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US Non-Immigrant Options - A Summary and Comparison for HR Professionals -

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US NON IMMIGRANT VISAS: TN's, L-1A/L-1B, H-1B Panel

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I. Introduction

Canadians planning to work in the United States enjoy immigration admission categories and simplified procedures under the *North American Free Trade Agreement* ("NAFTA") not available to most other nationals. For instance, instead of filing a petition at a Regional Service Center, as is normally required, and waiting on average 6 to 10 weeks for approval from a regional service center and then sending the prospective employee to a US Consulate abroad for visa issuance, many Canadian are able to have their Trade NAFTA Professional requests or intra-corporate "L" petitions adjudicated at a border Port of Entry or airport Pre-Flight inspection facility only hours before departing for the United States. The result, that might otherwise take months, can very often be finalized in a matter of a couple days.

In the world of business time is money and this time saving can be a godsend – particularly when your company is anxiously awaiting the arrival of a new recruit or transferee or a small business person has secured her first major contract in the United States. However, there are a number of sensitivities that HR Professionals needs to be aware of in using the various NAFTA provisions to his or her company's advantage. Moreover, in the post-September 11th era, borders and airports have become increasingly security sensitive places. Although this new reality is not generally directed at Canadians as a result of heightened security, border and pre-flight immigration processing while still fast and relatively uncomplicated, does now, more then ever, require especially good strategy, preparation, and presentation.

Finally, there are situations where the options available under the NAFTA will not work. In these cases it is necessary to consider other Non- Immigrant status options including H-1B "Speciality Occupation" status.

In this article we review the most useful admission options available to Canadian new hires, transferee and business people to the US; we also outline the basic requirements and list the standard documentary evidence required. We then identify some of the drawbacks and benefits of the admission options and discuss some of the more complicated cases scenarios.

II. Useful Non-Immigrant Options Available to Canadians under the NAFTA

Below is a summary of useful immigration categories available to Canadians assigned temporarily to work or relocating to the United States. As each category has its own specific requirements, restrictions and advantages it is always important to consider every aspect of the individual employee's situation - his or her qualification, logistical restraints, as well as his or her and the company's future joint future plans - before deciding how to proceed.

1. 'TN' Trade *NAFTA*-Professional

A Covering the Basics – Requirements and Documents

Perhaps the best quick fix immigration tool is TN (or Trade *NAFTA* –Professional) status. Canadians apply at an airport Pre-flight inspection facility or a border Port of Entry. TN preparation can be done in a matter of days – in some cases hours and adjudication can often take less than an hour. To qualify the recruit or transferee must have the required professional credentials (education and/ or experience) and intend to perform the duties of an approved profession. Some of the most common approved professionals we see in my office are the Computer Systems Analyst, the Engineer, the Accountant, the Graphics Designer and the Management Consultant.

Typically a Bachelor's degree is required but there are instances, depending on the particular profession, where a successful applicant might have a combination of a two year Post-Secondary Diploma or Certificate and three years of related experience. There are also some instances where an applicant can qualify on the basis of experience alone. Applicants will typically be required to present documentation proving their educational and experience as well as the suitability of the employment offer in the United States.

Who can the TN status holder work for in the US? The regulations are surprisingly accommodating. The TN status holder can work for a US company, his or her Canadian or Mexican employer or be filling a contract for services between a Canadian or Mexican company and a US Company.

There is no limit to the total period of stay in the United States allowed under the TN category but the initial period for admission is limited to a maximum of one year. Satisfying the temporary intent requirement may become an issue with repeat extensions or renewals. As well, because of the 'dual intent' issue, the TN is not a good launching pad for US permanent residence or the "Green Card".

The standard documents the applicant should have to apply are:

- A letter from the company – describing its business, a description of the professional nature of employee’s job, the anticipated length of employment, the salary, duties to be performed in the US. If the employee will be paid by the Canadian office and maintain Canadian residence this should also be stated in the letter;
- A legal letter setting out TN status requirements, satisfaction of same, and the appropriateness of issuance – this material can also be incorporated into the company letter;
- A copy of the employee’s university degree and / or diploma – if the degree was attained outside of Canada or the US, it must be evaluated by a credential evaluation organization to ensure that it is equivalent to a Canadian or US degree / diploma. If there is any issue as to the relatedness of the degree or diploma then my office might also include a transcript and highlight the related course;
- A valid Canadian passport; and
- The US\$56.00 processing fee.

If the applicant is going to the US to perform services for a US company, either a related company or under a contract between the Canadian and US companies, there are two additional documents to consider:

- A letter from US company confirming the need for the employee, the professional requirements of the assignment, and the location and duration of the assignment; and
- A copy of the contract with the US Company.

