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[Rules and Regulations]

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Rules and Regulations

Federal Register

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DEPARTMENT OF HOMELAND SECURITY

8 CFR Part 214

[CIS No. 2266-03]

RIN 1615-AA96

Eliminating the Numerical Cap on Mexican TN Nonimmigrants

AGENCY: Department of Homeland Security.

ACTION: Interim rule with request for comments.

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

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

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

ADDRESSES: Please submit written comments to the Director, Regulations and Forms Services Division, Department of Homeland Security, 425 I Street, NW., Room 4034, Washington, DC 20536. To ensure proper handling, please reference CIS No. 2266-03 on your correspondence. Comments may also be submitted electronically to the Department at [rfi.regs@dhs.gov](mailto:rfi.regs@dhs.gov). When submitting comments electronically, you must

include CIS No. 2266-03 in the subject box so that the comments can be electronically routed to the appropriate office for review. Comments may be inspected at the above address by calling (202) 514-3291 to arrange for an appointment.

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

SUPPLEMENTARY INFORMATION:

## What Is the NAFTA?

On December 17, 1992, The United States, Canada and Mexico signed the North American Free Trade Agreement (NAFTA). The NAFTA entered into force on January 1, 1994, creating one of the largest trade areas in the world. Under the terms of the agreement, NAFTA allows for the temporary entry of qualified businesspersons from each of the parties to the agreement. Chapter 16 of the NAFTA is entitled A Temporary Entry of Business Persons, and in addition to reflecting the preferential trading relationship between the parties to the agreement, it reflects the member nations' desire to facilitate temporary entry on a reciprocal basis. It also establishes procedures for temporary entry, addresses the need to ensure border security and seeks to protect the domestic labor force in the member nations.

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

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

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

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

render his or her services to a branch of the same employer or as parent, affiliate, or subsidiary thereof in a capacity that is managerial, executive, or involves specialized knowledge.

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

What Is a TN Nonimmigrant Alien?

A TN nonimmigrant alien is a citizen of Canada or Mexico who seeks admission to the United States, under the provisions of Section D of Annex 1603 of the NAFTA, to engage in business activities at a professional level as provided for in such annex. The NAFTA parties have agreed that 63 occupations qualify as professions. These occupations are listed in the Appendix 1603.D.1 to Annex 1603 to the NAFTA found in 8 CFR 214.6(c). The list contains the only professions in

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which an alien can engage in and obtain admission to the United States as a TN nonimmigrant alien.

What Changes Are Noted in This Rule?

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

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

Currently, a citizen of Mexico seeking to come to the U.S. as a TN nonimmigrant must have had submitted to the Department, on his or her behalf, a Form I-129, Petition for Nonimmigrant Worker. In order to properly file Form I-129 with the Department, an LCA must first be

certified by the Department of Labor (DOL). Upon approval of the petition by the Department, the Mexican citizen must then apply to the United States Department of State (DOS) for a visa.

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

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

#### Why Are These Changes Being Made?

At the time the NAFTA was negotiated, the agreement imposed the additional controls of the cap, petition, and LCA requirement on citizens of Mexico for a temporary period. In this case, the additional controls were put into place for 10 years. (These additional controls were not imposed on Canadian citizens.) Since the 10-year period will end on January 1, 2004, the Department will fulfill its obligations under the NAFTA by eliminating these requirements from its regulations.

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

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

#### Must a Mexican TN Applicant for Admission Obtain a Visa?

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

#### Request for Comments

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

#### Good Cause Exception

The Department's implementation of this rule as an interim rule, with provisions for post-promulgation public comments, is based on the ``good cause'' exceptions found at 5 U.S.C. 553(b)(B) and (d)(3). The reasons and necessity for the promulgation of this rule on January 1, 2004, are as follows: This rule is necessary to ensure that the Department is in compliance with the requirements placed upon the signatory nations that are parties to the NAFTA. As previously noted in this interim rule, the NAFTA requires the lifting of the annual cap of 5,500 Mexican TN professionals no longer than 10 years after the date the NAFTA became effective. Therefore, regardless of whether the Department promulgates regulations, the annual cap of Mexican TN professionals will sunset on January 1, 2004. By eliminating the cap and petition requirements now, the Executive Branch of the Federal Government will be in compliance with this requirement made by the NAFTA.

Adoption of this rule as an interim rule acknowledges the importance of equal treatment for both the Canadian and Mexican governments. In addition, the provisions of this interim rule will not have a negative affect on any qualified Mexican citizen seeking TN status, nor will it affect the qualified United States employer. The rule will eliminate one portion of the administrative process by which a qualified Mexican citizen may obtain TN status.

