Talent: Our Most Valuable Import

By Giselle Carson, Jacksonville, Florida

In its 2000 pages, the North American Free Trade Agreement ("NAFTA") eliminated most tariffs on goods moving through North American borders, granted protection for intellectual property and foreign investments, and removed barriers for foreign business travelers. Upon NAFTA's enactment, the world's largest free trade area—consisting of nearly 450 million people producing $17 trillion worth of goods and services—was created by the United States, Canada and Mexico.

Encouraged by the success of NAFTA, which took effect on 1 January 1991, the United States has entered into other free-trade agreements in the Americas. Such agreements include the U.S.-Chile Agreement of 2004; the Dominican Republic-Central America-U.S. Agreement (CAFTA-DR) of 2005, which involves Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and the Dominican Republic; the U.S.-Peru Trade Promotion Agreement (PTPA) of 2006; and the U.S.-Colombia Agreement of 2012.

Most recently, a long-awaited free-trade agreement with Panama went into effect on 31 October 2012. None of these agreements, however, provides the range of immigration benefits of Chapter 16 of NAFTA ("Temporary Entry of Business Persons").

As a result of NAFTA, many professionals and business people have new avenues and simplified ways to work, live and invest in the United States. NAFTA provides an expeditious temporary entry for four categories of business people: (1) professionals admitted under TN status; (2) traders and investors admitted as E-1s and E-2s; (3) intra-company transferees admitted as L-1; and (4) business visitors admitted as B-1s.

Nonimmigrant Visas Covered by NAFTA

TN category

The TN status/visa is available for certain Canadian and Mexican professional workers. A critical part of the process is ensuring that the applicant is coming to fulfill a professional position covered under NAFTA and that the applicant has the required credentials (education and/or experience). An educational evaluation of United States equivalency is typically required and should be started early in the application process. The educational equivalency must be based on education only, not experience. A complete list of professions and minimum educational requirements

and alternative credentials are available in Annex 1603 of NAFTA, Appendix 1603.D.1. With few exceptions, most applicants must have at least a bachelor's or a *licenciatura* degree.

NAFTA covers sixty-five professions including accountants, architects, economists, engineers, hotel managers, designers, land surveyors, dentists, pharmacists, physicians, nurses, teachers and scientists. As a result, the TN category is a welcome alternative for professionals to obtain work authorization when the H-1B cap has been reached and/or when the foreign national is running out of time under H-1B or L-1 status.

There are ongoing challenges with inconsistency in adjudication of TN applications but particularly with the occupations of management consultants and scientific technician/technologist (sci-tech). The management consultant is an "outside expert/consultant" hired to "provide services which 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 hired as independent contractors or employees of consulting firms under contracts with U.S. entities. This profession is closely scrutinized because it is one of only two NAFTA professions where an applicant is not absolutely required to have a formal post-secondary education. In the alternative, the applicant must present evidence of five years of relevant experience.

The application for a management consultant who does not have a bachelor's degree must include evidence that the applicant has five years' experience as an employee or consultant in the field or a related field. This could be accomplished with letters from prior clients and employers noting dates of engagement and work performed. If the applicant has not worked as a consultant, including a letter from a prior employer explaining how the employee's experience will be relevant to the consulting role may be helpful.

A written agreement or letter confirming that the applicant is, in fact, a consultant who will not be receiving any salary or benefits as an employee but who will be performing consulting work is essential. The Dictionary of Occupations Titles (DOT) and/or the Occupational Outlook Handbook (OOH) are helpful in providing guidance as to the duties of these professionals.

The sci-tech professional also encounters adjudication difficulties because the applicant is not required to have a formal education, the knowledge requirement is vague, and the applicant cannot work independently. The applicant must show that he or she

has successfully completed at least two years of training in one of the following disciplines: agricultural sciences, astronomy, biology, chemistry, engineering, forestry, geology, geophysics, meteorology, or physics—and has the ability to solve practical problems in the relevant field. The sci-tech application should contain a letter of employment with evidence that the applicant will be working under a professional supervisor in one of the aforementioned fields.