Note that some Ports of Entry and Pre-Flight Inspection offices now have recently required original degrees and certificates.

B. Drawbacks to the TN

The main drawback of the TN is that applicants must be pigeon-holed into specific professional categories; these categories, in turn, tend to be narrowly defined. The TN requires that professionals fit into pre-determined professional categories and that they meet very specific pre-determined educational and experience requirements. As such, the TN does not cover a number of individuals that

we would normally consider 'professionals' such as business management professions, marketing or Human Resources professionals.

Even if your employee fits neatly within one of the pre-determined professionals categories you may find that his or her education does not. We see this in a number of professions; perhaps the most common is in the computer industry. For example, in today's market, it is quite common to see computer professionals who are either self-taught or who have accumulated a number of industry respected certifications over their career. Yet, in order to qualify as a Computer Systems Analyst under the NAFTA, the applicant must have a Bachelors degree (now usually interpreted as required to be in a *related* field) or a post-secondary diploma (interpreted as having a minimum of 2 years duration) and three years of experience. It has been many years since the TN educational requirements were agreed upon, and in the time that has passed little has changed to reflect current business and industry trends. As we will see in the discussion of the Computer System's Analyst, the definitions of the duties performed by various professionals can be out of sync with contemporary business norms.

With respect to the former, the TN simply does not assist a great number of professionals, for example, Business Management, Marketing and Human Resources positions are not included. The TN is simply not useful to most Managers. If the manager is going to a related company, you should consider an L, if the manager is going to an unrelated company, then an H-1B might be appropriate.

C. Benefits of the TN

If the employee is not receiving direct payment from a US source, and is spending a short period of the US doing work that appears to qualify under the business visitor categories, some may consider it 'overkill' to get this work permit. However, if a US immigration officer sees the same individual traveling week after week as a visitor, he may demand that he obtain a TN. Once the employee has TN status he or she is unlikely to encounter questioning by immigration officers, so for the person who always seems to be beset by probing questions, a cautious TN may be worth the trouble. If the work being done is partially a permitted B-1 business visitor activity and partially not, it is safer to get the TN status rather than just go for the B-1. The TN can be obtained quickly and easily to allow last minute employment in the US.

D. Complicated Cases

While most of the TN professional categories are self-explanatory, some are not. Some of the more complicated categories and the complications that I have encountered are as follows:

The Management Consultant: The educational requirement for a Management Consultant is a Bachelor's degree or five years of experience in consulting or a related field. This is one of only two TN professions that do not require post-secondary education and as such it seems that many Canadians without formal education try to 'squeeze' in as Management Consultants. As a result of this perceived abuse, the Management Consultant category is renowned for being scrutinized.

In the absence of a degree, the TN Management Consultant's experience is likely to be very carefully reviewed. In addition to the documentation listed earlier, for Management Consultants I always document the required five years of experience in consulting or a related field. Such documentation typically includes letters of reference or recommendation from prior employers. If the Consultant is self-employed the documentation might alternatively consist of letter from existing or former clients that attest to the type of related services that he or she has provided.

I have found that the key to putting together a successful TN Management Consultant application is to start with an understanding of the duties of a Management Consultant then to ensure the best possible fit with your client's duties. A Management Consultant is someone who 'provides services which are directed toward improving the managerial, operating, and economic performance of private or public entities...' Generally speaking, Consultants are not 'hand-on' and are not involved in the 'day-to-day operations of a company' rather they look objectively at the company's activities to identify areas of improvement. In doing so they 'advise' and 'recommend' courses of action. I have found the Dictionary of Occupational Titles (DOT) to be particularly helpful in preparing TN applications; the Occupational Outlook Handbook (OOH) is also a sound recourse. Irrespective of the source, the key to success is to not only to reference accepted consulting duties but to clearly explain and detail your client's responsibilities in this language.

The Computer Systems Analyst: It is extremely important that you carefully consider the duties, past and present, of your client before assuming that he or she will satisfy the TN requirements. For instance, Computer Systems Analysts (CSAs) are not Computer Programmers; they are not typically Computer

Scientist or Web Designers or a host of other IT professionals. In the world of TNs, the Computer Systems Analyst is a very specific profession, which requires specific anticipated duties and education.

With respect to the duties, I again recommend reviewing and very carefully and referencing the corresponding DOT or OOH description. With respect to the education, although not actually spelt out in the NAFTA, practically speaking, CSAs are expected to have related education. So, part of your job will be to assess the applicant's degree or diploma to ascertain whether it is sufficiently related. As those of you who have done this before know, this task is not always easy. In the years since the NAFTA was enacted the IT industry has evolved dramatically. This is not the case for the corresponding NAFTA provisions. While the person with a completely unrelated Bachelor's degree who learned the profession on the job probably will not qualify, it will be your job to see that the application of the person with an arguably related degree is presented in the most compelling manner possible.

