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Immigration Aspects of NAFTA

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INTRODUCTION

The North American Free Trade Agreement (NAFTA), now the subject of intense presidential political debate, was entered into on December 17, 1992, by the signing of the Agreement by the heads of state of the United States, Mexico and Canada. It is an executive agreement rather than a treaty. It became effective a year later, when, Congress passed the North American Free-Trade Agreement Implementation Act which became effective on January 1, 1994. The Act replaced the United States-Canadian Free Trade Agreement of January 2, 1988 which had come into effect of January 1, 1989 and ended on December 31, 1993. The obvious major change was the inclusion of Mexico into the free trade arrangements, although Canada was permitted exclusively to retain certain rights it possessed under CFTA. In the last Presidential campaign, there were intense efforts to curb both legal and illegal immigration and a major presidential contender (Patrick Buchanan) had called for the repeal of the Agreement. The purpose of this paper is to examine the provisions in NAFTA relating to immigration.

NAFTA’s immigration provisions are contained in Chapter 16 of the Agreement entitled: “Temporary Entry for Business Persons.” The objectives of the Chapter are the facilitation of the temporary entry of nationals of each of the Party states into the other two Party states as well as to ensure border security,” protect the domestic labor force and to assure permanent employment of each of the Parties. Each Party is required to adopt, expeditiously, common criteria to prevent the impairment or delay in goods or services or conduct of investment activities under NAFTA. Accordingly, each Party must grant permission for temporary entry to a qualified business person [defined as “a citizen of a Party who is engaged in trade of goods, the provision of services or the conduct of investment activities” (emphasis added)]. Exceptions to such grant are provided as for foreign persons who may adversely affect the resolution of an ongoing labor dispute at the location of intended place of employment or who may be involved in the dispute. A person who is refused entry for the reasons stated must be notified by the refusing Party in a writing which sets forth the reasons for such refusal. Also, the fees charged for the immigration document permitting entry must be in accordance with the approximate costs of the services to the government rendering them. Grant of permission to enter one’s country does not obligate that state to grant permanent residence.

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permanent residency or citizenship. Not all persons, otherwise eligible, will be permitted into the U.S. There may be health related denial of entry and a number of other exclusionary grounds.\textsuperscript{11}

Categories of Business Persons.

There are four categories of business persons in NAFTA: (1) business visitors; (2) traders and investors; (3) intra-company transferees; and (4) professionals.

Business Visitors (Category B-1). Unless coming within the stated exceptions, each state is required to permit temporary entry \textsuperscript{2}of a business person for certain designated business activity without the necessity of an employment authorization upon presentation of: (1) proof of citizenship \textsuperscript{13} (not merely immigrant or permanent resident status) from one of the three Party states. If the visitor is not a citizen, it would appear that the host Party may readily deny admission without significant proof of the necessity of the business nature of the visit; (2) documentation establishing the purpose of entry and that the individual will be so engaged therein; and (3) evidence that the business activity is international rather than purely domestic in scope so as to establish that the business purpose is not to seek to enter the local labor market.\textsuperscript{14} The latter is demonstrated by evidence that the primary source of remuneration for the proposed activity is outside of the host Party and that the principal place of business and place of accrued profits is outside of the host Party.\textsuperscript{15}

Although NAFTA specifically sets forth the type of business activities covered by the Agreement, nevertheless, it further permits entry of other business persons who comply with existing host Party requirements for temporary entry. B-1 business visitors visas under the Immigration and Nationality Act of 1990 is a broader category than the enumerated purposes under NAFTA. Each Party is prohibited from requiring petitions, labor certification tests, prior approval procedures or from imposing numerical restrictions for temporary business visitors [exception for Mexicans entering the U.S.].\textsuperscript{16} The Parties are permitted to require a business person herein to obtain a visa or its equivalent prior to such person’s entry into the country of the host Party after consultation with the home state of the visitor.\textsuperscript{17} It is the aim of the Agreement to eliminate all such requirements in the future. The prohibition and visa requirement are common for all categories of business visitors.

There are 63 professions listed as business activity referred to above. They include research and design; growth, manufacture and production; marketing; sales; after-sales services; and general services.\textsuperscript{18} Research design is the conducting of technical, scientific and statistical research for the host Party’s enterprise. Under the category of “growth, manufacture and production,” the persons eligible are supervisory harvester owners or managers engaged in purchasing and production for the foreign enterprise. “Marketing” includes trade fairs and promotional personnel for a trade convention and market researchers and analysts conducting such work for the enterprise.

