriate (see below for information on both of these categories).

Even if an employee fits neatly within one of the predetermined professional categories, his or her education may not. In today's market, it is quite common to see computer professionals who are self-taught or who have accumulated a number of industry-respected certifications over the course of their careers. Yet, in order to qualify as a computer systems analyst under NAFTA, the applicant must have a bachelor's degree (now usually required to be in a related field) or a post-secondary diploma (usually required to be a minimum of two years in duration) and three years of experience. The TN educational requirements were agreed upon many years ago, and they have changed little since then to reflect current business and industry trends. As well, the definitions of the duties performed by various professionals can be out of sync with contemporary business norms.

Benefits of the TN Category

The TN can be obtained quickly and easily to allow for last-minute employment in the U.S. This can be particularly handy when an employee who is not receiving direct payment from a U.S. source, and is repeatedly entering the U.S. as a legitimate business visitor, nonetheless encounters difficulty at the border time and again. In this case, when the U.S. immigration officer sees the same individual travelling week after week as a visitor, he or she may insist that the employee obtain a work authorization. Once the employee has TN status, he or she is unlikely to encounter questioning by immigration officers. So, for the employee who seems to be beset by probing questions, a cautious TN may be worth the trouble.

Complicated Cases

While most of the TN professional categories are self-explanatory, some are not. Some of the more complicated categories include the following.

• ***Management Consultant:*** The educational requirement for a management consultant is a bachelor's degree or five years of experience in consulting or a related field. This makes "management consultant" one of only two TN professions that do not require post-secondary education and, as such, there is a perception 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 renowned for being scrutinized.

In the absence of a degree, the TN management consultant's experience is likely to be very carefully reviewed. Therefore, when compiling the applicant information for a management consultant seeking TN status, always document the required five years of experience in consulting or a related field. Such documentation typically includes letters of reference or recommendation from previous employers. If the consultant is self-employed, the documentation might consist of letters from existing or former clients that attest to the type of related services that he or she 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 then to ensure the best possible fit with the employee's duties. A management consultant is someone who provides services that are "directed toward improving the managerial, operating and economic performance of private or public entities. . .." Generally speaking, consultants are not hands-on and are not involved in the day-to-day operations of a company; rather, they look objectively at the company's activities to identify areas of improvement. 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. The key to success is not only to refer to accepted consulting duties, but also to clearly explain and detail the employee's responsibilities using the language in one of these resources.

• ***Computer Systems Analyst:*** Before assuming that an employee will satisfy the TN requirements for a computer systems analyst, it is extremely important to consider his or her duties, past and present. Computer systems analysts are not computer programmers; they are not typically computer scientists or Web designers or a host of other IT professionals. In the world of TNs, the computer systems analyst is a very specific profession that requires specific anticipated duties and education.

With respect to duties, the corresponding DOT or OOH description(s) must be reviewed and very carefully referenced. With respect to education, although requirements are not actually spelled out in NAFTA, computer systems analysts are, practically speaking, expected to have a related education. So the applicant's degree or diploma must be assessed to ascertain whether or not it is sufficiently related. This task is not always easy. In the years since NAFTA was enacted, the IT industry has evolved dramatically, while the corresponding NAFTA provisions have not. While the person with a completely unrelated bachelor's degree who learned the profession on the job probably will not qualify, the person with an

arguably related degree — if it is presented in the most compelling manner possible — just might.

• ***Scientific Technician:*** This category poses concerns in two main areas. First, because no post-secondary education requirement exists, proving the applicant's requisite knowledge is, in practice, difficult. 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." The best approach is to rely on the applicant's past performance by providing related letters of reference or recommendation.

Of course, the extent to which you are able to assist the company in setting out the employee's knowledge in the support letter will also be crucial. In a "Field Guidance Memo" dated November 7, 2002, the U.S. Immigration and Naturalization Service (INS) — now called the Bureau of Citizenship and Immigration Services (BCIS) — states that "theoretical knowledge should have been acquired through the successful completion of at least two years of training in a relevant educational program." As such, you can anticipate difficulty proving an applicant's "theoretical knowledge" if he or she lacks formal education (although proving this is not impossible).

Second, the scientific technician/technologist cannot work independently. He or she must work in direct support of a designated professional. The trick here is to identify the professional in the company letter of support, spell out his or her professional credentials and then set out the applicant's reporting relationship to the professional. In terms of documentation, you must provide a copy of the professional's degree and, where possible, designation. If it supports your case, you can also include pre-existing documentation that provides evidence of the company's reporting structure.

The L-1 "Intra-Company Transfer" Category

Covering the Basics: Requirements and Documents

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 related companies in the United States. L-1 status is available to nationals of other countries; however, Canadians may take advantage of simplified adjudication provisions under NAFTA. The main advantage of the L category for Canadians is that it can be applied for at an airport pre-flight inspection facility or at a border port of entry. By avoiding regional service centres, the petition approval period is reduced to a matter of a few hours from the usual six to eight weeks.

In order to qualify, you must normally establish that the employee has worked full-time in an executive, managerial or specialized knowledge capacity outside of the United States 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 of the company — in an executive, managerial or specialized knowledge capacity.

