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NAFTA - TEMPORARY ENTRY PROVISIONS - IMMIGRATION DIMENSIONS

*Ellen G. Yost**

IN THE GLOBAL ECONOMY of the end of the 20th Century, the movement of persons across borders is critical to the movement of goods, the international supply of services, and the availability of investments. Restricting the movements of business persons is arguably a non-tariff barrier to trade. Nevertheless, U.S. immigration law restricts the ability of foreign business persons to enter, even temporarily, for business or employment purposes. These restrictions reflect an intention to protect U.S. industry and labor markets. Free trade agreements such as the NAFTA, however, are designed to facilitate trade among the treaty countries, and their negotiators recently have recognized that it is necessary to provide for the freer movement of business persons.

With the implementation of the North American Free Trade Agreement on January 1, 1994, the United States, Canada, and Mexico (the "Parties" or, individually, a "Party") began the process of integrating one of the largest markets in the world. Chapter 16 of the NAFTA "Temporary Entry for Business Persons" contains the provisions of the NAFTA related to immigration. It is designed to facilitate the movement of individuals from one Party wishing to conduct business in another Party temporarily, but does not affect the Parties' domestic laws regarding permanent residence. It reflects the tension between the goals of preserving national autonomy, border security, and protecting the permanent employment of each Party's domestic labor force on the one hand, and encouraging the liberalization of trade on the other.

The United States-Canada Free Trade Agreement (FTA),¹ implemented in 1989, and the NAFTA are the first agreements negotiated in North America under the General Agreement on Trade and Tariffs (GATT) to provide for trade in services and to contain immigration provisions to facilitate the temporary entry of business persons.

This Article will provide an overview of the provisions of Chapter 16, compare them with existing U.S. immigration law, identify impor-

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¹ U.S.-Canada Free Trade Agreement, Jan. 2, 1988. 27 I.L.M.

tant trade liberalization measures that are not included in the Chapter, discuss the implementing legislation and regulations effecting Chapter 16, and discuss the experience under it.

I. OVERVIEW OF CHAPTER 16

Chapter 16 contains the commitments of the governments of the Parties to facilitate the reciprocal temporary entry² of business persons³ who are citizens of Mexico, Canada, and the United States. It reflects the preferential trading relationship among the Parties, their desire to facilitate temporary entry on a reciprocal basis, and to establish transparent criteria and procedures for temporary entry while recognizing the need to ensure border security and protect the domestic labor force and permanent employment.⁴ Each Party was eager to secure the rights of its citizens to enter the territories of the other countries to conduct business, but also was concerned with maintaining the ability to control its own immigration policies.⁵

The U.S. objectives were to obtain temporary entry to Canada and Mexico for its business visitors, certain professionals, traders and investors, and to provide reciprocal access for business persons of the other two countries. It sought stable and transparent commitments the three countries could accept substantively and politically.⁶

In Chapter 16, each Party agrees to grant temporary entry to enumerated categories of business persons who are citizens of the other Parties, provided certain safeguards are maintained. Because the need to ensure border security is a major concern, entrants must qualify under existing public safety and national security measures and comply with existing law regarding exclusion and deportation.⁷ To protect the Parties' domestic labor forces in certain fields, the NAFTA protects the ability of state or provincial governments to require professionals to be fully licensed under state or provincial law to practice regulated professions.⁸ In addition, as a concession to labor interests, an applicant may be denied temporary entry, although he or she satisfies all other re-

² "Temporary entry" means entry into the territory of a Party by a business person of another Party without the intent to establish permanent residence. NAFTA art. 1608.

³ "Business person" means a citizen of a Party who is engaged in trade in goods, the provision of services, or the conduct of investment activities. *Id.* art. 1608.

⁴ *Id.* art. 1601.

⁵ North American Free Trade Agreement Implementation Act Statement of Administrative Action, H.R. Doc. No. 103-159, vol.1, 103d Cong., 1st Sess. 175 (Nov. 3, 1993).

⁶ *The North American Free Trade Agreement: Hearing Before the Subcomm. on International Law, Immigration, and Refugees of the House Comm. on the Judiciary, 103d Cong., 1st Sess. (Nov. 3, 1993)* [hereinafter *Subcommittee Hearings*] (statement of Dr. Demetrios G. Papademetriou, Senior Associate & Director, Immigration Policy Program, Carnegie Endowment for International Peace).

⁷ NAFTA art. 1603(1).

⁸ H.R. Doc. No. 103-159, *supra* note 5 at 175; see also NAFTA annex 1603(D)(6).

quirements, when the entry might adversely affect the settlement of a labor dispute that is in progress at the place or intended place of employment, or might affect the employment of any person involved in that dispute.⁹

The four categories of business persons included in the provisions of Chapter 16 are:

1. business visitors engaged in international business activities related to research and design, growth, manufacture and production, marketing, sales, distribution, after-sales service, and other general services;
2. traders who carry on substantial trade in goods or services between their own country and the country they wish to enter, as well as investors seeking to commit a substantial amount of capital in that country, provided that such persons are employed or operate in a supervisory or executive capacity or in a capacity that involves essential skills;
3. intracompany transferees employed by a company in a managerial or executive capacity or in one that involves specialized knowledge and who are transferred within that company to the territory of another Party; and
4. certain categories of professionals who meet minimum educational requirements or possess equivalent credentials and who seek to engage in business activities at a professional level.¹⁰

The Parties agree to consult at least annually to consider the following: implementation and administration of Chapter 16, the development of measures to further facilitate the temporary entry of business persons on a reciprocal basis, proposed modifications of or additions to the Chapter, and the waiving of labor certification tests or procedures of similar effect for spouses of persons granted entry for more than one year as traders and investors, intracompany transferees, or professionals.¹¹ The Chapter establishes a Temporary Entry Working Group comprised of representatives of each country, including immigration officials.

