U.S. Immigration and Naturalization Service
Headquarters, Office of Inspections

North American Free Trade Agreement

NAFTA
HANDBOOK

November 1999

The NAFTA Handbook is provided by Headquarters Inspections as reference material to assist immigration inspectors in processing applicants for admission under the North American Free Trade Agreement.

Sources of information in this manual include: Chapter 16 of the North American Free Trade Agreement, pertinent sections of 8 CFR, Operating Instructions, Inspectors Field Manual, Interim Decisions and Case Law Summaries, NAFTA Interim and Final Rule, implementation wires, and pertinent memoranda.

The information contained herein is subject to change. It is the responsibility of each officer to be aware of changes that are made to the statute, regulations and Field Manuals as well as any other subsequent clarification, and to update the manual with relevant changes.

SECTION ONE

REFERENCE MATERIAL

North American Free Trade Agreement

Chapter Sixteen: Temporary Entry for Business Persons

Article 1601: General Principles

Further to Article 102 (Objectives), this Chapter reflects the preferential trading relationship between the Parties, the desirability of facilitating temporary entry on a reciprocal basis and of establishing transparent criteria and procedures for temporary entry, and the need to ensure border security and to protect the domestic labor force and permanent employment in their respective territories.

Article 1602: General Obligations

1. Each Party shall apply its measures relating to the provisions of this Chapter in accordance with Article 1601 and, in particular, shall apply expeditiously those measures so as to avoid unduly impairing or delaying trade in goods or services or conduct of investment activities under this Agreement.
2. The Parties shall endeavor to develop and adopt common criteria, definitions and interpretations for the implementation of this Chapter.

Article 1603: Grant of Temporary Entry

1. Each Party shall grant temporary entry to business persons who are otherwise qualified for entry under applicable measures relating to public health and safety and national security, in accordance with this Chapter, including the provisions of Annex 1603.
2. A Party may refuse to issue an immigration document authorizing employment to a business person where the temporary entry of that person might affect adversely:
   (a) the settlement of any labor dispute that is in progress at the place or intended place of employment; or
   (b) the employment of any person who is involved in such dispute.
3. When a Party refuses pursuant to paragraph 2 to issue an immigration document authorizing employment, it shall:
   (a) inform in writing the business person of the reasons for the refusal; and
   (b) promptly notify in writing the Party whose business person has been refused entry of the reasons for the refusal.
4. Each Party shall limit any fees for processing applications for temporary entry of business persons to the approximate cost of services rendered.

Article 1604: Provision of Information

1. Further to Article 1802 (Publication), each Party shall:
   (a) provide to the other Parties such materials as will enable them to become acquainted with its measures relating to this Chapter; and
   (b) no later than one year after the date of entry into force of this Agreement, prepare, publish and make available in its own territory, and in the territories of the other Parties, explanatory material in a consolidated document regarding the requirements for temporary entry under this Chapter in such a manner as will enable business persons of the other Parties to become acquainted with them.
2. Subject to Annex 1604.2, each Party shall collect and maintain, and make available to the other Parties in accordance with its domestic law, data respecting the granting of temporary entry under this Chapter to business persons of the other Parties who have been issued immigration documentation, including data specific to each occupation, profession or activity.

Article 1605: Working Group

1. The Parties hereby establish a Temporary Entry Working Group, comprising representatives of each Party, including immigration officials.
2. The Working Group shall meet at least once each year to consider:
   (a) the implementation and administration of this Chapter;
   (b) the development of measures to further facilitate temporary entry of business persons on a reciprocal basis;
   (c) the waiving of labor certification tests or procedures of similar effect for spouses of business persons who have been granted temporary entry for more than one year under Section B, C or D of Annex 1603; and
   (d) proposed modifications of or additions to this Chapter.

Article 1606: Dispute Settlement

1. A Party may not initiate proceedings under Article 2007 (Commission Good Offices, Conciliation and Mediation) regarding a refusal to grant temporary entry under this Chapter or a particular case arising under Article 1602(1) unless:

(a) the matter involves a pattern of practice; and

(b) the business person has exhausted the available administrative remedies regarding the particular matter.

2. The remedies referred to in paragraph (1)(b) shall be deemed to be exhausted if a final determination in the matter has not been issued by the competent authority within one year of the institution of an administrative proceeding, and the failure to issue a determination is not attributable to delay caused by the business person.

Article 1607: Relation to Other Chapters

Except for this Chapter, Chapters One (Objectives), Two (General Definitions), Twenty (Institutional Arrangements and Dispute Settlement Procedures) and Twenty Two (Final Provisions) and Articles 1801 (Contacts Points), 1802 (Publication), 1803 (Notification and Provision of Information) and 1804 (Administrative Proceedings), no provision of this Agreement shall impose any obligation on a Party regarding its immigration measures.

Article 1608: Definitions

For purposes of this Chapter:

business person means a citizen of a Party who is engaged in trade in goods, the provision of services or the conduct of investment activities;

citizen means "citizen" as defined in Annex 1608 for the Parties specified in that Annex;

existing means "existing" as defined in Annex 1608 for the Parties specified in that Annex; and

temporary entry means entry into the territory of a Party by a business person of another Party without the intent to establish permanent residence.

Annex 1603: Temporary Entry for Business Persons

Section A - Business Visitors

1. Each Party shall grant temporary entry to a business person seeking to engage in a business activity set out in Appendix 1603.A.1, without requiring that person to obtain an employment authorization, provided that the business person otherwise complies with existing immigration measures applicable to temporary entry, on presentation of:

(a) proof of citizenship of a Party;

(b) documentation demonstrating that the business person will be so engaged and describing the purpose of entry; and

(c) evidence demonstrating that the proposed business activity is international in scope and that the business person is not seeking to enter the local labor market.

2. Each Party shall provide that a business person may satisfy the requirements of paragraph 1(c) by demonstrating that:

(a) the primary source of remuneration for the proposed business activity is outside the territory of the Party granting temporary entry; and

(b) the business person's principal place of business and the actual place of accrual of profits, at least predominantly, remain outside such territory.

A Party shall normally accept an oral declaration as to the principal place of business and the actual place of accrual of profits. Where the Party requires further proof, it shall normally consider a letter from the employer attesting to these matters as sufficient proof.

3. Each Party shall grant temporary entry to a business person seeking to engage in a business activity other than those set out in Appendix 1603.A.1, without requiring that person to obtain an employment authorization, on a basis no less favorable than that provided under the existing provisions of the measures set out in Appendix 1603.A.3, provided that the business person otherwise complies with existing immigration measures applicable to temporary entry.

4. No Party may:

(a) as a condition for temporary entry under paragraph 1 or 3, require prior approval procedures, petitions, labor certification tests or other procedures of similar effect; or

(b) impose or maintain any numerical restriction relating to temporary entry under paragraph 1 or 3.

5. Notwithstanding paragraph 4, a Party may require a business person seeking temporary entry under this Section to obtain a visa or its equivalent prior to entry. Before imposing a visa requirement, the Party shall consult, on request, with a Party whose business persons would be affected with a view to avoiding the

imposition of the requirement. With respect to an existing visa requirement, a Party shall consult, on request, with a Party whose business persons are subject to the requirement with a view to its removal.

Section B - Traders and Investors

1. Each Party shall grant temporary entry and provide confirming documentation to a business person seeking to:

(a) carry on substantial trade in goods or services principally between the territory of the Party of which the business person is a citizen and the territory of the Party into which entry is sought, or

(b) establish, develop, administer or provide advice or key technical services to the operation of an investment to which the business person or the business person's enterprise has committed, or is in the process of committing, a substantial amount of capital,

in a capacity that is supervisory, executive or involves essential skills, provided that the business person otherwise complies with existing immigration measures applicable to temporary entry.

2. No Party may:

(a) as a condition for temporary entry under paragraph 1, require labor certification tests or other procedures of similar effect; or

(b) impose or maintain any numerical restriction relating to temporary entry under paragraph 1.

3. Notwithstanding paragraph 2, a Party may require a business person seeking temporary entry under this Section to obtain a visa or its equivalent prior to entry.

Section C - Intra-Company Transferees

1. Each Party shall grant temporary entry and provide confirming documentation to a business person employed by an enterprise who seeks to render services to that enterprise or a subsidiary or affiliate thereof, in a capacity that is managerial, executive or involves specialized knowledge, provided that the business person otherwise complies with existing immigration measures applicable to temporary entry. A Party may require the business person to have been employed continuously by the enterprise for one year within the three year period immediately preceding the date of the application for admission.

2. No Party may:

(a) as a condition for temporary entry under paragraph 1, require labor certification tests or other procedures of similar effect; or

(b) impose or maintain any numerical restriction relating to temporary entry under paragraph 1.

3. Notwithstanding paragraph 2, a Party may require a business person seeking temporary entry under this Section to obtain a visa or its equivalent prior to entry. Before imposing a visa requirement, the Party shall consult with a Party whose business persons would be affected with a view to avoiding the imposition of the requirement. With respect to an existing visa requirement, a Party shall consult, on request, with a Party whose business persons are subject to the requirement with a view to its removal.

Section D - Professionals

1. Each Party shall grant temporary entry and provide confirming documentation to a business person seeking to engage in a business activity at a professional level in a profession set out in Appendix 1603.D.1, if the business person otherwise complies with existing immigration measures applicable to temporary entry, on presentation of:

(a) proof of citizenship of a Party; and

(b) documentation demonstrating that the business person will be so engaged and describing the purpose of entry.

2. No Party may:

(a) as a condition for temporary entry under paragraph 1, require prior approval procedures, petitions, labor certification tests or other procedures of similar effect; or

(b) impose or maintain any numerical restriction relating to temporary entry under paragraph 1.

3. Notwithstanding paragraph 2, a Party may require a business person seeking temporary entry under this Section to obtain a visa or its equivalent prior to entry. Before imposing a visa requirement, the Party shall consult with a Party whose business persons would be affected with a view to avoiding the imposition of the requirement. With respect to an existing visa requirement, a Party shall consult, on request, with a Party whose business persons are subject to the requirement with a view to its removal.

4. Notwithstanding paragraphs 1 and 2, a Party may establish an annual numerical limit, which shall be set out in Appendix 1603.D.4, regarding temporary entry of business persons of another Party seeking to engage in business activities at a professional level in a profession set out in Appendix 1603.D.1, if the Parties concerned have not agreed otherwise prior to the date of entry into force of this Agreement for those Parties. In establishing such a limit, the Party shall consult with the other Party concerned.

5. A Party establishing a numerical limit pursuant to paragraph 4, unless the Parties concerned agree otherwise:
(a) shall, for each year after the first year after the date of entry into force of this Agreement, consider increasing the numerical limit set out in Appendix 1603.D.4 by an amount to be established in consultation with the other Party concerned, taking into account the demand for temporary entry under this Section;
(b) shall not apply its procedures established pursuant to paragraph 1 to the temporary entry of a business person subject to the numerical limit, but may require the business person to comply with its other procedures applicable to the temporary entry of professionals; and
(c) may, in consultation with the other Party concerned, grant temporary entry under paragraph 1 to a business person who practices in a profession where accreditation, licensing, and certification requirements are mutually recognized by those Parties.

6. Nothing in paragraph 4 or 5 shall be construed to limit the ability of a business person to seek temporary entry under a Party's applicable immigration measures relating to the entry of professionals other than those adopted or maintained pursuant to paragraph 1.

7. Three years after a Party establishes a numerical limit pursuant to paragraph 4, it shall consult with the other Party concerned with a view to determining a date after which the limit shall cease to apply.

Appendix 1603.A.1: 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:
  (a) with a group of passengers on a bus tour that has begun in, and will return to, the territory of another Party;
  (b) 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
  (c) 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.

Definitions

For purposes of this Appendix:
territory of another Party means the territory of a Party other than the territory of the Party into which temporary entry is sought;
tour bus operator means a natural person, including relief personnel accompanying or following to join, necessary for the operation of a tour bus for the duration of a trip; and
transportation operator means a natural person, other than a tour bus operator, including relief personnel accompanying or following to join, necessary for the operation of a vehicle for the duration of a trip.

Appendix 1603.A.3: Existing Immigration Measures

1. In the case of Canada, subsection 19(1) of the *Immigration Regulations, 1978*, SOR/78172, as amended, made under the *Immigration Act*, R.S.C. 1985, c. I2, as amended.
2. In the case of the United States, section 101(a)(15)(B) of the *Immigration and Nationality Act*, 1952, as amended.
3. In the case of Mexico, Chapter III of the *General Demography Law* ("Ley General de Población"), 1974, as amended.

Appendix 1603.D.1: Professionals

PROFESSION1	**MINIMUM EDUCATION REQUIREMENTS AND ALTERNATIVE CREDENTIALS**
General	
Accountant	Baccalaureate or Licenciatura Degree; or C.P.A.,C.A., C.G.A. or C.M.A.
Architect	Baccalaureate or Licenciatura Degree; or state/provincial license2
Computer Systems Analyst	Baccalaureate or Licenciatura Degree; or Post Secondary Diploma3 or Post Secondary Certificate4, and three years experience
Disaster Relief Insurance Claims Adjuster (claims Adjuster employed by an insurance company located in of a Party, or an independent claims adjuster)	Baccalaureate or Licenciatura Degree, and successful completion of training in the appropriate areas of insurance adjustment pertaining to disaster relief claims; or three years experience in claims adjustment and successful completion of training in the appropriate areas of insurance adjustment pertaining to disaster relief claims

Economist	Baccalaureate or Licenciatura Degree
Engineer	Baccalaureate or Licenciatura Degree; or state/provincial license
Forester	Baccalaureate or Licenciatura Degree; or state/provincial license
Graphic Designer	Baccalaureate or Licenciatura Degree; or Post Secondary Diploma or Post Secondary Certificate, and three years experience
Hotel Manager	Baccalaureate or Licenciatura Degree in hotel/restaurant management; or Post Secondary Diploma or Post Secondary Certificate in hotel/restaurant management, and three years experience in hotel/restaurant management
Industrial Designer	Baccalaureate or Licenciatura Degree; or Post Secondary Diploma or Post Secondary Certificate, and three years experience
Interior Designer	Baccalaureate or Licenciatura Degree; or Post Secondary Diploma or Post Secondary Certificate, and three years experience
Land Surveyor	Baccalaureate or Licenciatura Degree; or state/provincial/federal license
Landscape Architect	Baccalaureate or Licenciatura Degree
Lawyer (including Notary in the Province of Quebec)	LL.B., J.D., LL.L., B.C.L. or Licenciatura Degree (five years); or membership in a state/provincial bar
Librarian	M.L.S. or B.L.S. (for which another Baccalaureate or Licenciatura Degree was a prerequisite)
Management Consultant	Baccalaureate or Licenciatura Degree; or equivalent professional experience as established by statement or professional credential attesting to five years experience as a management consultant, or five years experience in a field of specialty related to the consulting agreement
Mathematician (including Statistician)	Baccalaureate or Licenciatura Degree
Range Manager/Range Conservationist	Baccalaureate or Licenciatura Degree
Research Assistant (working in a post-secondary educational institution)	Baccalaureate or Licenciatura Degree
Scientific Technician/Technologist5	Possession of (a) theoretical knowledge of any of the following: engineering, forestry, geology, geophysics, meteorology or physics; and (b) the ability to solve practical problems in any of those disciplines, or the ability to apply principles of any of those disciplines to basic or applied research
Social Worker	Baccalaureate or Licenciatura Degree
Sylviculturist (including Forestry Specialist)	Baccalaureate or Licenciatura Degree
Technical Publications Writer	Baccalaureate or Licenciatura Degree; or Post Secondary

	Diploma or Post Secondary Certificate, and three years experience
Urban Planner (including Geographer)	Baccalaureate or Licenciatura Degree
Vocational Counselor	Baccalaureate or Licenciatura Degree
Medical/Allied Professional	
Dentist or	D.D.S., D.M.D., Doctor en Odontologia or Doctor en Cirugia Dental; state/provincial license
Dietitian	Baccalaureate or Licenciatura Degree; or state/provincial license
Medical Laboratory Technologist (Canada)/Medical Technologist (Mexico and the United States)6	Baccalaureate or Licenciatura Degree; or Post-Secondary Diploma or Post-Secondary Certificate, and three years experience
Nutritionist	Baccalaureate or Licenciatura Degree
Occupational Therapist	Baccalaureate or Licenciatura Degree; or state/provincial license
Pharmacist	Baccalaureate or Licenciatura Degree; or state/provincial license
Physician (teaching or research only)	M.D. or Doctor en Medicina; or state/provincial license
Physiotherapist/Physical Therapist	Baccalaureate or Licenciatura Degree; or state/provincial license
Psychologist	State/provincial license; or Licenciatura Degree
Recreational Therapist	Baccalaureate or Licenciatura Degree
Registered Nurse	State/provincial license; or Licenciatura Degree
Veterinarian	D.V.M., D.M.V. or Doctor en Veterinaria; or state/provincial license
Scientist	
Agriculturist (including Agronomist)	Baccalaureate or Licenciatura Degree
Animal Breeder	Baccalaureate or Licenciatura Degree
Animal Scientist	Baccalaureate or Licenciatura Degree
Apiculturist	Baccalaureate or Licenciatura Degree
Astronomer	Baccalaureate or Licenciatura Degree
Biochemist	Baccalaureate or Licenciatura Degree
Biologist	Baccalaureate or Licenciatura Degree
Chemist	Baccalaureate or Licenciatura Degree
Dairy Scientist	Baccalaureate or Licenciatura Degree
Entomologist	Baccalaureate or Licenciatura Degree
Epidemiologist	Baccalaureate or Licenciatura Degree
Geneticist	Baccalaureate or Licenciatura Degree

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

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1 A business person seeking temporary entry under this Appendix may also perform training functions relating to the profession, including conducting seminars.

2 "State/provincial license" and "state/provincial/federal license" mean any document issued by a state, provincial or federal government, as the case may be, or under its authority, but not by a local government, that permits a person to engage in a regulated activity or profession.

3 "Post-Secondary Diploma" means a credential issued, on completion of two or more years of post secondary education, by an accredited academic institution in Canada or the United States.

4 "Post-Secondary Certificate" means a certificate issued, on completion of two or more years of post secondary education at an academic institution, by the federal government of Mexico or a state government in Mexico, an academic institution recognized by the federal government or a state government, or an academic institution created by federal or state law.

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

6 A business person in this category must be seeking temporary entry to perform in a laboratory chemical, biological, hematological, immunologic, microscopic or bacteriological tests and analyses for diagnosis, treatment or prevention of disease.

Appendix 1603.D.4: United States

1. Beginning on the date of entry into force of this Agreement as between the United States and Mexico, the United States shall annually approve as many as 5,500 initial petitions of business persons of Mexico seeking temporary entry under Section D of Annex 1603 to engage in a business activity at a professional level in a profession set out in Appendix 1603.D.1.
2. For purposes of paragraph 1, the United States shall not take into account:
    (a) the renewal of a period of temporary entry;
    (b) the entry of a spouse or children accompanying or following to join the principal business person;

(c) an admission under section 101(a)(15)(H)(i)(b) of the *Immigration and Nationality Act, 1952*, as may be amended, including the worldwide numerical limit established by section 214(g)(1)(A) of that Act; or

(d) an admission under any other provision of section 101(a)(15) of that Act relating to the entry of professionals.

3. Paragraphs 4 and 5 of Section D of Annex 1603 shall apply as between the United States and Mexico for no longer than:

(a) the period that such paragraphs or similar provisions may apply as between the United States and any other Party other than Canada or any non Party; or

(b) 10 years after the date of entry into force of this Agreement as between such Parties, whichever period is shorter.

Annex 1604.2: Provision of Information

The obligations under Article 1604(2) shall take effect with respect to Mexico one year after the date of entry into force of this Agreement.

Annex 1608: Country Specific Definitions

For purposes of this Chapter:

citizen means, with respect to Mexico, a national or a citizen according to the existing provisions of Articles 30 and 34, respectively, of the Mexican Constitution; and

existing means, as between:

(a) Canada and Mexico, and Mexico and the United States, in effect on the date of entry into force of this Agreement; and

(b) Canada and the United States, in effect on January 1, 1989.

FEDERAL REGISTER CITE: 63 FR 1331

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DEPARTMENT OF JUSTICE

Immigration and Naturalization Service

8 CFR Parts 103, 212, 214, 235, and 274a

[INS No. 1611-93]

RIN 1115-AB72

Temporary Entry of Business Persons Under the North American Free

Trade Agreement (NAFTA)

AGENCY: Immigration and Naturalization Service, Justice.

ACTION: Final rule.

SUMMARY: This rule implements provisions of the North American Free Trade Agreement (NAFTA) by amending the Immigration and Naturalization Service (Service) regulations establishing procedures for the temporary entry of Canadian and Mexican citizen business persons into the United States. This rule will facilitate temporary entry on a reciprocal basis among the United States, Canada, and Mexico, while recognizing the continued need to ensure border security and to protect indigenous labor and permanent employment in all three countries.

EFFECTIVE DATE: January 9, 1998.

FOR FURTHER INFORMATION CONTACT: Helen V. deThomas, Adjudications Officer, Immigration and Naturalization Service, 425 I Street, NW., Room 3214, Washington, DC 20536, telephone (202) 514-5014.

SUPPLEMENTARY INFORMATION: On December 17, 1992, the Presidents of the United States and Mexico and the Prime Minister of Canada entered into the North American Free Trade Agreement (NAFTA). Implementation of this agreement has been provided for by the North American Free Trade Agreement Implementation Act (NAFTA Implementation Act), Public Law 103-182. The NAFTA Implementation Act was signed into law by the President of the United States on December 8, 1993. The NAFTA entered into force on January 1, 1994.

This final rule pertains to Canadian and Mexican citizen temporary visitors for business seeking classification under section 101(a)(15)(B) of the Immigration and Nationality Act (Act), to Canadian and Mexican citizen treaty traders and treaty investors seeking classification under section 101(a)(15)(E) of the Act, to Canadian and Mexican citizen intracompany transferees seeking classification under section 101(a)(15)(L) of the Act, and to Canadian and Mexican citizens engaging in activities at a professional level seeking classification under section 214(e) of the Act, as amended by section 341(b) of the NAFTA Implementation Act.

This rule sets forth the procedures for the temporary entry of Canadian and Mexican citizen business persons as provided in Chapter 16 of the NAFTA and Subtitle D of Title III of the NAFTA Implementation Act. Chapter 16 of the NAFTA, Subtitle D of Title III of the NAFTA Implementation Act, and this rule reflect the special trading relationship now established among the United States, Canada, and Mexico, and recognize the desirability of facilitating temporary entry on a reciprocal basis and of establishing transparent criteria and

procedures for such temporary entry. At the same time, full recognition is given to the continued need to ensure border security while protecting the domestic labor force and permanent employment in all three countries.

On December 30, 1993, the Service published an interim rule with request for comments in the Federal Register at 58 FR 69205, implementing the NAFTA. Interested persons were invited to submit comments to the Service on or before February 28, 1994.

Discussion of Comments

The Service received comments from three commenters relating to the interim rule. One of the commenters requested that additional medical occupations be added to the list of professions contained in Appendix 1603.D.1. Although the Service appreciates this comment, this final rule is not the proper forum in which to discuss whether an occupation should be added to the list of professions contained in Appendix 1603.D.1. The determination as to whether an occupation should be added to Appendix 1603.D.1 is made in a separate procedure apart from this final rule and involves consultations, on the domestic side, with other government agencies belonging to the NAFTA Temporary Entry Working Group. See Article 1605 of the NAFTA. In addition, the process involves consultation with representatives of the Canadian and Mexican governments and appropriate U.S. Congressional subcommittees. See NAFTA Implementation Act Statement of Administrative Action at page 183. If a decision is made to add occupations to the Appendix 1603.D.1, the Service will notify the public by publishing a notice of proposed rulemaking in the Federal Register.

The second commenter, the U.S. Coast Guard, recommended that a provision for the temporary entry of spill response specialists and laborers be added as a new class of business activity under 8 CFR 214.2(b)(4)(i). Such a provision, the Coast Guard stated, would allow pollution response workers lawful entry to the United States in conjunction with an actual response or response preparedness exercise under the Joint Marine Pollution Contingency Plans in effect among the NAFTA parties. The Service's regulations at 8 CFR 214.2(b)(4) provide for the entry in B-1 nonimmigrant classification of citizens of Mexico and Canada pursuant to Section A of Annex 1603 of the NAFTA. Although Appendix 1603.A.1 to Annex 1603 of the NAFTA provides a detailed list of specific types of activities in which a B-1 business visitor seeking entry under the NAFTA may engage, it is not intended to be exhaustive. As stated in the existing provision already available at 8 CFR 214.2(b)(4)(ii), nothing precludes a citizen of Mexico or Canada from seeking entry to engage in business activities which are not included within Appendix 1603.A.1, provided he or she meets all requirements for entry as a business visitor under section 101(a)(15)(B) of the Act. Whether a particular type of activity falls within this provision, however, will depend on the specific facts, and will require an analysis of the precise activities the alien intends to perform in this country. For this reason, the Service cannot determine in advance whether a Canadian or Mexican citizen wishing to engage in the activities described by the commenter would be consistent with section 101(a)(15)(B) of the Act. Accordingly, the Service will not adopt the commenter's suggestion because no special amendment is needed to 8 CFR 214.2(b)(4) for entry in B-1 nonimmigrant classification.

The third commenter was the American Immigration Lawyers' Association (AILA), a bar association representing over 3,600 lawyers and law professors practicing and teaching in the field of immigration and nationality law. The following discussion addresses the six issues raised by AILA in its comments and provides the Service's position on those issues. The discussion also indicates the revisions adopted in the final rule based on the comments.

Effect of a Strike on a Treaty Trader or Investor Admitted Under the Provisions of the NAFTA--8 CFR 214.2(e)(22)

AILA suggested that the Service adopt regulatory language which would provide E nonimmigrant aliens with the same safeguards which both the L-1 and TN nonimmigrant aliens enjoy regarding labor disputes or work stoppages. Specifically, AILA noted that the regulations relating to the L-1 and TN nonimmigrant classifications state that the alien's participation in a labor dispute or work stoppage is not violative of his or her nonimmigrant classification. The Service agrees with this suggestion and will amend the language at 8 CFR 214.2(e)(22) to reflect that E nonimmigrants admitted under the NAFTA are subject to the same labor dispute and work stoppage rules as TN and NAFTA L-1 nonimmigrants.

Engage in Business Activities at a Professional Level--8 CFR 214.6(b)

AILA suggested that the definition of the term "engage in business activities at a professional level" should be amended to allow self-employed individuals (that is, individuals who are self-employed in Canada or Mexico) to obtain TN classification even if the alien will be employed by a U.S. corporation which is wholly-owned by the alien, "where such employment is not for self-subsistence and a true employment situation exists." AILA argued that the NAFTA does not preclude such a modification and that these aliens were admitted to the United States in the past under the United States-Canada Free-Trade Agreement (CFTA).

The Service cannot adopt this comment because its adoption would clearly conflict with the intent of the NAFTA Implementation Act. Annex 1603, section D, provides for the entry of a citizen of a Party country seeking to render professional-level services for an entity in another Party country. As stated in the NAFTA Implementation Act Statement of Administrative Action at page 178, "Section D of Annex 1603 does not authorize a professional to establish a business or practice in the United States in which the professional will be self-employed." It is the position of the Service that a professional may not avoid the bar to self-employment merely by adopting the corporate form. The test in all cases is whether the alien, in substance, is seeking admission for the purpose of establishing, or performing work for a business or practice that the alien has already established, in which he or she will be self-employed.

It should be noted that the bar on establishment of a business or practice in which the Canadian or Mexican citizen will be self-employed is in no way intended to limit a Canadian or Mexican citizen who is self-employed abroad from entering this country in, changing status to, or extending nonimmigrant stay in, TN classification pursuant to a pre-arranged agreement with a third party that is not substantively the same as, or de facto controlled by, the alien. On the other hand, a Canadian or Mexican citizen is precluded from entering this country in TN classification for the purpose of rendering pre-arranged services for a U.S. corporation or entity of which he or she is the sole or controlling shareholder or owner.

It should also be noted that, although the issue of self-employment was never specifically addressed under the regulations promulgated by the Service pursuant to the CFTA Implementation Act, the bar on establishment of a business or practice in which the professional will be self-employed is consistent with the intent of the United States and Canada in entering into the CFTA. Since entry into NAFTA was not intended to substantively change the treatment of professionals, this explicit bar merely clarifies existing law.

Finally, the Service notes that, under Chapter 16 of the NAFTA, Canadian or Mexican citizens seeking to engage in self-employment in trade or investment activities in this country may seek classification under section 101(a)(15)(E) of the Act. See NAFTA Implementation Act Statement of Administrative Action at page 178. In this regard, Annex 1603, section B, which deals with "traders and investors," establishes the appropriate category of temporary entry for a citizen of a Party country seeking to develop and direct investment operations in another Party country.

Temporary Entry--8 CFR 214.6(b)

AILA suggested that the Service apply the concept of "dual intent" to the TN classification to accommodate business persons who may be adversely affected by the filing of a permanent residence petition or an application for a labor certification in their behalf. The concept of "dual intent" allows certain nonimmigrant aliens to retain nonimmigrant status even where the alien may have made application for permanent residence or where an employer has filed an application for a labor certification or employment-based petition in his or her behalf.

This suggestion cannot be adopted because it is clearly inconsistent with Article 1608 of the NAFTA. For purpose of Chapter 16 of the NAFTA, Article 1608 of the NAFTA defines "temporary entry" specifically as "entry into the territory of a Party by a business person of another Party without the intent to establish permanent residence." (Emphasis added)

In order to further explain the temporary nature of a TN alien's entry into the United States, the definition of "temporary entry" has been clarified in the final rule providing that while there is no specific limit on the total period of time a citizen of Canada or Mexico may remain in TN status, the TN classification is nevertheless for persons seeking temporary entry without the intent to establish permanent residence. This clarified definition of "temporary entry" comports with that used by the Department of State and the intent of the Article 1608 of the NAFTA. See 22 CFR 41.59(c) (December 28, 1993).

Licensure for TN Classification--8 CFR 214.6(d)(2)(iv)

AILA stated that it appears from the language of the interim regulation that the licensure requirements at 8 CFR 214.6(d)(2)(iv) only apply to Mexican citizens and not to Canadian citizens since these requirements are listed under the heading "Classification of citizens of Mexico as TN professionals under the NAFTA." AILA stated that in fairness, the Service should apply equal requirements to both Canadian and Mexican citizens, and that, therefore, the Service should amend the interim rule accordingly. The Service agrees with the AILA that the licensure requirements for Canadian and Mexican citizens for purposes of temporary entry under the NAFTA should be, and notes that the requirements are, in fact, the same. In both instances, the Canadian or Mexico prospective TN professional must be in possession of the appropriate license, if required by law, to perform the duties of the profession in the location where the alien will be employed. Compare 8 CFR 214.6(d)(2) with 214.6(e)(3)(ii). The Service's discussion of the licensure requirements for Mexican citizens in a separate regulatory provision than those for Canadian citizens should in no way be interpreted to imply that there exist different licensure requirements for these two groups of person. The Service discusses classification of Mexican citizens as TN professionals separately from that of their Canadian counterparts for clarity of presentation and to reflect the fact that, at this time, a petition is required for Mexican citizens seeking TN classification, while no such requirement exists for Canadian citizens. See NAFTA Annex 1603(D)(5)(b); NAFTA Appendix 1603.D.4. Accordingly, Mexican citizen professionals must present evidence of licensure, if necessary to perform the intended duties of the profession, at a different stage of the process than their Canadian counterparts. For these reasons, the Service will not adopt AILA's suggestion.

Extension of Stay--8 CFR 214.6(h)(1) and (2)

The regulation requires the extensions of stay for TN nonimmigrant aliens be filed on Form I-129 at the Nebraska Service Center. AILA suggested that this provision be amended to allow Ports-of-Entry to adjudicate extensions of stay. The Service will not adopt this suggestion because the Service has been moving towards the centralized adjudication of all petitions and applications at service centers in order to better serve the public. Such centralization will ensure consistency in the decision-making process, and will ensure that all applications and petitions are adjudicated in a timely fashion throughout the country. Although the Service realizes that some aliens may be required to travel and leave the country on short notice, proper planning by the alien's employer should minimize disruption of the alien's employment. In addition, the Service has established a procedure at the Nebraska Center to expedite the processing of applications and petitions in those situations where the petitioner establishes a bona fide need for such action. Ports-of-Entry, therefore, will remain responsible for processing applicants for TN admission to the United States, but not for processing applications for extensions of stay.

Representation and Appearance--8 CFR Part 292

AILA suggested that 8 CFR 214.6 should be amended to specify that the provisions of 8 CFR part 292, which pertain to the representation of aliens who are in Service proceedings, apply to foreign consultants who enter the United States under the NAFTA. AILA stated that such a change "would enhance alien consumer protection from unscrupulous consultants who might seek to take advantage of aliens under the new TN program." The Service will not adopt this suggestion because 8 CFR part 292 clearly applies to all of Title 8 of the Code of Federal Regulations, including professionals admitted pursuant to 8 CFR 214.6, who may represent persons in proceedings before the Service. The Service believes that the provisions at 8 CFR part 292 are fully adequate to protect aliens from the actions of any unscrupulous legal consultants without needing to restate them in 8 CFR 214.6.

Regulatory Flexibility Act

The Commissioner of the Immigration and Naturalization Service, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed this regulation and by approving it certifies that the rule will not have a significant economic impact on a substantial number of small entities. This certification is made in light of the fact that this regulation substantially retained the standards for the admission of Canadians formerly provided for under the CFTA and those set forth in the interim rule. Moreover, under this regulation, only 5,500 petitions may initially be approved annually in behalf of citizens of Mexico seeking classification as TN professionals. Additionally, based on the Service's experience to date, it is anticipated that only a limited number of citizens of Mexico will seek classification as treaty traders and investors pursuant to this regulation.

Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local and tribal governments in the aggregate, or by the private sector, of $100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by section 804 of the Small Business Regulatory Enforcement Act of 1996. This rule will not result in an annual effect on the economy of $100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

Executive Order 12866

This rule is not considered by the Department of Justice, Immigration and Naturalization Service, to be a "significant regulatory action" under Executive Order 12866, section 3(f), Regulatory Planning and Review, and the Office of Management and Budget has waived its review process under section 6(a)(3)(A).

Executive Order 12612

The regulation adopted herein will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

Executive Order 12988 Civil Justice Reform

This final rule meets the applicable standards set forth in sections 3(a) and 3(b) of E.O. 12988.

List of Subjects

8 CFR Part 103

Administrative practice and procedure, Authority delegations (Government agencies), Freedom of information, Privacy, Reporting and record keeping requirements, Surety bonds.

8 CFR Part 212

Administrative practice and procedure, Aliens, Immigration, Passports and visas, Reporting and recordkeeping requirements.

8 CFR Part 214

Administrative practice and procedure, Aliens, Employment, Foreign Officials, Health professions, Reporting and recordkeeping requirements, Students.

8 CFR Part 235

Administrative practice and procedure, Aliens, Immigration, Reporting and recordkeeping requirements.

8 CFR Part 274a

Administrative practice and procedure, Aliens, Employment, Penalties, Reporting and recordkeeping requirements. Accordingly, the interim rule amending 8 CFR parts 103, 212, 214, 235, 274a, which was published at 58 FR 69205-69219 on December 30, 1993, is adopted as a final rule with the following changes:

PART 214--NONIMMIGRANT CLASSES

1. The authority citation for part 214 continues to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1182, 1184, 1186a, 1187, 1221, 1281, 1282; 8 CFR part 2.

2. Section 214.2 is amended by revising paragraph (e)(22), to read as follows:

§ 214.2 Special requirements for admission, extension, and maintenance of status.

(e) * * *

(22) Denial of treaty trader or treaty investor status to citizens of Canada or Mexico in the case of certain labor disputes. (i) A citizen of Canada or Mexico may be denied E treaty trader or treaty investor status as described in section 101(a)(15)(E) of the Act and section B of Annex 1603 of the NAFTA if:

(A) The Secretary of Labor certifies to or otherwise informs the Commissioner that a strike or other labor dispute involving a work stoppage of workers in the alien's occupational classification is in progress at the place where the alien is or intends to be employed; and

(B) Temporary entry of that alien may affect adversely either:

(1) The settlement of any labor dispute that is in progress at the place or intended place of employment, or

(2) The employment of any person who is involved in such dispute.

(ii) If the alien has already commenced employment in the United States and is participating in a strike or other labor dispute involving a work stoppage of workers, whether or not such strike or other labor dispute has been certified by the Secretary of Labor, or whether the Service has been otherwise informed that such a strike or labor dispute is in progress, the alien shall not be deemed to be failing to maintain his or her status solely on account of past, present, or future participation in a strike or other labor dispute involving a work stoppage of workers, but is subject to the following terms and conditions:

(A) The alien shall remain subject to all applicable provisions of the Immigration and Nationality Act, and regulations promulgated in the same manner as all other E nonimmigrants; and

(B) The status and authorized period of stay of such an alien is not modified or extended in any way by virtue of his or her participation in a strike or other labor dispute involving a work stoppage of workers.

(iii) Although participation by an E nonimmigrant alien in a strike or other labor dispute involving a work stoppage of workers will not constitute a ground for deportation, any alien who violates his or her status or who remains in the United States after his or her authorized period of stay has expired will be subject to deportation.

(iv) If there is a strike or other labor dispute involving a work stoppage of workers in progress, but such strike or other labor dispute is not certified under paragraph (e)(22)(i) of this section, or the Service has not otherwise been informed by the Secretary that such a strike or labor dispute is in progress, the Commissioner shall not deny entry to an applicant for E status.

3. Section 214.6 is amended by revising paragraph (b) to read as follows:

§ 214.6 Canadian and Mexican citizens seeking temporary entry to engage in business activities at a professional level.

(b) Definitions. As used in this section, the terms:

Business activities at a professional level means those undertakings which require that, for successful completion, the individual has a least a baccalaureate degree or appropriate credentials demonstrating status as a professional in a profession set forth in Appendix 1603.D.1 of the NAFTA.

Business person, as defined in the NAFTA, means a citizen of Canada or Mexico who is engaged in the trade of goods, the provision of services, or the conduct of investment activities.

Engage in business activities at a professional level means the performance of prearranged business activities for a United States entity, including an individual. It does not authorize the establishment of a business or practice in the United States in which the professional will be, in substance, self-employed. A professional will be deemed to be self-employed if he or she will be rendering services to a corporation or entity of which the professional is the sole or controlling shareholder or owner.

Temporary entry, as defined in the NAFTA, means entry without the intent to establish permanent residence. The alien must satisfy the inspecting immigration officer that the proposed stay is temporary. A temporary period has a reasonable, finite end that does not equate to permanent residence. In order to establish that the alien's entry will be temporary, the alien must demonstrate to the satisfaction of the inspecting immigration officer that his or her work assignment in the United States will end at a predictable time and that he or she will depart upon completion of the assignment.

* * * * *

August 13, 1997

Dated:

Signed

Doris Meissner,

Commissioner, Immigration
and Naturalization Service.

58 FR 69205

Department of Justice

Immigration and Naturalization Service

8 CFR Parts 103, 212, 214, 235, and 274a
(INS No. 1611-93)
RIN 1115-AB72

Temporary Entry of Business Persons Under the North American Free Trade Agreement (NAFTA)

Thursday, **December 30, 1993**

AGENCY: Immigration and Naturalization Service, Justice.
ACTION: Interim rule with request for comments.

SUMMARY: This rule implements provisions of the North American Free Trade Agreement (NAFTA) by amending the Immigration and Naturalization Service (Service) regulations to establish procedures for the temporary entry of Canadian and Mexican citizen business persons into the United States. This rule will facilitate temporary entry on a reciprocal basis among the United States, Canada, and Mexico, while recognizing the continued need to ensure border security, and to protect indigenous labor and permanent employment in all three countries.

DATES: The effective date is January 1, 1994. Written comments must be submitted on or before February 28, 1994.

ADDRESSES: Please submit written comments, in triplicate, to the Records Systems Division, Director, Policy Directives and Instructions Branch, Immigration and Naturalization Service, 425 I Street, NW., room 5307, Washington, DC 20536. To ensure proper handling, please reference INS number 1611-93 on your correspondence.

FOR FURTHER INFORMATION CONTACT:

Jacquelyn A. Bednarz, Chief, Nonimmigrant Branch, Immigration and Naturalization Service, 425 I Street, NW., room 7122, Washington, DC 20536, telephone (202) 514-5014.

SUPPLEMENTARY INFORMATION: On December 17, 1992, the Presidents of the United States and Mexico and the Prime Minister of Canada entered into the North American Free Trade Agreement (NAFTA). Implementation of this agreement has been provided for by the North American Free Trade Agreement Implementation Act (NAFTA Implementation Act), Public Law 103-182. The NAFTA Implementation Act was signed into law by the President of the United States on December 8, 1993. The NAFTA is currently set to enter into force on January 1, 1994.

This rule pertains to Canadian and Mexican citizen temporary visitors for business seeking classification under section 101(a)(15)(B) of the Immigration and Nationality Act (Act), to Canadian and Mexican citizen treaty traders and investors seeking classification under section 101(a)(15)(E) of the Act, to Canadian and Mexican citizen temporary workers seeking classification under section 101(a)(15)(L) of the Act, and to Canadian and Mexican citizens seeking classification for engagement in activities at a professional level under section 214(e) of the Act, as amended by section 341(b) of the NAFTA Implementation Act.

This rule establishes procedures for the temporary entry of Canadian and Mexican citizen business persons as provided in chapter 16 of the NAFTA and subtitle D of title III of the NAFTA Implementation Act. Chapter 16, subtitle D of title III, and this rule reflect the special trading relationship now established between the United States, Canada, and Mexico, and recognize the desirability of facilitating temporary entry on a reciprocal basis and of establishing transparent criteria and procedures for such temporary entry. At the same time, full recognition is given to the continued need to ensure border security while protecting the domestic labor force and permanent employment in all three countries.

The immigration-related provisions of the NAFTA are similar to those contained within the United States-Canada Free Trade Agreement (CFTA), which has been in force since January 1, 1989. The CFTA will be suspended when the NAFTA enters into force. The NAFTA provisions relate to the same four nonimmigrant classifications which were impacted by the CFTA: B-1, E, L-1, and Professional (previously designated TC for Canadian citizens under CFTA and redesignated TN for Canadian and Mexican citizens under NAFTA).

Section D of Annex 1603 of the NAFTA, however, permits the United States to establish a numerical limit with respect to professionals from Mexico for a transition period of up to ten years. Under Appendix 1603.D.4 of the NAFTA, beginning on the date of entry into force of the NAFTA, the numerical limit is set at 5,500 for such Trade Professionals annually. The United States and Mexico may mutually agree to increase the numerical limit or eliminate it entirely prior to the end of the ten year period.

Along with the numerical limit, citizens of Mexico who seek classification as a professional must do so on the basis of a petition filed by a United States employer. Before the employer may file the petition, it will be required to meet the labor attestation requirements of section 212(m) of the Act in the case of a registered nurse, and the application requirement of section 212(n) of the Act in the case of all other professionals set out in Appendix 1603.D.1 of the NAFTA.

Additionally, Article 1603 of the NAFTA states that each party to the agreement may refuse to issue an immigration document to a NAFTA business person where the temporary entry of that person may affect adversely the settlement of any labor dispute in progress at the place or intended place of employment, or if temporary entry would affect adversely the employment of any person involved in such dispute. The regulations relating to classification and admission of citizens of Canada and Mexico in the E, L-1, and Professional categories have been amended to reflect this provision. These provisions are designed to protect the domestic labor force of each signatory country.

Specific changes to 8 CFR are as follows:

8 CFR 103.1(f)(2)

Paragraphs (f)(2)(X) and (f)(2)(xxiii) of §103.1 have been amended to include within the appellate jurisdiction of the Associate Commissioner, Examinations, those petitions filed by United States employers in behalf of citizens of Mexico seeking classification as professionals under Appendix 1603.D.1 to Annex 1603 of the NAFTA.

8 CFR 103.7(b)

Section 103.7(b) is amended to allow for the entry of citizens of Canada to engage in business activities at a professional level pursuant to chapter 16 of the NAFTA, rather than pursuant to chapter 15 of the CFTA, which will be suspended with entry into force of the NAFTA. The processing fee to be remitted upon entry remains $50.00. It should be noted that no fee is to be remitted by a citizen of Canada who has been previously admitted in TC status and is seeking readmission to the United States in TN status for the remainder of the period authorized on Form I-94 (Arrival-Departure Record).

No fee is to be remitted by a citizen of Mexico who is entering to engage in business activities at a professional level.

8 CFR 212.1(1)

Section B to Annex 1603 of the NAFTA provides for the temporary entry of Canadian and Mexican citizens as treaty traders and investors. Section 341(a) of the NAFTA Implementation Act provides that such persons are considered to be classifiable as a nonimmigrant under section 101(a)(15)(E) of the Act. (Canadians were previously classifiable as treaty traders and investors under the CFTA.) Paragraph (1) is amended to replace the reference to the CFTA with a reference to the NAFTA. The requirement that an alien seeking admission as a treaty trader or investor be in possession of a nonimmigrant visa is maintained.

8 CFR 214.2(b)(1)

Section 214.2(b)(1) is amended to remove the language authorizing the admission in B-2 visitor status of the dependents of Canadian citizens admitted as TC professionals under the CFTA. A separate nonimmigrant visa classification has been established for the dependents of Professionals seeking entry under the NAFTA and has been designated TD (Trade Dependent).

8 CFR 214.2(b)(4)

Section 214.2(b)(4) is amended to provide for the entry in B-1 nonimmigrant classification of citizens of Mexico and Canada pursuant to Section A of Annex 1603 of the NAFTA. Additionally, Schedule 1 to Annex 1502.1 of the CFTA is replaced with Appendix 1603.A.1 to Annex 1603 of the NAFTA. Appendix 1603.A.1 is a list of business activities representative of a complete business cycle in which a B-1 business visitor seeking entry under the NAFTA may engage. Appendix 1603.A.1 is not an exhaustive list. Nothing precludes a citizen of Mexico or Canada from seeking entry to engage in traditional B-1 activities which are not included within

Appendix 1603.A.1., provided they meet all requirements for entry in such status, including restrictions on sources or remuneration.
Appendix 1603.A.1 as it is contained within paragraph (b)(4)(i) of this section is almost identical with Schedule 1. The language has been amended to include citizens of Mexico. It should be noted that, during the course of negotiations relating to the NAFTA immigration provisions, Mexico decided not to be a Party to the language involving temporary entry of customs brokers into the signatory countries. Therefore, Mexican citizen customs brokers are not referenced in Appendix 1603.A.1 nor are they included in this regulatory amendment. A citizen of Mexico is not, however, precluded from seeking entry into the United States in B-1 status to perform the functions of a customs broker, provided that the individual meets all existing requirements for B-1 admission.
Also, specific reference to the allowable activities of tour bus operators has been included at paragraph (b)(4)(i)(G)(6).

8 CFR 214.2(e)

A new paragraph (e)(3) sets in regulation the language regarding the denial of E treaty trader or investor classification to a citizen of Canada or Mexico in the case of certain labor disputes. Article 1603(2) of the NAFTA permits the United States to deny E classification where the temporary entry of the citizen of Canada or Mexico may affect adversely the settlement of a labor dispute or the employment of a person involved in such a dispute. A strike or other work stoppage of workers must be first certified to or otherwise be made known to the Attorney General by the Secretary of Labor before a citizen of Canada or Mexico seeking E classification maybe denied entry under this paragraph.
Regulations pertaining to the denial of issuance of E visas will be provided by the Department of State.
The Service is not, at this time, amending section 248 of this chapter relating to change of nonimmigrant classification. Citizens of Canada and Mexico are, however, classifiable as treaty traders and investors under the NAFTA and may, therefore, seek to change status to E-1 or E-2 classification while in the United States. If such change of status is granted to a citizen of Canada or Mexico and he or she subsequently departs the United States, he or she must obtain a valid E-1 or E-2 visa from a consular officer in order to seek reentry into the United States in that status.

8 CFR 214.2(1)(17)

Paragraph (1)(17)(i) is revised to limit the ports of entry which will accept and adjudicate Form I-129 (Petition for a Nonimmigrant Worker) filed in behalf of a Canadian citizen beneficiary seeking classification as an L-1 intracompany transferee. In order to provide more efficient service, it was decided to limit port adjudication of Form I-129 to those ports of entry located along the U.S.-Canadian border and at pre-flight/pre-clearance stations located in Canada. It is at these ports of entry where, since entry into force of the CFTA, the vast majority of Forms I-129 have been filed, rather than at ports along the U.S.-Mexican border or at international airports within the U.S. Also, most ports of entry along the U.S.-Canadian border have Free Trade Examiners on staff who have expertise in the adjudication of such forms.
It was determined to be more beneficial to the public to concentrate such adjudication along the U.S.-Canadian land border and at pre-flight stations within Canada. Those few individuals who would have filed a Form I-129 at either a port of entry on the U.S.-Mexican border or at an international airport located within the U.S. may do so with the Director of the appropriate Service Center.

8 CFR 212.2(1)(18)

A new paragraph (1)(18) has been added to provide for denial of L-1 classification for a citizen of Mexico or Canada if there is a labor dispute in progress at the place of current or intended employment. If a strike or work stoppage of workers has been certified by or otherwise made known by the Secretary of Labor to the Attorney General, the Service may deny a petition for L-1 classification, suspend an approved petition, or deny entry to a citizen of Canada or Mexico seeking L-1 classification at a port of entry.
A citizen of Canada or Mexico who has been admitted for employment in L-1 classification at a location where a labor dispute has been certified by the Secretary of Labor shall not be deemed to be failing to maintain status solely on account of participation in the strike or other labor dispute. Additionally, participation in a strike or work stoppage does not extend or modify in any way the L-1's period of authorized stay in the United States.

8 CFR 214.6
Section 214.6 was added to 8 CFR when the CFTA entered into force on January 1, 1989 and provided for the classification and admission of Canadian citizens seeking temporary entry to engage in business activities at a professional level. The classification was designated TC (Trade Canada). Chapter Sixteen of the NAFTA allows

citizens of Mexico to seek temporary entry to engage in business activities at a professional level as well as citizens of Canada. The nonimmigrant classification has been redesignated TN (Trade NAFTA), and specific requirements for citizens of Mexico have been set forth in this revision of §214.6. As with the CFTA, admission as a TN under this section does not imply that the citizen of Canada or Mexico would otherwise qualify as a professional under sections 101(a)(15)(H)(i) or 203(b)(3) of the Act.

Paragraph (a) is amended to replace the reference to the CFTA with reference to the NAFTA and include citizens of Mexico among those business persons who can seek entry to engage in business activities at a professional level.

Paragraph (b) contains definitions of terms used within §214.6. Definitions of the terms "business person", "business activities at a professional level", and "temporary entry" were not substantively modified except to replace references to the CFTA with the NAFTA. A new definition of the term "engage in business activities at a professional level" has been included and does not allow for entry in TN status of those business persons who are seeking entry to engage in self-employment. Such self-employment was never specifically addressed under the regulations promulgated by the Service in response to the CFTA.

Annex 1603, Section B, establishes the appropriate category of temporary entry for a Party citizen seeking to develop and direct investment operations in another Party country, while Annex 1603, Section D, provides for the entry of a Party citizen seeking to render professional level services for an entity in another Party country. As stated in the NAFTA Implementation Act Statement of Administrative Action at page 178, "Section D of Annex 1603 does not authorize a professional to establish a business or practice in the United States in which the professional will be self-employed." Canadian or Mexican citizens seeking to engage in self-employment in trade or investment activities in this country must seek classification under section 101(a)(15)(E) of the Act.

Paragraph (c) sets in regulation Appendix 1603.D.1 to Annex 1603 of the NAFTA which is a listing of occupations agreed upon by the three signatory countries. Appendix 1603.D.1 replaces Schedule 2 to Annex 1502.1 of the CFTA at 8 CFR 214.6(d)(2)(ii). A baccalaureate or Licenciatura degree is the minimum requirement for these professions unless an alternative credential is otherwise specified. In the case of a Canadian or Mexican citizen whose occupation does not appear on Appendix 1603.D.1 or who does not meet the transparent criteria specified, nothing precludes the filing of a petition for classification under another existing nonimmigrant classification.

A footnote to Appendix 1603.D.1 allows for temporary entry to perform training functions relating to any of the cited occupations or professions, including conducting seminars. However, these training functions must be conducted in the manner of prearranged activities performed for a United States entity and the subject matter to be proffered must be at a professional level. The training function does not allow for the entry of a business person to conduct seminars which do not constitute the performance of prearranged activities for a United States entity.

Paragraph (d) sets forth procedures for the classification of a citizen of Mexico as a TN professional under the NAFTA. Paragraphs (4) and (5) of Annex 1603(D) and of the NAFTA permit the establishment of an annual numerical limit on the number of persons seeking entry to engage in Appendix 1603.D.1 professions in the United States, with consideration given to raising the limit each year thereafter. Appendix 1603.D.4 of Annex 1603 sets the limit for the first year following entry into force of the NAFTA at 5,500 initial petitions for citizens of Mexico seeking TN classification.

Additionally, Annex 1603(D)(5) states that a Part, after establishing a numerical limit, may require the business person subject to the numerical limit to comply with other procedures in place for the temporary entry of professionals. It should be noted that, under Appendix 1604.D.4(3), the provisions of paragraphs (4) and (5) of Annex 1603(D) shall apply no longer than ten years after the date of entry into force of the NAFTA.

Paragraph (d)(1) requires the prospective United States employer of a Mexican citizen seeking classification as a TN to file a petition on Form I-129 with the Northern Service Center. This is the only Service Center designated by Headquarters Service Center Operations to accept Form I-129 filed on behalf of a citizen of Mexico seeking such classification. This limitation on filing will allow for specialization at the Northern Service Center and will improve adjudication efficiency.

Supporting documentation requirements are contained in paragraph (d)(2). Section 341(b)(5) of the NAFTA Implementation Act provides that, while the numerical limit is in place for citizens of Mexico, entry of such persons shall be subject to the attestation requirements of section 212(m) of the Act, in the case of a registered nurse, or the application requirement of section 212(n) of the Act, in the case of all other professionals set out in Appendix 1603.D.1 of Annex 1603 of the NAFTA. Therefore, Form I-129 shall be filed in conjunction with evidence that the employer has filed with the Secretary of Labor either Form ETA 9029 in the case of a registered nurse, or Form ETA 9035 in the case of all other Appendix 1603.D.1 professionals.

Additionally, the employer must submit evidence that the beneficiary meets the minimum education requirements or alternative credentials requirements set forth in Appendix 1603.D.1. The regulation requires that degrees, diplomas, or certificates received by the beneficiary from an educational institution located outside of the United States, Canada, or Mexico must be accompanied by an evaluation by a reliable credentials

evaluation service which specializes in such evaluations. Experiential evidence should be in the form of letters from former employers. If the beneficiary was formerly self-employed, business records should be submitted attesting to that self-employment.

Also, the petition must be accompanied by a separate statement from the United States employer specifically stating the Appendix 1603.D.1 profession in which the beneficiary will be engaging and giving a detailed description of the duties to be performed on a regular basis by the beneficiary. The Appendix 1603.D.1 profession is to be specifically set forth so that it may be noted for statistical purposes and to provide for more accurate adjudication of the petition in light of the proposed job duties.

Evidence of appropriate licensure must accompany the petition if the beneficiary will be engaging in an occupation or profession for which the particular state or locality has set forth licensing requirements.

The remainder of paragraph (d) contains Service procedural requirements relating to the approval, validity, denial, revocation and appeal of a petition. A petition classifying a citizen of Mexico as a TN professional may be approved for up to one year. Full appeal rights through the Administrative Appeals Unit are available to the petitioner in the case of a petition denial.

Finally, paragraph (d) sets forth the procedures for maintenance of the annual numerical limitation of 5,500 petition approvals for citizens of Mexico seeking TN classification.

Paragraph (e) sets forth the procedures for the classification of a citizen of Canada as a TN professional under the NAFTA. The requirements of this paragraph are substantially similar to those previously contained in §214.6 (c) and (d). References to the CFTA have been replaced with references to the NAFTA and the TC nonimmigrant classification has been replaced by the TN classification.

The documentary requirements at paragraph (e)(3)(ii) have been revised to more clearly state what is required to be included in the documentation provided to the TN applicant by the alien's United States employer or the alien's foreign employer, in the case of a Canadian citizen who is seeking entry in TN status to provide prearranged services to a United States entity. Specifically, the documentation must state the Appendix 1603.D.1 profession in which the applicant will be engaging and a description of his or her professional activities, including a brief summary of the daily job duties to be performed. As with the Mexican TN, educational credentials obtained outside of the United States, Canada, or Mexico shall be accompanied by an evaluation by a qualified credentials evaluator. Also, if state or local licensing requirements are in place for the professional activity in which the Canadian citizen will be engaging, evidence must be provided that those licensing requirements have been met prior to application for admission.

Paragraph (f) sets forth the procedures for admission of Canadian and Mexican citizens in TN classification. The Canadian citizen shall be required to remit the fee prescribed in 8 CFR 103.7 upon admission. That fee has been $50.00 (U.S) since implementation of the CFTA and will not be raised at this time. The applicant will be given a Service fee receipt and a Form I-94 showing admission in the classification TN for the period requested up to one year. The Form I-94 shall bear the legend "multiple entry". (Additional requirements relating to issuance of Form I-94 are contained in §235.1(f), discussed below.)

Citizens of Mexico seeking admission in TN classification are required to present a valid TN visa issued by a United States consular officer. The maintenance of visa requirements by parties to the Agreement is authorized in Annex 1603(D)(3) of the NAFTA. In addition to the visa requirement, the Mexican citizen shall present at the time of application for initial admission a copy of the employer's statement described in this section at paragraph (d)(2)(iii). Presentation of this statement is required to facilitate the inspection procedure.

An applicant for admission as a TN professional shall be treated as if seeking classification as a nonimmigrant pursuant to section 101(a)(15) of the Act and, therefore, the presumption of immigrant intent applicable through section 214(b) of the Act shall apply to that citizen of Canada or Mexico seeking such classification. At the time of application for entry, the citizen of Canada or Mexico will be subject to inspection to determine the applicability of section 214(b) of the Act to that applicant.

Paragraph (g) provides for the readmission to the United States of Canadian and Mexican citizens in TN status. Readmission procedures for Canadian citizens have not been amended. The citizen of Mexico who is in possession of a valid Form I-94 may be readmitted for the remainder of the time authorized provided that the original intended professional activities and employer(s) have not changed and should retain possession of that original Form I-94. If no longer in possession of a valid Form I-94 (e.g., a citizen of Mexico seeking readmission upon return from a business trip to Europe), the citizen of Mexico may be readmitted upon presentation of a valid TN visa and evidence of prior admission. That evidence of prior admission may include, but is not limited to, a Service fee receipt from a prior entry or an admission stamp in the applicant's passport. Upon readmission, a new I-94 shall be issued bearing the legend "multiple entry".

Paragraph (h) contains the procedures to be followed if the citizen of Mexico or Canada wishes to apply for an extension of his or her stay in TN status. A citizen of Mexico seeking an extension of stay in the United States in TN status shall be applied for on Form I-129 to the Northern Service Center. Documentary requirements include evidence that Department of Labor certification requirements continue to be met by the employer. Provision is included for consular notification should the applicant leave the United States during the pendency of the

application. A petition extension and extension of the applicant's stay may be granted for up to one year.
A citizen of Canada may seek an extension of stay through the filing of Form I-129 to the Northern Service Center. No Department of Labor certification requirements apply to a Canadian citizen in TN status who is seeking to extend that status. Provision is made for port of entry notification should the applicant depart the United States during the pendency of the application. An extension may be granted for up to one year.
Additionally, a citizen of Canada is not precluded from departing the United States and applying for admission with documentation from a United States employer or foreign employer, in the case of a Canadian citizen who is seeking to provide prearranged services at a profession level to a United States entity, which specifies that the applicant will be employed in the United States for an additional period of time. The evidentiary requirements set forth in paragraph (e)(3) shall be met by the applicant and the fee prescribed in 8 CFR 103.7 shall be remitted upon admission.
At the present time, there is no specified upper limit on the number of years a citizen of Mexico or Canada may remain in the United States in TN classification, as there is with most of the other nonimmigrant classes contained within section 101(a)(15) of the Act. However, section 214(b) of the Act is applicable to citizens of Canada or Mexico who seek an extension of stay in TN status and applications for extension or readmission must be examined in light of this statutory provision.
Paragraph (i) allows the Canadian or Mexican citizen to change or add employers while in the United States through the filing of a Form I-129 to the Northern Service Center. Also, the Canadian citizen may depart the United States and apply for reentry for the purpose of obtaining additional employment authorization with a new or an additional employer. Documentary requirements are prescribed in paragraph (e)(3)(ii) and the prescribed fee must be remitted upon admission.
Paragraph (j) provides for the admission of spouses and minor children who are accompanying or following to join TN professionals. They are to be accorded admission in TD (Trade Dependent) classification and are required to present a valid, unexpired nonimmigrant visa unless otherwise exempt under 8 CFR 212.1. For purposes of clarification, those persons who are normally exempt from nonimmigrant visa requirements include citizens of Canada and residents (Landed Immigrants) of Canada having a common nationality with Canadian citizens (British Commonwealth citizens).
No fee is required for the admission of dependents in TD status and they are to be issued a Form I-94 bearing the legend "multiple entry". Spouses and minor children are not authorized to accept employment while they are in the United States in TD status. If a TD dependent wishes to be employed, he or she must independently seek change of status to an employment-authorized nonimmigrant classification. Dependents in TD status may attend school in the United States on a full-time basis, as such attendance is deemed to be incidental to their purpose for being in the United States, which is to accompany the TN alien.
Paragraph (k) provides for denial of TN classification of a citizen of Canada or Mexico if there is a labor dispute in progress at the place of current or intended employment. This provision is substantively identical to that which is applicable to the Canadian or Mexican L-1 applicant cited at 8 CFR 214.2(1)(18) and discussed above.
Paragraph (l) provides for automatic conversion from TC to TN classification for Canadian citizen professionals in TC classification as of January 1, 1994, as well as automatic conversion from B-2 to TD classification for the spouses and unmarried minor children of such TC nonimmigrants as of the effective date of the NAFTA Implementation Act. In addition, beginning on January 1, 1994, TC principal aliens and their B-2 spouses and unmarried minor children will be readmitted in TN or TD classification respectively, without being required to submit additional paperwork or payment of the normal application fee for the remainder of the period authorized on their Form I-94. TC or B-2 spouses and minor children seeking to extend their stay beyond this period are required to comply with the normal filing requirements of paragraph (h), including submission of appropriate paperwork and the prescribed application fee. This paragraph also provides that any applications for extension of stay in TC or B-2 classification as the spouse of a TC nonimmigrant which are pending on January 1, 1994 will be treated as if they were for TN or TD classification respectively.
Paragraph (l) specifically makes unavailable these transitional benefits to Canadian professionals who were admitted in TC classification in order to engage in self-employment in a business or practice in this country, and to their B-2 spouses and/or children. Although such self-employment was never specifically addressed in the regulations promulgated by the Service in response to the CFTA, the NAFTA Implementation Act Statement of Administrative Action at page 178 clarifies that, "It should be noted that while there are many similarities between this NAFTA category and the categories relating to professionals set out in INA section 101(a)(15), a determination of admissibility under the NAFTA neither forecloses nor establishes eligibility for entry under such other categories. Further, Section D of Annex 1603 does not authorize a professional to establish a business or practice in the United States in which the professional will be self-employed." Consistent with the intent of the signatories of the CFTA and NAFTA, the interim regulation specifically precludes readmitting Canadian professionals who were previously admitted in TC classification from engaging in self-employment and from extending their stay in TC or TN (or in the case of spouses and/or children, B- 2 or TD) nonimmigrant classification. Canadian citizens seeking to engage in trade or investment activities in this country under the

NAFTA Implementation Act must do so pursuant to section 101(a)(15)(E) of the Act.

235.1(d)

A new paragraph (d)(8) has been added to provide for the denial of entry in E, L-1, or TN status of any citizen of Canada if the Secretary of Labor has certified to or otherwise informed the Commissioner that a strike or work stoppage of workers is occurring at the place of current or intended employment and the temporary entry of the applicant would affect adversely either settlement of the labor dispute or the employment of any person involved in the dispute. Additionally, the paragraph requires notification in writing to the applicant of the reason(s) for the refusal. Also, a designated representative of the applicant's home country government must be promptly notified in writing of the reasons for the refusal.
Additional instructions will be forthcoming from the Service regarding the appropriate methods and channels for notification of Party governments.

8 CFR 235.1(f)

Paragraph (f)(1) has been amended to include specific requirements regarding the completion of Form I-94 issued to a citizen of Canada or Mexico in TN status. Specifically, item 18 on the reverse of Form I-94 must be completed and the occupation stated must be contained within Appendix 1603.D.1 of Annex 1603 of the NAFTA. This requirement reflects the need to collect and maintain accurate statistics for reporting purposes to both the United States Congress and signatory governments.
Also, the name of the TN nonimmigrant's employer must be endorsed on both the Arrival and Departure portions of Form I-94 in order to comport with the requirements of section 274A of the Act.

8 CFR 274a.12(b) (19) and (20)

Paragraph (b)(19) is amended to include citizens of Mexico and Canada engaged in business activities at a professional level pursuant to Chapter 16 or the NAFTA to the classes of aliens authorized employment with a specific employer incident to status. Paragraph (b)(20) is amended to provide employment authorization to a citizen of Canada or Mexico in TN status in whose behalf an application for extension of stay has been timely filed.
The Service's implementation of this rule as an interim rule, with provisions for post-promulgation public comment, is based upon the "good cause" exceptions found at 5 U.S.C. 553 (b)(B) and (d)(3). The reasons and the necessity for immediate implementation of this interim rule without prior notice and comment are as follows:
The NAFTA Implementation Act was signed by the President on December 8, 1993 and the NAFTA goes into force on January 1, 1994. There is a clear necessity for immediate implementation of this provision so that the admission to the United States of Canadian and Mexican citizen business persons pursuant to Chapter 16 of the NAFTA may be facilitated by this Service on the date of entry into force of the Agreement. Under these circumstances, providing a notice and comment period in advance of publication of this interim rule would have been impracticable and contrary to Congressional intent. It is imperative that this interim rule become effective on January 1, 1994 so that those persons who are entitled to the benefits of the NAFTA Implementation Act may apply accordingly.
In accordance with 5 U.S.C. 605(b), the Commissioner of the Immigration and Naturalization Service certifies that this rule will not have a significant adverse economic impact on a substantial number of small entities. This certification is made in light of the fact that the regulation substantially retains current standards for the admission of Canadians formerly provided for under the CFTA, and that, under this regulation, only 5,500 petitions may initially be approved annually in behalf of citizens of Mexico seeking classification as TN professionals. Additionally, it is anticipated that only a limited number of citizens of Mexico will seek classification as treaty traders and investors pursuant to this regulation. For the same reasons, this is not considered a "significant regulatory action" under Executive Order 12866. Further, this rule does not have Federalism implications warranting the preparation of a Federal Assessment in accordance with Executive Order 12612.
The information collection requirements contained in this rule have been cleared by the Office of Management and Budget (OMB) in accordance with the Paperwork Reduction Act and are cited under 8 CFR 299.5, Display of Control Numbers.
The additional instructions for Form I-129 are printed at the end of this regulation.

List of Subjects

8 CFR Part 103

Administrative practice and procedure, Authority delegations (Government agencies), Freedom of information, Privacy, Reporting and recordkeeping requirements, Surety bonds.

8 CFR Part 212

Administrative practice and procedure, Aliens, Immigration, Passports and visas, Reporting and recordkeeping requirements.

8 CFR Part 214

Administrative practice and procedure, Aliens, Employment, Foreign officials, Health professions, Reporting and recordkeeping requirements, Students.

8 CFR Part 235

Administrative practice and procedure, Aliens, Immigration, Reporting and recordkeeping requirements.

8 CFR Part 274a

Administrative practice and procedure, Aliens, Employment, Penalties, Reporting and recordkeeping requirements.
Accordingly, chapter I of title 8 of the Code of Federal Regulations is amended as follows:

PART 103--POWERS AND DUTIES OF SERVICE OFFICERS; AVAILABILITY OF SERVICE RECORDS

1. The authority citation for part 103 continues to read as follows:

Authority: 5 U.S.C. 552, 552(a); 8 U.S.C. 1101, 1103, 1201, 1252 note, 1252b, 1304, 1356; 31 U.S.C. 9701; E.O. 12356, 47 FR 14874, 15557, 3 CFR, 1982 Comp., p. 166; 8 CFR part 2.

2. In §103.1, paragraph (f)(2) (x) and (xxiii) are revised to read as follows:

§103.1 Delegations of authority.
* * * * *
(f) * * *
(2) * * *
(x) Petitions for temporary workers or trainees and fiancées or fiancés of U.S. citizens under §§214.2 and 214.6 of this chapter;
* * * * *
(xxiii) Revoking approval of certain petitions, as provided in §§214.2 and 214.6 of this chapter;
* * * * *
3. In §103.7, paragraph (b)(1) is amended by revising the entry "Request", the third time it is listed, to read as follows:

§103.7 Fees.

* * * * *
(b) * * *
(1) * * *
Request. For classification of a citizen of Canada to be engaged in business activities at a professional level pursuant to section 214(e) of the Act (Chapter 16 of the North American Free Trade Agreement)--$50.00
* * * * *

PART 212--DOCUMENTARY REQUIREMENTS: NONIMMIGRANTS; WAIVERS; ADMISSION OF CERTAIN INADMISSIBLE ALIENS; PAROLE

4. The authority citation for part 212 continues to read as follows:

Authority: 8 U.S.C. 1101, 1102, 1103, 1182, 1184, 1225, 1226, 1228, 1252; 8 CFR part 2.

5. In §212.1, paragraph (1) is revised to read as follows:

§212.1 Documentary requirements for nonimmigrants.

* * * * *
(1) Treaty traders and investors. Notwithstanding any of the provisions of this part, an alien seeking admission as a treaty trader or investor under the provisions of Chapter 16 of the North American Free Trade Agreement (NAFTA) pursuant to section 101(a)(15)(E) of the Act, shall be in possession of a nonimmigrant visa issued by an American consular officer classifying the alien under that section.
* * * * *

PART 214--NONIMMIGRANT CLASSES
6. The authority citation for part 214 continues to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1182, 1184, 1186a, 1187, 1221, 1281, 1282; 8 CFR part 2.

7. Section 214.2 is amended by:
a. Revising paragraphs (b)(1) and (b)(4);
b. Adding a new paragraph (e)(3);
c. Revising paragraph (l)(17) heading;
d. Revising paragraph (l)(17)(i); and by
e. Adding a new paragraph (l)(18), to read as follows:

§214.2 Special requirements for admission, extension, and maintenance status.

