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Improving the Process of Adjudicating TN Status

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TN Status Compared to H-1B Status

The H-1B program enables professionals from various countries to work temporarily in the U.S.

The U.S. employer must file an application with the Department of Labor, attesting to wages and working conditions.

Canadians are issued H-1B status for 3 years, renewable for up to 6.

The H-1B program is subject to an annual cap of 85,000,⁴ and demand is far greater than supply; in 2015, 233,000 petitions were submitted.⁵

For a Canadian citizen seeking TN status, the U.S. employer needs only to provide a written job offer. TN status is valid for 3 years, with extensions possible. No annual cap applies to the TN program; 95,000 Canadians were granted TN status in 2009.⁶

Introduction. In 1994, pursuant to NAFTA, the TN (for “Trade NAFTA”) labor-mobility provision was established.¹ The TN concept was intended to meet the goal of “facilitating temporary entry on a reciprocal basis and of establishing transparent criteria and procedures for temporary entry” amongst the three NAFTA countries.² For Canadian citizens seeking *temporary* work of a professional nature in the U.S., TN status created an alternative to the H-1B program, which was established in 1990 (see the left sidebar).³ The process of gaining TN status was meant to be simpler than that of acquiring H-1B status, and no cap on the number of TN workers was imposed. The parties to NAFTA also sought to “protect the domestic labor force and permanent employment in their respective territories,”² and consulted labor experts to help devise the list of professional categories eligible for TN status (as well as the required qualifications of such professionals). This list is included in Appendix 1603.D.1 of NAFTA.

Today there is frustration with the TN provision and a feeling that it has not lived up to its promise. One prominent criticism is that the *list of professions* is outdated, given the change in the nature of jobs—e.g., many present-day information technology jobs did not exist in 1994. Only two professions have been added to the list in 21 years.⁷ But there also is frustration that the *process* of gaining TN status has not met the stated goal of transparency and simplicity. This article focuses upon issues associated with the adjudication process by which the United States confers TN status upon Canadian citizens. There have been changes in *when* and *where* an adjudication occurs, *who* conducts an adjudication, and *what criteria* are applied when judging whether an applicant possesses the required qualifications. The agency originally responsible for TN adjudication was the U.S. Immigration and Naturalization Service. With the creation of the Department of Homeland Security in 2002 and the associated restructuring of agencies, responsibility was assigned to U.S. Customs and Border Protection (CBP).

Timeline of Changes to the U.S. Adjudication Process.

- **1994. The Initial Process.** At first, an application for TN status could be sent to a port of entry (POE) prior to the time at which the applicant sought to enter the U.S. A “Free Trade Officer” (an inspector who, in addition to her other duties, had a great amount of on-the-job experience in the adjudication of

NAFTA-related matters) would review the application and determine if TN status would be granted or if the application was in some way deficient. This “pre-adjudication” of a TN application usually took two to three days. While pre-adjudication was an available option, it was also possible (and common) to seek TN status at a POE (or at a U.S. preclearance facility located in a Canadian airport) at the same time as seeking entry to the U.S. If denied TN status, an applicant could appeal the matter to an immigration judge. (*Note: the availability of judicial review was discontinued in 2001*).