The remedies for failure to comply with Chapter 16 are limited. The Chapter contains no separate dispute settlement mechanism. A Party faced with another Party's refusal to grant temporary entry may not invoke the NAFTA's overall dispute settlement provisions unless it demonstrates that the denial arose out of a pattern of repeated practices and that the business person exhausted the available administrative remedies.¹²

⁹ NAFTA art. 1603(2).

¹⁰ H.R. Doc. No. 103-159, *supra* note 5, at 175-76.

¹¹ *Id.* art. 1605.

¹² *Id.* art. 1606.

II. HOW THE NAFTA AFFECTS EXISTING UNITED STATES IMMIGRATION LAW

Chapter 16 was patterned on existing U.S. immigration law and practice. Canada and Mexico have been required to amend their immigration laws to implement their NAFTA commitments. Substantively, no major changes to U.S. immigration laws were required, but the list of permissible "B" business visitor activities were expanded, and citizens of Canada and Mexico were made eligible for "E" treaty trader and treaty investor status. The "TN" category was created and made available only to citizens of Canada and Mexico. It added no new entitlements, however, because those eligible for "TN" status could have applied for "H-1" status under existing law. Procedurally, Canadian citizens who do not require visas to enter the United States retain the option of port-of-entry adjudication of "L-1" intracompany transferee petitions and "TN" professional applications. Mexican citizens, who still require visas, may border process, but must first submit a prior application.

A. *The Immigration and Nationality Act of 1952, as Amended*

Immigration into the United States is governed by the Immigration and Nationality Act of 1952 as amended (INA).¹³ It was substantially amended in 1990 and 1991 to make the most sweeping changes in decades. The changes were employer-friendly. They tripled the annual number of immigrant visas available to highly skilled workers, and expanded the intracompany transferee (L-1)¹⁴ and treaty trader and treaty investor (E-1 and E-2) categories.¹⁵ However, they made a less employer-friendly change to the specialty worker (H-1) category. They introduced the Department of Labor into the application process by requiring that it approve a Labor Condition Attestation before the United States Immigration and Naturalization Service (INS) may grant H-1 status.¹⁶

The FTA, enacted on January 1, 1989, was the precursor of and substantially similar to the NAFTA. It was expected to enhance economic opportunities and to create jobs in both countries. One of its goals was to facilitate business travel between Canada and the United States. Chapter 15 of the CFTA, *Temporary Entry for Business Persons*, is almost identical to Chapter 16 of the NAFTA and provides temporary entry for the four categories of business persons referred to in the NAFTA. Because the FTA was patterned on U.S. law, it was

¹³ The Immigration Act of 1990, Pub. L. No. 101-649 (1990); The Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Pub. L. No. 102-232 (1991).

¹⁴ See 8 U.S.C. §1101(a)(15)(L)(1).

¹⁵ See 8 U.S.C. §1101(a)(15)(E).

¹⁶ 8 C.F.R. §214.2(h)(4)(i)(B)(1).

not necessary to amend the INA to codify its provisions. However, new regulations were promulgated by the INS, U.S. Department of State, and U.S. Department of Labor.

B. The North American Free Trade Agreement

The NAFTA extends to citizens of each of the three Parties the privileges granted reciprocally to United States and Canadian citizens by the FTA. In accordance with recent legal theory on the relation between international treaties and national law, the NAFTA supercedes other applicable legislation, including the FTA, where it is inconsistent. The NAFTA temporary entry provisions are similar to those of the FTA. Canadians will be treated no less favorably under the NAFTA than they have been treated under the FTA.¹⁷

Chapter 16 does not extend to Mexicans the visa-exempt status given Canadians by the INA. The NAFTA provides that a Mexican business visitor, intra-company transferee, investor, or professional may be required to obtain a visa or its equivalent prior to entry.¹⁸ Although the United States did not abolish the visa requirement for Mexicans, it has agreed to consult with Mexico with a view to removing it in the future.¹⁹ It remains to be seen when the United States and Mexico will reach an accord to abolish this visa requirement.

C. The Four Categories of Business Persons

1. Business Visitors

The great majority of foreign business persons are admitted to the United States in the business visitor (B-1) category. B-1s are visitors who enter for a limited time to oversee business operations, investigate business opportunities, sell goods, or engage in certain other business activities. They may not engage in gainful employment in the United States, may receive no remuneration from a United States source, and the principal benefit of their activities must accrue to a foreign entity.²⁰ B-1 business activity must be associated with international trade or commerce.

The INS will grant entry to a business visitor as a B-1 only for the period of stay necessary to conduct his or her business. Most B-1 visits

¹⁷ NAFTA annexes 1603(A)(5),(B)(3),(C)(3) and (D)(3).

¹⁸ NAFTA annexes 1603(A)(5),(B)(3),(C)(3) and (D)(3).