* * * * *
(b) Visitors--(1) General. any B-1 visitor for business or B-2 visitor for pleasure may be admitted for not more than one year and may be granted extensions of temporary stay in increments of not more than six months each, except that alien members of a religious denomination coming temporarily and solely to do missionary work in behalf of a religious denomination may be granted extensions of not more than one year each, provided that such work does not involve the selling of articles or the solicitation or acceptance of donations. Those B-1 and B-2 visitors admitted pursuant to the waiver provided at §212.1(e) of this chapter may be admitted to and stay on Guam for period not to exceed fifteen days and are not eligible for extensions of stay.
* * * * *
(4) Admission of aliens pursuant to the North American Fee Trade Agreement (NAFTA). A citizen of Canada or Mexico seeking temporary entry for purposes set forth in paragraph (b)(4)(i) of this section, who otherwise meets existing requirements under section 101(a)(15)(B) of the Act, including but not limited to requirements regarding the source of remuneration, shall be admitted upon presentation of proof of such citizenship in the case of Canadian applicants, and valid entry documents such as a passport and visa or Mexican Border Crossing Card (Form I-186 or I-586) in the case of Mexican applicants, a description of the purpose of entry, and evidence demonstrating that he or she is engaged in one of the occupations or professions set forth in paragraph (b)(4)(i) of this section. Existing requirements, with respect to Canada, are those requirements which were in effect at the time of entry into force of the CFTA and, with respect to Mexico, are those requirements which are in effect at the time of entry into force of the NAFTA. Additionally, nothing shall preclude the admission of a citizen of Mexico or Canada who meets the requirements of paragraph (b)(4)(ii) of this section.
(i) Occupations and professions set forth in Appendix 1603.A.1 to Annex 1603 of the NAFTA.--(A) Research and design. Technical scientific and statistical researchers conducting independent research or research for an enterprise located in the territory of another Party.
(B) Growth, manufacture and production (1) Harvester owner supervising a harvesting crew admitted under applicable law. (Applies only to harvesting of agricultural crops: Grain, fiber, fruit and vegetables.)
(2) Purchasing and production management personnel conducting commercial transactions for an enterprise located in the territory of another Party.
(C) Marketing. (1) Market researchers and analyst conducting independent research or analysis, or research or analysis for an enterprise located in the territory of another Party.
(2) Trade fair and promotional personnel attending a trade convention.
(D) Sales. (1) 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.
(2) Buyers purchasing for an enterprise located in the territory of another Party.
(E) Distribution. (1) Transportation operators transporting goods or passengers to the United States from the territory of another Party or loading and transporting goods or passengers from the United States to the territory

of another Party, with no unloading in the United States, to the territory of another Party. (These operators may make deliveries in the United States if all goods or passengers to be delivered were loaded in the territory of another Party. Furthermore, they may load from locations in the United States if all goods or passengers to be loaded will be delivered in the territory of another Party. Purely domestic service or solicitation, in competition with the United States operators, is not permitted.)
(2) Customs brokers performing brokerage duties associated with the export of goods from the United States to or through Canada.
(F) After-sales service. Installers, repair and maintenance personnel, and supervisors, possessing specialized knowledge essential to the 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 United States, during the life of the warranty or service agreement. (For the purposes of this provision, the commercial or industrial equipment or machinery, including computer software, must have been manufactured outside the United States.)
(G) General service. (1) Professionals engaging in a business activity at a professional level in a profession set out in Appendix 1603.D.1 to Annex 1603 of the NAFTA, but receiving no salary or other remuneration from a United States source (other than an expense allowance or other reimbursement for expenses incidental to the temporary stay) and otherwise satisfying the requirements of Section A to Annex 1063 of the NAFTA.
(2) Management and supervisory personnel engaging in commercial transactions for an enterprise located in the territory of another Party.
(3) Financial services personnel (insurers, bankers or investment brokers) engaging in commercial transactions for an enterprise located in the territory of another Party.
(4) Public relations and advertising personnel consulting with business associates, or attending or participating in conventions.
(5) 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. (The tour may begin in the United States; but must terminate in foreign territory, and a significant portion of the tour must be conducted in foreign territory. In such a case, an operator may enter the United States with an empty conveyance and a tour guide may enter on his or her own and join the conveyance.)
(6) Tour bus operators entering the United States:
(i) With a group of passengers on a bus tour that has begun in, and will return to, the territory of another Party.
(ii) 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.
(iii) With a group of passengers on a bus tour to be unloaded in the United States and returning with no passengers or reloading with the group for transportation to the territory of another Party.
(7) Translators or interpreters performing services as employees of an enterprise located in the territory of another Party.
(ii) Occupations and professions not listed in Appendix 1603.A.1 to Annex 1603 of the NAFTA. Nothing in this paragraph shall preclude a business person engaged in an occupation or profession other than those listed in Appendix 1603.A.1 to Annex 1603 of the NAFTA from temporary entry under section 101(a)(15)(B) of the Act, if such person otherwise meets the existing requirements for admission as prescribed by the Attorney General.
* * * * *
(e) * * *
(3) Denial of treaty trader or investor status to citizens of Canada or Mexico in the case of certain labor disputes. A citizen of Canada or Mexico may be denied E treaty trader or investor status as described in section 101(a)(15)(E) of the Act and section B of Annex 1603 of the NAFTA if:
(i) The Secretary of Labor certifies to or otherwise informs the Commissioner that a strike or other labor dispute involving a work stoppage of workers is in progress at the place where the alien is or intends to be employed; and
(ii) Temporary entry of that alien may affect adversely either:
(A) The settlement of any labor dispute that is in progress at the place or intended place of employment, or
(B) The employment of any person who is involved in such dispute.
* * * * *
(l) * * *
(17) Filing of individual petitions and certifications under blanket petitions for citizens of Canada under the North American Free Trade Agreement (NAFTA). (i) Individual petitions. Except as provided in paragraph (1)(2)(ii) of this section (filing of blanket petitions), a United States or foreign employer seeking to classify a citizen of Canada as an intracompany transferee may file an individual petition in duplicate on Form I-129 in conjunction with an application for admission of the citizen of Canada. Such filing may be made with an immigration officer at a Class A port of entry located on the United States-Canada land border or at a United States pre-

clearance/pre-flight station in Canada. The petitioning employer need not appear, but Form I-129 must bear the authorized signature of the petitioner.
* * * * *
(18) Denial of intracompany transferee status to citizens of Canada or Mexico in the case of certain labor disputes. (i) If the Secretary of Labor certifies to or otherwise informs the Commissioner that a strike or other labor dispute involving a work stoppage of workers is in progress where the beneficiary is to be employed, and the temporary entry of the beneficiary may affect adversely the settlement of such labor dispute or the employment of any person who is involved in such dispute, a petition to classify a citizen of Mexico or Canada as an L-1 intracompany transferee may be denied. If a petition has already been approved, but the alien has not yet entered the United States, or has entered the United States but not yet commenced employment, the approval of the petition may be suspended, and an application for admission on the basis of the petition may be denied.
(ii) If there is a strike or other labor dispute involving a work stoppage of workers in progress, but such strike or other labor dispute is not certified under paragraph (l)(18)(i) of this section, or the Service has not otherwise been informed by the Secretary that such a strike or labor dispute is in progress, the Commissioner shall not deny a petition or suspend an approved petition.
(iii) If the alien has already commended employment in the United States under an approved petition and is participating in a strike or other labor dispute involving a work stoppage of workers, whether or not such strike or other labor dispute has been certified by the Department of Labor, the alien shall not be deemed to be failing to maintain his or her status solely on account of past, present, or future participation in a strike or other labor dispute involving a work stoppage of workers, but is subject to the following terms and conditions.
(A) The alien shall remain subject to all applicable provisions of the Immigration and Nationality Act, and regulations promulgated in the same manner as all other L nonimmigrants;
(B) The status and authorized period of stay of such an alien is not modified or extended in any way by virtue of his or her participation in a strike or other labor dispute involving work stoppage of workers; and
(C) Although participation by an L nonimmigrant alien in a strike or other labor dispute involving a work stoppage of workers will not constitute a ground for deportation, any alien who violates his or her status or who remains in the United States after his or her authorized period of stay has expired will be subject to deportation.
* * * * *
8. Section 214.6 is revised to read as follows:

§214.6 Canadian and Mexican citizens seeking temporary entry to engage in business activities at a professional level.

(a) General. Under section 214(e) of the Act, a citizen of Canada or Mexico who seeks temporary entry as a business person to engage in business activities at a professional level may be admitted to the United States in accordance with the North American Free Trade Agreement (NAFTA).
(b) Definitions. As used in this section the terms:
Business activities at a professional level means those undertakings which require that, for successful completion, the individual has at least a baccalaureate degree or appropriate credentials demonstrating status as a professional.
Business person, as defined in the NAFTA, means a citizen of Canada or Mexico who is engaged in the trade of goods, the provision of services, or the conduct of investment activities.
Engage in business activities at a professional level means the performance of prearranged business activities for a United States entity, including an individual. It does not authorize the establishment of a business or practice in the United States in which the professional will be self-employed.
Temporary entry, as defined in the NAFTA, means entry without the intent to establish permanent residence.
(c) Appendix 1603.D.1 to Annex 1603 of the NAFTA. Pursuant to the NAFTA, an applicant seeking admission under this section shall demonstrate business activity at a professional level in one of the professions set forth in Appendix 1603.D.1 to Annex 1603. The professions in Appendix 1603.D.1 and the minimum requirements for qualification for each are as follows: [FN1]

Appendix 1603.D.1 (Annotated)

--Accountant--Baccalaureate or Licenciatura Degree; or C.P.A., C.A., C.G.A., or C.M.A.

FN1 A business person seeking temporary employment under this Appendix may also perform training functions relating to the profession, including conducting seminars.
--Architect--Baccalaureate or Licenciatura Degree; or state/provincial license. [FN2]

FN2 The terms "state/provincial license" and "state/provincial/federal license" mean any document issued by a state, provincial, or federal government, as the case may be, or under its authority, but not by a local government, that permits a person to engage in a regulated activity or profession.
--Computer Systems Analyst--Baccalaureate or Licenciatura Degree; or Post- Secondary Diploma [FN3] or Post Secondary Certificate [FN4] and three years' experience.

FN3 "Post Secondary Diploma" means a credential issued, on completion of two or more years of post secondary education, by an accredited academic institution in Canada or the United States.

FN4 "Post Secondary Certificate" means a certificate issued, on completion of two or more years of post secondary education at an academic institution, by the federal government of Mexico or a state government in Mexico, an academic institution recognized by the federal government or a state government, or an academic institution created by federal or state law.
--Disaster relief insurance claims adjuster (claims adjuster employed by an insurance company located in the territory of a Party, or an independent claims adjuster)--Baccalaureate or Licenciatura Degree and successful completion of training in the appropriate areas of insurance adjustment pertaining to disaster relief claims; or three years experience in claims adjustment and successful completion of training in the appropriate areas of insurance adjustment pertaining to disaster relief claims.
--Economist--Baccalaureate or Licenciatura Degree.
--Engineer--Baccalaureate or Licenciatura Degree; or state/provincial license.
--Forester--Baccalaureate or Licenciatura Degree; or state/provincial license.
--Graphic Designer--Baccalaureate or Licenciatura Degree; or Post-Secondary Diploma or Post-Secondary Certificate and three years experience.
--Hotel Manager--Baccalaureate or Licenciatura Degree in hotel/restaurant management; or Post-Secondary Diploma or Post Secondary Certificate in hotel/restaurant management and three years experience in hotel/restaurant management.
--Industrial Designer--Baccalaureate or Licenciatura Degree; or Post-Secondary Diploma or Post Secondary Certificate, and three years experience.
--Interior Designer--Baccalaureate or Licenciatura Degree or Post- Secondary Diploma or Post-Secondary Certificate, and three years experience.
--Land Surveyor--Baccalaureate or Licenciatura Degree or state/provincial/federal license.
--Landscape Architect--Baccalaureate or Licenciatura Degree.
--Lawyer (including Notary in the province of Quebec)--L.L.B., J.D., L.L.L., B.C.L., or Licenciatura degree (five years); or membership in a state/provincial bar.
--Librarian--M.L.S., or B.L.S. (for which another Baccalaureate or Licenciatura Degree was a prerequisite).
--Management Consultant--Baccalaureate or Licenciatura Degree; or equivalent professional experience as established by statement or professional credential attesting to five years experience as a management consultant, or five years experience in a field of specialty related to the consulting agreement.
--Mathematician (including Statistician)--Baccalaureate or Licenciatura Degree.
--Range Manager/Range Conservationist--Baccalaureate or Licenciatura Degree.
--Research Assistant (working in a post-secondary educational institution)-- Baccalaureate or Licenciatura Degree.
Scientific Technician/Technologist [FN5]--Possession of (a) theoretical knowledge of any of the following disciplines: agricultural sciences, astronomy, biology, chemistry, engineering, forestry, geology, geophysics, meteorology, or physics; and (b) the ability to solve practical problems in any of those disciplines, or the ability to apply principles of any of those disciplines to basic or applied research.

FN5 A business person in this category must be seeking temporary entry for work in direct support of professionals in agricultural sciences, astronomy, biology, chemistry, engineering, forestry, geology, geophysics, meteorology or physics.
--Social Worker--Baccalaureate or Licenciatura Degree.
--Sylviculturist (including Forestry Specialist)--Baccalaureate or Licenciatura Degree.
--Technical Publications Writer--Baccalaureate or Licenciatura Degree, or Post- Secondary Diploma or Post-Secondary Certificate, and three years experience.
--Urban Planner (including Geographer)--Baccalaureate or Licenciatura Degree.
--Vocational Counselor--Baccalaureate or Licenciatura Degree.

Medical/Allied Professionals

--Dentist--D.D.S., D.M.D., Doctor en Odontologia or Doctor en Cirugia Dental or state/provincial license.

--Dietitian--Baccalaureate or Licenciatura Degree; or state/provincial license.
--Medical Laboratory Technologist (Canada)/Medical Technologist (Mexico and the United States) [FN6]--Baccalaureate or Licenciatura Degree; or Post-Secondary Diploma or Post-Secondary Certificate, and three years experience.

FN6 A business person in this category must be seeking temporary entry to perform in a laboratory chemical, biological, hematological, immunologic, microscopic or bacteriological tests and analyses for diagnosis, treatment, or prevention of diseases.
--Nutritionist--Baccalaureate or Licenciatura Degree.
--Occupational Therapist--Baccalaureate or Licenciatura Degree; or state/provincial license.
--Pharmacist--Baccalaureate or Licenciatura Degree; or state/provincial license.
--Physician (teaching or research only)--M.D. Doctor en Medicina; or state/provincial license.
--Physiotherapist/Physical Therapist--Baccalaureate or Licenciatura Degree; or state/provincial license.
--Psychologist--state/provincial license; or Licenciatura Degree.
--Recreational Therapist-Baccalaureate or Licenciatura Degree.
--Registered nurse--state/provincial license or Licenciatura Degree.
--Veterinarian--D.V.M., D.M.V., or Doctor en Veterinaria; or state/provincial license.
--SCIENTIST
--Agriculturist (including Agronomist)--Baccalaureate or Licenciatura Degree.
--Animal Breeder--Baccalaureate or Licenciatura Degree.
--Animal Scientist--Baccalaureate or Licenciatura Degree.
--Apiculturist--Baccalaureate or Licenciatura Degree.
--Astronomer--Baccalaureate or Licenciatura Degree.
--Biochemist--Baccalaureate or Licenciatura Degree.
--Biologist--Baccalaureate or Licenciatura Degree.
--Chemist--Baccalaureate or Licenciatura Degree.
--Dairy Scientist--Baccalaureate or Licenciatura Degree.
--Entomologist--Baccalaureate or Licenciatura Degree.
--Epidemiologist--Baccalaureate or Licenciatura Degree.
--Geneticist--Baccalaureate or Licenciatura Degree.
--Geochemist--Baccalaureate or Licenciatura Degree.
--Geologist--Baccalaureate or Licenciatura Degree.
--Geophysicist (including Oceanographer in Mexico and the United States)-- Baccalaureate or Licenciatura Degree.
--Horticulturist--Baccalaureate or Licenciatura Degree.
--Meteorologist--Baccalaureate or Licenciatura Degree.
--Pharmacologist--Baccalaureate or Licenciatura Degree.
--Physicist (including Oceanographer in Canada--Baccalaureate or Licenciatura Degree.
--Plant Breeder--Baccalaureate or Licenciatura Degree.
--Poultry Scientist--Baccalaureate or Licenciatura Degree.
--Soil Scientist--Baccalaureate or Licenciatura Degree.
--Zoologist--Baccalaureate or Licenciatura Degree.
--TEACHER
--College--Baccalaureate or Licenciatura Degree.
--Seminary--Baccalaureate or Licenciatura Degree.
--University--Baccalaureate or Licenciatura Degree.
(d) Classification of citizens of Mexico as TN professionals under the NAFTA-- (1) General. A United States employer seeking to classify a citizen of Mexico as a TN professional temporary employee shall file a petition on Form I-129, Petition for Nonimmigrant Worker, with the Northern Service Center, even in emergent circumstances. The petitioner may submit a legible photocopy of a document in support of the visa petition in lieu of the original document. The original document shall be submitted if requested by the Service.
(2) Supporting documents. A petition in behalf of a citizen of Mexico seeking classification as a TN professional shall be accompanied by:
(i) A certification from the Secretary of Labor that the petitioner has filed the appropriate documentation with the Secretary in accordance with section (D)(5)(b) of Annex 1603 of the NAFTA.
(ii) Evidence that the beneficiary meets the minimum education requirements or alternative credentials requirements of Appendix 1603.D.1 of Annex 1603 of the NAFTA as set forth in §214.6(c). This documentation may consist of licenses, degrees, diplomas, certificates, or evidence of membership in professional organizations. Degrees, diplomas, or certificates received by the beneficiary from an educational institution not located within Mexico, Canada, or the United States must be accompanied by an evaluation by a reliable

credentials evaluation service which specializes in evaluating foreign educational credentials. Evidence of experience should consist of letters from former employers or, if formerly self-employed, business records attesting to such self-employment; and
(iii) A statement from the prospective employer in the United States specifically stating the Appendix 1603.D.1 profession in which the beneficiary will be engaging and a full description of the nature of the duties which the beneficiary will be performing. The statement must set forth licensure requirements for the state or locality of intended employment or, if no license is required, the non-existence of such requirements for the professional activity to be engaged in.
(iv) Licensure for TN classification--(A) General. If the profession requires a state or local license for an individual to fully perform the duties of that profession, the beneficiary for whom TN classification is sought must have that license prior to approval of the petition and evidence of such licensing must accompany the petition.
(B) Temporary licensure. If a temporary license is available and the beneficiary would be allowed to perform the duties of the profession without a permanent license, the director shall examine the nature of the duties, the level at which the duties are performed, the degree of supervision received, and any limitations which would be placed upon the beneficiary. If an analysis of the facts demonstrates that the beneficiary, although under supervision, would be fully authorized to perform the duties of the profession, TN classification may be granted.
(C) Duties without licensure. In certain professions which generally require licensure, a state may allow an individual to fully practice a profession under the supervision of licensed senior or supervisory personnel in that profession. In such cases, the director shall examine the nature of the duties and the level at which they are to be performed. If the facts demonstrate that the beneficiary, although under supervision, would fully perform the duties of the profession, TN classification may be granted.
(D) Registered nurses. The prospective employer must submit evidence that the beneficiary has been granted a permanent state license, a temporary state license or other temporary authorization issued by a State Board of Nursing authorizing the beneficiary to work as a registered or graduate nurse in the state of intended employment in the United States.
(3) Approval and validity of petition-- (i) Approval. The director shall notify the petitioner of the approval of the petition on Form I-797, Notice of Action. The approval notice shall include the beneficiary's name, classification, Appendix 1603.D.1 profession, and the petition's period of validity.
(ii) Recording the validity of petitions. Procedures for recording the validity period of petitions are:
(A) If the petition is approved before the date the petitioner indicates that employment will begin, the approved petition and approval notice shall show the actual dates requested by the petitioner as the validity period, not to exceed the limits specified by paragraph (d)(3)(iii) of this section.
(B) If the petition is approved after the date the petitioner indicates employment will begin, the approved petition and approval notice shall show a validity period commencing with the date of approval and ending with the date requested by the petitioner, as long as that date does not exceed the limits specified by paragraph (d)(3)(iii) of this section.
(C) If the period of employment requested by the petitioner exceeds the limit specified in paragraph (d)(3)(iii) of this section, the petition shall be approved only up to the limit specified in that paragraph.
(iii) Validity. An approved petition classifying a citizen of Mexico as a TN nonimmigrant shall be valid for a period of up to one year.
(4) Denial of petition--(i) Notice of intent to deny. When an adverse decision is proposed on the basis of derogatory information of which the petitioner is unaware, the director shall notify the petitioner of the intent to deny the petition and the basis for the denial. The petitioner may inspect and rebut the evidence and will be granted a period of thirty days in which to do so. All relevant rebuttal material will be considered in making a final decision.
(ii) Notice of denial. The petitioner shall be notified of the decision, the reasons for the denial, and the right to appeal the denial under part 103 of this chapter.
(5) Revocation of approval of petition--(i) General. (A) The petitioner shall immediately notify the Service of any changes in the terms and conditions of employment of a beneficiary which may effect eligibility under section 214(e) of the Act or §214.6. An amended petition should be filed when the petitioner continues to employ the beneficiary. If the petitioner no longer employs the beneficiary, the petitioner shall send a letter explaining the change(s) to the director who approved the petition.
(B) The director may revoke a petition at any time, even after the validity of the petition has expired.
(ii) Automatic revocation. The approval of an unexpired petition is automatically revoked if the petitioner goes out of business, files a written withdrawal of the petition, or notifies the Service that the beneficiary is no longer employed by the petitioner.
(iii) Revocation on notice--(A) Grounds for revocation. The director shall send to the petitioner a notice of intent to revoke the petition in relevant part if he or she finds that:
(1) The beneficiary is no longer employed by the petitioner in the capacity specified in the petition;
(2) The statement of facts contained in the petition were not true and correct;

(3) The petitioner violated the terms or conditions of the approved petition;
(4) The petitioner violated requirements of section 214(e) of the Act or § 214.6; or
(5) The approval of the petition violated §214.6 or involved gross error.
(B) Notice and decision. The notice of intent to revoke shall contain a detailed statement of the grounds for the revocation and the time period allowed for the petitioner's rebuttal. The petitioner may submit evidence in rebuttal within thirty days of the date of the notice. The director shall consider all relevant evidence presented in deciding whether to revoke the petition.
(6) Appeal of a denial or revocation of a petition--(i) Denial. A denied petition may be appealed under part 103 of this chapter.
(ii) Revocation. A petition that has been revoked on notice may be appealed under part 103 of this chapter. Automatic revocations may not be appealed.
(7) Numerical limit--(i) Limit on number of petitions to be approved in behalf of citizens of Mexico. Beginning on the date of entry into force of the NAFTA, not more than 5,500 citizens of Mexico can be classified as TN nonimmigrants annually.
(ii) Procedures. (A) Each citizen of Mexico issued a visa or otherwise provided TN nonimmigrant status under section 214(e) of the Act shall be counted for purposes of the numerical limit. Requests for petition extension or extension of the alien's stay and submissions of amended petitions shall not be counted for purposes of the numerical limit. The spouse and children of principal aliens classified as TD nonimmigrants shall not be counted against the numerical limit.
(B) Numbers will be assigned temporarily to each Mexican citizen in whose behalf a petition for TN classification has been filed. If a petition is denied, the number originally assigned to the petition shall be returned to the system which maintains and assigns numbers.
(C) When an approved petition is not used because the beneficiary does not apply for admission to the United States, the petitioner shall notify the service center director who approved the petition that the number has not been used. The petition shall be revoked pursuant to paragraph (d)(5)(ii) of this section and the unused number shall be returned to the system which maintains and assigns numbers.
(D) If the total annual limit has been reached prior to the end of the year, new petitions and the accompanying fee shall be rejected and returned with a notice stating that numbers are unavailable for Mexican citizen TN nonimmigrants and the date when numbers will again become available.
(e) Classification of citizens of Canada as TN professionals under the NAFTA-- (1) General. Under section 214(e) of the Act, a citizen of Canada who seeks temporary entry as a business person to engage in business activities at a professional level may be admitted to the United States in accordance with the NAFTA.
(2) Application for admission. A citizen of Canada seeking admission under this section shall make application for admission with an immigration officer at a United States Class A port of entry, at a United States airport handling international traffic, or at a United States pre-clearance/pre-flight station. No prior petition, labor certification, or prior approval shall be required.
(3) Evidence. A visa shall not be required of a Canadian citizen seeking admission as a TN nonimmigrant under section 214(e) of the Act. Upon application for admission at a United States port of entry, an applicant under this section shall present the following:
(i) Proof of Canadian citizenship. Unless travelling from outside the Western hemisphere, no passport shall be required; however, an applicant for admission must establish Canadian citizenship.
(ii) Documentation demonstrating engagement in business activities at a professional level and demonstrating professional qualifications. The applicant must present documentation sufficient to satisfy the immigration officer at the time of application for admission, that the applicant is seeking entry to the United States to engage in business activities for a United States employer(s) or entity(ies) at a professional level, and that the applicant meets the criteria to perform at such a professional level. This documentation may be in the form of a letter from the prospective employer(s) in the United States or from the foreign employer, in the case of a Canadian citizen seeking entry to provide prearranged services to a United States entity, and may be required to be supported by licenses, diplomas, degrees, certificates, or membership in a professional organization. Degrees, diplomas, or certificates received by the applicant from an educational institution not located within Canada, Mexico, or the United States must be accompanied by an evaluation by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials. The documentation shall fully affirm:
(A) The Appendix 1603.D.1 profession of the applicant;
(B) A description of the professional activities, including a brief summary of daily job duties, if appropriate, which the applicant will engage in for the United States employer/entity;
(C) The anticipated length of stay;
(D) The educational qualifications or appropriate credentials which demonstrate that the Canadian citizen has professional level status;
(E) The arrangements for remuneration for services to be rendered; and
(F) If required by state or local law, that the Canadian citizen complies with all applicable laws and/or licensing

requirements for the professional activity in which they will be engaged.
(f) Procedures for admission--(1) Canadian citizens. A Canadian citizen who qualifies for admission under this section shall be provided confirming documentation (Service Form I-94) and shall be admitted under the classification symbol TN for a period not to exceed one year. Form I-94 shall bear the legend "multiple entry". The fee prescribed under §103.7(b) of this chapter shall be remitted upon admission to the United States pursuant to the terms and conditions of the NAFTA. Upon remittance of the prescribed fee, the Canadian citizen applicant shall be provided a Service receipt (Form G-211, Form G-711, or Form I-797).
(2) Mexican citizens. The Mexican citizen beneficiary of an approved Form I-129 granting classification as a TN professional shall be admitted to the United States for the validity period of the approved petition upon presentation of a valid TN visa issued by a United States consular officer and a copy of the United States employer's statement as described in paragraph (d)(2)(iii) of this section. The Mexican citizen shall be provided Form I-94 bearing the legend "multiple entry".
(g) Readmission--(1) Canadian citizens. A Canadian citizen in this classification may be readmitted to the United States for the remainder of the period authorized on Form I-94, without presentation of the letter or supporting documentation described in paragraph (e)(3) of this section, and without remittance of the prescribed fee, provided that the original intended professional activities and employer(s) have not changed. If the Canadian citizen seeking readmission to the United States is no longer in possession of a valid, unexpired Form I-94, and the period of initial admission has not lapsed, he or she shall present alternate evidence in order to be readmitted in TN status. This alternate evidence may include, but is not limited to, a Service fee receipt for admission as a TN or a previously issued admission stamp as TN in a passport, and a confirming letter from the United States employer(s). A new Form I-94 shall be issued at the time of readmission bearing the legend "multiple entry".
(2) Mexican citizens. A Mexican citizen in this classification may be readmitted for the remainder of the period of time authorized on Form I-94 provided that the original intended professional activities and employer(s) have not changed. If the Mexican citizen seeking readmission to the United States is no longer in possession of a valid, unexpired Form I-94, he or she may be readmitted upon presentation of a valid TN visa and evidence of a previous admission. A new Form I-94 shall be issued at the time of readmission bearing the legend "multiple entry".
(h) Extension of stay--(1) Mexican citizen. The United States employer shall apply for extension of the Mexican citizen's stay in the United States by filing Form I-129 with the Northern Service Center. The applicant must also request a petition extension. The request for extension must be accompanied by either a new or a photocopy of the prior certification on Form ETA 9029, in the case of a registered nurse, or Form ETA 9035, in all other cases, that the petitioner continues to have on file with the Department of Labor for the period of time requested. The dates of extension shall be the same for the petition and the beneficiary's extension of stay. The beneficiary must be physically present in the United States at the time of the filing of the extension of stay. Even though the requests to extend the petition and the alien's stay are combined on the petition, the director shall make a separate determination on each. If the citizen of Mexico is required to leave the United States for business or personal reasons during the pendency of the extension request, the petitioner may request the director to cable notification of the approval of the petition to the consular office abroad where the beneficiary will apply for a visa. An extension of stay may be authorized for up to one year. There is no specific limit on the total period of time a citizen of Mexico may remain in TN status.
(2) Canadian citizen--(i) Filing at the service center. The United States employer of a Canadian citizen in TN status or United States entity, in the case of a Canadian citizen in TN status who has a foreign employer, may request an extension of stay by filing Form I-129 with the prescribed fee, with the Northern Service Center. The beneficiary must be physically present in the United States at the time of the filing of the extension of stay. If the alien is required to leave the United States for business or personal reasons while the extension request is pending, the petitioner may request the director to cable notification of approval of the application to the port of entry where the Canadian citizen will apply for admission to the United States. An extension of stay may be authorized for up to one year. There is no specific limit on the total period of time a citizen of Canada may remain in TN status.
(ii) Readmission at the border. Nothing in paragraph (h)(2)(i) of this section shall preclude a citizen of Canada who has previously been in the United States in TN status from applying for admission for a period of time which extends beyond the date of his or her original term of admission at any United States port of entry. The application for admission shall be supported by a new letter from the United States employer or the foreign employer, in the case of a Canadian citizen who is providing prearranged services to a United States entity, which meets the requirements of paragraph (e)(3)(ii) of this section. The fee prescribed under §103.7(b) of this chapter shall be remitted upon admission to the United States pursuant to the terms and conditions of the NAFTA.
(i) Request for change or addition of United States employer(s)--(1) Mexican citizen. A citizen of Mexico admitted under this paragraph who seeks to change or add a United States employer must have the new

employer file a Form I-129 petition with appropriate supporting documentation, including a letter from the new employer describing the services to be performed, the time needed to render such services, and the terms for remuneration for services and evidence of required filing with the Secretary of Labor. Employment with a different or with an additional employer is not authorized prior to Service approval of the petition.
(2) Canadian citizen--(i) Filing at the service center. A citizen of Canada admitted under this paragraph who seeks to change or add a United States employer during this period of admission must have the new employer file a Form I-129 petition with appropriate supporting documentation, including a letter from the new employer describing the services to be performed, the time needed to render such services, and the terms for remuneration for services. Employment with a different or with an additional employer is not authorized prior to Service approval of the petition.
(ii) Readmission at the border. Nothing in paragraph (i)(2)(i) of this section precludes a citizen of Canada from applying for readmission to the United States for the purpose of presenting documentation from a different or additional United States or foreign employer. Such documentation shall meet the requirements prescribed in paragraph (e)(3)(ii) of this section. The fee prescribed under §103.7(b) of this chapter shall be remitted upon admission to the United States pursuant to the terms and conditions of the NAFTA.
(3) No action shall be required on the part of a Canadian or Mexican citizen who is transferred to another location by the United States employer to perform the same services. Such an acceptable transfer would be to a branch or office of the employer. In the case of a transfer to a separately incorporated subsidiary or affiliate, the requirements of paragraphs (i) (1) and (2) of this section would apply.
(j) Spouse and unmarried minor children accompanying or following to join. (1) The spouse of unmarried minor child of a citizen of Canada or Mexico admitted in TN nonimmigrant status shall be required to present a valid, unexpired nonimmigrant TD visa unless otherwise exempt under §212.1 of this chapter.
(2) The spouse and dependent minor children shall be issued confirming documentation (Form I-94) bearing the legend "multiple entry". There shall be no fee required for admission of the spouse and dependent minor children.
(3) The spouse and dependent minor children shall not accept employment in the United States unless otherwise authorized under the Act.
(k) Effect of a strike. If the Secretary of Labor certifies to or otherwise informs the Commissioner that a strike or other labor dispute involving a work stoppage of workers is in progress, and the temporary entry of a citizen of Mexico or Canada in TN nonimmigrant status may affect adversely the settlement of any labor dispute or the employment of any person who is involved in such dispute:
(1) The United States may refuse to issue an immigration document authorizing entry or employment to such alien.
(2) A Form I-129 seeking to classify a citizen of Mexico as a TN nonimmigrant may be denied. If a petition has already been approved, but the alien has not yet entered the United States, or has entered the United States but not yet commenced employment, the approval of the petition may be suspended.
(3) If the alien has already commenced employment in the United States and is participating in a strike or other labor dispute involving a work stoppage of workers, whether or not such strike or other labor dispute has been certified by the Department of Labor, or whether the Service has been otherwise informed that such a strike or labor dispute is in progress, the alien shall not be deemed to be failing to maintain his or her status solely on account of past, present, or future participation in a strike or other labor dispute involving a work stoppage of workers, but is subject to the following terms and conditions:
(i) The alien shall remain subject to all applicable provisions of the Immigration and Nationality Act and regulations promulgated in the same manner as all other TN nonimmigrants;
(ii) The status and authorized period of stay of such an alien is not modified or extended in any way by virtue of his or her participation in a strike or other labor dispute involving a work stoppage of workers; and
(iii) Although participation by a TN nonimmigrant alien in a strike or other labor dispute involving a work stoppage of workers will not constitute a ground for deportation, any alien who violates his or her status or who remains in the United States after his or her authorized period of stay has expired will be subject to deportation.
(4) If there is a strike or other labor dispute involving a work stoppage of workers in progress, but such strike or other labor dispute is not certified under paragraph (k)(1) of this section, or the Service has not otherwise been informed by the Secretary that such a strike or labor dispute is in progress, the Commissioner shall not deny a petition, suspend an approved petition, or deny entry to an applicant for TN status.
(l) Transition for Canadian Citizen Professionals in TC classification and their B-2 spouses and/or unmarried minor children--(1) Canadian citizen professionals in TC Classification--(i) General. Canadian citizen professionals in TC classification as of the effective date of the NAFTA Implementation Act (January 1, 1994) will automatically be deemed to be in valid TN classification. Such persons may be readmitted to the United States in TN classification for the remainder of the period authorized on their Form I-94, without presentation of the letter or supporting documentation described in paragraph (e)(3) of this section, and without remittance of the prescribed fee, provided that the original intended professional activities and employer(s) have not changed.

Properly filed applications for extension of stay in TC classification which are pending on January 1, 1994 will be deemed to be, and adjudicated as if they were applications for extension to stay in TN classification.
(ii) Procedure for Canadian citizens admitted in TC classification in possession of Form I-94 indicating admission in TC classification. At the time of readmission, such professionals shall be required to surrender their old Form I-94 indicating admission in TC classification. Upon surrender of the old Form I-94, such professional will be issued a new Form I-94 bearing the legend "multiple entry" and indicating that he or she has been readmitted in TN classification.
(iii) Procedure for Canadian citizen admitted in TC classification who are no longer in possession of Form I-94 indicating admission in TC classification. If the Canadian citizen seeking readmission to the United States is no longer in possession of an unexpired Form I-94, and the period of initial admission has not lapsed, he or she shall present alternate evidence described in paragraph (g)(1) of this section in order to be readmitted in TN status. A Canadian professional seeking to extend his or her stay beyond the period indicated on the new Form I-94 shall be required to comply with the requirements of paragraph (h)(2) of this section, including remittance of the fee prescribed under §103.7 of this chapter.
(iv) Nonapplicability of this section to self-employed professionals in TC nonimmigrant classification. The provisions in paragraphs (l)(1) (i), (ii), and (iii) of this section shall not apply to professionals in TC nonimmigrant classification who are self-employed in this country on January 1, 1994. Effective January 1, 1994, such professionals are not authorized to engage in self-employment in this country, and may not be admitted in TN or readmitted in TC classification.
(2) Spouses and/or unmarried minor children of Canadian citizen professionals in TC classification--(i) General. Effective January 1, 1994, the nonimmigrant classification of a spouse and/or unmarried minor child of a Canadian citizen professional in TC classification will automatically be converted from B-2 to TD nonimmigrant classification. Effective January 1, 1994, the spouse and/or unmarried minor child of a Canadian citizen professional whose TC status has been automatically converted to TN, or the spouse and/or unmarried minor child of such professional whose status has been changed to TN pursuant to paragraph (1) of this section, who is seeking admission or readmission to this country, may be readmitted in TD classification for the remainder of the period authorized on their Form I-94, without presentation of the letter or supporting documentation described in paragraph (e)(3) of this section, and without remittance of the prescribed fee, provided that the original intended professional activities and employer(s) of the Canadian citizen professional have not changed. Properly filed applications for extension of stay in B-2 classification as the spouse and/or unmarried minor children of a Canadian citizen professional in TC classification which are pending on January 1, 1994 will be deemed to be, and adjudicated as if they were applications for extension of stay in TD classification.
(ii) Procedure for spouses and/or unmarried minor children of Canadian citizens admitted in TC classification who are in possession of Form I-94 indicating admission in B-2 classification. Upon surrender of the Form I-94 indicating that the alien has been admitted as the B-2 spouse or unmarried minor child of a TC alien valid for "multiple entry," such alien shall be issued a new Form I-94 indicating that the alien has been readmitted in TD classification. The new Form I-94 shall bear the legend "multiple entry."
(iii) Procedure for spouses and/or unmarried minor children of Canadian citizens admitted in TC classification who are no longer in possession of Form I-94 indicating admission in B-2 classification. If the Canadian citizen seeking readmission to the United States is no longer in possession of an unexpired Form I-94, and the period of initial admission has not lapsed, he or she shall present alternate evidence described in paragraph (g)(1) of this section in order to be admitted in TN status. Spouses and/or children of Canadian citizen professionals seeking to extend their stay beyond the period indicated on the new Form I-94 shall be required to comply with the requirements of paragraph (h)(2) of this section, including remittance of the fee prescribed under §103.7 of this chapter.
(iv) Nonapplicability of this section to spouses and/or unmarried minor children of self-employed professionals admitted in TC nonimmigrant classification. Paragraphs (l)(2) (i), (ii), and (iii) of this section shall not apply to the spouses and/or unmarried minor children of Canadian citizen professionals in TC nonimmigrant classification who are self-employed in this country on January 1, 1994. Effective January 1, 1994, such persons are not eligible for TD classification.

PART 235--INSPECTION OF PERSONS APPLYING FOR ADMISSION

9. The authority citation for part 235 continues to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1182, 1183, 1201, 1224, 1225, 1226, 1227, 1228, 1252.

10. Section 235.1 is amended by adding a new paragraph (d)(8), and by revising paragraph (f)(1) introductory text, to read as follows:

§235.1 Scope of examination.

* * * * *

(d) * * *

(8) Any citizen of Canada or Mexico seeking to enter the United States as a principal alien E-1 or E-2, or as an L-1 or TN, for the purpose of employment at a site where the Secretary of Labor has certified to or otherwise informed the Commissioner that there is a strike or other labor dispute involving a work stoppage of workers in progress, and the temporary entry of that citizen of Canada or Mexico may affect adversely either the settlement of any such labor dispute or the employment of any person who is involved in any such dispute, may be refused entry in the classification sought. The applicant shall be advised in writing of the reason(s) for the refusal. A designated representative of the government of Canada or Mexico shall be promptly notified in writing of the reason(s) for the refusal of entry.

* * * * *

(f) Arrival/Departure Record, Form I-94--(1) Nonimmigrants. Each nonimmigrant alien except as indicated below, who is admitted to the United States shall be issued a completely executed Form I-94 which must be endorsed to show: date and place of admission, period of admission, and nonimmigrant classification. A nonimmigrant alien who will be making frequent entries into the United States over its land borders may be issued a Form I-94 which is valid for any number of entries during the validity of the form. In the case of a nonimmigrant alien admitted as a TN under the NAFTA, the specific occupation of such alien as set forth in Appendix 1603.D.1 of the NAFTA shall be recorded in item number 18 on the reverse side of the arrival portion of Form I-94, and the name of the employer shall be notated on the reverse side of both the arrival and departure portions of Form I-94. The departure portion Form I-94 shall bear the legend "multiple entry". A Form I-94 is not required by: * * *

* * * * *

PART 274a--CONTROL OF EMPLOYMENT OF ALIENS

11. The authority citation for part 274a continues to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1324a; 8 CFR part 2.

12. In §274a.12, paragraphs (b) (19) and (20) are revised to read as follows:

§274a.12 Classes of aliens authorized to accept employment.

* * * * *

(b) * * *

(19) A nonimmigrant pursuant to section 214(e) of the Act. An alien in this status must be engaged in business activities at a professional level in accordance with the provisions of Chapter 16 of the North American Free Trade Agreement (NAFTA); or

(20) A nonimmigrant alien within the class of aliens described in paragraphs (b)(2), (b)(5), (b)(8), (b)(9), (b)(10), (b)(11), (b)(12), (b)(13), (b)(14), (b)(16), and (b)(19) of this section whose status has expired but who has filed a timely application for an extension of such stay pursuant to §§214.2 or 214.6 of this chapter. These aliens are authorized to continue employment with the same employer for a period not to exceed 240 days beginning on the date of the expiration of the authorized period of stay. Such authorization shall be subject to any conditions and limitations noted on the initial authorization. However, if the district director or service center director adjudicates the application prior to the expiration of this 240 day period and denies the application for extension of stay, the employment authorization under this paragraph shall automatically terminate upon notification of the denial decision.

* * * * *

Dated: December 23, 1993.

Doris Meissner,

Commissioner, Immigration and Naturalization Service.

Note: This appendix will not appear in the Code of Federal Regulations.

Appendix to the Preamble--Additional Instructions for Form I-129.

U.S. Department of Justice

Immigration and Naturalization Service, OMB No. 1115-0168 Additional Instructions for Form I-129

Temporary Entry Under the North American Free Trade Agreement

The North American Free Trade Agreement (NAFTA) entered into force on January 1, 1994. Chapter 16, Temporary Entry, of the Agreement exclusively covers four nonimmigrant classifications:
(1) B-1, Visitor for Business;
(2) E-1/E-2, Treaty Trader and Investor;
(3) L-1, Intracompany Transferee; and
(4) TN, Business Professional.
This form is for an employer to petition for initial classification, change of status, or extension of stay of a Mexican or Canadian citizen as an L-1; for an employer to request an extension of stay or change of status of a Mexican or Canadian citizen to the E-1 or E-2 classification; for the employer to request an extension of stay or change of status of a Canadian citizen to the NAFTA Professional classification (TN) or the change/addition of employers for a Canadian TN; and for an employer to petition for classification of a Mexican citizen as a NAFTA Professional (TN).
Regular instructions for Form I-129 shall be followed to petition for L classification and E-1/E-2 classification. The following additional instructions are provided to file for a TN.

Filing for a Canadian TN

No Form I-129 is required for Canadian citizens applying for admission to the U.S. in TN status. Form I-129 is used by an employer to request an extension of stay for a Canadian to TN, a change of status for a Canadian to TN classification, or the change/addition of employers for a Canadian TN.
On Form I-129, Part 2, Item 1, insert the classification symbol TN-1.
A U.S. employer/entity must file the Form I-129 with the following:
(1) a statement of the activity listed in Appendix 1603.D.1 (see the back of this form) in which the beneficiary will be engaging and a full description of the nature of the duties the beneficiary will be performing, the anticipated length of stay, and the arrangements for remuneration;
(2) evidence that the beneficiary meets the educational and/or alternative credentials for the activity listed in Appendix 1603.D.1;
(3) evidence of Canadian citizenship; and
(4) evidence that all licensure requirements, where applicable to the activity, have been satisfied.

Filing for a Mexican TN

Form I-129 is required for Mexican citizens applying for initial TN classification, extension of TN stay, change/addition of employers and change of classification to TN.
On Form I-129, Part 2, Item 1, insert the classification symbol TN-2.
A U.S. employer must file the petition with the following:
(1) a statement of the activity listed in Appendix 1603.D.1 (see the back of this form) in which the beneficiary will be engaging, a full description of the nature of the duties the beneficiary will be performing, the anticipated length of stay, and the arrangements for remuneration;
(2) evidence that the beneficiary meets the educational and/or alternative credentials for the activity listed in Appendix 1603.D.1;
(3) evidence of Mexican citizenship;
(4) evidence that all licensure requirements where applicable to the activity, have been satisfied; and
(5) a certification from the Secretary of Labor that the petitioner has filed the appropriate labor condition application or labor attestation for the specified activity.

When To File

File Form I-129 as soon as possible, but no more than 4 months before the proposed employment will begin or the extension of stay is required. If you do not submit Form I-129 at least 45 days before the employment will begin, processing and subsequent visa issuance may not be completed before the alien's services are require or previous employment authorization ends.

Where To File

When filing for a Mexican or Canadian TN, Form I-129 shall be filed with the Director of the Northern Service Center. In all other instances, Form I-129 shall be filed with the appropriate Service center per the instructions to Form I-129.

Fee

See general instructions for Form I-129.

Listing of Professional Occupations in Appendix 1603.D.1 of North American Free Trade Agreement

(The minimum educational or alternative credentials requirements for each profession are found at 8 CFR 214.6(c)).
Accountant
Architect
Computer Systems Analyst
Disaster relief insurance claims adjuster (claims adjuster employed by an insurance company located in the territory of a Party, or an independent claims adjuster)
Economist
Engineer
Forester
Graphic designer
Hotel manager
Industrial designer
Interior designer
Land surveyor
Landscape architect
Lawyer (including Notary in the province of Quebec)
Librarian
Management consultant
Mathematician (including statistician)
Range manager/Range conservationist
Research assistant (working in a post-secondary educational institution)
Scientific technician/technologist
Social worker
Sylviculturist (including forestry specialist)
Technical publications writer
Urban planner (including geographer)
Vocational counselor

Medical/Allied Professionals

Dentist
Dietitian
Medical laboratory technologist (Canada)/medical technologist (Mexico and the United States)
Nutritionist
Occupational therapist
Pharmacist
Physician (teaching or research only)
Physiotherapist/physical therapist
Psychologist
Recreational therapist
Registered nurse
Veterinarian

SCIENTIST

Agriculturist (agronomist)
Animal breeder
Animal scientist
Apiculturist

Astronomer
Biochemist
Biologist
Chemist
Dairy scientist
Entomologist
Epidemiologist
Geneticist
Geochemist
Geologist
Geophysicist (including oceanographer in Mexico and the United States)
Horticulturist
Meteorologist
Pharmacologist
Physicist (including Oceanographer in Canada)
Plant Breeder
Poultry scientist
Soil scientist
Zoologist

TEACHER

College
Seminary
University
For information regarding qualifications for the positions, additions or subtractions from Appendix 1603.D.1, and related information, you should contact your local Immigration and Naturalization Service office.

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NAFTA Admissions

(a) General. The North American Free Trade Agreement (NAFTA) between the United States, Canada, and Mexico entered into force on January 1, 1994. Chapter 16 of NAFTA pertains to Canadian and Mexican citizens seeking classification as one of four types of business persons:

- **B-1** temporary visitors for business under section 101(a)(15)(B) of the Act;
- **E-1 or E-2** treaty traders and treaty investors under section 101(a)(15)(E) of the Act;
- **L-1** intracompany transferees under section 101(a)(15)(L) of the Act; and
- **TN** professional level employees under section 214(e) of the Act.

The NAFTA is an historic accord governing the largest trilateral trade relationship in the world and covers trade in goods, services, and investments. NAFTA facilitates the movement of U.S., Canadian, and Mexican businesspersons across each country's border through streamlined procedures. The NAFTA maintains the provisions of existing laws that ensure border security and protect indigenous labor and permanent employment. Further, NAFTA fully protects the ability of state governments to require that Canadians and Mexicans practicing a profession in the United States are fully licensed under state law to do so. Current U.S. law and practice relating to exclusion and deportation of aliens applies unchanged to all business persons seeking temporary entry under the provisions of Chapter 16 of the NAFTA.

The immigration-related provisions of NAFTA are similar to those contained in the United States-Canada Free-Trade Agreement (CFTA), which was suspended with the entry into force of NAFTA.

The NAFTA is an international agreement subject to scrutiny by the public, the media, other governments and the Temporary Entry Working Group. INS inspectors must maintain the highest standards of objectivity, courtesy and professionalism when processing applicants for admission.

(b) Definitions.

(1) A **businessperson** as defined in NAFTA means a citizen of Canada or Mexico who is engaged in the trade of goods, the provision of services, or the conduct of investment activities.
(2) **Business activities at a professional level** means those undertakings which require that, for successful completion, the individual has at least a baccalaureate degree or appropriate credentials demonstrating status as a professional.
(3) **Temporary entry** as used in NAFTA means entry without the intent to establish permanent residence.
(4) To **engage in business activities at a professional level** means the performance of prearranged business activities for an U.S. entity, including an individual. It does not allow for entry in TN status of those businesspersons that are seeking entry to engage in self-employment.

(c) B-1 Classification: Business Visitor.

(1) **Qualifications**. A NAFTA B-1 must meet the same eligibility requirements, described in Chapter 15.4, as any other B-1. All persons seeking admission into the United States under this category, whether they engage in the activities listed in Appendix 1603.A.1 to Annex 1603 of the NAFTA or other legitimate business activities, must meet all the general standards described above. These standards have been written to be flexible and to accommodate normal legitimate business activities [See Appendix 15-3 of this manual.].

Appendix 1603.A.1 to Annex 1603 of the NAFTA is a list of business activities representative of a complete business cycle in which a B-1 business visitor seeking entry under the NAFTA may engage. Appendix 1603.A.1 is not an exhaustive list. Nothing precludes a citizen of Mexico or Canada from seeking entry to engage in traditional B-1 activities that are not included within Appendix 1603.A.1, provided they meet all requirements for entry in such states, including restrictions on sources of remuneration.

The activities contained in Appendix 1603.A.1 include:

(A**) Research and design**. Technical, scientific and statistical researchers conducting independent research or research for an enterprise located in the territory of another Party.

(B) **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.

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

(D) **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.

(E) **Distribution**. Transportation operations 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. (It should be noted that, during the course of negotiations relating to NAFTA immigration provisions, Mexico decided not to be a Party to the language involving temporary entry of customs brokers into the signatory countries. Therefore, Mexican citizen customs brokers are not referenced in Appendix 1603.A.1. A citizen of Mexico is not precluded, however, from seeking entry into the United States in B-1 status to perform the functions of a customs broker provided he or she meets all existing requirements for B-1 classification.) Customs brokers providing consulting services regarding the facilitation of the import or export of goods.

(F) **After-sales services** 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. The language concerning the life of a renewable service contract must have been included in clear and definitive terms in the original contract at the point of sale. Nothing under NAFTA precludes third party contracts for after-sales service providing the third party agreement was contracted at the time of sale.

(G) **General service**.

Professionals engaging in a business activity at a professional level in a profession set forth in Appendix 1603.D.1 to Annex 1603, but receiving no salary or other remuneration from a U.S. source (other than an expense allowance or other reimbursement for expenses incidental to the temporary stay).

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. The tour may begin in the United States, but must terminate in foreign territory, and a significant portion of the tour must be conducted in foreign territory. In such cases, an operator may enter the United States with an empty conveyance and a tour guide may enter on his or her own and join the conveyance.

Tour bus operators entering the territory of another Party with a group of passengers on a bus tour that has begun in, 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.

(2) **Terms of Admission**. A citizen of Canada need not apply for a B-1 nonimmigrant visa, but is not precluded from doing so. A citizen of Mexico must apply for a B-1 visa at an U.S. embassy or consulate abroad. A citizen of Canada or Mexico will be admitted into the United States at the discretion of the inspecting officer for the period necessary to engage in the intended activities, not to exceed 1 year. The alien may apply to extend his or her stay by filing an Application to Extend/Change Status on Form I-539 with the appropriate Service office. Extensions of stay are granted in increments of not more than 6 months.

There is a $6.00 fee at all land border ports-of-entry to process a Form I-94 for an applicant's admission into the United States.

(3) **Spouses and Children**. The spouse and children of a businessperson may accompany or follow to join the B-1 business visitor in B-2 classification if they otherwise meet the general requirements for temporary entry of visitors for pleasure. Such dependents may not work in the U.S. without obtaining a change of status, but may attend school, if incident to status.

(d) **E Classification as a Treaty Trader or Treaty Investor.**

(1) **Qualifications**. Section B of Annex 1603 of the NAFTA provides for the temporary entry of Canadian and Mexican citizens as treaty traders and treaty investors. This section required no changes to existing law and practice under section 101(a)(15)(E) of the Act, other than to authorize citizens of Canada and Mexico to apply for treaty trader (E-1) or treaty investor (E-2) status pursuant to the NAFTA.

A treaty trader is a businessperson who is coming to the U.S. solely to carry on substantial trade, principally between the U.S. and Canada, if the trader is a citizen of Canada, or between the U.S. and Mexico, if the trader is a citizen of Mexico.

A treaty investor is a business person who is coming to the United States solely to develop and direct the operations of an enterprise in which he or she has invested, or of an enterprise in which he or she is actively in the process of investing, a substantial amount of capital.

Immigration officers must familiarize themselves with the definition of the E classification in §101(a)(15)(E) of the Act and the regulations at 8 CFR 214.2(e) and 22 CFR 41.51.

(A**)** **Treaty Traders.** NAFTA businesspersons applying for the E-1 visa as a Treaty Trader must meet the following requirements.

• **Citizenship**. The trader, individual or entity must possess citizenship of Canada or Mexico. In the case of an entity, Canadian citizens or Mexican citizens must own at least 50% of that business.

• **Trade**. There must be an international exchange of a good or service, including title to that trade item, for consideration between the United States and either Canada or Mexico.

• **Substantial Trade**. The volume of trade must constitute a continuous flow of trade items involving numerous transactions between the United States and Canada or Mexico.

• **Trade Linked to Citizenship**. Trade is principally between the U.S. and Canada, if the trader possesses Canadian citizenship, or between the U.S. and Mexico, if the trader possesses Mexican citizenship. At least 50% of the international trade (as contrasted to domestic trade) of the trading entity must be conducted between the U.S. and Canada, if the trader possesses Canadian citizenship, or between the U.S. and Mexico, if the trader possesses Mexican citizenship.

(B) **Treaty Investors**. NAFTA businesspersons applying for the E-2 visa as a Treaty Investor must meet the following requirements.

• **Citizenship**. The investor, individual or entity must possess citizenship of Canada or Mexico. In the case of an entity, at least 50% of that business must be owned either by Canadian citizens or by Mexican citizens.

- **Investment Must Occur or Be in Process**. The investor has invested or is actively in the process of investing. The investor may invest in an established business or create a business. Being in the process of investing requires the irrevocable commitment of funds.
- **The Investment Must Be Real**. The enterprise is a real and operating commercial enterprise. A dormant or paper enterprise does not qualify.

- **The Investment Must Be Substantial**. A substantial amount of capital constitutes that amount that is substantial in the proportional sense pursuant to a proportionality test, that is, an inverted sliding scale in which the lower the total cost of the enterprise, the higher, proportionally, the investment must be. The overall cost of the enterprise is compared with the amount of personal funds and assets invested by the investor. Only loans guaranteed by personal assets qualify as actual investment by the treaty investor.

The business shall not be marginal, solely for the purpose of earning a living. A marginal enterprise is an enterprise that does not have the present or future capacity to generate more than enough income to provide a living for the treaty investor and his or her family.

- **The Investor Must Be Developing and Directing the Enterprise**. An investor develops and directs the business by owning at least 50% of the enterprise or by a combination involving ownership and possession of management responsibility, by controlling stock by proxy, etc.

(C) **Qualifying Employees for E-1 or E-1 Visa Classification**. Employees of Treaty Traders and Treaty Investors also may apply for an E-1 or E-2, if they meet the following requirements.

- **Citizenship**. The employee must possess the same citizenship as the trader or investor employer.

- **Position**. The employee is destined to an executive/supervisory position, possessing the authority and responsibility to make decisions which will set the direction of the enterprise; or the employee, if employed in a minor capacity, has special qualifications that make the services to be rendered essential to the successful or efficient operation of the enterprise. The essential employee must possess special skills including skills that are unique to operations in the U.S. Such employees are highly and specially skilled.

- **Temporary**. All persons must indicate the intent to depart the U.S. upon termination of status, ceasing business operations or sale of business, etc.

(2) **Terms of Admission**. An alien seeking admission as a treaty trader or treaty investor under the NAFTA as an E-1 or E-2 must be in possession of a nonimmigrant visa issued by an American consular officer classifying the alien under section 101(a)(15)(E) of the Act. Both Canadian and Mexican citizens must apply at an U.S. embassy or consulate for the issuance of an “E” nonimmigrant visa and pay any visa fee. A supplemental Form OF-156E must be submitted with pertinent documentation to the consular officer. Upon admission, issue both Canadian and Mexican treaty traders and treaty investors and their dependents a Form I-94, endorsed in the same manner as other E-1 and E-2 nonimmigrants. The classification code E-1 or E-2 will be marked clearly on the I-94. The I-94 with the E-1 or E-2 notation is the employment authorization documentation for the treaty trader or treaty investor. The Form I-94 is presented to the Social Security Administration for purposes of applying for a social security number. Periods of initial admission and extension are the same as for other E-1 and E-2 nonimmigrants.

(3) **Spouse and Dependent Children**. The spouse and children of a treaty trader or treaty investor may accompany or follow to join the E-1 or E-2 businessperson if they otherwise meet the general requirements for temporary entry. There is no requirement that the spouse and children be Canadian or Mexican citizens. Such dependents may not work in the U.S. without obtaining a change of status, but may attend school, if incident to status. As with other E-1 and E-2 nonimmigrant dependents, their I-94 visa symbol is the same as the principal’s; endorsements are the same as for other E dependents.

(e) **L Classification as an Intracompany Transferee.**

(1) **Qualifications**. The designated nonimmigrant classification for the intracompany transferee who enters the U.S. under the NAFTA is L-1. The L-1 classification has been part of the Act since the 1970's through section 101(a)(15)(L). The U.S. has committed to allow citizens of Canada and Mexico who meet the qualifications of the current L-1 classification to enter the U.S. as intracompany transferees while the NAFTA is in force. Immigration officers must familiarize themselves with definition of the L classification at section 101(a)(15)(L) of the Act and regulations at 8 CFR 214.2(l). See L-1 notes in Chapter 15.4 and Adjudicator's Field Manual, Chapter 32.

The NAFTA intracompany transferee must qualify under the existing requirements for L classification, including:

• **Citizenship**. To qualify for the NAFTA intracompany transferee classification, the applicant must establish Canadian or Mexican citizenship.

• **Qualifying Capacity.** The applicant must qualify in a capacity that is managerial, executive, or one involving specialized knowledge.

• **Qualifying Entity**. The applicant must be seeking entry to work for an entity in the U.S. that is the parent, branch, affiliate, or subsidiary of the entity in the foreign country.

• **Qualifying Past Employment**. The applicant must have been employed continuously for 1 year in the previous past 3 years with the qualifying entity abroad in a qualifying capacity.

(2) **Terms of Admission**. A petition must be filed in the applicant's behalf to accord the alien classification as an L-1. The petition must be submitted by the qualifying entity to the Service on Form I-129, Petition for Temporary Worker, in accordance with the instructions for that form. The Service will provide the NAFTA intracompany transferee and dependents with Forms I-94 at the time of admission endorsed in the same manner as other class L admissions. The I-94 is the employment authorization document for the L-1 and may be presented to the Social Security Administration for the purpose of applying for a social security number. Periods of admission and extension for NAFTA L aliens are the same as for other L nonimmigrants.

(A) **Citizens of Canada**. A citizen of Canada is not required to, but may obtain, a nonimmigrant visa. The applicant must establish Canadian citizenship.

The I-129 petition may be filed (in duplicate) by the U.S. or foreign employer in advance of entry or in conjunction with an application for admission. If the alien wishes to file in advance, the petition must be submitted to the appropriate Service Center and should be submitted at least 30 days in advance of the expected date of entry. The applicant must present evidence of the approved petition (form I-797, Notice of Approval) at the time of application for admission. If the petition is filed in conjunction with an application for admission, such filing must be made in person with an immigration officer at a Class A port-of-entry located on the US-Canada land border or at an U.S. pre-clearance/pre-flight station in Canada. Petitions may not be submitted to a port-of-entry in advance. The petitioning employer need not appear, but the Form I-129 must bear the authorized signature of the petitioner and all documentation and the appropriate filing fee must accompany the petition. The port of entry may accept appointments but the use of appointments may not preclude an applicant who did not make an appointment from being processed at the time of his/her application for admission. The I-129 petition is complex and requires sufficient time for review by the processing officer. The burden of processing time rests with the applicant not with the Service. Applicants for admission filing I-129 petitions at pre-flight locations in Canada must allow sufficient time prior to the departure of their flight for processing.

(B) **Citizens of Mexico**. A citizen of Mexico must apply for an L visa at an American consulate. At the port-of-entry, the applicant must present a valid Mexican passport with their L-1 visa.

(3) **Spouses and Dependent Children**. Spouses and dependent children of intracompany transferees may accompany or follow to join the L-1 principal if they otherwise meet the general immigration requirements for temporary entry. L-2 is the designated classification for both spouse and dependent children of intracompany transferees. There is no requirement that the spouse and dependent children be citizens of Canada or Mexico. L-2 dependents who are citizens of Canada are not required to obtain an L-2 visa but may seek visa issuance if desired. L-2 dependents who are citizens of Mexico or other countries generally are required to seek visa issuance. L-2's may not work in the United States. L-2's may attend school while in the United States incident to their temporary stay.

(f) **TN Classification as a Professional.**

(1) **General**. (A) Background. The NAFTA professional is unique to the North American Free Trade Agreement (the NAFTA). The classification is not found in general immigration provisions in section 101(a)(15) of the INA; rather, it is included in section 214(e) of the INA. Under NAFTA, a Canadian or Mexican citizen who seeks temporary entry into the United States as a professional may be admitted to the United States under the provisions of the NAFTA as a TN (for Trade NAFTA). The TN is limited to Canadian or Mexican professionals employed on a professional level. A professional is defined as a business person seeking entry to engage in a business activity at a professional level in a profession set forth in Appendix 1603.D.1 to Annex 1603, if the business person otherwise qualifies under existing, general immigration requirements for temporary entry into the United States. [See Appendix 15-4 of this manual for Annex 1603, Appendix 1603.D.1.][For regulations relating to NAFTA TN classification, refer to 8 CFR 214.6.].

The NAFTA professional is modeled on the professional category in the predecessor trade pact, the United States-Canada Free-Trade Agreement (CFTA), which was in effect from January 1, 1989 until the entry into force of the NAFTA on January 1, 1994. The provisions differ slightly for Canadian citizen applicants and Mexican citizen applicants. Presently, the number of Mexican citizens entering the United States as TN professionals under NAFTA is limited to 5,500. There is no numerical limitation on the number of Canadian citizen TN professionals.

As with the CFTA, admission as a TN under section 214(e) of the INA does not imply that the citizen of Canada or Mexico would otherwise qualify as a professional under sections 101(a)(15)(H)(i)(b) or 203(b)(3) of the INA. Note too that Section D of Annex 1603 does not authorize a professional to establish a business or practice in the United States in which the professional will be self-employed. Section D of Annex 1603 is limited to the entry of a citizen of a Party country seeking to render professional-level services for an entity in another Party country.

Self-employment also clearly conflicts with the intent of the NAFTA Implementation Act and its accompanying Statement of Administrative Action, which states, at page 178, "Section D of Annex 1603 does not authorize a professional to establish a business or practice in the United States in which the professional will be self-employed." In this regard, Section B of Annex 1603, which deals with "traders and investors," establishes the appropriate category of temporary entry for a citizen of a Party country seeking to develop and direct investment operations in another Party country. Canadian or Mexican citizens seeking to engage in self-employment in trade or investment activities in the United States, therefore, must seek classification under section 101(a)(15)(E) of the INA.

Although the issue of self-employment was never specifically addressed under the regulations promulgated by the INS pursuant to the CFTA Implementation Act, the bar on establishment of a business or practice in which the professional will be self- employed is consistent with the intent of the United States and Canada in entering into the CFTA. Since entry into NAFTA was not intended to substantively change the treatment of professionals, this explicit bar merely clarifies existing law.

Note that the bar on establishment of a business or practice in which the Canadian or Mexican citizen will be self-employed is in no way intended to preclude a Canadian or Mexican citizen who is self-employed abroad from seeking entry to the United States pursuant to a pre-arranged agreement with an enterprise owned by a person or entity other than him/herself located in the United States. On the other hand, a Canadian or Mexican citizen is precluded from entering this country in TN classification for the purpose of rendering pre-arranged services for a U.S. corporation or entity of which he or she is the sole or controlling shareholder or owner or over which he or she holds de facto control.

(B) **Pre-arranged Professional Services**. In order to obtain "TN" classification, a businessperson, including one who is self-employed, must be seeking entry to render pre-arranged professional services to an individual or an enterprise. If the business activities are to be rendered to an individual or an enterprise, the enterprise must be substantively separate from the businessperson seeking entry. Moreover, the business activities must not include establishment of a business or practice or any other type of activity in which the businessperson will be self-employed in the United States.

As used above, to constitute pre-arranged professional services, there must exist a formal arrangement to render professional service to an individual or an enterprise in the United States. The formal arrangement may be through an employee-employer relationship or through a signed contract between the businessperson or the businessperson's employer and an individual or an enterprise in the United States.

(C) **Enterprise for Which the Professional Activities are to be Performed in the United States**. The enterprise in the United States for which the business activities are to be performed can take any legal form (as defined in Article 201 of the NAFTA), that is, "any entity entirely constituted or organized under applicable law, whether or not for profit, and whether privately- owned or government-owned, including any corporation, trust partnership, sole proprietorship, joint venture or other association."

(D) **Substantively Separate from the Business Person Seeking Entry as NAFTA Professional**. A businessperson is ineligible for classification as a NAFTA Professional if the enterprise in the United States offering a contract or employment to the businessperson seeking entry is a sole proprietorship operated by that businessperson. Moreover, even if the receiving enterprise is legally distinct from the businessperson, such as a corporation having a separate legal existence, entry as a NAFTA Professional must be refused if the receiving enterprise is substantially controlled by that businessperson.

(E) **Substantial Control**. Whether the businessperson "substantially controls" the U.S. enterprise will depend on the specific facts of each case. The following factors, among others, are relevant in determining what constitutes substantial control:

- whether the applicant has established the receiving enterprise;
- whether, as a matter of fact, the applicant has sole or primary control of the U.S. enterprise (regardless of the applicant's actual percentage of share ownership);
- whether the applicant is the sole or primary owner of the business; or
- whether the applicant is the sole or primary recipient of income of the business.

(F) **Establishment of a Business** in Which the Professional Will be Self-Employed in the United States. The following factors, among others are relevant in determining whether the business person will be self-employed in the United States:

- incorporation of a company in which the business person will be self-employed;
- initiation of communications (e.g., by direct mail or by advertising) for the purpose of obtaining employment or entering into contracts for an enterprise in the United States; or
- responding to advertisements for the purpose of obtaining employment or entering into contracts.

On the other hand, the following activities do not constitute the establishment of a business in which the business person will be self-employed in the United States:

- responding to unsolicited inquiries about service(s) which the professional may be able to perform; or
- establishing business premises from which to deliver pre-arranged service to clients.

(Paragraph (f)(1) revised IN98-06)

(2) **Appendix 1603.D.1 to Annex 1603 of the NAFTA**. Under NAFTA, an applicant seeking classification as a TN must demonstrate business activity at a professional level in one of the professions or occupations listed in Appendix 1603.D.1 to Annex 1603. Appendix 1603.D.1 (which replaces Schedule 2 to Annex 1502.1 of the CFTA) is set forth at 8 CFR 214.6(c). A Baccalaureate (bachelor's) or

Licenciatura degree is the minimum requirement for these professions unless an alternative credential is otherwise specified. In the case of a Canadian or Mexican citizen whose occupation does not appear on Appendix 1603.D.1 or who does not meet the transparent criteria specified, nothing precludes the filing of a petition for classification under another existing nonimmigrant classification.

A footnote to Appendix 1603.D.1 allows for temporary entry to perform training functions relating to any of the cited occupations or profession, including conducting seminars. However, these training functions must be conducted in the manner of prearranged activities performed for an U.S. entity and the subject matter to be proffered must be at a professional level. The training function does not allow for the entry of a businessperson to conduct seminars that do not constitute the performance of prearranged activities for an U.S. entity.

The terms "**state/provincial license**" and "**state/provincial/federal license**" means any document issued by a state, provincial, or federal government, as the case may be, or under its authority, but not by a local government, that permits a person to engage in a regulated activity or profession.

A **"Post Secondary Diploma**" means a credential issued, on completion of two or more years of post secondary education, by an accredited academic institution in Canada or the United States. A "Post Secondary Certificate" means a certificate issued, on completion of two or more years of post secondary education at an academic institution, by the federal government of Mexico or a state government in Mexico, an academic institution recognized by the federal government or a state government, or an academic institution created by federal or state law.

The following notes relate to NAFTA TN admissions in specific occupations:

(A) A business person in the category of **"Scientific Technician/ Technologist"** must be seeking temporary entry for work in direct support of professionals in agricultural sciences, astronomy, biology, chemistry, engineering, forestry, geology, geophysics, meteorology or physics. These occupations do not ordinarily require a baccalaureate. Supporting documents could be an attestation from the prospective U.S. employer or the Canadian employer, or other documents establishing the individual possesses the skills set forth in Appendix 1603.D.1.

(B) A business person in the category of **"Medical Laboratory Technologist (Canada) /Medical Technologist (Mexico and the United States)"** must be seeking temporary entry to perform in a laboratory chemical, biological, hematological, immunologic, microscopic or bacteriological tests and analyses for diagnosis, treatment, or prevention of diseases.

(C) Foreign medical school graduates seeking temporary entry in the category of **"Physician (teaching or research only)"** may not engage in direct patient care. Patient care that is incidental teaching and/or research is permissible. Patient care is incidental when it is casually incurred in conjunction with the physician's teaching or research. To determine if the patient care will incidental, factors such as the amount of time spent in patient care relative to teaching and/or research, whether the physician receives compensation for such services, whether the salary offer is so substantial in teaching and/or research that direct patient care is unlikely, or whether the physician will have a regular patient load, should be considered by the officer.

(D) **Registered nurses** must demonstrate eligibility by providing a provincial or state license or Licenciatura degree. However, in order to be admitted the registered nurse must present a permanent state license, a temporary state license, or other temporary authorization to work as a registered nurse, issued by the state nursing board in the state of intended employment. Registered nurses holding temporary state licenses or other temporary state authorization shall not be required to show they have passed the examination given by the Commission on Graduates of Foreign Nursing Schools (CGFNS). Admission of nurses should not be limited to the expiration date of either document.

(E) **Sylviculturists and foresters** plan and supervise the growing, protection, and harvesting of trees. Range managers manage, improve, and protect rangelands to maximize their use without damaging the environment. A baccalaureate or Licenciatura degree in forestry or a related field or a state/provincial license is the minimum entry requirement for these occupations.

F) **Disaster relief insurance claims adjusters** must submit documentation that there is a declared disaster event by the President of the United States, or a state statute, or a local ordinance, or an event at a site which has been assigned a catastrophe serial number by the Property Claims Service of the

American Insurance Services Group, or, if property damage exceeds $5 million and represents a significant number of claims, by an association of insurance companies representing at least 15 percent of the property casualty market in the U.S.

G) **Management consultants** provide services that are directed toward improving the managerial, operating, and economic performance of public and private entities by analyzing and resolving strategic and operating problems and thereby improving the entity's goals, objectives, policies, strategies, administration, organization, and operation. Management consultants are usually independent contractors or employees of consulting firms under contracts to U.S. entities. They may be salaried employees of the U.S. entities to which they are providing services only when they are not assuming existing positions or filling newly created positions. As a salaried employee of such an U.S. entity, they may only fill supernumerary temporary positions. On the other hand, if the employer is an U.S. management-consulting firm, the employee may be coming temporarily to fill a permanent position. Canadian or Mexican citizens may qualify as management consultants by holding a Baccalaureate or Licenciatura degree or by having five years of experience in a specialty related to the consulting agreement.

(H) The **computer systems analyst** category does not include programmers. A systems analyst is an information specialist who analyzes how data processing can be applied to the specific needs of users and who designs and implements computer-based processing systems. Systems analysts study the organization itself to identify its information needs and design computer systems that meet those needs. Although the systems analyst will do some programming, the TN category has not been expanded to include programmers.

(I) **Hotel Managers** must possess a Baccalaureate or Licenciatura degree in hotel/restaurant management. A post-secondary diploma in hotel/restaurant management plus 3 years of experience in the field will also qualify.

(J) **Animal and Plant Breeders** breed animals and plants to improve their economic and aesthetic characteristics. Both occupations require a Baccalaureate or Licenciatura degree.

(3) **Qualifications**. The NAFTA professional must meet the following general criteria:

- Be a citizen of a NAFTA country (Canada or Mexico).

- Be engaged in professional-level activities for an entity in the United States. Only those professional-level activities listed in Appendix 1603.D.1 to Annex 1603 are covered under the NAFTA. The applicant must establish that the professional-level services will be rendered for an entity in the United States. The NAFTA professional category is not appropriate for Canadian or Mexican citizens seeking to set up a business in the United States in which he or she will be self-employed.

- Be qualified as a professional. The applicant must establish qualifications to engage in one of the activities listed in Appendix 1603.D.1. The Minimum Education Requirements and Alternative Credentials are listed in the Appendix for each professional-level activity. The regulation requires that degrees, diplomas, or certificates received by the TN applicant from an educational institution outside of the United States, Canada, or Mexico must be accompanied by an evaluation by a reliable credentials evaluation service that specializes in such evaluations. Experiential evidence should be in the form of letters from former employers. If the applicant was formerly self-employed, business records should be submitted attesting to that self-employment.

- Meet applicable license requirements. To practice a licensed profession, Canadian and Mexican entrants must meet all applicable requirements of the state in which they intend to practice.

Note: In certain circumstances, although a profession may generally require licensing, there may be duties within the occupation that do not require licensing. For example, an architect must be licensed to sign architectural plans, etc. but not all professional-level duties of an architect require licensure (an architect can work on development of plans but be precluded from signing the plans).