Under “sales,” persons eligible are representatives and agents procuring orders or negotiating contracts for the foreign Party’s enterprise and persons acting as buyers for the enterprise. “Distribution” includes transportation operators who bring in goods or persons to the host Party’s state, customs brokers providing consulting services for the import or export of goods. There are special provisions for Canadian and U.S. customs brokers entering the U.S. or Canada. Both countries permit entry of the brokers for the purpose of performing export related brokerage duties from the host state. “After-sales service” is installation, supervision and repair and maintenance personnel who engage in services relating to warranties and service contracts for equipment or machinery purchased outside the foreign Party’s state. “General services” are business professions defined below, management and supervisory personnel, financial services, public relations, tourism, tour bus operators and translators.\textsuperscript{19}

Traders (E-1) and Investors (E-2). The second category of business visitors under the Agreement is “Traders and Investors.”\textsuperscript{20} A “trader” is defined as a business person seeking to carry on a “substantial trade” in goods or services principally between the host Party and the visitor’s Party state.\textsuperscript{21} An “investor” is one who is involved in a supervisory or executive capacity or has essential skills in the establishment, development, administration of the enterprise or provides advice in the operation of an investment to which the business person or his/her enterprise has committed substantial capital.\textsuperscript{22}

The enterprise cannot be merely one giving sufficient income to support the investor and his family alone; rather it must be one which is substantial, i.e., contributes to employment of others and/or has a substantial impact on the local economy.\textsuperscript{24} If the enterprise is being formed, the investor must have irrevocably committed the funds to the enterprise.\textsuperscript{25} The investment must be active rather than passive (not merely owning stock in the enterprise). The investment must be substantial. The U.S. Department of State, although giving no dollar value, will cause the consular official to weigh various factors, such as the total value of the business enterprise, the amount normally necessary to establish it and the proportionate sum needed to be a major investor (the smaller the enterprise, the greater the investment percentage which will be required).\textsuperscript{26}

If the alien is an employee of the trader or investor, the employer must be a person with the nationality of a treaty signatory [a Party to the Agreement] or is an organization which is owned at least 50 percent by persons from a treaty country.\textsuperscript{27} The employee must share the nationality of the employer treaty investor. If the employee is an “essential employee,” proof will be necessary of his/her expertise, possession of unique skills, time required to obtain the skills, the need for the employee for efficient operation of the enterprise and the duration of the need.\textsuperscript{28} The visitor must also comply with existing immigration rules and regulations governing temporary entry.\textsuperscript{29}

Each of the Parties is forbidden from requiring labor certification tests or other similar procedures as a condition to temporary entry or from imposing numerical restrictions although it may require procurement of a visa or equivalent prior to entering
the host country. In the event of a strike or labor dispute involving a work stoppage where the alien is or will be employed, temporary entry may be denied if such entry may adversely affect the settlement of the dispute or the employment of a local person in the dispute. The obvious purpose of the requirement is to prevent employment of persons as substitutes for the striking employees.

Contrary to other provisions in NAFTA, Canadian citizens applying under this category will have to apply for a visa at a U.S. consulate, although a passport is not theoretically required but is desirable. Mexican citizens must apply for a visa and possess a passport in other NAFTA business categories.

Intra-Company Transferees (L-1). The third category of business persons who may enter temporarily is one who is sent to the enterprise or its affiliate in to the host Party' state to act in a managerial or executive capacity or who possesses specialized knowledge. Restrictions by the host Party (as in the U.S.) may be made requiring the visitor to establish that s/he was employed for at least one year of the prior three years for the enterprise. An incompany transferee acting in a "managerial capacity" is a person who manages the organization of a subdivision within the organization, has the authority to hire and fire or has similar authority in personnel matters and exercises discretion over day-to-day operations in his/her activity.

An intra-company transferee who acts in an "executive capacity" is one who directs the management of the organization or a major subdivision therein, sets goals and policies, has broad authority in decision-making and receives only general supervision from higher executives or from the board of Directors. "Specialized knowledge" may be that of the organization's product, service, management, techniques or other advanced knowledge or it may be specialized knowledge of a professional.

In order to acquire access to the United States as an intra-company transferee, it is necessary for the applicant to file a petition which evidences the organization to be a qualifying one, that the alien has met the one year of three years employment requirement and that the alien has met the managerial or other related requirement. The time limitations for remaining within the United States are five years for a person with specialized knowledge and seven years for a person acting in an executive or managerial capacity. To be readmitted, the alien will have to remain outside of the United States for a period of one year (other than brief visits for business or pleasure). The exception to the time limitation is for aliens who are employed in the United States for six months or less during the year or who reside abroad and regularly commute to the United States on a seasonal or intermittent basis. In no event may extensions be granted under this section beyond the stated five years for persons with specialized knowledge and seven years for those acting in a managerial or executive capacity.