¹⁹ *Id.* annexes 1603(A)(5),(C)(3),(D)(3). It is interesting to note that, for traders and investors, no removal of the existing requirements is provided. The agreement that a visa may be imposed was necessary also because the NAFTA contains an accession clause which was very much on the minds of the negotiators of Chapter 16. If as anticipated, other countries accede to the NAFTA, the United States wants to preserve its right to impose a visa requirement on citizens of that country.

²⁰ 8 U.S.C. §1101(a)(15)(B)(1).

are approved for periods of three to six months, and only in unusual circumstances will a stay of more than six months be granted. B-1 business visitors need not petition the INS in advance of entry. However, the Department of State maintains a list of acceptable B-1 activities. An applicant for B-1 status, if a visa is required, must apply for the visa at a United States Consulate abroad prior to entering the United States.²¹

The FTA expanded the list of acceptable B-1 activities for Canadians to include the following: research and design; growth, manufacture, and production; marketing; sales; distribution; after-sales service; general services; management, supervisory and financial services personnel engaging in commercial transactions for an enterprise located in Canada or the United States; public relations and advertising personnel consulting with business associates; tourism personnel attending or participating in conventions or conducting a tour begun in Canada or the United States; and translators or interpreters performing services as employees of an enterprise located in Canada or the United States.²²

The FTA provided a significant advantage for Canadian citizens. They could enter the United States in B-1 status to engage in activities normally considered H-1 activities without obtaining an approved Labor Condition Application from the Department of Labor or an approved petition from the INS, as long as the individual received no remuneration from a United States source.²³

Chapter 16 obliges the Parties to grant entry to business visitors or citizens of another Party who are engaged either in the categories of business activities enumerated in the NAFTA,²⁴ or in any other business activities,²⁵ provided that the applicant complies with existing applicable immigration measures.²⁶

The NAFTA extends to Mexican citizens the expanded B-1 activities provided to Canadians by the FTA.²⁷ This broadening is important because business visitors who do not require employment authorization can enter more easily than other categories of business persons who do.²⁸ The inclusion of the business visitor category, which did not exist in Mexican law, is intended to afford United States citizens entry to Mexico as business visitors.

No Party may impose a numerical limit on business visitors admit-

²¹ Visas are not generally required for Canadians and landed immigrants in Canada from British Commonwealth countries, and applicants from countries eligible for the visa waiver pilot program. 8 U.S.C. §1187; 8 C.F.R. §212.1(a); 22 C.F.R. §41.2.

²² FTA annex 1502(1).

²³ 8 C.F.R. §214.2(b)(4)(i)(G)(1)(1993).

²⁴ NAFTA appendix 1603.A.1.

²⁵ NAFTA annex 1603(A)(3); appendix 1603.A.3.

²⁶ NAFTA annex 1603(A)(1); appendix 1603.D.1.

²⁷ FTA annex 1502.1; NAFTA annex 1603(A).

²⁸ NAFTA annex 1603 (A)(1).

ted,²⁹ nor require prior approval procedures, petitions, labor certifications, tests, or other similar procedures.³⁰ The NAFTA mandates that temporary entry shall be granted to citizens of the Parties, without obtaining employment authorization, upon presentation of:

1. proof of citizenship;
2. documentation demonstrating that the business person will be engaged in a scheduled professional activity; and
3. evidence demonstrating that the proposed business activity is international in scope and that the business person is not seeking to enter the local labor market.³¹

To comply with the INA, the NAFTA requires that the primary source of remuneration for a B-1's business activity, his or her principal place of business, and the place where the profits of his or her efforts accrue, must be in the territory of a Party other than the Party granting entry.³²

2. Intracompany Transferees

Pursuant to the INA, intracompany transferees who are executives, managers, or employees with specialized knowledge are admitted to the United States on L-1 visa status.³³ The L-1 category is useful to an operating company with a qualified parent, subsidiary, affiliate, or branch that desires to temporarily transfer its key employees to the United States.

In 1990, the definitions of "manager" and "specialized knowledge" were expanded to make more business persons eligible for L-1 visa status. In addition, the maximum period of stay in L-1 status was extended from five years to seven years for executives and managers.

The United States urged the inclusion of the intracompany transferee category in the FTA to provide U.S. citizens the same ability to work in Canada as Canadian citizens have to work in the United States in L-1 status. Importantly, the FTA gave only Canadian citizens the option of submitting individual L-1 petitions in person at certain major ports-of-entry without advance filing with the INS.³⁴ This expedited adjudication greatly facilitated the entry of Canadian intracompany transferees into the United States.

The inclusion of the intracompany transferee category in the NAFTA is intended primarily to provide U.S. citizens the same ability to work in Mexico as Mexican citizens have to work in the United

²⁹ *Id.* annex 1603(A)(4)(b).

³⁰ *Id.* annex 1603(A)(4)(a).

³¹ *Id.* annex 1603(A)(1).

³² *Id.* annex 1603(A)(2).

³³ 8 U.S.C. §1101(a)(15)(L)(1).

³⁴ 8 C.F.R. §214.2(1)(17)(i).