Similarly, a dentist requires a license in the U.S. to practice dentistry but if a Canadian citizen is coming to the U.S. as a TN to give a seminar on dentistry, no U.S. license would be necessary. The Canadian

may establish qualifications as a dentist by showing a provincial license or a D.D.S., D.M.D., Doctor en Odontologia en Cirugia Dental..

This is analogous to the lawyer who seeks admission as a TN to offer professional-level legal advice about Canadian law but who is not going to practice before any state bar in the U.S.-- this Canadian citizen would need only to establish qualification as a lawyer-- a J.D. or provincial bar membership could suffice.

• Be in the United States temporarily. The NAFTA professional must establish that the intent of entry is not for permanent residence.

(4) **Application Process**.

(A) **Citizens of Canada**. A citizen of Canada may apply for entry to the U.S. as a NAFTA professional at major ports-of-entry, airports handling international flights, or at the airports in Canada where the Service has established a pre-clearance/pre-flight station. The applicant must submit documentary proof that he or she is a citizen of Canada. Such proof may consist of a Canadian passport or birth certificate together with photo identification. No visa is required for entry, but the applicant may seek visa issuance if desired.

An application for entry as a TN professional is an application for admission. It must be made, in person, to an immigration officer at the same time the individual is applying for admission to the United States. There is no written application for entry as a TN professional. No prior petition, labor certification, or prior approval may be required for Canadian citizens applying for admission to the U.S. in TN status. Advance adjudication of a TN applicant prior to the actual application for admission is not appropriate. Prior approval procedures are not permissible under Annex 1603.D.2(a) of the NAFTA. The applicant must be interviewed regarding his or her qualifications.

Documentation from the prospective employer in the U.S., or from the foreign employer, must include the following:

• A statement (in the form of a letter or contract) of the professional-level activity listed in Appendix 1603.D.1, in which the applicant will be engaging and a full description of the nature of the job duties the applicant will be performing, the anticipated length of stay, and the arrangements for remuneration;

• Evidence that the applicant meets the educational qualifications or alternative credentials for the activity listed in Appendix 1603.D.1; and

• Evidence that all licensure requirements, where required by state or local law, have been satisfied. {Please refer to note regarding license requirements in 15.5(f)(3)}.

(B) **Citizens of Mexico**. A citizen of Mexico may apply for entry to the U.S. as a NAFTA professional at major land border ports-of-entry, airports handling international flights, or at the airports in Canada where the Service has established a pre-clearance/pre-flight station. However, a citizen of Mexico must be in possession of a TN nonimmigrant visa issued by an American Consulate and present a valid Mexican passport.

Citizens of Mexico seeking classification as a TN must do so on the basis of a petition filed by the U.S. employer. Before filing the petition, the employer must meet the labor application requirement of section 212(n) of the Act.

Each prospective U.S. employer must file the petition on Form I-129, Petition for Nonimmigrant Worker, with the Nebraska Service Center, even in emergent circumstances, with the following:

• Evidence that the applicant is a citizen of Mexico;

• Evidence that the employer has filed with the Secretary of Labor Form ETA 9035 to show that the petitioner has met the labor condition application requirement of section 212(n) of the Act;

• A statement of the activity listed in Appendix 1603.D.1 in which the beneficiary will be engaging, a full description of the nature of the duties the beneficiary will be performing, the anticipated length of

stay, and the arrangements for remuneration;

- Evidence that the applicant meets the educational and/or alternative credentials for the activity listed in Appendix 1603.D.1; and

- Evidence that all applicable state or local licensure requirements have been satisfied.

The Service will provide the U.S. employer with a written decision approving or denying the petition. The applicant must then present the approval notice to the consular official when applying for a TN visa. There is a fee to apply for a TN visa. A petition classifying a citizen of Mexico as a TN professional may be approved for up to 1 year. In the case of a petition denial, full appeal rights through the Administrative Appeals Unit are available to the petitioner.

(5) **Terms of Initial Admission.**

(A) **Canadians**. A Canadian citizen who qualifies for admission under the NAFTA in the TN classification must remit the fee prescribed in 8 CFR 103.7 (presently $50.00 US) upon admission. Issue the applicant a Service fee receipt (Form G-211, Form G-711, or Form I-797) and a multiple entry Form I-94 showing admission in the classification TN for the period requested not to exceed 1 year.

(B) **Mexicans**. A Mexican citizen seeking admission in TN classification is required to present a valid TN visa issued by an American Consulate. In addition to the visa requirement, the Mexican citizen must present at the time of application for initial admission a copy of the employer's statement regarding the nature of the applicant's duties in the United States. Admit a Mexican TN for the validity period of the approved petition and issue a multiple entry Form I-94 showing admission classification as TN. (Note that only citizens of Canada pay the TN fee at the port-of-entry. This fee is not charged to Mexican citizens when applying for TN classification at the port-of-entry because fees are charged for filing the I-129 petition and for issuance of the TN nonimmigrant visa.)

At the time application for admission, the citizen of Canada or Mexico will be subject to inspection to determine the applicability of section 214(b) of the Act (presumption of immigrant intent) to the applicant.

(6) **Procedures for Readmission.**

(A) **Canadians**. A Canadian citizen eligible for TN classification may be readmitted to the U.S. for the remainder of the period authorized on his or her Form I-94, without presentation of the letter or supporting documentation described above, provided that the original intended business activities and employer(s) have not changed. If the Canadian citizen is no longer in possession of a valid, unexpired Form I-94, the applicant must present substantiating evidence. Substantiating evidence may be in the form of a Service fee receipt for admission as a TN, a previously issued TN admission stamp in a passport, and a confirming letter from the U.S. employer(s). Upon readmission, issue a new multiple entry Form I-94.

(B) **Mexicans**. The citizen of Mexico who is in possession of a valid Form I-94 may be readmitted for the remainder of the time authorized provided that the original intended professional activities and employer(s) have not changed and should retain possession of that original Form I-94. If no longer in possession of a valid Form I-94 (e.g. a citizen of Mexico seeking readmission upon return from a trip to Europe), the Mexican citizen may be readmitted upon presentation of a valid TN visa and evidence of prior admission. Evidence of prior admission may include, but is not limited to, an INS fee receipt from a prior entry or an admission stamp in the applicant's passport. Upon readmission, a new I-94 shall be issued bearing the legend "multiple entry."

(7) **Extension of stay.**

(A) **Canadians**. A citizen of Canada admitted pursuant to NAFTA may seek an extension of stay as a TN through the filing of a Form I-129 by the U.S. employer with the Nebraska Service Center. No Department of Labor certification requirements apply to a Canadian citizen in TN status who is

seeking to extend that status. The applicant must be in the U.S. at the time of filing the extension request. Provision is made for port-of-entry notification should the applicant depart the U.S. during the pendency of the application. An extension may be granted for up to 1 year.

A citizen of Canada is not precluded from departing the U.S. and applying for admission with documentation from a U.S. employer (or foreign employer, in the case of a Canadian citizen who is seeking to provide prearranged services at a professional level to a U.S. entity) which specifies that the applicant will be employed in the U.S. for an additional period of time. The applicant must meet the evidentiary requirements outlined above and the prescribed fee must be remitted upon admission.

(B) **Mexicans.** A citizen of Mexico seeking an extension of stay in the U.S. in TN status also must be petitioned for on Form I-129 at the Nebraska Service Center. Documentary requirements include evidence that Department of Labor certification requirements continue to be met by the employer. Provision is included for consular notification should the applicant leave the U.S. during the pendency of the application. A petition extension and extension of the applicant's stay may be granted for up to 1 year.

(C) **Limitations**. At the present time, there is no specified upper limit on the number of years a citizen of Canada or Mexico may remain in the U.S. in TN classification, as there is with most of the other nonimmigrant classifications. However, section 214(b) of the Act is applicable to citizens of Canada or Mexico who seek an extension of stay in TN status and applications for extension or readmission must be examined in light of this statutory provision.

Except as limited by section 248 of the Act, a citizen of Canada or Mexico who is currently in the U.S. in another valid classification is not precluded from requesting a change of status to TN. If such applicant is in the U.S. as an H-1 or L-1, he or she may be changed to TN status if otherwise eligible, without regard to the maximum time limits for those classifications. A Canadian J nonimmigrant who is subject to the 2-year foreign residence requirement may not change to TN classification, but may leave the U.S. and seek readmission as a TN.

(8) **Request for change/additions of U.S. employers**. A Canadian or Mexican citizen may change or add employers while in the U.S. through the filing of Form I-129 at the Nebraska Service Center. All documentary requirements pertaining to a citizen of Canada or a citizen of Mexico outlined above must be met. Employment with a different or with an additional employer is not authorized prior to INS approval of the petition.

Alternatively, the Canadian citizen may depart the United States and apply for reentry for the purpose of obtaining additional employment authorization with a new or additional employer. Documentary requirements outlined above must be met and the prescribed fee must be remitted upon readmission.

No action is required by a Canadian or Mexican citizen who is transferred to another location by the U.S. employer to perform the same services. An example of such an acceptable transfer would be to a branch or office of the employer. If the transfer is to a separately incorporated subsidiary or affiliate, Form I-129 must be filed.

(9) **Spouse and unmarried minor children**. The spouse and unmarried minor children who are accompanying or following to join a TN professional, if otherwise admissible, are to be accorded TD (Trade Dependent) classification. These are required to present a valid, unexpired nonimmigrant visa unless otherwise visa-exempt under 8 CFR 212.1. (Those persons who are normally exempt from nonimmigrant visa requirements include citizens of Canada and Landed Immigrants of Canada having a common nationality with Canadian citizens).

There is no requirement that the TD dependent be a citizen of Canada or Mexico.

No fee is required for admission of dependents in TD status (except the fee for the I-94) and they are to be issued multiple entry Forms I-94.

A TD spouse or child is not authorized to accept employment while in the U.S. in such status. Dependents in TD status may attend school in the U.S. on a full-time basis as such attendance is deemed incident to status.

(10) **Denial**. In the event a Canadian citizen applying for admission pursuant to NAFTA cannot demonstrate to the admitting officer that he or she satisfies the TN documentary requirements, the Canadian citizen should be offered a hearing before an immigration judge provided the applicant is confident he or she, in fact, meets the requirements pursuant to the NAFTA, Appendix 1603.D.1 The request for a hearing is equivalent to a TN appeal or a reconsideration of the admitting officer's decision.

SECTION TWO

B-1 Non-immigrant pursuant to NAFTA

B-1 Nonimmigrant pursuant to NAFTA

8 CFR 214.2(b)(4) Admission of aliens pursuant to the North American Free Trade Agreement (NAFTA). A citizen of Canada or Mexico seeking temporary entry for purposes set forth in paragraph (b)(4)(i) of this section, who otherwise meets existing requirements under Section 101(a)(15)(B) of the Act, including but not limited to requirements regarding the source of remuneration, shall be admitted upon presentation of proof of such citizenship in the case of Canadian applicants, and valid entry documents such as a passport and visa or Mexican Border Crossing Card (Form I-186 or I-586) in the case of Mexican applicants, a description of the purpose of entry, and evidence demonstrating that he or she is engaged in one of the occupations or professions set forth in paragraph (b)(4)(i) of this section. Existing requirements, with respect to Canada, are those requirements which were in effect at the time of entry into force of the CFTA and, with respect to Mexico, are those requirements which were in effect at the time of entry into force of the NAFTA. Additionally, nothing shall preclude the admission of a citizen of Mexico or Canada who meets the requirements of paragraph (b)(4)(ii) of this section.

(i) Occupations and professions set forth in Appendix 1603.A.1 to Annex 1603 of the NAFTA.

(A) Research and design. Technical, scientific and statistical researchers conducting independent research or research for an enterprise located in the territory of another Party.

(B) Growth, manufacture and production.

((1)) Harvester owner supervising a harvesting crew admitted under applicable law. (Applies only to harvesting of agricultural crops: grain, fiber, fruit, and vegetables.)

((2)) Purchasing and production management personnel conducting commercial transactions for an enterprise located in the territory of another Party.

(C) Marketing.

((1)) Market researchers and analysts conducting independent research or analysis, or research or analysis for an enterprise located in the territory of another Party.

((2)) Trade fair and promotional personnel attending a trade convention.

(D) Sales.

((1)) 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.

((2)) Buyers purchasing for an enterprise located in the territory of another Party.

(E) Distribution.

((1)) Transportation operators transporting goods or passengers to the United States from the territory of another Party or loading and transporting goods or passengers from the United States to the territory of another Party, with no unloading in the United States, to the territory of another Party. (These operators may make deliveries in the United States if all goods or passengers to be delivered were loaded in the territory of another Party. Furthermore, they may load from locations in the United States if all goods or passengers to be loaded will be delivered in the territory of another Party. Purely domestic service or solicitation, in competition with United States operators, is not permitted.)

((2)) Customs brokers performing brokerage duties associated with the export of goods from the United States to or through Canada.

(F) After-sales service. Installers, repair and maintenance personnel, and supervisors, possessing specialized knowledge essential to the 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 United States, during the life of the warranty or service agreement. (For the purposes of this provision, the commercial

or industrial equipment or machinery, including computer software, must have been manufactured outside the United States.)

(G) General service.

((1)) Professionals engaging in a business activity at a professional level in a profession set out in Appendix 1603.D.1 to Annex 1603 of the NAFTA, but receiving no salary or other remuneration from a United States source (other than an expense allowance or other reimbursement for expenses incidental to the temporary stay) and otherwise satisfying the requirements of Section A to Annex 1603 of the NAFTA.

((2)) Management and supervisory personnel engaging in commercial transactions for an enterprise located in the territory of another Party.

((3)) Financial services personnel (insurers, bankers or investment brokers) engaging in commercial transactions for an enterprise located in the territory of another Party.

((4)) Public relations and advertising personnel consulting with business associates, or attending or participating in conventions.

((5)) 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. (The tour may begin in the United States; but must terminate in foreign territory, and a significant portion of the tour must be conducted in foreign territory. In such a case, an operator may enter the United States with an empty conveyance and a tour guide may enter on his or her own and join the conveyance.)

((6)) Tour bus operators entering the United States:

((i)) With a group of passengers on a bus tour that has begun in, and will return to, the territory of another Party.

((ii)) 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.

((iii)) With a group of passengers on a bus tour to be unloaded in the United States and returning with no passengers or reloading with the group for transportation to the territory of another Party.

((7)) Translators or interpreters performing services as employees of an enterprise located in the territory of another Party.

(ii) Occupations and professions not listed in Appendix 1603.A.1 to Annex 1603 of the NAFTA. Nothing in this paragraph shall preclude a business person engaged in an occupation or profession other than those listed in Appendix 1603.A.1 to Annex 1603 of the NAFTA from temporary entry under Section 101(a)(15)(B) of the Act, if such person otherwise meets the existing requirements for admission as prescribed by the Attorney General. (Paragraph (b)(4) revised 1/1/94); 58 FR 69210)

(5) Construction workers not admissible. Aliens seeking to enter the country to perform building or construction work, whether on-site or in-plant, are not eligible for classification or admission as B - 1 non-immigrants under section 101(a)(15)(B) of the Act. However, alien non-immigrants otherwise qualified as B - 1 non-immigrants may be issued visas and may enter for the purpose of supervision or training of others engaged in building or construction work, but not for the purpose of actually performing any such building or construction work themselves.

(b) Visitors.

(1) Classification: B-1 Visitor for business.

Documents required: Passport valid for a minimum of 6 months beyond the period of admission unless otherwise provided for or waived. Nonimmigrant B-1 visa unless waived.

Qualifications: Alien has a residence in a foreign country which he or she does not intend to abandon. Subject to all nonimmigrant grounds of inadmissibility. Alien intends to enter the U.S. for a temporary visit to engage in legitimate activities relating to business. Applicant has made financial arrangements to carry out the purpose of the visit and depart the United States.

Terms of admission: Maximum admission is 1 year. A B-1 will be admitted for a period of time which is fair and reasonable for completion of the purpose of the visit. Extensions are permitted in increments of 6 months (1 year for missionaries).

Notations on I-94: B-1 (date to which admitted). If seaman joining vessel, enter vessel name on reverse.

Special notes:

(A) Restricted admission period. Arbitrarily small admission periods needlessly increase the volume of extension applications and should be avoided. Ordinarily, B-1 admission should be granted for the time requested or longer, in order to reduce needless extension requests.

(B) Determining eligibility. Consider the source of remuneration and also the actual place of accrual of profits for services rendered by an alien in determining whether an alien is classifiable as a B-1 (See Chapter 15.5 for special NAFTA B-1 instructions). Each of the following has been determined to be permissible B-1 activity if the alien is to receive no salary or other remuneration from a U.S. source (other than an expense allowance or other reimbursement for expenses incidental to the temporary stay):

(1) An alien coming to the U.S. to: engage in commercial transactions (i.e., buying or selling) which do not involve gainful employment in the US; negotiate contracts; consult with business associates, including attending meetings of the Board of Directors of a U.S. corporation; litigate; participate in scientific, educational, professional, or business conventions, conferences, or seminars; or undertake independent research;

(2) An alien coming to engage in activities that would be classifiable under H-3 except that there is no U.S. employer involved, and is either studying at a foreign medical school and is seeking to enter the U.S. temporarily to taken an "elective clerkship" (practical experience and instruction in the various disciplines of the practice of medicine under the supervision and direction of faculty physicians) at a U.S. medical school's hospital without remuneration from that hospital or undertaking training at the behest of a foreign employer by whom the alien is already employed abroad and from whom the alien will continue to receive his or her salary while in training in the United States;

(3) An alien coming to install, service, or repair commercial or industrial equipment or machinery purchased from a company outside the U.S. or to train U.S. workers to perform such services. (However, in such cases the contract of sale must specifically require the seller to provide such services or training, and the alien must possess specialized knowledge essential to the seller's contractual obligation to perform the services or training and must receive no remuneration from a U.S. source. These provisions do not apply to an alien seeking to perform building or construction work, whether on-site or in-plant except for an alien who is applying as a B-1 for the purpose of supervising or training other workers engaged in building or construction work, but not actually performing any such building or construction work);

(4) A professional athlete, such as a golfer or tennis player, who receives no salary or payment other than prize money for his or her participation in a tournament or sporting event;

(5) An athlete or team member who seeks to enter the U.S. as a member of a foreign-based team in order to compete with another sports team (provided: the foreign athlete and the foreign sports team have their principal place of business or activity in a foreign country; the income of the foreign based team and

the salary of its players are principally accrued in a foreign country; and the foreign based sports team is a member of an international sports league or the sporting activities involved have an international dimension);

(6) An amateur team sports player who is asked to join a professional team during the course of the regular professional season or playoffs for brief try-outs (The teams may provide only for such expenses as round-trip fare, hotel room, meals, and other try-out transportation costs);

(7) A professional entertainer coming to: (i) participate only in a cultural program sponsored by the sending country; who will be performing before a nonpaying audience; and all of whose expenses, including per diem, will be paid by the member's government; or (ii) participate in a competition for which there is no remuneration other than a prize (monetary or otherwise) and expenses;

(8) Crewman of a private yacht, regardless of the nationality of the private yacht, provided the yacht will be sailing out of a foreign home port and cruising in U.S. waters;

(9) An alien coming to perform his or her responsibilities as a "coasting officer" (A coasting officer is used when an officer of a foreign vessel is granted home leave while the vessel is in U.S. ports. The vessel does not remain in U.S. waters for more than 29 days, and the original officer returns in time to depart with the vessel. The coasting officer may then repeat the process with another vessel of the same foreign line);

(10) An alien seeking investment in the U.S. which would qualify him or her for E-2 status (Such alien is precluded from performing productive labor or from actively participating in the management of the business prior to being granted E-2 status);

(11) An alien performing services pursuant to the Outer Continental Shelf Lands Act Amendments of 1978 (The consular officer will annotate "OCS" on the B-1 visa). Alien construction workers who are entering to work from a derrick barge to construct an oil platform on the outer continental shelf are considered to man and crew the barge, not the platform. Foreign-owned barges are exempt from the requirements of 43 U.S.C. 1356(a)(3) which requires that any vessel, rig, platform, or structure used in regulated operations on the outer continental shelf be manned or crewed by U.S. citizens or lawful permanent residents. The Immigration and Nationality Act does not apply to aliens who are manning or crewing foreign-owned derrick barges on the outer continental shelf. Such aliens passing through the U.S. enroute to the outer continental shelf must have an appropriate visa, usually a B-1 visa. (In 1997, the Supreme Court denied certification of a D.C. circuit court decision on this issue);

(12) A personal or domestic servant who is accompanying or following to join a U.S. citizen employer who has a permanent home or is stationed in a foreign country, and who is visiting the U.S. temporarily, provided the employer-employee relationship existed prior to the commencement of the employer's visit to the United States;

(13) A personal or domestic servant who is accompanying or following to join a U.S. citizen employer temporarily assigned to the United States (The consular officer will annotate "personal or domestic servant of U.S. citizen (employer's name)" on the B-1 visa);

(14) A personal or domestic servant who is accompanying or following to join a foreign employer who seeks admission into or is already in the U.S. in B, E, F, H, I, J, L, M, O, P, or R nonimmigrant status (The consular officer will annotate "personal or domestic servant of nonimmigrant alien (employer's name)" on the B-1 visa);

(15) An alien seeking to enter the U.S. for employment with a foreign airline engaged in international transportation of passengers and freight in an executive, supervisory, or highly technical capacity who meets the requirements for E visa classification but is precluded from entitlement to E classification solely because there is no treaty of friendship, commerce, and navigation in effect between the U.S. and the country of the alien's nationality or because he or she is not a national of the airline's country of nationality;

(16) An alien coming to perform services on behalf of a foreign based employer as a jockey, sulky driver, trainer, or groom (Such alien is not allowed to work for any other employer);

(17) An alien coming to open or be employed in a new branch, subsidiary, or affiliate of the foreign employer, if the alien will become eligible for status as an L-1 upon securing proof of acquisition of physical premises;

(18) An employee of a foreign airline coming to pick-up aircraft if he or she is not transiting the U.S. and is not admissible as a crewman (The alien must present a letter from the foreign airline verifying the employment and official capacity of the applicant in the United States);

(19) An alien coming exclusively to observe the conduct of business or other professional or vocational activity, provided the alien pays for his or her own expenses;

(20) An alien coming to participate in any program of furnishing technical information and assistance under section 635(f) of the Foreign Assistance Act of 1961 (75 Stat. 424);

(21) An alien coming to participate in the training of Peace Corps volunteers or coming under contract pursuant to sections 9 and 10(a)(4) of the Peace Corps Act (75 Stat. 612), unless the alien qualifies for "A" classification;

(22) An alien coming to participate in the United Nations Institute for Training and Research (UNITAR) internship program, who is not an employee of a foreign government;

(23) An alien coming to plan, construct, dismantle, maintain, or be employed in connection with exhibits at international fairs or expositions if he or she is an employee of a foreign exhibitor and is not a foreign government representative and does not qualify for "A" classification; and

(24) An alien coming to participate in a voluntary service program benefiting U.S. local communities, who establishes that he or she is a member of and has a commitment to a particular recognized religious or nonprofit charitable organization and that no salary or remuneration will be paid from a U.S. source, other than an allowance or other reimbursement for expenses incidental to the volunteer's stay in the United States. (The alien must present to the officer a written statement indicating his or her name, date and place of birth, the foreign permanent residence address, the name and address of initial U.S. destination, and anticipated duration of assignment).

(25) An alien employee of an international bridge commission coming to plan, construct, maintain or operate bridge facilities at a port of entry within the immediate confines of the bridge area. (Added 9/15/97; IN97-02)

Requirements for Admission:

A citizen of Canada or Mexico seeking temporary entry into the United States to engage in a business activity set out in Appendix 1603.A.1 shall be granted temporary entry, if otherwise admissible, on presentation of the following:

(1) proof of citizenship

(2) documentation demonstrating the activity in which the business person will engage and describing the purpose of entry

(3) the primary source of remuneration is outside of the United States (may be oral declaration)

(4) the principal place of business and place of accrual of profits is predominantly outside of the United States (may be oral declaration)

The United States shall not require prior approval procedures, petitions, labor certifications or other procedures of similar effect or impose or maintain any numerical restriction.

A Canadian citizen who is determined to be admissible as a visitor for business pursuant to the FTA may be admitted as a B-1 for a period of time not to exceed 1 year. A Canadian citizen B-1 who requests documentation may be issued an arrival/departure record, Form I-94, in order to facilitate reentry.

North America Free Trade Agreement (NAFTA) Appendix 1603.A.1: 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:
  (a) with a group of passengers on a bus tour that has begun in, and will return to, the territory of another Party;
  (b) 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
  (c) 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.

Definitions

For purposes of this Appendix:
territory of another Party means the territory of a Party other than the territory of the Party into which temporary entry is sought;
tour bus operator means a natural person, including relief personnel accompanying or following to join, necessary for the operation of a tour bus for the duration of a trip; and
transportation operator means a natural person, other than a tour bus operator, including relief personnel accompanying or following to join, necessary for the operation of a vehicle for the duration of a trip.

This appendix represents a list of business activities representative of a complete business cycle in which a B-1 business visitor seeking entry under NAFTA may engage. It is not an exhaustive list and nothing precludes a citizen of Mexico or Canada from seeking entry to engage in traditional B-1 activities which are not included within Appendix 1603.A.1.

Spouse and Children

The spouse and unmarried minor children of a Canadian or Mexican citizen classifiable under the FTA as B-1, shall be admitted as B-2 provided they meet all existing requirements under section 212(a) of the Act. The B-2 spouse and children shall be admitted for a period of time commensurate with that of the B-1, not to exceed one year. The spouse and children shall be eligible for an extension of temporary stay and shall be included in the application for extension filed by the B-1.

Extension of Stay

A B-1 visitor for business may be admitted for not more than one year and may be granted extensions of temporary stay in increments of not more than six months each.

Filing on Form I-539: A B-1 nonimmigrant alien, who seeks to extend his or her stay beyond the currently authorized period of admission, must apply for an extension of stay on Form I-539 with the fee required in 8 CFR 103.7 of this chapter (currently $120, effective 10/13/99), together with any initial evidence specified in the applicable provisions of 8 CFR 214.2, and on the application form. The B-1 nonimmigrant may include his spouse and/or children on a single Form I-539. Extensions granted to members of a family group must be for the same period of time.

Timely filing and maintenance of status. An extension of stay may not be approved for an applicant who failed to maintain the previously accorded status or where such status expired before the application or petition

was filed, except that failure to file before the period of previously authorized status expired may be excused in the discretion of the Service and without separate application, with any extension granted from the date the previously authorized stay expired, where it is demonstrated at the time of filing that:

(i) The delay was due to extraordinary circumstances beyond the control of the applicant or petitioner, and the Service finds the delay commensurate with the circumstances;

(ii) The alien has not otherwise violated his or her nonimmigrant status;

(iii) The alien remains a bona fide nonimmigrant; and

(iv) The alien is not the subject of deportation proceedings under section 242 of the Act (prior to April 1, 1997) or removal proceedings under section 240 of the Act.

Decision in Form I-539 extension proceedings. Where an applicant or petitioner demonstrates eligibility for a requested extension, it may be granted at the discretion of the Service. There is no appeal from the denial of an application for extension of stay filed on Form I-129 or I-539.

Termination of status. Within the period of initial admission or extension of stay, the nonimmigrant status of an alien shall be terminated by the revocation of a waiver authorized on his or her behalf under section 212(d)(3) or (4) of the Act; by the introduction of a private bill to confer permanent resident status on such alien; or, pursuant to notification in the Federal Register, on the basis of national security, diplomatic, or public safety reasons.

Employment. A nonimmigrant in the United States in a class defined in section 101(a)(15)(B) of the Act as a temporary visitor for pleasure may not engage in any employment.

False information. A condition of a non-immigrant's admission and continued stay in the United States is the full and truthful disclosure of all information requested by the Service. Willful failure by a nonimmigrant to provide full and truthful information requested by the Service (regardless of whether or not the information requested was material) constitutes a failure to maintain nonimmigrant status under section 241(a)(1)(C)(i) of the Act.

Criminal activity. A condition of a non-immigrant's admission and continued stay in the United States is obedience to all laws of United States jurisdictions which prohibit the commission of crimes of violence and for which a sentence of more than one year imprisonment may be imposed. A nonimmigrant's conviction in a jurisdiction in the United States for a crime of violence for which a sentence of more than one year imprisonment may be imposed (regardless of whether such sentence is in fact imposed) constitutes a failure to maintain status under section 241(a)(1)(C)(i) of the Act.

U.S. Department of Justice
Immigration and Naturalization Service
HQ 70/6.2.2-C
HQ70/13.1;HQ70/21.11
425 1 Street NW
Washington, DC 20536

JUL 2 1998

MEMORANDUM FOR: All Regional Directors
Director, Office of International Affairs

FROM: Michael A. Pearson
Executive Associate Commissioner
Office of Field Operations

SUBJECT: Tour Bus Operators and Other Transportation Operators Applying for Admission as B- I Visitors. for Business

Questions have been raised in recent years with respect to the admission of tour bus operators and other transportation operators as visitors for business (nonimmigrant classification B-1) under INS regulations at 8 CFR 214.2(b)(4)(1) and (11). This memo is to provide guidance in determining whether tour bus operators or other transportation operators are admissible into the United States as B- I visitors for business.

Questions Reviewed by Headquarters:

I . Whether Canadian and Mexican tour bus drivers are admissible as visitors for business (nonimmigrant visa classification B- 1) under Chapter 16 of the NAFTA and INS regulations relating to 'tour bus operators' under the "General Service" provisions at 8 CFR 214.2(b)(4)(1)(G)(6), when the trip is an international tour, but the beginning and end of the trip is. in the United States.

2. If not admissible as 'tour bus operators' under the provisions at 8 CFR 214.2(b)(4)(1)(G)(6), whether these drivers are admissible as B- I visitors for business under the regulations relating to 'transportation operators I under the "Distribution" provisions at 8 CFR 2 14.2(b)(4)(1)(E)(1), or whether this kind of trip constitutes point-to-point hauling.

3. If not admissible as 'tour bus operators' under the regulations at 8 CFR

2 14.2(b)(4)(1), whether these drivers are admissible under the general "B" provisions of section 10 1 (a)(1 5)(B) of the Immigration and Nationality Act (INA), INS regulations at 8 CFR 214.2(b)(4)(11), and relating precedent decisions.

Specific commitments to the North American Free Trade Agreement (the NAFTA) and the general-B- I provisions:

Chapter 16 of the North American Free Trade Agreement (the NAFTA) provides for the admission of four categories of business persons into the three Party countries. Section A of Annex 1603 of the NAFTA provides for the admission of business visitors seeking to engage in a business activity set forth in Appendix 1603.A. 1. The United States chose to meet its commitments to admit Canadian and Mexican business visitors under Section A of Annex 1603 of the NAFTA through existing law under section 10 1 (a)(I 5)(B) of the INA.,

INS promulgated regulations at 8 CFR 214.2(b)(4) to incorporate the provisions of Appendix 1603.A. I and provide for the admission of citizens of Canada and Mexico as business visitors in B- I nonimmigrant classification pursuant to paragraph I of Section A of Annex 1603 of the NAFTA. The business -activities set forth in Appendix 1603. A. I are permissible business activities under current United States law and practice under section 10 l(a)(l 5)(B) of the INA. Entry pursuant to paragraph 3 of Section A for business activities not covered 'in Appendix 1603, A. I are otherwise authorized under section 10 1 (a)(I 5)(B) and required no regulatory changes for implementation.

Note that the acceptable activities for so-called 'NAFTA B- I nommmigrants' duplicate those allowed for all B- I visa holders under current INS regulations, such as research and design, warranty or service contract work, or delivering products. The Appendix 1603.A. I is, therefore, a list of business activities representative of a complete business cycle in which a B- I business visitor seeking entry under the NAFTA may engage. The activities listed in the Appendix were added at the request of the Governments of Canada and Mexico for clarification.

The Appendix is not, however, intended to be a complete listing of all business visitor activities. Nor do these activities expand or alter in any way the scope of the B- I nonimmigrant visa classification. Nothing under the statute, regulations, or operations instructions precludes a citizen of Mexico or Canada from seeking entry to engage in acceptable B- I activities which are not included within Appendix 1603. A. 1, provided they meet all requirements for entry in such classification, including restrictions on the source of remuneration. The traditional legal principles governing admission of B- I nonimmigrants apply, whether the business activities are included in the Appendix or not.

INS position:

The INS position is that alien bus drivers in all three of the questions above are admissible to the United States as visitors for business (13- 1) under INS regulations at 8 CFR 2 14.2(b)(4)(1) and/or (11), if otherwise admissible to the United States. This position is based upon **statute,** regulations, precedent decisions and opinions issued by the Office of General Counsel on similar issues, including the issue of cabotage or point-to-point loading and delivery in the United States. Rather than present officers with an exhaustive analysis of all sources, this memo condenses them into the following principles.

1. An alien admitted as a B- I nonimmigrant may not engage in any activity that qualifies as ordinary labor for hire. *See* Section 101(a)(15)(B) of the INA, 8 U.S.C. I 10 1 (a)(I 5)(B).

The operator of a transportation vehicle (e.g., truck, bus, etc.) may be admitted as a B- I nonimmigrant in order to transport goods or passengers in international Commerce. *See* Matter of Camilleri, 17 1 & N Dec. 441 (BIA 1980) and Matter of Cote, 17 1 & N Dec. 336 (BIA 1980).

The operator's permissible activities are limited to activities that are "necessary incidents" of international commerce. Ordinary cabotage (that is, carrying goods or passengers picked up at one point in the United States and dropped off at another point in the United States) is not a "necessary incident" of international commerce. A B- I nonimmigrant may not engage in cabotage. *See Greyhound Lines, Inc., v.* INS, No. 95-1608 (NHJ), Memorandum Opinion (D.D.C. Filed 10/23/95), 1995 WL 663185.

4. Where a bus tour involves international commerce, that is the tour takes place primarily in a foreign country, driving a tour bus (or acting as an escort or guide) that takes a tour from the United States into Canada or Mexico and back to the United States is considered to be a necessary incident of international commerce. A B- I nonimmigrant, therefore, may engage 'in these activities. *See* Matter of Hira, I&N Dec. 824 (BIA 1965, 1966 A G. 1966),

Summary

The Service's opinion is the same whether the issue is analyzed under the general principles of B- I law or under the NAFTA. The NAFTA regulations at 8 CFR 2 14 2(b)(4)(O(G)(6) clearly permit B- I tour bus drivers to take the tour group from the United States into Canada or Mexico, By its terms, (G)(6) appears to require that the tour group end its tour in Canada or Mexico. But another NAFTA provision, 8 CFR 214.2(b)(4)(i)(E)(1), permits a B-1 transportation operator to transport passengers from Canada or Mexico into the United States. Since (G)(6) and (E)(1) are not written so as to operate in isolation of each other, a B- I nonimmigrant may, as a necessary incident of international commerce, work on the tour bus. Where time spent in Canada or Mexico is so minimal that the tour actually does not involve international commerce, however, the B- I is not an acceptable classification for the transportation/tour bus operator.

The rule against cabotage must always be observed. Thus, while the tour bus is on its way to Canada or Mexico, the tour bus cannot discharge in the United States passengers picked up in the United States. Similarly, on its way back, the tour bus cannot pick up in the United States any additional passengers who will alight in the United States.

Although the NAFTA is a reciprocal agreement, individual decisions on admissibility should not be based upon reported refusals of United States citizens into Canada or Mexico. Rather, any such incidents of reported refusals of United States citizens should be reported to HQOPS Adjudications Branch.

Please be advised that this memo provides guidance about transportation operators in general. It is not meant to be exhaustive, and there may be other types of transportation scenarios that inspecting officials will encounter at Ports-of-Entry.

Please forward this memorandum to all District Directors, Officers-in-Charge and Port Directors for distribution to all offices under their jurisdiction. If you have any questions regarding this memorandum, contact Helen deThomas, HQOPS, at (202) 514-5014.

SECTION THREE

E-1 & E-2 Nonimmigrant pursuant to NAFTA

8 CFR Sec. 214.2(e) Treaty Traders and Investors --

(1) Treaty trader. An alien, if otherwise admissible, may be classified as a nonimmigrant treaty trader (E-1) under the provisions of section 101(a)(15)(E)(i) of the Act if the alien:

> (i) Will be in the United States solely to carry on trade of a substantial nature, which is international in scope, either on the alien's behalf or as an employee of a foreign person or organization engaged in trade principally between the United States and the treaty country of which the alien is a national, taking into consideration any conditions in the country of which the alien is a national which may affect the alien's ability to carry on such substantial trade; and
>
> (ii) Intends to depart the United States upon the expiration or termination of treaty trader (E-1) status.

(2) Treaty investor. An alien, if otherwise admissible, may be classified as a nonimmigrant treaty investor (E-2) under the provision of section 101(a)(15)(E)(ii) of the Act if the alien:

> (i) Has invested or is actively in the process of investing a substantial amount of capital in a bona fide enterprise in the United States, as distinct from a relatively small amount of capital in a marginal enterprise solely for the purpose of earning a living;
>
> (ii) Is seeking entry solely to develop and direct the enterprise; and
>
> (iii) Intends to depart the United States upon the expiration or termination of treaty investor (E-2) status.

(3) Employee of treaty trader or treaty investor. An alien employee of a treaty trader, if otherwise admissible, may be classified as E-1, and an alien employee of a treaty investor, if otherwise admissible, may be classified as E-2 if the employee is in or is coming to the United States to engage in duties of an executive or supervisory character, or, if employed in a lesser capacity, the employee has special qualifications that make the alien's services essential to the efficient operation of the enterprise. The employee must have the same nationality as the principal alien employer. In addition, the employee must intend to depart the United States upon the expiration or termination of E-1 or E-2 status. The principal alien employer must be:

> (i) A person in the United States having the nationality of the treaty country and maintaining nonimmigrant treaty trader or treaty investor status or, if not in the United States, would be classifiable as a treaty trader or treaty investor; or
>
> (ii) An enterprise or organization at least 50 percent owned by persons in the United States having the nationality of the treaty country and maintaining nonimmigrant treaty trader or treaty investor status or who, if not in the United States, would be classifiable as treaty traders or treaty investors.

(4) Spouse and children of treaty trader or treaty investor. The spouse and child of a treaty trader or treaty investor accompanying or following to join the principal alien, if otherwise admissible, may receive the same classification as the principal alien. The nationality of a spouse or child of a treaty trader or treaty investor is not material to the classification of the spouse or child under the provisions of section 101(a)(15)(E) of the Act. (Corrected 11/6/97; 62 FR 60122)

(5) Nonimmigrant intent. An alien classified under section 101(a)(15)(E) of the Act shall maintain an intention to depart the United States upon the expiration or termination of E-1 or E-2 status. However, an application for initial admission, change of status, or extension of stay in E classification may not be denied solely on the basis of an approved request for permanent labor certification or a filed or approved immigrant visa preference petition.

(6) Treaty country. A treaty country is, for purposes of this section, a foreign state with which a qualifying Treaty of Friendship, Commerce, or Navigation or its equivalent exists with the United States. A treaty country includes a foreign state that is accorded treaty visa privileges under section 101(a)(15)(E) of the Act by specific legislation.

(7) Treaty country nationality. The nationality of an individual treaty trader or treaty investor is determined by the authorities of the foreign state of which the alien is a national. In the case of an enterprise or organization, ownership must be traced as best as is practicable to the individuals who are ultimately its owners.

(8) Terms and conditions of E treaty status-(i) Limitations on employment. The Service determines the terms and conditions of E treaty status at the time of admission or approval of a request to change nonimmigrant status to E classification. A treaty trader, treaty investor, or treaty employee may engage only in employment which is consistent with the terms and conditions of his or her status and the activity forming the basis for the E treaty status.

(ii) Subsidiary employment. Treaty employees may perform work for the parent treaty organization or enterprise, or any subsidiary of the parent organization or enterprise. Performing work for subsidiaries of a common parent enterprise or organization will not be deemed to constitute a substantive change in the terms and conditions of the underlying E treaty employment if, at the time the E treaty status was determined, the applicant presented evidence establishing:

> (A) The enterprise or organization, and any subsidiaries thereof, where the work will be performed; the requisite parent-subsidiary relationship; and that the subsidiary independently qualifies as a treaty organization or enterprise under this paragraph;
>
> (B) In the case of an employee of a treaty trader or treaty investor, the work to be performed requires executive, supervisory, or essential skills; and
>
> (C) The work is consistent with the terms and conditions of the activity forming the basis of the classification.

(iii) Substantive changes. Prior Service approval must be obtained where there will be a substantive change in the terms or conditions of E status. In such cases, a treaty alien must file a new application on Form I-129 and E supplement, in accordance with the instructions on that form, requesting extension of stay in the United States. In support of an alien's Form I-129 application, the treaty alien must submit evidence of continued eligibility for E classification in the new capacity. Alternatively, the alien must obtain from a consular officer a visa reflecting the new terms and conditions and subsequently apply for admission at a port-of-entry. The Service will deem there to have been a substantive change necessitating the filing of a new Form I-129 application in cases where there has been a fundamental change in the employing entity's basic characteristics, such as a merger, acquisition, or sale of the division where the alien is employed.

(iv) Non-substantive changes. Prior approval is not required, and there is no need to file a new Form I-129, if there is no substantive, or fundamental, change in the terms or conditions of the alien's employment which would affect the alien's eligibility for E classification. Further, prior approval is not required if corporate changes occur which do not affect the previously approved employment relationship, or are otherwise non-substantive. To facilitate admission, the alien may:

> (A) Present a letter from the treaty-qualifying company through which the alien attained E classification explaining the nature of the change;
>
> (B) Request a new Form I-797, Approval Notice, reflecting the non-substantive change by filing with the appropriate Service Center Form I-129, with fee, and a complete description of the change, or;
>
> (C) Apply directly to State for a new E visa reflecting the change. An alien who does not elect one of the three options contained in paragraph (e)(8)(iv) (A) through (C) of this section, is not precluded from demonstrating to the satisfaction of the immigration officer at the port-of-entry in some other manner, his or her admissibility under section 101(a)(15)(E) of the Act.

(v) Advice. To ascertain whether a change is substantive, an alien may file with the Service Center Form I-129, with fee, and a complete description of the change, to request appropriate advice. In cases involving multiple employees, an alien may request that a Service Center determine if a merger or other corporate restructuring requires the filing of separate applications by filing a single Form I-129, with fee, and attaching a list of the related receipt numbers for the employees involved and an explanation of the change or changes. Where employees are located within multiple jurisdictions, such a request for advice must be filed with the Service Center in Lincoln, Nebraska.

(vi) Approval. If an application to change the terms and conditions of E status or employment is approved, the Service shall notify the applicant on Form I-797. An extension of stay in nonimmigrant E classification may be granted for the validity of the approved application. The alien is not authorized to begin the new employment until the application is approved. Employment is authorized only for the period of time the alien remains in the United States. If the alien subsequently departs from the United States, readmission in E classification may be authorized where the alien presents his or her unexpired E visa together with the Form I-797, Approval Notice, indicating Service approval of a change of employer or of a change in the substantive terms or conditions of treaty status or employment in E classification, or, in accordance with 22 CFR 41.112(d), where the alien is applying for readmission after an absence not exceeding 30 days solely in contiguous territory.

(vii) An unauthorized change of employment to a new employer will constitute a failure to maintain status within the meaning of section 237(a)(1)(C)(i) of the Act. In all cases where the treaty employee will be providing services to a subsidiary under this paragraph, the subsidiary is required to comply with the terms of 8 CFR part 274a.

(9) Trade-definitions. For purposes of this paragraph:

Items of trade include but are not limited to goods, services, international banking, insurance, monies, transportation, communications, data processing, advertising, accounting, design and engineering, management consulting, tourism, technology and its transfer, and some news-gathering activities. For purposes of this paragraph, goods are tangible commodities or merchandise having extrinsic value. Further, as used in this paragraph, services are legitimate economic activities which provide other than tangible goods.

Trade is the existing international exchange of items of trade for consideration between the United States and the treaty country. Existing trade includes successfully negotiated contracts binding upon the parties which call for the immediate exchange of items of trade. Domestic trade or the development of domestic markets without international exchange does not constitute trade for purposes of section 101(a)(15)(E) of the Act. This exchange must be traceable and identifiable. Title to the trade item must pass from one treaty party to the other.

(10) Substantial trade. Substantial trade is an amount of trade sufficient to ensure a continuous flow of international trade items between the United States and the treaty country. This continuous flow contemplates numerous transactions over time. Treaty trader status may not be established or maintained on the basis of a single transaction, regardless of how protracted or monetarily valuable the transaction. Although the monetary value of the trade item being exchanged is a relevant consideration, greater weight will be given to more numerous exchanges of larger value. There is no minimum requirement with respect to the monetary value or volume of each individual transaction. In the case of smaller businesses, an income derived from the value of numerous transactions which is sufficient to support the treaty trader and his or her family constitutes a favorable factor in assessing the existence of substantial trade.

(11) Principal trade. Principal trade between the United States and the treaty country exists when over 50 percent of the volume of international trade of the treaty trader is conducted between the United States and the treaty country of the treaty trader's nationality.

(12) Investment. An investment is the treaty investor's placing of capital, including funds and other assets (which have not been obtained, directly or indirectly, through criminal activity), at risk in the commercial sense with the objective of generating a profit. The treaty investor must be in possession of and have control over the capital invested or being invested. The capital must be subject to partial or total loss if investment fortunes reverse. Such investment capital must be the investor's unsecured personal business capital or capital secured by personal assets. Capital in the process of being invested or that has been invested must be irrevocably committed to the enterprise. The alien has the burden of establishing such irrevocable commitment. The alien may use any legal mechanism available, such as the placement of invested funds in escrow pending admission in, or approval of, E classification, that would not only irrevocably commit funds to the enterprise, but might also extend personal liability protection to the treaty investor in the event the application for E classification is denied.

(13) Bona fide enterprise. The enterprise must be a real, active, and operating commercial or entrepreneurial undertaking which produces services or goods for profit. The enterprise must meet applicable legal requirements for doing business in the particular jurisdiction in the United States.

(14) Substantial amount of capital. A substantial amount of capital constitutes an amount which is:

(i) Substantial in relationship to the total cost of either purchasing an established enterprise or creating the type of enterprise under consideration;

(ii) Sufficient to ensure the treaty investor's financial commitment to the successful operation of the enterprise; and

(iii) Of a magnitude to support the likelihood that the treaty investor will successfully develop and direct the enterprise. Generally, the lower the cost of the enterprise, the higher, proportionately, the investment must be to be considered a substantial amount of capital.

(15) Marginal enterprise. For purposes of this section, an enterprise may not be marginal. A marginal enterprise is an enterprise that does not have the present or future capacity to generate more than enough income to provide a minimal living for the treaty investor and his or her family. An enterprise that does not have the capacity to generate such income, but that has a present or future capacity to make a significant economic contribution is not a marginal enterprise. The projected future income-generating capacity should generally be realizable within 5 years from the date the alien commences the normal business activity of the enterprise.

(16) Solely to develop and direct. An alien seeking classification as a treaty investor (or, in the case of an employee of a treaty investor, the owner of the treaty enterprise) must demonstrate that he or she does or will develop and direct the investment enterprise. Such an applicant must establish that he or she controls the enterprise by demonstrating ownership of at least 50 percent of the enterprise, by possessing operational control through a managerial position or other corporate device, or by other means.

(17) Executive and supervisory character. The applicant's position must be principally and primarily, as opposed to incidentally or collaterally, executive or supervisory in nature. Executive and supervisory duties are those which provide the employee ultimate control and responsibility for the enterprise's overall operation or a major component thereof. In determining whether the applicant has established possession of the requisite control and responsibility, a Service officer shall consider, where applicable:

(i) That an executive position is one which provides the employee with great authority to determine the policy of, and the direction for, the enterprise;

(ii) That a position primarily of supervisory character provides the employee supervisory responsibility for a significant proportion of an enterprise's operations and does not generally involve the direct supervision of low-level employees, and;

(iii) Whether the applicant possesses executive and supervisory skills and experience; a salary and position title commensurate with executive or supervisory employment; recognition or indicia of the position as one of authority and responsibility in the overall organizational structure; responsibility for making discretionary decisions, setting policies, directing and managing business operations, supervising other professional and supervisory personnel; and that, if the position requires some routine work usually performed by a staff employee, such functions may only be of an incidental nature.

(18) Special qualifications. Special qualifications are those skills and/or aptitudes that an employee in a lesser capacity brings to a position or role that are essential to the successful or efficient operation of the treaty enterprise. In determining whether the skills possessed by the alien are essential to the operation of the employing treaty enterprise, a Service officer must consider, where applicable:

(i) The degree of proven expertise of the alien in the area of operations involved; whether others possess the applicant's specific skill or aptitude; the length of the applicant's experience and/or training with the treaty enterprise; the period of training or other experience necessary to perform effectively the projected duties; the relationship of the skill or knowledge to the enterprise's specific processes or applications, and the salary the special qualifications can command; that knowledge of a foreign language and culture does not, by itself, meet the special qualifications requirement, and;

(ii) Whether the skills and qualifications are readily available in the United States. In all cases, in determining whether the applicant possesses special qualifications which are essential to the treaty enterprise, a Service officer must take into account all the particular facts presented. A skill that is essential at one point in time may become commonplace at a later date. Skills that are needed to start up an enterprise may no longer be

essential after initial operations are complete and running smoothly. Some skills are essential only in the short-term for the training of locally hired employees. Under certain circumstances, an applicant may be able to establish his or her essentiality to the treaty enterprise for a longer period of time, such as, in connection with activities in the areas of product improvement, quality control, or the provision of a service not yet generally available in the United States. Where the treaty enterprise's need for the applicant's special qualifications, and therefore, the applicant's essentiality, is time-limited, Service officers may request that the applicant provide evidence of the period for which skills will be needed and a reasonable projected date for completion of start-up or replacement of the essential skilled workers.

(19) Period of admission. Periods of admission are as follows:

(i) A treaty trader or treaty investor may be admitted for an initial period of not more than 2 years.

(ii) The spouse and minor children accompanying or following to join a treaty trader or treaty investor shall be admitted for the period during which the principal alien is in valid treaty trader or investor status. The temporary departure from the United States of the principal trader or investor shall not affect the derivative status of the dependent spouse and minor unmarried children, provided the familial relationship continues to exist and the principal remains eligible for admission as an E nonimmigrant to perform the activity.

(iii) Unless otherwise provided for in this chapter, an alien shall not be admitted in E classification for a period of time extending more than 6 months beyond the expiration date of the alien's passport.

(20) Extensions of stay. Requests for extensions of stay may be granted in increments of not more than 2 years. A treaty trader or treaty investor in valid E status may apply for an extension of stay by filing an application for extension of stay on Form I-129 and E Supplement, with required accompanying documents, in accordance with § 214.1 and the instructions on that form.

(i) For purposes of eligibility for an extension of stay, the alien must prove that he or she:

(A) Has at all times maintained the terms and conditions of his or her E nonimmigrant classification;

(B) Was physically present in the United States at the time of filing the application for extension of stay; and

(C) Has not abandoned his or her extension request.

(ii) With limited exceptions, it is presumed that employees of treaty enterprises with special qualifications who are responsible for start-up operations should be able to complete their objectives within 2 years. Absent special circumstances, therefore, such employees will not be eligible to obtain an extension of stay.

(iii) Subject to paragraph (e)(5) of this section and the presumption noted in paragraph (e)(22)(ii) of this section, there is no specified number of extensions of stay that a treaty trader or treaty investor may be granted.

(21) Change of nonimmigrant status. (i) An alien in another valid nonimmigrant status may apply for change of status to E classification by filing an application for change of status on Form I-129 and E Supplement, with required accompanying documents establishing eligibility for a change of status and E classification, in accordance with 8 CFR part 248 and the instructions on Form I-129 and E Supplement.

(ii) The spouse or minor children of an applicant seeking a change of status to that of treaty trader or treaty investor alien shall file concurrent applications for change of status to derivative treaty classification on the appropriate Service form. Applications for derivative treaty status shall:

(A) Be approved only if the principal treaty alien is granted treaty alien status and continues to maintain that status;

(B) Be approved for the period of admission authorized in paragraph (e)(20) of this section.

(22) Denial of treaty trader or treaty investor status to citizens of Canada or Mexico in the case of certain labor disputes.

(i) A citizen of Canada or Mexico may be denied E treaty trader or treaty investor status as described in section 101(a)(15)(E) of the Act and section B of Annex 1603 of the NAFTA if:

(A) The Secretary of Labor certifies to or otherwise informs the Commissioner that a strike or other labor dispute involving a work stoppage of workers in the alien's occupational classification is in progress at the place where the alien is or intends to be employed; and

(B) Temporary entry of that alien may affect adversely either:

(1) The settlement of any labor dispute that is in progress at the place or intended place of employment, or

(2) The employment of any person who is involved in such dispute.

(ii) If the alien has already commenced employment in the United States and is participating in a strike or other labor dispute involving a work stoppage of workers, whether or not such strike or other labor dispute has been certified by the Secretary of Labor, or whether the Service has been otherwise informed that such a strike or labor dispute is in progress, the alien shall not be deemed to be failing to maintain his or her status solely on account of past, present, or future participation in a strike or other labor dispute involving a work stoppage of workers, but is subject to the following terms and conditions:

(A) The alien shall remain subject to all applicable provisions of the Immigration and Nationality Act, and regulations promulgated in the same manner as all other E nonimmigrants; and

(B) The status and authorized period of stay of such an alien is not modified or extended in any way by virtue of his or her participation in a strike or other labor dispute involving a work stoppage of workers.

(iii) Although participation by an E nonimmigrant alien in a strike or other labor dispute involving a work stoppage of workers will not constitute a ground for deportation, any alien who violates his or her status or who remains in the United States after his or her authorized period of stay has expired will be subject to deportation.

(iv) If there is a strike or other labor dispute involving a work stoppage of workers in progress, but such strike or other labor dispute is not certified under paragraph (e)(22)(i) of this section, or the Service has not otherwise been informed by the Secretary that such a strike or labor dispute is in progress, the Commissioner shall not deny entry to an applicant for E status.

(Paragraph (e) revised effective 11/12/97; 62 FR 48138) (Paragraph (e)(8) corrected 9/25/97; 62 FR 50435) (Paragraph (e)(22) revised 1/9/98; 63 FR 1331)

OI 214.2(e) Traders and investors.

The provisions of section 101(a) (15) (E) (i) apply to nationals of Argentina, Austria, Belgium, Bolivia, Borneo, China, Colombia, Costa Rica, Denmark, Estonia, Ethiopia, Finland, France, the Federal Republic of Germany, Greece, Honduras, Iran, Ireland, Israel, Italy, Japan, Korea, Latvia, Liberia, Luxembourg, the Netherlands, Norway, Pakistan, Paraguay, the Philippines, Spain, Sultanate of Muscat and Oman, Switzerland, Thailand, Togo, Turkey, the United Kingdom of Great Britain and Northern Ireland, Vietnam, and Yugoslavia. The provisions of section 101(a) (15) (E) (ii) apply only to nationals of Argentina, Austria, Belgium, China, Colombia, Costa Rica, Ethiopia, France, the Federal Republic of Germany, Honduras, Iran, Italy, Japan, Korea, Liberia, Luxembourg, the Netherlands, Norway, Pakistan, Paraguay, the Philippines, Spain, Sultanate of Muscat and Oman, Switzerland, Thailand, Togo, United Kingdom of Great Britain and Northern Ireland, Vietnam, and Yugoslavia. (TM 7/86)

The Treaty of Friendship, Commerce and Navigation between the United States and Nicaragua was terminated, effective May 1, 1986. Accordingly, no Nicaragua national who held E-1 or E-2 status pursuant to that treaty is eligible for an extension of stay beyond May 1, 1986, nor is any Nicaraguan national eligible for admission to the United States, or to readmission after an absence from this country, as an E-1 or E-2 nonimmigrant. (TM 7/86)

A qualified technician may be classified as a treaty trader under section 101(a) (15) (E) (i) if he is a national of a treaty country and is to be employed by a firm, at least 50% of which is owned by nationals of that country, which is engaged in a substantial volume of trade principally between the United States and the treaty country, he will be engaged in performing warranty repairs on intricate and complex products sold in the course of trade between the United States and that country, and it appears the firm is otherwise unable to obtain the services of technicians in the United States to perform such repairs. When granting an extension of stay to such a technician, or when granting a change of status to that of a treaty trader to such a technician, the employing firm shall be advised that the action has been taken with the understanding that the employer will utilize United States citizens or permanent resident aliens in the performance of the warranty repairs, as such persons become available to make the repairs or are to be trained in making such repairs. When the employing firm has been so notified, the alien's Form I-539 should be noted to so indicate. If the alien should subsequently apply for a further extension of stay, the adjudicator shall determine what steps the firm has taken to train or employ resident United States workers to perform warranty repairs. The extension should not be granted if it appears the firm has failed to make serious efforts to comply with the notification. (TM 7.86)

In general, when an alien who has been granted E-1 or E-2 classification applies for extension of temporary stay, the description of the applicant's duties shown on the accompanying form I-126 will be examined closely. If there is doubt regarding the accuracy of the description, an adjudicator shall make appropriate inquiry. The application should be denied if the applicant's duties are not executive, managerial, or supervisory in nature or if the applicant does not bare special qualifications necessary for the firm's efficient operation.

An alien employed by a foreign person may not be classified as an E-1 or E-2 nonimmigrant unless the foreign employer is also classified as an E-1 or E-2 nonimmigrant. If abroad, the employer must be eligible for admission to the United States as an E-1 or E-2 nonimmigrant. If the employer is a corporation or other business organization, the majority ownership (at least 50 percent) of the business must be by aliens who are of the same nationality as the employee and who, if not resident abroad, are maintaining status under section 101(a) (15) (E). An alien who is a lawful permanent resident of the United States does not qualify to bring employees into the United States under section 101(a) 915) (E). Shares of a business owned by lawful permanent aliens cannot be considered in making determinations of majority ownership by nationals of the treaty country. (TM 7/86)

While the Service is not in a position to authorize the nonimmigrant E spouse and children of a treaty trader or treaty investor to accept employment, they will not be deemed to have violated status if they do so; and so long as the principal E nonimmigrant is maintaining status, no action will be taken to require their departure.

The notes to 22 CFR 41.40 and 41.41 in Volume 9--Visas, Foreign Affairs Manual, contain information concerning the various treaties of trade entered into by the United States, and important information concerning certain limitations of treaty provisions. These notes must be consulted when considering matters involving treaty traders and investors.

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DEPARTMENT OF JUSTICE

Immigration and Naturalization Service

[INS 1938-98]

Filing of Applications and Petitions for Treaty Trader and Treaty Investor (E) and Alien Entrepreneur (EB-5) Classification

AGENCY: Immigration and Naturalization Service, Justice.

ACTION: Notice of location of filing petitions and applications.

SUMMARY: This notice announces that the Immigration and Naturalization Service (Service) is directing all petitions and applications related to classification as a treaty trader (E-1), treaty investor (E-2), or alien entrepreneur (EB-5) to be filed at the newly defined jurisdictional areas of either the Texas Service Center or the California Service Center. This action is necessary to provide more effective monitoring and control of these often complex, time-consuming adjudications.

DATES: This notice is effective December 4, 1998.

FOR FURTHER INFORMATION CONTACT: Katharine Auchincloss-Lorr, Adjudications Officer, Immigration and Naturalization Service, 425 I Street, NW, Room 3214, Washington, DC 20536, telephone (202) 514-5014.

SUPPLEMENTARY INFORMATION:

What Change is the Service Announcing Through the Publication of This Document?

Until this time, treaty trader and treaty investment applications and alien entrepreneur petitions have been processed at the four Service Centers located in California, Vermont, Texas, and Nebraska. With the publication of this notice, pursuant to 8 CFR 103.1 and 103.2, the Service is consolidating all petitions and applications relating to classification as a treaty trader (E-1), treaty investor (E-2), and alien entrepreneur (EB-5) at two Service Centers, namely those in Texas and California.

Why is the Service Changing the Location for Processing E-1 and E-2 Applications and EB-5 Petitions?

By consolidating these applications and petitions at the Texas and California Service Centers, the Service will ensure that the procedures related to the adjudication of these highly technical requests for immigration benefits are more uniform, consistent, and streamlined. Quality control and other necessary program oversight functions may be more readily undertaken as necessary. The Service can more easily ensure that the officers adjudicating these cases are appropriately trained and experienced in the relevant areas of regulatory trade, investment, financial, and economic policy and analysis, and that they have access to the additional expertise necessary in particularly complex matters.

How Will the Public Benefit From These Changes?

These petitioners and applicants will receive more comprehensive and effective adjudication of their requests for benefits. These adjudications will be performed only by trained and skilled adjudicators, familiar with these complex financial and economic requirements and the issues involved. Consolidation will enable the Service to respond more effectively to any procedural concerns and to provide prompt adjudication.

What Petitions and Forms are Involved?

The petitions and applications involved in this change of filing location include applications for extension or change of status of nonimmigrant classification to treaty trader (E-1) and treaty investor (E-2) status which are processed on Form I-129; petitions for alien entrepreneur classification, which are filed on Form I-526, and; petitions to remove conditions at the end of the 2 year period of conditional residence, which are filed on Form I-829.

What are the Mailing Addresses for These New Filing Locations?

The current mailing addresses for these petitions and applications are as follows: for the California Service Center, 24000 Avila Road, 2nd floor (P.O. Box 10526), Laguna Niguel, California 92607-0526; for the Texas Service Center, P.O. Box 852135, Mesquite TX 75185-2135.

Is This Change in Location a Change in Service Center Jurisdiction?

The Nebraska and Vermont Service Centers will no longer have jurisdiction over E-1, E-2, and EB-5 matters. The Texas and California Service Centers will have jurisdiction over these matters.

Effective [Insert date of publication in the Federal Register], petitions for immigrant investor classification which have been filed pursuant to § 204.6(b) with the Service Center having jurisdiction over the area in which the new commercial enterprise is or will be principally doing business, will be filed with: (1) The Texas Service Center if the new commercial enterprise is located, or will principally be doing business, in the areas previously covered by the Vermont and Texas Service Centers; (2) the California Service Center if the new commercial enterprise is located, or will principally be doing business, in the areas previously covered by the California and Nebraska Service Centers.

The same change will occur with regard to applications for extension of stay or change of status into E-1 or E-2 classification which are filed pursuant to the instructions on Form I-129 with the Service Center with jurisdiction over the location of employment.

What Will Happen to My Application or Petition if I Already Filed It at Another Service Center?

During the first 60 days following the effective date of this Notice, the Service Centers in Vermont and Nebraska will forward in a timely fashion to the Service Centers in Texas and California, as appropriate, any of these applications and petitions which have been inadvertently filed with the Service Centers in Vermont or Nebraska. In order to facilitate this transition, applicants and petitioners will be provided a notice at the time of filing at Vermont or Nebraska advising them that their application or petition is being forwarded to the correct service center, either Texas of California, for initial processing. When applications or petitions are forwarded from the Vermont or Nebraska Service Centers, they will be receipted and filed when they arrive at the Texas or California Service Centers, After the 60-day transition period, applications and petitions related to classification as treaty trader (E-1), treaty investor (E-2), or alien entrepreneur (EB-5) filed inadvertently at the Vermont or Nebraska Service Centers will be returned with a notice that directs the petitioner or applicant to mail the petition or application directly to the Texas or California Service Center, as appropriate, for processing.

November 13, 1998
_____
Dated:

Signed
_____
Doris Meissner,
Commissioner, Immigration and
Naturalization Service.

Inspectors Field Manual 15.4(e) Traders and Investors.

(1) Classification: E-1 Treaty trader, spouse, and children entering the U.S. under provisions of a treaty involving trade, commerce and service to which the U.S. and the alien's country are signatory.

Documents required: Passport valid for 6 months beyond the date to which admitted, unless exempt. Nonimmigrant visa (E-1) (including Canadians).

Qualifications: The company must be majority owned by nationals of the treaty country and the alien must be a national of that country. For a list of treaty countries, see Appendix 32.1 of the Adjudicator's Field Manual. Alien must engage in duties of an executive or supervisory character, or if employed in a lesser capacity have special qualifications that make the alien's service essential to the efficient operation of the enterprise. All nonimmigrant grounds of inadmissibility apply. See qualifications in 8 CFR 214.2(e) and 22 CFR 41.51.

Terms of admission: Admit E-1 for up to 2 years. For E-1, TECRO, see special notes section.

Notations on I-94: Front: E-1, (date to which admitted). Reverse: Principal's name in remarks section of dependent's I-94.

Special notes:

(A) Dependents. Admit spouse and children as E-1. Their period of admission is up to 2 years or to coincide with the stay of the principal alien. The spouse and children may follow to join but may not precede the principal alien. Spouse and children may attend school without changing status, but may not engage in employment.

(B) TECRO notation. Taipei government employees may be issued an E-1 visa endorsed "TECRO" (Taiwan Economic and Cultural Representative's Office, formerly CCNAA, Coordination Council for North American Affairs). Admit holders of such visas for duration of status (D/S).

(2) Classification: E-2 Treaty investor, spouse, and children entering the U.S. under provisions of a treaty between the U.S. and the alien's country of nationality to develop and direct an enterprise in which the alien has invested or is actively in the process of investing a substantial amount of money.

Documents required: Passport valid for 6 months beyond the date to which admitted, unless exempt. Nonimmigrant visa (E-2), (including Canadians).

Qualifications: Must be national of the treaty country, within the general description above. May be investor or qualifying employee of investor. All nonimmigrant grounds of inadmissibility apply. See list of treaty countries in Appendix 31-2 of the Adjudicator's Field Manual. Specific requirements for E-2 investors are contained in 8 CFR 214.2(e) and 22 CFR 41.51.

Terms of admission: Admit E-2 for up to 2 years.

Notations on I-94: Front: E-2, (date to which admitted). Reverse: Principal's name in remarks section of dependent's I- 94.

Special notes:

(A) Dependents. Admit spouse and children as E-2. Their period of admission is up to 2 years or to coincide with the stay of the principal alien. The spouse and children may follow to join but may not precede the principal alien. Spouse and children may attend school without changing status, but may not engage in employment. Nationality of the spouse and children is not material.

(B) Employee E-2s. If the alien is an employee of an E-2, he or she must be of the same nationality as the investor and must engage in duties of an executive or supervisory character, or if employed in a lesser capacity have special qualifications that make the alien's service essential to the efficient operation of the enterprise.
(Paragraph (e) revised IN98-22)

E Classification as a Treaty Trader or Treaty Investor.
Requirements for Admission:

Section B of Annex 1603 of the NAFTA provides for the temporary entry of Canadian and Mexican citizens as treaty traders and treaty investors. This section required no changes to existing law and practice under section 101(a)(15)(E) of the Act, other than to authorize citizens of Canada and Mexico to apply for treaty trader (E-1) or treaty investor (E-2) status pursuant to the NAFTA.

A **treaty trader** is a businessperson who is coming to the U.S. solely to carry on substantial trade, principally between the U.S. and Canada, if the trader is a citizen of Canada, or between the U.S. and Mexico, if the trader is a citizen of Mexico.

A **treaty investor** is a business person who is coming to the United States solely to develop and direct the operations of an enterprise in which he or she has invested, or of an enterprise in which he or she is actively in the process of investing, a substantial amount of capital.

Immigration officers must familiarize themselves with the definition of the E classification in §101(a)(15)(E) of the Act and the regulations at 8 CFR 214.2(e) and 22 CFR 41.51.

Treaty Traders. NAFTA businesspersons applying for the E-1 visa as a Treaty Trader must meet the following requirements.

- **Citizenship**. The trader, individual or entity must possess citizenship of Canada or Mexico. In the case of an entity, Canadian citizens or Mexican citizens must own at least 50% of that business.

- **Trade**. There must be an international exchange of a good or service, including title to that trade item, for consideration between the United States and either Canada or Mexico.

- **Substantial Trade**. The volume of trade must constitute a continuous flow of trade items involving numerous transactions between the United States and Canada or Mexico.

- **Trade Linked to Citizenship**. Trade is principally between the U.S. and Canada, if the trader possesses Canadian citizenship, or between the U.S. and Mexico, if the trader possesses Mexican citizenship. At least 50% of the international trade (as contrasted to domestic trade) of the trading entity must be conducted between the U.S. and Canada, if the trader possesses Canadian citizenship, or between the U.S. and Mexico, if the trader possesses Mexican citizenship.

Treaty Investors. NAFTA businesspersons applying for the E-2 visa as a Treaty Investor must meet the following requirements.

- **Citizenship**. The investor, individual or entity must possess citizenship of Canada or Mexico. In the case of an entity, at least 50% of that business must be owned either by Canadian citizens or by Mexican citizens.

- **Investment Must Occur or Be in Process**. The investor has invested or is actively in the process of investing. The investor may invest in an established business or create a business. Being in the process of investing requires the irrevocable commitment of funds.

- **The Investment Must Be Real**. The enterprise is a real and operating commercial enterprise. A dormant or paper enterprise does not qualify.

- **The Investment Must Be Substantial**. A substantial amount of capital constitutes that amount that is substantial in the proportional sense pursuant to a proportionality test, that is, an inverted sliding scale in which the lower the total cost of the enterprise, the higher, proportionally, the investment must be. The overall cost of the enterprise is compared with the amount of personal funds and assets invested by the investor. Only loans guaranteed by personal assets qualify as actual investment by the treaty investor.

The business shall not be marginal, solely for the purpose of earning a living. A marginal enterprise is an enterprise that does not have the present or future capacity to generate more than enough income to provide a living for the treaty investor and his or her family.

- **The Investor Must Be Developing and Directing the Enterprise**. An investor develops and directs the business by owning at least 50% of the enterprise or by a combination involving ownership and possession of management responsibility, by controlling stock by proxy, etc.

Qualifying Employees for E-1 or E-1 Visa Classification. Employees of Treaty Traders and Treaty Investors also may apply for an E-1 or E-2, if they meet the following requirements.

- **Citizenship**. The employee must possess the same citizenship as the trader or investor employer.

- **Position**. The employee is destined to an executive/supervisory position, possessing the authority and responsibility to make decisions which will set the direction of the enterprise; or the employee, if employed in a minor capacity, has special qualifications that make the services to be rendered essential to the successful or efficient operation of the enterprise. The essential employee must possess special skills including skills that are unique to operations in the U.S. Such employees are highly and specially skilled.

- **Temporary**. All persons must indicate the intent to depart the U.S. upon termination of status, ceasing business operations or sale of business, etc.

Terms of Admission. An alien seeking admission as a treaty trader or treaty investor under the NAFTA as an E-1 or E-2 must be in possession of a nonimmigrant visa issued by an American consular officer classifying the alien under section 101(a)(15)(E) of the Act. ***Both Canadian and Mexican citizens must apply at an U.S. embassy or consulate for the issuance of an "E" nonimmigrant visa and pay any visa fee.*** A supplemental Form OF-156E must be submitted with pertinent documentation to the consular officer.

Upon admission, issue both Canadian and Mexican treaty traders and treaty investors and their dependents a Form I-94, endorsed in the same manner as other E-1 and E-2 non-immigrants. The classification code E-1 or E-2 will be marked clearly on the I-94. The I-94 with the E-1 or E-2 notation is the employment authorization documentation for the treaty trader or treaty investor. The Form I-94 is presented to the Social Security Administration for purposes of applying for a social security number.

Periods of initial admission and extension are the same as for other E-1 and E-2 non-immigrants. A treaty trader or treaty investor may be admitted for an initial period of not more than 2 years.

Spouse and Dependent Children

The spouse and children of a treaty trader or treaty investor may accompany or follow to join the E-1 or E-2 businessperson if they otherwise meet the general requirements for temporary entry. There is no requirement that the spouse and children be Canadian or Mexican citizens. Such dependents may not work in the U.S. without obtaining a change of status, but may attend school, if incident to status. As with other E-1 and E-2 nonimmigrant dependents, their I-94 visa symbol is the same as the principal's; endorsements are the same as for other E dependents.

Extension of Stay

Requests for extensions of stay may be granted in increments of not more than 2 years. A treaty trader or treaty investor in valid E status may apply for an extension of stay by filing an application for extension of stay on Form I-129 and E Supplement, with required accompanying documents, in accordance with 8 CFR 214.1 and the instructions on that form.

For purposes of eligibility for an extension of stay, the alien must prove that he or she:

- Has at all times maintained the terms and conditions of his or her E nonimmigrant classification;
- Was physically present in the United States at the time of filing the application for extension of stay; and
- Has not abandoned his or her extension request.

With limited exceptions, it is presumed that employees of treaty enterprises with special qualifications who are responsible for start-up operations should be able to complete their objectives within 2 years. Absent special circumstances, therefore, such employees will not be eligible to obtain an extension of stay.

There is no specified number of extensions of stay that a treaty trader or treaty investor may be granted.