Accordingly, the Department believes that advance public notice and comment of this regulation is impracticable and contrary to the public interest. Therefore, there is good cause under 5 U.S.C. 553(b) and (d) for dispensing with the requirements of prior notice and to make this rule effective on January 1, 2004.

## Regulatory Flexibility Act

I have reviewed this rule, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)) and, by approving it, I certify that this rule will not have a significant economic impact on a substantial number of small entities. This rule affects only TN nonimmigrant individuals. These nonimmigrants are not considered small entities as that term is defined in 5 U.S.C. 601(6). This rule also affects U.S. employers of TN nonimmigrants, but does not create any new economic or procedural burdens for those entities. Although some petitioning businesses may be considered small businesses, this rule merely simplifies applicable procedures and eliminates certain filing requirements that in all likelihood will have a positive impact.

## Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local and tribal governments, in the aggregate, or by the private sector, of \$100 million or more

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in any one-year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

## Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by section 804 of the Small Business Regulatory Enforcement Act of 1996. This rule will not result in an annual effect on the economy of \$100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

## Executive Order 12866

This rule is considered by the Department of Homeland Security to be a ``significant regulatory action'' under Executive Order 12866, section 3(f), Regulatory Planning and Review. Accordingly, this rule has been submitted to the Office of Management and Budget (OMB) for review.

In particular, the Department has assessed both the costs and benefits of this rule as required by Executive Order 12866, section 1(b)(6) and has made a reasoned determination that the benefits of this regulation justify its costs. Briefly, that assessment is as follows. This rule eliminates the numerical cap on TN admissions and eliminates certain filing requirements. This will eliminate the time and expense associated with these forms, and will also reduce the processing and waiting times associated with obtaining TN classification.

#### Executive Order 13132

This rule will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

#### Executive Order 12988 Civil Justice Reform

This rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988.

#### Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995, Public Law 104-13, all Departments are required to submit to the Office of Management and Budget (OMB), for review and approval, any reporting or recordkeeping requirements inherent in a rule. This rule does not impose any new reporting or recordkeeping requirements under the Paperwork Reduction Act.

#### List of Subjects in 8 CFR Part 214

Administrative practice and procedure, Aliens, Employment, Reporting and recordkeeping requirements.

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Accordingly, part 214 of chapter I of title 8 of the Code of Federal Regulations is amended as follows:

#### PART 214--NONIMMIGRANT CLASSES

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1. The authority citation for part 214 continues to read as follows:

Authority: 8 U.S.C. 1101, 1102, 1103, 1182, 1184, 1186a, 1187, 1221, 1281, 1282, 1301-1305 and 1372; sec. 643, Pub. L. 104-208, 110 Stat. 3009-708; section 141 of the Compacts of Free Association with the Federated States of Micronesia and the Republic of the Marshall Islands, and with the Government of Palau, 48 U.S.C. 1901 note, and 1931 note, respectively; 8 CFR part 2.

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2. Section 214.6 is amended by:

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a. Revising the section heading;

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b. Revising paragraph (d);

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c. Revising paragraph (e);

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d. Removing and reserving paragraph (f);

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e. Revising paragraph (h);

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f. Revising paragraph (i); and

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g. Removing paragraph (l).

The revisions read as follows:

Sec. 214.6 Citizens of Canada or Mexico seeking temporary entry under NAFTA to engage in business activities at a professional level.

\* \* \* \* \*

(d) Classification of citizens of Canada or Mexico as TN professionals under the NAFTA--(1) Citizens of Mexico. A citizen of Mexico who seeks temporary entry as a business person to engage in business activities at a professional level may be admitted to the United States in accordance with NAFTA upon presentation of a valid passport and valid TN nonimmigrant visa at a United States Class A port-of-entry, at a United States airport handling international traffic, or at a United States pre-clearance/pre-flight station.

(2) Citizens of Canada. A citizen of Canada seeking temporary entry as a business person to engage in business activities at a professional

level shall make application for admission with a Department officer at the United States Class A port-of-entry, at a United States airport handling international traffic, or at a United States pre-clearance/pre-flight station.

(3) Documentation. Upon application for a visa at a United States consular office, or, in the case of a citizen of Canada making application for admission at a port-of-entry, an applicant under this section shall present the following:

(i) Proof of citizenship. A Mexican citizen applying for admission as a TN nonimmigrant must establish such citizenship by presenting a valid passport. Canadian citizens, while not required to present a valid passport for admission unless traveling from outside the Western hemisphere, must establish Canadian citizenship.