The host Party may not require labor certification tests or equivalent as a condition to entry or impose numerical restrictions. Although this section provides that the host Party may require a visa prior to entry, nevertheless, unlike the category of Traders and Investors, the host Party must consult with the visitor's Party state with a view toward the elimination of the requirement. Canadian intra-company transferees may enter by the filing of a petition in duplicate with application for admission at the U.S.-Canadian border or at a U.S. pre-clearance/pre-flight station in Canada. Blanket petitions by the employer may also be pre-filed and granted, thereby facilitating the entry of qualified persons. Spouses and children have comparable admission classification. Mexican transferees are required to procure a visa. As stated previously, in the event of a Secretary of Labor certified work stoppage or strike at the employer's facility, the Mexican or Canadian alien may be denied entry.

Professionals (TN). The last category of business visitors is that of professional workers. "TN" means "Trade NAFTA." The host Party is required to permit entry to a business person at a professional level. The Appendix to the Agreement lists over 63 professions from "General" professions such as accountants, architects, economists, engineers and mathematicians, to "Medical/Allied Professionals", such as dentists, nutritionists and veterinarians; "Scientists" of every type; and "Teachers" in college, seminars and universities. Each of the professions require proof of minimal educational or alternative requirements (generally, baccalaureate or licenciatura degrees). Other documentation may include membership in professional organizations, evidence of experience from former employers or other such proof.

The essential requirements for TN status is an individual must be a citizen of the host country or a legal permanent resident of that country. A U.S. citizen cannot apply to enter as a professional under the TN provision. Most nationals of Canada, Mexico and the United States may apply for TN status.

The regulations clearly forbid the self-employment of individuals of the listed professions. The words in NAFTA permitting entry for professionals, "a business person seeking to engage in a business activity at a professional level" is not to be construed as authorizing self-employment. Prior to 1993, Canadian professionals under CFTA were not barred from self-employment. It appears that they will now be denied such employment under the TN category.

There appears to be no express limitation with respect to the time in which a TN professional may stay in the U.S. The regulations state that a Canadian citizen shall be admitted for a period not to one year but "[N]othing shall preclude a citizen of Canada who has previously been in the United States in TN status from applying for admission for other than such purpose. In the event of a strike or labor dispute involving a work stoppage where the alien is or will be employed, temporary entry may be denied if such entry may adversely affect the settlement of the dispute or the employment of a local person in the dispute. The obvious purpose of the requirement is to prevent employment of persons as substitutes for the striking employees.

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An intra-company transferee who acts in an "executive capacity" is one who directs the management of the organization or a major subdivision therein, sets goals and policies, has broad authority in decision-making and receives only general supervision from higher executives or from the board of Directors. "Specialized knowledge" may be that of the organization's product, service, management, techniques or other advanced knowledge or it may be specialized knowledge of a professional.

In order to acquire access to the United States as an intra-company transferee, it is necessary for the applicant to file a petition which evidences the organization to be a qualifying one, that the alien has met the one year of three years employment requirement and that the alien has met the managerial or other related requirement. The time limitations for remaining within the United States are five years for a person with specialized knowledge and seven years for a person acting in an executive or managerial capacity. To be readmitted, the alien will have to remain outside of the United States for a period of one year (other than brief visits for business or pleasure). The exception to the time limitation is for aliens who are employed in the United States for six months or less during the year or who reside abroad and regularly commute to the United States on a seasonal or intermittent basis. In no event may extensions be granted under this section beyond the stated five years for persons with specialized knowledge and seven years for those acting in a managerial or executive capacity.

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The essential requirements for TN status is achieved upon presentation of proof of citizenship in a Party state and documentation establishing that the applicant will be engaged in a business at the professional level in the designated professions. Mexico is subject to a 5,500 numerical limitation for entry to the U.S. Any extensions of the limitations must be approved in the form of legislation by Congress. The Agreement does require the Party having a numerical limitation to consult with the other Parties in an endeavor to increase the permissible applicants for entry. Three years after the imposition of the limitation (presumably, after January 1, 1997), the Party imposing the limitation (the U.S. vis-a-vis Mexico) must consult with the affected Party with a view towards the elimination of the numerical imposition. The limitation, however, is not to be construed as to prevent a business visitor from applying for admission under some other visa category.