- *1999. Discontinuation of Pre-Adjudication.* The option of pre-adjudication was discontinued in 1999,⁸ creating a situation in which TN applicants had no choice but to arrive at a POE to obtain TN status. This change inserted a great deal of uncertainty into the employment process. For many years, a TN applicant denied entry would likely have to forego an employment opportunity with almost no warning. The termination of pre-adjudication also effectively ended the review of TN matters solely by specialist Free Trade Officers. Those officers were phased out, leaving TN adjudication as a task to be handled by regular CBP inspectors.
- *2001. Constraints Upon Required Qualifications.* One of the more problematic aspects of the adjudication of TN applicants is the interpretation of their professional qualifications. An application for TN status generally consists of a letter from the prospective U.S. employer describing details of the job, supported by evidence of the applicant’s qualifications and nationality. The officer processing the application must determine whether the offered *position* is appropriate (with reference to the list of professions identified in the NAFTA appendix), and then whether the applicant has the necessary *qualifications*. Though the parties to NAFTA sought to establish definitive standards with respect to professions and qualifications, problems arose with respect to interpretation of the appendix. Using the example of the Scientific Technologist/Technician (ST/T) category, the upper portion of Figure 1 shows the language relevant to this profession as presented in the NAFTA appendix. Due to the ambiguity of the requirements, assessing admissibility for applicants in the ST/T category has historically been problematic, and remains so. In addition to the difficulty in matching qualifications to the profession, this category has also come to be used as a catch-all for applicants that don’t meet the requirements for TN status in other categories. In response to difficulties that arose in adjudicating ST/T applications, the three NAFTA nations agreed upon a more rigid set of criteria, as seen in the lower portion of Figure 1. This discussion of the ST/T category is illustrative of a generic issue—other professions (e.g., Management Consultant) have also posed problems.
- *2012. New Adjudication Options.* In 2011, the *Beyond the Border Action Plan* was unveiled as a joint initiative of the U.S. and Canada, to collaborate on addressing threats to both nations while expediting lawful trade and travel. In late 2012, under the umbrella of the initiative, an additional filing option was made available to first-time Canadian TN applicants (it had previously been available to applicants seeking to extend TN status). Such applicants can pay a fee of \$325 (as opposed to the \$50 fee at a POE) and apply by mail to a U.S. Citizenship and Immigration Services (USCIS) Service Center. While this apply-by-mail option may lead to more forewarning of a deficient application, considerable delays still exist. For example, as of November 2015, the USCIS Vermont Service Center was experiencing a two-month delay in processing TN applications. Those seeking a predictable processing time can opt to pay an additional \$1,225 for “premium processing,” which takes 15 calendar days. An even newer option is available at the Blaine, Washington, POE (and perhaps at some others), whereby applicants may apply for TN status during *any* instance of admission to the U.S. (including for tourist purposes); their application no longer has to be made at the time they seek entry to begin employment. For example, a person seeking entry to the U.S. to go shopping may apply for TN status at that time, rather than waiting until the first time she will be traveling for TN purposes.

Figure 1. Tightening of Criteria Applicable to Scientific Technicians/Technologists

As written in [Appendix 1603.D.1 of NAFTA](#), a professional in the ST/T category had to possess:²

- a. 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.

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.

Criteria applicable to the ST/T category as [established by a NAFTA trilateral working group](#) in 2001:⁹

- (i) Individuals for whom ST/Ts wish to provide direct support *must qualify as a professional in their own right* in one of the following fields: agricultural sciences, astronomy, biology, chemistry, engineering, forestry, geology, geophysics, meteorology, or physics.
- (ii) A general offer of employment by such a professional is not sufficient, by itself, to qualify for admission as a Scientific Technician or Technologist. The offer should demonstrate that the work of the ST/T will be *inter-related with* that of the supervisory professional. That is, the work of the ST/T must be managed, coordinated and reviewed by the professional supervisor, and must also provide input to the supervisory professional's own work.
- (iii) The ST/T's theoretical knowledge should have been acquired through the *successful completion of at least two years of training in a relevant educational program*. Such training may be documented by presentation of a diploma, a certificate, or a *transcript accompanied by evidence of relevant work experience*.

This option reduces uncertainty for employees and employers alike, but is obviously useful only for people who live within reasonable distance of a POE that offers such an option.

- **2014. Optimized Processing.** Announced by CBP in late 2014, "optimized processing" now occurs at 14 designated POEs.¹⁰ At these POEs, staff with some experience in processing TN applications are available during particular time slots. The new process is intended to increase the efficiency of adjudicating TN status (and L-1 status). The return of dedicated officers and the introduction of specific time periods for adjudicating applications may increase the consistency of the process for applicants, as well as the overall efficiency at participating POEs.