States in L-1 status. The NAFTA provides that no Party may require labor certification or similar tests, or impose or maintain any numerical restrictions for intracompany transferees.³⁵ A Party may, however, require a visa.³⁶

The INA requires that intracompany transferees have been employed abroad by the same or a related employer for at least one of the three years immediately preceding the date of application for admission. The United States acceded to the request of Canada and Mexico that, to comply with their existing law and practice, Chapter 16 provide that a Party may, but does not have to, require previous employment abroad.³⁷ Pursuant to the NAFTA, the United States has decided to continue to require employment abroad for one of the prior three years, but Canada and Mexico have decided not to.

The NAFTA departs from existing U.S. law in its definition of the qualifying relationship between the sponsoring entity in the United States and the entity abroad. In general, regulations require that one entity must be a foreign branch, subsidiary, parent, affiliate, or joint venturer of the other. The NAFTA, however, limits the qualifying relationships to subsidiaries and affiliates.³⁸

3. Professionals

Nonimmigrant professionals including teachers, engineers, scientists, physicians, and others generally are admitted to the United States in the H-1 specialty occupation category.³⁹ Since 1990, all petitions to the INS for H-1 status must be accompanied by a Labor Condition Application approved by the Department of Labor stating that certain job-posting requirements have been satisfied, and that the new employee will be paid the prevailing wage for the position.

The FTA listed sixty-three categories of professionals who would otherwise qualify for H-1 status, and made them eligible for expedited entry in TC status. The NAFTA extended eligibility to citizens of Mexico, and each Party agreed to grant temporary entry to persons seeking to engage, at a professional level, in designated professions almost identical to those listed in the FTA.⁴⁰ The list included scientists, architects, engineers, economists, lawyers, librarians, and management consultants. This list is exclusive.⁴¹ Importantly, professionals admitted under the NAFTA are not allowed to be self-employed. A U.S. company, owned by the prospective employee, may not make a qualifying

³⁵ NAFTA annex 1603(C)(2).

³⁶ *Id.* annex 1603(C)(3).

³⁷ *Id.* annex 1603(C)(1).

³⁸ *Id.* annex 1603(C)(1).

³⁹ 8 U.S.C. §1101(a)(15)(H)(1).

⁴⁰ FTA annex 1502.1; NAFTA appendix 1603.D.1.

⁴¹ FTA schedule 2 to annex 1502.1.

job offer. This point was not clear under the FTA.

Candidates for TN status must possess a baccalaureate degree or appropriate credentials demonstrating their professional status. TN applications may be made at certain major ports-of-entry upon presentation of proof of citizenship, educational credentials, and a professional job offer in the United States. TN business persons are not required to have prior INS petition approval or Department of Labor Condition Application approval and are not subject to the period of stay limit and global annual limit imposed on H-1s.⁴²

However, Mexicans are treated less favorably than Canadians by the NAFTA. Under the FTA, Canadian TCs were admitted without numerical limit. In contrast, the NAFTA provides that a Party may establish annual numerical limits on the entries of professionals.⁴³ Only the United States has taken advantage of this provision and, to assuage the concerns of United States labor interests, has limited the entry of Mexican professionals. Mexico and the United States have approved a transitional annual limit of 5,500 initial petitions for Mexican professionals to enter the United States.⁴⁴ Licensed professionals may be excluded from the limit.⁴⁵ To provide for gradual access to the United States for Mexican citizens, who will remain generally subject to labor attestation requirements and the global annual limit applicable to the H-1 category, the United State imposes, during the period the limit applies, requirements other than those ordinarily applicable to entering NAFTA professionals.⁴⁶

The United States has agreed that, after one year, it will consider increasing the limit and, after three years, will consult with Mexico to determine the date the limit will be removed.⁴⁷ The limit will expire ten years from the effective date of the NAFTA unless the United States and Mexico agree to its earlier removal.⁴⁸

Unlike the United States, neither Canada nor Mexico have limited the number of professionals entering on TN status. However, Canada and Mexico retain the right to impose numerical limits on those entering from other countries which may in the future accede to the

⁴² Many Canadians have obtained TC status. From the implementation of the FTA through September 30, 1992, more than 32,500 TCs were approved in the United States. Unpublished INS statistics.

⁴³ NAFTA annex 1603(D)(4).

⁴⁴ *Id.* appendix 1603.D.4 (2)(c),(d). It should be noted that the initial 5,500 approved petitions are in addition to any petitions granted to Mexican citizens who otherwise qualify under the INA's H-1 provisions and as such are subject to a global annual limit in United States law of 65,000 H-1 professionals, and are in addition to those who otherwise qualify under any other nonimmigrant professional category under the INA.

⁴⁵ *Id.* annex 1603(D)(5)(c).

⁴⁶ *Id.* annex 1603(D)(4),(5).

⁴⁷ *Id.* annex 1603(D)(5)(a),(7).

⁴⁸ *Id.* appendix 1603.D.4 (3).

NAFTA.

The Parties may not require prior approval procedures, petitions, labor certification tests, or other procedures of similar effect.⁴⁹ This helps Canadian applicants more than Mexican. Although Mexican professionals are eligible for port-of-entry adjudication, they will still require visas to enter the United States and must, therefore, make an application prior to entry.

4. Traders and Investors

Under existing U.S. law, E-1 treaty trader visas are available to citizens of countries with which the United States has a Treaty of Commerce and Navigation and who enter the United States solely to carry on substantial trade. This includes trade in services or trade in technology, principally between the United States and a foreign state.⁵⁰ This category is useful for executives, supervisors, and employees with skills essential to the operation of the foreign company or branch, who enter for extended periods to oversee or to work in an enterprise that carries on substantial trade in goods or services principally between the United States and a foreign country.