SECTION FOUR

L-1 Nonimmigrant pursuant to NAFTA

8 CFR Sec. 214.2(l) Intracompany Transferees --

(1) Admission of intracompany transferees --

(i) General. Under section 101(a)(15)(L) of the Act, an alien who within the preceding three years has been employed abroad for one continuous year by a qualifying organization may be admitted temporarily 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. An alien transferred to the United States under this nonimmigrant classification is referred to as an intracompany transferee and the organization which seeks the classification of an alien as an intracompany transferee is referred to as the petitioner. The Service has responsibility for determining whether the alien is eligible for admission and whether the petitioner is a qualifying organization. These regulations set forth the standards applicable to these classifications. They also set forth procedures for admission of intracompany transferees and appeal of adverse decisions. Certain petitioners seeking the classification of aliens as intracompany transferees may file blanket petitions with the Service. Under the blanket petition process, the Service is responsible for determining whether the petitioner and its parent, branches, affiliates, or subsidiaries specified are qualifying organizations. The Department of State or, in certain cases, the Service is responsible for determining the classification of the alien.

(ii) Definitions.

(A) Intracompany transferee means an alien who, within three years preceding the time of his or her application for admission into the United States, has been employed abroad continuously for one year by a firm or corporation or other legal entity or parent, branch, affiliate, or subsidiary thereof, and who seeks to enter the United States temporarily in order to render his or her services to a branch of the same employer or a parent, affiliate, or subsidiary thereof in a capacity that is managerial, executive, or involves specialized knowledge. Periods spent in the United States in lawful status for a branch of the same employer or a parent, affiliate, or subsidiary thereof and brief trips to the United States for business or pleasure shall not be interruptive of the one year of continuous employment abroad but such periods shall not be counted towards fulfillment of that requirement.

(B) Managerial capacity means an assignment within an organization in which the employee primarily:

((1)) Manages the organization, or a department, subdivision, function, or component of the organization;

((2)) Supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;

((3)) Has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization) if another employee or other employees are directly supervised; if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

((4)) Exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

(C) Executive capacity means an assignment within an organization in which the employee primarily:

((1)) Directs the management of the organization or a major component or function of the organization;

((2)) Establishes the goals and policies of the organization, component, or function;

((3)) Exercises wide latitude in discretionary decision-making; and

((4)) Receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

(D) Specialized knowledge means special 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 in the organization's processes and procedures.

(E) "Specialized knowledge professional" means an individual who has specialized knowledge as defined in paragraph (l)(1)(ii)(D) of this section and is a member of the professions as defined in section 101(a)(32) of the Immigration and Nationality Act.

(F) New office means an organization which has been doing business in the United States through a parent, branch, affiliate, or subsidiary for less than one year.

(G) Qualifying organization means a United States or foreign firm, corporation, or other legal entity which:

((1)) Meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (l)(1)(ii) of this section;

((2)) Is or will be doing business (engaging in international trade is not required) as an employer in the United States and in at least one other country directly or through a parent, branch, affiliate, or subsidiary for the duration of the alien's stay in the United States as an intracompany transferee; and

((3)) Otherwise meets the requirements of section 101(a)(15)(L) of the Act.

(H) Doing business means the regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad.

(I) "Parent" means a firm, corporation, or other legal entity which has subsidiaries.

(J) "Branch" means an operating division or office of the same organization housed in a different location.

(K) Subsidiary means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

(L) Affiliate means

((1)) One of two subsidiaries both of which are owned and controlled by the same parent or individual, or

((2)) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity, or

((3)) In the case of a partnership that is organized in the United States to provide accounting services along with managerial and/or consulting services and that markets its accounting services under an internationally recognized name under an agreement with a worldwide coordinating organization that is owned and controlled by the member accounting firms, a partnership (or similar organization) that is organized outside the United States to provide accounting services shall be considered to be an affiliate of the United States partnership if it markets its accounting services under the same internationally recognized name under the agreement with the worldwide coordinating organization of which the United States partnership is also a member.

(M) "Director" means a Service Center director with delegated authority at 8 CFR 103.1.

(2) Filing of petitions --

(i) Except as provided in paragraph (l)(2)(ii) and (l)(17) of this section, a petitioner seeking to classify an alien as an intracompany transferee shall file a petition on Form I-129, Petition for Nonimmigrant Worker, only at the Service Center which has jurisdiction over the area where the alien will be employed, even in emergent situations. The petitioner shall advise the Service whether it has filed a petition for the same beneficiary with another office, and certify that it will not file a petition for the same beneficiary with another office, unless the circumstances and conditions in the initial petition have changed. Failure to make a full disclosure of previous petitions filed may result in a denial of the petition.

(ii) A United States petitioner which meets the requirements of paragraph (l)(4) of this section and seeks continuing approval of itself and its parent, branches, specified subsidiaries and affiliates as qualifying organizations and, later, classification under section 101(a)(15)(L) of multiple numbers of aliens employed by itself, its parent, or those branches, subsidiaries, or affiliates may file a blanket petition on Form I - 129 with the director having jurisdiction over the area where the petitioner is located. The blanket petition shall be adjudicated and maintained at the appropriate Service Center. Approved blanket petition files shall be maintained indefinitely by that Service Center. The petitioner shall be the single representative for the qualifying organizations with which the Service will deal regarding the blanket petition.

(3) Evidence for individual petitions. An individual petition filed on Form I - 129 shall be accompanied by:

(i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.

(ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.

(iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.

(iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive, or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

(v) If the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or to be employed in a new office in the United States, the petitioner shall submit evidence that:

(A) Sufficient physical premises to house the new office have been secured;

(B) The beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity and that the proposed employment involved executive or managerial authority over the new operation; and

(C) The intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined in paragraphs (l)(1)(ii)(B) or (C) of this section, supported by information regarding:

((1)) The proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;

((2)) The size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States; and

((3)) The organizational structure of the foreign entity.

(vi) If the petition indicates that the beneficiary is coming to the United States in a specialized knowledge capacity to open or to be employed in a new office, the petitioner shall submit evidence that:

(A) Sufficient physical premises to house the new office have been secured;

(B) The business entity in the United States is or will be a qualifying organization as defined in paragraph (l)(1)(ii)(G) of this section; and

(C) The petitioner has the financial ability to remunerate the beneficiary and to commence doing business in the United States.

(vii) If the beneficiary is an owner or major stockholder of the company, the petition must be accompanied by evidence that the beneficiary's services are to be used for a temporary period and evidence that the beneficiary will be transferred to an assignment abroad upon the completion of the temporary services in the United States.

(viii) Such other evidence as the director, in his or her discretion, may deem necessary.

(4) Blanket petitions --

(i) A petitioner which meets the following requirements may file a blanket petition seeking continuing approval of itself and some or all of its parent, branches, subsidiaries, and affiliates as qualifying organizations if:

(A) The petitioner and each of those entities are engaged in commercial trade or services;

(B) The petitioner has an office in the United States that has been doing business for one year or more;

(C) The petitioner has three or more domestic and foreign branches, subsidiaries, or affiliates; and

(D) The petitioner and the other qualifying organizations have obtained approval of petitions for at least ten "L" managers, executives, or specialized knowledge professionals during the previous 12 months; or have U.S. subsidiaries or affiliates with combined annual sales of at least $25 million; or have a United States work force of at least 1,000 employees.

(ii) Managers, executives, and specialized knowledge professionals employed by firms, corporations, or other entities which have been found to be qualifying organizations pursuant to an approved blanket petition may be classified as intracompany transferees and admitted to the United States as provided in paragraphs (l) (5) and (11) of this section.

(iii) When applying for a blanket petition, the petitioner shall include in the blanket petition all of its branches, subsidiaries, and affiliates which plan to seek to transfer aliens to the United States under the blanket petition. An individual petition may be filed by the petitioner or organizations in lieu of using the blanket petition procedure. However, the petitioner and other qualifying organizations may not seek L classification for the same alien under both procedures, unless a consular officer first denies eligibility. Whenever a petitioner which has blanket L approval files an individual petition to seek L classification for a manager, executive, or specialized knowledge professional, the petitioner shall advise the Service that it has blanket L approval and certify that the beneficiary has not and will not apply to a consular officer for L classification under the approved blanket petition.

(iv) Evidence. A blanket petition filed on Form I - 129 shall be accompanied by:

(A) Evidence that the petitioner meets the requirements of paragraph (l)(4)(i) of this section.

(B) Evidence that all entities for which approval is sought are qualifying organizations as defined in subparagraph (l)(1)(ii)(G) of this section.

(C) Such other evidence as the director, in his or her discretion, deems necessary in a particular case.

(5) Certification and admission procedures for beneficiaries under blanket petition.

(i) Jurisdiction. United States consular officers shall have authority to determine eligibility of individual beneficiaries outside the United States seeking L classification under blanket petitions, except for visa-exempt nonimmigrants. An application for a visa-exempt nonimmigrant seeking L classification under a blanket petition or by an alien in the United States applying for change of status to L classification under a blanket petition shall be filed with the Service office at which the blanket petition was filed.

(ii) Procedures.

(A) When one qualifying organization listed in an approved blanket petition wishes to transfer an alien outside the United States to a qualifying organization in the United States and the alien requires a visa to enter the United States, that organization shall complete Form I - 129S, Certificate of Eligibility for Intracompany Transferee under a Blanket Petition, in an original and three copies. The qualifying organization shall retain one

copy for its records and send the original and two copies to the alien. A copy of the approved Form I - 797 must be attached to the original and each copy of Form I - 129S.

(B) After receipt of Form I - 797 and Form I - 129S, a qualified employee who is being transferred to the United States may use these documents to apply for visa issuance with the consular officer within six months of the date on Form I - 129S.

(C) When the alien is a visa-exempt nonimmigrant seeking L classification under a blanket petition, or when the alien is in the United States and is seeking a change of status from another nonimmigrant classification to L classification under a blanket petition, the petitioner shall submit Form I-129S, Certificate of Eligibility, and a copy of the approval notice, Form I-797, to the Service Center with which the blanket petition was filed.

(D) The consular or Service officer shall determine whether the position in which the alien will be employed in the United States is with an organization named in the approved petition and whether the specific job is for a manager, executive, or specialized knowledge professional. The consular or Service officer shall determine further whether the alien's immediate prior year of continuous employment abroad was with an organization named in the petition and was in a position as manager, executive, or specialized knowledge professional.

(E) Consular officers may grant "L" classification only in clearly approvable applications. If the consular officer determines that the alien is eligible for L classification, the consular officer may issue a nonimmigrant visa, noting the visa classification "Blanket L - 1" for the principal alien and "Blanket L - 2" for any accompanying or following to join spouse and children. The consular officer shall also endorse all copies of the alien's Form I - 129S with the blanket L - 1 visa classification and return the original and one copy to the alien. When the alien is inspected for entry into the United States, both copies of the Form I - 129S shall be stamped to show a validity period not to exceed three years and the second copy collected and sent to the appropriate Regional Service Center for control purposes. Service officers who determine eligibility of aliens for L - 1 classification under blanket petitions shall endorse both copies of Form I - 129S with the blanket L - 1 classification and the validity period not to exceed three years and retain the second copy for Service records.

(F) If the consular officer determines that the alien is ineligible for L classification under a blanket petition, the consular officer's decision shall be final. The consular officer shall record the reasons for the denial on Form I - 129S, retain one copy, return the original of I - 129S to the Service office which approved the blanket petition, and provide a copy to the alien. In such a case, an individual petition may be filed for the alien with the director having jurisdiction over the area of intended employment; the petition shall state the reason the alien was denied L classification and specify the consular office which made the determination and the date of the determination.

(G) An alien admitted under an approved blanket petition may be reassigned to any organization listed in the approved petition without referral to the Service during his/her authorized stay if the alien will be performing virtually the same job duties. If the alien will be performing different job duties, the petitioner shall complete a new Certificate of Eligibility and send it for approval to the director who approved the blanket petition.

(6) Copies of supporting documents. The petitioner may submit a legible photocopy of a document in support of the visa petition, in lieu of the original document. However, the original document shall be submitted if requested by the Service.

(7) Approval of petition --

(i) General. The director shall notify the petitioner of the approval of an individual or a blanket petition within 30 days after the date a completed petition has been filed. If additional information is required from the petitioner, the 30 day processing period shall begin again upon receipt of the information. Only the Director of a Service Center may approve individual and blanket L petitions. The original Form I-797 received from the Service with respect to an approved individual or blanket petition may be duplicated by the petitioner for the beneficiary's use as described in paragraph (l)(13) of this section.

(A) Individual petition --

(1) Form I - 797 shall include the beneficiary's name and classification and the petition's period of validity.

(2) An individual petition approved under this paragraph shall be valid for the period of established need for the beneficiary's services, not to exceed three years, except where the beneficiary is coming to the United States to open or to be employed in a new office.

(3) If the beneficiary is coming to the United States to open or be employed in a new office, the petition may be approved for a period not to exceed one year, after which the petitioner shall demonstrate as required by paragraph (l)(14)(ii) of this section that it is doing business as defined in paragraph (l) (1)(ii)(H) of this section to extend the validity of the petition.

(B) Blanket petition --

(1) Form I - 797 shall identify the approved organizations included in the petition and the petition's period of validity.

(2) A blanket petition approved under this paragraph shall be valid initially for a period of three years and may be extended indefinitely thereafter if the qualifying organizations have complied with these regulations.

(3) A blanket petition may be approved in whole or in part and shall cover only qualifying organizations.

(C) Amendments. The petitioner shall file an amended petition, with fee, at the Service Center where the original petition was filed to reflect changes in approved relationships, additional qualifying organizations under a blanket petition, change in capacity of employment (i.e., from a specialized knowledge position to a managerial position), or any information which would affect the beneficiary's eligibility under section 101(a)(15)(L) of the Act.

(ii) Spouse and dependents. The spouse and unmarried minor children of the beneficiary are entitled to L nonimmigrant classification, subject to the same period of admission and limits as the beneficiary, if the spouse and unmarried minor children are accompanying or following to join the beneficiary in the United States. Neither the spouse nor any child may accept employment unless he or she has been granted employment authorization.

(8) Denial of petition --

(i) Notice of intent to deny. When an adverse decision is proposed on the basis of evidence not submitted by the petitioner, the director shall notify the petitioner of his or her intent to deny the petition and the basis for the denial. The petitioner may inspect and rebut the evidence and will be granted a period of 30 days from the date of the notice in which to do so. All relevant rebuttal material will be considered in making a final decision.

(ii) Individual petition. If an individual petition is denied, the petitioner shall be notified within 30 days after the date a completed petition has been filed of the denial, the reasons for the denial, and the right to appeal the denial.

(iii) Blanket petition. If a blanket petition is denied in whole or in part, the petitioner shall be notified within 30 days after the date a completed petition has been filed of the denial, the reasons for the denial, and the right to appeal the denial. If the petition is denied in part, the Service Center issuing the denial shall forward to the petitioner, along with the denial, a Form I-797 listing those organizations which were found to qualify. If the decision to deny is reversed on appeal, a new Form I-797 shall be sent to the petitioner to reflect the changes made as a result of the appeal.

(9) Revocation of approval of individual and blanket petitions --

(i) General. The director may revoke a petition at any time, even after the expiration of the petition.

(ii) Automatic revocation. The approval of any individual or blanket petition is automatically revoked if the petitioner withdraws the petition or the petitioner fails to request indefinite validity of a blanket petition.

(iii) Revocation on notice.

(A) The director shall send to the petitioner a notice of intent to revoke the petition in relevant part if he/she finds that:

(1) One or more entities are no longer qualifying organizations;

(2) The alien is no longer eligible under section 101(a)(15)(L) of the Act;

(3) A qualifying organization(s) violated requirements of section 101(a)(15)(L) and these regulations;

(4) The statement of facts contained in the petition was not true and correct; or

(5) Approval of the petition involved gross error; or

(6) None of the qualifying organizations in a blanket petition have used the blanket petition procedure for three consecutive years.

(B) The notice of intent to revoke shall contain a detailed statement of the grounds for the revocation and the time period allowed for the petitioner's rebuttal. Upon receipt of this notice, the petitioner may submit evidence in rebuttal within 30 days of the notice. The director shall consider all relevant evidence presented in deciding whether to revoke the petition in whole or in part. If a blanket petition is revoked in part, the remainder of the petition shall remain approved, and a revised Form I - 797 shall be sent to the petitioner with the revocation notice. (iv) Status of beneficiaries. If an individual petition is revoked, the beneficiary shall be required to leave the United States, unless the beneficiary has obtained other work authorization from the Service. If a blanket petition is revoked and the petitioner and beneficiaries already in the United States are otherwise eligible for L classification, the director shall extend the blanket petition for a period necessary to support the stay of those blanket L beneficiaries. The approval notice, Form I - 171C, shall include only the names of qualifying organizations and covered beneficiaries. No new beneficiaries may be classified or admitted under this limited extension.

(10) Appeal of denial or revocation of individual or blanket petition --

(i) A petition denied in whole or in part may be appealed under 8 CFR part 103. Since the determination on the Certificate of Eligibility, Form I-129S, is part of the petition process, a denial or revocation of approval of an I-129S is appealable in the same manner as the petition.

(ii) A petition that has been revoked on notice in whole or in part may be appealed under Part 103 of this chapter. Automatic revocations may not be appealed.

(11) Admission. A beneficiary may apply for admission to the United States only while the individual or blanket petition is valid. The beneficiary of an individual petition shall not be admitted for a date past the validity period of the petition. The beneficiary of a blanket petition may be admitted for three years even though the initial validity period of the blanket petition may expire before the end of the three-year period. If the blanket petition will expire while the alien is in the United States, the burden is on the petitioner to file for indefinite validity of the blanket petition or to file an individual petition in the alien's behalf to support the alien's status in the United States. The admission period for any alien under section 101(a)(15)(L) shall not exceed three years unless an extension of stay is granted pursuant to paragraph (l)(15) of this section.

(12) L-1 limitation on period of stay.

(i) Limits. An alien who has spent five years in the United States in a specialized knowledge capacity or seven years in the United States in a managerial or executive capacity under section 101(a)(15)(L) and/or (H) of the Act may not be readmitted to the United States under section 101(a)(15)(L) or (H) of the Act unless the alien has resided and been physically present outside the United States, except for brief visits for business or pleasure, for the immediate prior year. Such visits do not interrupt the one year abroad, but do not count towards fulfillment of that requirement. In view of this restriction, a new individual petition may not be approved for an alien who has spent the maximum time period in the United States under section 101(a)(15)(L) and/or (H) of the Act, unless the alien has resided and been physically present outside the United States, except for brief visits for business or pleasure, for the immediate prior year. The petitioner shall provide information about the alien's employment, place of residence, and the dates and purpose of any trips to the United States for the previous year. A consular or Service officer may not grant L classification under a blanket petition to an alien who has spent five years in the United States as a professional with specialized knowledge or seven years in the United States as a manager or executive, unless the alien has met the requirements contained in this paragraph.

(ii) Exceptions. The limitations of paragraph (l)(12)(i) of this section shall not apply to aliens who do not reside continually in the United States and whose employment in the United States is seasonal, intermittent, or consists of an aggregate of six months or less per year. In addition, the limitations will not apply to aliens who reside abroad and regularly commute to the United States to engage in part-time employment. The petitioner and the alien must provide clear and convincing proof that the alien qualifies for an exception. Clear and convincing proof shall consist of evidence such as arrival and departure records, copies of tax returns, and records of employment abroad.

(13) Beneficiary's use of Form I - 797 and Form I - 129S --

(i) Beneficiary of an individual petition. The beneficiary of an individual petition who does not require a nonimmigrant visa may present a copy of Form I - 797 at a port of entry to facilitate entry into the United States. The copy of Form I - 797 shall be retained by the beneficiary and presented during the validity of the petition (provided that the beneficiary is entering or reentering the United States) for entry and reentry to resume the same employment with the same petitioner (within the validity period of the petition) and to apply for an extension of stay. A beneficiary who is required to present a visa for admission and whose visa will have expired before the date of his or her intended return may use an original Form I - 797 to apply for a new or revalidated visa during the validity period of the petition and to apply for an extension of stay.

(ii) Beneficiary of a blanket petition. Each alien seeking L classification and admission under a blanket petition shall present a copy of Form I - 797 and a Form I - 129S from the petitioner which identifies the position and organization from which the employee is transferring, the new organization and position to which the employee is destined, a description of the employee's actual duties for both the new and former positions, and the positions, dates, and locations of previous L stays in the United States. A current copy of Form I - 797 and Form I - 129S should be retained by the beneficiary and used for leaving and reentering the United States to resume employment with a qualifying organization during his/her authorized period of stay, for applying for a new or revalidated visa, and for applying for readmission at a port of entry. The alien may be readmitted even though reassigned to a different organization named on the Form I - 797 than the one shown on Form I - 129S if the job duties are virtually the same.

(14) Extension of visa petition validity--

(i) Individual petition. The petitioner shall file a petition extension on Form I-129 to extend an individual petition under section 101(a)(15)(L) of the Act. Except in those petitions involving new offices, supporting documentation is not required, unless requested by the director. A petition extension may be filed only if the validity of the original petition has not expired.

(ii) New offices. A visa petition under section 101(a)(15)(L) which involved the opening of a new office may be extended by filing a new Form I - 129, accompanied by the following:

(A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;

(B) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;

(C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;

(D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a managerial or executive capacity; and

(E) Evidence of the financial status of the United States operation.

(iii) Blanket petitions --

(A) Extension procedure. A blanket petition may only be extended indefinitely by filing a new Form I - 129 with a copy of the previous approval notice and a report of admissions during the preceding three years. The report of

admissions shall include a list of the aliens admitted under the blanket petition during the preceding three years, including positions held during that period, the employing entity, and the dates of initial admission and final departure of each alien. The petitioner shall state whether it still meets the criteria for filing a blanket petition and shall document any changes in approved relationships and additional qualifying organizations.

(B) Other conditions. If the petitioner in an approved blanket petition fails to request indefinite validity or if indefinite validity is denied, the petitioner and its other qualifying organizations shall seek L classification by filing individual petitions until another three years have expired; after which the petitioner may seek approval of a new blanket petition.

(15) Extension of stay.

(i) In individual petitions, the petitioner must apply for the petition extension and the alien's extension of stay concurrently on Form I-129. When the alien is a beneficiary under a blanket petition, a new certificate of eligibility, accompanied by a copy of the previous approved certificate of eligibility, shall be filed by the petitioner to request an extension of the alien's stay. The petitioner must also request a petition extension. The dates of extension shall be the same for the petition and the beneficiary's extension of stay. The beneficiary must be physically present in the United States at the time the extension of stay is filed. Even though the requests to extend the visa petition and the alien's stay are combined on the petition, the director shall make a separate determination on each. If the alien is required to leave the United States for business or personal reasons while the extension requests are pending, the petitioner may request the director to cable notification of approval of the petition extension to the consular office abroad where the alien will apply for a visa.

(ii) An extension of stay may be authorized in increments of up to two years for beneficiaries of individual and blanket petitions. The total period of stay may not exceed five years for aliens employed in a specialized knowledge capacity. The total period of stay for an alien employed in a managerial or executive capacity may not exceed seven years. No further extensions may be granted. When an alien was initially admitted to the United States in a specialized knowledge capacity and is later promoted to a managerial or executive position, he or she must have been employed in the managerial or executive position for at least six months to be eligible for the total period of stay of seven years. The change to managerial or executive capacity must have been approved by the Service in an amended, new, or extended petition at the time that the change occurred.

(16) Effect of approval of a permanent labor certification or filing of a preference petition on L-1 classification. The approval of a permanent labor certification or the filing of a preference petition for an alien shall not be a basis for denying an L petition, a request to extend an L petition, or the alien's application for admission, change of status, or extension of stay. The alien may legitimately come to the United States as a nonimmigrant under the L classification and depart voluntarily at the end of his or her authorized stay, and at the same time, lawfully seek to become a permanent resident of the United States.

(17) Filing of individual petitions and certifications under blanket petitions for citizens of Canada under the North American Free Trade Agreement (NAFTA). (Heading revised 1/1/94; 58 FR 69211)

(i) Individual petitions. Except as provided in paragraph (l)(2)(ii) of this section (filing of blanket petitions), a United States or foreign employer seeking to classify a citizen of Canada as an intracompany transferee may file an individual petition in duplicate on Form I-129 in conjunction with an application for admission of the citizen of Canada. Such filing may be made with an immigration officer at a Class A port of entry located on the United States - Canada land border or at a United States pre-clearance/pre-flight station in Canada. The petitioning employer need not appear, but Form I-129 must bear the authorized signature of the petitioner. (Revised 1/1/94; 58 FR 69211)

(ii) Certification of eligibility for intracompany transferee under the blanket petition. An immigration officer at a location identified in paragraph (1)(17)(i) of this section may determine eligibility of individual citizens of Canada seeking L classification under approved blanket petitions. At these locations, such citizens of Canada shall present the original and two copies of Form I - 129S, Intracompany Transferee Certificate of Eligibility, prepared by the approved organization, as well as three copies of Form I - 797, Notice of Approval of Nonimmigrant Visa Petition.

(iii) Nothing in this section shall preclude or discourage the advance filing of petitions and certificates of eligibility in accordance with paragraph (l)(2) of this section.

(iv) Deficient or deniable petitions or certificates of eligibility. If a petition or certificate of eligibility submitted concurrently with an application for admission is lacking necessary supporting documentation or is otherwise deficient, the inspecting immigration officer shall return it to the applicant for admission in order to obtain the necessary documentation from the petitioner or for the deficiency to be overcome. The fee to file the petition will be remitted at such time as the documentary or other deficiency is overcome. If the petition or certificate of eligibility is clearly deniable, the immigration officer will accept the petition (with fee) and the petitioner shall be notified of the denial, the reasons for denial, and the right of appeal. If a formal denial order cannot be issued by the port of entry, the petition with a recommendation for denial shall be forwarded to the appropriate Service Center for final action. For the purposes of this provision, the appropriate Service Center will be the one within the same Service region as the location where the application for admission is made.

(v) Spouse and dependent minor children accompanying or following to join.

(A) The Canadian citizen spouse and Canadian citizen unmarried minor children of a Canadian citizen admitted under this paragraph shall be entitled to the same nonimmigrant classification and same length of stay subject to the same limits as the principal alien.

They shall not be required to present visas, and they shall be admitted under the classification symbol L - 2.

(B) A non-Canadian citizen spouse or non-Canadian citizen unmarried minor child shall be entitled to the same nonimmigrant classification and the same length of stay subject to the same limits as the principal, but shall be required to present a visa upon application for admission as an L - 2 unless otherwise exempt under Sec. 212.1 of this chapter.

(C) The spouse and dependent minor children shall not accept employment in the United States unless otherwise authorized under the Act.

(18) Denial of intracompany transferee status to citizens of Canada or Mexico in the case of certain labor disputes.

(i) If the Secretary of Labor certifies to or otherwise informs the Commissioner that a strike or other labor dispute involving a work stoppage of workers is in progress where the beneficiary is to be employed, and the temporary entry of the beneficiary may affect adversely the settlement of such labor dispute or the employment of any person who is involved in such dispute, a petition to classify a citizen of Mexico or Canada as an L-1 intracompany transferee may be denied. If a petition has already been approved, but the alien has not yet entered the United States, or has entered the United States but not yet commenced employment, the approval of the petition may be suspended, and an application for admission on the basis of the petition may be denied.

(ii) If there is a strike or other labor dispute involving a work stoppage of workers in progress, but such strike or other labor dispute is not certified under paragraph (l)(18)(i) of this section, or the Service has not otherwise been informed by the Secretary that such a strike or labor dispute is in progress, the Commissioner shall not deny a petition or suspend an approved petition.

(iii) If the alien has already commenced employment in the United States under an approved petition and is participating in a strike or other labor dispute involving a work stoppage of workers, whether or not such strike or other labor dispute has been certified by the Department of Labor, the alien shall not be deemed to be failing to maintain his or her status solely on account of past, present, or future participation in a strike or other labor dispute involving a work stoppage of workers, but is subject to the following terms and conditions

(A) The alien shall remain subject to all applicable provisions of the Immigration and Nationality Act, and regulations promulgated in the same manner as all other L nonimmigrants;

(B) The status and authorized period of stay of such an alien is not modified or extended in any way by virtue of his or her participation in a strike or other labor dispute involving a work stoppage of workers; and

(C) Although participation by an L nonimmigrant alien in a strike or other labor dispute involving a work stoppage of workers will not constitute a ground for deportation, any alien who violates his or her status or who remains in the United States after his or her authorized period of stay has expired will be subject to deportation.
(Paragraph (l)(18) added 1/1/94; 58 FR 69211)

OI 214.2(l) Intracompany Transferees.

(1) General. The regulations at 8 CFR 214.2(l) are designed to facilitate the temporary transfer of foreign nationals with management, executive, and specialized knowledge skills to the United States to continue employment with an office of the same employer, its parent, branch, subsidiary, or affiliate. Petitioners seeking to classify aliens as intracompany transferees must file an I-129L petition with the Service for a determination and whether the alien is eligible for L classification and whether the petitioner is a qualifying organization.

(2) Basic requirements for L classification. The following requirement apply to all petitions filed for L classification:

(i) There must be a qualifying relationship between the business entity in the United States and the foreign operation which employs the alien abroad;

(ii) For the duration of the alien's stay in the United States as an intracompany transferee, the petitioner must continue to do business both in the United States and in at least one other country, either directly or through a parent, branch, subsidiary, or affiliate.

(iii) The alien must have been employed abroad continuously by the foreign operation for the immediate prior year. Although authorized periods of stay in the United States for the foreign employer are not interruptive of the immediate prior year of employment, such periods may not be counted towards the qualifying year of employment abroad.

(iv) The alien's prior year of employment abroad must have been in a managerial, executive, or specialized knowledge capacity. The prospective employment in the United States must also be in a managerial, executive, or specialized knowledge capacity. However, the alien does not have to be transferred to the United States in the same capacity in which he or she was employed abroad. For example, a manager abroad could be transferred to the United States in a specialized knowledge capacity or vice versa.

(v) The petitioner and the alien must have the intent for the alien to come to the United States for a temporary period and return abroad at the end of the authorized stay, unless the alien becomes a permanent resident of the United States during the authorized stay. The L classification may not be used for the principal purpose of circumventing the wait for a preference visa number.

(3) Petitioner's status. The petitioner for an intracompany transferee must be a firm, corporation, or affiliate thereof which is seeking to transfer a foreign employee to the United States temporarily from one of its operations outside the United States. Either the United States employer or the foreign employer may file a petition with the Service to classify the alien as an intracompany transferee. The petitioner must be able to document the existence of foreign operations to which the employee can reasonably be expected to be transferred at the end of his or her assignment in the United States. The petitioner must be actively engaged in providing goods and/or services in the United States and abroad, either directly or through a parent, branch, subsidiary, or affiliate, with employee in both countries, for the duration of the alien's stay. The mere presence of an agent or office of the petitioner is insufficient evidence of this requirement.

(4) Business relationships.

(i) General. For purposes of L classification, ownership and control are the factors for establishing a qualifying relationship between business entities. The United States and foreign business must be legal entities.

In the United States, a business is usually in the form of a corporation, partnership, or a proprietorship.

(ii) Ownership. Ownership means the legal right of possession with full power and authority to control.

(ii) Control. Control means the right and authority to direct the management and operations of the business entity.

(iii) Description of Business entitles. The regulations define the legal entities included under the L classification. Evidence that the employer is a legal entity consists of evidence, such as articles of incorporation, partnership agreement, license to do business, or evidence of registration with the Internal Revenue Service as an

employer. In petitions involving known corporations, no such evidence should be required. The petitioner is required to identify each of the qualifying organizations as one of the following business entities:

(A) Parent. Any business entity which has subsidiaries is a parent. However, a subsidiary may own other subsidiaries and also be a parent, even though it has an ultimate parent.

(B) Branch. An office or operating division of the same employer which is merely housed in a different location and is not established as a separate business entity is considered a branch.

(C) Subsidiaries. The Service recognizes only three situations to constitute a subsidiary relationship:

((1)) Where a parent directly or indirectly owns more than half of the entity and has control;

((2)) Where a parent directly or indirectly owns 50% of a 50-50 joint venture and has equal control and veto power. The 50-50 joint venture can be owned and controlled by only two legal entities. All other combinations of a joint venture are not qualifying as a subsidiary;

((3)) Where a parent directly or indirectly owns less than half of the entity, but has control because the other stock is widely dispersed among minor shareholders. This can happen, for example, when an individual or company acquires sufficient shares of a publicly held company to be able to nominate and elect the board of directors.

(D) Affiliate. Subsidiaries are affiliates of each other. The affiliate relationship is due to the ownership and control of both subsidiaries by the same legal entity. Affiliation also exists between legal entities where an identical group of individuals own and control both businesses in basically the same proportions or percentages. Associations between companies based on factors such as ownership of a small amount of stock in another company, exchange of products or services, licensing or franchising agreements, membership on boards of directors, or the formation of consortiums or cartels do not create affiliate relationships between the entities for L purposes.

(iv) Nonqualifying business relationships. The most common types of business relationships which are not qualifying under the L category are those based on contractual, licensing, and franchise agreements. There are probably numerous others, such as less than 50-50 joint ventures and charter membership arrangements, that are not qualifying. The petitioner must document ownership and control of both legal entities to meet the qualifying relationships specified in the regulations.

(5) Alien's employment.

(i) Capacities. Detailed descriptions of the alien's prior year of employment abroad and of the intended employment in the United States are required from the petitioner to determine if the alien was and will be employed in a managerial, executive, or specialized knowledge capacity.

(A) Managerial or executive capacity. The discussion of managerial and executive capacity that follows provides guidance for applying the definition of these terms to specific case situations:

((1)) An executive or managerial capacity requires a certain level of authority and an approximate mix of job duties. Managers and executives plan, organize, direct, and control an organization's major functions and work through other employees to achieve the organization's goals. Supervisors who plan, schedule, and supervise the day-to-day work of nonprofessional employees are not employed in an executive or managerial capacity, even though they may be referred to as managers in their particular organization. In addition, individuals who primarily perform the tasks necessary to produce the product(s) or provide the service(s) of an organization are not employed in an executive or managerial capacity.

((2)) Eligibility requires that the duties of a position be primarily of an executive or managerial nature. The test is basic to ensure that a person not only has requisite authority, but that a majority of his or her duties relate to operational or policy management, not to the supervision of lower level employees, performance of the duties of another type of position, or other involvement in the operational activities of the company, such as doing sales work or operating machines or supervising those that do. This does not mean that the executive or manager cannot regularly apply his or her technical or professional expertise to a particular problem. The definitions are

not intended to exclude from the duties of a manager or executive activities that are not strictly managerial, but are common to those positions, such as customer and public relations and lobbying and contracting.

((3)) An executive may manage a function within an organization. It must be clearly demonstrated, however, that the function is not directly performed by the executive. If the function itself is performed by the intended executive, the position should be viewed as a staff officer or specialist, not as an executive. In general, classification in a specialized knowledge capacity is more appropriate for individuals who control and perform a function within an organization, but do not have subordinate staff, except perhaps a personal staff.

((4)) If a small or medium-sized business supports a position wherein the duties are primarily executive or managerial, it can qualify under the L category. However, neither the title of a position nor ownership of the business are, by themselves, indicators of managerial or executive capacity. For example, a physician may incorporate his or her practice for business purposes and may hire a receptionist, bookkeeper, and a nurse to assist in that medical practice. For L purposes, the physician is not a manager, but a person who primarily practices his or her professional skills as a physician.

((5)) The L beneficiary who is coming to the United States to open a new office may be classified as a manager or executive during the one year required to reach the "doing business" standard if the factors surrounding the establishment of the proposed organization are such that it can be expected that the organization will, within one year, support a managerial or executive position. The factors to be considered include amount of investment, intended personnel structure, product or service to be provided, physical premises, and viability of the foreign operation. It is expected that a manager or executive who is required to open a new business or office will be more actively involved in day-to-day operations during the initial phases of the business, but must also have authority and plans to hire staff and have wide latitude in making decisions about the goals and management of the organization.

(B) Specialized knowledge capacity. The term "specialized knowledge" implies that eligibility is dependent upon a showing that a person possesses a type of knowledge and advanced level of expertise that are different from the ordinary or usual in a particular field, process, or function. Knowledge which is widely held or related to common practices or techniques and which is readily available in the United States job market is not specialized for purposes of L classification. The level of knowledge required and the employment of the specific alien must directly relate to the proprietary interest of the petitioner. To be proprietary, the knowledge must relate to something which relates exclusively to the petitioner's business. For example, knowledge which is essential to a special research program, or expert knowledge regarding a firm's materially different product or manufacturing process may be deemed specialized. Further, the employment of the beneficiary or a person with equivalent knowledge must be critical to the petitioner's proprietary interests. Eligibility under section 101(a)(15)(L) does not extend t persons whose general knowledge and expertise enable them to merely produce a product or provide a service. For example, chefs and specialty cooks are not considered to have specialized knowledge, even though they may have knowledge of a restaurant's special recipes.

(ii) Nature of employment.

(A) Temporary services. The intracompany transferee must be coming to the United States for a temporary period, but may perform services that are permanent or temporary in nature. The petitioner is not required to explain the need for the alien's services for the temporary period, nor is the petitioner required to specify some event which will cause the petitioner to terminate the alien's services in the United States. The dates of employment must be within the limits prescribed by the Service for a temporary stay in the L category.

(B) Extent of service. It must be established that the alien will be rendering services to and employed by the entity inside the United States. The statute does not require the beneficiary to perform full-time services within the United States. It must be established, however, that a significant portion of the alien's time, on a regular or systematic basis, is spent performing managerial, executive, or specialized knowledge activities which are a part of or directly affect the day-to-day operations of the United States entity. There must be evidence of productive employment in the United States. Generally, activities alone, such as conferring with officials, attending meetings and conferences, and participating in training are not considered productive employment and are appropriate for B-1 classification.

(6) Documentation. The burden is on the petitioner to provide the documentation required to establish eligibility for L classification. The regulations do not require submission of extensive evidence of business relationships, the alien's employment, and the petitioner and alien's temporary intent. In most cases, completion of the items

on the petition and supplementary explanations by an authorized official of the petitioning company will suffice. In doubtful or marginal cases, the director may require other appropriate evidence which he or she deems necessary to establish eligibility in a particular case.

(ii) Individual petition. An individual petition involves the transfer of one alien between two qualifying organizations. The types of documentation required to establish L eligibility are:

(A) **Business relationship.**

((1)) **Large, established organizations**. Such organizations may submit a statement by the company's president, corporate attorney, corporate secretary, or other authorized official describing the ownership and control of each qualifying organization, accompanied by other evidence such as a copy of its most recent annual report, Securities and Exchange Commission filings, or other documentation which lists the parent and its subsidiaries.

((2)) **Small business and marginal operations**. In addition to a statement of an authorized official regarding ownership and control of each qualifying organization, other evidence of ownership and control should be submitted, such as records of stock ownership, profit and loss statements or other accountant's reports, tax returns, or articles of incorporation, by-laws, and minutes of board meetings.

((3)) **New offices**. If the beneficiary is coming to the United States to open a new office, proof of ownership and control, in addition to financial Viability, is required. The petitioners' statement of ownership and control should be accompanied by appropriate evidence such as evidence of capitalization of the company or evidence of financial resources committed by the foreign company, articles of incorporation, by-laws, and minutes of board of directors' meetings, corporate bank statements, profit and loss statements or other accountants' reports, or tax returns.

((4)) **Partnerships**. To establish who owns and controls a partnership, a copy of the partnership agreement must be submitted. To establish what the partnership owns and controls, other evidence may be necessary.

((5)) **Proprietorships.** In cases where the business is not a separate legal entity from the owner(s), the petitioner's statement of ownership and control must be accompanied by evidence, such as a license to do business, record of registration as an employer with the Internal Revenue Service, business tax returns, or other evidence which identifies the owner(s) of the businesses.

(B) **Alien's employment**. To document the alien's employment abroad and the alien's intended employment in the United States, a letter signed by an authorized official of the petitioner describing the prospective employee's employment abroad for at least the prior year and the intended employment in the United States, including the dates of employment, job titles, specific job duties, number and types of employees supervised, qualifications for the job, level of authority, salary, and dates of time spent in the United States during the previous year. In cases where the accuracy of the statement is in question, the director may require other evidence, such as wage and earning statements or an employment letter from an authorized official of the employing company abroad.

(C**) Temporary intent**.

((1)) General. A petitioner may legitimately have the intent to use the services of an alien lawfully for a temporary period and, in the future, to permanently employ the alien when and if the petitioner can lawfully do so; the alien may also legitimately have the intent to come to the United States temporarily and depart voluntarily at the end of his or her authorized stay unless, within that period, the alien has become a permanent resident of the United States. The temporary admission may not be sought, however, for the principal purpose of immigrating prematurely. The regulations clarify that the burden is on the petitioner and alien to establish the requisite intent. In view of this, the approval of a permanent labor certification or the filing of a preference petition for an alien is not by itself a ground to deny an L petition or a request for extension of stay during the five/six-year period allowed for a temporary stay unless the director determines that certain conditions have not been met. The regulations provide examples of factors which the director should consider in determining whether those conditions are met.

((2)) Criteria for determining intent. Under the Act, nonimmigrant categories cannot be used to wait for a visa number to become available. Although the regulations specify examples of criteria for determining intent, the petitioner and the alien are not precluded from providing evidence of other factors which they believed can more appropriately demonstrate their intent. Extensive documentation is not required to demonstrate intent. Most factors require a written explanation from the petitioner and the alien. Others can be determined form the facts of the petition. Examples of certain factors are:

((i)) For L classification, the existence of operations and an appropriate position abroad to which the alien can be transferred at the end of the authorized stay is the most significant factor to consider in determining extent. Intracompany transferee status envisions a temporary transfer to the United States with expectations of returning to a position with the petitioner's operations(s) abroad. For example, the fact that a permanent labor certification has been obtained or a preference petition has been filed for the alien, along with evidence that there does not exist an appropriate position abroad to which give the Service reason to believe that the petitioner and the alien intend permanent residence.

((ii)) Although intent must be determined in each case, a petitioner's past history of employing aliens is some evidence of his intentions. For example, if the petitioner transferred 20 Ls to the United States during the past three years and all became permanent residents based on their employment with the petitioner, it would be reasonable to consider, in the absence of other evidence to the contrary, that the petitioner is using the L category to permanently staff the U.S. operation in advance of the availability of visa numbers.

((iii)) Blanket petition. The blanket petition program allows a petitioner to seek continuing approval of itself, its parent, and its branches, subsidiaries, and affiliates as qualifying organizations and, later, classification under section 101 (a) (15) (L) of multiple numbers of aliens employed by itself, its parent, or some of its branches, subsidiaries, and affiliates. The program is restricted to relatively large international employers who are engaged in commercial trade or services. The petitioner is required to document that it meets certain criteria to file a blanket petition and to document the relationship between the qualifying organizations which will be included in the blanket petition. When the blanket petition is adjudicated, the decision relates only to these factors. Whether alien beneficiaries of the blanket petition qualify for L classification is later determined by a consular office when the alien applies for a visa or by a Service officer if the alien is visa-exempt or applying for a change of status. An alien, who for the previous year has been employed by a qualifying organization as a manager, executive, or specialized knowledge professional, is eligible to transfer to the United States to a qualifying organization listed in the blanket petition as a manager, executive, or specialized knowledge professional.

(A) **Eligibility to file a blanket petition**. The petitioner must submit a written statement and appropriate evidence to document that it meets the criteria to file a blanket petition:

((1)) All of the organization listed in the blanket petition must be engaged in commercial trade or services. The petitioner's statement that the organizations provide goods and/or services for profit satisfies this requirement.

((2)) The petitioner must identify in its written statement an office in the United States which has been doing business for a year or longer. The date that officer was established should be indicated by the petitioner.

((3)) Inclusion of three or more organizations in the blanket petition is adequate evidence that the petitioner has three or more domestic and foreign branches, subsidiaries, or affiliates.

((4)) The final criteria allows the petitioner to document one of three factors. The petitioner should submit copies of Form I-171C to show that it has transferred ten "L" managers, executives, or specialized knowledge professionals to the United States in the previous 12 months. The Petitioner's statement regarding the combined annual sales of its United States organizations or the size of its United States workforce may be accepted as evidence of the alternative criteria. A copy of the company's annual report may also provide this information.

(B) **Business relationship**. The petitioner must submit a statement signed by the company's president, corporate attorney, corporate secretary. or other authorized official describing the ownership and control of the organizations included in the blanket petition, accompanied by supporting evidence, such as the company's latest annual report, Security and Exchange Commission filings, or another appropriate document which lists the company's parent and subsidiaries.

(C) **Certificate of Eligibility**. Form I-129S, Certificate of Eligibility, is the form used exclusively for beneficiaries of blanket petitions. When a qualifying organization seeks to transfer an alien to the United States against a blanket petition, the qualifying organization completes the certificate of eligibility for the alien. The alien must provide the consular officer, or a Service officer if the certificate is for a visa-exempt alien or involves a change of status, the following documents with this form to support eligibility for L Classification:

((1)) A letter from the prospective employee's employer abroad confirming his or her dates of employment, job duties, qualifications, and salary for at least the previous year.

((2)) Records of educational training, degrees, and other pertinent evidence to document that the prospective employee is a specialized knowledge professional.

(7) **Limits on a temporary stay.**

(i) General. The total period of a temporary stay in the United States for an L nonimmigrant is limited to five years, except where a sixth year is granted in extraordinary circumstances. Although an alien may be admitted initially for a period up to three years and given extensions in increments of two years, each period of stay requested and authorized may be less than the maximum period allowed. Therefore, the number of petitions and extensions granted during the five/six years are not relevant as long as the alien's total period of stay does not exceed the five/six-year limit. The five/six-year limit applies to the alien's total period of stay, regardless of the number of changes in employers or change in classification from the L to the H nonimmigrant category. The five/six-year limit applies to both current and future L visa holders.

(ii) Extraordinary circumstances. An extension to the sixth year must recommended by the director to the Administrative Appeals Unit (AAU). The director may deny the extension to the sixth year, but must certify an approval to the AAU. Approval of the sixth year is only granted in extraordinary circumstances which exist when it is found:

(A) that termination of the alien's services will impose extreme hardship on the petitioner's business operation, such as significant layoffs of U.S. workers, cessation of the petitioner's business, or severe financial losses; or

(B) the alien's services are in the national welfare, safety, or security interests of the United States, such as completion of work on an essential military contract, a research project which has national significance, or work which is essential to U.S. Government intelligence or security.

(iii) Limit on readmission.

(A) Rationale. An alien who seeks to remain in the United States continuously or to reenter in a work-authorized capacity a short time after spending a five/ six-year period of time in the United States is viewed by the Service as having a permanent intent to remain in the United States and thus, should be classified as an immigrant, rather than a nonimmigrant. By residing outside the United States for one year after spending five/ six years in the United States, the alien will have demonstrated that he or she has the temporary intent required for H-1 or L classification.

(B) Limitation. After a five/six-Year period of stay, the alien cannot reenter the United States in the H or L visa classifications unless he or she has resided and been physically present outside the United States for one year. Brief trips to the United States for business or pleasure will not be interruptive of the one-year requirement, but will not count towards fulfillment of that requirement. For aliens who reside continually in the United States for extended periods, the filing of a new petition after spending a short time abroad will not exempt the alien from the five/six-year limit. The new petition's approval period should be based on the five/six-year limit. For example, a Petition's for an alien who spends three years in the U.S. and leaves for three months will receive

an approval period of no more than two years, after which the alien must reside abroad for one year.

(iv) Exception to the five/six-year limit. The regulations provide exceptions to the five/six-year limit on a temporary stay and the requirement for the alien to reside abroad for one year after a five/six-year authorized stay in the U.S. The limitations do not apply to aliens who do not employment in the United States is seasonal, intermittent, or an aggregate of six months or less per year. In addition, the limitations will not apply to aliens who reside abroad and regularly commute to the United States to engage in part-time employment. Examples of aliens who would qualify for an exception are entertainers, professional athletes, some university faculty, and businessmen who work part-time or intermittently in the United States. Th burden is on the petitioner and the alien to establish that the alien qualifies for an exception.

(8) **Extension of stay procedure.**

(i) General. The regulations eliminated the requirement to file a petition extension to extend the stay of an L beneficiary. They require only the filing of an application for extension of stay by the beneficiary, along with supporting documents. Approval of the alien's extension of stay will result in automatic extension of the petition for the same period.

(ii) Appeal. The Service does not provide appellate review of an alien's application for extension of stay. A decision to grant or deny the application is discretionary. Due process does not require the Service to provide appellate review of the discretionary denial of an application for a benefit conferred on a nonimmigrant. When novel or unusually complex issues are presented, the application should receive supervisory-level review. An alien who believes that his or her application has been arbitrarily or erroneously denied may file a motion to reopen or reconsider the case, request certification, or seek judicial relief. A denial of the extension of stay application requires no action on the petition; therefore, there is no decision on the petition to appeal. However, the petitioner is not precluded form filing a new petition in the alien's behalf.

(9) **Re-adjudication of L eligibility**.

(i) General. The eligibility of the alien for L classification may be re-adjudicated when the initial classification involved gross error or when the petitioner and/or alien no longer met eligibility requirements for L classification. These circumstances will be detected usually at the time the application for extension of stay is filed.

(ii) Procedure. Eligibility for L classification is determined when the petition is adjudicated. Because the request for extension does not require the filing of a petition extension, the director must motion to reopen or reconsider the petition in order to readjudicate eligibility for L classification. The situation may involve circumstances where the alien was clearly not a manager or executive or the petitioner no longer maintains an operation abroad. It is inappropriate to deny the alien's extension of stay application on these grounds, since these are factors which relate to the petition. The petition must be reopened and readjudicated, and if denied, the alien's application for extension of stay is also denied since there is not an approved petition to support the employment.

(10**) Other**.

(i) Investigations. The adjudicator shall not request an overseas investigation of the qualifications of a beneficiary of an L-1 petition if there are other grounds for denial of the petition. The request for an overseas investigation shall be accompanied by copies of the Form I-129L and supporting documents.

There is a high incidence of misrepresentation involving work experience gained in Hong Kong, Taiwan, the Peoples Republic of China, Pakistan, Bangladesh, and India. Even so, when the adjudicating officer is convinced that the evidence substantiates the work experience for an L-1 nonimmigrant, the petition may be approved. The officer shall send all other L-1 nonimmigrant petitions for these countries for investigation.

Service field offices will, without exception, submit requests for such investigation directly to and only to the Officer-In-Charge, Hong Kong, in cases involving beneficiaries who allegedly gained work experience in Hong Kong, the People's Republic of China, or Taiwan or to the Officer-in-Charge, New Delhi, in cases

involving beneficiaries who allegedly gained work experience in Bangladesh, India, or Pakistan. Requests will not be made directly to an Embassy or Consulate.

Any request for an overseas investigation must be accompanied by copies of Form I-129B and all supporting documents. All requests for overseas investigation must be made in accordance with the general provisions of OI 103.1(c)(1).

The adjudicator shall attach any report of investigation of the beneficiary's qualifications to the approved petition when it is forwarded to the consulate at which the visa application is to be made.

(ii) Soviet-bloc nationals. When the beneficiary is a Soviet-bloc national, the notice of approval on Form I-171C shall instruct the petitioner to notify the Service office having jurisdiction over the port of departure 24 hours in advance of the alien's proposed departure; that office shall insure that Form I-94 showing facts of departure is promptly received and forwarded to the Central office.

(Entire OI 214.2(1) revised TM 2/87)

Inspectors Field Manual Chapter 15.4
(l) Intracompany Transferees.

(1) Classification: L-1 Includes aliens entering to render services to a branch, parent, subsidiary, or affiliate of the company of previous employment outside the United States.

Documents required: Passport valid for 6 months at time of entry unless exempt. Nonimmigrant visa (L-l) unless exempt. Must have evidence of approved I-129 petition in the form of a notation on the nonimmigrant visa indicating the petition number and employer's name, or a Notice of Action, Form I-797, indicating approval, unless the applicant is a Canadian citizen. In that case, the alien may file the I-129 at a Canadian pre-flight station or Canadian land border port-of-entry at the time he or she applies for admission. If arriving at an airport without having been inspected preflight, a Canadian applicant must have evidence of petition approval, Form I-797.

Qualifications: Must be in a managerial, executive, or specialized knowledge capacity but may be transferred from any one of the capacities to another (e.g. from management to executive). All nonimmigrant grounds of inadmissibility apply. Must have worked for the company (branch, parent, subsidiary, or affiliate) outside the U.S. for at least 1 continuous year within the preceding 3 years [See 8 CFR 214.2(l) and 22 CFR 41.54.].

Terms of admission: Admit L-1 for validity of petition (up to 3 years initially).

Notations on I-94: Front: L-1, (date to which admitted). Reverse: Petition number and occupation from list in Adjudicator's Field Manual Appendix 31-1.

Special notes:

(A) Dependents. Admit the spouse and children as L-2.

(B) Petition limitations. Petition may be approved for up to 3 years, except start-up companies which are limited initially to 1 year. Expiration date of visa will usually be the same as the validity of the petition. The maximum stay in the U.S. for an L-1 specialized knowledge employee is 5 years. The maximum stay in the U.S. for an L-1, executive or manager is 7 years.

(C) Blanket petitions. Some L aliens may be admitted on "blanket" petitions, i.e. petitions approved for large companies where corporate requirements are not re-adjudicated with each individual L alien. An alien may not be initially admitted if the company's blanket petition approval has expired but may be readmitted to complete a previously authorized period of stay. Maximum initial period of admission for a blanket L-1 is 3 years. Blanket petition applicants will have Form I-129S in their possession.

(D) NAFTA L aliens. Under the North American Free Trade Agreement (NAFTA), a Canadian citizen may file an I-129 for an L-1 classification in conjunction with his/her application for admission at certain land border ports-of-entry and preflight inspection stations. Because of this, officers must be completely familiar with the adjudication process of an I-129 petition for L-1 benefits. The following procedure may serve as a guideline:

(1) Determine applicant to be a Canadian citizen and otherwise eligible for admission;

(2) Be sure the I-129 is completed in duplicate and signed;

(3) Determine qualifying relationship between the U.S. and Canadian entities. Very often a great volume of material is not necessary;

(4) Verify that the applicant was employed abroad by the Canadian entity in a qualifying capacity for a period of 1 year during the prior 3 years immediately preceding the date of application for admission;

(5) The job offer by the U.S. entity must place the applicant in a qualifying managerial, executive or specialized knowledge capacity. Examine supporting documentation. Form M-332, Instructions for Filing I-129 Petition for Intracompany Transferee, is a good source of information concerning acceptable supporting documentation;

(6) Collect fee, place fee stamp, approval stamp, and officer signature in proper places on the I-129;

(7) Prepare I-94 multiple entry for 1 year if the alien is coming to a new office, (i.e. in business for less than 1 year) 3 years if other than new office;

(8) Make sure alien receives the I-94, a receipt for the fee paid, Form I-9 and M-279 for initial admission. Advise the alien that he or she will receive an I-797, Notice of Action, from the service center; and

(9) Attach arrival copy of I-94 to "record of proceedings," (original I-129 with supporting documents) and forward to the Service Center that has jurisdiction over your port-of-entry.

(2) Classification: L-2 Includes spouse and children of L-1.

Documents required: Passport valid for 6 months at time of entry unless exempt. Nonimmigrant visa (L-2) unless exempt.

Qualifications: Must have the required family relationship with the principal alien. Must be accompanying or following to join the principal L-1. All nonimmigrant grounds of inadmissibility apply.

Terms of admission: Admit L-2, same period as principal.

Notations on I-94: L-2, (date to which admitted).

Special notes:

(A) Employment authorization: Spouse and children may not work as L-2 but may attend school without changing status

(B) NAFTA L dependents. Under the North American Free Trade Agreement, only the applicant need be a Canadian/Mexican citizen.

Requirements for Admission:
The NAFTA intracompany transferee must qualify under the existing requirements for L classification, including:

- **Citizenship**. To qualify for the NAFTA intracompany transferee classification, the applicant must establish Canadian or Mexican citizenship.

- **Qualifying Capacity**. The applicant must qualify in a capacity that is managerial, executive, or one involving specialized knowledge.

- **Qualifying Entity**. The applicant must be seeking entry to work for an entity in the U.S. that is the parent, branch, affiliate, or subsidiary of the entity in the foreign country.

- **Qualifying Past Employment**. The applicant must have been employed continuously for 1 year in the previous past 3 years with the qualifying entity abroad in a qualifying capacity.

Terms of Admission: Form I-129, Petition for Temporary Worker, must be filed in the applicant's behalf to accord the alien classification as an L-1. The petition must be submitted by the qualifying entity to the Service, in accordance with the instructions to that form. The Service will provide the NAFTA intracompany transferee and dependents with Forms I-94 at the time of admission endorsed in the same manner as other class L admissions. The I-94 is the employment authorization document for the L-1 and may be presented to the Social Security Administration for the purpose of applying for a social security number. Periods of admission and extension for NAFTA L aliens are the same as for other L nonimmigrants.

(A) Citizens of Canada. A citizen of Canada is not required to, but may obtain, a nonimmigrant visa. The applicant must establish Canadian citizenship.

The I-129 petition may be filed (in duplicate) by the U.S. or foreign employer in advance of entry or in conjunction with an application for admission. When filing in advance, the petition should be submitted to the appropriate Service Center at least 30 days in advance of the expected date of entry. The applicant must present evidence of the approved petition at the time of application for admission. If the petition is filed with an application for admission, such filing must be made with an immigration officer at a Class A port-of-entry located on the US-Canada land border or at a U.S. pre-clearance/pre-flight station in Canada. The petitioning employer need not appear, but the Form I-129 must bear the authorized signature of the petitioner and all documentation and the appropriate filing fee must accompany the petition.

(B) Citizens of Mexico. A citizen of Mexico must apply for an L visa at an American consulate. At the port-of-entry, the applicant must present a valid Mexican passport with their L-1 visa.

Basic requirements for L classification. The following requirement apply to all petitions filed for L classification:

(i) There must be a qualifying relationship between the business entity in the United States and the foreign operation which employs the alien abroad;

(ii) For the duration of the alien's stay in the United States as an intracompany transferee, the petitioner must continue to do business both in the United States and in at least one other country, either directly or through a parent, branch, subsidiary, or affiliate.

(iii) The alien must have been employed abroad continuously by the foreign operation for the immediate prior year. Although authorized periods of stay in the United States for the foreign employer are not interruptive of the immediate prior year of employment, such periods may not be counted towards the qualifying year of employment abroad.

(iv) The alien's prior year of employment abroad must have been in a managerial, executive, or specialized knowledge capacity. The prospective employment in the United States must also be in a managerial, executive, or specialized knowledge capacity. However, the alien does not have to be transferred to the United States in the same capacity in which he or she was employed abroad. For example, a manager abroad could be transferred to the United States in a specialized knowledge capacity or vice versa.

(v) The petitioner and the alien must have the intent for the alien to come to the United States for a temporary period and return abroad at the end of the authorized stay, unless the alien becomes a permanent resident of the United States during the authorized stay. The L classification may not be used for the principal purpose of circumventing the wait for a preference visa number.

Petitioner's status. The petitioner for an intracompany transferee must be a firm, corporation, or affiliate thereof which is seeking to transfer a foreign employee to the United States temporarily from one of its operations outside the United States. Either the United States employer or the foreign employer may file a petition with the Service to classify the alien as an intracompany transferee. The petitioner must be able to document the existence of foreign operations to which the employee can reasonably be expected to be transferred at the end of his or her assignment in the United States. The petitioner must be actively engaged in providing goods and/or services in the United States and abroad, either directly or through a parent, branch, subsidiary, or affiliate, with employee in both countries, for the duration of the alien's stay. The mere presence of an agent or office of the petitioner is insufficient evidence of this requirement.

Business relationships.

For purposes of L classification, ownership and control are the factors for establishing a qualifying relationship between business entities. The United States and foreign business must be legal entities. In the United States, a business is usually in the form of a corporation, partnership, or a proprietorship.

Ownership. Ownership means the legal right of possession with full power and authority to control.

Control. Control means the right and authority to direct the management and operations of the business entity.

Description of Business entities. The regulations define the legal entities included under the L classification. Evidence that the employer is a legal entity consists of evidence, such as articles of incorporation, partnership agreement, license to do business, or evidence of registration with the Internal Revenue Service as an employer. In petitions involving known corporations, no such evidence should be required. The petitioner is required to identify each of the qualifying organizations as one of the following business entities:

Parent. Any business entity which has subsidiaries is a parent. However, a subsidiary may own other subsidiaries and also be a parent, even though it has an ultimate parent.

Branch. An office or operating division of the same employer which is merely housed in a different location and is not established as a separate business entity is considered a branch.

Subsidiaries. The Service recognizes only three situations to constitute a subsidiary relationship:

(1) Where a parent directly or indirectly owns more than half of the entity and has control;

(2) Where a parent directly or indirectly owns 50% of a 50-50 joint venture and has equal control and veto power. The 50-50 joint venture can be owned and controlled by only two legal entities. All other combinations of a joint venture are not qualifying as a subsidiary;

(3) Where a parent directly or indirectly owns less than half of the entity, but has control because the other stock is widely dispersed among minor shareholders. This can happen, for example, when an individual or company acquires sufficient shares of a publicly-held company to be able to nominate and elect the board of directors.

Affiliate. Subsidiaries are affiliates of each other. The affiliate relationship is due to the ownership and control of both subsidiaries by the same legal entity. Affiliation also exists between legal entities where an identical group of individuals own and control both businesses in basically the same proportions or percentages. Associations between companies based on factors such as ownership of a small amount of stock in another company, exchange of products or services, licensing or franchising agreements, membership on boards of directors, or the formation of consortiums or cartels do not create affiliate relationships between the entities for L purposes.

Nonqualifying business relationships. The most common types of business relationships which are not qualifying under the L category are those based on contractual, licensing, and franchise agreements. There are probably numerous others, such as less than 50-50 joint ventures and charter membership arrangements that are not qualifying. The petitioner must document ownership and control of both legal entities to meet the qualifying relationships specified in the regulations.

ALIEN'S EMPLOYMENT.

Detailed descriptions of the alien's prior year of employment abroad and of the intended employment in the United States are required from the petitioner to determine if the alien was and will be employed in a managerial, executive, or specialized knowledge capacity.

Managerial or executive capacity. The discussion of managerial and executive capacity that follows provides guidance for applying the definition of these terms to specific case situations:

(1) An executive or managerial capacity requires a certain level of authority and an approximate mix of job duties. Managers and executives plan, organize, direct, and control an organization's major functions and work through other employees to achieve the organization's goals. Supervisors who plan, schedule, and supervise the day-to-day work of nonprofessional employees are not employed in an executive or managerial capacity, even though they may be referred to as managers in their particular organization. In addition, individuals who primarily perform the tasks necessary to produce the product(s) or provide the service(s) of an organization are not employed in an executive or managerial capacity.

(2) Eligibility requires that the duties of a position be primarily of an executive or managerial nature. The test is basic to ensure that a person not only has requisite authority, but that a majority of his or her duties relate to operational or policy management, not to the supervision of lower level employees, performance of the duties of another type of position, or other involvement in the operational activities of the company, such as doing sales work or operating machines or supervising those that do. This does not mean that the executive or manager cannot regularly apply his or her technical or professional expertise to a particular problem. The definitions are not intended to exclude from the duties of a manager or executive activities that are not strictly managerial, but are common to those positions, such as customer and public relations and lobbying and contracting.

(3) An executive may manage a function within an organization. It must be clearly demonstrated, however, that the function is not directly performed by the executive. If the function itself is performed by the intended executive, the position should be viewed as a staff officer or specialist, not as an executive. In general, classification in a specialized knowledge capacity is more appropriate for individuals who control and perform a function within an organization, but do not have subordinate staff, except perhaps a personal staff.

(4) If a small or medium-sized business supports a position wherein the duties are primarily executive or managerial, it can qualify under the L category. However, neither the title of a position nor ownership of the business are, by themselves, indicators of managerial or executive capacity. For example, a physician may incorporate his or her practice for business purposes and may hire a receptionist, bookkeeper, and a nurse to assist in that medical practice. For L purposes, the physician is not a manager, but a person who primarily practices his or her professional skills as a physician.

(5) The L beneficiary who is coming to the United States to open a new office may be classified as a manager or executive during the one year required to reach the "doing business" standard if the factors surrounding the establishment of the proposed organization are such that it can be expected that the organization will, within one year, support a managerial or executive position. The factors to be considered include amount of investment, intended personnel structure, product or service to be provided, physical premises, and viability of the foreign operation. It is expected that a manager or executive who is required to open a new business or office will be more actively involved in day-to-day operations during the initial phases of the business, but must also have authority and plans to hire staff and have wide latitude in making decisions about the goals and management of the organization.

Specialized knowledge capacity. The term "specialized knowledge" implies that eligibility is dependent upon a showing that a person possesses a type of knowledge and advanced level of expertise that are different from the ordinary or usual in a particular field, process, or function. Knowledge which is widely held or related to common practices or techniques and which is readily available in the United States job market is not specialized for purposes of L classification. The level of knowledge required and the employment of the specific alien must directly relate to the proprietary interest of the petitioner. To be proprietary, the knowledge must relate to something which relates exclusively to the petitioner's business. For example, knowledge which is essential to a special research program, or expert knowledge regarding a firm's materially different product or manufacturing process may be deemed specialized. Further, the employment of the beneficiary or a person with equivalent knowledge must be critical to the petitioner's proprietary interests. Eligibility under section 101(a)(15)(L) does not extend t persons whose general knowledge and expertise enable them to merely produce a product or provide a service. For example, chefs and specialty cooks are not considered to have specialized knowledge, even though they may have knowledge of a restaurant's special recipes.

Nature of employment.

Temporary services. The intracompany transferee must be coming to the United States for a temporary period, but may perform services that are permanent or temporary in nature. The petitioner is not required to explain the need for the alien's services for the temporary period, nor is the petitioner required to specify some event which will cause the petitioner to terminate the alien's services in the United States. The dates of employment must be within the limits prescribed by the Service for a temporary stay in the L category.

Extent of service. It must be established that the alien will be rendering services to and employed by the entity inside the United States. The statute does not require the beneficiary to perform full-time services within the United States. It must be established, however, that a significant portion of the alien's time, on a regular or systematic basis, is spent performing managerial, executive, or specialized knowledge activities which are a part of or directly affect the day-to-day operations of the United States entity. There must be evidence of productive employment in the United States. Generally, activities alone, such as conferring with officials, attending meetings and conferences, and participating in training are not considered productive employment and are appropriate for B-1 classification.

Documentation. The burden is on the petitioner to provide the documentation required to establish eligibility for L classification. The regulations do not require submission of extensive evidence of business relationships, the alien's employment, and the petitioner and alien's temporary intent. In most cases, completion of the items on the petition and supplementary explanations by an authorized official of the petitioning company will suffice. In doubtful or marginal cases, the director may require other appropriate evidence which he or she deems necessary to establish eligibility in a particular case.

Individual petition. An individual petition involves the transfer of one alien between two qualifying organizations. The types of documentation required to establish L eligibility are:

(A) Business relationship.

(1) Large, established organizations. Such organizations may submit a statement by the company's president, corporate attorney, corporate secretary, or other authorized official describing the ownership and control of each qualifying organization, accompanied by other evidence such as a copy of its most recent annual report, Securities and Exchange Commission filings, or other documentation which lists the parent and its subsidiaries.

(2) Small business and marginal operations. In addition to a statement of an authorized official regarding ownership and control of each qualifying organization, other evidence of ownership and control should be submitted, such as records of stock ownership, profit and loss statements or other accountant's reports, tax returns, or articles of incorporation, by-laws, and minutes of board meetings.

(3) New offices. If the beneficiary is coming to the United States to open a new office, proof of ownership and control, in addition to financial Viability, is required. The petitioners' statement of ownership and control should be accompanied by appropriate evidence such as evidence of capitalization of the company or evidence of financial resources committed by the foreign company,

articles of incorporation, by-laws, and minutes of board of directors' meetings, corporate bank statements, profit and loss statements or other accountant's reports, or tax returns.

(4) Partnerships. To establish who owns and controls a partnership, a copy of the partnership agreement must be submitted. To establish what the partnership owns and controls, other evidence may be necessary.

(5) Proprietorships. In cases where the business is not a separate legal entity from the owner(s), the petitioner's statement of ownership and control must be accompanied by evidence, such as a license to do business, record of registration as an employer with the Internal Revenue Service, business tax returns, or other evidence which identifies the owner(s) of the businesses.

Alien's employment. To document the alien's employment abroad and the alien's intended employment in the United States, a letter signed by an authorized official of the petitioner describing the prospective employee's employment abroad for at least the prior year and the intended employment in the United States, including the dates of employment, job titles, specific job duties, number and types of employees supervised, qualifications for the job, level of authority, salary, and dates of time spent in the United States during the previous year. In cases where the accuracy of the statement is in question, the director may require other evidence, such as wage and earning statements or an employment letter from an authorized official of the employing company abroad.

Limits on temporary stay for L-1 nonimmigrant.

The total period of a temporary stay in the United States for an L nonimmigrant is limited to five years, except where a sixth year is granted in extraordinary circumstances. Although an alien may be admitted initially for a period up to three years and given extensions in increments of two years, each period of stay requested and authorized may be less than the maximum period allowed. Therefore, the number of petitions and extensions granted during the five/six years are not relevant as long as the alien's total period of stay does not exceed the five/six-year limit. The five/six-year limit applies to the alien's total period of stay, regardless of the number of changes in employers or change in classification from the L to the H nonimmigrant category. The five/six-year limit applies to both current and future L visa holders.

Extraordinary circumstances. An extension to the sixth year must be recommended by the director to the Administrative Appeals Unit (AAU). The director may deny the extension to the sixth year, but must certify an approval to the AAU. Approval of the sixth year is only granted in extraordinary circumstances which exist when it is found:

(A) that termination of the alien's services will impose extreme hardship on the petitioner's business operation, such as significant layoffs of U.S. workers, cessation of the petitioner's business, or severe financial losses; or

(B) the alien's services are in the national welfare, safety, or security interests of the United States, such as completion of work on an essential military contract, a research project which has national significance, or work which is essential to U.S. Government intelligence or security.

Limit on readmission. An alien who seeks to remain in the United States continuously or to reenter in a work-authorized capacity a short time after spending a five/ six-year period of time in the United States is viewed by the Service as having a permanent intent to remain in the United States and thus, should be classified as an immigrant, rather than a nonimmigrant. By residing outside the United States for one year after spending five/ six years in the United States, the alien will have demonstrated that he or she has the temporary intent required for H-1 or L classification.

Limitation. After a five/six-Year period of stay, the alien cannot reenter the United States in the H or L visa classifications unless he or she has resided and been physically present outside the United States for one year. Brief trips to the United States for business or pleasure will not be interruptive of the one-year requirement, but will not count towards fulfillment of that requirement. For aliens who reside continually in the United States for extended periods, the filing of a new petition after spending a short time abroad will not exempt the alien from the five/six-year limit. The new petition's approval period should be based on the five/six-year limit. For example, a Petition for an alien who spends three years in the U.S. and leaves for

three months will receive an approval period of no more than two years, after which the alien must reside abroad for one year.

Exception to the five/six-year limit. The regulations provide exceptions to the five/six-year limit on a temporary stay and the requirement for the alien to reside abroad for one year after a five/six-year authorized stay in the U.S. The limitations do not apply to aliens who do not employment in the United States is seasonal, intermittent, or an aggregate of six months or less per year. In addition, the limitations will not apply to aliens who reside abroad and regularly commute to the United States to engage in part-time employment. Examples of aliens who would qualify for an exception are entertainers, professional athletes, some university faculty, and businessmen who work part-time or intermittently in the United States. Th burden is on the petitioner and the alien to establish that the alien qualifies for an exception.

Extension of stay procedure.

The regulations eliminated the requirement to file a petition extension to extend the stay of an L beneficiary. They require only the filing of an application for extension of stay by the beneficiary, along with supporting documents. Approval of the alien's extension of stay will result in automatic extension of the petition for the same period.

The Service does not provide appellate review of an alien's application for extension of stay. A decision to grant or deny the application is discretionary. Due process does not require the Service to provide appellate review of the discretionary denial of an application for a benefit conferred on a nonimmigrant. When novel or unusually complex issues are presented, the application should receive supervisory-level review. An alien who believes that his or her application has been arbitrarily or erroneously denied may file a motion to reopen or reconsider the case, request certification, or seek judicial relief. A denial of the extension of stay application requires no action on the petition; therefore, there is no decision on the petition to appeal. However, the petitioner is not precluded form filing a new petition in the alien's behalf.

Procedures for admission of L-1 beneficiary.
Upon approval of the petition and all necessary closing actions, the beneficiary shall be inspected. If the beneficiary is determined to be admissible, Form I-94 shall be completed and the departure portion of Form I-94 shall be provided to the beneficiary. The beneficiary shall be informed that Form I-94 and either Form I-171C (or Form I-797) from the petitioner or a new petition will be required for readmission as L-1.

