

REVISION OF NAFTA PROFESSIONAL PROCEDURES FOR

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FM SECSTATE WASHDC
TO ALL DIPLOMATIC AND CONSULAR POSTS
SPECIAL EMBASSY PROGRAM
AMEMBASSY KABUL
AMEMBASSY KHARTOUM
AMEMBASSY BUJUMBURA
AMEMBASSY DUSHANBE

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VISAS

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SUBJECT: REVISION OF NAFTA PROFESSIONAL PROCEDURES FOR
MEXICANS

1. Summary: January 1, 2004 will be the tenth anniversary of NAFTA. The unique visa category for NAFTA is the NAFTA professional. The procedures for Canadian and Mexican professionals have differed these ten years. As of the first of the year, the procedures will be simplified for Mexicans by removing the requirement for petitions and labor condition applications. Mexicans will no longer be subject to a numerical limitation for these professionals. But Mexican citizens will still require a visa to seek admission into the United States. Specifics of these requirements are set forth in the revised FAM notes provided in this cable.

2. TN requirements: After the first of the New Year Mexican nationals may apply at consular sections around the world for a "TN" (NAFTA professional) visa. The applicant must submit a visa application form with a letter of employment in the United States. The letter must indicate that the position in question in the US requires the employment of a person in a professional capacity consistent with the NAFTA Chapter 16, Annex 1603, Appendix 1603.d.1. The applicant must present evidence that s/he possesses the credentials of that profession as

listed in the Appendix.

3. List of professions: the list of professions is found in 9 FAM 41.59. The letter of offer of employment must identify the need for a person in one of the listed professions. The applicant must present evidence that s/he possesses all the qualifications as listed in the Appendix in order to qualify for status.

4. Licensure: It must be remembered that while a license is required to practice certain professions in the United States, possession of such a license is not required for visa issuance or admission. Local authorities must enforce any licensure requirements. For example, an applicant who has a law degree, but no US license to practice in this country, may be issued a visa and admitted to the US to practice law. It is the responsibility of local authorities to ensure that the alien obtains all the necessary licenses to practice.

5. Visa Reciprocity: Visa reciprocity will continue to be three years with multiple entries unless reciprocity changes.

6. Post processing procedures: As this visa classification is no longer petition based, it is recommended that posts process similar to procedures established to process Treaty Trader/Investor Visas. The United States is committed to facilitative processing of NAFTA visas, so posts are encouraged to be mindful of this commitment when setting procedures.

7. 9 FAM 41.59 Notes (as follows):

9 FAM 41.59 N1 Background

A. 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), pub. l. 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.

B. Chapter 16 of NAFTA, entitled "temporary entry for business consistency persons" was designed to facilitate

the movement of business persons among the United States, Canada, and Mexico. This chapter contains the visa-related provisions relating to the temporary entry of business persons. NAFTA allows investment, trade, and professional commerce services to take place, and thus affects four nonimmigrant visa categories in the U.S. Immigration and Nationality Act: Temporary Visitors for business (B-1); Treaty Trader and Investors (E); intra-company transferees (L) and NAFTA professionals (TN). C. The U.S.-Canada Free Trade Agreement (US-CFTA) created a class of professional nonimmigrants, (TC), but did not provide authority for visa issuance. NAFTA has modified and adopted the TC professional category and treats this new admission category (TN) as if it were a nonimmigrant visa classification under INA 101(a)(15), thus, authorizing the issuance of visas to both Mexicans and Canadians. The CFTA was suspended when NAFTA entered into force. The TN category should not be confused with the H-1b visa classification. It is a separate and distinct category. Similarities do exist, however, since this category was derived from the H-1b classification.

9 FAM 41.59 N2 Countries that benefit from agreement. Only citizens of the NAFTA parties (Canada, Mexico and the United States) may benefit from the agreement. Permanent resident status in any NAFTA party country does not in itself confer any benefits under this chapter of the agreement.

9 FAM 41.59 N3 NAFTA professional requirements

9 FAM 41.59 N3.1 Qualified as professional

A. This category extends visa classification only to NAFTA citizens who are members of a profession listed in Appendix 1603.d.1 of NAFTA, chapter 16.