U.S. regulations clearly forbid the self-employment of individuals of the listed professions. The words in NAFTA permitting entry for professionals, "a business person seeking to engage in a business activity at a professional level" is not to be construed as authorizing self-employment. Prior to 1993, Canadian professionals under CFTA were not barred from self-employment. It appears that they will now be denied such employment under the TN category.

There appears to be no express limitation with respect to the time in which a TN professional may stay in the U.S. The regulations state that a Canadian citizen shall be admitted for a period not to one year but "[N]othing shall preclude a citizen of Canada who has previously been in the United States in TN status from applying for admission for other than such purpose."
a period of time which extends beyond the date of his or her original term of admission. A new letter from the employer establishing the necessity for the employee and the payment of the prescribed fee appears all that is required. For Mexican professionals, both the application for extension of time and for extension of the petition must be presented. Like Canadians, the regulations explicitly state that there is no limit on the total time the Mexican citizen may remain in the U.S. The TN professional may switch employers subject to approval of the INS.

**Canadian Entry to U.S.**

Canadians have an expedited procedure for U.S. entry under NAFTA. The expedited procedure is not available to Mexican business personnel because of the need for procurement of visas before coming to the U.S. At any of the numerous ports of entry into the U.S., a Canadian citizen need only prepare and present the application, pay the appropriate filing fee and receive the I-94 record of admission. Proof of citizenship is required (birth certificate/passport). For a B-1 application, a letter describing in detail the qualifying business purposes will be necessary. For a L-1 application, the said letter should have information about the employer and the employee. If a spouse and/or children are to accompany the petitioner, proof of their Canadian citizenship will also be needed.

A TN application allows a qualifying business person permission to enter the U.S. (within one day) and to receive work authorization and an application for a social security number. Under INS Regulations, 8 CFR section 214.6(f)(3), all that is needed is proof of Canadian citizenship, the filing fee and documentation establishing the engagement of business activities at a professional level and professional qualifications as set forth in NAFTA. The documentation can be in the form of a letter from the prospective employer in the U.S. or Canada, which describes the business activities, anticipated stay, educational requirements, remuneration, as well as exhibition of licenses, diplomas and the like.

**Mexican Implementation of NAFTA.**

To date, the Mexican Government has not issued detailed regulations concerning its required procedures under NAFTA. The two agencies which are directly involved in the grant of permission for business entry are the Secretaria de Gobernacion’s Instituto Nacional de Migracion (its U.S. counterpart is the Immigration and Naturalization Service) and the Secretaria de Relaciones Exteriores (U.S. Department of State counterpart). General guidelines were issued and published on May 9, 1994 in the Diario Oficial (like the U.S. Federal Register). The guidelines followed the NAFTA provisions as stated in the treaty. Business visitors may procure a “Forma Migratoria de Negocios (FMN)” visa good for 30 days with respect to the four nonimmigrant NAFTA categories. As any U.S. visitor to Mexico learns in traveling to Mexico, the procedures therein are quite informal unlike the stringent entry procedures at U.S. ports of entry.

Due to the great desire for tourist dollars, the only entry requirement for tourists in general into Mexico is the completion of a Forma Migratoria Turista visa. The visa is extended to all persons entering for recreational, artistic, cultural or sports activities. The visa is good for up to six months and not renewable until the passage of a year. It may not be used to become employed within Mexico or to achieve economic gain. U.S. tourists need only complete a brief form shortly before entry. Certain visitors, such as from Iran and Syria, require pre-approval at local consulates in the respective countries. Mexico also issues transmigrant visas (FM-6) to persons entering Mexico on route to another country. They are good for 30 days and are issued by the appropriate Mexican consulate.

Visitors visas (FM-3) are issued for non-tourist purposes. Examples of such visas are students, business visitors, corporate board members and other visitors. U.S. or Canadian business visitors may apply either for a FM-3 visa or a FMN visa. The former is good for a year and covers one or more entries into Mexico. It is procurable in Mexico at a Mexican consulate or at the National Immigration Institute within Mexico. If the visitor is entering Mexico for a business purpose, the visa may be used for any legal business activity within Mexico including the four NAFTA categories. To procure such a visa, an applicant will ordinarily need a company letter indicating the business purpose for the trip and the details thereof. If the visitor is to become employed by a Mexican company within Mexico, the visa will have to be issued by the National Immigration Institute.