Conclusion. As many have noted, the list of TN professions is outdated, with only two professions added since the inception of NAFTA 21 years ago. However, this article presents the case that consideration of *adjudication methods* is equally, if not more, important when assessing potential changes to the processing of TN applications. The 1999 removal of Free Trade Officers and termination of pre-adjudication made the granting of TN status to Canadians more restrictive and less predictable for over a decade, while also increasing the workload of CBP officers at POEs. Recent policy changes initiated under the *Beyond the Border* accord have partially reversed this trend, with the return of pre-adjudication through USCIS, the introduction of "optimized processing" at designated POEs, and the ability to apply for TN status at a POE (Blaine, at least) in advance of when work-related admission is sought. CBP has also tried in recent years to communicate better with both immigration attorneys and employers, with the goal of minimizing denials at POEs.

Despite such changes, Canadians seeking TN status to work temporarily in the U.S. still face an arduous process, which is at odds with the intent of the TN category as designed under NAFTA. The process remains unpredictable, whether that unpredictability is the possibility of last-minute denial of a TN application at a POE, or protracted processing at USCIS Service Centers. The ways in which CBP has recently improved the adjudication process are suggestive of other possible improvements, such as:

- Addition of the ability to schedule an appointment at an optimized processing center, which would balance the workload for officers and minimize wait-times for applicants.
- Continuation (or augmentation) of efforts to educate stakeholders.
- Addition of staff at USCIS service centers, so that decisions are available in far less time and in a more predictable timeframe.
- Uniform availability at POEs of the option to apply for TN status during an instance of U.S. entry *prior to* the initial TN-related entry, coupled with outreach that provides notice of this option.

Finally, this article speaks only to the processes applicable to Canadians seeking entry to the U.S. Given the reciprocal and trilateral intent of the TN provision, examination of the other five relevant processes (Mexican processes applied to Canadians, Canadian processes applied to Americans, etc.) would likely be useful. And the elusive task of updating the list of eligible TN professions must still be tackled.

Endnotes

1. A precursor to the TN category was developed in 1989, under the Canadian-American Free Trade Agreement (CAFTA) and was expanded in 1994 under NAFTA to include Mexico.
2. As stated in Chapter 16. The full text of NAFTA is available at: <https://www.nafta-sec-alena.org/Home/Legal-Texts/North-American-Free-Trade-Agreement?mvid=2#8fd98e3e-4495-43a8-ba47-4a6955d6b5db>.
3. Mexican citizens are required to obtain a TN Visa, issued at a U.S. Embassy abroad, while Canadians are required to obtain TN status.
4. A number of exemptions to the annual cap exist. More information is available at: <http://www.uscis.gov/working-united-states/temporary-workers/h-1b-specialty-occupations-and-fashion-models/h-1b-fiscal-year-fy-2016-cap-season>.
5. Source: USCIS. Available at: <http://www.uscis.gov/news/alerts/uscis-completes-h-1b-cap-random-selection-process-fy-2016>.
6. Changes in data reporting measures enacted in 2010 now make an accurate account of individuals difficult (post-2009 reporting identifies the number of TN entries, rather than TN-status persons). Source: Department of Homeland Security, “Annual Flow Report: Nonimmigrant Admissions to the United States: 2010” August, 2011. Available at: http://www.dhs.gov/sites/default/files/publications/ni_fr_2010.pdf.
7. Actuaries and plant pathologists were added to the list of TN professions in 2004. Source: Federal Register, Vol. 69, No. 197 (10/13/2004). Available at: <http://www.gpo.gov/fdsys/pkg/FR-2004-10-13/pdf/04-23011.pdf>.
8. An INS memo dated 10/29/1999 stated: “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 that the individual is applying for admission to the United States...Advance adjudication of a TN applicant prior to actual application for admission is not appropriate...The applicant must be interviewed regarding his or her qualifications for the profession.”
9. As established at the NAFTA TEWG Annual Meeting in San Diego, California, drafted 12/10/2001.
10. Source: CBP (<http://www.cbp.gov/travel/canadian-and-mexican-citizens/traveling-tn-or-l1-visa-canada>).

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