B. The alien must meet the specific requirements, education and/or experience, etc. listed in the annex related to that particular profession. While the list originally included professional activities included under the former H-1 standards as professions, it has been extended to include additional professions. However, with rare exception each profession requires a baccalaureate degree as an entry-level requirement. If a baccalaureate is indeed required, experience cannot be substituted for that degree. In some professions, alternative criteria to

a bachelor's degree is listed, and sometimes experience and criteria are required in addition to the degree. The list is occasionally expanded upon agreement of all NAFTA parties.

9 FAM 41.59 N3.2 Employment required

The alien must engage in prearranged business activity for a U.S. or foreign employer. But self-employment is not an option under the category. If the alien seeks self-employment, the alien should pursue that business under the Treaty Trader or Investor Visa classification, or another visa category. Evidence of engagement by a U.S. employer(s) or entity(ies) to engage in prearranged business activities at a professional level is necessary to accord "TN" classification.

9 FAM 41.59 N4 Entry documentation

9 FAM 41.59 N4.1 Canadian citizens

Since Canadian citizens, unlike Mexican citizens, are not obliged to be in possession of a nonimmigrant visa to enter the United States, (except in the E and K categories), the issuance of a TN or TD visa should be rare. Consular officers should remember, however, that although Canadians don't need visas, they may, and should be issued to qualified applicants upon request.

9 FAM 41.59 N4.2 Mexican citizens

A Mexican citizen seeking TN status must apply for and be issued a visa. The validity of the visa should coincide with the reciprocity schedule. The Mexican applicant seeking visa issuance must present the requisite evidence to a consular officer for adjudication.

N4.3 Required documentation:

Both nationalities will have to submit the following documentation:

- (1) proof of citizenship; (note 6)
- (2) evidence of an offer of employment by submission of employment letter in one of the professional occupations which requires the education and/or experience listed in appendix 1603.d.1 of NAFTA chapter 16 (note 7)
- (3) evidence that the applicant meets the minimum education

and/or work experience requirements set forth in appendix 1603.d.1]; (note 7.1) and

9 FAM 41.59 N5 Temporary entry

The agreement encompasses only businesspersons coming to the U.S. temporarily. Chapter 16 provides the following definition: "Temporary entry means an entry into the United States without the intent to establish permanent residence." The department's regulation [22 CFR 41.59(c)] amplifies this definition to provide additional guidance. The essence of the requirement is that the alien is seeking "Temporary" entry into the U.S. the alien, therefore, must satisfy the consular officer that the proposed stay is temporary. A temporary period has a reasonable, finite end that does not equate to permanent residence. The circumstances surrounding an application should reasonably and convincingly indicate that the alien's temporary work assignment in the United States will end predictably and that the alien will depart upon completion of the assignment. An intent to immigrate in the future which is in no way connected to the proposed immediate trip need not in itself result in a finding that the immediate trip is not temporary. An extended stay, even in terms of years, may be temporary, as long as there is no immediate intent to immigrate.

9 FAM 41.59 N6 Evidence of citizenship

The NAFTA applicant must present the requisite evidence of citizenship.

A. Mexican citizens must present a passport, as they require visa issuance.

B. Canadian citizens may present a passport, as visas are not required, or they may provide secondary evidence, such as a birth certificate. However, Canadian citizens traveling to the United States from outside the Western Hemisphere are required to present a valid passport at the port-of-entry.

9 FAM 41.59 N7 Evidence of professional employment

The applicant must present evidence sufficient to satisfy the Immigration or Consular Officer of intent to engage in prearranged business activities for a U.S. employer(s) or entity(ies) at a professional level. This evidence may be

in the form of an employment letter from a U.S. or foreign employer, or contract providing a detailed description of the business activities which the individual will be engaged in, and should state the following:

- (1) activity in which the alien shall be engaged;
- (2) purpose of entry;
- (3) anticipated length of stay;
- (4) educational qualifications or appropriate credentials demonstrating professional status;
- (5) Evidence of compliance with DHS regulations, and/or state laws; and
- (6) arrangements for remuneration.

9 FAM 41.59 N7.1 Education and/or experience requirement

A. Education: the applicant's employer must submit evidence that the applicant meets the minimum education requirements or has the alternative credentials set forth in appendix 1603.d.1 of chapter 16 of the NAFTA agreement. Evidence of professional qualifications may be in the form of degrees, certificates, diplomas, professional licenses, or membership in a professional organization. Degrees, diplomas, or certificates received from an educational institution outside the United States, Canada, or Mexico must be accompanied by an evaluation by a reliable credentials evaluation service specializing in evaluating foreign documentation.

