**DEPARTMENT OF HOMELAND SECURITY**

**8 CFR Part 214**

**[CIS No. 2068–00]**

**RIN 1615–AA38**

## Adding Actuaries and Plant Pathologists to Appendix 1603.D.1 of the North American Free Trade Agreement

**AGENCY:** U.S. Citizenship and Immigration Services, DHS.

**ACTION:** Final rule.

**SUMMARY:** This final rule adopts without substantive change a proposed rule that was published in the **Federal Register** by the former Immigration and Naturalization Service (Service). This final rule amends the Department of Homeland Security's (Department's) regulations by adding Actuaries and Plant Pathologists to Appendix 1603.D.1 of the North American Free Trade Agreement (NAFTA) and by modifying the licensure requirements for Canadian citizens seeking admission to the United States as ''trade NAFTA'' (TN) nonimmigrant aliens. These amendments reflect the agreements made among the three parties to the NAFTA and will facilitate travel to and business in the United States. On March 1, 2003, the Service transferred from the Department of Justice to the Department, pursuant to the Homeland Security Act of 2002 (Pub. L. 107–296). Accordingly, the Service's adjudication function transferred to the U.S. Citizenship and Immigration Services (USCIS) of the Department.

**DATES:** This final rule is effective November 12, 2004.

**FOR FURTHER INFORMATION CONTACT:** Craig Howie, Staff Officer, Business and Trade Services Branch, Program and Regulations Development, U.S. Citizenship and Immigration Services, Department of Homeland Security, 425 I Street, NW., ULLICO Building, 3rd Floor, Washington, DC 20536, telephone (202) 514–3228.

**SUPPLEMENTARY INFORMATION:**

### What Is NAFTA?

On December 17, 1992, the United States, Canada and Mexico signed NAFTA. NAFTA entered into force on January 1, 1994, creating one of the largest trading areas in the world. Besides trade, NAFTA allows for the temporary entry of qualified business persons from each of the parties to the agreement. NAFTA is comprised of 22 chapters. Chapter 16 of NAFTA is entitled ''Temporary Entry of Business Persons,'' and in addition to reflecting the preferential trading relationship between the parties to the agreement, it reflects the member nations' desire to facilitate temporary entry on a reciprocal basis. It also establishes procedures for temporary entry, addresses the need to ensure border security and seeks to protect the domestic labor force in the member nations.

### Who Is a TN Nonimmigrant Alien?

A TN nonimmigrant alien is a citizen of Canada or Mexico who seeks admission to the United States, under the provisions of Section D of Annex 1603 of NAFTA, to engage in business activities at a professional level as provided for in the Annex. NAFTA parties have agreed that 63 occupations qualify as professions. These occupations are listed in the Appendix 1603.D.1 to Annex 1603 to the NAFTA found in 8 CFR 214.6(c). Canadian and Mexican citizens seeking to engage in occupations not included in Appendix 1603.D.1 to Annex 1603 are not eligible for classification as TN nonimmigrants.

### What Changes Were Proposed in the Proposed Rule?

In the proposed rule published on December 19, 2000 at 65 FR 79320, the former Service proposed to add the occupation of actuary to the list of professions in Appendix 1603.D.1. In addition, the rule proposed to include plant pathologist to the Appendix 1603.D.1 as a footnote to the occupation of biologist. The former Service also proposed to change the licensure requirements for Canadian TN aliens applying for admission to the United States described at 8 CFR 214.6(e)(3)(ii)(F). The rule further proposed to remove 8 CFR 214.6(l), which relates to the transition period for Canadian citizens who were admitted to the United States under the United States-Canada Free Trade Agreement that existed before the effective date of NAFTA. The former Service also proposed to change all references to the Northern Service Center to the Nebraska Service Center to reflect the center's current name. Finally, the former Service proposed to remove the term ''diplomas, or certificates'' from 8 CFR 214.6(d)(2)(ii) and at 8 CFR 214.6(e)(3)(ii) since these regulatory cites are inconsistent with the footnotes to the Appendix.

