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DEPARTMENT OF HOMELAND SECURITY

8 CFR Part 214

[CIS No. 2266-03]

RIN 1615-AA96

Eliminating the Numerical Cap on Mexican TN Nonimmigrants

AGENCY: Department of Homeland Security.

ACTION: Interim rule with request for comments.

SUMMARY: This rule removes the annual numerical cap on the number of Mexican professional admissions under the North American Free Trade Agreement (NAFTA). This rule also eliminates the associated requirement of a petition for a Mexican-based NAFTA professional and the corresponding labor condition application. These changes to the regulations are consistent with the NAFTA's requirement that the annual numerical cap and petition provisions for Mexican professionals sunset by January 1, 2004. Note that on March 1, 2003, the Immigration and Naturalization Service (Service) transferred from the Department of Justice to the Department of Homeland Security (the Department) pursuant to the Homeland Security Act of 2002, Public Law 107-296. Accordingly, the Service's adjudication function transferred to the Bureau of Citizenship and Immigration Services (BCIS) of the Department.

DATES: Effective date. This interim rule is effective on January 1, 2004.

Comment date. Written comments must be submitted on or before May 10, 2004.

ADDRESSES: Please submit written comments to the Director, Regulations and Forms Services Division, Department of Homeland Security, 425 I Street, NW., Room 4034, Washington, DC 20536. To ensure proper handling, please reference CIS No. 2266-03 on your correspondence. Comments may also be submitted electronically to the Department at rfs.regs.@dhs.gov. When submitting comments electronically, you must include CIS No. 2266-03 in the subject box so that the comments can be electronically routed to the appropriate office for review. Comments may be inspected at the above address by calling (202) 514-3291 to arrange for an appointment.

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

SUPPLEMENTARY INFORMATION:

What Is the NAFTA?

On December 17, 1992, The United States, Canada and Mexico signed the North American Free Trade Agreement (NAFTA). The NAFTA entered into force on January 1, 1994, creating one of the largest trade areas in the world. Under the terms of the agreement, NAFTA allows for the temporary entry of qualified businesspersons from each of the parties to the agreement. Chapter 16 of the NAFTA is entitled A 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.

Chapter 16 of the NAFTA and Annex 1603 to Article 1603 of the NAFTA established four categories of businesspersons to be allowed temporary entry into the territory of another NAFTA party. The four categories are: (1) Business visitors; (2) traders and investors; (3) intra-company transferees; and (4) professionals.

Business visitors under the NAFTA are admitted to the United States under the B-1 nonimmigrant classification (section 101(a)(15)(B) of the Immigration and Nationality Act (Act)). A business visitor is a businessperson from another NAFTA party who seeks to engage in an occupation or profession with one of the seven categories of business activities listed in Appendix 1603.A.1. The seven categories of business activities listed in Appendix 1603.A.1 represent a complete business cycle and include: (1) Research and Design; (2) Growth, Manufacture and Production; (3) Marketing; (4) Sales; (5) Distribution; (6) After-Sales Service; and (7) General Service.

Traders and investors are admitted to the United States under the E-1 and E-2 nonimmigrant categories, respectively, under section 101(a)(15)(E) of the Act. A trader is an alien in the United States admitted solely to carry on trade of a substantial nature principally between the United States and the country of the alien's nationality. An investor is an alien who has invested or is actively in the process of investing a substantial amount of capital in a bona fide enterprise in the United States.

Intra-company transferees are admitted to the United States under the L-1 nonimmigrant classification (section 101(a)(15)(L) of the Act). An intra-company transferee is an alien who, within 3 years preceding the time of his or her application for admission into the United States, has been employed abroad continuously for 1 year by a firm or corporation or other legal entity or parent, branch, affiliate, or subsidiary, and who seeks to enter the United States temporarily to render his or her services to a branch of the same employer or as parent, affiliate, or subsidiary thereof in a capacity that is managerial, executive, or involves specialized knowledge.