Denial of Petition
Deficient or deniable petitions or certificates of eligibility.

Deficient or deniable petitions or certificates of eligibility. If a petition or certificate of eligibility submitted concurrently with an application for admission is lacking necessary supporting documentation or is otherwise deficient, the inspecting immigration officer shall return it to the applicant for admission in order to obtain the necessary documentation from the petitioner or for the deficiency to be overcome. The fee to file the petition will be remitted at such time as the documentary or other deficiency is overcome. If the petition or certificate of eligibility is clearly deniable, the immigration officer will accept the petition (with fee) and the petitioner shall be notified of the denial, the reasons for denial, and the right of appeal. If a formal denial order cannot be issued by the port of entry, the petition with a recommendation for denial shall be forwarded to the appropriate Service Center for final action. For the purposes of this provision, the appropriate Service Center will be the one within the same Service region as the location where the application for admission is made.

In such cases, a prospective beneficiary shall not classifiable as L-1 for purposes of entry and shall be denied admission unless otherwise qualified under the Immigration and Nationality Act.

Spouses and Dependent Children

Spouses and dependent children of intracompany transferees may accompany or follow to join the L-1 principal if they otherwise meet the general immigration requirements for temporary entry. L-2 is the designated classification for both spouse and dependent children of intracompany transferees. There is no requirement that the spouse and dependent children be citizens of Canada or Mexico.
The dependent spouse and minor children of an L-1 admitted under the terms and conditions of the FTA shall be entitled to classification as L-2, if otherwise admissible. The qualifying spouse or dependent minor children who are exempt from the visa requirements under 8 CFR 212.1 may be admitted with the principal alien beneficiary upon approval of the petition.

L-2 dependents who are citizens of Canada are not required to obtain an L-2 visa but may do so if desired. L-2 dependents who are citizens of Mexico or other countries generally are required to seek visa issuance. L-2's may not work in the United States. L-2's may attend school while in the United States incidental to their temporary stay.

The non-Canadian citizen spouse or children (who are not exempt from the visa requirement of 8 CFR 212.1) may not accompany the principal alien beneficiary. They shall await the issuance of the Notice of Approval, Form I-171C (or Form I-797), with which they may apply for a nonimmigrant visa at a consular office. After obtaining a nonimmigrant visa, they may follow to join the principal alien beneficiary. In emergent cases, the designated consular office may be provided the pertinent information concerning the I-129L approval by cable.

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DEPARTMENT OF JUSTICE

Immigration and Naturalization Service

8 CFR Parts 214 and 245

[INS No. 1881-97]

RIN 1115-AE96

Adjustment of Status; Continued Validity of Nonimmigrant Status,

Unexpired Employment Authorization, and Travel Authorization for

Certain Applicants Maintaining Nonimmigrant H or L Status

AGENCY: Immigration and Naturalization Service, Justice.

ACTION: Interim rule with request for comments.

SUMMARY: This rulemaking amends and clarifies Immigration and Naturalization Service regulations governing an H-1 and L-1 nonimmigrant's continued nonimmigrant status during the pendency of an application for adjustment of status. This action incorporates into the regulations existing Service policy statements regarding this issue. In addition, this rule eliminates the requirement for those adjustment applicants who maintain valid H-1 and L-1 nonimmigrant status, and their dependent family members, to obtain advance parole prior to traveling outside the United States. Finally, the Service is considering expanding the "dual intent" concept to cover long term nonimmigrants, in E, F, J, and M visa classifications, who are visiting this country as traders, investors, students, scholars, etc.

DATES: Effective date: This interim regulation is effective July 1, 1999.

Comment date: Written comments must be submitted on or before August 2, 1999.

ADDRESSES: Please submit written comments, in triplicate, to the Director, Policy Directives and Instructions Branch, Immigration and Naturalizations Service, 425 I Street, NW., Room 5307, Washington, DC 20536. To ensure proper handling, please reference INS No. 1881-97 on your correspondence. Comments are available for public inspection at the above address by calling (202) 514-3048 to arrange for an appointment.

FOR FURTHER INFORMATION CONTACT: Frances A. Murphy, Adjudications Officer, Residence and Status Services Branch, Office of Adjudications, Immigration and Naturalization Service, 425 I Street, NW., Room 3214, Washington, DC 20536, telephone (202) 514-3978.

SUPPLEMENTARY INFORMATION:

Why Is the Service Issuing This Regulation?

This rule is being issued to codify previous Service policy statements regarding the eligibility of H-1 and L-1 nonimmigrants, and their dependent family members, to maintain and to extend their nonimmigrant status while their applications for permanent residence remain pending. This rule also addresses the issue of the eligibility of these aliens to travel outside the Untied States without abandoning their applications for status.

What Categories of Aliens May Maintain Nonimmigrant Status After Having Filed for Adjustment of Status?

Under Section 214(b) of the Immigration and Nationality Act, (Act), most nonimmigrants who apply for adjustment of status to that of permanent residents of the United States are presumed to be intending immigrants and, therefore, are no longer eligible to maintain nonimmigrant status. Section 214(h) of the Act, however, permits aliens described in section 101(a)(15)(H)(i) and (L) of the Act, i.e., temporary workers in specialty occupations, intracompany managerial or executive transferees, and their dependent spouses and children, to maintain their nonimmigrant status during the pendency of their applications for adjustment of status.

In addition, the Service is considering expanding the dual intent concept to cover other long term nonimmigrants who are visiting this country as traders (E-1), investors (E-2), students (F-1, J-1 or M-1), or scholars (J-1), etc. These nonimmigrants, who are typically authorized to stay in this country for considerable lengths of time, often need to make short overseas travels during their authorized stay. Under the "dual intent" doctrine, these nonimmigrants would be able to maintain valid nonimmigrant status and travel overseas without advance parole while applying for adjustment of status.

The Service has, traditionally, considered applying for adjustment of status as relevant evidence in determining whether an alien has abandoned the requisite nonimmigrant intent. Section 214(b) of the Act does not, however, require the Service to hold this position as an absolute rule. So long as the alien clearly intends to comply with the requirements of his or her nonimmigrant status, the fact that the alien would like to become a permanent resident, if the law permits this, does not bar the alien's continued holding of a nonimmigrant status.

The Service is interested in the public view on this matter and would appreciate written comments.

How Does This Rule Affect Maintenance of H-1 and L-1 Nonimmigrant Status?

Section 214(h) of the Act specifically provides that the fact that an H-1 or L-1 nonimmigrant is the beneficiary of an application for a preference status filed under section 204 or has "otherwise sought permanent residence" in the United States shall not constitute evidence of an intent to abandon the foreign residence. The Service interprets section 214(h) to mean that, in addition to the approval of a labor certification or a preference visa petition, the mere filing of an application for status shall not be the basis for denying an H-1 or L-1 nonimmigrant's properly completed application (or that of their dependent family members in H-4 or L-2 status) for extension of stay or change of status within the H-1 or L-1 (or, as applicable, a H-4 or L-2) classifications. A pending adjustment application, however, does not relieve nonimmigrant H-1 and L-1 aliens of the requirement to comply with the terms of their nonimmigrant classification, including restrictions on periods of stay, change of employer, and engaging in employment. For example, changing employers without first obtaining approval from the Service will cause the alien to lose his or her valid H-1 or L-1 nonimmigrant status.

What Are the Documentary Requirements for Travel Outside the United States for H-1 and L-1 With Pending Applications for Adjustment of Status?

Current Service regulations at § 245.2(a)(4)(ii) require that all adjustment applicants obtain advance parole authorization prior to traveling outside the United States. Prior to enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 [IIRIRA], such persons were deemed to be applicants seeking admission and were subject to the grounds of excludability. The Service imposed the advance parole requirement and the concomitant exclusion process in order to maintain control over the re-entry of such aliens. With the phasing out of exclusion proceedings under IIRIRA, however, the Service believes it is now appropriate to amend its regulations to provide fuller effect to section 214(h) of the Act by exempting H-1 and L-1 nonimmigrants with pending applications for adjustment of status (as well as their dependent family members) from obtaining advance parole authorization prior to traveling outside the United States. Generally, such H-1 and L-1 nonimmigrants may be readmitted into the United States in the same status provided they are in possession of a valid H-1 or L-1 nonimmigrant visa (for those aliens not visa exempt), and the original I-797 receipt notice for the application for adjustment of status, and continue to remain eligible for H-1 or L-1 classification. All other nonimmigrants with pending applications for status must obtain advance parole authorization in accordance with § 245.2(a)(4)(ii) prior to traveling outside the United States.

Under What Section of the Regulations Would H-1 or L-1 Nonimmigrants be Granted Authorization for Continued Employment?

H-1 and L-1 nonimmigrants filing applications for permanent residence have two options with respect to work authorization, but the choices have different consequences. Such aliens, of course, may continue to work in accordance with the terms of their nonimmigrant employment authorization, as provided in § 274a.12(b)(9) or (12). This means that, while their application for adjustment of status is still pending, their employment is limited to the employer for whom the current nonimmigrant visa petition was approved.

In the alternative, when filing an application for permanent residence, an H-1 or L-1 nonimmigrant may also file a form I-765 application for unrestricted employment authorization as provided in § 274a.12(c)(9). After receiving an Employment Authorization Document, the alien would be eligible to work for any employer, and this work authorization would continue as long as the alien's application for adjustment of status remains pending. However, such an alien should bear in mind that, by accepting employment with an employer other than the one which filed the approved H-1 or L-1 nonimmigrant petition under § 274a.12(c)(9), the alien would no longer be in compliance with the requirements of the H-1 or L-1 nonimmigrant status.

If the alien's application for adjustment of status is ultimately approved, then it would not matter which option the alien had followed. However, if the application for adjustment is denied, then the alien's status would depend on which option was followed. If the alien had continued to work for an approved employer under the terms of his or her H-1 or L-1 status, and otherwise properly maintained such status, the alien would still retain his or her nonimmigrant status, if that status had not yet expired according to the established terms. However, an alien who had chosen to work for a different employer during the period that his or her application for adjustment of status was pending would have thereby lost his or her H-1 or L-1 nonimmigrant status. Thus, if the alien's application for adjustment of status is denied, the alien would no longer be in a lawful status and would be subject to removal proceedings. In addition, a dependent family member who had chosen to engage in unrestricted employment while the application for adjustment of status was pending would lose his or her H-4 or L-2 nonimmigrant dependent status. Therefore, if the principal's application for adjustment of status is denied, such dependent family members would also not be in a lawful status and could not revert back to H-4 or L-2 dependent status.

Filing of I-765 for H's and L's Seeking Employment Authorization Under § 274a.12(c)(9)

H-1 and L-1 nonimmigrants filing adjustment applications who intend to seek open-market employment authorization under § 274a.12(c)(9) should file Form I-765 concurrently with the I-485 to avoid a lapse of employment authorization. After filing the Form I-765, the H-1 or L-1 nonimmigrant must wait until he or she receives the employment authorization document before the alien may enter into open-market employment. The INS Service Centers will continue to entertain requests for expeditious handling of Form I-765 employment authorization requests in accordance with prevailing criteria. Expeditious handling of a request for employment authorization under § 274a.12(c)(9), however, may be insufficient to ensure that a lapse in employment authorization does not occur when the application for status is filed near the expiration of H-1 or L-1 nonimmigrant status.

What Are the Effects of Denial of I-485 on Employment Authorization and Nonimmigrant Status?

An alien whose adjustment of status application is denied but who has continuously maintained his or her H-1 or L-1 nonimmigrant status while the adjustment application was pending, may continue to work in accordance with the terms of the nonimmigrant visa. If the adjustment of status application is denied, any employment authorization granted to the alien under § 274a.12(c)(9) will be subject to termination pursuant to § 274a.14(b). Further, if the alien is not maintaining his or her H-1 or L-1 nonimmigrant status, he or she will be subject to removal proceedings.

How Does the Approval of an Application for Adjustment of Status During the Alien's Absence From the United States Affect His or Her Readmission?

In accordance with 8 CFR 211.1, a Form I-797 approval notice for an adjustment of status application is insufficient to establish an arriving alien's entitlement to lawful permanent residence. An H-1 or L-1 nonimmigrant (or a dependent family member) whose application for adjustment of status was approved during the alien's absence from the United States will be granted deferred inspection in accordance with § 235.2(b) upon presentation of a valid I-797 notice of approval of the application for status. Such deferred action shall be for the purpose of providing conclusive evidence that the alien's status has in fact been adjusted to that of a lawful permanent resident.

Good Cause Exception

The Service's implementation of this rule as an interim rule, with provisions for post-promulgation public comments, is based on the "good cause" exceptions found at 5 U.S.C. 533(b)(3)(B), and (d)(3). The immediate implementation of this interim rule without prior notice and comment is necessary to: (1) Clarify existing Service policy with respect to adjustment applicants who need to travel abroad while their application is pending, (2) provide a benefit to U.S. employers by facilitating the continued employment of nonimmigrant H-1 and L-1 workers who have filed for adjustment of status, and (3) allow such workers more flexibility to travel. The Service will consider fully all comments submitted during the comment period.

Regulatory Flexibility Act

The Commissioner of the Immigration and Naturalization Service, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed this regulation and, by approving it, certifies that this rule will not have a significant economic impact on a substantial number of small entities because it affects individuals by allowing them to continue to be employed and to travel while seeking adjustment of status. Any effect on small entities that employ such nonimmigrants will be beneficial.

Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any 1 year, and will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by section 804 of the Small Business Regulatory Enforcement Act of 1996. This rule will not result in an annual effect on the economy of $100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of the United States-based companies to compete with foreign-based companies in domestic and export markets.

Executive Order 12866

This rule is not considered by the Department of Justice, Immigration and Naturalization Service, to be a "significant regulatory action" under Executive Order 12866, section 3(f), Regulatory Planning and Review, and the Office of Management and Budget has waived its review process under section 6(a)(3)(A).

Executive Order 12612

The regulation adopted herein will not have substantial direct effects on the States, on the realtionship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

Executive Order 12988 Civil Justice Reform

This interim rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of E.O. 12988.

List of Subjects

8 CFR Part 214

Administrative practice and procedure, Aliens, Employment, Foreign officials, Health professions, Reporting and recordkeeping requirements, Students.

8 CFR Part 245

Aliens, Immigration, Reporting and recordkeeping requirements.

Accordingly, chapter I of title 8 of the Code of Federal Regulations is amended as follows:

PART 214--NONIMMIGRANT CLASSES

1. The authority citation for part 214 continues to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1182, 1184, 1186a, 1187, 1221, 1281, 1282; 8 CFR part 2

2. Section 214.2 is amended by revising paragraphs (h)(16)(i) and (l)(16) to read as follows:

§ 214.2 Special requirements for admission, extension, and maintenance of status.

* * * * *

(h) * * *

(16) * * * (i) H-1 classification. An alien may legitimately come to the United States for a temporary period as an H-1 nonimmigrant and, at the same time, lawfully seek to become a permanent resident of the United States provided he or she intends to depart voluntarily at the end of his or her authorized stay. The filing of an application for or approval of a permanent labor certification, an immigrant visa preference petition, or the filing of an application for adjustment of status for an H-1 nonimmigrant shall not be a basis for denying:

(A) An H-1 petition,

(B) A request to extend an H-1 petition,

(C) The H-1 alien's application (and that of their dependent family members) for change of status to a different H-1 or L classification, or a dependent of an H-1 of L nonimmigrant, or

(E) The H-1 alien's application for extension of stay, (and that of their dependent family members).

* * * * *

(l) * * *

(16) Effect of filing an application for or approval of a permanent labor certification, preference petition, or filing of an application for adjustment of status on L-1 classification. An alien may legitimately come to the United States for a temporary period as an L-1 nonimmigrant and, at the same time, lawfully seek to become a permanent resident of the United States provided he or she intends to depart voluntarily at the end of his or her authorized stay. The filing of an application for or approval of a permanent labor certification, an immigrant visa preference petition, or the filing of an application of readjustment of status for an L-1 nonimmigrant shall not be the basis for denying:

(i) An L-1 petition filed on behalf of the alien,

(ii) A request to extend an L-1 petition which had previously been filed on behalf of the alien;

(iii) An application for admission as an L-1 nonimmigrant by the alien, or as an L-2 nonimmigrant by the spouse or child of such alien;

(iv) An application for change of status to H-1 or L-2 nonimmigrant filed by the alien, or to H-1, H-4, or L-1 status filed by the L-2 spouse or child of such alien;

(v) An application for change of status to H-4 nonimmigrant filed by the L-1 nonimmigrant, if his or her spouse has been approved for classification as an H-1; or

(vi) An application for extension of stay filed by the alien, or by the L-2 spouse or child of such alien.

* * * * *

PART 245--ADJUSTMENT OF STATUS TO THAT OF PERSON ADMITTED FOR PERMANENT RESIDENCE

3. The authority citation for part 245 continues to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1182, 1255, § 202, Pub. L. 105-100 (111 Stat. 2160, 2193); and 8 CFR part 2.

4. In § 245.2, paragraph (a)(4)(ii) is revised to read as follows:

§ 245.2 Application.

(a) * * *

(4) * * *

(ii) Under section 245 of the Act. (A) The departure from the United States of an applicant who is under exclusion, deportation, or removal proceedings shall be deemed an abandonment of the application constituting grounds for termination of the proceeding by reason of the departure. Except as provided in paragraph (a)(4)(ii)(B) and (C) of this section, the departure of an applicant who is not under exclusion, deportation, or removal proceedings shall be deemed an abandonment of the application constituting grounds for termination of any pending application for adjustment of status, unless the applicant was previously granted advance parole by the Service for such absences, and was inspected upon returning to the United States. If the adjustment application of an individual granted advance parole is subsequently denied the individual will be treated as an applicant for admission, and subject to the provisions of section 212 and 235 of the Act.

(B) The travel outside of the United States by an applicant for adjustment who is not under exclusion, deportation, or removal proceedings shall not be deemed an abandonment of the application if he or she was previously granted advance parole by the Service for such absences, and was inspected and paroled upon returning to the United States. If the adjustment of status application of such individual is subsequently denied, he or she will be treated as an applicant for admission, and subject to the provisions of section 212 and 235 of the Act.

(C) The travel outside of the United States by an applicant for adjustment of status who is not under exclusion, deportation, or removal proceeding and who is in lawful H-1 or L-1 status shall not be deemed an abandonment of the application if, upon returning to this country, the alien remains eligible for H or L status, is coming to resume employment with the same employer for whom he or she had previously been authorized to work as an H-1 or L-1 nonimmigrant, and, is in possession of a valid H or L visa (if required) and the original I-797 receipt notice for the application for adjustment of status. The travel outside of the United States by an applicant for adjustment of status who is not under exclusion, deportation, or removal proceeding and who is in lawful H-4 or L-2 status shall not be deemed an abandonment of the application if the spouse or parent of such alien through whom the H-4 or L-2 status was obtained is maintaining H-1 or L-1 status and the alien remains otherwise eligible for H-4 or L-2 status, and, the alien is in possession of a valid H-4 or L-2 visa (if required) and the original copy of the I-797 receipt notice for the application for adjustment of status.

* * * * *

May 12, 1999 Signed

_____ _____

Dated: Doris Meissner,
Commissioner, Immigration and

Interpretation of Special Knowledge
Memorandum from HQ Office of Operations: March 9, 1994

The Immigration Act of 1990 contains a definition of the term "specialized knowledge" which is different in many respects that the prior regulatory definition. The purpose of this memorandum is to provide field offices with guidance on the proper interpretation of the new statutory definition.

The prior regulatory definition required that the beneficiary possess an advanced level of expertise and proprietary knowledge not available in the United States labor market. The current definition of specialized knowledge contains two separate criteria and obviously involves a lesser, but still high, standard. The statute states that the alien has specialized knowledge if he/she has special knowledge of the company product and its application in international markets or has an advanced level of knowledge of the processes and procedures of the company.

Since the statutory definitions and legislative history do not provide any further guidelines or insight as to the interpretation of the terms "advanced" or "special", officers should utilize the common dictionary definitions of the two terms as provided below.

Webster's II New Riverside University Dictionary defines the term "special" as "surpassing the usual; distinct among others of a kind." Also, Webster's Third New International Dictionary defines the term "special" as "distinguished by some unusual quality; uncommon; noteworthy."

Based on the above definition, an alien would possess specialized knowledge if it was shown that the knowledge is different from that generally found in the particular industry. The knowledge need not be proprietary or unique, but it must be different or uncommon.

Further, Webster's II New Riverside University Dictionary defines the term "advanced" as " highly developed or complex; at a higher level than others." Also, Webster's Third New International Dictionary defines the term "advanced" as "beyond the elementary or introductory; greatly developed beyond the initial stage."

Again, based on the above definition, the alien's knowledge need not be proprietary or unique, merely advanced. Further, the statute does not require that the advanced knowledge be narrowly held throughout the company, only that the knowledge be advanced.

The determination of whether an alien possesses specialized knowledge does not involve a test of the United States labor market. Whether or not here are United States workers available to perform the duties in the United States is not a relevant factor since the test for specialized knowledge involves only an examination of the knowledge possessed by the alien, not whether there are similarly employed United States workers. However, officers adjudicating the petitions involving specialized knowledge must ensure that the knowledge possessed by the beneficiary is not general knowledge held commonly throughout the industry but that it is truly specialized. There is no requirement in current legislation that the alien's knowledge be unique, proprietary, or not commonly found in the United States labor market.

The following are some of the possible characteristics of an alien who possesses specialized knowledge. They are not all inclusive. The alien:

- Possesses knowledge that is valuable to the employer's competitiveness in the market place;
- Is qualified to contribute to the United States employer's knowledge of foreign operating conditions as a result of special knowledge not generally found in the industry;
- Has been utilized abroad in a capacity involving significant assignments which have enhanced the employer's productivity, competitiveness, image, or financial position;
- Possesses knowledge which, normally, can be gained only through prior experience with that employer;
- Possesses knowledge of a product or process which cannot be easily transferred or taught to another individual.

The following are provided as general examples of situations where an alien possesses specialized knowledge.

- The foreign company manufactures a product which no other firm manufactures. The alien is familiar with the various procedures involved in the manufacture, use, or service of the product.

- The foreign company manufactures a product which is significantly different from other products in the industry. Although there may be similarities between products, the knowledge required to sell, manufacture, or service the product is different from the other products to the extent that the United States or foreign firm would experience a significant interruption of business in order to train a new worker to assume those duties.

- The alien beneficiary has knowledge of a foreign firm's business procedures or methods of operation to the extent that the United States firm would experience a significant interruption of business in order to train a United States worker to assume those duties.

A specific example of a situation involving specialized knowledge would be if a foreign firm in the business of purchasing used automobiles for the purpose of repairing and reselling them, some for export to the United States, petitions for an alien to come to the United States as a staff officer. The beneficiary has knowledge of the firm's operational procedures, e.g., knowledge of the expenses the firm would entail in order to repair the car as well in selling the car. The beneficiary has knowledge of the firm's cons structure for various activities which serves as a basis for determining the proper price to be paid for the vehicle. The beneficiary also has knowledge of various United States customs laws and EPA regulations in order to determine what modifications must be made to import the vehicles into the United States. In this case it can be concluded that the alien has advanced knowledge of the firm's procedures because a substantial amount of time would be required for the foreign or United States employer to teach another employee the firm's procedures. Although it can be argued that a good portion of what the beneficiary knows is general knowledge, i. E. customs and EPA regulations, the combination of the procedures which the beneficiary has knowledge of renders him essential to the firm. Specifically the firm would have a difficult time training another employee to assume these duties because of the inter-relationship of the beneficiary's general knowledge with the firm's method of doing business. The beneficiary therefore possesses specialized knowledge.

- An alien beneficiary has knowledge of a process or a product which is of a sophisticated nature, although not unique to the foreign firm, which is not generally known in the United States.

A specific example of the above is a firm involved in processing certain shellfish desires to petition for a beneficiary to work in the United States in order to catch and process the shellfish. The beneficiary learned the process from his employment from an unrelated firm but has been utilizing that knowledge for the foreign firm for the past year. However, the knowledge required to process the shellfish is unknown in the United States. In this instance the beneficiary possesses specialized knowledge since his knowledge of processing shellfish must be considered advanced.

The common theme which runs through these examples is that the knowledge which the beneficiary possesses, whether it is knowledge of a process or a product, would be difficult to impart to another individual without significant economic inconvenience to the united States or foreign firm. The knowledge is not generally known and is of some complexity.

The above examples and scenarios are presented as general guidelines for officers involved in the adjudication of petitions involving specialized knowledge. The examples are not all inclusive and there are many other examples of aliens who possess specialized knowledge which are not covered in this memorandum.

From a practical point of view, the mere fact that a petitioner alleges that an alien's knowledge is somehow different does not, in and of itself, establish hat the alien possesses specialized knowledge. The petitioner bears the burden of establishing through the submission of probative evidence that the alien's knowledge is uncommon, noteworthy, or distinguished by some unusual quality and not generally known by practitioners in the alien's field of endeavor. Likewise, a petitioner's assertion that the alien possesses an advanced level of knowledge of the processes and procedures of the company must be supported by evidence describing and setting apart that knowledge from the elementary or basic knowledge possessed by others. It is the weight and type of evidence which establishes whether or not he beneficiary possesses specialized knowledge.

In closing, this memorandum is designed solely as a guide. It must be noted that specialized knowledge can apply to any industry, including service and manufacturing firms, and can involve any type of position.

SUMMARY OF PROCESSING INSTRUCTIONS

DOCUMENTS TO BE FILED BY CANADIAN CITIZENS APPLYING AT A PORT OF ENTRY: A United States or foreign employer seeking to classify a citizen of Canada as an intracompany transferee, may file an individual petition in duplicate on Form I-129 in conjunction with an application for admission of the citizen of Canada. Such filing may be made with an immigration officer at a Class A port of entry located on the United States - Canada land border or at a United States pre-clearance/pre-flight station in Canada.

1. **Proof of Canadian Citizenship**
Passport
Birth Certificate
Certificate of: Naturalization, Derivation, Birth Abroad, etc.
May be oral declaration

2. **I-129 Petition** in duplicate with original authorized signature of the petitioner.

3. Evidence that the petitioner and the organization that employed or will employ the beneficiary are qualifying organizations as defined in 8 CFR 214.2(l)(1)(ii)(G).

4. Evidence that the beneficiary will be employed in an executive, managerial or specialized knowledge capacity, including a detailed description of the services to be performed.

5. Evidence that the beneficiary has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.

6. Evidence that the beneficiary's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the beneficiary's prior education, training and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work that the alien performed abroad.

FEE COLLECTION: $110.00 U. S. FUNDS = Cash, U. S. Bank check, or International Money Order in U.S. dollars

ADMINISTRATIVE STEPS IN PROCESSING L-1 APPLICANTS:

1. Conduct all system checks: CIS, NAILS, NCIC, CPIC

2. Issue fee receipt (G-211). Place fee stamp in appropriate location on form I-129 and annotate with fee receipt number.

3. Place adjudication stamp in appropriate box on I-129 and sign. Annotate with Port of Entry designation.

4. Route I-129 to appropriate Service Center for issuance of I-797, Notice of Approval.

APPLICANT PROCESSING:

1. Admit for time requested on the I-129 petition NOT TO EXCEED **THREE YEARS** FOR **INTITAL ENTRY**. NOT TO EXCEED **ONE YEAR** FOR **NEW OFFICE**. **See notes for New Office. **

2. **I-94 Arrival copy**: Annotate admission stamp as follows
   a. L-1 (Managerial or Executive) - Note L-1A on I-129 petition
   b. L-1 (Specialized Knowledge) - Note L-1B on I-129 petition
   c. Length of stay (see # 1)
   d. On reverse note occupation as Managerial, Executive or Specialized Knowledge
   e. Name and address of employer

3. I-94 Departure Copy: note class of admission and period of admission, stamp Multiple Entry
   On reverse annotate:
   a. Occupation
   b. Employer
   c. A file number if applicable

L-1 INTRACOMPANY TRANSFEREES DESTINED TO NEW OFFICES

Reference: 8 CFR 214.2(l)(3)(v)

If the I-129 petition indicates that the beneficiary is coming to the United States as a manager or executive to open or to be employed in a new office in the United States, the petitioner shall submit evidence that:

1. The company has secured sufficient physical premises to house the new office.
2. The beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity and that the proposed employment involves executive or managerial authority over the new operation; and
3. The intended United States operation, within one year of approval of the petition, will support an executive or managerial position as defined in paragraphs 8 CFR 212.2(l)(1)(ii)(B) or (C), Supporting information:

a. The proposed nature of the office, describing the scope of the entity, its organizational structure, and its financial goals;

b. The size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States; and

c. The organizational structure of the foreign entity.

4. If the petition indicates that the beneficiary is coming to the United States in a specialized capacity to open or to be employed in a new office, the petitioner shall submit evidence that:

a. Sufficient physical premises to house the new office have been secured;

b. The business entity in the United States is or will be a qualifying organization as defined in paragraph 8 CFR 212.2(l)(1)(ii)(G); and

c. The petitioner has the financial ability to remunerate the beneficiary and to commence doing business in the United States.

d. If the beneficiary is an owner or major stockholder of the company, the petition must be accompanied by evidence that the beneficiary's services are to be used for a temporary period and evidence that the beneficiary will be transferred to an assignment abroad upon the completion of the temporary services in the United States.

e. Other evidence deemed necessary may be requested.

NOTE: I-129 petitions for new offices are allowed only ONE YEAR on INITIAL ENTRY APPROVAL. For extension of a new office approval beyond one year, the petitioner must file a new Form I-129 accompanied by the following:

1. Evidence that the United States and foreign entities are still qualifying organizations as defined in 8 CFR 214.2(L)(1)(ii)(G);
2. Evidence that the United States entity has been doing business as defined in 8 CFR 214.2(l)(1)(ii)(H) for the previous year;
3. A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;
4. A statement detailing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a managerial or executive capacity; and
5. Evidence of the financial status of the United States operation.

If a company is purchased in the United States or Canada, and has been in existence for over ONE YEAR, it is not considered a new office.

L-1 APPLICATION PROCEDURES WITH APPROVED BLANKET PETITION: A citizen of Canada, who is the beneficiary of a blanket petition may present the I-797 and I-129S to an immigration officer at a port of entry. See 8 CFR 214.2(l)(4) for detailed information regarding Blanket petitions.

1. Proof of Canadian Citizenship
Passport
Birth Certificate
Naturalization Certificate, Derivation, Birth Abroad, etc.
May be oral declaration

2. Original and two copies of the I-129S

3. Three copies of I-797, Notice of Approval

FEE COLLECTION: NONE

APPLICANT PROCESSING

1. Conduct all system checks: CIS, NAILS, NCIC and CPIC.

2. Verify that the company, branch, affiliate where the employee is going is listed on the I-797.

3. Confirm the qualifications of the employee for the position. Remember that the I-129 has been adjudicated and you are merely adjudicating the employees status. Form I-129S identifies the position and organization from which the employee is transferring, the new organization and position to which the employee is destined, a description of the employee's actual duties for both the new and former positions and the positions, dates and locations of previous L stays in the United States.

NOTE: 8 CFR 214.2(l)(4)(I)(D) refers to "specialized knowledge professionals". In order to qualify the applicant and the position should meet the definition of professional set forth in INA 101(a)(32). Evidence would include records of educational training, degrees, and other pertinent evidence that demonstrates that the prospective employee is a specialized knowledge professional.

4. Admit for time requested on I-129 petition not to exceed three years for initial entry (or one year if new office)

5. Place the admission stamp in the block where the fee stamp normally goes and annotate classification and period of admission.

6. Place the adjudication stamp in the action block and sign.

7. I-94 arrival copy: admission stamp with following:
   a. L-1 managerial or executive
   b. L-1 specialized knowledge
   c. length of stay
   d. on reverse note occupation as managerial, executive or specialized knowledge
   e. name and address of employer
   f. A file number if applicable

8. I-94 departure copy admission stamp, L-1, period of admission, stamp multiple entry.
   On reverse note:
   a. Occupation
   b. Employer
   c. A file number if applicable

9. After the immigration inspector has adjudicated the I-129S, one copy of the I-129S and the I-797 should be retained by the applicant for future use to reenter the United States.

10. Forward one copy of the I-129 to the appropriate Service Center.

SECTION FIVE

Canadian TN Nonimmigrant pursuant To NAFTA

8 CFR Sec. 214.6 Canadian and Mexican citizens seeking temporary entry to engage in business activities at a professional level. (Sec. 214.6 revised 1/1/94; 58 FR 69212)

(a) General. Under Section 214(e) of the Act, a citizen of Canada or Mexico who seeks temporary entry as a business person to engage in business activities at a professional level may be admitted to the United States in accordance with the North American Free Trade Agreement (NAFTA).

(b) Definitions. As used in this section, the terms:

Business activities at a professional level means those undertakings which require that, for successful completion, the individual has a least a baccalaureate degree or appropriate credentials demonstrating status as a professional in a profession set forth in Appendix 1603.D.1 of the NAFTA.

Business person, as defined in the NAFTA, means a citizen of Canada or Mexico who is engaged in the trade of goods, the provision of services, or the conduct of investment activities.

Engage in business activities at a professional level means the performance of prearranged business activities for a United States entity, including an individual. It does not authorize the establishment of a business or practice in the United States in which the professional will be, in substance, self-employed. A professional will be deemed to be self-employed if he or she will be rendering services to a corporation or entity of which the professional is the sole or controlling shareholder or owner.

Temporary entry, as defined in the NAFTA, means entry without the intent to establish permanent residence. The alien must satisfy the inspecting immigration officer that the proposed stay is temporary. A temporary period has a reasonable, finite end that does not equate to permanent residence. In order to establish that the alien's entry will be temporary, the alien must demonstrate to the satisfaction of the inspecting immigration officer that his or her work assignment in the United States will end at a predictable time and that he or she will depart upon completion of the assignment. (Paragraph (b) revised 1/9/98; 63 FR 1331)

(c) Appendix 1603.D.1 to Annex 1603 of the NAFTA. Pursuant to the NAFTA, an applicant seeking admission under this section shall demonstrate business activity at a professional level in one of the professions set forth in Appendix 1603.D.1 to Annex 1603. The professions in Appendix 1603.D.1 and the minimum requirements for qualification for each are as follows: 1/

Appendix 1603.D.1 (Annotated)

--Accountant--Baccalaureate or Licenciatura Degree; or
C.P.A., C.A., C.G.A., or C.M.A.
--Architect--Baccalaureate or Licenciatura Degree; or
state/provincial license. 2/
--Computer Systems Analyst--Baccalaureate or Licenciatura
Degree; or Post-Secondary Diploma 3/ or Post Secondary
Certificate 4/and three years' experience.
--Disaster relief insurance claims adjuster (claims adjuster
employed by an insurance company located in the territory of
a Party, or an independent claims adjuster)--Baccalaureate or
Licenciatura Degree and successful completion of training in
the appropriate areas of insurance adjustment pertaining to
disaster relief claims; or three years experience in claims
adjustment and successful completion of training in the
appropriate areas of insurance adjustment pertaining to
disaster relief claims.
--Economist--Baccalaureate or Licenciatura Degree.
--Engineer--Baccalaureate or Licenciatura Degree; or
state/provincial license
--Forester--Baccalaureate or Licenciatura Degree; or
state/provincial license
--Graphic Designer--Baccalaureate or Licenciatura Degree; or

Post-Secondary Diploma or Post-Secondary Certificate and three years experience.

--Hotel Manager--Baccalaureate or Licenciatura Degree in hotel/restaurant management; or Post-Secondary Diploma or Post-Secondary Certificate in hotel/restaurant management and three years experience in hotel/restaurant management.

--Industrial Designer--Baccalaureate or Licenciatura Degree; or Post-Secondary Diploma or Post-Secondary Certificate, and three years experience.

--Interior Designer--Baccalaureate or Licenciatura Degree; or Post-Secondary Diploma or Post-Secondary Certificate, and three years experience.

--Land Surveyor--Baccalaureate or Licenciatura Degree or state/provincial/federal license.

--Landscape Architect--Baccalaureate or Licenciatura Degree.

--Lawyer (including Notary in the province of Quebec)--L.L.B., J.D., L.L.L., B.C.L., or Licenciatura degree (five years); or membership in a state/provincial bar.

--Librarian--M.L.S., or B.L.S. (for which another Baccalaureate or Licenciatura Degree was a prerequisite).

--Management Consultant--Baccalaureate or Licenciatura Degree; or equivalent professional experience as established by statement or professional credential attesting to five years experience as a management consultant, or five years experience in a field of specialty related to the consulting agreement.

--Mathematician (including Statistician)--Baccalaureate or Licenciatura Degree.

--Range Manager/Range Conservationist--Baccalaureate or Licenciatura Degree.

--Research Assistant (working in a post-secondary educational institution)--Baccalaureate or Licenciatura Degree.

--Scientific Technician/Technologist 5/--Possession of (a) theoretical knowledge of any of the following disciplines: agricultural sciences, astronomy, biology, chemistry, engineering, forestry, geology, geophysics, meteorology, or physics; and (b) the ability to solve practical problems in any of those disciplines, or the ability to apply principles of any of those disciplines to basic or applied research.

--Social Worker--Baccalaureate or Licenciatura Degree.

--Sylviculturist (including Forestry Specialist)--Baccalaureate or Licenciatura Degree.

--Technical Publications Writer--Baccalaureate or Licenciatura Degree, or Post-Secondary Diploma or Post-Secondary Certificate, and three years experience.

--Urban Planner (including Geographer)--Baccalaureate or Licenciatura Degree.

--Vocational Counselor--Baccalaureate or Licenciatura Degree.

--MEDICAL/ALLIED PROFESSIONALS

--Dentist--D.D.S., D.M.D., Doctor en Odontologia or Doctor en Cirugia Dental or state/provincial license.

--Dietitian--Baccalaureate or Licenciatura Degree; or state/provincial license.

--Medical Laboratory Technologist (Canada)/Medical Technologist (Mexico and the United States) 6/--Baccalaureate or Licenciatura Degree; or Post-Secondary Diploma or Post-Secondary Certificate, and three years experience.

--Nutritionist--Baccalaureate or Licenciatura Degree.
--Occupational Therapist--Baccalaureate or Licenciatura Degree; or state/provincial license.
--Pharmacist--Baccalaureate or Licenciatura Degree; or state/provincial license.
--Physician (teaching or research only)--M.D. Doctor en Medicina; or state/provincial license.
--Physiotherapist/Physical Therapist--Baccalaureate or Licenciatura Degree; or state/provincial license.
--Psychologist--state/provincial license; or Licenciatura Degree.
--Recreational Therapist--Baccalaureate or Licenciatura Degree.
--Registered nurse--state/provincial license or Licenciatura Degree.
--Veterinarian--D.V.M., D.M.V., or Doctor en Veterinaria; or state/provincial license.

--SCIENTIST
--Agriculturist (including Agronomist)--Baccalaureate or Licenciatura Degree.
--Animal Breeder--Baccalaureate or Licenciatura Degree.
--Animal Scientist--Baccalaureate or Licenciatura Degree.
--Apiculturist--Baccalaureate or Licenciatura Degree.
--Astronomer--Baccalaureate or Licenciatura Degree.
--Biochemist--Baccalaureate or Licenciatura Degree.
--Biologist--Baccalaureate or Licenciatura Degree.
--Chemist--Baccalaureate or Licenciatura Degree.
--Dairy Scientist--Baccalaureate or Licenciatura Degree.
--Entomologist--Baccalaureate or Licenciatura Degree.
--Epidemiologist--Baccalaureate or Licenciatura Degree.
--Geneticist--Baccalaureate or Licenciatura Degree.
--Geochemist--Baccalaureate or Licenciatura Degree.
--Geologist--Baccalaureate or Licenciatura Degree.
--Geophysicist (including Oceanographer in Mexico and the United States)--Baccalaureate or Licenciatura Degree.
--Horticulturist--Baccalaureate or Licenciatura Degree.
--Meteorologist--Baccalaureate or Licenciatura Degree.
--Pharmacologist--Baccalaureate or Licenciatura Degree.
--Physicist (including Oceanographer in Canada)--Baccalaureate or Licenciatura Degree.
--Plant Breeder--Baccalaureate or Licenciatura Degree.
--Poultry Scientist--Baccalaureate or Licenciatura Degree.
--Soil Scientist--Baccalaureate or Licenciatura Degree.
--Zoologist--Baccalaureate or Licenciatura Degree.

--TEACHER
--College--Baccalaureate or Licenciatura Degree.
--Seminary--Baccalaureate or Licenciatura Degree.
--University--Baccalaureate or Licenciatura Degree.

(d) Classification of citizens of Mexico as TN professionals under the NAFTA.

(1) General. A United States employer seeking to classify a citizen of Mexico as a TN professional temporary employee shall file a petition on Form I-129, Petition for Nonimmigrant Worker, with the Northern Service Center, even in emergent circumstances. The petitioner may submit a legible photocopy of a document in support of the visa petition in lieu of the original document. The original document shall be submitted if requested by the Service.

(2) Supporting documents. A petition in behalf of a citizen of Mexico seeking classification as a TN professional shall be accompanied by:

(i) A certification from the Secretary of Labor that the petitioner has filed the appropriate documentation with the Secretary in accordance with section (D)(5)(b) of Annex 1603 of the NAFTA.

(ii) Evidence that the beneficiary meets the minimum education requirements or alternative credentials requirements of Appendix 1603.D.1 of Annex 1603 of the NAFTA as set forth in Sec. 214.6(c). This documentation may consist of licenses, degrees, diplomas, certificates, or evidence of membership in professional organizations. Degrees, diplomas, or certificates received by the beneficiary from an educational institution not located within Mexico, Canada, or the United States must be accompanied by an evaluation by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials. Evidence of experience should consist of letters from former employers or, if formerly self-employed, business records attesting to such self-employment; and

(iii) A statement from the prospective employer in the United States specifically stating the Appendix 1603.D.1 profession in which the beneficiary will be engaging and a full description of the nature of the duties which the beneficiary will be performing. The statement must set forth licensure requirements for the state or locality of intended employment or, if no license is required, the non-existence of such requirements for the professional activity to be engaged in.

(iv) Licensure for TN classification.

(A) General. If the profession requires a state or local license for an individual to fully perform the duties of that profession, the beneficiary for whom TN classification is sought must have that license prior to approval of the petition and evidence of such licensing must accompany the petition.

(B) Temporary licensure. If a temporary license is available and the beneficiary would be allowed to perform the duties of the profession without a permanent license, the director shall examine the nature of the duties, the level at which the duties are performed, the degree of supervision received, and any limitations which would be placed upon the beneficiary. If an analysis of the facts demonstrates that the beneficiary, although under supervision, would be fully authorized to perform the duties of the profession, TN classification may be granted.

(C) Duties without licensure. In certain professions which generally require licensure, a state may allow an individual to fully practice a profession under the supervision of licensed senior or supervisory personnel in that profession. In such cases, the director shall examine the nature of the duties and the level at which they are to be performed. If the facts demonstrate that the beneficiary, although under supervision, would fully perform the duties of the profession, TN classification may be granted.

(D) Registered nurses. The prospective employer must submit evidence that the beneficiary has been granted a permanent state license, a temporary state license or other temporary authorization issued by a State Board of Nursing authorizing the beneficiary to work as a registered or graduate nurse in the state of intended employment in the United States.

(3) Approval and validity of petition.

(i) Approval. The director shall notify the petitioner of the approval of the petition on Form I-797, Notice of Action. The approval notice shall include the beneficiary's name, classification, Appendix 1603.D.1 profession, and the petition's period of validity.

(ii) Recording the validity of petitions. Procedures for recording the validity period of petitions are:

(A) If the petition is approved before the date the petitioner indicates that employment will begin, the approved petition and approval notice shall show the actual dates requested by the petitioner as the validity period, not to exceed the limits specified by paragraph (d)(3)(iii) of this section.

(B) If the petition is approved after the date the petitioner indicates employment will begin, the approved petition and approval notice shall show a validity period commencing with the date of approval and ending with the date

requested by the petitioner, as long as that date does not exceed the limits specified by paragraph (d)(3)(iii) of this section.

(C) If the period of employment requested by the petitioner exceeds the limit specified in paragraph (d)(3)(iii) of this section, the petition shall be approved only up to the limit specified in that paragraph.

(iii) Validity. An approved petition classifying a citizen of Mexico as a TN nonimmigrant shall be valid for a period of up to one year.

(4) Denial of petition.

(i) Notice of intent to deny. When an adverse decision is proposed on the basis of derogatory information of which the petitioner is unaware, the director shall notify the petitioner of the intent to deny the petition and the basis for the denial. The petitioner may inspect and rebut the evidence and will be granted a period of thirty days in which to do so. All relevant rebuttal material will be considered in making a final decision.

(ii) Notice of denial. The petitioner shall be notified of the decision, the reasons for the denial, and the right to appeal the denial under Part 103 of this chapter.

(5) Revocation of approval of petition.

(i) General.

(A) The petitioner shall immediately notify the Service of any changes in the terms and conditions of employment of a beneficiary which may effect eligibility under Section 214(e) of the Act or Sec. 214.6. An amended petition should be filed when the petitioner continues to employ the beneficiary. If the petitioner no longer employs the beneficiary, the petitioner shall send a letter explaining the change(s) to the director who approved the petition.

(B) The director may revoke a petition at any time, even after the validity of the petition has expired.

(ii) Automatic revocation. The approval of an unexpired petition is automatically revoked if the petitioner goes out of business, files a written withdrawal of the petition, or notifies the Service that the beneficiary is no longer employed by the petitioner.

(iii) Revocation on notice.

(A) Grounds for revocation. The director shall send to the petitioner a notice of intent to revoke the petition in relevant part if he or she finds that:

((1)) The beneficiary is no longer employed by the petitioner in the capacity specified in the petition;

((2)) The statement of facts contained in the petition were not true and correct;

((3)) The petitioner violated the terms or conditions of the approved petition;

((4)) The petitioner violated requirements of Section 214(e) of the Act or Sec. 214.6; or

((5)) The approval of the petition violated Sec. 214.6 or involved gross error.

(B) Notice and decision. The notice of intent to revoke shall contain a detailed statement of the grounds for the revocation and the time period allowed for the petitioner's rebuttal. The petitioner may submit evidence in rebuttal within thirty days of the date of the notice. The director shall consider all relevant evidence presented in deciding whether to revoke the petition.

(6) Appeal of a denial or revocation of a petition.

(i) Denial. A denied petition may be appealed under Part 103 of this chapter.

(ii) Revocation. A petition that has been revoked on notice may be appealed under Part 103 of this chapter. Automatic revocations may not be appealed.

(7) Numerical limit.

(i) Limit on number of petitions to be approved in behalf of citizens of Mexico. Beginning on the date of entry into force of the NAFTA, not more than 5,500 citizens of Mexico can be classified as TN nonimmigrants annually.

(ii) Procedures.

(A) Each citizen of Mexico issued a visa or otherwise provided TN nonimmigrant status under Section 214(e) of the Act shall be counted for purposes of the numerical limit. Requests for petition extension or extension of the alien's stay and submissions of amended petitions shall not be counted for purposes of the numerical limit. The spouse and children of principal aliens classified as TD nonimmigrants shall not be counted against the numerical limit.

(B) Numbers will be assigned temporarily to each Mexican citizen in whose behalf a petition for TN classification has been filed. If a petition is denied, the number originally assigned to the petition shall be returned to the system which maintains and assigns numbers.

(C) When an approved petition is not used because the beneficiary does not apply for admission to the United States, the petitioner shall notify the service center director who approved the petition that the number has not been used. The petition shall be revoked pursuant to paragraph (d)(5)(ii) of this section and the unused number shall be returned to the system which maintains and assigns numbers.

(D) If the total annual limit has been reached prior to the end of the year, new petitions and the accompanying fee shall be rejected and returned with a notice stating that numbers are unavailable for Mexican citizen TN nonimmigrants and the date when numbers will again become available.

(e) Classification of citizens of Canada as TN professionals under the NAFTA.

(1) General. Under Section 214(e) of the Act, a citizen of Canada who seeks temporary entry as a business person to engage in business activities at a professional level may be admitted to the United States in accordance with the NAFTA.

(2) Application for admission. A citizen of Canada seeking admission under this section shall make application for admission with an immigration officer at a United States Class A port of entry, at a United States airport handling international traffic, or at a United States pre-clearance/pre-flight station. No prior petition, labor certification, or prior approval shall be required.

(3) Evidence. A visa shall not be required of a Canadian citizen seeking admission as a TN nonimmigrant under Section 214(e) of the Act. Upon application for admission at a United States port of entry, an applicant under this section shall present the following:

(i) Proof of Canadian citizenship. Unless travelling from outside the Western hemisphere, no passport shall be required; however, an applicant for admission must establish Canadian citizenship.

(ii) Documentation demonstrating engagement in business activities at a professional level and demonstrating professional qualifications. The applicant must present documentation sufficient to satisfy the immigration officer at the time of application for admission, that the applicant is seeking entry to the United States to engage in business activities for a United States employer(s) or entity(ies) at a professional level, and that the applicant meets the criteria to perform at such a professional level. This documentation may be in the form of a letter from the prospective employer(s) in the United States or from the foreign employer, in the case of a Canadian citizen seeking entry to provide prearranged services to a United States entity, and may be required to be supported by licenses, diplomas, degrees, certificates, or membership in a professional organization. Degrees, diplomas, or certificates received by the applicant from an educational institution not located within Canada, Mexico, or the United States must be accompanied by an evaluation by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials. The documentation shall fully affirm:

(A) The Appendix 1603.D.1 profession of the applicant;

(B) A description of the professional activities, including a brief summary of daily job duties, if appropriate, which the applicant will engage in for the United States employer/entity;

(C) The anticipated length of stay;

(D) The educational qualifications or appropriate credentials which demonstrate that the Canadian citizen has professional level status;

(E) The arrangements for remuneration for services to be rendered; and

(F) If required by state or local law, that the Canadian citizen complies with all applicable laws and/or licensing requirements for the professional activity in which they will be engaged.

(f) Procedures for admission.

(1) Canadian citizens. A Canadian citizen who qualifies for admission under this section shall be provided confirming documentation (Service Form I-94) and shall be admitted under the classification symbol TN for a period not to exceed one year. Form I-94 shall bear the legend "multiple entry". The fee prescribed under Sec. 103.7(b) of this chapter shall be remitted upon admission to the United States pursuant to the terms and conditions of the NAFTA. Upon remittance of the prescribed fee, the Canadian citizen applicant shall be provided a Service receipt (Form G-211, Form G-711, or Form I-797).

(2) Mexican citizens. The Mexican citizen beneficiary of an approved Form I-129 granting classification as a TN professional shall be admitted to the United States for the validity period of the approved petition upon presentation of a valid TN visa issued by a United States consular officer and a copy of the United States employer's statement as described in paragraph (d)(2)(iii) of this section. The Mexican citizen shall be provided Form I-94 bearing the legend "multiple entry".

(g) Readmission.

(1) Canadian citizens. A Canadian citizen in this classification may be readmitted to the United States for the remainder of the period authorized on Form I-94, without presentation of the letter or supporting documentation described in paragraph (e)(3) of this section, and without remittance of the prescribed fee, provided that the original intended professional activities and employer(s) have not changed. If the Canadian citizen seeking readmission to the United States is no longer in possession of a valid, unexpired Form I-94, and the period of initial admission has not lapsed, he or she shall present alternate evidence in order to be readmitted in TN status. This alternate evidence may include, but is not limited to, a Service fee receipt for admission as a TN or a previously issued admission stamp as TN in a passport, and a confirming letter from the United States employer(s). A new Form I-94 shall be issued at the time of readmission bearing the legend "multiple entry".

(2) Mexican citizens. A Mexican citizen in this classification may be readmitted for the remainder of the period of time authorized on Form I-94 provided that the original intended professional activities and employer(s) have not changed. If the Mexican citizen seeking readmission to the United States is no longer in possession of a valid, unexpired Form I-94, he or she may be readmitted upon presentation of a valid TN visa and evidence of a previous admission. A new Form I-94 shall be issued at the time of readmission bearing the legend "multiple entry".

(h) Extension of stay.

(1) Mexican citizen. The United States employer shall apply for extension of the Mexican citizen's stay in the United States by filing Form I-129 with the Northern Service Center. The applicant must also request a petition extension. The request for extension must be accompanied by either a new or a photocopy of the prior certification on Form ETA 9029, in the case of a registered nurse, or Form ETA 9035, in all other cases, that the petitioner continues to have on file with the Department of Labor for the period of time requested. The dates of extension shall be the same for the petition and the beneficiary's extension of stay. The beneficiary must be physically present in the United States at the time of the filing of the extension of stay. Even though the requests to extend the petition and the alien's stay are combined on the petition, the director shall make a separate determination on each. If the citizen of Mexico is required to leave the United States for business or personal reasons during the pendency of the extension request, the petitioner may request the director to cable

notification of the approval of the petition to the consular office abroad where the beneficiary will apply for a visa. An extension of stay may be authorized for up to one year. There is no specific limit on the total period of time a citizen of Mexico may remain in TN status.

(2) Canadian citizen.

(i) Filing at the service center. The United States employer of a Canadian citizen in TN status or United States entity, in the case of a Canadian citizen in TN status who has a foreign employer, may request an extension of stay by filing Form I-129 with the prescribed fee, with the Northern Service Center. The beneficiary must be physically present in the United States at the time of the filing of the extension of stay. If the alien is required to leave the United States for business or personal reasons while the extension request is pending, the petitioner may request the director to cable notification of approval of the application to the port of entry where the Canadian citizen will apply for admission to the United States. An extension of stay may be authorized for up to one year. There is no specific limit on the total period of time a citizen of Canada may remain in TN status.

(ii) Readmission at the border. Nothing in paragraph (h)(2)(i) of this section shall preclude a citizen of Canada who has previously been in the United States in TN status from applying for admission for a period of time which extends beyond the date of his or her original term of admission at any United States port of entry. The application for admission shall be supported by a new letter from the United States employer or the foreign employer, in the case of a Canadian citizen who is providing prearranged services to a United States entity, which meets the requirements of paragraph (e)(3)(ii) of this section. The fee prescribed under Sec. 103.7(b) of this chapter shall be remitted upon admission to the United States pursuant to the terms and conditions of the NAFTA.

(i) Request for change or addition of United States employer(s).

(1) Mexican citizen. A citizen of Mexico admitted under this paragraph who seeks to change or add a United States employer must have the new employer file a Form I-129 petition with appropriate supporting documentation, including a letter from the new employer describing the services to be performed, the time needed to render such services, and the terms for remuneration for services and evidence of required filing with the Secretary of Labor. Employment with a different or with an additional employer is not authorized prior to Service approval of the petition.

(2) Canadian citizen.

(i) Filing at the service center. A citizen of Canada admitted under this paragraph who seeks to change or add a United States employer during the period of admission must have the new employer file a Form I-129 petition with appropriate supporting documentation, including a letter from the new employer describing the services to be performed, the time needed to render such services, and the terms for remuneration for services. Employment with a different or with an additional employer is not authorized prior to Service approval of the petition.

(ii) Readmission at the border. Nothing in paragraph (i)(2)(i) of this section precludes a citizen of Canada from applying for readmission to the United States for the purpose of presenting documentation from a different or additional United States or foreign employer. Such documentation shall meet the requirements prescribed in paragraph (e)(3)(ii) of this section. The fee prescribed under Sec. 103.7(b) of this chapter shall be remitted upon admission to the United States pursuant to the terms and conditions of the NAFTA.

(3) No action shall be required on the part of a Canadian or Mexican citizen who is transferred to another location by the United States employer to perform the same services. Such an acceptable transfer would be to a branch or office of the employer. In the case of a transfer to a separately incorporated subsidiary or affiliate, the requirements of paragraphs(i)(1) and (2) of this section would apply.

(j) Spouse and unmarried minor children accompanying or following to join.

(1) The spouse or unmarried minor child of a citizen of Canada or Mexico admitted in TN nonimmigrant status shall be required to present a valid, unexpired nonimmigrant TD visa unless otherwise exempt under Sec. 212.1 of this chapter.

(2) The spouse and dependent minor children shall be issued confirming documentation (Form I-94) bearing the legend "multiple entry". There shall be no fee required for admission of the spouse and dependent minor children.

(3) The spouse and dependent minor children shall not accept employment in the United States unless otherwise authorized under the Act.

(k) Effect of a strike. If the Secretary of Labor certifies to or otherwise informs the Commissioner that a strike or other labor dispute involving a work stoppage of workers is in progress, and the temporary entry of a citizen of Mexico or Canada in TN nonimmigrant status may affect adversely the settlement of any labor dispute or the employment of any person who is involved in such dispute:

(1) The United States may refuse to issue an immigration document authorizing entry or employment to such alien.

(2) A Form I-129 seeking to classify a citizen of Mexico as a TN nonimmigrant may be denied. If a petition has already been approved, but the alien has not yet entered the United States, or has entered the United States but not yet commenced employment, the approval of the petition may be suspended.

(3) If the alien has already commenced employment in the United States and is participating in a strike or other labor dispute involving a work stoppage of workers, whether or not such strike or other labor dispute has been certified by the Department of Labor, or whether the Service has been otherwise informed that such a strike or labor dispute is in progress, the alien shall not be deemed to be failing to maintain his or her status solely on account of past, present, or future participation in a strike or other labor dispute involving a work stoppage of workers, but is subject to the following terms and conditions:

(i) The alien shall remain subject to all applicable provisions of the Immigration and Nationality Act and regulations promulgated in the same manner as all other TN nonimmigrants;

(ii) The status and authorized period of stay of such an alien is not modified or extended in any way by virtue of his or her participation in a strike or other labor dispute involving a work stoppage of workers; and

(iii) Although participation by a TN nonimmigrant alien in a strike or other labor dispute involving a work stoppage of workers will not constitute a ground for deportation, any alien who violates his or her status or who remains in the United States after his or her authorized period of stay has expired will be subject to deportation.

(4) If there is a strike or other labor dispute involving a work stoppage of workers in progress, but such strike or other labor dispute is not certified under paragraph (k)(1) of this section, or the Service has not otherwise been informed by the Secretary that such a strike or labor dispute is in progress, the Commissioner shall not deny a petition, suspend an approved petition, or deny entry to an applicant for TN status.

(l) Transition for Canadian Citizen Professionals in TC classification and their B-2 spouses and/or unmarried minor children.

(1) Canadian citizen professionals in TC Classification.

(i) General. Canadian citizen professionals in TC classification as of the effective date of the NAFTA Implementation Act (January 1, 1994) will automatically be deemed to be in valid TN classification. Such persons may be readmitted to the United States in TN classification for the remainder of the period authorized on their Form I-94, without presentation of the letter or supporting documentation described in paragraph (e)(3) of this section, and without remittance of the prescribed fee, provided that the original intended professional activities and employer(s) have not changed. Properly filed applications for extension of stay in TC classification which are pending on January 1, 1994 will be deemed to be, and adjudicated as if they were applications for extension of stay in TN classification.

(ii) Procedure for Canadian citizens admitted in TC classification in possession of Form I-94 indicating admission in TC classification. At the time of readmission, such professionals shall be required to surrender their old Form I-94 indicating admission in TC classification. Upon surrender of the old Form I-94, such professional will be issued a new Form I-94 bearing the legend "multiple entry" and indicating that he or she has been readmitted in TN classification.

(iii) Procedure for Canadian citizens admitted in TC classification who are no longer in possession of Form I-94 indicating admission in TC classification. If the Canadian citizen seeking readmission to the United States is no longer in possession of an unexpired Form I-94, and the period of initial admission has not lapsed, he or she shall present alternate evidence described in paragraph (g)(1) of this section in order to be readmitted in TN status. A Canadian professional seeking to extend his or her stay beyond the period indicated on the new Form I-94 shall be required to comply with the requirements of paragraph (h)(2) of this section, including remittance of the fee prescribed under Sec.103.7 of this chapter.

(iv) Nonapplicability of this section to self-employed professionals in TC nonimmigrant classification. The provisions in paragraphs (l)(1)(i), (ii), and (iii) of this section shall not apply to professionals in TC nonimmigrant classification who are self-employed in this country on January 1, 1994. Effective January 1, 1994, such professionals are not authorized to engage in self-employment in this country, and may not be admitted in TN or readmitted in TC classification.

(2) Spouses and/or unmarried minor children of Canadian citizen professionals in TC classification.

(i) General. Effective January 1, 1994, the nonimmigrant classification of a spouse and/or unmarried minor child of a Canadian citizen professional in TC classification will automatically be converted from B-2 to TD nonimmigrant classification. Effective January 1, 1994, the spouse and/or unmarried minor child of a Canadian citizen professional whose TC status has been automatically converted to TN, or the spouse and/or unmarried minor child of such professional whose status has been changed to TN pursuant to paragraph (l) of this section, who is seeking admission or readmission to this country, may be readmitted in TD classification for the remainder of the period authorized on their Form I-94, without presentation of the letter or supporting documentation described in paragraph (e)(3) of this section, and without remittance of the prescribed fee, provided that the original intended professional activities and employer(s) of the Canadian citizen professional have not changed. Properly filed applications for extension of stay in B-2 classification as the spouse and/or unmarried minor children of a Canadian citizen professional in TC classification which are pending on January 1, 1994 will be deemed to be, and adjudicated as if they were applications for extension of stay in TD classification.

(ii) Procedure for spouses and/or unmarried minor children of Canadian citizens admitted in TC classification who are in possession of Form I-94 indicating admission in B-2 classification. Upon surrender of the Form I-94 indicating that the alien has been admitted as the B-2 spouse or unmarried minor child of a TC alien valid for "multiple entry," such alien shall be issued a new Form I-94 indicating that the alien has been readmitted in TD classification. The new Form I-94 shall bear the legend "multiple entry."

(iii) Procedure for spouses and/or unmarried minor children of Canadian citizens admitted in TC classification who are no longer in possession of Form I-94 indicating admission in B-2 classification. If the Canadian citizen seeking readmission to the United States is no longer in possession of an unexpired Form I-94, and the period of initial admission has not lapsed, he or she shall present alternate evidence described in paragraph (g)(1) of this section in order to be admitted in TN status. Spouses and/or children of Canadian citizen professionals seeking to extend their stay beyond the period indicated on the new Form I-94 shall be required to comply the requirements of paragraph (h)(2) of this section, including remittance of the fee prescribed under Sec. 103.7 of this chapter.

(iv) Nonapplicability of this section to spouses and/or unmarried minor children of self-employed professionals admitted in TC nonimmigrant classification. Paragraphs (l)(2)(i), (ii), and (iii) of this section shall not apply to the spouses and/or unmarried minor children of Canadian citizen professionals in TC nonimmigrant classification who are self-employed in this country on January 1, 1994. Effective January 1, 1994, such persons are not eligible for TD classification.

[54 FR 48579, Nov. 24, 1989]

Footnotes

1/ A business person seeking temporary employment under this Appendix may also perform training functions relating to the profession, including conducting seminars.

2/ The terms "state/provincial" and "state/provincial/federal license" mean any document issued by a state, provincial, or federal government, as the case may be, or under its authority, but not by a local government, that permits a person to engage in a regulated activity or profession.

3/ "Post Secondary Diploma" means a credential issued, on completion of two or more years of post secondary education, by an accredited academic institution in Canada or the United States.

4/ "Post Secondary Certificate" means a certificate issued, on completion of two or more years of post secondary education at an academic institution, by the federal government of Mexico or a state government in Mexico, an academic institution recognized by the federal government or a state government, or academic institution created by federal or state law.

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

6/ A business person in this category must be seeking temporary entry to perform in a laboratory chemical, biological, hematological, immunologic, microscopic or bacteriological tests and analyses for diagnosis, treatment, or prevention of diseases.

Requirements for Admission for the TN classification as a Professional.

The NAFTA professional is unique to the North American Free Trade Agreement (the NAFTA). The classification is not found in general immigration provisions in section 101(a)(15) of the INA; rather, it is included in section 214(e) of the INA. Under NAFTA, a Canadian or Mexican citizen who seeks temporary entry into the United States as a professional may be admitted to the United States under the provisions of the NAFTA as a TN (for Trade NAFTA). The TN is limited to Canadian or Mexican professionals employed on a professional level. A professional is defined as a business person seeking entry to engage in a business activity at a professional level in a profession set forth in Appendix 1603.D.1 to Annex 1603, if the business person otherwise qualifies under existing, general immigration requirements for temporary entry into the United States.

The NAFTA professional is modeled on the professional category in the predecessor trade pact, the United States-Canada Free-Trade Agreement (CFTA), which was in effect from January 1, 1989 until the entry into force of the NAFTA on January 1, 1994. The provisions differ slightly for Canadian citizen applicants and Mexican citizen applicants. Presently, the number of Mexican citizens entering the United States as TN professionals under NAFTA is limited to 5,500. There is no numerical limitation on the number of Canadian citizen TN professionals.

As with the CFTA, admission as a TN under section 214(e) of the INA does not imply that the citizen of Canada or Mexico would otherwise qualify as a professional under sections 101(a)(15)(H)(i)(b) or 203(b)(3) of the INA. Note too that Section D of Annex 1603 does not authorize a professional to establish a business or practice in the United States in which the professional will be self-employed. Section D of Annex 1603 is limited to the entry of a citizen of a Party country seeking to render professional-level services for an entity in another Party country.

Self-employment also clearly conflicts with the intent of the NAFTA Implementation Act and its accompanying Statement of Administrative Action, which states, at page 178, “Section D of Annex 1603 does not authorize a professional to establish a business or practice in the United States in which the professional will be self-employed.” In this regard, Section B of Annex 1603, which deals with “traders and investors,” establishes the appropriate category of temporary entry for a citizen of a Party country seeking to develop and direct investment operations in another Party country. Canadian or Mexican citizens seeking to engage in self-employment in trade or investment activities in the United States, therefore, must seek classification under section 101(a)(15)(E) of the INA.

Although the issue of self-employment was never specifically addressed under the regulations promulgated by the INS pursuant to the CFTA Implementation Act, the bar on establishment of a business or practice in which the professional will be self- employed is consistent with the intent of the United States and Canada in entering into the CFTA. Since entry into NAFTA was not intended to substantively change the treatment of professionals, this explicit bar merely clarifies existing law.

Note that the bar on establishment of a business or practice in which the Canadian or Mexican citizen will be self-employed is in no way intended to preclude a Canadian or Mexican citizen who is self-employed abroad from seeking entry to the United States pursuant to a pre-arranged agreement with an enterprise owned by a person or entity other than him/herself located in the United States. On the other hand, a Canadian or Mexican citizen is precluded from entering this country in TN classification for the purpose of rendering pre-arranged services for a U.S. corporation or entity of which he or she is the sole or controlling shareholder or owner or over which he or she holds de facto control.

(B) **Pre-arranged Professional Services**. In order to obtain “TN” classification, a businessperson, including one who is self-employed, must be seeking entry to render pre-arranged professional services to an individual or an enterprise. If the business activities are to be rendered to an individual or an enterprise, the enterprise must be substantively separate from the businessperson seeking entry. Moreover, the business activities must not include establishment of a business or practice or any other type of activity in which the businessperson will be self-employed in the United States.

As used above, to constitute pre-arranged professional services, there must exist a formal arrangement to render professional service to an individual or an enterprise in the United States. The formal arrangement may be through an employee-employer relationship or through a signed contract between the businessperson or the businessperson’s employer and an individual or an enterprise in the United States.

(C) **Enterprise for Which the Professional Activities are to be Performed in the United States**. The enterprise in the United States for which the business activities are to be performed can take any legal form (as defined in Article 201 of the NAFTA), that is, "any entity entirely constituted or organized under applicable law, whether or not for profit, and whether privately- owned or government-owned, including any corporation, trust partnership, sole proprietorship, joint venture or other association."

(D) **Substantively Separate from the Business Person Seeking Entry as NAFTA Professional**. A businessperson is ineligible for classification as a NAFTA Professional if the enterprise in the United States offering a contract or employment to the businessperson seeking entry is a sole proprietorship operated by that businessperson. Moreover, even if the receiving enterprise is legally distinct from the businessperson, such as a corporation having a separate legal existence, entry as a NAFTA Professional must be refused if the receiving enterprise is substantially controlled by that businessperson.

(E) Substantial Control. Whether the businessperson "substantially controls" the U.S. enterprise will depend on the specific facts of each case. The following factors, among others, are relevant in determining what constitutes substantial control:

- whether the applicant has established the receiving enterprise;
- whether, as a matter of fact, the applicant has sole or primary control of the U.S. enterprise (regardless of the applicant's actual percentage of share ownership);
- whether the applicant is the sole or primary owner of the business; or
- whether the applicant is the sole or primary recipient of income of the business.

(F) Establishment of a Business in Which the Professional Will be Self-Employed in the United States. The following factors, among others are relevant in determining whether the business person will be self-employed in the United States:

- incorporation of a company in which the business person will be self-employed;
- initiation of communications (e.g., by direct mail or by advertising) for the purpose of obtaining employment or entering into contracts for an enterprise in the United States; or
- responding to advertisements for the purpose of obtaining employment or entering into contracts.

On the other hand, the following activities do not constitute the establishment of a business in which the business person will be self-employed in the United States:

- responding to unsolicited inquiries about service(s) which the professional may be able to perform; or
- establishing business premises from which to deliver pre-arranged service to clients.

Appendix 1603.D.1 to Annex 1603 of the NAFTA. Under NAFTA, an applicant seeking classification as a TN must demonstrate business activity at a professional level in one of the professions or occupations listed in Appendix 1603.D.1 to Annex 1603. Appendix 1603.D.1 (which replaces Schedule 2 to Annex 1502.1 of the CFTA) is set forth at 8 CFR 214.6©. A Baccalaureate (bachelor's) or Licenciatura degree is the minimum requirement for these professions unless an alternative credential is otherwise specified.

A footnote to Appendix 1603.D.1 allows for temporary entry to perform training functions relating to any of the cited occupations or profession, including conducting seminars. However, these training functions must be conducted in the manner of prearranged activities performed for an U.S. entity and the subject matter to be proffered must be at a professional level. The training function does not allow for the entry of a businessperson to conduct seminars that do not constitute the performance of prearranged activities for an U.S. entity.

The terms "state/provincial license" and "state/provincial/federal license" means any document issued by a state, provincial, or federal government, as the case may be, or under its authority, but not by a local government, that permits a person to engage in a regulated activity or profession.

A "Post Secondary Diploma" means a credential issued, on completion of two or more years of post secondary education, by an accredited academic institution in Canada or the United States. A "Post Secondary Certificate" means a certificate issued, on completion of two or more years of post secondary education at an academic institution, by the federal government of Mexico or a state government in Mexico,

an academic institution recognized by the federal government or a state government, or an academic institution created by federal or state law.

The following notes relate to NAFTA TN admissions in specific occupations:
(A) A business person in the category of "Scientific Technician/ Technologist" must be seeking temporary entry for work in direct support of professionals in agricultural sciences, astronomy, biology, chemistry, engineering, forestry, geology, geophysics, meteorology or physics. These occupations do not ordinarily require a baccalaureate. Supporting documents could be an attestation from the prospective U.S. employer or the Canadian employer, or other documents establishing the individual possesses the skills set forth in Appendix 1603.D.1.

(B) A business person in the category of "Medical Laboratory Technologist (Canada) /Medical Technologist (Mexico and the United States)" must be seeking temporary entry to perform in a laboratory chemical, biological, hematological, immunologic, microscopic or bacteriological tests and analyses for diagnosis, treatment, or prevention of diseases.

(C) Foreign medical school graduates seeking temporary entry in the category of "Physician (teaching or research only)" may not engage in direct patient care. Patient care that is incidental teaching and/or research is permissible. Patient care is incidental when it is casually incurred in conjunction with the physician's teaching or research. To determine if the patient care will incidental, factors such as the amount of time spent in patient care relative to teaching and/or research, whether the physician receives compensation for such services, whether the salary offer is so substantial in teaching and/or research that direct patient care is unlikely, or whether the physician will have a regular patient load, should be considered by the officer.

(D) Registered nurses must demonstrate eligibility by providing a provincial or state license or Licenciatura degree. However, in order to be admitted the registered nurse must present a permanent state license, a temporary state license, or other temporary authorization to work as a registered nurse, issued by the state nursing board in the state of intended employment. Registered nurses holding temporary state licenses or other temporary state authorization shall not be required to show they have passed the examination given by the Commission on Graduates of Foreign Nursing Schools (CGFNS). Admission of nurses should not be limited to the expiration date of either document.

(E) Sylviculturists and foresters plan and supervise the growing, protection, and harvesting of trees. Range managers manage, improve, and protect rangelands to maximize their use without damaging the environment. A baccalaureate or Licenciatura degree in forestry or a related field or a state/provincial license is the minimum entry requirement for these occupations.