The Scientific Technician: There are two main areas of concern for this category:

First, because there is no post secondary education requirement, practically speaking, it is difficult to prove the applicant's requisite knowledge. The knowledge required is vague: 'theoretical knowledge of the discipline' and 'an ability to solve practical problems in the discipline, or the ability to apply principles of the discipline to basic or applied research'. In my experience, the best approach is to rely on the applicant's past performance by providing related letters of reference or recommendation. Of course, the extent to which you are able to assist the company in setting out the employee's knowledge in their letter will also be crucial. However, in a Field Guidance Memo dated November 7, 2002 then INS states that 'theoretical knowledge should have been acquired through the successful completion of at least two years of training in a relevant educational program' (their emphasis). As such, although not impossible, the legal practitioner can anticipate difficulty in proving this aspect of qualification where the applicant lacks formal education.

Second, the Scientific Technician cannot work independently. He or she must work in direct support of a designated professional. The approved professional that I see most often is the Engineer. In my office we identify the professional in the company letter of support, spell out his or her professional credentials and then set out the applicant's reporting relationship to the professional. In terms of documentation, we provide a copy of the professional's degree and, where possible, designation, if supportive, we also include pre-existing documentation evidencing the company's reporting structure.

2. 'L-1' Intra-corporate Transfer Requirements

A. Covering the Basics – Requirements and Documents

The L-1 is the non-immigration status that allows companies to temporarily transfer Executives and Managers ("L-1A") and those having "Specialized Knowledge" ("L-1B") to affiliates or subsidiaries in the United States. L-1 status is available to all nationals; however Canadians may take advantage of simplified provisions under the NAFTA. Their main advantage is that they can apply at an airport Pre-Flight inspection facility or at a border Port of Entry. Again, in avoiding the Regional Service Center process, the petition approval period is reduced from 6-8 weeks to a matter of a few hours.

In order to qualify, the corporate client must normally establish that the employee has worked in an executive, managerial or specialized knowledge capacity outside the United States in a full-time capacity for the foreign parent, branch, affiliate or subsidiary for at least one year within the previous three years. You must also establish that he or she is entering the United States to work for the same company or a parent, affiliate or subsidiary, in an executive, managerial or specialized knowledge capacity.

Canadians with L-1A or L-1B status do not require a visa and are therefore not required to attend at a US Consulate abroad before entering the United States. More over, Executives and Managers, who qualify for L-1A status, whether under the NAFTA, or the regular procedures, are subsequently in a position to qualify for US permanent residence under advantageous priority provisions.

Below is a basic list of documents that I typically provide in support of the L petition:

- Letter of support from the US Company;
- Completed and signed Form I-129 and L Supplement;
- Copy of the Canadian corporate Information (Articles of Incorporation and Common Share Certificates);
- Copy of US Corporate information (Certificate of Incorporation and Common Share Certificates);
- Corporate brochure;
- The Beneficiary's Canadian passport;

- Requisite filing fee in the amount of US\$185.00; and
- Completed and signed Form G-28.

B. Drawbacks to the L Category – Can the Client Avail itself?

The main drawback of the L is that it is of no help to new hires regardless of their seniority and/or value to your company. Note additionally, that the L is presently under political attack and legislation proposed in the US Congress could result in restrictive changes to the L intra-corporate transferee category. Educational requirements, limitation and duration reductions, and an annual cap of 35,000 are among the curtailing changes being considered. It is too early to know if any of these proposed changes will be enacted into law. The good news is that, even if they are, it would seem, at least initially, that the changes would not impact upon Canadians availing themselves of the NAFTA L provisions to work in the US.

C. Benefits of the L

There are many benefits of L intra-corporate status. Here are the main ones: the L can be a quick and effective way to bring an employee to the United States; unlike the H-1B, the beneficiary's employment is not subject to geographical limitations within the United States and the L-1A, can be issued for a total of up to 7 years and provides a good route to US Permanent Residence. Moreover, effective January 16, 2002, the *Immigration and Nationality Act* was amended to permit the employment of some L-1 intra-company transferee spouses. Unlike most other US non-immigration categories, the spouses of L-1A status holders are now permitted to work in the US. For clarity, this is not the case for the spouse of a TN or H-1B Specialty Occupation status holder.