E-2 treaty investor visas are available to investors who enter solely to develop and direct the operations of an enterprise in which he or she has invested, or of an enterprise in which he or she is actively in the process of investing, a substantial amount of capital.⁵¹ This category is useful for key employees of a foreign company making a substantial investment in the United States, either as the person who directs the investment, as a qualified manager, or as a specially trained and highly qualified employee necessary for its development. Trade in services and technology are qualifying types of trade.

The United States has no Treaty of Commerce and Navigation with Canada or Mexico. To encourage Canadians to enter the United States to trade in goods or services, or to make investments, the FTA made citizens of Canada eligible for E visa status. The NAFTA makes Mexicans eligible for E visas without limit on the number of visas available.⁵² The NAFTA broadens the INA by not requiring that traders be executives, supervisors, or those with essential skills, and by expanding the permissible activities for investors.

Under Chapter 16, each Party will grant temporary entry to a business person to:

⁴⁹ *Id.* annex 1603(D)(2)(a).

⁵⁰ 8 U.S.C. §1101(a)(15)(E)(1).

⁵¹ 8 U.S.C. §1101(a)(15)(E)(2).

⁵² E visas are made available, not on the basis of a Treaty of Commerce and Navigation, but on the basis of an agreement between the Presidents of the United States and Mexico. H.R. Doc. No. 103-159, *supra* note 5.

- a) carry on substantial trade in goods or services principally between the territory of the Party of which the business person is a citizen and the territory of the Party into which entry is sought; or to
- b) establish, develop, administer, or provide advice or key technical services to the operation of an investment to which the business person or the business person's enterprise has committed, or is in the process of committing, a substantial amount of capital, in a capacity that is supervisory, executive, or involves essential skills.⁵³

Under existing immigration law, an E-1 treaty investor must "solely. . . develop or direct" an investment. Under the more liberal provisions of the NAFTA, entering to establish a new enterprise, render advice, or provide key technical services will suffice and is expected to increase the flow of personnel.

III. TRADE LIBERALIZATION MEASURES NOT INCLUDED IN CHAPTER 16

A. *The NAFTA Does Not Affect Immigration*

Although the NAFTA has become linked to immigration in the public perception, it does not specifically address the issue. From the inception of negotiations, the United States declared that permanent immigration issues were not on the negotiating table.⁵⁴ It does not provide for free establishment across the borders in North America, nor does it create a common market for labor. In that respect, what is happening in North America is very different from the European experience.⁵⁵ Although Chapter 16 directly affects the immigration laws of the Parties, it affects only nonimmigrant, or temporary entries.⁵⁶

Chapter 16 does not provide Canadians any easier access to the United States than they had under the FTA. Mexicans, at least temporarily, are granted more limited access than Canadians to the United States. This was thought necessary in part because the H-1 requirements for professionals had been made more onerous after the FTA was implemented⁵⁷ and it was not considered reasonable to grant Mexicans the benefit of the more favorable provisions granted to Canadians

⁵³ NAFTA annex 1603(B)(1).

⁵⁴ U.S. Trade Representative Carla Hills, Press Conference, June 14, 1991. For purposes of United States law, immigrants are those who, at the time they enter, intend to remain in the United States permanently. Nonimmigrants are those who, when they enter, intend eventually to return to a foreign residence.

⁵⁵ When the six governments constituting the European Economic Community adopted the Treaty of Rome in 1957 it explicitly included a freedom of movement component. The NAFTA does not.

⁵⁶ NAFTA arts. 1603(a), 1607.

⁵⁷ Specifically, by passage of the Immigration Nursing Relief Act of 1989, Pub. L. No. 101-238 (1989) which created the H-1A category and the Immigration Act of 1990, *supra* note 13, which made dramatic changes to the H-1 category and some changes to the L-1 category.

by the FTA when a more liberal immigration law was in effect. It was also thought necessary because of U.S. concerns about both visa fraud and the entry of low-skilled Mexican workers.

Its supporters expect that NAFTA will have an indirect impact on immigration issues by creating jobs in the United States and Mexico. Further, supporters maintain that strengthening the Mexican economy will help stem the migration of undocumented workers.⁵⁸ The Clinton Administration believes that the NAFTA, together with the legalization provisions of the Immigration Reform and Control Act of 1986 and the "family unification" provisions of IMMACT 90, will greatly reduce illegal immigration.⁵⁹

Congress recognized the difficulty of trying to stem the flow of illegal migration through unilateral action and concluded that close consultation and cooperation with Mexico and Canada were essential. As a result, immigration issues have been discussed among the Departments of Labor and Justice and the Mexican government as part of the U.S.-Mexico binational relationship during the past ten years. Increased cooperation under the NAFTA is expected to be useful. However, given the disparity between economic opportunities in the United States and Mexico, even with the trade benefits that the NAFTA is expected to generate, significant illegal immigration is expected to continue for the next ten to fifteen years.⁶⁰

B. The NAFTA Does Not Grant Work Authorization for Spouses

One of the most troublesome issues for the negotiators was the possibility of granting the right to work, without prior employment authorization or labor certification, to spouses of business persons admitted for more than one year under the NAFTA. Under the INA, a spouse of a nonimmigrant may not work unless he or she qualifies independently. In an era of two-career families, refusing to grant a spouse the right to work is arguably a barrier to trade. The issue was discussed at length, but no agreement was reached. The United States opposed amending existing law in this regard and the matter was left to the Temporary Entry Working Group for discussion.⁶¹

C. The NAFTA Retains a Visa Requirement for Mexicans

The United States did not take the opportunity during the NAFTA negotiations to eliminate the visa requirement for Mexicans.