Under NAFTA, the U.S. or Canadian business person may complete the FMN which is good for up to a 30 day period within a one year period. The form is obtainable through any Mexican consulate. It is allegedly good only for multiple entries but the visitor may be restricted to a single entry. The failure of the visitor to leave Mexico after
the 30 day period will subject him/her to a fine and/or deportation. The FM-3 visa may be a better alternative for the business visitor due to its extended length and multiple entry possibilities.

Miscellaneous Provisions.

Accession and withdrawal. The North American Free Trade Agreement does provide for accession by any other country or group thereof. The accession is subject to the terms and conditions imposed by the consenting countries and any Party may refuse to consent to such accession. It is anticipated that other countries of Central and South America will eventually request to become additional parties; in such event, the hemispheric development will be reminiscent of the gradual evolution of the European Union. A Party is permitted to withdraw from the Agreement upon six months notice to the other Parties. In such event, the Agreement continues as to the remaining Parties.

Dispute settlement. Under NAFTA, a Free Trade Commission was established, composed of cabinet-level representatives or their designees of the Parties. The Commission has the responsibility of overall supervision of the implementation of the Agreement as well as the resolution of disputes. It is to convene at least once annually and is to be chaired by each Party successively. A Secretariat is to be established under the commission with separate sections for each of the Parties. The Secretariat is to assist the Commission, aid in resolving disputes and support committees and groups operating under NAFTA.

The Agreement seeks to coordinate its dispute mechanism with that of GATT. If any dispute arises under both NAFTA and GATT, either forum may be used for its resolution. The exceptions are disputes relating to Article 104 of NAFTA (Relation to Environmental and Conservation Agreements), Chapter Seven, Section B (Sanitary and Phytosanitary Measures) and Chapter Nine (Standards-Related Measures). Where there are disputes, the Parties are to consult with each other. If there is no resolution, a Party may ask for the intervention of the Commission. If the Commission does not resolve the matter, any Party may request that an arbitral panel be convened to make a determination. The Parties are to establish a roster of 30 members who are experts in law, international trade and other matters under the Agreement. For the arbitration, five members are to be appointed to a panel by the Parties. The panel hears the testimony of the witnesses, reviews the evidence presented and renders an initial report. A disputing Party may make comments to the panel respecting its report. The panel then issues its final report.

Customs Union v. Free Trade Area

A customs union, such as the European Union, differs substantially from a free trade area. The latter seeks to eliminate tariffs between member countries so as to permit goods to move freely among them without monetary or other barriers, whereas a customs union also imposes a unified common tariff for goods imported from non-member states.

Thus, Germany, Italy, France and the other members of the European Union are one entity for the purpose of trade with other non-European Union states. A customs union, however, may be a much more extensive arrangement. The European Union envisions a near total integration of the member states. In effect, it is designed to eliminate national boundaries as to all economic activities as an eventual prelude to political integration. The Union has a supranational political, legislative and judicial system which may override national promulgations. Thus, the decisions of the European Court of Justice supersede the decisions of the highest court of member states. There is a European Parliament composed of members elected from the various member states, which has rather expanded legislative powers.

Another major difference between a free trade area and a customs union as envisioned in the European Union is the degree of freedom of movement permitted under the two arrangements. The policies of the European Union is comparable to the freedom of movement of U.S. nationals within the United States. Just as any resident may travel, reside and work in any state without restriction, similarly, a resident in any country within the Union may travel and work in any member country. Under NAFTA, there is limited freedom of movement, restricted to only those business persons provided for under the Agreement. The reason for the discrepancy is largely historical. The countries of Europe have engaged in numerous wars which caused enormous devastation. In an attempt to end European and global conflict, a “United States of Europe” was envisioned Schuman and Monet of France which would unite the warring states into an economic union, thus eliminating the most significant cause of wars.

Under NAFTA, there was no underlying fear of future armed conflict among the three states; rather it was the desire to further enhance the efficiency and growth of the interdependent economies. Instead of a permanent right to move freely, NAFTA provides only for a temporary entry for prescribed business purposes. The U.S. sought to expand the Mexican economy in an endeavor to greatly curtail illegal immigration, particularly into California. The concept is that with the creation of jobs south of the border, the need to leave family to find a job would come to an end. One author noted “the anomaly of NAFTA’s endorsement of free trade and closed border.”

Is NAFTA racist?