On a more positive note, with the expansion and changes in the United States health care system, the TN category may resurface as a useful alternative for Canadian and Mexican nurses due to the difficulties in obtaining an H-1B for a nursing position. In general, the application should include evidence that the nurse has a current United States nursing license and has a certification issued by the Commission on Graduates of Foreign Nursing Schools (CGFNS) or another approved credentialing service.

Canadian citizens may typically apply for TN status at a border post and do not need a visa. Mexican citizens must apply for a TN visa prior to requesting admission to the United States. USCIS petitions are not required for either Mexican or Canadian citizens.

TN status is granted for three years, and extensions of stay are granted in three-year increments. The TN has no dual intent. Therefore, applying for legal permanent residence requires some advanced planning.

E Visa

The E-1 visa (for traders) and E-2 visa (for investors) are available for individuals from nations that have a treaty of commerce and navigation with the United States. Since neither Canada nor Mexico has a treaty of commerce and navigation with the United States, they were not eligible for E visas until the enactment of the CFTA and NAFTA respectively.

Owners and key employees of businesses that conduct substantial trade between the U.S. and the home country can file for an E-1 visa. A foreign national who comes to direct and develop the operations of an enterprise in which he or she has invested a substantial amount of capital in the United States can file for an E-2 visa. NAFTA also widened the scope of the E visa to include those entering to establish a new enterprise, render advice or provide key technical services.

Unlike the TN, L or B status, Canadian citizens applying to enter the United States on E-1 or E-2 status must first file and obtain an E visa at a United States consulate abroad. The applicant must then present himself or herself for admission at a port of entry. The status should be renewed every two years. There is no limit to the number of renewals as long as the business enterprise is financially viable.

L-1 Category

The L-1 is available to a person who has worked for a company abroad in

an executive, managerial or "specialized knowledge" capacity for at least one continuous year in the three years prior to coming to the United States to work for a related (parent, subsidiary, affiliate or branch) company in an executive or managerial (L-1A) or specialized-knowledge (L-1B) capacity. These basic substantive requirements must be shown whether the L-1 petition is submitted to USCIS or at a border post. Because denials and requests for additional evidence in the L-1 category have increased dramatically over the last four years, having the opportunity to present the application at a border post and communicate with the adjudicating officer has significant advantages.

Canadian citizens can present the petition, Form I-129 with the L supplement, and supporting documents to a border officer and pay the applicable filing fees (including a $500 anti-fraud fee for first-time applicants). If the requirements are met, the applicant should receive an approval within about an hour after filing. If there are deficiencies in the petition, the applicant has an opportunity to correct them in a very short time rather than waiting several weeks to hear from USCIS.

Unfortunately, Mexican citizens cannot apply at the border for L status. The United States employer of a Mexican citizen must file an L-1 petition with USCIS. Once that petition is approved, the foreign national must apply for a visa at a United States consulate abroad and thereafter apply for admission at a port of entry.

When processing an L-1A for a small business, the applicant must be prepared to answer how the company abroad will continue to do business if the executive or manager of the company is relocating to the United States as this is one of the requirements of the L-1 category.

A key to a successful application is presenting a package that is easy to understand and well organized. Officers like to see diagrams and organizational charts that depict the organizations' relationships and the positions of the applicant within the companies. In the case of a small employer, it is also recommended that payroll records and/or existing contracts—in addition to photographs of the business premises—in support of the company's existence and financial viability be submitted.

The maximum stay is typically seven years for managers and executives and five years for specialized-knowledge employees, but foreign nationals who are considered to be "seasonal" employees or those who reside in the United States for only a total of six months or less each year may extend their L-1 status indefinitely. Additionally, L-1 status holders can apply to recapture time spent outside the United States—which can amount to a few months or years—if the person is in the United States in L-1 status for brief periods of time.