### Did the Former Service Receive Any Comments in Response to the Proposed Rule?

Yes, the former Service received 12 comments on the proposed rule. Seven of the comments dealt with the proposal that would add actuaries and plant pathologists to NAFTA and five comments related to the proposal to modify the licensure requirements for Canadian TN nonimmigrants. One of the comments addressing the proposed licensure requirements for Canadian TN nonimmigrants was actually a number of questions relating to the process that the former Service (now Department) uses to determine whether an alien has an appropriate license to practice in his or her occupation or profession. Since the questions posed in this comment letter do not directly relate to the proposed rule, this comment will not be discussed.

None of the comments addressed the technical changes that the former Service noted in the proposed rule. These technical changes include the removal from the regulations of the discussion of the transition period for Canadian citizens who were admitted to the United States under the former United States-Canada Free Trade Agreement, changing references to the ''Northern Service Center'' to ''Nebraska Service Center,'' and removal of the term ''diplomas, or certificates'' from 8 CFR 214.6(d)(2)(ii) and 8 CFR 214.6(e)(3)(ii) since these regulatory cites are inconsistent with the footnotes to the appendix. The Department published an interim final rule on March 10, 2004 (69 FR 11287) which implemented changes to the TN application process resulting from the sunset of some NAFTA requirements imposed on Mexican TN's. The changes in that interim final rule resolved the technical issues referenced above, and this rule finalizes the technical changes noted in the proposed rule.

### What Were the Specific Comments That the Former Service Received Regarding the Proposed Change in the Licensure Requirements for Canadian TN's?

The former Service received four comments on this proposal. The American Nursing Association (ANA) stated that it was not supportive of the provision modifying the licensure requirement because it would allow unqualified Canadian nurses into the United States. The ANA argued that the removal of the requirement that a Canadian nurse have a United States license would undermine a provision that was designed to protect the United States public from unqualified health care workers.

Another commenter, a board member of the American Immigration Lawyers Association, argued that the proposal would create a distinction between the processing of Mexican and Canadian TN

nonimmigrant aliens. The commenter stated that the intended employer of a Mexican citizen is required to submit the alien's license with Form I–129, Petition for Nonimmigrant Worker, before the Mexican TN can be admitted to the United States. In the case of Canadian TN's, the license would never be presented to the Department.

The National Council of State Boards of Nursing (Council) also commented on the final rule and stated that it was opposed to the provision removing the licensure requirement for Canadian nonimmigrants. The Council asserted that the provision would allow Canadian citizens easy access to the United States labor market to work in their chosen profession as TN nonimmigrant aliens. However, the Council also suggested that employers in the United States would not employ these aliens in their profession but in similar or related occupations at a substandard salary. Finally, the Council argued that, in the case of nursing, the proposal would result in many American citizens being treated by unlicensed health care professionals.

The Commission on Graduates of Foreign Nursing Schools (CGFNS) also commented. CGFNS is an international authority on the education, registration, and licensure of nurses and foreign health care workers worldwide. CGFNS asserted that the implementation of the licensure proposal would result in the admission of Canadian healthcare workers to the United States without the appropriate license. CGFNS argued that these Canadian workers will not wait until they are licensed to seek employment and will begin to work in the United States healthcare system in any capacity they can find. Under the former Service's proposal, licensure verification would become the responsibility of the employer, not the government. CGFNS also stated in its comment that the requirement that a Canadian TN present his or her license at the time of admission is consistent with the NAFTA. Finally, CGFNS represented that there is substantial evidence that some Canadian TN's will have difficulty obtaining a United States nursing license and, as a result, the proposal will create a pool of unqualified health care workers who will be providing healthcare services to American consumers.

**Why Did the Former Service Propose To Change the Licensure Requirements for Canadian TN Nonimmigrants?**

To ensure that the former Service's regulations implementing Chapter 16 are in conformity with the obligations of the United States under the Agreement, the former Service proposed to remove 8 CFR 214.6(e)(3)(ii)(F). This provision requires the presentation of a license by a Canadian citizen as an entry requirement under the NAFTA.