Clearly, as indicated above, Canadian business visitors are treated differently with less restrictions than their Mexican counterparts. Under NAFTA, Mexican business persons must obtain a B-1 visa from a consulate [or U.S. Embassy] in Mexico. In order to obtain it, they are required to have a valid Mexican passport which further requires an interview, proof of legitimacy of purpose plus any other documentary or other requirements which the consular official may demand such as ties to Mexico, monies to support oneself in the U.S. and/or invitations from the U.S. company. Proof may be required anew at the U.S. port of entry. Canadians need only show proof of Canadian citizenship, such as a birth certificate for a B-1 classification. No visa or passport is necessary. With respect to the E-1 and E-2 visas for Treaty Traders and Investors, there
is no overt discrimination. Both Mexican and Canadian persons seeking entry must obtain the appropriate visas.

There is discriminatory treatment as to Intra-Company Transferees [L-1 status]. As stated above, Canadian nationals may present his/her application with the employer’s petition at the port of entry at the U.S.-Canadian border for expedited entry. A Mexican national must initially present a valid Mexican passport to a U.S. Consulate or Embassy in Mexico in order to obtain an L- nonimmigrant visa. There is generally a delay of almost a month before the Mexican national is able to complete the process. Again the visa requirements are more strict than the requirements for Canadian nationals. 78

The Professional (TN) requirement is another example of discriminatory treatment. The only numerical limitations upon the entry of professionals is placed upon Mexican nationals. Appendix 1603 D. 4 limits the number of professionals permitted entry into the U.S. to 5,500 annually. Mexican professionals are also subject to labor attestation requirements and must have prospective employers petition for them for entry. Approval is by no means certain. In addition to the petition to be filed by the employer, it must be substantiated by attestations concerning the nature of the employment and that the salary to be paid will be no less than prevailing wages [in this writer’s experience, the requirement is often onerous and somewhat arbitrary]. The approval is for a one year period but is renewable. Canadians need no prior petition or labor certification. To obtain a TN visa, all that is necessary is proof of professional status and an offer of employment by a U.S. employer for the professional. No passport is required.

It would appear that Canadians are clearly favored over their Mexican counterparts. The favoritism, at best, can be ascribed to the fact that to induce Canada to terminate the prior U.S.-Canadian Free Trade Agreement in favor of NAFTA, Canada insisted that it receive treatment no less burdensome than it had under CFTA. Mexico, somewhat desperate, to revive its economy, was agreeable to the less than equal provisions of the agreement. There may be anti-Latino aspects coloring the differences in treatment. 79 Although Congress debated Mexican illegal immigration in deciding whether or not to approve legislation enacting NAFTA, nevertheless, there was a de-linking of the issues of illegal immigration from free trade. It was feared that the joinder of the two issues would derail the agreement. 80

Final Comments.

NAFTA represents a continuing attempt by the United States to have a global economy free of tariffs and other barriers. Somewhat imitating the efforts of GATT [now, the World Trade Organization] and the European Union, NAFTA is the expansion of free trade, which began with the United States-Canada Free Trade Agreement of 1992, and is expected to continue throughout the Western Hemisphere. There is much controversy in the United States as to the effects of the Agreement upon the U.S. labor market. To date there is little evidence of the loss of U.S. jobs, although the balance of trade did change from 1994 to 1995 from a U.S. surplus of $1.6 billion to a deficit of $8.9 billion. The peso collapse has diminished the expectations of supporters of NAFTA. Illegal immigration has continued unabated. 83 Free trade appears to be beneficial for the parties thereof wherever it is instituted. It awaits to be seen what the ultimate results will be with the institution of NAFTA.

ENDNOTES

2 P.L. 103-183, 107 Stat. 2057, which Act was signed by the President on December 8, 1993. The President issued an Executive Order, No. 12889, on December 27, 1993, 58 Fed. Reg. 69681 (December 30, 1993).
4 The reason apparently is to induce Canada to be a signatory to the Agreement. See Ellen Ginsberg Yost, "Overview of NAFTA," Immigration Practice and Procedure Under the North American Free Trade Agreement, (Washington, D.C.: American Immigration Lawyers Association), ed. Janet H. Cheethan, pp. 1-15 at p.2. In addition to NAFTA, the U.S. has bi-lateral trade agreements with other Central and South American countries. These agreements provide for the issuance of E-1 and/or E-2 visas discussed in the main text. Among the countries with which the U.S. has such agreements are Argentina, Bolivia, Colombia, Costa Rica, Honduras, Panama and Paraguay. For a discussion of business visitor entry visas to the United States, see Katherine L. Haight and Kevin C. Braguie, "The International Transfer of Business Personnel into the United States," 2 Sw. J. L. & Trade Am. 545 (Fall, 1995).
6 Article 1601 of the North American Free Trade Agreement (hereinafter referred to as the "Agreement").
7 Article 1602 of the Agreement.
8 Article 1608 of the Agreement.
9 Article 1603 (2) of the Agreement.
10 Article 1603 (4) of the Agreement.
12 "Temporary entry" is defined under Article 1608 as "entry into the territory of a Party by a business person of another Party without the intent to establish permanent residence."
13 Annex 1608 of the Agreement defines "citizen" with respect to Mexico as "a national or a citizen according to the existing [in effect on date of entry of NAFTA] provisions of Articles 30 and 34, respectively of the Mexican Constitution."