B. Experience: Evidence attesting to the applicant's experience should be in the form of letters from former employers employees. If the applicant was self-employed, business records should be submitted attesting to that self-employment.

9 FAM 41.59 N7.2 Licensing requirements

A. The list of professions reveals requirements for admission into the United States under immigration provisions. Such requirements for admission or classification as a NAFTA professional do not include licensure. Licensure to practice a given profession in the United States is a post-entry requirement subject to enforcement by the appropriate state or other sub-federal authority.

b. Proof of licensure to practice a given profession in the United States may be offered along with a job offer letter, or other documentation in support of an application for TN classification. But

admission/classification should not be denied based solely on the fact that the applicant does not already hold a license to practice in the United States.

9 FAM 41.59 N8 Denial of TN status in certain labor disputes

A citizen of Canada or Mexico may be denied TN status as described in section 214(e) and annex 1603 of the NAFTA if:

(1) 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.

(2) 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.

9 FAM 41.59 N8.1 If employed alien is participating in strike

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, he and/or she is not considered 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. This holds whether or not such strike or other labor dispute has been certified by the Secretary of Labor, or whether DHS has been otherwise informed that such a strike or labor dispute is in progress. The alien is subject to the following terms and conditions.

9 FAM 41.59 N8.2 Notification of denial

If it is determined that an alien shall be denied a TN visa, or is denied entry to the United States, the applicant must be notified in writing of the reason(s) for the refusal. In addition, VO/L/A must be immediately informed of such denial so that a designated representative of the applicant's home country government may be promptly notified in writing of the reason for the

refusal.

9 FAM 41.59 N9 Fees

DHS will assess a processing fee of \$50.00 to classify Canadian citizens as NAFTA TN professionals. No fee shall be charged to Mexican citizens.

9 FAM 41.59 N10 Length of stay in U.S.

A Canadian or Mexican citizen seeking admission as a TN professional shall be treated as if seeking classification under INA 101(a)(15), therefore, the INA 214(b) presumption of immigrant intent applies if he fails to meet all the requirements of the TN visa category. The maximum period of admission of a TN is one year. The admission period of a dependent (TD) shall coincide with the TN principal's. (see 9 FAM 41.59 N5 for definition of "temporary").

9 FAM 41.59 N11 Part-time employment

An alien entering the U.S. in TN status may be employed on a part-time basis.

9 FAM 41.59 N12 Changing or adding employers

A. Aliens in TN status may change or add employers while in the United States by filing form I-129 with the Nebraska service center of the U.S. Citizenship and Immigration Service. He or she must present new documentary evidence, and pay the prescribed processing fee of \$120.00.

b. A Canadian citizen wishing to change or add employers may also depart the United States and apply for readmission at the Port-of-Entry, using new documentary evidence and paying the required \$50 fee.

9 FAM 41.59 N12.1 Spouses and minor children

A. Spouses and minor, unmarried children who are accompanying or following to join TN professionals, may be admitted to the United States in the TD classification. Dependents are not permitted to accept employment in the U.S. while in TD status. They are, however, permitted to attend school on a full-time basis. There is no processing fee for classifying dependents of Canadian TNs.

As with any derivative status, TD applicants must demonstrate a bona fide spousal or parent-child relationship to a TN status holder.

b. Canadians should be able to show a valid I-94 authorizing their TN status. Aliens normally exempt from visa requirements need not obtain visas.

9 FAM 41.59 N13 Validity of visas for TN family members

9 FAM 41.59 N13.1 Mexican or Canadian family members

Family members possessing either Mexican or Canadian citizenship should be issued multiple entry visas valid for the maximum period authorized by appendix c) or for the length of the principal alien's visa and/or authorized period of stay, whichever is less. [see 9 FAM Appendix C for fees.]