⁵⁸ *Subcommittee Hearings*, *supra* note 6, (statement of Doris M. Meissner, Commissioner, Immigration and Naturalization Service) at 2.

⁵⁹ *Id.* (statement of Deputy U.S. Trade Representative Rufus Yerxa) at 8.

⁶⁰ *Id.* (statement of Lawrence Katz, Chief Economist, United States Department of Labor) at 12.

⁶¹ NAFTA art. 1605(2)(c).

Although Chapter 16 states that a visa requirement may be removed, the Parties have not agreed to do so. A visa requirement may be imposed by a Party for any category of business persons included in the provisions of Chapter 16.⁶² However, before a Party may impose a visa requirement for business visitors, intracompany transferees, or professionals, it must consult with the affected Party with a view to avoiding the imposition.⁶³ Regarding an existing visa requirement imposed in connection with any of those categories, a Party must, on request, consult with the government of the affected Party with a view to its removal.⁶⁴ For traders and investors, a visa requirement may be maintained or imposed without prior consultations.⁶⁵

IV. UNITED STATES IMPLEMENTING LEGISLATION

Because the categories made eligible for temporary entry by Chapter 16 correspond to existing U.S. immigration law, no major legislative changes were required to implement its provisions for business visitors and intracompany transferees. Limited technical amendments are required for traders, investors, and professionals. Legislation is required also to implement the provisions regarding denial of entry in the case of a labor dispute.⁶⁶

The NAFTA implementing legislation codifies the provisions of Chapter 16 related to traders and investors, professionals, numerical limitations on professionals, and labor disputes.⁶⁷

A. Traders and Investors

Canadians and Mexicans are made eligible by the NAFTA for temporary entry as traders and investors under requirements for admission identical to those contained in the INA for admission upon authorization pursuant to a Treaty of Commerce and Navigation. Because the United States has no such treaty with either Canada or Mexico, the Implementing Legislation specifically accords treaty trader and investor status to citizens of the two countries.⁶⁸ It does so not by amending current law, but on the basis of reciprocity secured by an agreement

⁶² *Id.* annexes 1603(A)(5),(B)(3),(C)(3) and (D)(3).

⁶³ *Id.* annexes 1603(5),(C)(3) and (D)(3).

⁶⁴ *Id.*

⁶⁵ The United States is determined to retain the right to impose visa requirements. The accession clause of the NAFTA was considered by the negotiators of Chapter 16, and the United States wants to be able to impose visa requirements on citizens of any countries that may accede.

⁶⁶ *Id.*

⁶⁷ The North American Free Trade Agreement Implementation Act of 1993, H.R. 3450, S. 1627, 103d Cong., 1st Sess. (1993) [hereinafter Implementing Legislation].

⁶⁸ *Id.*, sec. 341(a). Although Canadians are accorded treaty trader and investor status under the FTA, legislative authorization is required to confer that status on Canadians under the NAFTA.

entered into by the Presidents of the United States and Mexico.⁶⁹

B. Professionals

The Implementing Legislation amends existing law⁷⁰ to permit Canadians and Mexicans to be admitted in the list of professions set out in the NAFTA.⁷¹ As far as Canadians are concerned, the NAFTA and its Implementing Legislation merely confirm the system established by the FTA. The Implementing Legislation authorizes the imposition of an annual numerical limit for entry of Mexican professionals. It conforms to the letter of Chapter 16 by providing that the limit may be adjusted or removed.⁷² It appears, however, to violate the spirit of the NAFTA, which is to remove any limit as soon as possible.⁷³ Instead, the Implementing Legislation mandates an arduous process to increase or remove the U.S. limit on the admission of Mexican professionals. The limit may be adjusted only after the President has consulted with the private and non-federal governmental advisory sectors mandated by the Trade Act of 1974.⁷⁴ Additionally, the Implementing Legislation requires the President to submit a report to the Committees on the Judiciary of the Senate and the House of Representatives, to wait sixty days after submission of the report, and to consult with both committees before lifting the limit.⁷⁵ As a result, any adjustment of the limit will be the subject of what may be expected to be a fierce political debate.

Importantly, while the limit is in effect, the Implementing Legislation subjects Mexican professionals to the requirements of labor attestation and prior INS approval of a petition.⁷⁶ These provisions effectively deny easier access to Mexicans, and will make it difficult to reduce or remove the limit prior to its mandatory elimination in ten years.

The Implementing Legislation codifies existing U.S. practice and permits entry, but not employment authorization, to spouses and children of nonimmigrant professionals.⁷⁷ By treating Mexican and Canadian professionals as nonimmigrants under U.S. immigration law, it subjects them to the general requirements relating to the admission or

⁶⁹ The U.S.-Canada Free Trade Agreement Implementation Act of 1988, Pub. L. No. 100-449, granted E status to Canadians on the basis of an agreement between the Canadian and United States governments.

