

# WHY NAFTA'S IMMIGRATION PROVISIONS DISCRIMINATE AGAINST MEXICAN NATIONALS

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Although the oft-stated goal of the North American Free Trade Agreement (NAFTA)<sup>1</sup> is to create the world's largest free trade zone, stretching from the Yukon to the Yucatan, U.S. policymakers have seen to it that NAFTA's immigration provisions allow for discriminatory treatment of Mexican nationals as compared to Canadian nationals. Following an overview of the immigration provisions found in NAFTA, this article explores how those provisions discriminate against Mexicans and suggests why this discriminatory treatment exists. The discussion then turns inward to look at this country's attitudes toward our southern neighbor.

## I. AN OVERVIEW OF NAFTA'S IMMIGRATION PROVISIONS

NAFTA's immigration provisions are found in Chapter Sixteen of the agreement, which is titled "Temporary Entry for Business Persons."<sup>2</sup> Chapter Sixteen provides that the obligation of each Party to NAFTA is to apply its immigration measures "so as to avoid unduly impairing or delaying trade in goods or services or conduct of investment activities under this Agreement."<sup>3</sup> Chapter Sixteen is augmented by Annex 1603,<sup>4</sup> which sets forth four separate categories of business persons whose entry to the United States is affected by NAFTA. Each of these will be addressed separately.

### A. *Business Visitors (Annex 1603-Section A)*

The Business Visitor category under NAFTA corresponds to that found in the United States Immigration and Nationality Act of 1952<sup>5</sup> for the nonimmigrant B-1 classification.<sup>6</sup> Business Visitors will be granted temporary entry to engage in business activities, including research and design, marketing,

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1. North American Free Trade Agreement, 19 U.S.C. §§ 3301-3473 (1993), reprinted in 32 I.L.M. 296 (Mar. 1993) [hereinafter NAFTA].

2. Id. ch. 16.

3. Id.

4. Id. Annex 1603.

5. Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (codified as amended at 8 U.S.C. §§ 1101-1524 (1988 & Supp. V 1993) [hereinafter INA].

6. INA § 101(a)(15)(B), 8 U.S.C. § 1101(a)(15)(B).

sales, distribution, after-sales service, and other activities of a commercial nature. The Business Visitor must be prepared to demonstrate that "(a) the primary source of remuneration for the proposed business activity is outside the territory of the Party granting temporary entry; and (b) the business person's principal place of business and the actual place of accrual of profits, at least predominantly, remain outside such territory."<sup>7</sup> In plain language, the business activity must be international in scope and the business person must not intend to enter the local labor market.

#### B. *Traders and Investors (Annex 1603-Section B)*

Annex 1603-Section B provides that business persons shall be granted temporary entry to:

- (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
- (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. . . .<sup>8</sup>

This provision parallels the nonimmigrant E-1 (Treaty Trader) and E-2 (Treaty Investor) classifications found in the INA.<sup>9</sup> Like the E-1/E-2 classifications, Annex 1603 requires that the business person be employed in a capacity that is supervisory, executive, or involves essential skills.

#### C. *Intra-Company Transferees (Annex 1603-Section C)*

Intra-company transferees are business persons transferred from a business enterprise in the territory of one Party for employment by the same enterprise, or a subsidiary or affiliate thereof, in the territory of another Party. Section C specifies that the transfer must be temporary and in a capacity that is managerial, executive, or involves specialized knowledge of the enterprise. Section C also provides that a Party *may* require the business person to be employed continuously by the enterprise for at least one year within the last three before permitting the transfer to the subsidiary or affiliate in that Party's territory.

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7. NAFTA, Annex 1603, § A(2).

8. *Id.* Annex 1603 § B(1)(a)-(b).

9. INA § 101(a)(15)(E), 8 U.S.C. § 1101(a)(15)(E).

The nonimmigrant L-1 classification in the INA parallels NAFTA's Intra-Company Transferee category.<sup>10</sup> It imposes the same "one year out of the last three" employment requirement on the transferee before an executive, manager, or alien possessing specialized knowledge of the company can be transferred temporarily to the United States.