D. Complicated Cases

The Initial / Small Company L: In the past few years I have assisted a number of smaller Canadian companies gain access to the United States. These companies are typically small, privately held affairs and as a result they present certain additional challenges. Moreover, because they are sending personal to the United States for the first time, they are also subject to the 'initial L' requirements. The regulations require that the initial L petitioner be coming to the US to manage a new US office. The key here is to show that the new office will be able to sustain a manager or executive transferee within one

year of approval of the petition. As such, the legal practitioner additionally needs to address the following: the purpose of the new office, its organizational structure and financial goals. You also should speak to the size of any investment in the US office or operations, as well as the financial ability of the new office to remunerate the beneficiary and to commence business in the United States. In my experience, the ability to satisfy the reviewing officer that the US office and operations are legitimate and will be viable within a reasonable period of time is essential. Accordingly, below is a list of additional documentation that I typically submit in support of an initial and/or small company L petition:

- Copy of US Office Leasehold Agreement and proof of payment;
- Evidence of hiring (Payroll documentation);
- Evidence of Advertising;
- Copies of Canadian Tax Returns (and US Tax Returns where applicable);
- Copy of US Quarterly Withholding, Wage Reporting and Unemployment Insurance Returns or equivalent (where applicable);
- Copy of existing US client contracts;
- Copy of US client invoice/payment documentation; and
- US and Canadian company financial statements.

3. H-1B Specialty Occupation

A. Covering the Basics – Requirements and Documents

Although not exclusively a category for Canadians, H-1B status is nonetheless a valuable tool of last resort. H-1B petitions are filed on behalf of professionals. Professionals are people who hold at least a bachelor's degree or the equivalent in a specialized field of knowledge relating to their employment, where holding such a degree ordinarily is considered a prerequisite to entering the field. The actual position being offered must require the services of a professional. Examples of job classifications that may qualify for H-1B status are Engineers, Accountants, Chemists, Computer professionals, and some business professionals.

The application process involves three steps. First, the Labor Condition Attestation (LCA) must be filed with the Department of Labor. By filing the LCA, the employer must attest that:

- It will pay the prospective foreign employee's "required wage" (the higher of the prevailing wage or the actual wage paid to U.S. workers similarly employed);
- The prospective foreign employee's employment will not adversely affect the working conditions of U.S. workers similarly employed;
- There is no strike or lock-out which has necessitated the hiring of the Prospective foreign employee; and
- Notice of the hiring of the prospective foreign employee has been provided to the company's employees.

Once the LCA is certified, the U.S. employer must file an H-1B petition with a BCIS regional service center. Service centers typically take six to eight weeks to adjudicate H-1B petitions. Most beneficiaries then must obtain the requisite H-1B visa endorsement at a U.S. Consulate abroad. Canadians are exempt from this third step and are, therefore, eligible to work in the United States at least two to three weeks before most of their fellow H1B status colleagues.

In order to proceed with the H-1B process we require that the prospective foreign employee provide our office with the following list of supporting documentation in support of this process:

- Resume or a detailed description of present and all previous jobs - (Each job description should include a list of responsibilities, specific projects on which you worked, particular accomplishments you achieved, the dates you held the position and the number of persons supervised or managed. Please place particular emphasis on those aspects of the employee's background which especially qualify you to accept the planned U.S. Assignment);
 - Copies of university diplomas and transcripts in English and, if possible, copies of your school transcripts - (Note that Japanese, Chinese, Korean and Arabic degrees and transcripts should be issued in English by the schools.
 - All certificates for all technical training;
 - Offer Letter; and
 - Marriage Certificate (where applicable).
- If the prospective foreign employee is already employed in the United States, please provide the following additional information:
- Current US address/phone;

- Current I-94 (stamped dates must be legible). If you are currently in the United States, please attach a copy of the front and back of your I-94 card and the cards of any family members who may be present with you. If you are currently in F-1 or J-1 status, please also attach copies of your I-20, employment authorization card, and/or IAP-66, as applicable;
- Social Security Number (copy - if applicable);
- Copy of Passport ID Page; and
- Most recent pay stub.

B. Drawbacks for the H-1B

The H-1B classification is subject to a yearly quota. The quota for fiscal year 2004 is 65,000 H-1B visas. Unfortunately, this quota was reached this spring. As a result no new H-1B petitions will be approved until the start of the new fiscal year in October.

Another drawback of the h-1b is that it can not be adjudicated at a Port of entry or at Pre-flight Inspection.

C. Benefits of the H-1B

D. Complicated Cases

Closing Remarks

In the present day environment of security sensitivity it is extremely important the immigration petitions and applications are prepared thoroughly and carefully. Over the past year we have been asked to help a number of companies clean up their internal immigration procedures and practices. I have presented lectures to Human Resources Managers, Project Managers and Employees alike with the aim of improving corporate immigration practices. Some corporate clients have taken a stern top down approach while others have implemented simple but effective changes at the ground level.