⁷⁰ Implementing Legislation, *supra* note 67, at §341(b).

⁷¹ *Id.*

⁷² *Id.*

⁷³ NAFTA annex 1603(D)(5)(b).

⁷⁴ The Trade Act of 1974, 19 U.S.C. 2155 (1993).

⁷⁵ Implementing Legislation, *supra* note 67.

⁷⁶ *Id.*

⁷⁷ *Id.*

exclusion of nonimmigrants. A denial of entry in a NAFTA category neither forecloses nor establishes eligibility for entry under other visa categories of existing immigration law.

C. Labor Disputes

A significant provision, added as a concession to labor interests, states that a Party may refuse employment authorization if the temporary entry might adversely affect the settlement of a labor dispute in progress at the place or intended place of employment or which might affect the employment of any person who is involved in such a dispute.⁷⁸ If a Party invokes this provision, it must inform the business person and his or her government in writing of the reason for the refusal.⁷⁹ Business visitors cannot be denied entry under this provision. However, an executive, manager, high-level technical advisor, or professional could be denied.

The Implementing Legislation authorizing the refusal of nonimmigrant classification to Mexican or Canadian business persons does not sufficiently clarify the definition of a "labor dispute" but states that

if there is in progress a strike or lockout in the course of a labor dispute in the occupational classification at the place or intended place of employment, unless the alien establishes, pursuant to regulations promulgated by the Attorney General, that the alien's entry will not affect adversely the settlement of the strike or lockout or the employment of any person who is involved in the strike or lockout.⁸⁰

D. Administrative Action

The Department of State and the Attorney General have principal authority for the administration and enforcement of the immigration laws. The Department of Labor has authority regarding the employment of foreign nationals. Together they implement Chapter 16 through administrative action. No significant changes to existing regulations, practices, or procedures are required.

1. Professionals

So that business persons of a Party may learn the requirements for temporary entry, each Party agrees to publish and to make available explanatory material in its own territory and in the territories of the other two Parties.⁸¹ The relevant executive branch agencies will participate in the preparation and distribution of a consolidated document.

⁷⁸ NAFTA art. 1603(2).

⁷⁹ *Id.* art. 1603(3).

⁸⁰ Implementing Legislation, *supra* note 67, §341(c).

⁸¹ NAFTA art. 1604(1)(b).

To ensure proper monitoring of the implementation of Chapter 16, each Party has agreed to collect data specific to each occupation, profession, or activity granted temporary entry, and to publish and make available, in its own territory and in the territories of the other two Parties, statistics regarding business entry.⁸² The INS, the Department of State, and the Department of Labor will insure that appropriate data are collected and made available as required by the NAFTA.

The INS has promulgated extensive regulations regarding the admission of professionals under Chapter 16.⁸³ Because U.S. immigration law and regulations had been substantially amended since the implementation of the FTA, the treatment accorded Canadians under the FTA and continued in the NAFTA is significantly more favorable than that accorded citizens of Mexico.

Professionals, admitted as TCs under the FTA, are admitted as TNs under the NAFTA.⁸⁴ In accordance with the Implementing Legislation, the regulations do not allow entry on professional status to engage in self-employment.⁸⁵ Self-employment had not been addressed by the regulations promulgated under the FTA, and TC status had often been issued to the self-employed.

The schedule of professional occupations contained in the new regulations are almost identical to those for TCs under the FTA. A baccalaureate or licenciatura degree is the minimum required unless the regulations specify an alternative credential for a particular profession.⁸⁶

While no limit has been imposed on the number of TN extensions available, the regulations promulgated under Chapter 16 provide, as regulations under the FTA did not, that an entrant seeking professional status must satisfy the consular officer that the proposed stay is temporary and does not equate to permanent residence.⁸⁷ For professionals, as for the other NAFTA categories, the new regulations provide that entry may be denied in the context of a labor dispute.⁸⁸

Although the eligibility requirements are the same for Canadians, the procedures to classify a citizen of Mexico as a professional are more complicated.⁸⁹ The prospective employer of a Mexican citizen seeking *TN* status must file a petition with the INS. In addition, so long as the numerical limit on the number of Mexican professionals continues, the employer will be subject to the labor attestation require-

⁸² *Id.* art. 1604(2), annex 1604.2.

⁸³ 8 C.F.R. §214.6(C).

⁸⁴ C.F.R. §214.6. TN dependents, admitted on B-2 visitor status under the FTA, will be admitted in a new TD classification pursuant to 8 C.F.R. 214.6(l)(2)

⁸⁵ 8 C.F.R. §214.6(b). *See also* 8 C.F.R. 214.6(l)(1)(iv).

⁸⁶ 8 C.F.R. §214.6(c).

⁸⁷ 22 C.F.R. §41.59(c).

⁸⁸ 8 C.F.R. §214.6(k).