F) Disaster relief insurance claims adjusters must submit documentation that there is a declared disaster event by the President of the United States, or a state statute, or a local ordinance, or an event at a site which has been assigned a catastrophe serial number by the Property Claims Service of the American Insurance Services Group, or, if property damage exceeds $5 million and represents a significant number of claims, by an association of insurance companies representing at least 15 percent of the property casualty market in the U.S.

G) **Management consultants** provide services that are directed toward improving the managerial, operating, and economic performance of public and private entities by analyzing and resolving strategic and operating problems and thereby improving the entity's goals, objectives, policies, strategies, administration, organization, and operation. Management consultants are usually independent contractors or employees of consulting firms under contracts to U.S. entities. They may be salaried employees of the U.S. entities to which they are providing services only when they are not assuming existing positions or filling newly created positions. As a salaried employee of such an U.S. entity, they may only fill supernumerary temporary positions. On the other hand, if the employer is a U.S. management-consulting firm, the employee may be coming temporarily to fill a permanent position. Canadian or Mexican citizens may qualify as management consultants by holding a Baccalaureate or Licenciatura degree or by having five years of experience in a specialty related to the consulting agreement.

(H) The **computer systems analyst** category does not include programmers. A systems analyst is an information specialist who analyzes how data processing can be applied to the specific needs of users and who designs and implements computer-based processing systems. Systems analysts study the

organization itself to identify its information needs and design computer systems that meet those needs. Although the systems analyst will do some programming, the TN category has not been expanded to include programmers.

(I) **Hotel Managers** must possess a Baccalaureate or Licenciatura degree in hotel/restaurant management. A post-secondary diploma in hotel/restaurant management plus 3 years of experience in the field will also qualify.

(J) **Animal and Plant Breeders** breed animals and plants to improve their economic and aesthetic characteristics. Both occupations require a Baccalaureate or Licenciatura degree.

(3) **Qualifications**. The NAFTA professional must meet the following general criteria:

- Be a citizen of Canada

- Be engaged in professional-level activities for an entity in the United States. Only those professional-level activities listed in Appendix 1603.D.1 to Annex 1603 are covered under the NAFTA. The applicant must establish that the professional-level services will be rendered for an entity in the United States. The NAFTA professional category is not appropriate for Canadian citizens seeking to set up a business in the United States in which he or she will be self-employed.

- Be qualified as a professional. The applicant must establish qualifications to engage in one of the activities listed in Appendix 1603.D.1. The Minimum Education Requirements and Alternative Credentials are listed in the Appendix for each professional-level activity. The regulation requires that degrees, diplomas, or certificates received by the TN applicant from an educational institution outside of the United States, Canada, or Mexico must be accompanied by an evaluation by a reliable credentials evaluation service that specializes in such evaluations. Experiential evidence should be in the form of letters from former employers. If the applicant was formerly self-employed, business records should be submitted attesting to that self-employment.

- Meet applicable license requirements. To practice a licensed profession, Canadian entrants must meet all applicable requirements of the state in which they intend to practice.

- Be in the United States temporarily. The NAFTA professional must establish that the intent of entry is not for permanent residence.

(4) **Application Process**.

Citizens of Canada. A citizen of Canada may apply for entry to the U.S. as a NAFTA professional at major land border ports-of-entry, airports handling international flights, or at the airports in Canada where the Service has established a pre-clearance/pre-flight station. The applicant must submit documentary proof that he or she is a citizen of Canada. Such proof may consist of a Canadian passport or birth certificate together with photo identification. No visa is required for entry, but the applicant may seek visa issuance if desired.

The application for entry as a TN must be made to an immigration officer. There is no written application, and no prior petition, labor certification, or prior approval is required for Canadian citizens applying for admission to the U.S. in TN status. Documentation from the prospective employer in the U.S., or from the foreign employer, must include the following:

- A statement (in the form of a letter or contract) of the professional-level activity listed in Appendix 1603.D.1, in which the applicant will be engaging and a full description of the nature of the job duties the applicant will be performing, the anticipated length of stay, and the arrangements for remuneration;

- Evidence that the applicant meets the educational qualifications or alternative credentials for the activity listed in Appendix 1603.D.1; and

- Evidence that all licensure requirements, where required by state or local law, have been satisfied.

(5) **Terms of Initial Admission.**

(A) **Canadians**. A Canadian citizen who qualifies for admission under the NAFTA in the TN classification must remit the fee prescribed in 8 CFR 103.7 (presently $50.00 US) upon admission. Issue the applicant a Service fee receipt (Form G-211, Form G-711, or Form I-797) and a multiple entry Form I-94 showing admission in the classification TN for the period requested not to exceed 1 year.

At the time application for admission, the citizen of Canada will be subject to inspection to determine the applicability of section 214(b) of the Act (presumption of immigrant intent) to the applicant.

(6) **Procedures for Readmission.**

(A) **Canadians**. A Canadian citizen eligible for TN classification may be readmitted to the U.S. for the remainder of the period authorized on his or her Form I-94, without presentation of the letter or supporting documentation described above, provided that the original intended business activities and employer(s) have not changed. If the Canadian citizen is no longer in possession of a valid, unexpired Form I-94, the applicant must present substantiating evidence. Substantiating evidence may be in the form of a Service fee receipt for admission as a TN, a previously issued TN admission stamp in a passport, and a confirming letter from the U.S. employer(s). Upon readmission, issue a new multiple entry Form I-94.

(7) **Extension of stay.**

Canadians. A citizen of Canada admitted pursuant to NAFTA may seek an extension of stay as a TN through the filing of a Form I-129 by the U.S. employer with the Nebraska Service Center. No Department of Labor certification requirements apply to a Canadian citizen in TN status who is seeking to extend that status. The applicant must be in the U.S. at the time of filing the extension request. Provision is made for port-of-entry notification should the applicant depart the U.S. during the pendency of the application. An extension may be granted for up to 1 year.

A citizen of Canada is not precluded from departing the U.S. and applying for admission with documentation from a U.S. employer (or foreign employer, in the case of a Canadian citizen who is seeking to provide prearranged services at a professional level to a U.S. entity) which specifies that the applicant will be employed in the U.S. for an additional period of time. The applicant must meet the evidentiary requirements outlined above and the prescribed fee must be remitted upon admission.

Limitations. At the present time, there is no specified upper limit on the number of years a citizen of Canada may remain in the U.S. in TN classification, as there is with most of the other nonimmigrant classifications. However, section 214(b) of the Act is applicable to citizens of Canada who seek an extension of stay in TN status and applications for extension or readmission must be examined in light of this statutory provision.

Except as limited by section 248 of the Act, a citizen of Canada who is currently in the U.S. in another valid classification is not precluded from requesting a change of status to TN. If such applicant is in the U.S. as an H-1 or L-1, he or she may be changed to TN status if otherwise eligible, without regard to the maximum time limits for those classifications. A Canadian J nonimmigrant who is subject to the 2-year foreign residence requirement may not change to TN classification, but may leave the U.S. and seek readmission as a TN.

(8) **Request for change/additions of U.S. employers**. A Canadian citizen may change or add employers while in the U.S. through the filing of Form I-129 at the Nebraska Service Center. All documentary requirements pertaining to a citizen of Canada outlined above must be met. Employment with a different or with an additional employer is not authorized prior to INS approval of the petition.

Alternatively, the Canadian citizen may depart the United States and apply for reentry for the purpose of obtaining additional employment authorization with a new or additional employer. Documentary requirements outlined above must be met and the prescribed fee must be remitted upon readmission.

No action is required by a Canadian citizen who is transferred to another location by the U.S. employer to perform the same services. An example of such an acceptable transfer would be to a branch or office of the employer. If the transfer is to a separately incorporated subsidiary or affiliate, Form I-129 must be filed.

(9) **Spouse and unmarried minor children**. The spouse and unmarried minor children who are accompanying or following to join a TN professional, if otherwise admissible, are to be accorded TD (Trade Dependent) classification. These are required to present a valid, unexpired nonimmigrant visa unless otherwise visa-exempt under 8 CFR 212.1. (Those persons who are normally exempt from nonimmigrant visa requirements include citizens of Canada and Landed Immigrants of Canada having a common nationality with Canadian citizens).

There is no requirement that the TD dependent be a citizen of Canada or Mexico.

No fee is required for admission of dependents in TD status (except the fee for the I-94) and they are to be issued multiple entry Forms I-94.

A TD spouse or child is not authorized to accept employment while in the U.S. in such status. Dependents in TD status may attend school in the U.S. on a full-time basis as such attendance is deemed incident to status.

(10)**Denial**. In the event a Canadian citizen applying for admission pursuant to NAFTA cannot demonstrate to the admitting officer that he or she satisfies the TN documentary requirements, the Canadian citizen should be offered a hearing before an immigration judge provided the applicant is confident he or she, in fact, meets the requirements pursuant to the NAFTA, Appendix 1603.D.1 The request for a hearing is equivalent to a TN appeal or a reconsideration of the admitting officer's decision.

SUMMARY
CANADIAN TN PROCESSING INSTRUCTIONS

The application for entry as a TN must be made in person to an immigration officer at a port of entry. There is no written application, and no prior petition, labor certification, or prior approval may be required for Canadian citizens applying for admission to the U.S. in TN status. Documentation from the prospective employer in the U.S. must include the following:

- A statement (in the form of a letter or contract) of the professional-level activity listed in Appendix 1603.D.1, in which the applicant will be engaging and a full description of the nature of the job duties the applicant will be performing, the anticipated length of stay, and the arrangements for remuneration;

- Evidence that the applicant meets the educational qualifications or alternative credentials for the activity listed in Appendix 1603.D.1; and

- Evidence that all licensure requirements, where required by state or local law, have been satisfied.

- Evidence of Canadian citizenship or oral declaration (if satisfied)

- Applicant must be otherwise admissible

Perform all database checks.

Collect fee: $50.00; issue fee receipt (G-211).

Admit on I-94 for period of agreement up to one year.
I-94 Departure copy: admission stamp annotated TN - stamp "Multiple Entry"
I-94 Arrival copy: reverse annotated with employer and occupation (It is very important to capture occupation information. INS has the obligation under NAFTA Article 1604.2 to share data specific to each occupation, profession or activity, with Canada and Mexico.)

Spouse and child are admitted TD for same period of time as TN; if they are not visa exempt they need an NIV issued by a U. S. Consulate or Embassy.

The information on the following page should be printed as a handout when admitting TN professionals. Please enter the name and telephone number of the port of entry.

Information About Your Admission as a TN Professional

You have been admitted to the United States as a Professional (TN) pursuant to the provisions of the North American Free Trade Agreement (NAFTA). You have been issued Form I-94 (Departure Record) that is stamped "multiple entry", showing the period of time for which you have been admitted. This is your employment authorization and you must retain it for the duration of your status as written on the admission stamp. You must present the I-94 each time you apply for readmission. When your employment terminates in the United States, you are required to depart the United States and return the I-94 to the Immigration and Naturalization Service.

Your dependents, if following to join you, will have to present copies of your entry documents, proof of citizenship and evidence of a legal relationship (i.e. marriage certificate, long form birth certificate) which entitles them to be properly classified as dependents (TD) of a TN professional. If they are not Canadian citizens or if they are not exempt a nonimmigrant visa, they will be required to present a TD nonimmigrant visa issued at a U.S. Embassy or Consulate.

As a TN, you are NOT authorized to:

1) Accept employment with any employer other than the employer for whom you were admitted to work, unless you receive permission from INS.
2) Continue to work or remain in the United States after your period of authorized stay has expired.

You may extend your status inside the United States by applying for an extension of stay on form I-129. You must file the I-129, and prescribed fee, with the Nebraska Service Center prior to the expiration of your current status. You must be physically present in the United States at the time of filing the extension of stay. Your application for extension also includes your dependents.

You may also depart the United States and apply for readmission. This is considered a new application and you will be required to present a current letter from your employer and all supporting documentation just as you did on your initial entry. You will also be required to pay the $50.00 processing fee. Your dependents will be required to accompany you in order to be properly readmitted.

For readmission to the United States after travel outside of the Western Hemisphere, you should present a copy of your I-94, the receipt for the processing fee and a copy of the letter from your employer that you presented to gain admission as a TN.

If you have any questions concerning your status or admission, you may contact the United States Immigration & Naturalization Service at _____, telephone _____.

SECTION SIX

Mexican TN Nonimmigrant pursuant to NAFTA

Mexican TN Nonimmigrant pursuant to NAFTA

The NAFTA professional is unique to the North American Free Trade Agreement (the NAFTA). The classification is not found in general immigration provisions in section 101(a)(15) of the INA; rather, it is included in section 214(e) of the INA. Under NAFTA, a Canadian or Mexican citizen who seeks temporary entry into the United States as a professional may be admitted to the United States under the provisions of the NAFTA as a TN (for Trade NAFTA). The TN is limited to Canadian or Mexican professionals employed on a professional level. A professional is defined as a business person seeking entry to engage in a business activity at a professional level in a profession set forth in Appendix 1603.D.1 to Annex 1603, if the business person otherwise qualifies under existing, general immigration requirements for temporary entry into the United States.

The NAFTA professional is modeled on the professional category in the predecessor trade pact, the United States-Canada Free-Trade Agreement (CFTA), which was in effect from January 1, 1989 until the entry into force of the NAFTA on January 1, 1994. The provisions differ slightly for Canadian citizen applicants and Mexican citizen applicants. Presently, the number of Mexican citizens entering the United States as TN professionals under NAFTA is limited to 5,500. There is no numerical limitation on the number of Canadian citizen TN professionals.

As with the CFTA, admission as a TN under section 214(e) of the INA does not imply that the citizen of Canada or Mexico would otherwise qualify as a professional under sections 101(a)(15)(H)(i)(b) or 203(b)(3) of the INA. Note too that Section D of Annex 1603 does not authorize a professional to establish a business or practice in the United States in which the professional will be self-employed. Section D of Annex 1603 is limited to the entry of a citizen of a Party country seeking to render professional-level services for an entity in another Party country.

Self-employment also clearly conflicts with the intent of the NAFTA Implementation Act and its accompanying Statement of Administrative Action, which states, at page 178, “Section D of Annex 1603 does not authorize a professional to establish a business or practice in the United States in which the professional will be self-employed.” In this regard, Section B of Annex 1603, which deals with “traders and investors,” establishes the appropriate category of temporary entry for a citizen of a Party country seeking to develop and direct investment operations in another Party country. Canadian or Mexican citizens seeking to engage in self-employment in trade or investment activities in the United States, therefore, must seek classification under section 101(a)(15)(E) of the INA.

Although the issue of self-employment was never specifically addressed under the regulations promulgated by the INS pursuant to the CFTA Implementation Act, the bar on establishment of a business or practice in which the professional will be self- employed is consistent with the intent of the United States and Canada in entering into the CFTA. Since entry into NAFTA was not intended to substantively change the treatment of professionals, this explicit bar merely clarifies existing law.

Note that the bar on establishment of a business or practice in which the Canadian or Mexican citizen will be self-employed is in no way intended to preclude a Canadian or Mexican citizen who is self-employed abroad from seeking entry to the United States pursuant to a pre-arranged agreement with an enterprise owned by a person or entity other than him/herself located in the United States. On the other hand, a Canadian or Mexican citizen is precluded from entering this country in TN classification for the purpose of rendering pre-arranged services for a U.S. corporation or entity of which he or she is the sole or controlling shareholder or owner or over which he or she holds de facto control.

Pre-arranged Professional Services. In order to obtain “TN” classification, a businessperson, including one who is self-employed, must be seeking entry to render pre-arranged professional services to an individual or an enterprise. If the business activities are to be rendered to an individual or an enterprise, the enterprise must be substantively separate from the businessperson seeking entry. Moreover, the business activities must not include establishment of a business or practice or any other type of activity in which the businessperson will be self-employed in the United States.

As used above, to constitute pre-arranged professional services, there must exist a formal arrangement to render professional service to an individual or an enterprise in the United States. The formal arrangement may be through an employee-employer relationship or through a signed contract between the businessperson or the businessperson’s employer and an individual or an enterprise in the United States.

Enterprise for Which the Professional Activities are to be Performed in the United States. The enterprise in the United States for which the business activities are to be performed can take any legal form (as defined in Article 201 of the NAFTA), that is, "any entity entirely constituted or organized under applicable law, whether or not for profit, and whether privately- owned or government-owned, including any corporation, trust partnership, sole proprietorship, joint venture or other association."

Substantively Separate from the Business Person Seeking Entry as NAFTA Professional. A businessperson is ineligible for classification as a NAFTA Professional if the enterprise in the United States offering a contract or employment to the businessperson seeking entry is a sole proprietorship operated by that businessperson. Moreover, even if the receiving enterprise is legally distinct from the businessperson, such as a corporation having a separate legal existence, entry as a NAFTA Professional must be refused if the receiving enterprise is substantially controlled by that businessperson.

Substantial Control. Whether the businessperson "substantially controls" the U.S. enterprise will depend on the specific facts of each case. The following factors, among others, are relevant in determining what constitutes substantial control:

- whether the applicant has established the receiving enterprise;
- whether, as a matter of fact, the applicant has sole or primary control of the U.S. enterprise (regardless of the applicant's actual percentage of share ownership);
- whether the applicant is the sole or primary owner of the business; or
- whether the applicant is the sole or primary recipient of income of the business.

(F) **Establishment of a Business** in Which the Professional Will be Self-Employed in the United States. The following factors, among others are relevant in determining whether the business person will be self-employed in the United States:

- incorporation of a company in which the business person will be self-employed;
- initiation of communications (e.g., by direct mail or by advertising) for the purpose of obtaining employment or entering into contracts for an enterprise in the United States; or
- responding to advertisements for the purpose of obtaining employment or entering into contracts.

On the other hand, the following activities do not constitute the establishment of a business in which the business person will be self-employed in the United States:

- responding to unsolicited inquiries about service(s) which the professional may be able to perform; or
- establishing business premises from which to deliver pre-arranged service to clients.

(2) **Appendix 1603.D.1 to Annex 1603 of the NAFTA**. Under NAFTA, an applicant seeking classification as a TN must demonstrate business activity at a professional level in one of the professions or occupations listed in Appendix 1603.D.1 to Annex 1603. Appendix 1603.D.1 (which replaces Schedule 2 to Annex 1502.1 of the CFTA) is set forth at 8 CFR 214.6(c). A Baccalaureate (bachelor's) or Licenciatura degree is the minimum requirement for these professions unless an alternative credential is otherwise specified. In the case of a Canadian or Mexican citizen whose occupation does not appear on Appendix 1603.D.1 or who does not meet the transparent criteria specified, nothing precludes the filing of a petition for classification under another existing nonimmigrant classification.

A footnote to Appendix 1603.D.1 allows for temporary entry to perform training functions relating to any of the cited occupations or profession, including conducting seminars. However, these training functions must be conducted in the manner of prearranged activities performed for an U.S. entity and the subject matter to be proffered must be at a professional level. The training function does not allow for the entry of a businessperson to conduct seminars that do not constitute the performance of prearranged activities for an U.S. entity.

The terms "**state/provincial license**" and "**state/provincial/federal license**" means any document issued by a state, provincial, or federal government, as the case may be, or under its authority, but not by a local government, that permits a person to engage in a regulated activity or profession.

A **"Post Secondary Diploma**" means a credential issued, on completion of two or more years of post secondary education, by an accredited academic institution in Canada or the United States. A "Post Secondary Certificate" means a certificate issued, on completion of two or more years of post secondary

education at an academic institution, by the federal government of Mexico or a state government in Mexico, an academic institution recognized by the federal government or a state government, or an academic institution created by federal or state law.

The following notes relate to NAFTA TN admissions in specific occupations:

(A) A business person in the category of **"Scientific Technician/ Technologist"** must be seeking temporary entry for work in direct support of professionals in agricultural sciences, astronomy, biology, chemistry, engineering, forestry, geology, geophysics, meteorology or physics. These occupations do not ordinarily require a baccalaureate. Supporting documents could be an attestation from the prospective U.S. employer or the Canadian employer, or other documents establishing the individual possesses the skills set forth in Appendix 1603.D.1.

(B) A business person in the category of **"Medical Laboratory Technologist (Canada) /Medical Technologist (Mexico and the United States)"** must be seeking temporary entry to perform in a laboratory chemical, biological, hematological, immunologic, microscopic or bacteriological tests and analyses for diagnosis, treatment, or prevention of diseases.

(C) Foreign medical school graduates seeking temporary entry in the category of **"Physician (teaching or research only)"** may not engage in direct patient care. Patient care that is incidental teaching and/or research is permissible. Patient care is incidental when it is casually incurred in conjunction with the physician's teaching or research. To determine if the patient care will incidental, factors such as the amount of time spent in patient care relative to teaching and/or research, whether the physician receives compensation for such services, whether the salary offer is so substantial in teaching and/or research that direct patient care is unlikely, or whether the physician will have a regular patient load, should be considered by the officer.

(D) **Registered nurses** must demonstrate eligibility by providing a provincial or state license or Licenciatura degree. However, in order to be admitted the registered nurse must present a permanent state license, a temporary state license, or other temporary authorization to work as a registered nurse, issued by the state nursing board in the state of intended employment. Registered nurses holding temporary state licenses or other temporary state authorization shall not be required to show they have passed the examination given by the Commission on Graduates of Foreign Nursing Schools (CGFNS). Admission of nurses should not be limited to the expiration date of either document.

(E) **Sylviculturists and foresters** plan and supervise the growing, protection, and harvesting of trees. Range managers manage, improve, and protect rangelands to maximize their use without damaging the environment. A baccalaureate or Licenciatura degree in forestry or a related field or a state/provincial license is the minimum entry requirement for these occupations.

F) **Disaster relief insurance claims adjusters** must submit documentation that there is a declared disaster event by the President of the United States, or a state statute, or a local ordinance, or an event at a site which has been assigned a catastrophe serial number by the Property Claims Service of the American Insurance Services Group, or, if property damage exceeds $5 million and represents a significant number of claims, by an association of insurance companies representing at least 15 percent of the property casualty market in the U.S.

G) **Management consultants** provide services that are directed toward improving the managerial, operating, and economic performance of public and private entities by analyzing and resolving strategic and operating problems and thereby improving the entity's goals, objectives, policies, strategies, administration, organization, and operation. Management consultants are usually independent contractors or employees of consulting firms under contracts to U.S. entities. They may be salaried employees of the U.S. entities to which they are providing services only when they are not assuming existing positions or filling newly created positions. As a salaried employee of such a U.S. entity, they may only fill supernumerary temporary positions. On the other hand, if the employer is an U.S. management-consulting firm, the employee may be coming temporarily to fill a permanent position. Canadian or Mexican citizens may qualify as management consultants by holding a Baccalaureate or Licenciatura degree or by having five years of experience in a specialty related to the consulting agreement.

(H) The **computer systems analyst** category does not include programmers. A systems analyst is an information specialist who analyzes how data processing can be applied to the specific needs of users and who designs and implements computer-based processing systems. Systems analysts study the organization itself to identify its information needs and design computer systems that meet those needs. Although the systems analyst will do some programming, the TN category has not been expanded to include programmers.

(I) **Hotel Managers** must possess a Baccalaureate or Licenciatura degree in hotel/restaurant management. A post-secondary diploma in hotel/restaurant management plus 3 years of experience in the field will also qualify.

(J) **Animal and Plant Breeders** breed animals and plants to improve their economic and aesthetic characteristics. Both occupations require a Baccalaureate or Licenciatura degree.

(3) **Qualifications**. The NAFTA professional must meet the following general criteria:

- Be a citizen of a NAFTA country (Canada or Mexico).

- Be engaged in professional-level activities for an entity in the United States. Only those professional-level activities listed in Appendix 1603.D.1 to Annex 1603 are covered under the NAFTA. The applicant must establish that the professional-level services will be rendered for an entity in the United States. The NAFTA professional category is not appropriate for Canadian or Mexican citizens seeking to set up a business in the United States in which he or she will be self-employed.

- Be qualified as a professional. The applicant must establish qualifications to engage in one of the activities listed in Appendix 1603.D.1. The Minimum Education Requirements and Alternative Credentials are listed in the Appendix for each professional-level activity. The regulation requires that degrees, diplomas, or certificates received by the TN applicant from an educational institution outside of the United States, Canada, or Mexico must be accompanied by an evaluation by a reliable credentials evaluation service that specializes in such evaluations. Experiential evidence should be in the form of letters from former employers. If the applicant was formerly self-employed, business records should be submitted attesting to that self-employment.

- Meet applicable license requirements. To practice a licensed profession, Canadian and Mexican entrants must meet all applicable requirements of the state in which they intend to practice.

- Be in the United States temporarily. The NAFTA professional must establish that the intent of entry is not for permanent residence.

Application Process

Citizens of Mexico. A citizen of Mexico may apply for entry to the U.S. as a NAFTA professional at major land border ports-of-entry, airports handling international flights, or at the airports in Canada where the Service has established a pre-clearance/pre-flight station. However, a citizen of Mexico must be in possession of a TN nonimmigrant visa issued by an American Consulate and present a valid Mexican passport.

Citizens of Mexico seeking classification as a TN must do so on the basis of a petition filed by the U.S. employer. Before filing the petition, the employer must meet the labor application requirement of section 212(n) of the Act.

Each prospective U.S. employer must file the petition on Form I-129, Petition for Nonimmigrant Worker, with the Nebraska Service Center, even in emergent circumstances, with the following:

- Evidence that the applicant is a citizen of Mexico;

- Evidence that the employer has filed with the Secretary of Labor Form ETA 9035 to show that the petitioner has met the labor condition application requirement of section 212(n) of the Act;

- A statement of the activity listed in Appendix 1603.D.1 in which the beneficiary will be engaging, a full description of the nature of the duties the beneficiary will be performing, the anticipated length of stay, and the arrangements for remuneration;

- Evidence that the applicant meets the educational and/or alternative credentials for the activity listed in Appendix 1603.D.1; and

- Evidence that all applicable state or local licensure requirements have been satisfied.

The Service will provide the U.S. employer with a written decision approving or denying the petition. The applicant must then present the approval notice to the consular official when applying for a TN visa. There is a fee to apply for a TN visa. A petition classifying a citizen of Mexico as a TN professional may be approved for up to 1 year. In the case of a petition denial, full appeal rights through the Administrative Appeals Unit are available to the petitioner.

Terms of Initial Admission

Mexicans. A Mexican citizen seeking admission in TN classification is required to present a valid TN visa issued by an American Consulate. In addition to the visa requirement, the Mexican citizen must present at the time of application for initial admission a copy of the employer's statement regarding the nature of the applicant's duties in the United States.

Admit a Mexican TN for the validity period of the approved petition and issue a multiple entry Form I-94 showing admission classification as TN. Annotate the occupation in block #18 on the back of the arrival portion of the I-94. (It is very important to capture occupation information. INS has the obligation under NAFTA Article 1604.2 to share data specific to each occupation, profession or activity, with Canada and Mexico.)

(Note that only citizens of Canada pay the TN application fee at the port-of-entry. This fee is not charged to Mexican citizens when applying for TN classification at the port-of-entry because fees are charged for filing the I-129 petition and for issuance of the TN nonimmigrant visa.)

At the time application for admission, the citizen of Mexico will be subject to inspection to determine the applicability of section 214(b) of the Act (presumption of immigrant intent) to the applicant.

Procedures for Readmission

The citizen of Mexico who is in possession of a valid Form I-94 may be readmitted for the remainder of the time authorized provided that the original intended professional activities and employer(s) have not changed and should retain possession of that original Form I-94. If no longer in possession of a valid Form I-94 (e.g. a citizen of Mexico seeking readmission upon return from a trip to Europe), the Mexican citizen may be readmitted upon presentation of a valid TN visa and evidence of prior admission. Evidence of prior admission may include, but is

not limited to, an INS fee receipt from a prior entry or an admission stamp in the applicant's passport. Upon readmission, a new I-94 shall be issued bearing the legend "multiple entry."

Extension of stay

A citizen of Mexico seeking an extension of stay in the U.S. in TN status also must be petitioned for on Form I-129 at the Nebraska Service Center. Documentary requirements include evidence that Department of Labor certification requirements continue to be met by the employer. Provision is included for consular notification should the applicant leave the U.S. during the pendency of the application. A petition extension and extension of the applicant's stay may be granted for up to 1 year.

Limitations. At the present time, there is no specified upper limit on the number of years a citizen of Mexico may remain in the U.S. in TN classification, as there is with most of the other nonimmigrant classifications. However, section 214(b) of the Act is applicable to citizens of Mexico who seek an extension of stay in TN status and applications for extension or readmission must be examined in light of this statutory provision.

Except as limited by section 248 of the Act, a citizen of Mexico who is currently in the U.S. in another valid classification is not precluded from requesting a change of status to TN. If such applicant is in the U.S. as an H-1 or L-1, he or she may be changed to TN status if otherwise eligible, without regard to the maximum time limits for those classifications. A Canadian J nonimmigrant who is subject to the 2-year foreign residence requirement may not change to TN classification, but may leave the U.S. and seek readmission as a TN.

Request for change/additions of U.S. employers. A Mexican citizen may change or add employers while in the U.S. through the filing of Form I-129 at the Northern Service Center. All documentary requirements pertaining to a citizen of Mexico outlined above must be met. Employment with a different or with an additional employer is not authorized prior to INS approval of the petition.

No action is required by a Mexican citizen who is transferred to another location by the U.S. employer to perform the same services. An example of such an acceptable transfer would be to a branch or office of the employer. If the transfer is to a separately incorporated subsidiary or affiliate, Form I-129 must be filed.

Spouse and unmarried minor children

The spouse and unmarried minor children who are accompanying or following to join a TN professional, if otherwise admissible, are to be accorded TD (Trade Dependent) classification. These are required to present a valid, unexpired nonimmigrant visa unless otherwise visa-exempt under 8 CFR 212.1. (Those persons who are normally exempt from nonimmigrant visa requirements include citizens of Canada and Landed Immigrants of Canada having a common nationality with Canadian citizens).

There is no requirement that the TD dependent be a citizen of Canada or Mexico.
No fee is required for admission of dependents in TD status (except the fee for the I-94) and they are to be issued multiple entry Forms I-94.
A TD spouse or child is not authorized to accept employment while in the U.S. in such status. Dependents in TD status may attend school in the U.S. on a full-time basis as such attendance is deemed incident to status.

SECTION SEVEN

ENTRY OF NONIMMIGRANT WORKERS DURING LABOR DISPUTES

ENTRY OF NONIMMIGRANT WORKERS DURING LABOR DISPUTES

INA 214(j) Not withstanding any other provision of this Act, an alien who is a citizen of Canada or Mexico who seeks to enter the United States under and pursuant to the provisions of Section B, Section C, or Section D of Annex 1603 of the North American Free Trade Agreement, shall not be classified as a nonimmigrant under such provisions if there is in progress a strike or lockout in the course of a labor dispute in the occupational classification at the place or intended place of employment, unless such alien establishes, pursuant to regulations promulgated by the Attorney General, that the alien's entry will not affect adversely the settlement of the strike or lockout. Notice of a determination under this subsection shall be given as may be required by paragraph 3 of article 1603 of such Agreement. For purposes of this subsection, the term "citizen of Mexico" means "citizen" as defined in Annex 1608 of such Agreement.

INSPECTORS FIELD MANUAL
15.10 Entry of Nonimmigrant Workers during Labor Disputes.

(a) **General**. There are specific regulations governing the admission of nonimmigrant alien workers entering during strikes and lockouts involving their employers. In general, an alien who has not yet entered the U.S. under an approved I-129 petition or who has not yet entered as a D, E, or TN, is inadmissible once the Secretary of Labor has certified to the Attorney General that a strike is in progress. An alien who has already commenced employment may participate in a strike (if not engaging in unlawful conduct) without jeopardizing his or her status [Specific regulations governing admission of nonimmigrants during strikes are contained in relevant subsections of 8 CFR 214.2].

(b) **Labor Disputes Involving NAFTA Nonimmigrants**. Article 1603(2) of NAFTA establishes a safeguard for the domestic labor force in each NAFTA country. This provision permits each party to NAFTA to refuse issuance of an immigration document to a NAFTA business person whose temporary entry may affect adversely the settlement of any labor dispute in progress at the place or intended place of employment, or if temporary entry would affect adversely the employment of any person involved in such dispute. This provision may also be invoked with respect to a NAFTA business person seeking entry as a treaty trader, treaty investor, intracompany transferee, or professional, whose activities in the U.S. require an employment authorization. If a petition has already been approved, but the alien has not yet entered the U.S., or has entered the U.S. but not yet started employment, the approval of the petition may be revoked [See §214(j) of the Act, and 8 CFR 214.2(e), (l), and 214.6].

Only if the Secretary of Labor certifies to or otherwise informs the Commissioner that a strike or other labor dispute involving a work stoppage of workers is in progress can adverse action (admission in a NAFTA category or approval of a petition) under this provision be initiated.

After the inspecting official determines if the temporary entry of the applicant may adversely affect the settlement of any labor dispute or the employment of any person who is involved in such a dispute, the applicant must be advised in writing of the reason(s) for the refusal. This can be the routine INS notice of refusal at the port-of-entry.

In addition, written notification must be provided to the NAFTA country of which the business person is a citizen. The following steps should be taken at the port-of-entry or service center:

Notify Headquarters Adjudications, Business and Trade Services Branch, in writing (fax to (202) 514-0198) of the refusal. Include the following information:

- Name and address, if known, of the business person;
- Citizenship of the business person;
- Date and place of refusal of document authorizing employment (I-94);
- Name and address of prospective employer;
- Position to be occupied;

- Requested duration of stay;

- Reasons for refusal;

- Reference specific statutory or regulatory authority for refusal (if applicable); and

- Statement indicating that the business person was informed in writing of the refusal and the reasons for the refusal.

Headquarters will notify the appropriate government officials whose citizen was refused an employment authorization document pursuant to this NAFTA provision.

Where a principal alien is refused classification under NAFTA, the dependent family members are not classifiable as dependents.

SECTION EIGHT

NAFTA IMPLEMENTATION CABLES

HQ 1815-C. **THIS IS NAFTA IMPLEMENTATION CABLE 001**

CONGRESS PASSED THE IMPLEMENTING LEGISLATION FOR THE NORTH AMERICAN FREE TRADE AGREEMENT (NAFTA). CHAPTER 16 OF THE AGREEMENT ADDRESSES THE MOVEMENT OF BUSINESS PERSONS AMONG CANADA, MEXICO, AND THE UNITED STATES. WHILE THE PRESIDENT HAS NOT YET SIGNED THE ENROLLED BILL, THE EFFECTIVE IMPLEMENTATION DATE OF THE AGREEMENT IS STILL PROJECTED TO BE JANUARY 1, 1994.

AS IN THE U.S. -CANADA FTA, CHAPTER 16 OF THE NAFTA AGREEMENT COVERS EXCLUSIVELY FOUR NONIMMIGRANT CLASSIFICATIONS: B-1, TEMPORARY VISITORS FOR BUSINESS; E, TREATY TRADER AND INVESTOR; L, INTRACOMPANY TRANSFEREE; AND THE PROFESSIONAL BUSINESSPERSON. CHAPTER 16 OF THE NORTH AMERICAN FREE TRADE AGREEMENT IS CONSISTENT WITH EXISTING SECTION 101(A)(15)(B) OF THE IMMIGRATION AND NATIONALITY ACT AS AMENDED. WHILE CANADIAN CITIZENS WILL CONTINUE TO BENEFIT FROM THE EXEMPTION TO VISA ISSUANCE, MEXICAN CITIZENS WILL STILL BE REQUIRED TO OBTAIN A VALID B-1 VISA OR A BORDER CROSSING-CARD.

E VISA CLASSIFICATION. TRADERS AND INVESTORS: THE NORTH AMERICAN FREE TRADE AGREEMENT EXTENDS THE PRIVILEGE OF THE E VISA CLASSIFICATION UNDER 101(A) (15) (E) TO CITIZENS OF MEXICO AND CANADA. TITLE 8, CODE OF FEDERAL REGULATIONS PART 212.1(L) WILL BE MODIFIED TO REFLECT THAT AN ALIEN SEEKING ADMISSION AS A TREATY TRADER OR INVESTOR UNDER THE PROVISIONS OF CHAPTER 16 OF THE NORTH AMERICAN FREE TRADE AGREEMENT (NAFTA) PURSUANT TO SECTION 101 (A) (15) (E) OF THE ACT, SHALL BE IN POSSESSION OF A NONIMMIGRANT VISA ISSUED BY AN AMERICAN CONSULAR OFFICER CLASSIFYING THE ALIEN UNDER THAT SECTION.

THE TREATMENT OF WOULD-BE L-1 APPLICANTS WILL REMAIN VIRTUALLY THE SAME AS CURRENT PRACTICE, MEANING THAT THE PETITION REQUIREMENT AND RELATED REQUIREMENTS REMAIN AND THAT MEXICAN CITIZENS WILL CONTINUE TO NEED VISAS IN ORDER TO ENTER THE UNITED STATES. SOME PROCEDURAL CHANGES REGARDING TITLE 8, CODE OF FEDERAL REGULATIONS PART 214.2(L)(17) ARE BEING CONTEMPLATED REGARDING THE FILING OF INDIVIDUAL PETITIONS BY CANADIAN CITIZENS AT CLASS A PORTS OF ENTRY.

THERE ARE MULTIPLE CHANGES FROM CURRENT PRACTICE IN THE TREATMENT OF PROFESSIONAL PERSONS UNDER THE AGREEMENT. THE IMPLEMENTING LEGISLATION PROVIDES THAT THIS ADMISSION CLASS IS CONSIDERED TO BE A REGULAR ADMISSION CLASS UNDER SECTION 101 (A) (15) INA.

SCHEDULE 2 OF THE CANADIAN FREE TRADE AGREEMENT HAS BEEN INCORPORATED INTO THE NAFTA AGREEMENT AND IS SET FORTH IN APPENDIX 1603.D.l. THE IMPLEMENTING LEGISLATION NOW PROVIDES FOR DERIVATIVES AND THUS DEPENDENTS WILL NOT HAVE TO SEEK B-2 STATUS.THERE WILL BE A NEW NONIMMIGRANT CLASSIFICATION SOLELY ADDRESSING THE DEPENDENTS OF PROFESSIONALS.

WHILE NO CURRENT LIMITATION EXISTS OR IS PROPOSED FOR CANADIAN CITIZENS ENTERING AS PROFESSIONALS, THERE IS AN ANNUAL CEILING OF FIVE THOUSAND FIVE HUNDRED (5,500) PROVIDED FOR MEXICAN CITIZENS SEEKING ADMISSION AS PROFESSIONALS UNDER THE NAFTA AGREEMENT DURING THE FIRST YEAR OF THE AGREEMENT. MEXICAN CITIZENS SEEKING STATUS AS PROFESSIONALS WILL BE GOVERNED BY SIMILAR PROCEDURAL REQUIREMENTS As H-1A AND H-1B NONIMMIGRANTS.THIS MEANS THAT PRIOR TO SEEKING ENTRY,THE MEXICAN CITIZEN WILL NOT ONLY HAVE TO OBTAIN A VALID NONIMMIGRANT VISA CLASSIFYING SAID MEXICAN CITIZEN AS A PROFESSIONAL PERSON BUT ALSO THE UNITED STATES EMPLOYER WILL HAVE TO OBTAIN A LABOR CONDITION STATEMENT AND THEN SUBMIT A FORM I-129 TO THE APPROPRIATE SERVICE CENTER REQUESTING THAT THE PERSON BE CLASSIFIED AS A PROFESSIONAL FOR THE PURPOSES OF OBTAINING A NONIMMIGRANT VISA. THUS, UNLIKE THE TREATMENT OF CANADIAN PROFESSIONALS, THERE WILL BE NO FEE COLLECTED FROM MEXICAN PROFESSIONALS AT THE TIME OF THEIR APPLICATION FOR ADMISSION.

OTHER CHANGES PROVIDED FOR ADDRESS THE QUESTION OF THE ADMISSION OF TREATY TRADERS AND INVESTORS, INTRACOMPANY TRANSFEREES**,** AND PROFESSIONAL PERSONS DURING THE PERIOD THAT THERE IS A STRIKE OR OTHER LABOR DISPUTE IN PROCESS AND OTHER PROVISIONS RELATING TO THE PROVISION OF INFORMATION, PUBLIC NOTICES, AND DISPUTE SETTLEMENT. IF THE APPLICANT SEEKING STATUS AS A TREATY TRADER OR INVESTOR, INTRACOMPANY TRANSFEREE, OR PROFESSIONAL PERSON IS DENIED ENTRY BECAUSE OF THIS PROVISION RELATING TO STRIKES OR OTHER LABOR DIFFICULTIES, THE PERSON AFFECTED MUST BE INFORMED OF THE REASONS FOR THE REFUSAL, AND A COPY OF THE REFUSAL MUST BE FORWARDED TO THE TRADE REPRESENTATIVE. DETAILED POLICY REGARDING THE ENTIRE NAFTA IMPLEMENTATION WILL BE FORTHCOMING AS WILL TRAINING PACKAGES FOR FIELD OFFICES AND RELEASES FOR PUBLIC INFORMATION AND ASK IMMIGRATION. QUESTIONS SHOULD BE ADDRESSED TO HQADN/NONIMMIGRANT BRANCH AT (202)514-5014.CHAPTER 16 WILL BE PROVIDED UNDER SEPARATE COVER.

HQ 1815-C. **THIS IS NAFTA IMPLEMENTATION CABLE 002**.

ON DECEMBER 8, 1993, THE PRESIDENT SIGNED THE NORTH AMERICAN FREE TRADE AGREEMENT IMPLEMENTATION ACT. ON JANUARY 1, 1994, THE UNITED STATES-CANADA FREE TRADE AGREEMENT WILL BE SUBSUMED INTO THE NORTH AMERICAN FREE TRADE AGREEMENT (NAFTA). CHAPTER 16 OF THE AGREEMENT ADDRESSES THE MOVEMENT OF BUSINESS PERSONS AMONG CANADA, MEXICO, AND THE UNITED STATES.

GENERAL NAFTA INFORMATION:
IN ORDER TO COMPLY WITH ARTICLE 1604 OF THE NORTH AMERICAN FREETRADE AGREEMENT REGARDING THE DISSEMINATION OF INFORMATION, REVISED AND EXPANDED. FORM M-316 IS BEING NAFTA-RELATED INFORMATION IS BEING PREPARED FOR THE ASK IMMIGRATION SYSTEM. OTHER AGENCIES HAVE EITHER PREPARED MATERIALS OR, WILL BE PREPARING MATERIALS, PAMPHLETS AVAILABLE NOW FROM OTHER AGENCIES ARE CUSTOMS PUBLICATION NO.571 ENTITLED THE NORTH AMERICAN FREE TRADE AGREEMENT: A GUIDE TO CUSTOMS PROCEDURES AVAILABLE THROUGH THE GOVERNMENT PRINTING OFFICE AT $3.50 PER COPY, AND A BROCHURE ENTITLED EXPORTS MEXICO AVAILABLE THROUGH THE DEPARTMENT OF COMMERCE. THERE ARE VARIOUS TELEPHONE NUMBERS THAT AN.INQUIRER MAY CONTACT FOR INFORMATION FROM VARIOUS AGENCIES INVOLVED IN THE IMPLEMENTATION OF THE NORTH AMERICAN FREE TRADE AGREEMENT. THE DEPARTMENT OF AGRICULTURE HAS A TELEPHONE NUMBER THAT AN INQUIRER MAY CALL FOR INFORMATION REGARDING GENERAL INFORMATION AND SIDE AGREEMENTS ON AGRICULTURE - (202) 720-1336. THE UNITED STATES CUSTOMS SERVICE HAS QUOTE FLASH FACTS UNQUOTE TELEPHONE NUMBER FOR INFORMATION REGARDING THE TARIFF SCHEDULE- (202) 927-1692, AND A HELP DESK NUMBER FOR IMPORTANT INFORMATION - (202) 927-0066. THE COMMERCE DEPARTMENT HAS THREE NUMBERS TO BE CONTACTED DEPENDING ON THE NATURE OF THE INFORMATION REQUESTED, 1-800-USATRADE, HOW TO EXPORT TO MEXICO; (202) 482-4464, A QUOTE MEXICO FLASH FACTS TELEPHONE NUMBER; AND (202) 482-3101, A QUOTE CANADA FLASH FACTS TELEPHONE NUMBER. VARIOUS PAMPHLETS ARE ALSO BEING PREPARED FOR DISTRIBUTION. SERVICE OFFICES RECEIVING INQUIRIES REGARDING OTHER PROVISIONS OUTSIDE OF CHAPTER 16 SHOULD DIRECT THE INQUIRIER TO THE APPROPRIATE AGENCY AND INFORMATION.

NAFTA PROFESSIONALS

THE IMPLEMENTING LEGISLATION FOR CHAPTER 16 OF THE AGREEMENT PROVIDES FOR THE ADMISSION OF CITIZENS OF CANADA AND MEXICO AS PROFESSIONALS AS UNDER SECTION 101 (A) (15) OF THE IMMIGRATION AND NATIONALITY ACT. THE DESIGNATION APPROVED TO DENOTE THIS NEW CLASS OF ADMISSION IS QUOTE TN UNQUOTE FOR TRADE NAFTA. EFFECTIVE JANUARY 1, 1994, ANY CANADIAN CITIZEN ADMITTED AS A NAFTA PROFESSIONAL AT ANY PORT OF ENTRY IS TO BE ASSIGNED THIS CLASSIFICATION. A CITIZEN OF MEXICO WILL REQUIRE THE ISSUANCE OF A NONIMMIGRANT VISA CLASSIFYING SAID MEXICAN CITIZEN AS A TN. EACH NONIMMIGRANT ALIEN FROM CANADA OR MEXICO ADMITTED AS A TN WILL REQUIRE A COMPLETELY EXECUTED FORM 1-94 WHICH MUST BE ENDORSED TO SHOW THE DATE AND PLACE OF ADMISSI0N AND THE PERIOD OF ADMISSION. ON THE BACK OF THE FORM I-94, BLOCK 18 RELATING TO OCCUPATION MUST BE COMPLETED AND THE NAME OF THE EMPLOYER MUST BE NOTATED ON THE REVERSE OF BOTH THE ARRIVAL AND DEPARTURE FORMS I-94, AND THE FORM 1-94 MUST BE ENDORSED TO SHOW "MULTIPLE ENTRY." TITLE 8, CODE OF FEDERAL REGULATIONS PART 235.1(F) IS BEING REVISED TO REQUIRE THE ADDITIONAL INFORMATION IN ORDER THAT THE SERVICE COMPLY WITH THE REPORTING REQUIREMENTS OF THE AGREEMENT.

A CANADIAN CITIZEN PREVIOUSLY ADMITTED AS A QUOTE TC UNQUOTE PROFESSIONAL UNDER THE PROVISIONS OF THE UNITED STATES-CANADA FREE TRADE AGREEMENT WHOSE AUTHORIZED PERIOD OF ADMISSION HAS NOT EXPIRED AND WHO IS CONTINUING TO MAINTAIN VALID NONIMMIGRANT STATUS MAY REMAIN IN TIHE UNITED STATES UNTIL THE AUTHORIZED PERIOD OF ADMISSION EXPIRES AND THEREAFTER MAY SEEK STATUS AS TN, THROUGH A REQUEST FOR READMISSION OR A REQUEST FOR EXTENSION OF STAY. THE DEPENDENTS OF THE CANADIAN CITIZEN MAY ALSO REMAIN SO LONG AS THE PRINCIPAL ALIEN REMAINS IN VALID STATUS.

REQUEST FOR EXTENSION

AT THE TIME THE PRINCIPAL ALIEN SUBMITS THE REQUEST ON FORM I-129 FOR STATUS AS A TN, THE DEPENDENTS WILL NEED TO SUBMIT THEIR OWN FORM 1-539 TO BE CLASSIFIED AS THE DEPENDENTS OF A NAFTA PROFESSIONAL.

REQUEST FOR READMISSION

THERE IS NO REQUIREMENT THAT THE CANADIAN PROFESSIONAL DEPART FROM THE UNITED STATES BUT SHOULD THE PROFESSIONAL DEPART, IT WOULD BE POSSIBLE FOR SAID PERSON TO BE GRANTED TN STATUS ON A NEW APPLICATION FOR ADMISSION.

MEXICAN CITIZENS AND THE NAFTA AGREEMENT

A CITIZEN OF MEXICO WILL REQUIRE A VALID, UNEXPIRED NONIMMIGRANT VISA FOR EACH NONIMMIGRANT CATEGORY PROVIDED FOR UNDER THE AUSPICES OF CHAPTER 16 OF THE NORTH AMERICAN FREE TRADE AGREEMENT. THE UNITED STATES EMPLOYER OF A PROSPECTIVE MEXICAN PROFESSIONAL WILL FIRST NEED TO OBTAIN THE APPROPRIATE LABOR ATTESTATION IF THE POSITION IS FOR THAT OF A REGISTERED NURSE OR LABOR CONDITION APPLICATION IF THE POSITION IS FOR ANY OTHER SPECIALTY OCCUPATION AND THEN SUBMIT FORM 1-129 TO THE DESIGNATED SERVICE CENTER. THE SERVICE CENTER WILL NOTIFY THE PETITIONER OF THE APPROVAL OF THE PETITION ON FORM I-797. ANNEX 1603 TO CHAPTER 16 OF THE NAFTA AGREEMENT PROVIDES FOR A LIMITATION OF 5,500 MEXICAN CITIZENS WHO MAY BE ADMITTED TO THE UNITED STATES AS NAFTA PROFESSIONALS. FOR PURPOSES OF THIS 5,500 CEILING, THE SERVICE CENTERS WILL COUNT THE NUMBER OF INITIAL PETITIONS FILED IN BEHALF OF MEXICAN TN PROFESSIONALS.PETITIONS FOR EXTENSION, CHANGE/ADDITION OF EMPLOYERS, AND AMENDED PETITIONS WILL NOT BE COUNTED FOR THIS PURPOSE.

ADDITIONAL NAFTA IMPLEMENTATION INFORMATION WILL BE FORTHCOMING. QUESTIONS MAY BE DIRECTED TO HQ ADJUDICATIONS, NONIMMIGRANT BRANCH AT (202) 514-5014.

HQ 1815-C. **THIS IS NAFTA IMPLEMENTATION CABLE 003.**

PUBLIC LAW 103-182 IMPLEMENTS THE NORTH AMERICAN FREE TRADE AGREEMENT, WHICH WILL BECOME EFFECTIVE ON J ANUARY 1, 1994. UNDER CHAPTER 16 OF THE NORTH AMERICAN FREE TRADE AGREEMENT (NAFTA), AN IMPORTANT SAFEGUARD FOR THE DOMESTIC LABOR FORCE WAS PROVIDED WHICH PERMITS EACH NAFTA COUNTRY TO REFUSE TO ISSUE AN IMMIGRATION DOCUMENT AUTHORIZING EMPLOYMENT WHERE THE TEMPORARY ENTRY OF A BUSINESS PERSON MIGHT AFFECT ADVERSELY THE SETTLEMENT OF A LABOR DISPUTE OR THE EMPLOYMENT OF A PERSON INVOLVED IN SUCH A DISPUTE ARTICLE 1603(2) THUS SPECIFICALLY ALLOWS THE UNITED STATES TO DENY TEMPORARY ENTRY TO A NAFTA INTRACOMPANY TRANSFEREE (L-1), TRADER OR INVESTOR (E-1 OR E-2), OR PROFESSIONAL (TN), WHOSE ACTIVITIES IN THE UNITED STATES REQUIRE EMPLOYMENT AUTHORIZATION, IF ADMISSION MIGHT INTERFERE WITH AN ONGOING LABOR DISPUTE. NAFTA FURTHER PROVIDES THAT IF ARTICLE 1603(2) IS INVOKED, THE BUSINESS PERSON MUST BE INFORMED IN WRITING OF THE REASON FOR THE REFUSAL, AND THE COUNTRY WHOSE BUSINESS PERSON IS AFFECTED MUST BE NOTIFIED. PENDING A REVISION OF THE OPERATIONS INSTRUCTIONS, THE VEHICLE TO BE USED FOR NOTIFYING THE BUSINESS PERSON WILL BE FORM I-160A ON THE NORTHERN BORDER, AND FORM I-180 ON THE SOUTHERN BORDER. A COPY OF THE COMPLETED FORMS I-160A OR I-180 WILL BE FAXED TO HEADQUARTERS, EXAMINATIONS BRANCH, ATTENTION: JACQUELYN BEDNARZ, CHIEF, NONIMMIGRANT BRANCH, FAX NUMBER 202-514-0198, WHO WILL TAKE ACTION TO NOTIFY THE APPROPRIATE COUNTRY. HEADQUARTERS WILL NOTIFY ALL FIELD OFFICES BY CABLE OF ANY INSTANCE IN WHICH THE SECRETARY OF LABOR CERTIFIES TO THE COMMISSIONER THAT THERE IS A STRIKE OR OTHER LABOR DISPUTE INVOLVING A WORK STOPPAGE WHERE THE ENTRY OF A NAFTA E, L, OR, OR TN MAY HAVE AN ADVERSE EFFECT.

HQ 1815-C**. THIS IS NAFTA IMPLEMENTATION CABLE 004.**

THE NORTH AMERICAN FREE TRADE AGREEMENT WILL BECOME EFFECTIVE ON JANUARY 1, 1994. CHAPTER 16 OF THE NORTH AMERICAN FREE TRADE AGREEMENT ADDRESSES THE TEMPORARY ENTRY OF BUSINESS PERSONS. UNDER NAFTA, BOTH A MEXICAN CITIZEN AND A CANADIAN CITIZEN MAY SEEK ADMISSION AS PROFESSIONAL PERSONS. THE CLASSIFICATION SYMBOL "TN" (TRADE NAFTA) HAS BEEN DESIGNATED FOR THIS NAFTA TEMPORARY ENTRY CATEGORY. A CANADIAN CITIZEN MAY SUBMIT AN APPLICATION FOR STATUS AS A "TN" UNQUOTE AT A CLASS A PORT OF ENTRY. A MEXICAN CITIZEN MUST FIRST SECURE AN APPROVED PETITION SUPPORTED BY THE REQUIRED LABOR ATTESTATION OR LABOR CONDITION STATEMENT AND THEN MUST OBTAIN A VALID NONIMMIGRANT VISA ACCORDING STATUS AS A "TN" THE PETITION ON BEHALF OF THE MEXICAN CITIZEN MUST BE FILED WITH THE NORTHERN SERVICE CENTER IN LINCOLN, NEBRASKA. UNDER NAFTA, A MEXICAN CITIZEN AND A CANADIAN CITIZEN MAY ALSO REQUEST A CHANGE OF NONIMMIGRANT STATUS TO THAT OF "TN". IF THE MEXICAN OR CANADIAN CITIZEN ARE IN STATUS IN ANOTHER NONIMMIGRANT CLASSIFICATION, A FORM I-129 MAY BE FORWARDED TO THE NORTHERN SERVICE CENTER IN LINCOLN, NEBRASKA REQUESTING THAT A CHANGE OF NONIMMIGRANT STATUS BE GRANTED. ANY REQUESTS FOR EXTENSION OF "TN" STATUS MUST ALSO BE SUBMITTED TO THE NORTHERN SERVICE CENTER IN LINCOLN, NEBRASKA. ANY INQUIRER SEEKING INFORMATION REGARDING WHERE TO SUBMIT THE REQUEST FOR STATUS AS A PROFESSIONAL SHOULD BE DIRECTED TO FILE WITH THE NORTHERN SERVICE CENTER. ADDITIONAL INSTRUCTIONS TO THE FORM I-129 HAVE BEEN SENT TO THE OFFICE OF MANAGEMENT AND BUDGET (OMB) FOR CLEARANCE FOR PUBLIC USE. THESE ADDITIONAL INSTRUCTIONS ADDRESS THE USE OF THE FORM FOR NAFTA CATEGORIES OF TEMPORARY ENTRY. THEY WILL BE PRINTED AND AVAILABLE TO THE PUBLIC SHORTLY.

HQ 1815-P. **THIS IS NAFTA IMPLEMENTATION CABLE 005.**

THE NORTH AMERICAN FREE TRADE AGREEMENT (NAFTA) WILL BECOME EFFECTIVE ON JANUARY 1, 1994. CHAPTER 16 OF THE TEMPORARY ENTRY OF BUSINESS PERSONS. REGULATIONS AND OPERATIONS INSTRUCTIONS AND INSTRUCTIONS TO FORMS 1-539 AND FORM 1-129 ARE BEING REVISED TO PROVIDE INSTRUCTIONS AND PROCEDURES TO BE FOLLOWED IN IMPLEMENTING THE PROVISIONS OF CHAPTER 16 AND THE NAFTA IMPLEMENTATION ACT. PENDING PROMULGATION OF THE REGULATIONS AND RECEIPT OF THOSE INSTRUCTIONS, THIS IS TO SERVE AS A POLICY TO BE ADHERED TO BY ALL SERVICE PERSONNEL IN IMPLEMENTING NAFTA.

A COPY OF CHAPTER 16 WAS SENT TO ALL FIELD OFFICES UNDER SEPARATE COVER, DATED DECEMBER 8, 1993.CHAPTER 16 COVERS FOUR CATEGORIES OF TEMPORARY ENTRY: THE BUSINESS VISITOR, B-1; THE TRADER AND INVESTOR, E-1 AND E-2; THE INTRACOMPANY TRANSFEREE, L-1; AND THE NAFTA PROFESSIONAL, TN. VISITORS FOR BUSINESS, B-1: CHAPTER 16, ANNEX, 1603 OF THE NAFTA PROVIDES FOR THE ADMISSION OF CITIZENS OF CANADA OR MEXICO AS VISITORS FOR BUSINESS. THERE ARE NO DOCUMENTARY CHANGES AND NO CHANGES IN THE DEFINITION OF WHAT CONSTITUTES A VISITOR FOR BUSINESS, "B-1". A CITIZEN OF CANADA IS NOT REQUIRED TO PRESENT A NONIMMIGRANT VISA FOR ADMISSION AS A B-1 BUT MUST ESTABLISH CITIZENSHIP TO THE SATISFACTION OF THE INSPECTING OFFICER. A CITIZEN OF MEXICO MUST PRESENT A PASSPORT AND EITHER A NONIMMIGRANT VISA OR A BORDER CROSSING, CARD. BOTH CANADIAN AND MEXICAN CITIZENS MUST ESTABLISH THAT THEY ARE ADMISSIBLE UNDER THE IMMIGRATION AND NATIONALITY ACT.

BOTH CANADIAN AND MEXICAN CITIZENS MUST ESTABLISH THAT THEY QUALIFY AS A VISITOR FOR BUSINESS BY REASON OF HAVING PROVIDED EVIDENCE GENERALLY REQUIRED OF ANY BUSINESS VISITOR UNDER SECTION 101 (SMALL A) (15) (13) INCLUDING, BUT NOT LIMITED TO, THE SOURCE OF REMUNERATION, A DESCRIPTION OF THE PURPOSE OF ENTRY, AND EVIDENCE DEMONSTRATING THAT HE OR SHE IS ENGAGED IN ONE OF THE OCCUPATIONS OR PROFESSIONS SET FORTH IN APPENDIX 1603.A.1 OF CHAPTER 16 OR IF NOT SEEKING ADMISSION FOR THE PURPOSE OF ENGAGING IN ONE OF THE OCCUPATIONS OR PROFESSIONS SET FORTH IN APPENDIX 1603.A.1, THAT SAID PERSON IS OTHERWISE ELIGIBLE TO ENTER AS A VISITOR FOR BUSINESS IN ACCORDANCE WITH GENERAL B-1 PROVISIONS. TRADERS AND INVESTOR, E-1 AND E-2: COMMENCING JANUARY 1, 1994, A MEXICAN CITIZEN WILL FOR THE FIRST TIME BE ELIGIBLE TO SEEK THE ISSUANCE OF A NONIMMIGRANT VISA TO CLASSIFY HIM OR HER AS A TREATY TRADER OR INVESTOR. A CANADIAN CITIZEN WAS PREVIOUSLY ELIGIBLE TO APPLY FOR ISSUANCE OF A NONIMMIGRANT VISA TO CLASSIFY HIM OR HER AS A TREATY TRADER OR INVESTOR UNDER THE PROVISIONS OF PUBLIC LAW 100-449 IMPLEMENTING THE UNITED STATES-CANADA FREE TRADE AGREEMENT. BOTH A CANADIAN CITIZEN AND A MEXICAN CITIZEN MUST PRESENT A VALID, UNEXPIRED NONIMMIGRANT VISA INDICATING CLASSIFICATION AS A TREATY TRADER OR INVESTOR AT THE TIME OF APPLICATION FOR ADMISSION AS PROVIDED IN TITLE 8, CODE OF FEDERAL REGULATIONS PART 212.l. A CANADIAN CITIZEN WHO OBTAINS A CHANGE OF NONIMMIGRANT STATUS TO THAT OF A TREATY TRADER OR INVESTOR MUST BE IN POSSESSION OF A VALID NONIMMIGRANT VISA IN ORDER TO REENTER THE UNITED STATES FROM ANY FOREIGN TERRITORY IF STILL SEEKING ADMISSION AS A TREATY TRADER OR INVESTOR AS PRESCRIBED IN CURRENT OPERATIONS INSTRUCTIONS PART 248.8.

IF THE SECRETARY OF LABOR HAS CERTIFIED TO, OR OTHERWISE INFORMED, THE COMMISSIONER THAT THERE IS A STRIKE OR OTHER LABOR DISPUTE INVOLVING A WORK STOPPAGE OF WORKERS WHERE THE ALIEN INTENDS TO BE EMPLOYED, AND THE INSPECTING OFFICER BELIEVES THAT THE TEMPORARY ENTRY OF THAT ALIEN MAY AFFECT ADVERSELY EITHER THE SETTLEMENT OF SUCH LABOR DISPUTE OR THE EMPLOYMENT OF A PERSON INVOLVED IN THE DISPUTE, SAID ALIEN IS TO BE REFUSED ADMISSION. SEE NAFTA IMPLEMENTATION CABLE 003 FOR PRELIMINARY PROCEDURES.

INTRACOMPANY TRANSFEREE, L-1:
THERE IS NO SUBSTANTIVE CHANGE REGARDING THE CLASSIFICATION OR ADMISSION OF INTRACOMPANY TRANSFEREES UNDER CHAPTER 16 OF THE NAFTA. A CANADIAN CITIZEN SEEKING STATUS AS A QUOTE L-1 UNQUOTE MAY EITHER SUBMIT THE REQUIRED PETITION TO THE SERVICE CENTER HAVING JURISDICTION OVER THE INTENDED PLACE OF EMPLOYMENT OR AT A

PRESCRIBED CLASS A PORT OF ENTRY. PENDING THE PUBLICATION OF THE REVISED REGULATIONS AND APPROPRIATE PUBLIC DISSEMINATION OF INFORMATION, ANY CLASS A PORT OF ENTRY ENCOUNTERING A CANADIAN CITIZEN SEEKING TO SUBMIT A FORM 1-129 AT THE PORT OF ENTRY SHOULD ADJUDICATE THE PETITION. THE DOCUMENTARY REQUIREMENT SPECIFIED IN TITLE 8, CODE OF FEDERAL REGULATIONS PART 214.2 (L) (3) THAT THE BENEFICIARY PREVIOUSLY HAVE PERFORMED SERVICES FOR EMPLOYER OR A SUBSIDIARY OR AFFILIATE THE SAME THEREOF IN A MANAGERIAL, EXECUTIVE, OR SPECIALIZED KNOWLEDGE CAPACITY FOR A FOREIGN PARENT, BRANCH, SUBSIDIARY, OR AFFILIATE OF THE UNITED STATES EMPLOYER FOR ONE OUT OF THE PRECEDING THREE YEARS CONTINUES IN EFFECT AND THE RELATED REQUIREMENTS SPECIFIED IN THE REGULATIONS AND IN THE INSTRUCTIONS TO FORM 1-129 MUST STILL BE ADHERED TO.

IF THERE IS A STRIKE OR OTHER LABOR DISPUTE IN PROGRESS AT THE PLACE OF INTENDED EMPLOYMENT AND THE SECRETARY OF LABOR HAS CERTIFIED TO, OR OTHERWISE INFORMED, THE COMMISSIONER THAT THERE IS A STRIKE, A DETERMINATION MUST BE MADE AS TO WHETHER THE ADMISSION OF THE PARTICULAR INTRACOMPANY TRANSFEREE APPLICANT MAY AFFECT
ADVERSELY EITHER THE LABOR DISPUTE ITSELF OR THE EMPLOYMENT OF A PERSON INVOLVED IN THE DISPUTE. IF CERTIFICATION OR OTHER DEPARTMENT OF LABOR INFORMATION OF THE EXISTENCE OF A STRIKE OR OTHER LABOR DISPUTE HAS BEEN PROVIDED AND THE ADMISSION OF THE APPLICANT IS BELIEVED TO AFFECT ADVERSELY EITHER OF THE ABOVE, THE APPLICANT SHALL BE REFUSED ADMISSION AND APPROPRIATE NOTIFICATION REGARDING THE REFUSAL IS TO BE PROVIDED TO HQADN.

PROFESSIONALS, TN:
A. GENERAL: THE IMPLEMENTING LEGISLATION FOR NAFTA PROVIDES FOR THE CREATION OF A NEW NONIMMIGRANT CLASS, THE "TN" FOR CERTAIN CANADIAN AND MEXICAN CITIZEN PROFESSIONALS. THE IMPLEMENTING LEGISLATION ALSO PROVIDES FOR THE CREATION OF A SEPARATE NONIMMIGRANT CLASS FOR THE SPOUSES AND UNMARRIED MINOR CHILDREN OF PROFESSIONALS, THE "TD". BOTH CANADIAN CITIZENS AND MEXICAN CITIZENS WILL BE ELIGIBLE TO SEEK ADMISSION AS NAFTA PROFESSIONALS SCHEDULE 2 OF THE UNITED STATES-CANADA FREE TRADE AGREEMENT HAS BEEN INCORPORATED INTO THE NAFTA AGREEMENT AND IS SET FORTH IN APPENDIX 1603.D.1 OF CHAPTER 16.

B. CANADIAN CITIZEN REQUESTS FOR TN CLASSIFICATION:
EFFECTIVE JANUARY 1, 1994, A CANADIAN CITIZEN SEEKING ADMISSION AS A PROFESSIONAL AT A PORT OF ENTRY WILL BE CLASSIFIED AS A "TN". APPLICATION MAY BE MADE AT ANY CLASS A PORT OF ENTRY, A UNITED STATES AIRPORT HANDLING INTERNATIONAL TRAFFIC, OR A PRE-CLEARANCE STATION. THE INSPECTING OFFICER SHALL, AFTER DETERMINING CANADIAN CITIZENSHIP, REVIEW ANY LETTERS AND OTHER EVIDENCE SUBMITTED BY THE APPLICANT TO DETERMINE WHETHER THE APPLICANT QUALIFIES AS A PROFESSIONAL AND THAT THE APPLICANT IS COMING TO BE EMPLOYED IN THE CAPACITY OF A PROFESSIONAL. IF A DETERMINATION IS MADE THAT THE APPLICANT WILL BE SO EMPLOYED, THE PROCEDURES IN THE UNITED STATES-CANADA FREE TRADE AGREEMENT FOR THE ADMISSION OF QUALIFIED PROFESSIONALS AS 'TC" SHALL BE FOLLOWED. A CANADIAN CITIZEN ADMITTED AS A "TC" PRIOR TO JANUARY 1. 1994 MAY REMAIN IN THE UNITED STATES SO LONG AS HE OR SHE IS MAINTAINING STATUS UNTIL THE AUTHORIZED PERIOD OF ADMISSION EXPIRES. WHEN A REQUEST FOR EXTENSION OF TEMPORARY STAY IS FILED BEFORE THE SERVICE, THE APPLICANT'S STATUS IS TO BE AUTOMATICALLY CONVERTED TO THAT OF A TN PROFESSIONAL AS I PART OF THE ADJUDICATION PROCESS WITHOUT THE PAYMENT OF AN ADDITIONAL FEE. AS STATED IN THE STATEMENT OF ADMINISTRATIVE ACTION TO THE LEGISLATION IMPLEMENTING NAFTA, CHAPTER 16, SELF-EMPLOYMENT IS SPECIFICALLY PRECLUDED FOR THE "TN" CLASSIFICATION. EFFECTIVE JANUARY 1, 1994, SUCH PROFESSIONALS ARE NOT AUTHORIZED TO ENGAGE IN SELF-EMPLOYMENT IN THIS COUNTRY. IF THE APPLICANT IS A SELF-EMPLOYED PROFESSIONAL, THE REQUEST FOR EXTENSION IS TO BE DENIED AND THE APPLICANT IS TO BE GRANTED 30 DAYS TO VOLUNTARILY DEPART FROM THE UNITED STATES AND THE APPLICANT IS TO BE ADVISED THAT OTHER NONIMMIGRANT CLASSIFICATIONS MAY BE SUITABLE TO PERMIT THE DEVELOPMENT AND DIRECTION OF A BUSINESS INVESTMENT IN THE UNITED STATES. IF THE CANADIAN CITIZEN PREVIOUSLY ADMITTED AS A PROFESSIONAL UNDER THE PROVISIONS OF THE UNITED STATES--CANADA FREE TRADE AGREEMENT PROCEEDS OUTSIDE THE UNITED STATES PRIOR TO

THE EXPIRATION OF THE AUTHORIZED PERIOD OF ADMISSION, AND THEREAFTER SAID CANADIAN CITIZEN SEEKS READMISSION TO THE UNITED STATES, THE CANADIAN CITIZEN IS TO BE QUESTIONED REGARDING HIS OR HER EMPLOYMENT AND MUST PRESENT AN UNEXPIRED FORM 1-94 OR AN 1-797 OR OTHER ACCEPTABLE EVIDENCE REFLECTING THE GRANTING OF AN APPLICATION FOR EXTENSION OF TEMPORARY STAY. IF THE APPLICANT FOR READMISSION IS CONTINUING EMPLOYMENT WITH THE SAME EMPLOYER FOR WHICH HE OR SHE WAS LAST AUTHORIZED TO RENDER PROFESSIONAL SERVICES, SUCH PROFESSIONALS SHALL BE REQUIRED TO SURRENDER THEIR OLD FORM 1-94 INDICATING ADMISSION IN TC CLASSIFICATION. UPON SURRENDER OF THE OLD FORM 1-94, SUCH PROFESSIONAL WILL BE ISSUED A NEW FORM 1-94 BEARING THE LEGEND "MULTIPLE ENTRY" AND INDICATING THAT HE OR SHE HAS BEEN READMITTED IN "TN" CLASSIFICATION. THE OLD FORM 1-94 CLASSIFYING THE APPLICANT AS A TC IS TO BE LIFTED AND A NEW FORM 1-94 CLASSIFYING THE APPLICANT AS A TN IS TO BE ISSUED. THE VALIDITY PERIOD OF THE NEWLY ISSUED FORM 1-94 IS TO CORRESPOND TO THE SAME DATE AS THAT ON THE ORIGINAL DOCUMENT WITHOUT THE COLLECTION OF A NEW FEE. IF THE CANADIAN CITIZEN IS NO LONGER IN POSSESSION OF THE FORM 1-94 PREVIOUSLY ISSUED GRANTING SAID CANADIAN CITIZEN PROFESSIONAL "TC" STATUS AND THE PERIOD OF INITIAL ADMISSION HAS NOT LAPSED, HE OR SHE SHALL PRESENT SUITABLE ALTERNATIVE EVIDENCE THEREOF. IF, DURING THE INSPECTION PROCESS, THE INSPECTING OFFICER FINDS THAT THE APPLICANT IS A SELF-EMPLOYED PROFESSIONAL, THE FORM 1-94 IS TO BE LIFTED AND THE APPLICANT IS TO BE ADMITTED AS A VISITOR FOR BUSINESS FOR SUFFICIENT TIME TO SETTLE HIS AFFAIRS AND DEPART FROM THE UNITED STATES OR TO SEEK A CHANGE OF STATUS TO A SUITABLE NONIMMIGRANT CLASSIFICATION.