**What Is the Department's Response to the Comments Received Regarding the Proposal To Change the Licensure Requirements for Canadian TN Nonimmigrants?**

The Department has reviewed the opinions expressed in the comments to the proposed rule. After careful consideration, the Department will adopt the proposal that removes the requirement that a Canadian TN must present a license at the time of application for admission to the United States.

As one of the regulatory agencies responsible for the administration of the immigration laws of the United States, the Department has a responsibility to ensure that its regulations are in agreement with existing laws, treaties, and agreements. In this instance, the requirement that a Canadian TN nonimmigrant alien present a United States license at the time of application for admission to the United is inconsistent with the NAFTA.

The Department disagrees with the CGFNS argument that requiring a state-issued license as a condition of admission is not in conflict with Chapter 16 of the NAFTA. As stated in the proposed rule, this regulatory change ensures that the Department's obligations under Chapter 16 are in conformity with the obligations of the United States under the NAFTA agreement.

The basic issue under consideration is whether a license is (1) an employment requirement, or (2) an entry plus employment requirement, for the Canadian professional desiring to work in the United States in TN status. Under the NAFTA, the requirements for entry as a professional are clearly spelled out and are noted in the list of educational credentials or alternative criteria found in Chapter 16. In select instances, a license is noted as an alternative document for entry, but not as a required primary document for entry. In no case is a license required by the prospective Canadian TN as the absolute primary documentary requirement for entry. For Canadian registered nurses, the primary group subject to comments made in response to the proposed rule, either a state-issued license or a Canadian provincial license is required as an entry document. Such documentation provide only for the entry of the prospective Canadian TN (provided that the individual is otherwise admissible).

The Department wishes to make clear that all Canadian TN nonimmigrants are subject to any individual state's licensure requirements. Granted, and in particular in the case of Canadian registered nurses, any such state licensure will most likely take place after entry. But, as we note above, the state license is not a mandatory documentary requirement for entry. States continue to maintain the ability to impose licensure requirements on any individual intending to work in the state.

The Department has taken special note of the comments that expressed concern that the change in the licensure requirement may have an adverse affect on the welfare of the United States. The Department is of the opinion that this rule will have no negative effect on the health and welfare of United States citizens. In those jurisdictions where a particular profession or occupation requires licensure, State or Federal law will continue to require the alien's employer to ensure that the alien has the proper license before the alien commences employment. In this regard, a Canadian TN alien will be treated in the same fashion as a United States worker. While this final rule will ensure that the Department will not require a Canadian TN to present a license to be admitted to the United States, the alien still will have to have a license to work in the United States consistent with Chapter 12 of NAFTA.

The change in the licensure requirement for Canadian TN nonimmigrant aliens does not result in different requirements between Mexican and Canadian TN nonimmigrant aliens. On March 10, 2004, the Department published an interim final rule in the **Federal Register** at 69 FR 11287 eliminating the numerical cap on Mexican TN nonimmigrants and eliminating the associated requirement of a petition for Mexican-based professionals. Prior to the March 10, 2004 effective date of this rule, Mexican TN nonimmigrant aliens were required to provide evidence of licensure as part of the petition process. Following elimination of the petition requirement on March 10, 2004, Mexican TN nonimmigrant aliens are no longer required to provide evidence of licensure as a prerequisite to admission to the United States. Thus, Mexican TN nonimmigrant aliens are treated the same as Canadian TN nonimmigrant aliens with respect to removal of the licensure requirement. Both Mexican and Canadian TN nonimmigrant aliens, however, must be reminded that State

and Federal law continue to control in regard to any licensure requirement as a condition of employment in the United States.

**What Were the Specific Comments That the Former Service Received Regarding the Proposed Addition of Actuaries and Plant Pathologists to Appendix 1603.D.1 of the NAFTA?**

The former Service received seven comments on the proposal to add actuaries and plant pathologists to the NAFTA. Of these comments, six agreed with the proposal and urged its adoption as written.

One commenter urged the former Service to broaden the possible qualifications for the TN category of actuary. This particular commenter, a private law firm, asked that the government consider other academic disciplines as being essentially equivalent to a degree in actuarial science.