⁸⁹ 8 C.F.R. §214.6(d).

ments applying to professionals. The petition must be filed with an approved Labor Condition Application from the Department of Labor.⁹⁰

Application for professional status for citizens of Canada may be made by petition to the INS or directly at a port-of-entry without prior approval from the Department of Labor.⁹¹ Canadian entrants on professional status must meet more rigorous documentary requirements than under the FTA and must present evidence that licensing requirements have been met.⁹²

2. Business Visitors

INS regulations adopted pursuant to Chapter 16 contain the expanded appropriate B-1 activities listed in the NAFTA for citizens of Mexico and Canada. They parallel existing regulations governing the admission of Canadian business visitors under the FTA.⁹³ The list is not exhaustive, and a citizen of Canada or Mexico may seek entry to engage in traditional B-1 activities not included in the NAFTA and regulations.

3. Traders & Investors

For traders and investors, INS regulations authorize citizens of Mexico, as well as Canada, to apply for E visa status pursuant to Chapter 16. The INS continues to require a visa for both Canadians and Mexicans in this category.⁹⁴ The regulations provide that treaty trader or investor status may be denied to citizens of Canada and Mexico in the case of certain labor disputes.⁹⁵

4. Intracompany Transferees

For intracompany transferees, neither changes to existing law and practice nor administrative action is required. New INS regulations, however, limit the ports which may accept port-of-entry applications from Canadians.⁹⁶ A new section has been added to provide for denial of L-1 classification for a citizen of Mexico or Canada in the case of certain labor disputes.⁹⁷

⁹⁰ *Id.* See also Department of State regulations at 22 C.F.R. §41.59 and Department of Labor regulations at 20 C.F.R. §655.700(c)(2).

⁹¹ 8 C.F.R. §214.6(e).

⁹² 8 C.F.R. §214.6(d)(2)(iv).

⁹³ 8 C.F.R. §214.2 (b)(4).

⁹⁴ 8 C.F.R. §212.1(1).

⁹⁵ 8 C.F.R. §214.2(e).

⁹⁶ 8 C.F.R. §214.2(l)(17)(i) limits port adjudication to ports-of-entry located along the United States/Canadian border and pre-flight/pre-clearance stations located in Canada.

⁹⁷ 8 C.F.R.214.2(l)(18), 22 C.F.R. §41.54(e).

V. EXPERIENCE UNDER CHAPTER 16

The most current available statistics regarding NAFTA admissions into the United States are for 1994. Of a total of 391,181 admissions, 70,216 were Canadians and 320,965 were Mexicans. Of the Canadians, 24,455 were admitted on B-1 status; 187 on E-1; 2,877 on E-2; 6,617 on L-1 (4,269 as L-2 dependents); and 25,104 on TN (with 6,707 TD dependents). Of the Mexicans, 316,221 were admitted on B-1 visas; 122 as E-1; 237 as E-2; 2,808 as L-1 (1,550 as L-2 dependents); and only 16 on TN (with 11 TD dependents).⁹⁸ The fact that only sixteen Mexican professionals were admitted makes the U.S. concern about limits on TN admissions seem unnecessary. The 1995 statistics should be available by September 1996, and should show a clearer picture.

VI. THE SIGNIFICANCE OF CHAPTER 16

Chapter 16 is designed to facilitate trade in goods, services, and investment among the Parties. It is not intended to harmonize the immigration systems of the Parties, nor to create free and unrestricted access to their territories by business persons, even temporarily. It is designed to protect the border security and domestic labor markets of the Parties.

Chapter 16 makes significant progress towards the liberalization of trade. It includes Mexico in the preferential trading relationship established between the United States and Canada by the FTA. It extends to Mexican citizens the benefit of expedited temporary entry to carry on certain types of business activity extended to Canadians in 1989. It establishes rules for the temporary entry of business persons from other countries in the hemisphere who accede as parties to the NAFTA. Importantly, Mexican citizens are now eligible for E status and are allowed greater access as B-1 business visitors to the United States, although they still require visas.

The Parties have maintained the integrity of their laws relating to permanent immigration. They have reached commitments which they can live with substantively and politically. Importantly from the perspective of the United States, these commitments do not depart significantly from existing United States immigration law and regulations.⁹⁹ By forging closer ties with Mexico and Canada, the United States has secured their cooperation in dealing with border issues.

Perhaps most importantly, Chapter 16 will restrain the ability of the Parties to further restrict those sections of their immigration laws

⁹⁸ Unpublished Statistics from the Statistics Division, U.S. Immigration and Naturalization Service.

⁹⁹ *Subcommittee Hearings, supra* note 6.

relating to the NAFTA categories as far as the other Parties are concerned. Since the FTA was enacted, the United States has amended its laws to make the entry of some business persons more difficult. However, Canadians continue to benefit from the FTA's more favorable provisions which were based on prior law. With the NAFTA, the United States is committing to Canada and Mexico, and to other countries that may accede, that it will not unilaterally withdraw the commitments made in Chapter 16. Any changes will have to be negotiated with Canada and Mexico. If the United States were to act unilaterally, it would be subject to retaliatory action by the other two Parties.

The NAFTA is a living document. The Chapter 16 Working Group will continue to discuss modifications. How the provisions of Chapter 16 will evolve and how they are likely to affect future trade negotiations is a crystal ball-gazing exercise. At issue is the tension between the proclaimed benefits of free trade around the globe, and the tendency to establish hemispheric trading blocs such as the European Union, NAFTA, and ASEAN which indicate a move away from global free trade and the free circulation of goods, services, persons, and capital. In Chapter 16, the Parties adopt commitments to assist trade liberalization which balance their concerns and establish rules for the freer circulation of business persons in North America.