C. MEXICAN CITIZENS SEEKING TN CLASSIFICATION: UNDER NAFTA,
A MEXICAN CITIZEN MAY ALSO SEEK ADMISSION AS A PROFESSIONAL. THE MEXICAN CITIZEN WILL REQUIRE THE ISSUANCE OF A NONIMMIGRANT VISA ACCORDING CLASSIFICATION AS A PROFESSIONAL. IN ADDITION TO PRESENTING THE PASSPORT CONTAINING A VALID "TN" VISA, THE MEXICAN CITIZEN SEEKING ADMISSION MUST ALSO PRESENT A COPY OF THE UNITED STATES EMPLOYER'S STATEMENT WHICH ACCOMPANIED THE PETITION FOR TN CLASSIFICATION. PRIOR TO THE ISSUANCE OF THE NONIMMIGRANT VISA, THE MEXICAN CITIZEN SEEKING STAI"US AS A PROFESSIONAL WILL NEED TO BE THE BENEFICIARY OF AN APPROVED PETITION. PETITIONS FILED ON BEHALF OF MEXICAN CITIZENS SEEKING QUOTE TN UNQUOTE STATUS MAY NOT BE APPROVED UNLESS PROSPECTIVE EMPLOYERS HAVE PROPERLY FILED WITH THE DEPARTMENT OF LABOR AN LCA IN ACCORDANCE WITH SECTION 212(SMALL M) OF THE ACT IN THE CASE OF REGISTERED NURSES OR A LABOR ATTESTATION UNDER SECTION 212 (SMALL N) OF THE ACT IN THE CASE OF OTHER PROFESSIONALS. . THE UNITED STATES EMPLOYER WILL FORWARD FORM 1-129 ENTITLED PETITION FOR NONINIMIGRANT WORKER, TO THE NORTHERN SERVICE CENTER IN LINCOLN, NEBRASKA WITH THE REQUIRED LABOR ATTESTATION OR LABOR CONDITION STATEMENT AND SUCH OTHER EVIDENCE AS MAY BE REQUESTED. THE MEXICAN CITIZEN SEEKING STATUS AS A PROFESSIONAL THUS WILL BE REQUIRED TO HAVE HAD ALL DOCUMENTATION SUBMITTED PRIOR TO HIS OR HER ARRIVAL AT ANY PORT OF ENTRY.

D. EFFECT OF A STRIKE ON TN CLASSIFICATION:
IF THE SECRETARY OF LABOR HAS CERTIFIED TO OR OTHERWISEINFORMED THE COMMISSIONER THAT THERE IS A STRIKE OR OTHER LABOR DISPUTE IN PROGRESS AT THE SITE OF THE INTENDED UNITED STATES EMPLOYER, A DETERMINATION MUST BE MADE AS TO WHETHER OR NOT THE ADMISSION OF TH E APPLICANT MAY ADVERSELY AFFECT EITHER THE SETTLEMENT OF THE STRIKE OR OTHER LABOR DISPUTE OR.THE EMPLOYMENT OF ANY EMPLOYEE PRESENTLY INVOLVED IN THE DISPUTE. IF A DETERMINATION IS MADE THAT THE ADMISSION OF THE APPLICANT MAY HAVE SUCH AN EFFECT, THE APPLICANT IS TO BE REFUSED ADMISSION AND APPROPRIATE NOTIFICATION TO HEADQUARTERS, EXAMINATIONS BRANCH, MUST BE PROVIDED. SEE NAFTA IMPLEMENTATION CABLE 003.

E. ADMISSION PROCEDURES FOR BOTH CANADIAN AND MEXICAN TN PROFESSIONALS:
WHEN A DETERMINATION IS MADE TO ADMIT EITHER THE CANADIAN OR MEXICAN CITIZEN AS A PROFESSIONAL UNDER NAFTA, FORM 1-94 IS TO BE COMPLETELY EXECUTED AND MUST BE ENDORSED TO SHOW THE DATE AND PLACE OF ADMISSION AND THE PERIOD OF ADMISSION. IN ADDITION, BLOCK 18 ON THE BACK OF FORM 1-94 IS TO BE ENDORSED TO SHOW THE SPECIFIC OCCUPATION AS SET FORTH IN APPENDIX 1603.D.1 OF CHAPTER 16 OF NAFTA, THE NAME OF THE EMPLOYER MUST BE ENDORSED ON BOTH THE ARRIVAL AND DEPARTURE FORMS 1-94, AND THE

FORM 1-94 MUST BE ENDORSED TO SHOW "MULTIPLE ENTRY." THE INSPECTING OFFICER IS REQUIRED TO PLACE THE ABOVE INFORMATION ON FORM 1-94 IN ORDER THAT INS COMPLY WITH THE REPORTING REQUIREMENTS UNDER NAFTA.

DEPENDENTS OF NAFTA TEMPORARY ENTRANTS:
THE DEPENDENTS OF A VISITOR FOR BUSINESS, A TREATY TRADER OR INVESTOR, AN INTRACOMPANY TRANSFEREE, AND A PROFESSIONAL ARE NOT AUTHORIZED EMPLOYMENT BY VIRTUE OF THEIR DEPENDENT STATUS- IT MAY BE POSSIBLE FOR THE DEPENDENTS TO QUALIFY FOR ADMISSION IN A WORK-AUTHORIZED NONIMMIGRANT CLASSIFICATION IN THEIR OWN RIGHT.

IF THE DEPENDENT WAS PREVIOUSLY ADMITTED TO THE UNITED STATES AS A VISITOR FOR PLEASURE AS THE DEPENDENT OF A "TC" PROFESSIONAL UNDER THE UNITED STATES CANADA FREE TRADE AGREEMENT, THAT DEPENDENT MAY BE READMITTED TO THE UNITED STATES WITHOUT A VISA FOLLOWING A SHORT ABSENCE AS A "TD" IF THE DEPENDENT IS EITHER A CANADIAN CITIZEN OR FROM A BRITISH COMMONWEALTH COUNTRY HOLDING LANDED STATUS IN CANADA, AS LONG AS THE DEPENDENT PROVIDES SUFFICIENT EVIDENCE TO ENABLE THE INSPECTING OFFICER TO CONCLUDE THAT THEY ARE EITHER A CANADIAN CITIZEN OR HOLD LANDED STATUS IN CANADA FROM A BRITISH COMMONWEALTH COUNTRY AND THE PRINCIPAL APPLICANT IS NOT SELF-EMPLOYED IN THE UNITED STATES.

IF THE PRINCIPAL IS SELF-EMPLOYED, THE DEPENDENTS WOULD NOT BE ELIGIBLE FOR READMISSION FOLLOWING A BRIEF AND CASUAL ABSENCE. IF THE DEPENDENT IS NOT EXEMPT FROM THE REQUIREMENT OF PRESENTING A VALID AND UNEXPIRED NONIMMIGRANT VISA, THE DEPENDENT MUST EITHER PRESENT A VALID NONIMMIGRANT VISA CLASSIFYING THEM AS A "TD" OR ELSE HAVE OBTAINED A CHANGE OF NONIMMIGRANT STATUS TO "TD" AND MEET THE REQUIREMENTS FOR AUTOMATIC VISA REVALIDATION. IF ELIGIBLE, THE DEPENDENTS MAY BE GRANTED READMISSION AND ISSUED DOCUMENTATION ACCORDING THEM "TD" STATUS UP TO THE REMAINING PERIOD OF TIME HELD BY THE PRINCIPAL ALIEN PROFESSIONAL. THE DEPENDENTS OF A CANADIAN CITIZEN PROFESSIONAL ADMITTED UNDER THE PROVISIONS OF THE UNITED STATES-CANADA FREE TRADE AGREEMENT WILL HAVE THEIR STATUS AUTOMATICALLY CONVERTED FROM "B-2" TO "TD" WITHOUT THE PAYMENT OF AN ADDITIONAL FEE AS LONG AS THE PRINCIPAL ALIEN IS MAINTAINING STATUS AND IS NOT SELF-EMPLOYED. IF THE PRINCIPAL CANADIAN PROFESSIONAL ADMITTED PRIOR TO JANUARY 1, 1994 IS SELF-EMPLOYED, THE REQUEST FOR EXTENSION SUBMITTED BY THE DEPENDENTS IS TO BE DENIED AS STATUS IS DEPENDENT UPON THAT OF THE PRINCIPAL. THE DEPENDENTS ARE TO BE GRANTED THE SAME PERIOD OF VOLUNTARY DEPARTURE AS THE PRINCIPAL ALIEN. QUESTIONS REGARDING THESE POLICIES MAY BE DIRECTED TO HQADN/NONIMMIGRANT BRANCH AT (202) 514-5014.

THIS IS NAFTA IMPLEMENTATION CABLE 006

THE SERVICE PUBLISHED AN INTERIM REGULATION CONTROLLING THE IMPLEMENTATION OF THE TEMPORATY ENTRY PROCEDURES OF THE NORTH AMERICAN FREE TRADE AGREEMENT (NAFTA) ON DECEMBER 30, 1993 (58 FEDERAL REGISTER 69205). PUBLIC COMMENT WILL BE ACCEPTED UNTIL FEBRUARY 29, 1994. THIS INTERIM RULE SHOULD BE MADE AVAILABLE TO ALL PRSONNEL INVOLVED WITH THE PROCESSING OF IMMIGRATION BENEFITS UNDER NAFTA. NAFTA IMPLEMENTATION CABLE 005 DERIVES FROM THE INTERIM RULE.

THE DEPARTMENT OF LABOR/WAGE AND HOUR DIVISION PUBLISHED AN INTERIM RULE ON DECEMBER 30, 1993 (58 FEDERAL REGISTER 69226) TO IMPLEMENT PROCEDURAL REQUIREMENTS APPLICABLE TO THE TEMPORARY ENTRY OF NAFTA PROFESSIONALS FROM MEXICO. BASICALL, UNITED STATES EMPLOYES SEEKING TO ENGAGE THE PRORESSIONAL SERVICES OF A MEXICA CITIZEN PURSUAT TO CAHPTER 16 OF NAFTA SHALL FOLLOW PROCEDURES IMPLEMENTING SECION 212(n) OF THE IMMIGRATION AND NATIIONALITY ACT (LABOR CONDITION APPLICATION) AND SECTION 212(m) OF THE INA FOR REGISTERED NURSES.

THE DEPARTMENT OF STATE/VISA OFFICE PUBLISHED AN INTERIM RULE ON DECEMBER 28, 1993 (58 FEDERAL REGISTER 68526) TO IMPLEMENT CHAPTER 16 OF NAFTA. CONSULAR POSTS WILL BE AUTHORIZED TO ISSUE TN AND TD VISAS

QUESTIONS MAY BE DIRECTED TO HQADN/NONIMMIGRANT BRANCH ATTN: JACKIE BEDNARZ AT 202-514-5014.

NAFTA IMPLEMENTATION CABLE 007

THE PURPOSE OF THIS CABLE IS TO PROVIDE INFORMATION FROM THE DEPARTMENT OF STATE REGARDING NAFTFA VISA ISSUANCE:

THE DEPARTMENT OF STATE (DOS) ADVISES THAT POSTS ARE INSTRUCTED TO BEGIN ISSUING NAFTA-RELATED NONIMMIGRANT VISAS (NIV) IN THE FOLLOWING MANNER:

1. E-1, E-2, L, AND B-1 NIVS: POSTS WILL CONTINUE TO ISSUE NIV FOR TREATY TRADERS AND INVESTORS, INTRACOMPANY TRANSFEREES, AND BUSINESS VISITORS IN ACCORDANCE WITH EXISTING PROCEDURES. NAFTA LEGISLATION ENABLES MEXICAN CITIZEN TO SEEK CLASSIFICATION AS E-1/E-2 FOR THE FIRST TIME. CANADIAN CITIZENS ARE REPEAT ARE REQUIRED TO OBTAIN AN E-1/E-2 NIV FOR ADMISSION TO THE UNITED STATES.

2. TN PROFESSIONAL NIVS AND TD DEPENDENT NIVS: DOS ADVISES THAT NECESSARY SOFTWARE CHANGES WILL NOT BE COMPLETED FOR APPROXIMATELY SIX MONTHS TO ENABLE POSTS EQUIPPED TO ISSUED MACHINE READABLE VISAS (MRVS) THE CAPABILITY TO ISSUE TN OR TD NIVS. IN THE MEANWHILE, MRV POSTS WILL ISSUE N-8 NIVS TO QUALIFIED MEXICAN OR CANADIAN APPLICANTS FOR TN STATUS AND N-9 NIVS TO QUALIFIED APPLICANTS SEEKING TO CLASSIFICATION. DOS HAS INSTRUCTED MRV POSTS TO ANNOTATE THE N-8 AND N-9 NIVS WITH THE FOLLOWING: "ADMIT NAFTA TN BY N-8" OR "ADMIT NAFTA TD BY N-9". N-8 AND N-9 NIVS FOR NAFTA APPLICANTS WILL BE ANNOTATED FURTHER WITH THE NAFTA OCCUPATION OF THE TN AND, IN THE CASE OF MEXICAN TN APPLICANTS, THE RECEIPT NUMBER OF THE APPROVED PETITION FROM THE NORTHERN SERVICE CENTER. NOTE THAT POSTS MAY STILL USE THE N-8 AND N-9 CLASSIFICATIONS FOR THEIR ORIGINAL PURPOSE TO DESIGNATE DEPENDENTS OF SK SPECIAL IMMIGRANTS. INS OFFICERS WILL BE ABLE TO DISTINGUISH BETWEEN THE TWO USES OF THE CLASSIFICATIONS BY THE ANNOTATION. DOS FURTHER ADVISES THAT POSTS EQUIPPED TO ISSUE BURROUGHS NIVS WILL INSERT THE TN OR TD CLASSIFICATION SYMBOL ON THE NIV AND ANNOTATE WITH THE NAFTA OCCUPATION AND, IN THE CASE OF A MEXICAN TN APPLICANT, RECEIPT NUMBER OF THE APPROVED PETITION.

3. FOR YOUR READY REFERENCE, DOS PROVIDED THE NIV ISSUING CAPABILITIES OF POSTS LOCATED IN CANADA AND MEXICO. THIS LISTING IS SUBJECT TO CHANGE: CANADIAN POSTS- MONTREAL AND TORONTO ARE MRV POSTS. VANCOUVER, CALGARY, OTTAWA, QUEBEC, AND HALIFAX ARE BURROUGHS POSTS.

MEXICAN POSTS- MEXICO CITY, HERMOSILLO, TIJUANA, AND CIUDAD JUAREZ ARE MRV POSTS. MONTERREY, GUADALAJARA, MATAMOROS, AND MERIDA ARE BURROUGHS POSTS.

4. POE PROCESSING. ALIENS IN POSSESSION OF N-8 OR N-9 NAFTA ANNOTATED NIVS WHO ARE OTHERWISE ADMISSIBLE TO THE UNITED STATES SHALL BE ISSUED FORM 1-94 AS TN OR TD RESPECTIVELY. ALIENS IN POSSESSION OF A BURROUGHS TYPE NIV WHO ARE OTHERWISE ADMISSIBLE SHALL BE ISSUED FORM I-94 AS TN OR TD AS NOTED ON THE NIV. ON THE REVERSE SIDE OF THE 1-94, BLOCK 18 RELATING TO THE OCCUPATION SHALL BE ANNOTATED WITH THE NAFTA OCCUPATION OF THE TN AND THE NAME OF THE EMPLOYER MUST BE ANNOTATED ON THE REVERSE SIDE OF BOTH THE ARRIVAL AND DEPARTURE PORTION OF THE I94.

QUESTIONS REGARDING THIS INSTRUCTION MAY BE ADDRESSED TO HQADN/NONIMMIGRANT BRANCH, JACKIE BEDNARZ, AT 202-5145014.

NAFTA IMPLEMENTATION CABLE 008.

SEVERAL QUESTI0NS HAVE BEEN RAISED REGARDING THE CONCEPT OF "SELF EMPLOYMENT" ASSOCIATED WITH THE NAFTA PROFESSI0NAL (TN) CLASSTFICATION. HEADQUARTERS ACKNOWLEDGES THE IMPORTANCE OF ADDRESSING THIS CONCEPT IN GREATER DETAIL TO ENSURE UNIFORM APPLICATION OF THE TN PROVISIONS. HOWEVER, THE TRILATERAL NATURE OF THE NAFTA ENTRY PROVISIONS COUPLED WITH THE COMPLEXITY OF THE ISSUE DEMAND CONCERTED STUDY BY CANADIAN, MEXICAN, AND UNITED STATES OFFICIALS.

ARTICLE 1605 OF NAFTA ESTABLISHES A TEMPORARY ENTRY WORKING GROUP COMPRISED OF IMMIGRATION OFFICIALS FROM CANADA, MEXICO, AND THE UNITED STATES. THE FIRST MEETING OF THIS WORKING GROUP CONVENED IN MARCH 1994 IN WASHINGTON AND THE AGENDA INCLUDED THE ISSUE OF "SELF EMPLOYMENT" OF NAFTA PROFESSIONALS CANADA, MEXICO, AND THE UNITED STATES HAVE UNDERTAKEN COMMITMENTS TO FACILITATE ENTRY OF BUSINESS PERSONS ON A RECIPROCAL BASIS AND IT IS IMPORTANT THAT THE PROVISIONS OF CHAPTER 16 ARE APPLIED BY THE THREE PARTIES ON A RECIPROCAL BASIS UNTIL FINAL RESOLUTION OF THIS ISSUE IS REACHED AMONG THE THREE PARTIES AND ADDITIONAL GUIDANCE CAN BE PROVIDED. HEADQUARTERS DRAWS CLOSE ATTENTION TO THE FOLLOWING:

1. THE STATEMENT OF ADMINISTRATIVE ACTION ACCOMPANYING THE IMPLEMENTING LEGISLATION FOR NAFTA CHAPTER 16, PAGE 178 OF THE STATEMENT OF ADMINISTRATIVE ACTION PROVIDES IN PERTINENT PART, "SECTION D OF ANNEX 1603, DOES NOT AUTHORIZE A PROFESSIONAL TO ESTABLISH A BUSINESS OR PRACTICE IN THE UNITED STATES IN WHICH THE PROFESSIONAL WILL BE SELF-EMPLOYED".

2. CITIZENSHIP AND IMMIGRATION CANADA OPERATIONS MEMORANDUM: CITIZENSHIP AND IMMIGRATION CANADA INSTRUCTIONS TO ITS FIELD OFFICERS INSTRUCTS THAT THE PURPOSE OF ENT RY OF NAFTA PROFESSIONALS INTO CANADA MUST BE TO PROVIDE PRE-ARRANGED SERVICES TO A CANADIAN ENTERPRISE.

3. NAFTA: ANNEX 1603 SECTION B - TRADERS AND INVESTORS: INVESTMENT OPPORTUNITIES BY CITIZENS OF NAFTA PARTIES IS RECOGNIZED IN SECTION B OF ANNEX 1603. THE INS REGULATIONS REFLECT THAT A CANADIAN OR MEXTCAN CITIZEN SEEKING TO DIRECT AND DEVELOP AN INVESTMENT IN THE UNITED STATES MAY APPLY FOR CLASSIFICATION AS AN E-2 NONIMMIGRANT.

4. NAFTA: ANNEX 1603 SECTION C - INTRACOMPANY TRANSFEREES:
THE AUTHORITY OF THE UNITED STATES TO CARRY OUT THE INTRACOMPANY TRANSFEREE COMMITMENTS IN ANNEX 1603 IS FOUND IN EXISTING STATUTE AND REGULATION CONTROLLING THE L NONIMMIGRANT CLASSIFICATION, THE REGULATIONS AT 8 CFR 214.2 (SMALL L) SET FORTH THE REQUIREMENTS TO ESTABLISH A NEW OFFICE IN THE UNITED STATES. A CANADIAN OR MEXICAN CITIZEN WHO QUALIFIES FOR L CLASSIFICATION UNDER THESE REGULATIONS MAY BE ADMISSIBLE TO OPEN A NEW BUSINESS. NONE OF THE ABOVE REFERENCES PRECLUDES A CITIZEN OF CANADA OR MEXICO WHO IS SELF-EMPLOYED OUTSIDE OF THE UNITED STATES FROM SEEKING ENTRY TO THE UNITED STATES TO ENGAGE IN A PRE-ARRANGED ACTIVITY AT THE PROFESSIONAL *LEVEL* LISTED IN APPENDIX 1603.D.1 *FOR AN* ENTERPRISE OWNED BY A PERSON OR ENTITY OTHER THAN HIM OR HERSELF WHICH IS LOCATED IN THE UNITED STATES**.** ADDITIONAL GUIDANCE WILL BE PROVIDED AS IT IS DEVELOPED THROUGH THE TEMPORARY ENTRY WORKING GROUP.

Signed: ACTING EXECUTIVE ASSOCIATE COMMISSIONER FOR OPERATIONS

NAFTA IMPLEMENTATION CABLE 009.

THE PURPOSE OF THIS CABLE IS TO ALERT FIELD OFFICE PERSONNEL THAT AN ARTICLE ENTITLED 'IMMIGRATION PROVISIONS OF THE NORTH AMERICAN FREE TRADE AGREEMENT " WAS PUBLISHED IN IMMIGRATION BRIEFINGS, NUMBER 94, DATED MARCH 1994. THE ARTICLE REFERS TO PRELIMINARY DRAFT OPERATIONS INSTRUCTIONS REGARDING NAFTA. THE REFERENCE IS INACCURATE. INS HEADQUARTERS HAS PROVIDED NO PRELIMINARY DRAFT OPERATIONS INSTRUCTIONS TO ANY SOURCE AND HAS NO KNOWLEDGE OF SUCH PRELIMINARY DRAFT OPERATIONS. CURRENTLY, THE INS AUTHORITY TO IMPLEMENT THE TEMPORARY ENTRY PROVISIONS OF NAFTA ARE FOUND UNDER STATUTE (THE NORTH AMERICAN FREE TRADE IMPLEMENTATION ACT, PUBLIC LAW 103-182) AND UNDER REGULATION AS PUBLISHED AS AN INTERIM RULE IN THE FEDERAL REGISTER ON DECEMBER 30, 1993 (58 FEDERAL REGISTER 69202). OPERATIONS INSTRUCTIONS WILL BE DISSEMINATED AFTER PROMULGATION OF A FINAL RULE. QUESTIONS CONCERNING NAFTA IMPLEMENTATION POLICY MAY BE DIRECTED TO HEADQUARTERS ADJUDICATIONS, NONIMMIGRANT BRANCH, AT 202-514-5014.

NAFTA IMPLEMENTATION CABLE 010.

THE OFFICE OF THE UNITED STATES TRADE REPRESENTATIVES HAS CONFIRMED THAT THE TERMS AND COVERAGE UNDER THE NORTH AMERICAN FREE TRADE AGREEMENT (NAFTA) SHALL NOT APPLY IN RESPECT TO GUAM, THE COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS, AMERICAN SAMOA AND THE UNITED STATES VIRGIN ISLANDS. REFERENCES IN NAFTA TO A STATE OF THE UNITED STATES SHALL BE DEEMED TO REFER ALSO TO THE DISTRICT OF COLUMBIA AND THE COMMONWEALTH OF PUERTO RICO.

ACCORDINGLY, CHAPTER 16 OF NAFTA, TEMPORARY ENTRY, SHOULD NOT BE APPLIED TO CITIZENS OF MEXICO OR CANADA SEEKING ENTRY TO GUAM, THE NORTHERN MAIRANA ISLANDS, AMERICAN SAMOA, OR THE UNITED STATES VIRGIN ISLANDS.

QUESTIONS ABOUT THE SCOPE OF COVERAGE OF NAFTA MAY BE DIRECTED TO HEADQUARTERS ADJUDICATIONS, NONIMMIGRANT BRANCH, AT (202)-514-5014.

NAFTA IMPLEMENTATION WIRE 011

I. STRIKEBREAKER PROVISIONS-GENERAL.

CHAPTER 16 OF THE NORTH AMERICAN FREE TRADE AGREEMENT (NAFTA) INCLUDES AN IMPORTANT SAFEGUARD FOR THE DOMESTIC LABOR FORCE OF EACH NAFTA COUTNRY WHICH THE UNITED STATES-CANADA FREE-TRADE AGREEMENT DID NOT CONTAIN. THIS PROVISION UNDER ARTICLE 1603 ALLOWS EACH NAFTA COUNTRY TO REFUSE TO ISSUE AN IMMIGRATION DOCUMENT AUTHORIZING EMPLOYMENT WHERE THE TEMPORARY ENTRY OF THE NAFTA BUSINESS PERSON MIGHT AFFECT ADVERSELY THE OUTCOME OF A LABOR DISPUTE OR THE EMPLOYMENT OF ANY WORKER INVOLVED IN SUCH A LABOR DISPUTE.

ENABLING LEGISLATION (THE NORTH AMERICAN FREE TRADE AGREEMENT IMPLEMENTATION ACT) AUTHORIZES THE UNITED STATES TO INVOKE THIS NAFTA PROVISION AT SECTION 214(SMALL J) OF THE IMMIGRATION AND NATIONALITY ACT.

SPECIFICALLY, THE PROVISION APPLIES TO CANADIAN AND MEXICAN CITIZENS SEEKING ENTRY TO THE UNITED STATES AS TRADERS AND INVESTORS (E-1 AND E-2), INTRACOMPANY TRANSFEREES (L-1), AND PROFESSIONALS (TN). THE UNITED STATES SHALL CARRY OUT THIS "STRIKEBREAKER PROVISION" AT THE TIME OF: 1. ADJUDICATION OF THE PETITION, WHERE REQUIRED, OR; 2. APPLICATION FOR NONIMMIGRANT VISA, WHERE REQUIRED, OR; 3. APPLICATION FOR ADMISSION AT A POE.

THE CURRENT REGULATIONS CONTROLLING THE E, L, AND TN CATEGORIES PROVIDE THAT THE SECRETARY OF LABOR SHALL CERTIFY TO OR OTHERWISE INFORM THE INS THAT A STRIKE OR OTHER LABOR-DISPUTE INVOLVING A WORK STOPPAGE IS IN PROGRESS, AND THAT THE TEMPORARY ENTRY OF THE CANADIAN OR MEXICAN CITIZEN IN SUCH NONIMMIGRANT CLASSIFICATION MAY AFFECT ADVERSELY THE SETTLEMENT OF ANY LABOR DISPUTE OR THE EMPLOYMENT OF ANY PERSON WHO IS INVOLVED IN SUCH DISPUTE. SUCH NOTIFICATION FROM THE DEPARTMENT OF LABOR MAY INCLUDE THE LOCATIONS AND OCCUPATIONS AFFECTED BY THE STRIKE.

BASED UPON SUCH NOTIFICATION OR CERTIFICATION OF THE SECRETARY OF LABOR AND AS PROVIDED AT 8 CFR 214.2(e), OR 8 CFR 214.2(l)(18), OR CFR 214.6(SMALL K), THE SERVICE SHALL DETERMINE IF THE TEMPORARY ENTRY OF THE APPLICANT MAY AFFECT ADVERSELY THE SETTLEMENT OF ANY LABOR DISPUTE OR THE EMPLOYMENT OF ANY PERSON WHO IS INVOLVED IN SUCH DISPUTE.

WRITTEN NOTIFICATION OF REFUSAL MUST BE PROVIDED TO (1) THE NAFTA BUSINESS PERSON AND (2) THE NAFTA COUNTRY OF WHICH THE BUSINESS PERSON IS A CITIZEN.

II. PROCEDURES TO BE FOLLOWED

THIS WIRE PROVIDES GUIDANCE TO BE FOLLOWED IN ALL CASES WHERE NAFTA BUSINESS PERSONS ARE REFUSED CLASSIFICATION OR ADMISSION AS E-1, E-2, L-1, OR TN BASED ON ARTICLE 1603 OF NAFTA.

DEPENDENT FAMILY MEMBERS OF NAFTA BUSINESS PERSONS (E, L, AND TN) ARE NOT DIRECTLY SUBJECT TO THE PROVISIONS IN AS MUCH AS THEY ARE NOT AUTHORIZED TO WORK IN THE UNITED STATES INCIDENT TO THEIR DEPENDENT STATUS. HOWEVER, THEY ARE AFFECTED INDIRECTLY, AS THEY ARE CLASSIFIABLE AS E-1 OR E-2, L-2, AND TD SOLELY ON THE BASIS OF CLASSIFICATION OF THE PRINCIPAL ALIEN. WHERE A PRINCIPAL ALIEN IS REFUSED CLASSIFICATION UNDER NAFTA, THE DEPENDENT FAMILY MEMBERS ARE NOT CLASSIFIABLE AS DEPENDENTS.

FOR PURPOSES OF THIS PROVISION, THE EMPLOYMENT AUTHORIZATION DOCUMENT REFERS TO EITHER FORM 1-129, CLASSIFYING THE ALIEN AS L-1, E, OR TN, OR THE FORM 1-94, ARRIVAL-DEPARTURE RECORD.

STEPS TO BE TAKEN BY THE POE OR SERVICE CENTER:

1. NOTIFY IN WRITING THE APPLICANT OF THE REASONS FOR REFUSAL (THIS CAN BE ROUTINE INS NOTICE OF DENIAL AT A SERVICE CENTER, FORM 1-797, OR THE ROUTINE NOTICE OF REFUSAL AT THE POE).
2. NOTIFY HEADQUARTERS ADJUDICATIONS, CHIEF, NONIMMIGRANT BRANCH, IN WRITING (FAX 202-514-5014) OF THE REFUSAL. THE FOLLOWING INFORMATION MUST BE PROVIDED:

A) NAME AND ANY KNOWN ADDRESS OF THE BUSINESS PERSON
B) CITIZENSHIPP OF BUSINESS PERSON
C) DATE AND PLACE OF REFUSAL OF DOCUMENT AUTHORIZING EMPLOYMENT (1-94)
D) NAME AND ADDRESS OF PROSPECTIVE EMPLOYER
E) POSITION TO BE OCCUPIED
F) REQUESTED DURATION OF STAY
G) REASONS FOR REFUSAL
H) REFERENCE TO APPROPRIATE STATUTORY OR REGULATORY ACTHORITY FOR REFUSAL (IF APPLICABLE)
I) STATEMENT INDICATING THAT THE BUSINESS PERSON WAS INFORMED IN WRITING OF THE REFUSAL AND THE REASONS FOR THE REFUSAL.

HQADN SHALL NOTIFY IN WRITING THE APPROPRIATE GOVERNMENT OFFICIALS WHOSE CITIZEN WAS REFUSED AN EMPLOYMENT AUTHORIZATION DOCUMENT PURSUANT TO THIS FTA PROVISION.

III. INTENT OF PROVISION.

ARTICLE 1603 ESTABLISHED THIS SAFEGUARD TO BE CONSISTENT WITH THE OVERALL OBJECTIVES OF CHAPTER 16: RECOGNITION OF THE PREFERENTIAL TRADING RELATIONSHIP BETWEEN THE PARTIES THROUGH FACILITATED ENTRY PROCEDURES OF BUSINESS PERSONS WHILE ENSURING BORDER SECURITY AND PROTECTION OF THE DOMESTIC LABOR FORCE. THE APPLICATION OF THIS QUOTE STRIKEBREAKER PROVISION UNQUOTE SHALL BE MADE ON A CASEBY-CASE BASIS IN ORDER TO DETERMINE WHETHER THE NAFTA BUSINESS PERSONS ENTRY WOULDAFFECT ADVERSELY STRIKE OR OTHER LABOR DISPUTE. KEEP IN MIND THAT EXCECUTIVES, MANAGERS, AND OTHER SPECIALIZED EMPLOYEES OF A BUSINESS MAY BE ADMISSIBLE TO ENGAGE IN ACTIVITIES WHICH DO NOT AFFECT ADVERSELY A LABOR DISPUTE.

QUESTIONS CONCERNING THIS NAFTA PROVISION MAY BE DIRECTED THROUGH APPROPRIATE CHANNELS TO HQADN, NONIMMIGRANT BRANCH, AT 202-514-5014.
HQOPS

HQ 70/23.1-P HQ 70/21.1.14-P
HQ 50/5.1296 ACT.041

Instructions on the Processing of Certain Foreign Health Care Workers: IIRIRA Section 343

June 6, 1997

All District Directors
All Officers-in-Charge
All Service Center Directors
All Regional Directors
Office of Field Operations
All Regional Counsels
All District Counsels
Director of Training- Artesia
Director of Training- Glynco

Office of Examinations
(HQEXM)

The purpose of this memorandum is to provide you with additional information with respect to the processing of foreign health care workers affected by section 343 of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA). As you know, this office published a memorandum dated January 28, 1997, which provided initial guidance with respect to the implementation of section 343. This memorandum updates certain portions of the January 28 memorandum.

Affected Occupations

Effective immediately, the only health care occupations covered by 212(a)(5)(C) of the Act, as added by section 343 of IIRIRA are the following: nurses, physical therapists, occupational, therapists, speech language pathologists, medical technologist, medical technicians and physician assistants. An alien coming to the United States to perform health care services in any other occupation, either as an immigrant or a nonimmigrant, is not subject to a determination of admissibility under INA 212(a)(5)(C). You will be notified as additional occupations are added to this listing. This is a significant change from the January 28 memorandum which applied the statutory provision to ail health care workers. This memorandum limits the applicability of the statutory provision to the occupations listed in the conference report.

Nonimmigrants-Waiver of Inadmissibility

The January 28 memorandum indicated that the INS and the Department of States (DOS) had agreed to a blanket waiver of inadmissibility under section 212 (a)(5)(C) for nonimmigrant health care workers lacking the required CGFNS certificate or other certification pursuant to section 212(d)(3)(A) until such time as appropriate certification procedures have been put in place. The Service will also waive inadmissibility under section 212(a)(5)(C) pursuant to section 212(d)(3)(B) for aliens already in possession of nonimmigrant visas or who are visa-exempt aliens, including Canadians applying for admission as TNs. Under this blanket waiver, Service officers at U.S. Ports-of-Entry and foreign pre-clearance sites may-accept applications for waivers. Any otherwise admissible nonimmigrant health-care worker who receives a waiver for section 212(a)(5)(C) inadmissibility shall be authorized admission into the United States with a single-entry Form 1-94 with a validity date of six (6) months. Otherwise admissible dependents covered by the blanket policy will also be authorized admission into the United States for a time coinciding with that of the principal alien.

Field Offices are hereby notified that this waiver should be granted without the filing of a formal application or fee. Further, any otherwise admissible nonimmigrant health-care worker granted a waiver of this provision shall be authorized admission into the United States with a single-entry Form 1-94 valid for six (6) months except in the case of aliens who reside in and commute from contiguous territories. These aliens shall be issued a multiple-entry Form 1-94 valid for six (6) months.

This procedure will be effective until further notice.
Nonimmigrants-Change of Status or Extensions of Temporary Stay

Applicants for a change of nonimmigrant status or for an extension of temporary stay under a nonimmigrant visa category involving a health care occupation may also be granted a waiver of 212(a)(5)(C) inadmissibility, without form or fee, and may be granted an extension of stay of 1 year or for the requested period of the extension of time if less than I year.

Immigrants-General

Service officers are reminded that the waiver procedures discussed above relate solely to nonimmigrant aliens and do not-apply to immigrant aliens. The statutory authority to grant waivers under 212(d)(3) of the Act applies to aliens seeking classification/admission as nonimmigrant aliens. Pursuant to the instructions contained in the January 28 memorandum with respect to the processing of immigrant health care workers, applications-for adjustment of status filed by aliens who are the beneficiaries of approved employment-based immigrant petitions to work as health care workers must be held-in abeyance until further notice.

An interagency task force has been established for the purpose of devising a procedure to implement section 343. The Service will issue a rule in the near future to implement section 343 of IERIRA. You will be advised of any further developments as soon as they occur.

Nurses

In part M of the January 28 memorandum, the INS discussed the certification requirements for registered nurses. The memorandum implied that a nurse could adjust status in the United States if the nurse obtained a certification from the Commission on Foreign Nursing Schools (CGFNS). Unfortunately, the certification contemplated in the memorandum has not been developed by the CGFNS. The current CGFNS certificate is not equivalent to the certification discussed in section 343 of IIRIRA. There are at least two differences between the two certifications. As a result a nurse may not adjust status in the United State or be admitted to the United States on an immigrant visa until such time as the nurse obtains a certificate issued under the provisions of section 343 of IIRIRA. Nurses seeking entry into the United States as nonimmigrant aliens should be processed pursuant to the instructions contained in the section of this memorandum discussing waivers.

Service officers should not advise an alien to obtain a certificate from CGFNS since the current certificate does not overcome this ground of inadmissibility. This provision applies to both aliens educated in the United States and abroad.

For further information, please contact Adjudications Officer John W. Brown at 202-514-3240.

Louis D. Crocetti, Jr.
Associate Commissioner

U.S. Department of Justice
Immigration and Naturalization Service
425 1 Street NW
Washington, , DC 2036

APR 30, 1998

HQ 70/23.1P HQ 70/21.1.14-P
HQ 50/5-12 96 ACT.069

MEMORANDUM FOR: All District Directors
All Officers-in-Charge
All Service Center Directors
Ail Regional Directors
All Regional Counsels
All District Counsels
Director of Training-Artesia, NM
Director of Training- Glynco, GA

FROM: Joseph R. Greene
Acting Associate Commissioner
Programs

SUBJECT: **Temporary Admission of Foreign Health Care Workers**

The purpose of this memorandum is to clarify the procedure for the temporary admission to the United States of nonimmigrant foreign health care workers prior to the publication of regulations implementing section 343 of the Illegal Immigration Reform and immigrant Responsibility Act of 1996 (IIRJPA).

This is the fourth memorandum written concerning this particular issue. The prior memoranda were dated January 28, 1997, June 6, 1997, and August 2-7, 1997 respectively. Copies of the prior memoranda are attached for your reference.

The January 28 memorandum provided that the Immigration and Naturalization Service (INS) and the Department of State (DOS) agreed to exercise discretion pursuant to section 212(d)(3) of the Immigration and Nationality Act in granting a blanket waiver *of* inadmissibility under section 212 (a)(5)(C) for nonimmigrant health care workers lacking the required certificate until such time as appropriate certification procedures *have* been put in place. The Service also waived inadmissibility under section 212(a)(5)(C) pursuant to section 212(d)(3)(3) for aliens already in possession of nonimmigrant visas or who are visa-exempt aliens, including Canadians applying for admission as TNs.

The memorandum went on to state that any otherwise admissible nonimmigrant health *care worker who* receives a waiver for section 212(a)(5)(C) inadmissibility, shall be authorized admission into the United States with a single-entry Form 1-94 with a validity date of six (6) months. 0therwise admissible dependents covered by the blanket policy will also be authorized admission into the United States for a time consistent with that of the principal alien.

The June 6 memorandum provided additional guidance. The memorandum notified Field Offices that the waiver should be granted without the filing of a formal application or fee. Further, that memorandum indicated that any otherwise admissible nonimmigrant health care worker granted a waiver of this provision shall be authorized admission into the United States with a single-entry Form 1-94 valid for six (6) months <u>except in the case of aliens who reside in and commute from contiguous territories. These aliens shall be issued a multiple-entry Form I-94 valid for six (6) months.</u>

This last instruction has created a number of problems at various ports of entry, the northern border. Effective immediately, any foreign health care worker granted a Waiver of the provision described in section 212(a)(5)(C) of the Act, shall be -issued a multiple entry Form 1-94 valid for six months regardless of his or her place of residence. An alien issued an 1-94 under these circumstances may make application for admission to the United States during the validity period of the previously issued 1-94 without requesting a new waiver. TN nonimmigrant aliens are not required to pay the admission fee described in 8 CFR 21 4.6(f) when applying for admission during the validity period of the previously issued 1-94. Until further notice, there is no limit to the number of waivers which a nonimmigrant alien can be granted under section 212(d)(3) of the INA.

Finally, any foreign health care worker granted a waiver of the provision described in section, 212(a)(5)(C) of the Act is eligible to receive an extension of temporary stay after the expiration of the initial 6 month period of admission. There is no limit on the number of extensions of stay which a nonimmigrant alien may be granted provided, of course, the alien is otherwise for an extension of stay.

For further information, please contact Adjudications Officer John W. Brown at 202514-324C.

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DEPARTMENT OF JUSTICE

Immigration and Naturalization Service

8 CFR Parts 212 and 245

[INS-1879-97]

RIN 1115-AE73

Interim Procedures for Certain Health Care Workers

AGENCY: Immigration and Naturalization Service, Justice.

ACTION: Interim rule with request for comments.

SUMMARY: This interim rule, which has been drafted in consultation with the U.S. Department of Health and Human Services (HHS), amends regulations of the Immigration and Naturalization Service (Service or INS) in order to implement, on a temporary basis, certain portions of section 343 of the Illegal Immigration Reform and Immigrant Responsibility act of 1996 (IIRIRA) as they relate to prospective immigrants. Section 343, which was codified at section 212(a)(5)(C) of the Immigration and Nationality Act (Act or INA), provides that aliens coming to the United States to perform labor in covered health care occupations (other than as a physician) are inadmissible unless they present a certificate relating to their education, qualifications, and English language proficiency. This requirement is intended to ensure that aliens possess proficiency in the skills that affect the provision of health care services in the United States. This rule establishes a temporary mechanism to allow applicants for immigrant visas or adjustment of status in the fields of nursing and occupational therapy to satisfy the requirements of section 343 on a provisional basis. The Service expects to publish a proposed rule in the near future which
will implement in full the provisions of section 343.

DATES: Effective date: This rule is effective December 14, 1998.

Comment date: Written comments must be submitted on or before February 11, 1999.

ADDRESSES: Please submit written comments, in triplicate, to the Director, Policy Directives and Instructions Branch, Immigration and Naturalization Service, 425 I Street NW., Room 5307, Washington, DC 20536. To ensure proper handling, please reference the INS No. 1879-97 on your correspondence. Comments are available for public inspection at the above address by calling (202) 514-3048 to arrange for an appointment.

FOR FURTHER INFORMATION CONTACT: John W. Brown, Adjudications Officer, Benefits Division, Immigration and Naturalization Service, 425 I Street NW., Room 3214, Washington, DC 20536, telephone (202) 514-3240.

SUPPLEMENTARY INFORMATION: On September 30, 1996, President Clinton signed the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), Pub. L. 104-208. Section 343 of IIRIRA created a new ground of inadmissibility at section 212(a)(5)(C) of the Act for aliens coming to the United States to perform labor in certain health care occupations. Pursuant to section 343, any alien coming to the United States for the purpose of performing labor as a health care worker, other than as a physician, is inadmissible unless the alien presents to the consular officer, or, in the case or adjustment of status, the Attorney General, a certificate from

the Commission on Graduates of Foreign Nursing Schools (CGFNS), or an equivalent independent credentialing organization approved by the Attorney General in consultation with the Secretary of HHS.

Under section 343, the certificate must verify that: (1) The alien's education, training, license, and experience meet all applicable statutory and regulatory requirements for admission into the United States under the classification specified in the application; are comparable with that required for an American health care worker; are authentic and, in the case of a license, the alien's license is unencumbered; (2) the alien has the level of competence in oral and written English considered by the Secretary of HHS, in consultation with the Secretary of Education (DoE), to be appropriate for health care work of the kind in which the alien will be engaged, as shown by an appropriate score on one or more nationally recognized, commercially available, standardized assessments of the applicants ability to speak and write English; and, finally, (3) if a majority of states licensing the profession in which the alien intends to work recognize a test predicting the alien's success on the profession's licensing or certification examination, the alien has passed such a test, or has passed such an examination.

Section 343 raises a number of important and difficult issues as to its scope and proper implementation and requires extensive coordination between the Service and other Federal agencies. Prior to the publication of this rule, the Service met with representatives of HHS, as well as the United States Trade Representative, the Department of Labor (DOL), the Department of State (DOS), the DoE, the Department of Commerce (DOC), the CGFNS, the National Board for Certification in Occupational Therapy (NBCOT), various professional organizations representing these health care occupations, and many other interested parties.

The Purpose of the Interim Rule

The purpose of this interim rule is to establish temporary procedures which will: (1) Allow the immigration of certain health care workers into the United States on a permanent basis in order to prevent the disruption of critical health care services to the public; (2) provide for the immigration of certain health care workers who were petitioned on a permanent basis prior to the enactment of IIRIRA; and (3) establish a temporary mechanism to ensure that nurses and occupational therapists immigrating to this country have education, experience, and training which are equivalent to a United States worker in a similar occupation.

This interim rule provides a temporary mechanism for implementing section 343 with respect to nurses and occupational therapists. Aliens who obtain a certificate in accordance with this interim rule will be deemed to have satisfied the education, training, and licensing requirements of section 343. Credentialing organizations verifying that an alien's education, training, license, and experience meet all applicable statutory and regulatory requirements for admission into the United States under the classification specified in the application are required to determine, to the best of their ability, whether the alien appears to be classifiable under section 203(b) of the Act. (The Service has substituted the term "admission" for the term "entry," in conformity with section 308(f) of Pub. L. 104-208 which amended the Act.) Although credentialing organizations are required to make certain verifications in accordance with this interim rule, the Service is not in any way deferring or delegating to the credentialing organizations the authority to make binding determinations regarding the alien's admissibility into the United States.

The decision to include nursing and occupational therapy in this interim rule was based on information from DOL that there is a sustained level of demand for foreign-trained workers in these two occupations. Moreover, organizations with an established track record in providing credentialing services exist for these two occupations. For the purposes of this interim rule, the Service finds that these two criteria allow the implementation of section 343 of IIRIRA on a temporary basis.

For the purposes of this interim rule, the term "sustained level of demand" means the presence of an existing demand for foreign health care workers in a particular occupation that is expected to continue in the foreseeable future.

The term "organizations with an established track record" means, for the purposes of this interim rule, an organization which has a record of issuing actual certificates, or documents similar to a certificate, that are generally accepted by the state regulatory bodies as certificates that an individual has met certain minimal qualifications.

The two organizations identified in this rule, the CGFNS for nurses and the NBCOT for occupational therapists, are organizations which have been issuing certificates, or similar documents, for a period of years

and which have attained credibility with the various professional and regulatory bodies which deal with the two occupations listed in this rule. Therefore, the NBCOT and the CGFNS both meet the two criteria identified for inclusion in this interim rule. The Service has not identified other credentialing organizations which have an established track record in providing credentialing services for these two occupations other than the two organizations discussed in this rule.

During the period of time that the interim rule is in effect, the Service will entertain any requests to issue certificates from an organization which demonstrates a proven track record in issuing certificates for a health care occupation and where there is a sustained level of demand for foreign-trained individuals. Such organizations are encouraged to contact the Service at the address provided earlier in the rule.

The implementation of this interim rule on a limited basis also allows the Service additional time to obtain comment on a number of issues which extend beyond near-term immigration issues in nursing and occupational therapy to other policy concerns, such as the overall impact on the public health and the domestic labor market for a variety of health care occupations.

Given the complex nature of the requirements of section 343, the Service will publish a proposed rule in the near future which will, among other things, list all the occupations covered by section 343, further describe the procedures for obtaining and presenting the certificates, describe the standards required for an organization to obtain approval to issue certificates, and describe the procedure whereby an organization's authorization can be terminated by the Service. The Service believes that major issues such as the scope of covered occupations, the standards for obtaining authorization to issue certificates, and the procedure for termination of an organization's authority to issue certificates are better addressed through proposed rule making. The Service expects to publish the proposed rule as soon as possible, within approximately 1 year.

The Service's Temporary Policies and Their Effect

The Service has issued a number of temporary policy guidelines which will continue to apply while the Service develops a rule fully implementing section 343.

Occupations Covered

The current policy of the Service is that section 343 is applicable only to the seven occupations listed in the Joint Explanatory Statement of the Committee of Conference published in the Congressional Record of September 24, 1996, Nos. 132-133, page H10900. The seven occupations are: Nursing, physical therapy, occupational therapy, speech language pathology, medical technology, medical technician, and physician's assistant.

Nonimmigrant Health Care Workers

In order to ensure that health care facilities remain fully staffed and are able to continue to provide the same level and quality of service to the United States public pending promulgation of a final rule, the Service and DOS have agreed to exercise authority under section 212 (d) (3) of the Act and temporarily waive the certification requirement of section 343 for aliens coming to the United States as nonimmigrant care workers. The Service and the DOS have agreed to extend from 6 months to 1 year the period for which such a waiver is granted. This policy will continue until a final rule is published which fully implements section 343.

Immigrant Health Care Workers

There is a two-step process for an alien to become a permanent resident or enter the United States as an immigrant to perform labor as a health care worker. In general, a United States employer must file a Form I-140, Immigrant Petition for Alien Worker, with the Service with the appropriate supporting documentation. The Form I-140 petition establishes the alien's eligibility for the employment-based classification sought. Once the Form I-140 petition is approved by the Service, the alien may apply for an immigrant visa abroad at a consular post or apply for adjustment of status to that of a lawful permanent resident by filing a Form I-485, Application to Register Permanent Resident of Adjust Status in the United States.

The Service has no statutory authority to waive the requirements of section 343 for aliens coming to the United States permanently as immigrants to perform health care services in this country. Thus, the Service has adopted an interim policy whereby, instead of denying the applications for adjustment of status filed by

uncertified aliens seeking to perform labor on a permanent basis in covered health care occupation, such applications are held in abeyance pending promulgation of the implementing regulations. Similarly, the DOS has no statutory authority to issue immigrant visas to such uncertified aliens, and has held visa applications from such persons in abeyance as well. As a result, the number of applications for adjustment of status which have been held in abeyance and the number of aliens unable to obtain immigrant visas has grown to significant proportions. The four service centers have advised that they are holding in excess of 11,000 such adjustment cases in abeyance.

Who Is Affected by the Rule--§ 212.15(a), (b) and (c) This interim rule will apply to aliens coming to the United States as immigrants and to aliens applying for permanent residency to perform labor in the occupations of nurse and occupational therapist. This interim rule does not apply to any other health care occupation. The applications of aliens seeking to engage permanently in any of the other five health care occupations, i.e., physical therapy, speech language pathology, medical technology, medical technician, and physician's assistant, listed in the Joint Explanatory Statement previously cited, will continue to be held in abeyance pending promulgation of a final regulation implementing section 343.

This interim rule does not affect the admission of nonimmigrant aliens coming to the United States to work temporarily in any health care field. Nonimmigrants in the fields or nursing, occupational therapy, physical therapy, speech language pathology, medical technology, medical technician, or physician's assistant will continue to be admitted consistent with the Service's waiver policy previously described.

At this time, the Service has not extended the application of section 343 beyond the seven occupations listed in the Joint Explanatory Statement of the Committee of Conference. The Service, in consultation with HHS, may include additional health care occupations in its forthcoming proposed rule and expects to seek public comment on whether such occupations should be affected by section 343. Until a final regulation implementing section 343 is promulgated, however, the Service (as well as DOS) will continue to deem both immigrants and nonimmigrants in occupations other than the seven listed above to be exempt from the requirements of section 343. Applications for permanent resident status filed by aliens to work in the occupations of speech language pathologist, medical technologist, medical technicians, physical therapists, and physician assistants, however, will continue to be held in abeyance until a final rule is published. Further, the DOS has notified the Service that it will continue its policy of not issuing immigrant visas to aliens coming to the United States to perform labor in these five occupations until a final rule is published.

The Service has interpreted the term "performing labor as a health care worker" to mean providing direct or indirect health care services to a patient. Aliens coming to the United States to perform services in non-clinical health care occupations such as, but not limited to, medical teachers, medical researchers, managers of health care facilities, and medical consultants to the insurance industry, therefore, are not covered by the provisions of section 343. Individuals employed in these occupations do not perform patient care and, therefore, are not performing labor in a health care occupation as contemplated in the statute. Nevertheless, aliens who are indirectly involved in the performance of patient care, for example, supervisory nurses, must comply with the provisions of section 343.

Since the statute specifically refers only to aliens who are seeking to enter the United States under section 203(b) of the Act for the purpose of performing labor as health care workers, section 343 does not apply to the spouse and dependent children of such aliens. Dependent aliens are admitted to the United States for the primary purpose of family unity and are merely accompanying the principal alien. Therefore, the admissibility of dependent aliens is not affected by the provisions of section 343. For similar reasons, it is the position of the Service that an alien who has applied for adjustment of status under section 245 of the Act on the basis of a family-sponsored immigrant petition pursuant to section 203(a) of the Act or on the basis of an employment-based immigrant petition in a non-health care occupation does not have to comply with section 343 of IIRIRA.

Additionally, an alien who applies for adjustment of status pursuant to sections 209, 210, 245a, 249 or any other section of the Act is not affected by the provisions of section 343 of IIRIRA. This distinction derives from the fact that section 343 of IIRIRA applies only to aliens who are coming to the United States for the primary purpose of performing labor as a health care worker. Aliens applying for adjustment of status under these statutory provisions, regardless of their ultimate professional goal, will not be deemed to be adjusting status for the purpose of performing labor as a health care worker.

Organization Granted Temporary Approval To Issue Certificates for Nurses and Occupational Therapists--§ 212.15(e)

This rule grants temporary authorization to the CGFNS to issue certificates to aliens coming to the United States on a permanent basis to work in the field of nursing. This rule grants temporary authorization to the NBCOT to issue certificates to aliens coming to the United States on a permanent basis to work in the field of occupational therapy.

Under this interim rule, CGFNS is authorized to issue certificates only for the occupation of nurse, for which it has an established track record of issuing certificates, and not for the occupation of occupational therapy. Since CGFNS does not have an established track record of issuing certificates for occupational therapists at this time, it will be limited to issuing certificates for occupation of nursing for the validity period of this interim rule.

The Service defers consideration of whether CGFNS may be authorized to issue certificates for other health care occupations, including occupational therapy, until the promulgation of its forthcoming proposed rule.

This interim rule authorizes NBCOT, on a temporary basis, to issue certificates in accordance with section 343 for the occupation of occupational therapy. NBCOT is authorized to issue such certificates solely because of NBCOT's proven track record in issuing certificates for the position of occupational therapist and the current acceptance of these certificates by the various state regulatory boards in the field of occupational therapy.

Insofar as this interim rule addresses the certification requirements for aliens seeking to immigrate to the United States, the Service has determined that it is unnecessary to require that the certificate issued by CGFNS or NBCOT be valid for a specific period of time beyond the date of admission or adjustment of status. The Service may nevertheless consider imposing such a validity period in the context of promulgating its proposed rule.

English Language Requirement--§ 212.15(g)

Purusant to section 343 of IIRIRA, HHS, in consultation with the Secretary of Education, is required to establish a level of competence in oral and written English which is appropriate for the health care work of the kind in which the alien will be engaged, as shown by an appropriate score on one or more nationally recognized, commercially available, standardized assessments of the applicant's ability to speak and write.

The statute vests the Secretary of HHS with the "sole discretion" to determine the standardized tests and appropriate minimum scores required by section 343 of IIRIRA.

The HHS has identified two testing services which conduct a nationally recognized, commercially available, standardized assessment as contemplated in the statute. The two testing services are the Educational Testing Service (ETAS) and the Michigan English Language Assessment Battery (MELAB). The new regulation at § 212.15(g) lists the tests and appropriate scores as determined by HHS for each occupation.

In developing the English language test scores, HHS consulted with the DoE and appropriate health care professional organizations. The HHS also examined a study sponsored in part by NBCOT entitled "Standards for Examinations Assessing English as a Second Language" in arriving at these scores. The scores reflect the current industry requirements for the occupations.

Under this interim regulation, an organization approved to issue certificates may use either of the above-named testing services. It should be noted, however, that HHS has determined that occupational therapists should only take the test administered by ETS. The HHS has advised the Service that it made this determination based on the fact that all 50 states have accepted the NBCOT requirements which list the ETS as the only acceptable examination.

In addition, organizations authorized to issued certifications are encouraged to develop a test specifically designed to measure English language skills and seek HHS approval of the test. While HHS has identified MELAB and ETS for purposes of this interim rule, other testing services may submit information about their testing services to the Service so that HHS and the DOE could review whether the testing service should be included in the final rule.

HHS has advised that graduates of health professional programs in Australia, Canada (except Quebec), Ireland, New Zealand, the United Kingdom, and the United States are exempt from the English language requirements of section 343 of IIRIRA for the duration of the interim rule. The HHS has determined that, for purposes of this rule, aliens who have graduated from these programs have competency in oral and written English because the level of English that they would need to graduate from these programs is deemed equivalent to the level that would be demonstrated by achieving the minimum passing score on the test described above.

Presentation of the Certificate--§ 212.15(d) and § 245.14

Section 343 of IIRIRA is codified in section 212(a) of the Act as a new ground of inadmissibility. In general, grounds listed in section 212(a) are bars to admission to the United states which must be overcome when an alien applies for admission. This interim rule provides that the certificate must be presented to a consular officer at the time that the alien applies for an immigrant visa and to the Service at the time of admission or adjustment of status. The certificate must be valid at the time the alien applies for an immigrant visa at a consular post abroad and seeks admission or adjustment of status to that of a permanent resident.

The Service and the DOS will consider, in the context of the proposed rulemaking, whether it would be more efficient to review the certificate as part of the review of the alien's qualifications for classification at the time that a Form I-140 is adjudicated by the Service. In this regard, it should be noted that such a filing procedure has long been used with respect to labor certifications under section 212(a)(5)(A) of the Act.

Good Cause Exception

This interim rule is effective 60 days from the date of publication in the Federal Register. The Service invites post-promulgation comments and will address any such comments in a final rule. For the following reasons, the Service finds that good cause exists for adopting this rule without the prior notice and comment period ordinarily required by 5 U.S.C. 553. Although section 343 went into effect on September 30, 1996, due to the complexities of the requirements of section 343, and the need to coordinate the interests and concerns of a great number of Federal agencies, the health care sector, and members of the affected public, the Service is still in the process of developing a proposed rule in order to solicit comment from the public. A continued delay in the implementation of this provision, however, could have a negative effect on the availability of health care in this country, particularly in medically under-served areas for nursing and occupational therapy, and will create a further backlog with respect to pending applications filed by aliens seeking to immigrate to perform labor in a health care occupation.

Regulatory Flexibility Act

The Commissioner of the Immigration and Naturalization Service, in accordance with 5 U.S.C. 605(b), has reviewed this regulation and, by approving it, certifies that the rule will not have a significant economic impact on a substantial number of small entities. This rule has been drafted in a way to minimize the economic impact that it has on small business while meeting its intended objective. The health care workers who will be issued certificates are not considered small entities as the term is defined in 5 U.S.C. 601(6).

Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any 1 year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by section 804 of the Small Business Regulatory Enforcement Act of 1996. This rule will not result in an annual effect on the economy of $100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

Executive Order 12866

This rule is considered by the Department of Justice, Immigration and Naturalization Service, to be a "significant regulatory action" under Executive Order 12866, section 3(f), Regulatory Planning and Review. Accordingly, this regulation has been submitted to the Office of Management and Budget (OMB) for review.

Executive Order 12612

The regulation adopted herein will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

Executive Order 12988 Civil Justice Reform

This rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of E.O. 12988.

Paperwork Reduction Act of 1995

The information required on the certificate for health care workers showing that the alien possesses proficiency in the skills that affect the provisions of health care services in the United State (as provided in § 212.15(f)) is considered an information collection. Since a delay in issuing this interim rule could create a further backlog with respect to pending applications filed by aliens seeking to immigrate to perform labor in a health care occupation, the INS is using emergency review procedures, for review and clearance by the Office of Management and Budget (OMB) in accordance with the Paperwork Reduction Act (PRA) of 1995.

The OMB approval has been requested by November 13, 1998. If granted, the emergency approval is only valid for 180 days. Comments concerning the information collection should be directed to: Office of Information and Regulatory Affairs (OMB), OMB Desk Officer for the Immigration and Naturalization Service, Office of Management and Budget, Room 10235, Washington, DC 20503.

During the first 60 days of this same period a regular review of this information will also be undertaken. Written comments are encouraged and will be accepted until December 14, 1998. Your comments should address one or more of the following points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

The Service, in calculating the overall burden this requirement will place upon the public, estimates that approximately 7,000 certificates will be issued annually. The Service also estimates that it will take the testing entity approximately 2 hours to comply with the requirements. This amounts to 14,000 total burden hours.

Organizations and individuals interested in submitting comments regarding this burden estimate or any aspect of these information collection requirements, including suggestions for reducing the burden, should direct them to: Immigration and Naturalization Service, Director, Policy Directives and Instructions Branch (HQPDI), 425 I Street NW., Room 5307, Washington, DC 20536.

List of Subjects

8 CFR Part 212

Administrative practice and procedures, Aliens, Immigration, Passports and visas, Reporting and recordkeeping requirements.

8 CFR Part 245

Aliens, Immigration, Reporting and recordkeeping requirements.

Accordingly, chapter I of title 8 of the Code of Federal Regulations is amended as follows:

PART 212--DOCUMENTARY REQUIREMENTS: NONIMMIGRANTS; WAIVERS; ADMISSION OF CERTAIN INADMISSIBLE ALIENS; PAROLE

1. The authority citation for part 212 continues to read as follows:

Authority: 8 U.S.C. 1101, 1102, 1103, 1182, 1184, 1187, 1225, 1226, 1227, 1228, 1252; 8 CFR part 2.

2. Section 212.15 is added to read as follows:

§ 212.15 Certificates for foreign health care workers.

(a) Inadmissible aliens. With the exception of the aliens described in paragraph (b) of this section, any alien coming to the United States for the primary purpose of performing labor in a health care occupation listed in paragraph (c) of this section is inadmissible to the United States unless the alien presents a certificate as described in paragraph (f) of this section.

(b) Inapplicability of the ground of inadmissibility. The following aliens are not subject to this ground of inadmissibility:

(1) Aliens seeking admission to the United States to perform services in a non-clinical health care occupation. A non-clinical health-care occupation is one where the alien is not required to perform direct or indirect patient care. Occupations which are considered to be non-clinical include, but are not limited to, medical teachers, medical researchers, managers of health care facilities, and medical consultants to the insurance industry;

(2) The spouse and dependent children of any immigrant alien who is seeking to immigrate in order to accompany or follow to join the principal alien; and

(3) Any alien applying for adjustment of status to that of a permanent resident under any provision of law other than an alien who is seeking to immigrate on the basis of an employment-based immigrant visa petition which was filed for the purpose of obtaining the alien's services in a health care occupation described in paragraph (c) of this section.

(c) Occupations affected by this provision. With the exception of the aliens described in paragraph (b) of this section, any alien seeking admission to the United States to perform labor in one of the following health care occupations, regardless of where he or she received his or her education or training, is subject to this provision:

(1) Licensed Practical Nurses, Licensed Vocational Nurses, and Registered Nurses.

(2) Occupational Therapists.

(d) Presentation of the certificate. An alien described in paragraph (a) of this section who is applying for admission as an immigrant seeking to perform labor in a health care occupation as described in this section must present a certificate to a consular officer at the time of visa issuance and to the Service at the time of admission or adjustment of status. The certificate must be valid at the time of visa issuance and admission at a port-of-entry, or, if applicable, at the time of adjustment of status.

(e) Organizations approved by the Service to issue certificates for health care workers. (1) The Commission on Graduates of Foreign Nursing Schools is authorized to issue certificates under section 343 for

the occupation of nurse. (2) The National Board for Certification in Occupational Therapy is authorized by the Service to issue certificates under section 343 for the occupation of occupational therapist.

(f) Contents of the certificate. A certificate must contain the following information:

(1) The name and address of the certifying organization;

(2) A point of contact where the organization may be contacted in order to verify the validity of the certificate;

(3) The date of the certificate was issued;

(4) The occupation for which the certificate was issued;

(5) The alien's name, and date and place of birth;

(6) Verification that the alien's education, training, license, and experience are comparable with that required for an American health care worker of the same type;

(7) Verification that the alien's education, training, license, and experience are authentic and, in the case of a license, unencumbered;

(8) Verification that the alien's education, training, license, and experience meet all applicable statutory and regulatory requirements for admission into the United States as an immigrant under section 203(b) of the Act. This verification is not binding on the Service; and

(9) Verification either that the alien has passed a test predicting success on the occupation's licensing or certification examination, provided such a test is recognized by a majority of States licensing the occupation for which the certificate is issued, or that the alien has passed the occupation's licensing or certification examination.

(g) English testing requirement. (1) With the exception of those aliens described in paragraph (g)(2) of this section, every alien must meet certain English language requirements in order to obtain a certificate. The Secretary of Health and Human Services has determined that an alien must have a passing score on one of the two tests listed in paragraph (g)(3) of this section before he or she can be granted a certificate.

(2) Aliens exempt form the English language requirement. Aliens who have graduated from a college, university, or professional training school located in Australia, Canada (except Quebec), Ireland, New Zealand, the United Kingdom, and the United States are exempt from the English language requirement.

(3) Approved testing services.

(i) Michigan English Language Assessment Battery (MELAB).

(ii) Test of English as a Foreign Language, Educational Testing Service (ETS).

(4) Passing scores for various occupations. (i) Occupational therapists. An alien seeking to perform labor in the United States as an occupational therapist must obtain the following scores on the English tests administered by ETS: Test Of English as a Foreign Language (TOEFL), Paper-Based 560, Computer-Based 220; Test of Written English (TWE): 4.5; Test of Spoken English (TSE): 50. Certifying organizations shall not accept the results of the MELAB for the occupation of occupational therapists. Aliens seeking to obtain a certificate to work as an occupational therapist must take the test offered by the ETS. MELAB scores are not acceptable for these occupations.

(ii) Registered nurses. An alien coming to the United States to perform labor as a registered nurse must obtain the following scores to obtain a certificate: ETS: TOEFL: Paper-Based 540, Computer-Based 207; TWE: 4.0; TSE: 50; MELAB: Final Score 79; Oral Interview: 3+.

(iii) Licensed practical nurses and licensed vocational nurses. An alien coming to the United States to perform labor as a licensed practical nurse or licensed vocational nurse must have the following scores to be issued a certificate: ETS: TOEFL: Paper-Based 530, Computer-Based 197; TWE: 4.0; TSE: 50; MELAB: Final Score 77; Oral Interview: 3+.

PART 245--ADJUSTMENT OF STATUS TO THAT OF PERSON ADMITTED FOR PERMANENT RESIDENCE

3. The authority citation for part 245 continues to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1182, 1255; 8 CFR part 2.

4. Section 245.14 is added to read as follows:

§ 245.14. Adjustment of status of certain health care workers.

An alien applying for adjustment of status to perform labor in a health care occupation as described in 8 CFR 212.15(c) must present evidence at the time he or she applies for adjustment of status, and, if applicable, at the time of the interview on the application, that he or she has a valid certificate issued by the Commission on Graduates of Foreign Nursing Schools or the National Board of Certification in Occupational Therapy.

Memorandum issued October 20, 1999 from Michael Cronin, Acting Associate Commissioner, Programs through William Yates, Deputy Executive Associate Commissioner, Immigration Services Division, Field Operations

Reference: HQ 70/23.1PHQ 70/21.1.14-P
HQ 50/5.12 996 ACT.069

SUBJECT: **Update on the Temporary Admission of Foreign Health Care Workers**

The Service published an interim rule on October 14, 1998 that implemented portions of section 343 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). The rule addressed only aliens applying for immigrant visas or adjustment of status to a permanent resident coming to the United States to perform services in a limited number of health care occupations. The Service's prior instructions, dated January 28, 1997, June 6, 1997, August 27, 1997, and April 30, 1998, relating to the temporary admission of heath care workers will remain in effect until the publication a final rule implementing section 343 of IIRIRA in full.

This office expects to publish a final rule within I year that will implement the provisions of section 343 of IIRIRA in full. In view of this time frame, the Service, in conjunction with the Department of State (DOS), has now determined that foreign heq1th care workers affected by section 343 of IIRIRA may be admitted to the United States for a period of I year, not 6 months as previously instructed. Of course, the alien must meet all other regulatory and statutory requirements for admission. Again, Service officers should continue to apply the instructions contained in the prior memoranda, other than the length of admission for a nonimmigrant alien. The following represents a summary of the instructions contained in the four previous memoranda.

The Service and the DOS agreed to exercise discretion pursuant to section 212(d)(3) of the Immigration and Nationality Act in granting a blanket waiver of inadmissibility under section 212 (a)(5)(C) for nonimmigrant health care workers lacking the- required certificate until such time as appropriate certification procedures have been put in place. The Service also waived inadmissibility under section 212(a)(5)(C) pursuant to section 212(d)(3)(B) for aliens already in possession of nonimmigrant visas or who are visa-exempt aliens, including Canadians applying for admission as TN's. The waiver should be granted without the filing of a formal application or fee.

An otherwise admissible nonimmigrant health care worker who receives a waiver for section 212(a)(5)(C) inadmissibility, shall be authorized admission into the United States for a period of I year. Otherwise admissible dependents covered by the blanket policy will also be authorized admission into the United States for a time coinciding with that of the principal alien. An alien admitted to the United States under these circumstances may make application for admission to the United States during the validity period of the previously issued 1-94 without requesting a new waiver. TN nonimmigrant aliens are not required to pay the admission fee described in 8 CFR 214.6(f) when applying for admission during the validity period of the previously issued I94. There is no limit to the number of waivers that a nonimmigrant alien can be granted under section 212(d)(3) of the INA. Aliens admitted to the United States under this blanket waiver policy are eligible for extensions of stay in increments of I year. The total period of temporary stay for specific nonimmigrant classifications as described in regulation and statute is not affected by this policy.

For further information, please contact Adjudication Officer John W. Brown at 202-616-7435.

SECTION NINE

DEFINITIONS

INA: ACT 101 - DEFINITIONS

Sec. 101. [8 U.S.C. 1101] (a) As used in this Act-

(4) The term "application for admission" has reference to the application for admission into the United States and not to the application for the issuance of an immigrant or nonimmigrant visa.

(13)2/ (A) The terms "admission" and "admitted" mean, with respect to an alien, the lawful entry of the alien into the United States after inspection and authorization by an immigration officer.

(15) The term "immigrant" means every alien except an alien who is within one of the following classes of nonimmigrant aliens:

(B) an alien (other than one coming for the purpose of study or of performing skilled or unskilled labor or as a representative of foreign press, radio, film, or other foreign information media coming to engage in such vocation) having a residence in a foreign country which he has no intention of abandoning and who is visiting the United States temporarily for business or temporarily for pleasure;

(E) an alien entitled to enter the United States under and in pursuance of the provisions of a treaty of commerce and navigation between the United States and the foreign state of which he is a national, and the spouse and children of any such alien if accompanying or following to join him:

(i) solely to carry on substantial trade, including trade in services or trade in technology, principally between the United States and the foreign state of which he is a national; or

(ii) solely to develop and direct the operations of an enterprise in which he has invested, or of an enterprise in which he is actively in the process of investing, a substantial amount of capital;

(L) an alien who, within 3 years preceding the time of his application for admission into the United States, has been employed continuously for one year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States temporarily in order to continue to render his services to the same employer or a subsidiary or affiliate thereof in a capacity that is managerial, executive, or involves specialized knowledge, and the alien spouse and minor children of any such alien if accompanying him or following to join him;

(17) The term "immigration laws" includes this Act and all laws, conventions, and treaties of the United States relating to the immigration, exclusion, deportation, expulsion, or removal of aliens.

(18) The term "immigration officer" means any employee or class of employees of the Service or of the United States designated by the Attorney General, individually or by regulation, to perform the functions of an immigration officer specified by this Act or any section thereof.

(26) The term "nonimmigrant visa" means a visa properly issued to an alien as an eligible nonimmigrant by a competent officer as provided in this Act.

(32) The term "profession" shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries.

(33) The term "residence" means the place of general abode; the place of general abode of a person means his principal, actual dwelling place in fact, without regard to intent.

(34) The term "Service" means the Immigration and Naturalization Service of the Department of Justice.

(44)(A) The term "managerial capacity" means an assignment within an organization in which the employee primarily-

(i) manages the organization, or a department, subdivision, function, or component of the organization;

(ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;

(iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization) or, if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

(iv) exercises discretion over the day- to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

(B) The term "executive capacity" means an assignment within an organization in which the employee primarily-

(i) directs the management of the organization or a major component or function of the organization;

(ii) establishes the goals and policies of the organization, component, or function;

(iii) exercises wide latitude in discretionary decision-making; and

(iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

(C) If staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, the Attorney General shall take into account the reasonable needs of the organization, component, or function in light of the overall purpose and stage of development of the organization, component, or function. An individual shall not be considered to be acting in a managerial or executive capacity (as previously defined) merely on the basis of the number of employees that the individual supervises or has supervised or directs or has directed.

(45) The term "substantial" means, for purposes of paragraph (15)(E) with reference to trade or capital, such an amount of trade or capital as is established by the Secretary of State, after consultation with appropriate agencies of Government.

(b) As used in titles I and II-

(1) The term "child" means an unmarried person under twenty-one years of age who is-

(A) a child born in wedlock;

(B) a stepchild, whether or not born out of wedlock, provided the child had not reached the age of eighteen years at the time the marriage creating the status of stepchild occurred;

(C) a child legitimated under the law of the child's residence or domicile, or under the law of the father's residence or domicile, whether in or outside the United States, if such legitimation takes place before the child reaches the age of eighteen years and the child is in the legal custody of the legitimating parent or parents at the time of such legitimation;

(D) a child born out of wedlock, by, through whom, or on whose behalf a status, privilege, or benefit is sought by virtue of the relationship of the child to its natural mother or to its natural father if the father has or had a bona fide parent-child relationship with the person;

(E) a child adopted while under the age of sixteen years if the child has been in the legal custody of, and has resided with, the adopting parent or parents for at least two years: Provided, That no natural parent of any such adopted child shall thereafter, by virtue of such parentage, be accorded any right, privilege, or status under this Act; or

(F) a child, under the age of sixteen at the time a petition is filed in his behalf to accord a classification as an immediate relative under section 201(b), who is an orphan because of the death or disappearance of, abandonment or desertion by, or separation or loss from, both parents, or for whom the sole or surviving parent is incapable of providing the proper care and has in writing irrevocably released the child for emigration and adoption; who has been adopted abroad by a United States citizen and spouse jointly, or by an unmarried United States citizen at least twenty-five years of age, who personally saw and observed the child prior to or during the adoption proceedings; or who is coming to the United States for adoption by a United States citizen and spouse jointly, or by an unmarried United States citizen at least twenty-five years of age, who have or has complied with the preadoption requirements, if any, of the child's proposed residence: Provided, That the Attorney General is satisfied that proper care will be furnished the child if admitted to the United States: Provided further, That no natural parent or prior adoptive parent of any such child shall thereafter, by virtue of such parentage, be accorded any right, privilege, or status under this Act.