(ii) Documentation demonstrating engagement in business activities at a professional level and demonstrating professional qualifications. The applicant must present documentation sufficient to satisfy the consular officer (in the case of a Mexican citizen) or the Department officer (in the case of a Canadian citizen) that the applicant is seeking entry to the United States to engage in business activities for a United States employer(s) or entity(ies) at a professional level, and that the applicant meets the criteria to perform at such a professional level. This documentation may be in the form of a letter from the prospective employer(s) in the United States or from the foreign employer, and must be supported by diplomas, degrees or membership in a professional organization. Degrees received by the applicant from an educational institution not located within Canada, Mexico, or the United States must be accompanied by an evaluation by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials. The documentation shall fully affirm:

(A) The Appendix 1603.D.1 profession of the applicant;

(B) A description of the professional activities, including a brief summary of daily job duties, if appropriate, in which the applicant will engage in for the United States employer/entity;

(C) The anticipated length of stay;

(D) The educational qualifications or appropriate credentials which demonstrate that the Canadian or Mexican citizen has professional level status; and

(E) The arrangements for remuneration for services to be rendered.

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(e) Procedures for admission for a citizen of Canada or Mexico--A citizen of Canada or Mexico who qualifies for admission under this section shall be provided confirming documentation (Form I-94) and

shall be admitted under the classification symbol TN for a period not to exceed one year. Form I-94 shall bear the legend ``multiple entry''. The fee prescribed under 8 CFR 103.7(b)(1) shall be remitted by Canadian Citizens upon admission to the United States pursuant to the terms and conditions of the NAFTA. Upon remittance of the prescribed fee, the TN applicant for admission shall be provided a Department-issued receipt (Form G-211, Form G-711, or Form I-797).

(f) Reserved.

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(h) Extension of stay--(1) Filing at the service center. The United States employer of a citizen of Canada or Mexico in TN status or a United States entity, in the case of a citizen of Canada or Mexico in TN status who has a foreign employer, may request an extension of stay by filing Form I-129 with the prescribed fee noted at 8 CFR 103.7(b)(1), with the Nebraska Service Center. The beneficiary must be physically present in the United States at the time of the filing of the extension of stay. If the alien is required to leave the United States for any reasons while the extension request is pending, the petitioner, in the case of a Mexican citizen TN beneficiary, may request the director to cable notification of approval to the consular office abroad where the Mexican TN beneficiary will apply for a visa. In the case of a Canadian TN beneficiary, the petitioner may request the director to cable notification of approval of the application to the port-of-entry where the Canadian TN beneficiary will apply for admission to the United States. If approved, an extension of stay may be authorized for up to one year. There is no specific limit on the total period of time an alien may remain in TN status.

(2) Readmission at the border. Nothing in paragraph (h)(1) of this section shall preclude a citizen of Canada or Mexico who has previously been in the United States in TN status from applying for admission for a period of time that extends beyond the date of his or her original term of admission at any United States port-of-entry. The application for admission shall be supported by a new letter from the United States employer or the foreign employer, in the case of a citizen of Canada who is providing prearranged services to a United States entity, which meets the requirements of paragraph (e) of this section. The fee prescribed under 8 CFR 103.7(b)(1) shall be remitted by Canadian citizens upon admission to the United States pursuant to the terms and conditions of the NAFTA. Citizens of Mexico must present a valid passport and nonimmigrant TN visa when applying for readmission, as outlined in paragraph (d)(1) of this section.

(i) Request for change or addition of United States employers--(1) Filing at the service center. A citizen of Canada or Mexico admitted into the United States as a TN nonimmigrant who seeks to change or add

a United States employer during the period of admission must have the new employer file a Form I-129 with appropriate supporting documentation, including a letter from the new employer describing the services to be performed, the time needed to render such services, and the terms of remuneration for services. Employment with a different or with an additional employer is not authorized prior to Department approval of the request.

(2) Readmission at the border. Nothing in paragraph (i)(1) of those section precludes a citizen of Canada or Mexico from applying for readmission to the United States for the purpose of presenting documentation from a different or additional United States or foreign employer. Such documentation shall meet the requirements prescribed in paragraph (d) of this section. The fee prescribed under 8 CFR 103.7(b)(1) shall be remitted by Canadian citizens upon admission to the United States pursuant to the terms and conditions of the NAFTA. Citizens of Mexico may present documentation from a different or additional United States or foreign employer to a consular officer as evidence in support of a new nonimmigrant TN visa application.

(3) No action shall be required on the part of a citizen of Canada or Mexico in TN status who is transferred to another location by the same United States employer to perform the same services. Such an acceptable transfer would be to a branch or office of the employer. In a case of a transfer to a separately incorporated subsidiary or affiliate, the requirements of paragraphs (i)(1) and (i)(2) of this section will apply.

Dated: March 3, 2004.

Tom Ridge,  
Secretary of Homeland Security.  
[FR Doc. 04-5324 Filed 3-9-04; 8:45 am]

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