9 FAM 41.59 N13.2 TN family members not possessing Mexican or Canadian citizenship

Non-Canadian or Non-Mexican family members of TN status holders are entitled to TD visas, which can be issued in non-Canadian or non-Mexican passports. However, only the Canadian and Mexican reciprocity schedules in Appendix C provide data for TN and TD visas. Therefore, the number of entries, fees and validity for non-Canadian or non-Mexican Family members of a TN status holder seeking TD visas should be based on the reciprocity schedule of the TN principal alien. For example, a Chinese national married to a Canadian would be issued a TD visa in his and/or her Chinese passport based on the Canadian reciprocity schedule. In this case the applicant would be the recipient of a visa valid for multiple entries, no fee. However, a Mexican married to a Canadian would be issued a TD visa in his and/or her Mexican passport valid for multiple entries with a fee of \$100.00 based on the Mexican reciprocity schedule.

9 FAM 41.59 N13.3 Domestic servants of TNs

A domestic servant of a TN who meets the requirements set forth at 9 FAM 41.31 N6.3-3 may be issued a B-1 visa.

9 FAM 41.59 N13.4 Canadians requiring TN visas

In rare cases, posts may need to issue a TN visa to a

Canadian. For example, a Canadian without TN status, who resides in a third country with a non-Canadian spouse or family members, and who plans to enter the U.S. as a NAFTA professional simultaneously with the Family member(s) will need a TN visa in order to confer derivative (TD) status on his and/or her dependents. In such cases, the Canadian could not wait to have his and/or her case adjudicated by DHS at a port of entry, since the non-Canadian dependent would require a visa to board a flight and to apply for entry into the U.S.

9 FAM 41.59 N14 Aliens subject to INA 212(e)

The two-year home residency requirement for some former J-1 holders applies only to immigrant visa applicants, and to H and L nonimmigrant visa applicants. Thus, TN applicants and their TD Family members who are former exchange visitors subject to INA 212(e) are not prohibited from receiving visas and entering the U.S. as NAFTA professionals, even if their professional activities might be similar or identical to those of an H or L recipient.

9 FAM 41.59 N15 Denial of Treaty Trader or Treaty Investor status to Canadians or Mexicans in certain labor disputes [see 8 CFR 214.2(e)(22).]

8. The following are the procedural notes:

9 FAM 41.59 N1 Visa issuance procedures

9 FAM 41.59 PN1 Evidence Of TN Qualifications.

A Mexican or Canadian citizen seeking issuance of a TN nonimmigrant visa must present the following documentary evidence to substantiate his/her claim to TN classification:

- (1) Proof of citizenship (9 FAM 41.59 N6);
- (2) Evidence of an offer of employment, such as a letter or contract offering employment in one of the professional occupations which requires the education and/or experience listed in appendix 1603.d.1 of NAFTA chapter 16 (9 FAM 41.59 N7);
- (3) Evidence that the applicant meets the minimum education and/or work experience requirements set forth in appendix 1603.d.1 (9 FAM 41.59 N7.1).

9 FAM 41.59 PN2 Spouses and Minor Children

A. Spouses and minor, unmarried children who are accompanying or following to join TN professionals, may be issued TD visas. As with any derivative status, TD applicants must demonstrate a bona fide spousal or parent-child relationship to a TN status holder. Dependents of Canadian citizens in TN status should be able to show a valid I-94 authorizing the principal's TN status. Dependents who are Canadian citizens are not required to obtain visas.

B. Family members possessing either Mexican or Canadian citizenship should be issued multiple entry visas valid for the maximum period authorized by Appendix C or for the length of the principal alien's visa and/or authorized period of stay, whichever is less.

C. Non-Canadian or Non-Mexican family members of TN status holders are entitled to TD visas, which can be issued in non-Canadian or non-Mexican passports. The Canadian or Mexican reciprocity schedules in Appendix C (depending on the TN status holder's nationality) should be followed regardless of the dependent's actual nationality (9 FAM 41.59 N13.2).

9 FAM 41.59 PN3 Visa Annotations

A. TN visas issued to NAFTA professionals should be annotated indicating the employer and the NAFTA "profession" on which the TN status is based.

B. TD visas issued to dependent family members of TN status holders should be annotated with the name of the principal alien.

9 FAM 41.59 PN4 Fees

TN visa applicants, whether Canadian or Mexican, must pay the application (MRV) fee as indicated on the Schedule of Consular Fees. DHS shall assess Canadian citizens entering the U.S. as NAFTA professionals without a visa a processing fee of \$50.00. Since Mexicans entering the U.S. as NAFTA professionals must possess a valid TN visa, no similar fee shall be charged to Mexican citizens.