Annex 1603(2) of the Agreement. Generally, an oral declaration will suffice as a letter from the employer stating the required information.

Annex 1603, Section A(4)(b). Appendix 1603.D.4 of the Agreement provides that the U.S. is to approve annually as many as 5,500 petitions of business persons [professionals as defined in Appendix 1603.D.1, i.e., engaging in a business activity at a professional level] from Mexico seeking temporary entry. The number is exclusive of those persons receiving renewal of visas or of spouses or children accompanying the business visitor or persons admitted under other sections of the Immigration and Nationality Act. The restriction is valid for only 10 years or a lesser period if the U.S. has a less restrictive arrangement with any other state which may become a Party to the Agreement.

Annex 1603, Section A(5) of the Agreement.

The “after-sales” category is an expansion of the B-1 visitor category applicable to non-NAFTA business visitors. It permits Mexican and Canadian business persons to come into the U.S. to perform after-sales service for the product sold for the duration of the sales warranty and adds computer software to the product list within this category. See Haight and Brague, op. cit. p. 548.

Appendix 1603.A.1 of the Agreement.

Annex 1603, Section B of the Agreement.

“Trade” refers to “the exchange, purchase or sale of goods and/or services.” “Goods” are tangible personalty having intrinsic value while “services” are economic activities other than producing goods which include banking, advertising, engineering, insurance and the like. 8 CFR section 214.2(e)(2).

Id., Section B(1)(a). The Immigration and Naturalization Act, section 101(a)(15)(E) permits an alien to enter the U.S. pursuant to a treaty of commerce (not just NAFTA) together with his spouse and children “solely to carry on substantial trade, including trade in services or trade in technology between the United States and the foreign state of which he is a national...” See, also, Department of State Regulations, section 41.51.

Id., Section B(1)(b). The Department of State Regulations, 22 CFR section 41.51(a)(3)b states that the qualified alien “has invested or is actively in the process of investing a substantial amount of capital in a bona fide enterprise from a relatively small amount of capital in a marginal enterprise solely for the purpose of earning a living...”

9 FAM, note 10 to 22 CFR section 41.51.


Department of State Regulations, 22 CFR section 41.51(c). It appears, however, that 51 percent may be required inasmuch as the applicant should have a controlling interest in the enterprise in order to have the requisite capability of developing and directing the enterprise.

9 FAM, notes 15.3 and 13.3-1 to 22 CFR section 41.51.

9 FAM, note 22 CFR section 41.51.

20 Id., Section B(1). Under INS Regulations [8 CFR section 214.2(c)(1)], the alien is permitted entry into the US for an initial period of up to one year with up to a two year extension thereafter. Such trader or investor who wishes to change employers may do so upon written request to and approval of the local district director. Failure to do so would be grounds for cessation of status.

21 8 CFR 214.2(c)(3). See, also, Department of State Regulations 22 CFR section 41.51(f).

22 The Department of State [Regulations 22 CFR section 41.51] has regulations governing issuance of visas abroad to treaty traders or investors. E-1 visas for Treaty Traders [INA 101(a)(15)(E)(i)] meeting the definition to intend to depart upon ending of E-1 status. Treaty Investor, E-2, [INA section 101(a)(15)(E(i)] is one who qualifies under this section and has invested or is actively in the process of investing a substantial amount of capital in bon-a-fide enterprises in the US (not merely a small amount to earn a living) and will leave when the activity is completed.

23 22 CFR section 41.2(m).

24 Annex 1603 of the Agreement, Section C(1). See INS Regulations 8 CFR, 214.20(1)(i) which specifically so provides that “an alien who within the preceding three years has been employed abroad for one continuous year by a qualifying organization may be admitted temporarily admitted to the United States to be employed by a parent, branch, affiliate, or subsidiary of that employer in a managerial or executive capacity, or in a position requiring specialized knowledge...”