B-1 Category

Although many Canadians and Mexicans enter the United States to

"visit friends," to "vacation," or for "business meetings" (regardless of their actual intended activity), it is important to know and understand what is permitted for a NAFTA business visitor. Fortunately, NAFTA has expanded the list of permissible activities. Appendix 1603.A.1 to Annex 1603 NAFTA provides an expanded range of appropriate B-1 activities including: (1) research and design; (2) growth, manufacture, and production; (3) marketing; (4) sales; (5) distribution; (6) after-sales service; and (7) general service. This broad list is particularly beneficial to Canadian and Mexican citizens as citizens of other countries seeking to enter the U.S. to perform these activities are typically required to obtain prior approval from USCIS and/or a consulate.

This list is only a guide and is not exhaustive. A business visitor might seek to enter under NAFTA to engage in traditional B-1 activities not included in Appendix 1603.A.1., as long as the proposed activity is permitted under other immigration provisions.

Additionally, all NAFTA applicants must comply with the requirements of a typical B-1 admission including: providing evidence of strong ties to their home country and retained foreign residence; demonstrating that the purpose of the trip is to enter the United States for business of a legitimate nature; and showing that they will remain for a specific limited period of time and will have the funds to cover the expenses of the trip and stay in the United States. The total period of stay is typically up to six months with the potential for extension.

Canadian business visitors are not required to have a visa and can process their entry directly at CBP pre-flight inspection at certain airports or a land border port of entry. Mexican business visitors must obtain a laser visa/Border Crossing Card (BCC) before applying for admission at a United States port of entry.

Beyond the Border Action Plan

On 4 February 2011, United States President Obama and Canadian Prime Minister Harper announced a Beyond the Border ("BTB") Action Plan—a joint declaration that sets out priorities for achieving a long-term partnership in four key areas: (1) addressing threats early; (2) promoting trade facilitation, economic growth, and jobs; (3) strengthening cross-border law enforcement; and (4) protecting shared critical infrastructure, including enhancing continental and global cybersecurity.

One of the ways the plan is expected to promote economic growth, trade, jobs and border enforcement is by enhancing the trusted traveler and trader programs. The plan would align requirements, enhance member benefits, and provide applicants with the opportunity to submit one application to be enrolled in multiple programs. The Department of Homeland Secu-

rity ("DHS") has made a commitment to facilitate business travel across the border, provide a single "window" for importers to submit information needed to comply with customs and other regulations, promote supply chain connectivity, and increase public transparency.

To keep the flow of goods and people moving smoothly, the DHS promises to coordinate the border infrastructure investment at key border crossings and at small and remote ports of entry to align hours of operation and co-manage facilities.

Improvements to the Process

While the BTB Plan and NAFTA show promise in improving efficiency and transparency at the border, the buck ultimately stops with Customs and Border Patrol ("CBP") in terms of how immigration applications are processed and adjudicated. The adjudication of all NAFTA nonimmigrant categories at the various ports of entries has been inconsistent, and the avenues for redress and advocacy are very limited.

Currently, there is limited immigration law education for CBP officers as illegal trade and terrorist activity detection are paramount. While safeguarding our border is of critical importance, the proper consideration and processing of traveler immigration status at our ports of entry should not be an afterthought. These applicants bring unique and diverse talent that is vital to promoting economic growth in the United States.

The BTB Plan is a step in the right direction toward improving CBP's adjudication of immigration matters—particularly the consistency of the process, redress procedures and communication—while facilitating lawful business travel and exchange.


G. Carson

Giselle Carson *is a shareholder with Marks Gray, P.A., in Jacksonville, Florida, and practices primarily in the areas of U.S. and global immigration and business, civil litigation, wills, and estate planning. Ms. Carson was born in Cuba and immigrated to Montreal,Canada, before coming to the United States. She is a frequent writer and lecturer on immigration and has represented clients in federal court and before federal and state agencies. She is General Counsel for the Jacksonville Regional Chamber of Commerce and a board member of the Jacksonville Bar Association.*