(2) The term "parent", "father", or "mother" means a parent, father, or mother only where the relationship exists by reason of any of the circumstances set forth in (1) above, except that, for purposes of paragraph (1)(F) (other than the second proviso therein) in the case of a child born out of wedlock described in paragraph (1)(D) (and not described in paragraph (1)(C)), the term "parent" does not include the natural father or the child if the father has disappeared or abandoned or deserted the child or if the father has in writing irrevocably released the child for emigration and adoption.

Sec. 214.6 Canadian and Mexican citizens seeking temporary entry to engage in business activities at a professional level.

b) Definitions. As used in this section, the terms:

Business activities at a professional level means those undertakings which require that, for successful completion, the individual has a least a baccalaureate degree or appropriate credentials demonstrating status as a professional in a profession set forth in Appendix 1603.D.1 of the NAFTA.

Business person, as defined in the NAFTA, means a citizen of Canada or Mexico who is engaged in the trade of goods, the provision of services, or the conduct of investment activities.

Engage in business activities at a professional level means the performance of prearranged business activities for a United States entity, including an individual. It does not authorize the establishment of a business or practice in the United States in which the professional will be, in substance, self-employed. A professional will be deemed to be self-employed if he or she will be rendering services to a corporation or entity of which the professional is the sole or controlling shareholder or owner.

Temporary entry, as defined in the NAFTA, means entry without the intent to establish permanent residence. The alien must satisfy the inspecting immigration officer that the proposed stay is temporary. A temporary period has a reasonable, finite end that does not equate to permanent residence. In order to establish that the alien's entry will be temporary, the alien must demonstrate to the satisfaction of the inspecting immigration officer that his or her work assignment in the United States will end at a predictable time and that he or she will depart upon completion of the assignment.

SECTION TEN

SOURCES OF INFORMATION

SOURCES OF INFORMATION

Dictionary of Occupational Titles (D.O.T.) prepared by the U. S. Employment Service, Employment and Training Administration (ETA), U. S. Department of Labor. The Dictionary of Occupational Titles is available on the Internet at http://www.oalj.dol.gov/libdot.htm.

The latest version of the D.O.T. is the Revised Fourth Edition (1991). It is available for $50 from the Superintendent of Documents, U. S. Government Printing Office, Washington, DC 20402. Phone (202) 512-1800. Specify GPO Stock Number 029-013-00094-2.

The ETA has developed The Occupational Information Network (O*NET), as a new automated replacement for the D.O.T. It provides a comprehensive database that identifies and describes important information about occupations, worker skills and training requirements. The O*NET Data Dictionary is available in CD ROM package, in printed version and Internet download. More information may be obtained by contacting O*NET@doleta.gov.

The **Occupational Outlook Handbook**, 1998-99 (Paper) describes about 250 occupations in detail. It covers what workers do on the job, working conditions, the training and education needed, earnings and expected job prospects. The stock number is 029-001-03274-9 and the price is $44.00 including shipping.

You may submit your order, along with payment, to the Government Printing Office by postal mail to:

Superintendent of Documents
P.O. Box 371954
Pittsburgh, PA 15250-7954

Orders may be submitted to one of 24 U.S. Government Bookstores located throughout the United States. More information on ordering is available on the Internet: at access.gpo.gov.

Occupational Outlook Handbook is available on the Internet at http://stats.bls.gov/ocohome.htm.

Iris: Immigration Research Information Service is a complete law library on CD-Rom (2 discs).

IRIS includes:
- INA
- Immigration Reform Act of 1996
- BIA Decisions
- Code of Federal Regulations
- INS Operations Instructions
- Federal Register
- Dictionary of Occupational Titles
- Occupational Outlook Handbook
- Foreign Affairs Manual
- UNHCR Handbook
- BALCA Handbook
- BALCA Decisions
- Interpreter Releases
- Kurzban's Sourcebook
- Basic Law Manual
- Immigration Briefings
- Martin's Asylum Case Law

IRIS is available from:
West Group
610 Opperman Drive
Eagen, MN 55123-1396
Phone: 1-800-328-4880 for information on ordering.

SECTION ELEVEN

RELATED INTERIM DECISIONS

Summaries of Precedent Decisions Relating to B-1 Petitions

Matter of M----- , 6 I & N Dec. 533. Nonimmigrant status under section 101(a)(15)(B) of the Immigration and Nationality Act is not established by an alien who seeks to enter the United States for a period of two weeks to sell Christmas trees previously purchased by her in Canada, where the evidence shows that she has engaged in such business for the preceding three years and intends to continue therein for an indefinite number of years in the future. Excludable: Section 212(a)(20) of the Act of 1952 –Not in possession of a valid unexpired immigrant visa and valid passport.

Matter of B-------- and K--------, 6 I & N Dec. 827. Nonimmigrant – Section 101(a)(15)(B), Immigration and Nationality Act – Factors to be considered – Canadian farmers. (1) In determining the eligibility for admission as a temporary visitor for business, the significant factors for consideration are: (a) is there a clear intent on the part of the alien applicant to continue his foreign residence and not to abandon his existing domicile; (b) are the principal place of business and the actual accrual of profits predominantly in the foreign country; (c) are the various entries into the United States of a plainly temporary nature (although the business activity itself need not be temporary and may be long continued).

Matter of P------, 8 I & N Dec. 206. Nonimmigrant—Visitor for business—Canadian salesman eligible to enter United States temporarily to solicit orders. Employee of Canadian firm who comes to United States about four times a year for 2-week periods to sell plastic bags to united States customers is eligible for admission as nonimmigrant visitor for business where his employer's principal place of business is in Canada, the accrual of profits from his work takes place in Canada, his commissions from sales in the United States are a minor part of his over-all income, and each of his entries is plainly of a temporary nature.

Matter of Vilanova-Gonzalez, 11 I & N Dec. 610. (1) Since the term "business" as used in Section 101(A)(15)(B) of the Immigration and Nationality Act does not include local employment or labor for hire, a nonimmigrant visitor for business who secured a social security number and unauthorized employment on a 40-hour per week basis as a construction worker which employment is not of a temporary nature, is deportable under section 241(a)(9) of the Act for failure to comply with the conditions of his status.

Matter of Hira, 11 I & N Dec. 824. An alien who, in behalf of his employer, a Hong Kong manufacturer of custom made men's clothing, travels to various cities in the United States to take orders from, and the measurements of, prospective customers whom he does not solicit but by whom he is contacted as the result of literature distributed in this country by his employer; who sends the order together with the purchase price, to his employer in Hong Kong; and who receives only expense money while in this country, his monthly salary being sent to his parents in India by his employer is engaged in intercourse of a commercial character, and, having indicated he would return to Hong Kong at the termination of his authorized stay, his sojourn here is of a temporary character, and he is eligible for nonimmigrant classification as a visitor for business under section 101(a)(15)(b) of the Immigration and Nationality Act.

Matter of Neill, 15 I & N Dec. 331. The applicant in this case is a professional engineer who sought admission to the United States as a visitor for business under Section 101(a)(15)(b) of the Immigration and Nationality Act. The applicant is a principal in a firm which employs 55 people and earns about 30 per cent of its income from business in the United States during which he spends some time soliciting business; however the bulk of his time appears to be devoted to consulting with clients and obtaining necessary information from them. Since only a small amount of his time is spent soliciting business and the majority of his time appears to be spent in connection with the rendition of his professional services as an engineer, he is in effect extending his professional engineering practice to the United States. He may not, under the classification of temporary visitor for business, extend his professional engineering practice into the United States. Since he has not shown that he qualifies for admission as a nonimmigrant, he is presumed to be an immigrant having no visa, was properly found excludable under section 212(a)(20) of the Act.

Matter of Cote, 17 I & N Dec. 336. A Canadian citizen truck driver of a United States firm who seeks to deliver automobiles manufactured in Canada into the United States ad to pick up automobiles in the United States and transport them back to Canada is admissible to the United States as a visitor for business under section 101(a)(15)(B) of the Act as the transportation function he performs is a necessary incident to international trade and the unloading of automobiles in the United States by the applicant is merely incidental to his primary purpose of transporting them into the country.

Matter of Camilleri, 17 I & N Dec. 441. A Canadian citizen truck driver employee (owner-operator) of a United States firm seeking to deliver goods manufactured in Canada to a terminal in the United States and to pick up goods to be delivered to points in Canada is admissible to the United States as a nonimmigrant visitor for business under section 101(a)(15)(B) of the Act.

INTERIM DECISION #3038: MATTER OF DUCKETT

Volume 19 (Page 493)

MATTER OF DUCKETT

In Exclusion Proceedings

A-27683768

Decided by Board November 4, 1987

A Canadian citizen railroad clerk employed by a Canadian railroad who seeks to enter the United States on a daily basis for a portion of his shift in order to clear his employer's railroad cars for transport from the United States to Canada is admissible to the United States as a visitor for business under section 101(a)(15)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(B) (1982), as the function he performs is a necessary incident to international trade or commerce. Matter of L-, 3 I&N Dec. 857 (C.O., BIA 1950), distinguished.

EXCLUDABLE: Act of 1952 - Sec. 212(a)(20) [8 U.S.C. § 1182(a)(20)] - No valid immigrant visa

ON BEHALF OF APPLICANT:
Kenneth A. Cohen, Esquire
Gellman, Cohen & Grasmick
4043 Maple Road
Buffalo, New York 14226-1037

ON BEHALF OF SERVICE:
James M. Grable
District Counsel

Janice Podolny
Appellate Counsel

BY: Milhollan, Chairman; Dunne, Morris, Vacca, and Heilman, Board Members

In a decision dated March 26, 1986, the immigration judge found the applicant admissible to the United States as a nonimmigrant visitor for business. The Immigration and Naturalization Service has appealed from that decision. The appeal will be dismissed.

The applicant is a native and citizen of Canada who resides in that country with his wife and children. He has been employed for the last 18 years as a railroad clerk, first by Conrail Corporation in Canada and, since May 1, 1985, by CP-Rail-CASO in Canada. On February 21, 1986, he sought admission for a portion of his shift to the United States as a nonimmigrant visitor for business in order to clear his employer's railroad cars for transport from Niagara Falls, New York, to Niagara Falls, Ontario. Because he was not clearly admissible, he was placed in exclusion proceedings.

The record reflects that the applicant's employer, CP-Rail-CASO, is a wholly-owned subsidiary of Canadian Pacific Rail, a transcontinental railway operating in Canada with access to international markets in the United States. CP-Rail-CASO is involved in international rail transportation, as less than 5 percent of its activities are domestic transportation within Canada. In May 1985, Canadian Pacific Railroad and the Canadian National Railroad succeeded in purchasing the Canadian assets of Consolidated Rail Corporation (Conrail) plus certain assets in the United States. The United States assets included the Niagara River Bridge across the Niagara River between Niagara Falls, New York, and Niagara Falls, Ontario, and 8/10 of a mile of track from the American side of the bridge in Niagara Falls, New York, to Conrail's Niagara Falls, New York, yards. In order to facilitate the international rail transportation of goods in international commerce, CP-Rail-CASO and Conrail entered into an interchange agreement which permitted CP-Rail-CASO to obtain cars set out for its transportation to Canada at Conrail's Niagara Falls, New York, yard. From May 1985 until July 1985, Conrail's clerks prepared documentation and instructions which enabled CP-Rail-CASO train crews to move the cars across the border into Canada. In June 1985, Conrail notified CP-Rail-CASO that it would no longer provide the clerical functions which enabled the train to move in international commerce. As a result of this action, the applicant was assigned to the United States in July 1985 until January 1986 on a full-time basis to train for the responsibilities of rail clerk, as they relate to clearing trains for crossing the international border, and to gain familiarity with the various problems which occur in the rail transportation of goods in international commerce.

In support of his application for admission, the applicant presented a detailed account of his responsibilities as a railroad clerk. Since January 1986, the applicant reports to work at CP-Rail-CASO's Montrose yard in Niagara Falls, Ontario. He obtains documents related to the international shipment for his use in the United States and performs other responsibilities. When Conrail calls CP-Rail-CASO to advise them the train is leaving its Buffalo yard for Niagara Falls, New York, the applicant uses the company truck to drive to Conrail's Niagara Falls, New York, yard. Once he arrives at Conrail he drives to the eastern portion of the yard to do a rollby check of the train. In this check he compares the cars actually being delivered to those appearing on the consist 1/ and also conducts a preliminary safety check of the condition of the train. He then gives his finding to the Conrail crew. The Conrail crew makes any appropriate changes and enters that information into its computer. Conrail then utilizes the updated information to provide the applicant with an accurate list of the cars that were just transported and the cars already in the yard awaiting transport to Canada. Conrail also provides him with the waybills 2/ for each car and all customs and other documentation it has relating to those cars.

In his employment, the applicant reviews the documentation he brought from Canada and the documentation delivered to him by Conrail to ascertain that each car has proper documentation to move in international commerce. He instructs the crew to marshall the train correctly and prepares customs export declarations and other documentation for those cars lacking such documentation. He also transmits information about the cars on the train to CP-Rail-CASO so that his employer may enter information relating to those cars into its computer system. The applicant then leaves the documentation and instructions for CP-Rail-CASO's train crew and returns to Canada. If the United States Customs Service desires to inspect any cars on the train leaving the United States he returns from Canada to the border in order to open the cars. (Traditional security measures in union contracts prohibit the train's crew from opening the cars for customs inspections.) On his return to Canada the applicant spends 70 percent of his time performing additional clerical work on the same train. He helps complete the data processing, helps with Canadian customs manifesting, and conducts a rollby check of the train when it arrives from the United States. Out of each shift he spends between 2 and 3 hours in the United States and between 5 and 6 hours of his time in Canada. He is the only employee regularly assigned to this duty.

The applicant maintains that his employment requires a high degree of expertise which is usually obtained after 4 or more years of on-the-job training. Safety is the utmost consideration of a railroad clerk's job. He must know how to walk safely in the yard and must learn public safety regulations. Governmental regulations define dangerous cargo, control placement of cars containing dangerous cargo, and control the safe capacities of cargo a car may contain. The clerk must be able to identify dangerous cargo, place the car carrying it correctly and safely in the train, spot overloads, and alert the yard manager so CP-Rail-CASO may take corrective action. Moreover, once the applicant's employer accepts cars, it is legally bound by their condition and may be fined substantial amounts if it accepts and transports rail cars that are unsafe, undocumented, or overloaded or otherwise violate applicable rail transportation regulations. The clerk must visually compare the rail cars with the waybill, check their condition, and provide CP-Rail-CASO with the information necessary to decide whether to accept or reject the cars. He must also prepare a consist and assist the train crew to clear the goods through United States and Canadian customs. The applicant also points out that customary railroad practices, both in the United States and Canada, prohibit these functions from being performed by the train's operating crew.

In his consideration of the applicant's request for admission, the immigration judge applied a two-pronged test for admissibility, as visitors for business, of employees of common carriers engaged in international trade or commerce in accordance with Matter of Camilleri, 17 I&N Dec. 441 (BIA 1980). The immigration judge found that the applicant possessed a clear intent to continue his residence in Canada and to maintain his domicile there. He also determined that the applicant's entries into the United States were, individually or separately, of a plainly temporary nature, being only so long as required to permit transfer of a train from Conrail to the applicant's employer. In his review of the applicant's case, the immigration judge also distinguished the holding in Matter of L-, 3 I&N Dec. 857 (C.O., BIA 1950), which involved a relief telegrapher, employed by Canadian Pacific R.R. 3 days a week in Canada and 2 days a week in the United States, who was precluded from entering the United States as a nonimmigrant visitor because the work involved was of a permanent and continuing nature performed at a fixed place of employment pursuant to a regular assignment. The immigration judge found that Matter of L-, supra, was inapplicable because it did not consider the effect of employment by a common carrier engaged in international commerce.

On appeal, the Service urges reversal of the immigration judge's decision. It maintains that the applicant is coming to the United States solely to perform purely local employment or labor for hire as a railroad clerk, who is not otherwise qualified for entry as a business visitor, because the function he performs is not a necessary

incident to international trade or commerce. The Service contends that, unlike the truck driver in Matter of Cote, 17 I&N Dec. 336 (BIA 1980), whose manual labor activities such as loading and unloading were deemed to be a necessary function of delivery and were merely incidental to his primary business activity of transportation, the applicant's clerical duties are his only business activities, and he is not coming to the United States, as does a truck driver or a train crew member, in the act of transporting goods across the border. The Service argues that the immigration judge improperly adopted the test of admissibility set forth in Matter of Hira, 11 I&N Dec. 824 (BIA 1965, 1966; A.G. 1966), and reiterated in Matter of Camilleri, supra, rather than focusing on the nature of the activity to be performed by the applicant, which was, the Service maintains, the approach applied in Matter of Cote, supra, and Matter of Camilleri, supra.

In his response on appeal, the applicant likens his job to that of a navigator on an airplane and stresses the importance of his function for the transport of goods in international commerce. In support of this position, the applicant points out that in Matter of R-, 3 I&N Dec. 750 (BIA 1949), a helper employed by a Canadian company on a moving van, coming to load and unload household goods, was found admissible because his position was equivalent to an operating crew member. The applicant also states that he has a home in Canada which he does not intend to abandon, that the bulk of his work and payment by his Canadian employer for his services occurs in Canada, and that each of his entries is clearly temporary, lasting for only a few hours of his shift, in contrast to the telegrapher in Matter of L-, supra, or the employee of a Canadian company in Matter of G-, 6 I&N Dec. 255 (BIA 1954), who worked full-time at his employer's facility in the United States as a receiving clerk and loader.

Section 101(a)(15)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(B) (1982), defines a nonimmigrant visitor for business as an alien (other than one coming for the purpose of study or of performing skilled or unskilled labor or as a representative of foreign press, radio, film, or other foreign information media coming to engage in such vocation) having a residence in a foreign country which he has no intention of abandoning and who is visiting the United States temporarily for business.

The term "business" as used in section 101(a)(15)(B) has been held not to include ordinary labor for hire, but to include only intercourse of a commercial character. See Karnuth v. United States ex rel. Albro, 279 U.S. 231 (1929); Matter of Hira, supra; Matter of P-, 8 I&N Dec. 206 (BIA 1958). However, an alien need not be considered a "businessman" to qualify as a business visitor if the function he performs is a necessary incident to international trade or commerce. Matter of Hira, supra; see also Matter of W-, 6 I&N Dec. 832 (BIA 1955); Matter of R-, supra.

Based upon our review of the record, we find that the applicant is engaged in "business" within the meaning of section 101(a)(15)(B) of the Act because the function he performs is a necessary incident to international trade. Focusing on the applicant's activities, we find that the applicant is engaged in the transportation of goods across the international boundary. The functions which the applicant performs in his job as a railroad clerk in the United States are in many ways as crucial as the duties performed by the train engineer for the movement of the train and the transportation of goods across the border. The applicant is not precluded from establishing his admissibility by the fact that he is not a member of the train's operating crew. In Matter of R-, supra, the Board found admissible a helper on a moving van engaged in international commerce whose function was to load and unload goods, finding that he was equivalent to an operating crew member. In the present case, the applicant performs certain duties, such as the opening of cars for inspection purposes, which require his presence in the same way the presence of an operating crew is required for the movement of the train. We note that, although the applicant is precluded from riding the train as a member of the operating crew by traditional distinctions between a railroad's operating crew and its clerical support staff, he essentially escorts the train across the border, spending the bulk of his shift both in the United States and Canada clearing a particular train for transport across the border. Because the record shows the applicant performs duties without which the train would not physically be permitted to cross the international boundary, we do not find the distinctions between the train's operating crew and the applicant's clerical support functions controlling in the present case.

In our consideration, we also do not find fatal to the applicant's request for admission the fact that his duties are performed on a regular and permanent basis at a fixed place of employment in the United States. The applicant does not spend his entire shift in the United States. Cf. Matter of G-, supra. It has also been held permissible to engage in duties in the same location in the United States on a routine (although not full-time) basis where such duties are an integral part of international transportation of goods. See Matter of W-, supra. We note that in Matter of L-, supra, a relief telegrapher for an international carrier who was regularly assigned to this country 2 days a week was precluded from entry to the United States because he engaged in work of a permanent and continuing nature, which was to be performed at a fixed place of employment pursuant to a

regular assignment. In that case, however, it was not apparent that the applicant performed a duty of any significance for international transportation of goods. In the present case, we find it indisputable that the applicant is directly involved in the movement of goods across the international border.

Because we find that the applicant is admissible as a nonimmigrant visitor for business, the appeal will be dismissed.

ORDER: The appeal is dismissed.

FOOTNOTES FOR INTERIM DECISION #3038

1/ A consist is a list of all the cars on a train, their destination, and other information.

2/ A waybill is the document on which a car moves. It contains the car numbers, cargo, destination, and other information.

Summaries of Precedent Decisions Relating to L-1 Petitions

Matter of Bocris, 13 I&N Dec. 601. L-1 status approved despite the fact that the same petitioner had filed and received approval of a 6th preference visa petition on behalf of the same beneficiary for the same position. (This decision is often erroneously quoted as authorizing approval of L-1 petitions -which are temporary in nature - even if the beneficiary is coming to the United States to assume a permanent position and seek immigrant status. Bocris was approved because the petitioner had previously been advised by the Service to file an 1-140 on behalf of the beneficiary even though the petitioner did not seek his services permanently; the petitioner had been so instructed erroneously on the grounds that the position was permanent even though the beneficiary was not destined to be the ultimate "permanent" employee in the position.)

Matter of Raulin, 13 I&N Dec. 618. A beneficiary, who, during her employment for the past two years as executive secretary to the vice president of a Paris subsidiary of the petitioner, maintained liaison with high government officials and presidents of the companies doing business with the petitioning company, possesses "specialized knowledge" and qualifies as L-1.

Matter of Schick, 13 I&N Dec. 647. The beneficiary is found ineligible for L-1 classification because the relationship between the petitioning American company and the beneficiary's foreign employer is only a contractual agreement whereby the American company has a ten year commitment to buy equipment from the foreign business. There is no affiliate or subsidiary relationship, and the American company is not associated with the French company beyond its agreement to furnish and buy equipment for a period of time.

Matter of Vaillancourt, 13 I&N Dec. 654. The petition is approved to classify the beneficiary as an L-1 coming to a managerial position when he had previously (immediate prior year) been employed in a capacity involving "specialized knowledge" which led to his promotion to the "managerial" position**.**

Matter of Leblanc, 13 I&N Dec. 816. The statute does not require the beneficiary to be corning to an already existing office, branch, or other establishment of the foreign employer as long as there is a bona fide intent to acquire physical premises and open an office in the United States. (Note: this "intent to open a business" clause is not qualifying for approval of an immigrant visa petition -Form 1-140.)

Matter of Continental Grain Company, 14 I&N Dec. 140. In reference to the 11one year immediately prior to filing" rule, a petition was approved on behalf of a beneficiary who was in the United States as a nonimmigrant H-3 trainee. Training was related to his qualifying employment with the foreign country and the "training" period was judged not interruptive of his employment abroad continuously the year prior to filing.

Matter of Pozzoli, 14 I&N Dec. 569. The fact that the beneficiary's salary while in the United States will be paid by the foreign affiliate of the petitioning company does not preclude him from establishing eligibility for L-1 status.

Matter of Del Mar Ben, Inc., 15 I&N Dec. 5. Mere ownership by the petitioning American corporation of stock in a Japanese corporation and an informal cooperative agreement between the presidents of the two companies does not render petitioner an affiliate or subsidiary of the foreign corporation and thereby does not allow beneficiary (employee of the Japanese business) intra-company transferee status.

Matter of Chartier, 16 I&N Dec. 284. The petition seeking L-1 status is approved even though the petitioning employer (U.S. petitioner) has no affiliate or subsidiary abroad. The beneficiary had been employed by the petitioner abroad. (In this case there was a foreign subsidiary in a third country, but that fact was incidental to the decision which still found the beneficiary qualified as having been employed for the year immediately prior by the petitioner, through his rendering of "specialized knowledge" services to the petitioner's customers located in Canada.)

Matter of Michelin Tire Corp., 17 I&N Dec. 248. The petition is denied because where a beneficiary seeks to enter in L-1 status classification based on specialized knowledge that knowledge must be relevant to the business itself. Beneficiary's specialized knowledge was in providing instruction as a teacher in French to employees of the French company while in the United States.

Matter of Aphrodite Investments, Ltd., 17 I&N Dec. 530. A corporation is a separate entity from its stockholders for the purpose of qualifying an alien beneficiary. (It is partly on the basis of this decision that many aliens actually petition for then-selves.)

Matter of Hedrick, 17 I&N Dec. 571. To qualify for the "blanket labor certification" (e.g., for immigrant visa preference through Form 1-140), the beneficiary must be qualified to enter or have already entered the United States under section 101(a)(15)(L)(1), and the qualifying experience must have been with the international corporation while the beneficiary was outside the United States and immediately prior to seeking admission as an "intra-company transferee" immigrant. (Reaffirms that qualifying experience must be outside the U.S. and immediately prior to petition.

Matter of Tessel, Inc., 17 I&N Dec. 631. The "affiliate/subsidiary" concept is established where there is a high degree of common ownership between the two companies, either directly or through a third party. An unsalaried appointed chairman of a corporation is an "employee" in a managerial or executive position for Schedule A ' Group IV labor certification purposes. The corporation is a separate legal entity from its stockholders, able to "employ" then and to file a petition on their behalf. (Augments Matter of Aphrodite Investments.)

Matter of Barsai, 18 I&N Dec. 13. A foreign firm may qualify as a subsidiary/affiliate even if it is a branch of a foreign government. (Beneficiary worked for a socialist medical supply firm run by the Hungarian Government.)

Matter of Penner, 18 I&N Dec. 49. Occupations so not inherently qualify a beneficiary foF-L-1 classification. The Service looks for elements beyond general job tasks and duties; in other words, the specialized knowledge related to the proprietary interests of the business, its management, and concerned skills or knowledge not readily found in the job market. This decision interprets Matter of Vaillancourt, Matter of Raulin, and Matter of Le Blanc.

Matter of Colley, et al. , 18 I&N 117. Most employees today are specialists and have been trained and given specialized knowledge; however, it cannot be concluded that all employees with specialized knowledge or performing highly technical duties are eligible for classification as intra-company transferee.

Matter of Hughes, 18 I&N Dec. 289. Affiliation exists between two companies when the petitioning company has a 50 percent financial interest in the foreign company, has de facto control over the foreign company, and the foreign company exists solely to sell the petitioner's product. Affiliation is based upon both ownership and control. ownership need not be majority if control exists. Affiliation exists between two companies which have no direct linkage but are directed, controlled, and at the least partially owned by the same parent organization. The term "subsidiary" is a more specific form of affiliation in which the company so described is subordinate to the control of another.

Matter of Kloeti, 18 I&N Dec. 295. A beneficiary cannot qualify as an L-1 when the beneficiary's only previous experience for the petitioning firm was as a B-1 nonimmigrant.

Matter of Siemens Medical System, Inc., ID 3008, (Com., March 1986). Where each of two corporations (parents) owns and controls 50 percent of a third corporation (joint venture), the joint venture is a subsidiary of each of the parents for purposes of section 101(a)(15) (L). Matter of Hughes clarified.

INTERIM DECISION #3008: MATTER OF SIEMEN'S MEDICAL SYSTEMS

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MATTER OF SIEMENS MEDICAL SYSTEMS, INC.

In Visa Petition Proceedings

DEN-N-8540

Decided by Commissioner March 31, 1986

(1) Where each of two corporations (parents) owns and controls 50 percent of a third corporation (joint venture), the joint venture is a subsidiary of each of the parents for purposes of section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L) (1982). Matter of Hughes, 18 I&N Dec. 289 (Comm. 1982) clarified.

(2) Each parent, through ownership and control of 50 percent of the voting shares of the joint venture, has the power to prevent action by that company through exercise of its veto power; hence, each parent "negatively" controls that company.

(3) All agreements between the parents relating to voting of the shares, distribution of profits, management and direction of the subsidiary, and similar factors which affect actual control over 50 percent of the subsidiary must be identified. Unless such agreements restrict the actual control of one parent, the 50-percent ownership will be deemed per se control.

ON BEHALF OF PETITIONER: Martin R. Greenberg, Esquire
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New York, New York 10165

This appeal is before the Commissioner from the February 27, 1985, decision of the district director denying the visa petition to classify the beneficiary under section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1l01(a)(15)(L) (1982). The district director found that the petitioner had failed to establish an affiliation with the beneficiary's foreign employer. The appeal will be sustained.

I. FACTS

The petitioner, Siemens Medical Systems, Inc., seeks to classify the beneficiary as an intracompany transferee under section 101(a)(15)(L) of the Act to enable the beneficiary to provide services as a senior technical representative for medical x-ray equipment for its operation in the United States. Section 101(a)(15)(L) requires the beneficiary to be coming to the United States to continue employment in a managerial, executive, or specialized knowledge capacity with the same employer, its parent, branch, subsidiary, or affiliate with which the beneficiary was continuously employed abroad for the immediate prior year.

The petitioner is a United States wholly-owned subsidiary of Siemens AG, a multinational corporation headquartered in West Germany, and is involved in the development and sale of medical and dental equipment and systems. The beneficiary was employed as an x-ray engineer by wholly-owned subsidiaries of Siemens AG from 1975 until 1982. In July 1982, the beneficiary was transferred to Hospitalia International GmbH, a 50-50 joint venture between Siemens AG and Phillips International, to work on an x-ray maintenance project at King Hussein Medical Center, Amman, Jordan. After the project terminated in January 1985, he was reassigned to Siemens AG headquarters.

II. CASE HISTORY, DECISION, AND APPEAL

The petition was filed on February 14, 1985. On February 27, 1985, the district director denied the petition after determining, following Matter of Hughes, 18 I&N Dec. 289 (Comm. 1982), that the petitioner submitted no evidence that Siemens AG controls Hospitalia International and, therefore, failed to establish that affiliation

exists between Siemens Medical Systems and Hospitalia International. On April 15, 1985, the petitioner filed a motion to reopen and reconsider in which it argued that the beneficiary's identity as an employee of Siemens AG was not terminated or otherwise affected by his assignment to Hospitalia. The district director denied the motion, noting that there is nothing in the record to indicate that the beneficiary should be considered an employee of Siemens during the time he was at Hospitalia; nor is there evidence that Siemens exercises control over the management or policies of Hospitalia, which is required for affiliation.

On appeal, the petitioner contends that a qualifying affiliation under the statute exists between itself and Hospitalia through Siemens AG and makes the following argument:

Control does not nor should not mean total control. In the case at hand, it has previously been documented that Siemens AG supplies most of the technical personnel to Hospitalia International and owns 50% of the assets and 50% of the outstanding shares of stock in Hospitalia International. These three items, as indicated in the above section, should be sufficient to show control in order to establish affiliation as is defined under the immigration laws. However, it should be further noted that Siemens AG also participates in profits from Hospitalia International on a 50-50 basis; Hospitalia International's board of directors is comprised by 50% of people from Siemens AG; Hospitalia International does not manufacture equipment, but installs all necessities used in hospitals--to wit, beds, x-ray machinery, and other diagnostic equipment. The medical equipment used by Hospitalia International in the equipping of these hospitals is manufactured by Siemens AG.

The petitioner also notes that the beneficiary's identity as an employee of Siemens AG remained constant despite the beneficiary's assignment to Hospitalia. When the beneficiary went to Hospitalia International, he was assigned by Siemens AG and did not seek employment with Hospitalia International on his own volition and, at the end of his term with Hospitalia International, remained an employee of Siemens AG.

III. ANALYSIS AND CONCLUSION

Classification under section 101(a)(15)(L) of the Act requires consideration of several factors including, among others, whether or not there is a qualifying relationship between the petitioner and the entity from which the beneficiary will be transferred; whether or not the beneficiary has been employed abroad continuously for the immediate prior year in a managerial, executive, or specialized knowledge capacity by a parent, branch, subsidiary, or affiliate of the petitioner; and whether the proposed employment in the United States will be in a qualifying capacity.

A. RELATIONSHIP BETWEEN THE ENTITIES

In this case, it must be established that there is a qualifying relationship between Siemens Medical Systems, Inc. (a wholly-owned subsidiary of Siemens AG) and Hospitalia International GmbH (a 50-50 joint venture established by Siemens AG and Phillips International).

The Service will accept the interpretation that a 50-50 joint venture creates a subsidiary relationship for purposes of section 101(a)(15)(L) of the Act. Where each of two corporations (parents) owns and controls 50 percent of a third corporation (joint venture), the joint venture is a subsidiary of each of the parents. There is no majority control, but where each parent through ownership and control of 50 percent of the voting shares of the joint venture has the power to prevent action by that company through exercise of its veto power, it "negatively" controls that company. That company is, therefore, properly regarded as a subsidiary of each parent.

The petitioner has the burden of establishing that the parent owns and controls 50 percent of the claimed subsidiary. To enable the Service to determine whether de facto control exists, the petition must identify all agreements between the parents relating to voting of the shares, management and direction of the subsidiary, and similar factors which affect actual control over 50 percent of the subsidiary. Unless such agreements restrict actual control of one parent, the 50-percent ownership will be deemed per se control.

The petitioner has provided sufficient evidence to establish that Hospitalia is a subsidiary of Siemens AG. The evidence shows that Siemens AG has de facto control over 50 percent of the voting shares. It jointly manages the joint venture, shares equally in its profits, and manufactures the equipment sold and installed by Hospitalia. Since Siemens Medical Systems, Inc. is a subsidiary of Siemens AG, it is an affiliate of Hospitalia. The subsidiary and affiliate relationships in this case conform to the holdings of Matter of Hughes, supra, where it was held that (1) the term "subsidiary" is a more specific form of affiliation in which the company so described is subordinate to the control of another, and (2) the term "affiliate" is sometimes more specifically used to describe

the relationship between two companies which have no direct linkage, but are directed, controlled, and at least partially owned by the same parent corporation. We conclude that there is a qualifying relationship for purposes of section 101(a)(15)(L) of the Act between the petitioner and the beneficiary's employers abroad.

B. BENEFICIARY'S EMPLOYMENT

It is evident from the facts of the case that the beneficiary had been employed abroad continuously by subsidiaries of the same parent corporation since 1975 until his reassignment to that parent in January 1985. His employment was in a specialized knowledge capacity and the proposed employment in the United States will be in a specialized knowledge capacity. It has been established that the beneficiary's employment qualifies him for classification under section 101(a)(15)(L) of the Act.

ORDER: The appeal is sustained. The decision of the district director is withdrawn and the petition is approved.

INTERIM DECISION #3052: MATTER OF CHURCH SCIENTOLOGY INTERNATIONAL

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MATTER OF CHURCH SCIENTOLOGY INTERNATIONAL

In Visa Petition Proceedings

A-26781336

Decided by Commissioner March 15, 1988

(1) A person seeking a Schedule A, Group IV, labor certification must meet all eligibility requirements for "L-1" classification as a manager or executive, including those relating to a qualifying relationship between the entities for which the person has been and would be employed.

(2) In view of congressional intent that the "L-1" provisions be used for personnel transferred by international businesses, any religious personnel who are able to meet all the same "L-1" requirements which apply to business or other personnel may be granted "L-1" visas or Schedule A, Group IV, labor certifications.

(3) Ownership and control are the factors for establishing a qualifying relationship between entities for purposes of "L-1" classification.

(4) Ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control.

(5) Control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity.

ON BEHALF OF PETITIONER: Jerald B. Serviss
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The director, Western Regional Service Center, denied the sixth-preference immigrant visa petition and certified his decision to the Commissioner for review. The Commissioner affirmed the director's decision.

Counsel now moves the matter be reconsidered. The matter will be reconsidered. The decisions of the director and the Commissioner will be affirmed.

The petitioner is the Mother Church of the Church of Scientology. It seeks the beneficiary's services as an establishment executive.

The petitioner claims the beneficiary is eligible for a Schedule A, Group IV, labor certification under 20 C.F.R. § 656.10(d)(1) (1988). That regulation relates to an alien in the United States who was admitted to the United States to work in, and is currently working in, a managerial or executive position with the same international corporation or organization with which he or she was continuously working as a manager or executive for 1 year immediately prior to admission. For 1 year prior to her admission to the United States, the beneficiary worked as a deputy commanding officer for tours for the Church of Scientology, Inc. in Sydney, Australia.

The director and the Commissioner both determined the beneficiary does not qualify for a Schedule A, Group IV, labor certification. This is based on their findings that the United States and foreign entities are not part of the same inter- national corporation or organization for purposes of such a labor certification.

Counsel seeks reconsideration on the following four grounds:

(1) The petitioner (the Mother Church of a hierarchical religion) and the foreign entity (another church of the same religion) satisfy the requirements of a qualifying affiliate relationship because of the nature of ecclesiastical control in a hierarchical religion.

(2) The test and standards of proof applied to the petitioner are arbitrary and capricious.

(3) Denial of the petition constitutes religious discrimination in violation of the due process and equal protection clauses of the fifth and fourteenth amendments to the United States Constitution.

(4) Denial of the petition violates the first amendment to the Constitution.

Although the beneficiary was found ineligible for a Schedule A, Group IV, labor certification on the ground that the United States and foreign entities are not part of the same inter- national corporation or organization, there is another issue in this proceeding which was not previously explored. This issue is whether or not the beneficiary is eligible for such a labor certification as a manager or executive. Each issue will be addressed separately.

QUALIFYING RELATIONSHIP BETWEEN THE UNITED STATES
AND FOREIGN ENTITIES

Applicability of "L-1" standards to Schedule A, Group IV

A person seeking a Schedule A, Group IV, labor certification must meet all eligibility requirements for "L-1" nonimmigrant intra-company transferee classification as a manager or executive pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L) (1982), including those relating to a qualifying relationship between the entities for which the person has been and would be employed. Title 20 C.F.R. § 656.22(f)(1) (1988) states:

Aliens seeking labor certifications under Group IV of Schedule A shall meet, at the time of filing the application, the eligibility requirements of the Immigration and Nationality Act for an L-1 nonimmigrant visa classification as a manager or an executive.

Similarly, the Department of Labor's Technical Assistance Guide, No. 656, Labor Certifications (1981) ("TAG"), provides on pages 14 and 15:

The only aliens who qualify for Group IV of Schedule A are those in executive or managerial positions who can qualify to enter the United States under an "(L)" visa.

In an advisory opinion dated January 10, 1986, contained in the record of proceeding, the Department of Labor reasserts its view that this is the correct standard for Schedule A, Group IV.

Criteria for a qualifying relationship between entities

Case law has confirmed that ownership and control are the factors for establishing a qualifying relationship between United States and foreign entities for purposes of "L-1" classification. Matter of Siemens Medical Systems, Inc., 19 I&N Dec. 362 (Comm. 1986); Matter of Hughes, 18 I&N Dec. 289 (Comm. 1982); see also Matter of Tessel, Inc., 17 I&N Dec. 631 (Acting Assoc. Comm. 1981). Accordingly, to establish the existence of such a relationship, a petitioner must demonstrate ownership and control.

Ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control. Control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. See the definitions of the terms "ownership" and "control" in the Immigration and Naturalization Service Operations Instructions 214.2(l)(4). See also Matter of Hughes, supra. While an entity is usually in the form of a corporation, partnership, or sole proprietorship and is either a profit or

nonprofit organization, the nature and form of the entity are not relevant. Johnson-Laird, Inc. v. INS, 537 F. Supp. 52 (D. Or. 1981).

The ownership and control of both entities must be the same for a finding of a same employer, parent/subsidiary, or affiliate relationship, as required by the statute. In each case, the Service must determine whether the same individual(s) or organization owns enough of the assets of both entities to enable the individual(s) or organization to control the management and operations of both entities.

Qualifying relationship between religious organizations

The "L-1" classification was originally created for business, not religious, personnel. House of Representatives Report No. 91-851 (which accompanied Public Law 91-225 (1970) when the "L-1" provisions were first enacted into law) states the purpose of the "L-1" provisions is to facilitate the admission of "key personnel" and "managerial personnel" of international businesses. H.R. Rep. No. 851, 91st Cong, 2d Sess., reprinted in 1970 U.S. Code Cong. & Ad. News 2750. According to the report:

> This amendment would help eliminate problems now faced by American companies having offices abroad in transferring key personnel freely within the organization. This proposal would meet the objectives of American industry which has been seriously hampered in transferring personnel.

Id. at 2754.

The report, however, makes no mention of religious organizations. The Service does not believe that Congress intended "L-1" visas to be used by employees of religious organizations. There are other statutory and regulatory provisions to facilitate the entry of persons engaged in religious activities.

Nonetheless, the lack of a provision for employees of religious organizations to obtain "L-1" visas does not preclude their obtaining these visas if they are otherwise qualified. The following interpretation of the Department of State specifically indicates they are allowed to do so:

> An organized religious, charitable, service, or other nonprofit organization is considered to be '. . . a firm or corporation or other legal entity or an affiliate or subsidiary thereof . . .' for purposes of section 101(a)(15)(L) of the Act.

Vol. 9, Foreign Affairs Manual, Part II, 22 C.F.R. § 41.67 note 2.9 ("FAM").

The main thrust of counsel's argument is that a hierarchical religion such as that of the Church of Scientology, in which the Mother Church exercises control over the theology and doctrines of other Scientology churches, has the necessary qualifying relationship between its entities to meet the requirements for "L-1" classification. Counsel argues further that, since members of a religious organization, unlike stockholders in a business enterprise, do not own any property, ecclesiastical and doctrinal control, not ownership, should be the standard for determining whether or not there is a qualifying relationship between religious entities.

Additionally, counsel submits a copy of an unpublished Service decision (NYC-N-109090) where a qualifying structural link between two separate Catholic religious orders was found for purposes of "L-1" classification based on the fact that the transfer of the beneficiary (a Roman Catholic nun) required and received the administrative approval of the Vatican bureaucracy. Counsel also notes the standards for determining qualifying relationships between entities have, in the past, varied from case to case.

The Service, in the absence of any legislative history, regulations, or precedent decisions on the applicability to religious personnel of the "L-1" and Schedule A, Group IV, provisions, has been attempting to set standards and may have
inadvertently rendered some inconsistent decisions. In spite of this, this Service is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals which may have been erroneous. Matter of Khan, 14 I&N Dec. 397 (BIA 1973), by extension; Matter of M-, 4 I&N Dec. 532 (BIA 1951; BIA, A.G. 1952); see also Pearson v. Williams, 202 U.S. 281 (1906); Lazarescu v. United States, 199 F.2d 898 (4th Cir. 1952); United States ex rel. Vajta v. Watkins, 179 F.2d 137 (2d Cir. 1950); Mannerfrid v. Brownell, 145 F. Supp. 55 (D.D.C.), aff'd, 238 F.2d 32 (D.C. Cir. 1956).

In view of the congressional intent that the "L-1" provisions be used for personnel transferred by international businesses, the only appropriate standards for determining "L-1" eligibility are those applied to businesses. Accordingly, this Service withdraws from the decision in NYC-N-109090 involving a Roman Catholic nun (mentioned above) and any other prior "L-1" or Schedule A, Group IV, decisions which apply other standards. Since personnel of religious organizations are not precluded from obtaining "L-1" visas or Schedule A, Group IV, labor certifications, any religious personnel who are able to meet the same "L-1" requirements which apply to business or other personnel may be granted these benefits.

With reference to NYC-N-109090, it should be noted that evidence of the Vatican's administrative approval of the beneficiary's transfer, in and of itself, does not establish the existence of a qualifying relationship between the two religious orders. Based upon a review of the narrative decision only and without reference to the record of proceeding in that case, it is not possible to determine whether or not the petition met the standards articulated here for a qualifying relationship between the relevant entities.

Applying the same standards to all business, religious, and other personnel is the only fair way to adjudicate "L-1" and Schedule A, Group IV, cases. These standards apply equally to personnel of all religions (whether newly established or older) seeking the benefits in question.

Type of qualifying relationship claimed in this proceeding

The Immigration and Nationality Act does not define the terms "subsidiary" and "affiliate," but new "L-1" regulations defining these terms went into effect March 30, 1987, after this petition was filed. The new regulations do not reflect a change in Service policy. They merely codify definitions already set forth in administrative case law. See Matter of Siemens Medical Systems, Inc., supra; Matter of Hughes, supra.

Title 8 C.F.R. § 214.2(l)(1)(ii)(K) (1988), effective March 30, 1987, states:

'Subsidiary' means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, 50% of a 50-50 joint venture and has equal control and veto power; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

Title 8 C.F.R. § 214.2(l)(1)(ii)(L) (1988) states:

'Affiliate' means one of two subsidiaries both of which are owned and controlled by the same parent or individual or one of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.

The record in this proceeding attempts to establish the existence of an affiliate relationship between the petitioning Mother Church and the foreign entity. Since it is asserted that the Mother Church controls the subordinate foreign entity in Australia, the actual question in this case is whether a parent/subsidiary relationship exists.

Counsel's citations from the TAG and FAM

In a brief dated August 16, 1985, counsel argues the United States and foreign entities constitute a qualifying association within the meaning of the following discussion of Schedule A, Group IV, on page 13 of the TAG:

For Group IV purposes, corporations and organizations shall also include associations, firms, partnerships, joint ventures, joint stock companies, affiliates, and subsidiaries, but shall not include relationships which are only licensor-licensee or franchisor-franchisee.

This citation from the TAG explains the types of entities which may have qualifying relationships. It does not mean that all such entities qualify for purposes of Schedule A, Group IV. Furthermore, the Commissioner's decision found no evidence establishing the existence of a qualifying association.

In the brief dated August 16, 1985, and in the motion to reconsider, counsel advances the argument that the United States and foreign entities in question, as "an organized religious . . . organization," are part of the same international organization within the meaning of the State Department interpretation from the FAM cited previously. In the motion, counsel takes issue with the Commissioner's conclusion that components of

international churches have qualifying relationships no more automatically than do components of international commercial enterprises. Counsel argues the FAM merely requires the religious, charitable, or service organization to be organized. According to counsel, if the organization is organized, no further examination is necessary to determine affiliation.

Nevertheless, as in the case of the above citation from the TAG, the excerpt from the FAM simply explains that religious, charitable, and service organizations may have qualifying relationships for purposes of "L-1" nonimmigrant intra-company transferee classification. It does not mean that all organizations of this type qualify for purposes of "L-1" and Schedule A, Group IV, benefits.

The Church of Scientology and the Roman Catholic Church

Counsel asserts the hierarchical structure of the Church of Scientology is similar to, if not identical to, that of other longer established hierarchical religions, where the Service has recognized qualifying relationships between entities for purposes of "L-1" classification. Specifically, counsel asserts "the parallels between the Roman Catholic Church and the Church of Scientology are particularly strong." While the Mother Church of Scientology controls the doctrine and theology of local Scientology churches, review of the evidence in the record does not support counsel's proposition.

The Church of Scientology does exhibit some of the same characteristics as the Roman Catholic Church. Both religions have similar structures in that both have separately incorporated individual units. Both also have hierarchies consisting of nonprofit entities. Consequently, neither has stock ownership or accrual of profits. In spite of these similarities, the two hierarchies must be compared with profit-making organizations in many other respects in order to determine ownership of assets and control of the entities.

The petitioner has submitted, as a sample of a typical incorporation in the Roman Catholic Church, a copy of an amendment of the articles of incorporation of a Roman Catholic bishop (designated as a corporation sole) changing its jurisdiction and changing its name to that of an archbishop. Comparison of this document with a copy of the constitution and general rules of a typical Scientology church reflects markedly different control of the subordinate entities.

The sample document indicates that a Roman Catholic bishop or archbishop incorporates a diocese or archdiocese on authority and under order or proclamation of the Pope. The Pope has sole authority to appoint or remove the bishop or archbishop. It is the Pope who entrusts the bishop or archbishop with the corporate powers to manage and operate the diocese or archdiocese under rules, regulations, and disciplines of the Roman Catholic Church, just as the parent corporation of a business enterprise appoints a board of directors to manage and operate its subsidiaries according to its rules, regulations, and philosophy. In addition, the Pope has authority to change jurisdictions and names of dioceses and archdioceses and to create new ones.

Thus, not only does the Pope have control over theological doctrines, but he also has control over the assets, management, and operations of each diocese or archdiocese, as well as control over bishops and archbishops. A bishop or archbishop, as shown in the sample document, is designated as a corporation sole. Therefore, the Pope also indirectly owns the assets of the diocese or archdiocese.

Black's Law Dictionary (5th ed. 1979) states:

> A corporation sole is one consisting of one person only, and his successors in some particular station, who are incorporated by law in order to give them some legal capacities and advantages, particularly that of perpetuity, which in their natural persons they could not have had.

The sample document reflects that a bishop or archbishop (the corporation sole) is "authorized to hold, own and administer properties." Since the Pope may appoint, promote, or remove the person who is designated as the corporation sole or change his jurisdiction, the Pope indirectly owns the corporation sole's property.

On the other hand, the foreign entity (local church) in Australia in this case is subject only to the theological and doctrinal control of the petitioning Mother Church. Although a trustee must be a duly ordained minister of Scientology in good standing with the Mother Church, whose tenure may be terminated for failure to continue in this status, the members of the Board of Trustees of the foreign entity are elected by local church members or other trustees. They manage the foreign entity's own affairs and elect other church officers.

While the foreign entity must follow the doctrines of the Mother Church and contract with it for trademarks, products, literature, and services used in the practice of Scientology, there is a major distinction between its theological and corporate relationship with the Mother Church. Unlike the Roman Catholic hierarchy, where the Pope alone has the authority to create and change jurisdictions of dioceses and archdioceses, the foreign entity can be dissolved by a majority of four-fifths of the votes at a general meeting.

Notwithstanding counsel's assertion that all religious organizations are based on voluntary participation, the Church of Scientology in Sydney, Australia, according to its constitution and general rules, is bound by the hierarchical structure of the international organization only through a voluntary and self-determined agreement which is not present in the Roman Catholic Church. Such an agreement does not establish control of one entity by the other.

Similarly, notwithstanding counsel's assertion to the contrary, approval by the Mother Church of transfers of personnel from one church entity to another, in and of itself, does not establish the existence of a qualifying relationship between entities. As noted above, this is equally true in the case of the Roman Catholic nun (NYC-N-109090), discussed previously.

In addition, the agreement for services between the Mother Church and the foreign entity clearly provides for binding arbitration, under the auspices of the Los Angeles office of the American Arbitration Association, of disputes between the two entities. The license agreement between them also provides for arbitration. In the Roman Catholic Church, however, the Pope is the supreme pastor, supreme legislator, and supreme judge.

Other distinctions between the Church of Scientology and the Roman Catholic Church are that, unlike the Roman Catholic Church, the Mother Church of Scientology does not own, either directly or indirectly, or control any of the assets of the foreign entity. Moreover, the Mother Church does not ordain local church ministers. Rather, the assets are owned locally and ordinations are performed, and may be revoked, by the local church. Accordingly, the petitioning Mother Church clearly does not own or have the ultimate legal right to control the local church.

The relationship between the Mother Church and the foreign entity is, in business terms, that of a franchisor/franchisee, not a parent/subsidiary relationship. According to Black's Law Dictionary:

> In its simplest terms, a franchise is a license from [the] owner of a trademark or trade name permitting another to sell a product or service under that name or mark. More broadly stated, a 'franchise' has evolved into an elaborate agreement under which the franchisee undertakes to conduct a business or sell a product or service in accordance with methods and procedures prescribed by the franchisor, and the franchisor undertakes to assist the franchisee through advertising, promotion, and other advisory services.

In this case, the petitioning Mother Church provides continuous religious guidance to the local church, gives training to its ministers, and ensures the standardization of its doctrines and practices, much as a franchisor in the business world would guide, give training to and regulate a franchisee. The local church, which is locally owned and solely responsible for acquiring trustees and church officers and managing its affairs, may likewise be compared with the independently owned business of a franchisee.

The Mother Church and the foreign entity are joined by a license agreement and an agreement for services. The Mother Church and the religious Technology Center (another Scientology organization) own and control, by trademarks and service marks, the products, literature, and services used in the practice of Scientology. The Mother Church and the Religious Technology Center permit the foreign entity to use them under the terms of a license. A contractual relationship of this type is not considered to be a qualifying relationship for purposes of "L-1" classification. See Matter of Schick, 13 I&N Dec. 647 (R.C. 1970).

The above discussion cannot be construed to mean that there is a qualifying relationship between all organizations associated with the Roman Catholic Church, or that there is not a qualifying relationship between the Church of Scientology and its other associated organizations. Such a determination is made on a case-by-case basis after considering the petitioner's evidence of ownership and control.

Test and standards of proof applied to the petitioner

Counsel argues the test and standards of proof applied to the petitioner are arbitrary and capricious. In considering the nature of relationships between religious entities for purposes of "L-1" classification, the Service,

while applying law and regulation equally, must examine organizational structure and relevant factors. As with nonreligious entities, this must be accomplished by reviewing the documentary evidence of record.

In each case, all evidence must be evaluated, and there is no presumption of eligibility. The fact that some religious entities may be able to establish qualifying relationships while others are not able to do so may lead to the erroneous conclusion asserted by counsel that the findings are subjective opinions relating to individual petitioners. This is not the case. Varying opinions should be expected where diverse structures are found.

The tests and standards of proof utilized in this proceeding have been clearly established through regulation and administrative case law, as discussed at length above. The record demonstrates that all due consideration has been accorded the petitioner in accordance with current Service policy.

Constitutional issues

Counsel also claims that denial of the petition raises constitutional issues. Counsel does not, however, claim that the statute is unconstitutional. Of course, the Service cannot pass upon the constitutionality of the statute it administers. Nevertheless, we can address questions relating to the constitutionality of its application. Since all petitioners who seek "L-1" or Schedule A, Group IV, benefits must qualify on the same basis regardless of their religion, no violation of the equal protection or due process clauses can be found.

Counsel argues that the Service has denied the petitioner a mechanism for bringing its personnel to the United States, thereby violating the free exercise clause. The fact is the Service treats all religions the same. Whether or not religious employees qualify for "L-1" classification on merits not relating to religious preference or practice is a different matter.

Counsel asserts that the Service's review of the petitioning religion's internal organization is a violation of the establishment clause. Matter of Brantigan, 11 I&N Dec. 493 (BIA 1966), holds that, in visa petition proceedings, the burden of proof to establish eligibility for the benefit sought rests with the petitioner. In carrying out its obligation to ensure compliance with the congressional intent of the immigration laws, the Service must examine the organizational structure of an entity seeking "L-1" or Schedule A, Group IV, benefits in order to determine whether or not it has met its burden of proof. This does not violate the establishment clause.

MANAGERIAL OR EXECUTIVE CAPACITY

As in the case of the definitions of the terms "subsidiary" and "affiliate," the new "L-1" regulations, effective March 30, 1987, define qualifying managerial and executive capacities. The definitions of "managerial capacity" and "executive capacity" also do not reflect a policy change. As noted on February 26, 1987, when the new regulations were published, "The standards included the proposed regulations were intended to clarify the Service's interpretation of the statute and current regulations, not to make a change in policy." 52 Fed. Reg. 5739 (1987).

Generally speaking, under either the old or new regulations, two factors identify a qualifying managerial or executive capacity, as defined in 8 C.F.R. §§ 214.2(l)(1)(ii)(A) and (B) (1987), now cited at 8 C.F.R. §§ 214.2(l)(1)(ii)(B) and (C) (1988), and both must be present. First, the position must involve significant authority over generalized policy of an organization or a major subdivision of an organization. Second, the employee's duties must be primarily at the managerial or executive level. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. Moreover, a managerial or executive employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor.

Having discretionary authority and a managerial or executive title (such as establishment executive and deputy commanding officer for tours) does not, in and of itself, mean a person is employed in a managerial or executive capacity. Here, the beneficiary's positions for both the United States and foreign entities have managerial or executive titles and discretionary authority.

While working for the foreign entity, the beneficiary was responsible for a staff of 20, including 2 division heads, but she also "wrote programs which she implemented" to ensure that Church policy was followed regarding "dissemination tours for Church expansion." This appears to be the function of a staff officer or specialist not usually performed by a manager or executive. In her current position with the petitioning United States entity, the beneficiary is responsible for running an entire division, but she supervises only five other employees.

The record does not contain sufficiently detailed descriptions of the beneficiary's job duties, the job duties of her subordinates, and the organizational structures at her job sites to determine whether her employment is in a qualifying managerial or executive capacity. This issue was not raised in prior decisions. As the petition is otherwise not approvable, it does not need to be addressed further. It is simply noted for the record.

CONCLUSION AND ORDER

For the reasons discussed above, the decisions of the director and the Commissioner will be affirmed. This action is without prejudice to consideration of a new sixth-preference visa petition accompanied by a labor certification based upon a specific job offer pursuant to 20 C.F.R. § 656.21 (1988).

This action also does not preclude a finding of a qualifying relationship between the petitioner and a foreign entity which it owns and controls. The Church of Scientology, as with all other religious or nonreligious organizations, may secure "L-1" or Schedule A, Group IV, benefits for its employees when all requirements of the statute and related regulations are met.

ORDER: The decision of May 29, 1986, dismissing the appeal is affirmed.

INTERIM DECISION #3067: MATTER OF SANDOZ CROP PROTECTION

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MATTER OF SANDOZ CROP PROTECTION CORPORATION

In Visa Petition Proceedings

CHI-N-36181

Decided by Commissioner May 20, 1988

(1) Specialized knowledge involves proprietary knowledge and an advanced level of expertise not readily available in the United States job market. This knowledge and expertise must be clearly different from those held by others employed in the same or similar occupations. Different procedures are not a proprietary right within this context unless the entire system and philosophy behind the procedures are clearly different from those of other firms, they are relatively complex, and they are protected from disclosure to competition.

(2) A petitioner's ownership of patented products or copyrighted works, in and of itself, does not establish that a particular employee has specialized knowledge. In order to qualify, the beneficiary must himself or herself be a key person with knowledge which is critical for performance of the job duties and which is protected from disclosure through patent, copyright, or company policy.

ON BEHALF OF PETITIONER: Melvyn E. Stein, Esquire
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This is an appeal from the adverse decision of the director, Northern Regional Service Center. The appeal will be dismissed.

The petitioner manufactures and sells crop protection chemicals. It seeks to classify the beneficiary as an "L-1" intra-company transferee based upon its intent to employ him as a marketing manager. The beneficiary has been employed by the foreign enterprise as a sales representative.

The director denied the petition on the ground that the petitioner had failed to establish the beneficiary qualifies for "L-1" classification as a person who has been and would continue working in a capacity involving specialized knowledge.

On appeal, counsel asserts the beneficiary's knowledge of, and experience in, the marketing and sale of the petitioner's patented herbicide constitutes the necessary proprietary knowledge of a unique product to the specialized knowledge. According to counsel, the beneficiary's knowledge and skill are critical to the success of the petitioner's products in the United States.

"L-1" eligibility requires that a petitioner establish a beneficiary has been employed outside the United States in a qualifying managerial or executive capacity, or in a capacity involving specialized knowledge, for a qualifying firm, for the year prior to the beneficiary's application for admission to the United States. The petitioner must also demonstrate the beneficiary will be immediately employed in a qualifying capacity.

New regulations effective March 30, 1987, define "specialized knowledge." Specialized knowledge, as now described in 8 C.F.R. § 214.2(l)(1)(ii)(D) (1988), involves advanced knowledge and an advanced level of expertise not readily available in the United States job market, with the petitioner having a proprietary right to the knowledge or its product. The petitioner's proprietary interest must be such that the knowledge required is clearly different from that held by others employed in the same or similar occupations. Different procedures are not a proprietary right within this context unless the entire system and philosophy behind the procedures are clearly different from those of other firms, they are relatively complex, and they are protected from disclosure to competition.

According to supplementary information published with the new regulations on February 26, 1987:

It was the Service's intention to provide clearer standards for determining specialized knowledge. Although commenters would prefer to retain the definition in current regulations, the Service believes that a revision is appropriate to better articulate case law.

52 Fed. Reg. 5740-41 (1987).

Most employees today are specialists and have been trained and given special knowledge. Nevertheless, it cannot be concluded all employees with special knowledge or all employees performing highly technical duties are eligible for classification as intra-company transferees. Matter of Colley, et al., 18 I&N Dec. 117 (Comm. 1981); Matter of Penner, 18 I&N Dec. 49 (Comm. 1982). "L-1" petitions for other than managers and executives may only be approved for "persons with specialized knowledge, not for skilled workers." Matter of Penner, supra, at 52.

Both of the above precedent decisions cite the House of Representatives report which accompanied Public Law 91-225 (1970) when the "L-1" provisions were first enacted into law. H.R. Rep. No. 851, 91st Cong., 2d Sess. 2, reprinted in 1970 U.S. Code Cong. & Ad. News 2750, 2753-54. That report states the purpose of the "L-1" provisions is to facilitate the admission of "key personnel" and "managerial personnel."

A petitioner's ownership of patented products and processes or copyrighted works, in and of itself, does not establish that a particular employee has specialized knowledge. In order to qualify, the beneficiary must be a key person with materially different knowledge and expertise which are critical for performance of the job duties; which are critical to, and relate exclusively to, the petitioner's proprietary interest; and which are protected from disclosure through patent, copyright, or company policy.

The primary product the beneficiary has been marketing and selling in Canada is a specialized, patented herbicide agricultural chemical used to control broadleaf weeds. The petitioner argues the knowledge gained by the beneficiary managing two areas in Canada make him one of very few people able to market the herbicide for application to corn and wheat and for other specialized applications to pasture lands, fallow land, industrial vegetation, grass seed, and perennial weeds. According to the petitioner, the marketing of this herbicide requires a thorough knowledge of the product and the ability to communicate its use and effectiveness.

The petitioner has not established that skills relating exclusively to its business are necessary for the beneficiary to perform his proposed duties of marketing this product. In fact, one of the beneficiary's duties is to communicate to customers the use and effectiveness of the patented product, and the petitioner has not established the beneficiary needs proprietary knowledge of the product to do this.

In this proceeding, the petitioner has not established the beneficiary's knowledge is not related to common practices and is not readily available in the United States labor market. On the contrary, the beneficiary's knowledge of the sale and marketing of herbicides and the Canadian market is that normally expected of an employee in his position. It is not an advanced level of expertise which is materially different from that of others in similar positions employed by competitors.

Matter of Brantigan, 11 I&N Dec. 493 (BIA 1966), holds, in visa petition proceedings, the burden of proof to establish eligibility for the benefit sought rests with the petitioner. Here, that burden has not been met.

It is noted the record, as presently constituted, does not contain any evidence of a qualifying relationship between the United States and foreign enterprises. As the petition is otherwise not approvable, this issue does not need to be addressed further.

ORDER: The appeal is dismissed.

SECTION TWELVE

CASE LAW SUMMARIES

Arctic Catering, Inc. v. Thornburgh, 769 F. Supp. 1167 (D. Colo. 1991)

Facts: Petitioner sought a third preference for its general manager who had entered on an L Visa. He managed catering services at remote locations for oil developers and similar groups. He had two college degrees but neither was related to the job qualifications. The application was denied by INS for failure to meet either the degree requirement or special services test for a professional.

Issue: Was the denial an abuse of discretion?

Held: Yes, despite the fact that the agency interpretation of the statute was entitled to deference under Chevron. The court accepted the reasonableness of the job related degree requirement for a professional and the alternate of unique services required. It found an abuse of discretion in failing to indicate the comparisons it had relied on in stating that the managerial services provided the petitioning employer were not unique. The matter was remanded for reconsideration of the factual record with respect to the unique demands of the position.

Elkins v. Moreno, 435 U.S. 647 (1978)

Facts: Nonimmigrant alien students, each of whom was dependent on a parent who held a "G-4 visa", i.e., a nonimmigrant visa granted to all officers or employees of international treaty organizations and members of their immediate family, and each of whom was named in that visa, brought suit against the University of Maryland and its president, alleging that the university's refusal to grant them "in-state" status for tuition purposes violated the Fourteenth Amendment's due process and equal protection clauses. The District Court granted relief, but limited it to a declaration and injunction restraining the president from denying plaintiffs the opportunity to establish in-state status solely because of an "irrebuttable presumption of non-domicile." The Court of Appeals affirmed.

Issue: Under federal law, can a G-4 alien form the intent necessary to allow him to change his domicile?

Held: Yes.

Although nonimmigrant aliens can generally be viewed as temporary visitors to the United States, the nonimmigrant classification is by no means homogeneous with respect to the terms on which a nonimmigrant enters the United States. For example, Congress expressly conditioned admission for some purposes on an intent not to abandon a foreign residence or, by implication, on an intent not to seek domicile in the United States. Thus, the 1952 Act defines a visitor to the United States as "an alien . . . having a residence in a foreign country which he has no intention of abandoning" and who is coming to the United States for business or pleasure. § 101(a) (15)(B). Similarly, a nonimmigrant student is defined as "an alien having a residence in a foreign country which he has no intention of abandoning . . . and who seeks to enter the United States temporarily and solely for the purpose of pursuing . . . a course of study . . . ." § 101(a)(15)(F). See also § 101(a)(15)(C) (aliens in "immediate and continuous transit"); § 101(a)(15)(D) (vessel crewman "who intends to land temporarily"); § 101(a)(15)(H) (temporary worker having residence in foreign country "which he has no intention of abandoning").

By including restrictions on intent in the definition of some nonimmigrant classes, Congress must have meant aliens to be barred from these classes if their real purpose in coming to the United States was to immigrate permanently. Moreover, since a nonimmigrant alien who does not maintain the conditions attached to his status can be deported, see § 241(a)(9) of the 1952 Act, 66 Stat. 206, 8 U.S.C. § 1251(a)(9) (1976 ed.), it is also clear that Congress intended that, in the absence of an adjustment of status (discussed below), nonimmigrants in restricted classes who sought to establish domicile would be deported.

But Congress did not restrict every nonimmigrant class. In particular, no restrictions on a nonimmigrant's intent were placed on aliens admitted under § 101(a)(15)(G)(iv). Since the 1952 Act was intended to be a comprehensive and complete code, the conclusion is therefore inescapable that, where as with the G-4 class Congress did not impose restrictions on intent, this was deliberate. Congress' silence is therefore pregnant, and we read it to mean that Congress, while anticipating that permanent immigration would normally occur through immigrant channels, was willing to allow nonrestricted nonimmigrant aliens to adopt the United States as their domicile. Congress' intent is confirmed by the regulations of the Immigration and Naturalization Service, which

provide that G-4 aliens are admitted for an indefinite period -- so long as they are recognized by the Secretary of State to be employees or officers (or immediate family members of such employees or officers) of an international treaty organization. See 8 CFR § 214.2(g) (1977); 1 C. Gordon & Rosenfield, Immigration Law and Procedure § 2.13b, p. 2-101 (rev. ed. 1977). Whether such an adoption would confer domicile in a State would, of course, be a question to be decided by the State.

Under present law, therefore, were a G-4 alien to develop a subjective intent to stay indefinitely in the United States, he would be able to do so without violating either the 1952 Act, the Service's regulations, or the terms of his visa. Of course, should a G-4 alien terminate his employment with an international treaty organization, both he and his family would lose their G-4 status. Ibid. Nonetheless, such an alien would not necessarily be subject to deportation nor would he have to leave and re-enter the country in order to become an immigrant.

[at 665-67, footnote omitted]. Since the question whether G-4 aliens can become Maryland domiciliaries is a matter of state law and potentially dispositive of this case, the question is certified to the Maryland Court of Appeals for determination. [at 668].

International Union of Bricklayers v. Meese, 616 F. Supp. 1387 (N.D. Cal. 1985)

Facts: The plaintiff bricklayers union filed a suit for declaratory and injunctive relief, alleging that an INS Operating Instruction (O.I.) was contrary to the Immigration and Nationality Act (Act) and was therefore invalid. Temporary visitor for business visas pursuant to 8 U.S.C. § 1101(a)(15)((B) (B-1 visas) had been issued to West German employees of a firm whose equipment was purchased by a United States company. The aliens were admitted as temporary business visitors to complete fabrication of newly-designed gold processing system in the United States, as provided in the sale contract. Operating Instruction 214.5(b)(5) permitted the classification as B-1 non-immigrants of aliens who were to receive no salary from a United States source and were "coming to install, service, or repair commercial or industrial machinery purchased from a company outside the United States, provided: the contract of sale specifically requires the seller to perform such services or training, [and] the alien possesses specialized knowledge essential to the seller's contractual obligation . . . ." The union asserted that the foreign workers were not visitors for business, but rather, should have been classified as temporary workers under 8 U.S.C. § 1105(a)(15)(H)(ii). It claimed that the O.I. was contrary to the above statutes and to Congress' intent to protect United States workers, in that it permitted those aliens falling within the definition of "temporary worker" to be admitted without a labor certification.

Issues: 1. Did the union have standing to challenge the Operating Instruction and visa issuance?

2. Was the Operating Instruction invalid because it was contrary to the statues and intent of Congress?

3. Could the injunctive relief be granted absent class certification?

4. Should relief be granted only prospectively?

Held: 1. Yes. The court found that the Union had standing to challenge the O.I. on behalf of its members. The decision contains a fairly thorough discussion of the standing issue. The court concluded that injury was adequately shown by the Union's allegations that its members had been deprived (1) of an opportunity to complete for employment without the threat of foreign competition, and (2) of the protection afforded by the labor certification procedure. The court also concluded that the plaintiffs' injuries were fairly traceable to the defendants' conduct. Taking a broad view, the court found that this requirement was satisfied because, absent the defendants' practices pursuant to the O.I., alien laborers would have been required to obtain H-2 visas and labor certifications. The court found that the plaintiffs' satisfied the third requirement that their injuries are likely to be redressed by the relief sought. As to the prudential element of standing, the court found that the union was not asserting the rights of others, but was raising its own legal rights and rights of its members. The court found the plaintiffs did not assert generalized grievances shared by a large class of citizens, but instead specific injuries. The court also found that the plaintiffs were within the zone of interests protected by the Act. Lastly, the court observed that standing had been found in a similar suit, International Union of Bricklayers v. Meese, 761 F.2d 798 (D.C. Cir. 1985). The court therefore concluded that plaintiffs had standing to sue.

2. Yes. The court found the O.I. to be invalid. The court found that the O.I. is contrary to 8 U.S.C. § 1101(a)(15)(B), which excludes from the B-1 classification an alien "coming for the purpose of . . .

performing skilled or unskilled labor." The court further found that the O.I. ignores the provision of 8 U.S.C. § 1101(a)(15)(H)(ii) concerning labor certifications and the availability of American workers. After reviewing the legislative history, the court observed that a central purpose of the Act was to protect American labor, and that 8 U.S.C. § 1101(a)(15)(B) and 1101 (a)(15)(H)(ii) were intended to restrict the influx of foreign laborers. The court concluded that the O.I. was inconsistent with the language and legislative intent of the Act.

3. Yes. The court rejected the government's argument that the injunctive relief sought could not be granted absent class certification. The court noted that this is a membership suit, and that declaratory and injunctive relief had been permitted in such suits without class certification.

4. Relying on the test for non-retroactivity in Chevron Oil Co. v. Huson, 404 U.S. 97 106-07 (1971), the court held that its ruling should not be applied retroactively. The court rejected the idea that non-retroactivity analysis is inappropriate in district court decisions, because the case involves declaratory and injunctive relief rather than damages. Cf. Kessler v. Associates Financial Services Co., 573 F.2d 577 (9th Cir. 1977). The court declared the O.I. unlawful and issued a permanent injunction barring the issuance of B-1 visas under the O.I.

International Union of Bricklayers v. Meese, 761 F.2d 798 (D.C. Cir. 1985)

Facts: International and local unions and three members brought an action challenging an operating instruction for admission of business visitors in connection with the installation of a sawmill. The installer had brought in masons to assist in the construction. By the time of the district court decision the job was over and the workers were gone. Plaintiffs alleged one prior violation and a current project on the West Coast. The district court dismissed for want of jurisdiction, standing, and mootness.

Issue: Did the court have jurisdiction?

Held: Yes. The subject matter jurisdiction existed for the general claim of invalidity of the operating instruction. A pattern or practice as distinguished from individual adjudications are exempt from consular non-reviewability doctrine. The plaintiffs alleged injury in fact from interference from foreign workers. The plaintiffs were within the zone of protected classes Congress had in mind for protection of American labor. There was a sufficient threat of repetition to survive a claim of mootness.