8 CFR 214.20(1)(i)(C).

8 CFR 214.20(1)(i)(D).

8 CFR 214.20(2).

8 CFR 214.20(12)(i).

8 CFR 214.20(12)(ii).

8 CFR 214.20(15).

Annex 1603 of the Agreement, Section C(2).

Id., Section C(3).

8 CFR 214.20(17)(i).

8 CFR 214.20(17)(v).

8 CFR 214.20(18).

Annex 1603 of the Agreement, Section D.

Appendix 1603, D. 1 of the Agreement.
Annex 1603, Section D of the Agreement. The regulations of the Department of State mirror closely the Agreement. It separates Mexicans from Canadians. The latter merely must show evidence of an offer of employment in the U.S. requiring employment for the purpose stated in the Annex and proof of credentials. Mexicans must show approval of a petition from the INS for the classification or confirmation of petition approval or the approval of the aliens' stay in such classification. 22 CFR. section 41.59. See also, Department of Labor regulations in 20 CFR section 655.7006(c)(3).

See INS regulations, 8 CFR section 214.6(d)(7). If the numerical limits are reached, then no further numbers may be assigned for entry for the year. Spouse and children are not counted towards the limitation nor are petitions for extensions or amendments of petitions.

Annex 1603, Section D 7.

INS Regulations, 8 CFR section 214.6(b).


8 CFR section 214.6(f)(3)(ii).

8 CFR section 214.6(h)(1).

8 CFR section 214.6(i).

This section is based upon William Z. Reich, "Processing of Canadian NAFTA Applications at the Port of Entry," Immigration Practice and Procedure, op. cit., pp. 51-57.

Appendix 1603.D.1 of the Agreement.

8 CFR, section 214.6(E)(3).


For a summary of the changes, see Bush and Frankel, op. cit.

This section is based upon the research found in Kathleen Campbell Walker and Roberto Fernandez Reyes, "NAFTA Implementation in Mexico," Immigration Practice and Procedure Under the North American Free Trade Agreement, ed. Janet H. Cheetham supra, pp. 92-106.

Article 2204 of the Agreement.

Article 2205 of the Agreement.

Article 2001 of the Agreement.

Article 2001((3)(5) of the Agreement.

Article 2001((3) of the Agreement.

Article 2005(1)(3)(4) of the Agreement.

Articles 2006 and 2007 of the Agreement.

Articles 2016-2018 of the Agreement.

The European Union began initially by the creation of the European Coal and Steel Community in April, 1951 by six countries, namely, Belgium, France, West Germany, Italy, Luxembourg and the Netherlands. It expanded by the creation of two additional entities, The European Economic Community and the European Atomic Energy Community in the Treaty of Rome signed on March 25, 1957 and which became effective on January 1, 1958. Significant expansion of the Union took place in later years with the addition of Denmark, Ireland and United Kingdom on January 1, 1981, the admission of Greece on January 1, 1981, the entry of Portugal and Spain on January 1, 1986 and the admission of Austria, Sweden and Finland in 1994.

The European Parliament was initially called the Assembly had almost no binding legislative powers. The Single European Act of February 17, 1986 and the Maastricht Treaty [Treaty on European Union] of February 7, 1992 renamed the Assembly and gave it some legislative capability but not quite the powers of national legislative bodies.

See Articles 7 and 8 of the Maastricht Treaty which confers European Union citizenship upon every national of the member states and explicitly grants the right of freedom of movement throughout the territory. For a more detailed discussion of the comparative aspects of the two types of arrangements, see: Christopher J. Cassine, "The European Union v. The United States Under the NAFTA: A Comparative Analysis of the Free Movement of Persons Within the Regions," 46 Syracuse L. Rev. 1343 (1996).

Obviously, any foreign national having a valid visa may travel quite freely within the U.S. By freedom of movement we are referring to the virtual elimination of any borders for eligible persons for purposes of travel, reside or become employed.

NAFTA, Article 1601.


Id.

For a discussion of Latinos and immigration see: Kevin R. Johnson, "Civil Rights and Immigration: Challenges for the Latino Community in the Twenty-First Century," 8 La Raza L.J. ((1995). See also Kevin Johnson's article, op. cit., p. 941. The author notes that while Congressional debate focused on Mexican illegal immigration, nothing was said concerning illegal immigration from Canada.

The failure to link the issues was frowned upon by one author, Alan C. Nelson, "NAFTA: Immigration Issues Must Be Addressed," 27 U.C. Davis L. Rev. 987 (Summer 1994), p. 988. See also, Kevin Johnson, Id.