Professionals under the NAFTA are admitted to the United States as Trade NAFTA (TN) nonimmigrant aliens under section 214(e) of the Act.

What 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 the NAFTA, to engage in business activities at a professional level as provided for in such annex. The 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). The list contains the only professions in which an alien can engage in and obtain admission to the United States as a TN nonimmigrant alien.

What Changes Are Noted in This Rule?

Appendix 1603.D.4 of the NAFTA, reflected in section 214(e)(4) and (5) of the Act, establishes an annual numerical ceiling of 5,500 on Mexican TN admissions. In order to accurately administer this cap, the Department has required the filing of Form I-129, Petition for Alien Worker. This rule eliminates the annual numerical cap for citizens of Mexico seeking a visa and admission as a TN nonimmigrant. Because this rule reflects the elimination of the numerical cap (as required by the provisions of the NAFTA), it will also eliminate the petition requirement, which has allowed the Department to manage the numerical limit. One requirement associated with the filing of the Form I-129 petition was the requirement of a certified labor condition application (LCA). Because the numerical cap is eliminated, these associated requirements are also eliminated.

What Is the Current Process Used by Mexican Citizens Seeking TN Status?

Currently, a citizen of Mexico seeking to come to the U.S. as a TN nonimmigrant must have had submitted to the Department, on his or her behalf, a Form I-129, Petition for Nonimmigrant Worker. In order to properly file Form I-129 with the Department, an LCA must first be certified by the Department of Labor (DOL). Upon approval of the petition by the Department, the Mexican citizen must then apply to the United States Department of State (DOS) for a visa.

How Will the Process Used by Mexican Citizens Seeking TN Status Change?

This rule eliminates the petition and LCA requirement. Rather than make application to the DOL and the Department, a Mexican citizen wishing to come to the U.S. in TN classification must apply directly to the DOS for a visa. DOS will adjudicate the alien's eligibility for TN classification, and upon approval and issuance of a visa the alien may apply for admission to the United States. While the Department will no longer collect a fee associated with the filing of Form I-129 since it is no longer required, the DOS may collect fees prescribed by their Secretary as consistent with the NAFTA.

Why Are These Changes Being Made?

At the time the NAFTA was negotiated, the agreement imposed the additional controls of the cap, petition, and LCA requirement on citizens of Mexico for a

temporary period. In this case, the additional controls were put into place for 10 years. (These additional controls were not imposed on Canadian citizens.) Since the 10-year period will end on January 1, 2004, the Department will fulfill its obligations under the NAFTA by eliminating these requirements from its regulations.

Will Extension Requests and Requests for a Change of Employer Continue To Require a Form I-129 Petition and LCA?

As is currently the case, requests for an extension of stay and requests to add or change employers must be submitted on Form I-129. However, no LCA will be required in order to obtain an extension. It should be noted that the extension request made on Form I-129 is not a petition for status within the meaning of section 214(c)(1) of the Act and does not confer any of the appeal rights normally associated with a petition. Form I-129 is required to obtain an extension of stay. The Form I-129 in the context of an application for extension of stay is merely the vehicle by which the Department collects the information needed to make a determination on the extension application. Under 8 CFR 214.1(c)(5), there is no appeal of a denial of an application for extension of stay.

Must a Mexican TN Applicant for Admission Obtain a Visa?

Yes. The consular office will make a determination as to whether the alien is eligible for the TN classification and issuance of visa. This determination replaces the former role of the Department in adjudicating the Form I-129 petition. Because the NAFTA does not change the requirement of a valid visa for a citizen of Mexico, this rule retains the existing requirement of a valid passport for Mexican TN's.

Request for Comments

The Department of Homeland Security is seeking public comment regarding this interim rule. In particular, the Department is interested in comments addressing the lifting of the petition and labor certification requirements for Mexican citizens desiring TN status in the United States.