The Department will not include this suggested change in this final rule as it is not consistent with the criteria agreed to by the three NAFTA parties to establish that an individual qualifies as an actuary. Therefore, the Department will adopt the proposed rule's language with one modification. In lieu of inserting the profession of Actuary into the body of Appendix 1603.D.1, a new footnote to the category of Mathematician will note that actuaries are included within the meaning of the term ''mathematician.'' As it is generally accepted that an actuary is in fact a type of mathematician, the Department finds that inclusion of the profession of actuary within the meaning of the term mathematician is an acceptable and non-significant modification to the language of the proposed rule.

The Department also notes that no comments were received regarding the proposal to add plant pathologists as a footnote to the category of biologists in Appendix 1603.D.1 to the NAFTA and the language of the proposed rule is adopted without change.

**Regulatory Flexibility Act**

The Department has reviewed this rule in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)) and, by approving it, the Department certifies that this rule will not have a significant economic impact on a substantial number of small entities. While some employers may be considered small entities, this final rule will benefit United States employers by allowing certain aliens to transfer their professional skills to the United States and to work in their chosen occupation in the United States in a more expeditious fashion.

**Unfunded Mandates Reform Act of 1995**

This final 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 effect 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 final rule is not a major rule as defined by section 804 of the Small Business Regulatory Enforcement Fairness Act of 1996. This final 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 final rule is considered by the Department 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 for review.

This final rule is intended to benefit various United States employers by amending the Department's regulations to add the professions of actuaries and plant pathologists to the list of viable NAFTA professional occupations. Indirectly, this final rule will benefit Canadian and Mexican actuaries and plant pathologists destined for employment in the United States, and, reciprocally, United States actuaries and plant pathologists destined for employment in either Canada or Mexico. The final rule imposes no new costs to the pre-existing filing fees for NAFTA professionals. Since this final rule provides a benefit to the public without producing any additional costs, the Department feels it is justified in issuing this final rule.

**Executive Order 13132**

This final rule 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 section 6 of Executive Order 13132, it is determined that this final rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

**Executive Order 12988 Civil Justice Reform**

This final rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988.

**Paperwork Reduction Act**

Under the Paperwork Reduction Act of 1995, Public Law 104–13, all Departments are required to submit to the Office of Management and Budget (OMB), for review and approval, any reporting or recordkeeping requirements inherent in a rule. This final rule does not impose any new reporting or recordkeeping requirements under the Paperwork Reduction Act.

**List of Subjects in 8 CFR Part 214**

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

■ Accordingly, part 214 of 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, 1102, 1103, 1182, 1184, 1186a, 1187, 1221, 1281, 1282, 1301–1305 and 1372; sec. 643, Pub. L. 104–208, 110 Stat. 3009–708; section 141 of the Compacts of Free Association with the Federated States of Micronesia and the Republic of the Marshall Islands, and with the Government of Palau, 48 U.S.C. 1901, note, and 1931 note, respectively; 8 CFR part 2.

■ 2. Section 214.6 is amended by:
■ a. Revising the section heading;
■ b. Redesignating footnotes 5 and 6 as footnotes 6 and 7, respectively;
■ c. Adding a new footnote 5 at the end of the occupation ''Mathematician'' in paragraph (c), Appendix 1603.D.1;
■ d. Adding footnote 8 at the end of the occupation ''Biologist'' in paragraph (c), Appendix 1603.D.1; and
■ e. Adding the text of new footnotes 5 and 8.

The revision and additions read as follows:

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

* * * * *

(c)* * *

[5] The term ''Mathematician'' includes the profession of Actuary. An Actuary must satisfy the necessary requirements to be recognized as an actuary by a professional actuarial association or society. A professional actuarial association or society means a professional actuarial association or society operating in the territory of at least one of the Parties.

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[8] The term ''Biologist'' includes the profession of Plant Pathologist.

Dated: October 6, 2004.

**Tom Ridge,**

*Secretary of Homeland Security.*

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