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

Below is a basic list of documents typically provided in support of an L petition:

- a letter of support from the U.S. company;
- a completed and signed Form I-129 and L Supplement;
- a copy of the company's Canadian corporate information (i.e., articles of incorporation and common share certificates);
- a copy of the company's U.S. corporate information (i.e., certificate of incorporation and common share certificates);
- a corporate brochure;
- the beneficiary's Canadian passport;
- the requisite filing fee (which stood at US$185 in March 2005); and
- a completed and signed Form G-28 (where applicable).

Drawbacks to the L Category

The main drawback of the L category is that it is of no help to new hires, regardless of their seniority and/or value to your company. As well, in recent years there has been a political backlash against the L category due to a growing sense that the category is open for abuse. Perhaps in response, on December 8, 2004, U.S. President George Bush signed into law a bill that reforms the intra-company "L" non-immigrant category. The new law, which is aimed largely at preventing 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 creates a new fee of US$500 called the "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

annual cap of 35,000 are among the possible curtailing changes that have gained support. It is therefore particularly important that the human resources professional stay abreast of changes in this area.

Benefits of the L Category

The L intra-company status has many benefits. It 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 a yearly quota or to geographical limitations within the United States as to where the employee can work. The L-1A can be issued for a total of up to seven years, and it provides a good route to obtaining permanent residence in the U.S. Moreover, as of January 16, 2002, the *Immigration and Nationality Act* was amended to permit the employment of L-1 intra-company transferee spouses. Unlike most other U.S. non-immigration categories, the spouses of L-1 status holders are permitted to work in the U.S. For clarity, this is not the case for the spouse of a TN or H-1B "specialty occupation" status holder.

Complicated Cases

The rules that apply to companies setting up an office in the United States require that the first-time L employee be coming to the U.S. to manage the new U.S. 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 petition approval. If your company is expanding to the U.S. for the first time, you will need to address the following: the purpose of the new office, its organizational structure and its financial goals. You should also disclose the size of any investment in the U.S. office or operations, as well as the financial ability of the new office to remunerate the beneficiary and to commence business in the United States. The ability to satisfy the reviewing officer that the U.S. office and operations are legitimate and will be viable within a reasonable period of time is essential.

The H-1B "Specialty Occupation" Category

Covering the Basics: Requirements and Documents

Although not exclusively a category for Canadians, H-1B status has, in the past, been 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, a Labor Condition Attestation (LCA) must be filed with the U.S. Department of Labor. By filing the LCA, the employer must attest that:

- it will pay the prospective foreign employee's "required wage" (the higher of the prevailing wage or the actual wage paid to U.S. workers similarly employed);
- the prospective foreign employee's employment will not adversely affect the working conditions of U.S. workers similarly employed;
- no strike or lock-out has necessitated the hiring of the prospective foreign employee; and
- notice of the hiring of the prospective foreign employee has been provided to the company's employees.

Once the LCA is certified, the U.S. employer must file an H-1B petition at a BCIS Regional Service Center. In the absence of an additional fee for premium processes, these service centres typically take six to eight weeks to adjudicate H-1B petitions. Most beneficiaries must then also obtain the requisite H-1B visa endorsement at a U.S. consulate abroad. However, Canadians are exempt from this third step and are able to work in the United States at least two to three weeks before most of their fellow H-1B status colleagues.

In order to proceed with the H-1B process, the following basic supporting documentation is needed:

- a résumé (or detailed description of the applicant's present and all previous jobs) that includes, for each job, the responsibilities of the job, specific projects on which the employee worked, particular accomplishments achieved, the dates he or she held the position, and the number of persons supervised or managed — with particular emphasis being placed throughout the résumé on those aspects of the employee's background that qualify him or her for the planned U.S. assignment;
- copies of university diplomas and transcripts in English and, if possible, copies of school transcripts (note that Japanese, Chinese, Korean and Arabic degrees and transcripts should be issued in English by the schools);
- all certificates for all technical training; and
- the letter offering employment.

Drawbacks for the H-1B

The H-1B classification is subject to a yearly quota. The quota for fiscal year 2004 was 65,000 H-1Bs. Unfortunately, this quota was reached

very early in the fiscal year. The news continues to be bad on the H-1B front. New legislation signed by President Bush confirmed that the present congressional cap of 65,000 H-1B petitions per year will remain in 2005. Note, however, that 20,000 H-1B beneficiaries will not be subject to the cap. As well, the fees for H-1B petitions has now been raised from US$1000 to US$1500. As such, without congressional relief, U.S. companies could be barred from petitioning for new H-1Bs for most of 2005. Another drawback of the H-1B is that it cannot be adjudicated at a port of entry or at a pre-flight inspection office.

Benefits of the H-1B

The H-1B is a means of bringing certain new employees to the Unites States to work. The criterion is fairly straightforward and, as a result, the outcome of most petitions is relatively certain.

[In the second part of this Feature Article (HRMC April 2005), the authors will look at work permit options for foreign workers relocating to Canada.]