

POLICY ANALYSIS: HOW WITHDRAWAL FROM NAFTA WOULD IMPACT HIGH-SKILLED IMMIGRATION

*"We are going to start renegotiating on NAFTA, on immigration and on security at the border."
President Trump, January 20, 2017*

President Donald Trump is considering notifying Canada and Mexico that he is starting the process to withdraw from the North American Free Trade Agreement (NAFTA), according to multiple news sources. NAFTA includes numerous immigration provisions, including a visa classification for high-skilled professionals that hundreds of thousands of professionals rely on as an alternative to the H-1B visa category. According to the most recent statistics from the Department of Homeland Security, approximately 712,737 workers were admitted to the U.S. under the Trade NAFTA (TN) classification in 2014.¹

BACKGROUND

NAFTA became effective on Jan. 1, 1994. The four categories of business persons included in the provisions of Chapter 16 of NAFTA are:

- Business visitors engaged in international business activities.
- Traders and investors who carry on substantial trade in goods or services between their own country and the country they wish to enter.
- 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.
- 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.

Professionals: TN Visa Category

To qualify for a TN visa, Mexican or Canadian citizens must possess certain credentials and be included in a list of about 63 professions identified in Appendix D to NAFTA. That list is definitive, meaning a professional would not qualify for admission as a TN nonimmigrant if he or she does not intend to work in a profession on that list. With some exceptions, each profession requires a baccalaureate degree as an entry-level requirement.

There are several key differences between the TN visa and the H-1B visa categories:

- There is no annual cap on TN visas.
- A TN visa can be renewed indefinitely.
- An employer is not required to submit a Labor Condition Application (LCA) to the Department of Labor.

Canadian applicants remain visa-exempt and may apply for TN status directly at a U.S. port of entry. Mexican applicants, however, must first obtain a TN visa from a consulate overseas. Spouses of TN visa holders are admitted in TD status. Spouses are not allowed to work in TD status.

¹ <https://www.dhs.gov/immigration-statistics/yearbook/2014/table25>

Traders and Investors

E-1 treaty trader visas are available to citizens of countries with which the U.S. has a Treaty of Commerce and Navigation and who enter the U.S. solely to carry on substantial trade. Though no qualifying treaty exists with Canada or Mexico, NAFTA makes Canadians and Mexicans eligible for E visas.

NAFTA broadens existing immigration law for E visa holders by not requiring that traders be executives, supervisors, or those with essential skills. Additionally, a NAFTA E treaty investor may enter to establish a new enterprise, render advice, or provide key technical services – activities that are not clearly permitted under the statutory E provisions.

Intracompany Transfers

NAFTA did not materially alter the visa eligibility criteria for L-1 intracompany transfers from Canada and Mexico, though the agreement did result in increased access for Americans seeking to travel to those countries in that visa category.

An intracompany transferee is a person employed in a managerial or executive position, or one that requires specialized knowledge, at a company in a NAFTA country who will be providing services to a parent, branch, subsidiary or affiliate of that company in another NAFTA country. The person must have been employed in his or her company for at least one of the three years immediately preceding an application for temporary entry.

For temporary entry into the U.S., the U.S. or foreign company that employs a transferee from Canada or Mexico must file a petition with the U.S. Citizenship and Immigration Services on his or her behalf in order to obtain Temporary Worker status. A petition for an intracompany transferee from Canada may be filed in advance or at the port of entry, and he or she is not required to obtain a nonimmigrant (L-1) visa. A petition for an intracompany transferee from Mexico must be filed in advance, and he or she must also obtain a nonimmigrant (L-1) visa.

Business Visitors

Aside from a narrow provision for Canadian nationals, NAFTA did not alter the eligibility criteria for B-1 short-term travelers. For temporary entry into the United States, a business visitor from Canada does not need a visa, but must submit evidence to U.S. immigration officials at the port of entry which shows that he or she qualifies as a business visitor under Chapter 16.

A Mexican business visitor must obtain a B-1 visa or a Border Crossing Card from a U.S. embassy or consulate before applying for admission at a port of entry. Canadian and Mexican business visitors may be admitted for the period necessary to engage in the intended activity, not to exceed one year.

CHANGING NAFTA

There is no formal provision built into NAFTA to open it up for renegotiation. President Trump could trigger the provision that provides that “a Party may withdraw from this Agreement six months after it provides notice to other parties.” Canada and Mexico have signaled a willingness to renegotiate the terms of NAFTA, so withdrawal may not occur unless Trump determines it is necessary to reset the stage for a new agreement.

Short of officially withdrawing, the president could seek to make changes to the high-skilled immigration provisions through the Temporary Entry Working Group (TEWG), which is made up of immigration

officials from each of the respective parties. One scenario is that President Trump could seek to modify Appendix D, which lists the professions that are eligible for TN status and the requirements for entry to work in those professions.

After NAFTA was signed, the U.S. Congress amended U.S. law to conform to the treaty. Some of the amendments may remain in place even if the U.S. withdraws from NAFTA. The immigration provisions were not codified in the Immigration and Nationality Act (INA), though they were implemented through regulation. If the U.S. does withdraw from NAFTA, it is possible that the administration would deem existing regulations null and void or would promulgate a regulation immediately rescinding those regulations.

RECOMMENDATIONS

As NAFTA is primarily a trade agreement, negotiations will be driven by policy considerations beyond immigration. Under NAFTA, regional trade increased sharply over the treaty's first two decades, from roughly \$290 billion in 1993 to more than \$1.1 trillion in 2016. So while President Trump may seek to renegotiate NAFTA, and immigration changes may be likely, it is premature to say what that agreement would look like or even whether a future version of NAFTA will be devoid of immigration options.

Meanwhile, the overall immigration landscape remains very fluid. President Trump has also issued an Executive Order directing agencies to reform the H-1B visa category, including the H-1B selection process. By the time the next version of NAFTA is in place – which will be many months in the future – the other visa categories may look very different than they do today. Companies will want to evaluate timing and potential risks for all visa categories to avoid jumping from the frying pan into the fire.

The pressing question for companies is whether they should file H-1B petitions for existing TN visa holders or pursue other visa options. At the minimum, companies should identify all foreign national workers whose work-authorized status is dependent on NAFTA and explore alternative visa options in the U.S. and work authorization options in other countries.