#### D. *Professionals (Annex 1603-Section D)*

Annex 1603-Section D provides that each Party to NAFTA shall grant temporary entry to business persons seeking to engage in a profession set out in Appendix 1603.D.1.<sup>11</sup> This Appendix names 63 professions, including accountants, hotel managers, urban planners, dieticians, registered nurses, astronomers, poultry scientists, and college teachers.

The Annex places limitations on cross-border travelers in the identified professions. For example, physicians may not engage in patient care and are limited to teaching or research positions only. NAFTA business persons engaging in one of the listed professions must present documentation that they possess the minimum education or licensing credentials set out in Appendix 1603.D.1, which generally is at least a baccalaureate or *licenciatura* degree, and also must be prepared to demonstrate that they will practice in the profession. United States officials have interpreted this language to mean an offer of employment from a U.S. employer intending to employ the individual in his professional capacity; self-employment is not allowed.<sup>12</sup> Section D has no direct counterpart in the INA, although the H-1B classification provides for temporary entry of workers with at least a baccalaureate degree or foreign equivalent<sup>13</sup> in so-called "specialty occupations."<sup>14</sup> The professions listed in Appendix 1603.D.1 are virtually identical to those listed in Schedule 2 to Annex 1502.1 of the United States-Canada Free Trade Agreement (CFTA),<sup>15</sup> which NAFTA superseded on January 1, 1994.

NAFTA's immigration provisions generally track the four categories found in the CFTA. These provisions controlled the temporary entry of persons between the United States and Canada from January 1, 1989, through the end of 1993. However, the superseding provisions in NAFTA allow the United

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10. INA § 101(a)(15)(L), 8 U.S.C. § 1101(a)(15)(L), 22 C.F.R. § 41.54, n. 2.1 (1994).

11. 8 C.F.R. § 214.6(c) (1994).

12. *Id.* §§ 214.6(d)(2)(iii), 214.6(d)(2)(ii).

13. INA § 214(i)(1)(B), 8 U.S.C. § 1184(i)(1)(B).

14. INA § 101(a)(15)(H)(i)(b), 8 U.S.C. § 1101(a)(15)(H)(i)(b). The companion provision for registered nurses is INA § 101(a)(15)(H)(i)(a), 8 U.S.C. § 1101(a)(15)(H)(i)(a).

15. United States-Canada Free Trade Agreement, H.R. DOC. NO. 216, 100th Cong., 2d Sess. (1988) [hereinafter CFTA], reprinted in 27 I.L.M. 281 (Mar. 1988). Schedule 2 was codified at 8 C.F.R. § 214.6(d)(2)(ii) (1994).

States to discriminate in a number of ways against business persons from Mexico seeking temporary entry.

## II. HOW NAFTA'S IMMIGRATION PROVISIONS DISCRIMINATE AGAINST MEXICAN NATIONALS

### A. *Business Visitors*

Annex 1603, Section A states that no Party to NAFTA may require "prior approval procedures, petitions, labor certification tests or other procedures" for NAFTA Business Visitors.<sup>16</sup> However, Section A preserves a Party's right to require a Business Visitor to obtain a visa prior to entry into its territory.<sup>17</sup> A Party imposing a visa requirement must consult with the Party whose nationals are affected by the requirement.<sup>18</sup>

Prior to NAFTA, citizens of Canada seeking to enter the United States temporarily in the nonimmigrant B-1 classification were not required to obtain a visa from a U.S. diplomatic post in Canada beforehand.<sup>19</sup> Also, Canadians were not required to present a Canadian passport as long as they could present other adequate evidence of Canadian citizenship, such as a birth certificate.<sup>20</sup> In this way, the procedure for Canadian business persons was straightforward: first, they simply went to a United States-Canada port of entry; second, they showed proof of Canadian citizenship to a U.S. immigration officer; and, third, they demonstrated to the immigration officer that their purpose for entry was for business and would be temporary. No official documentation was issued to the Canadian business person, and, for legitimate Business Visitors, the entire process tended to be informal. In sum, neither the U.S. legislation<sup>21</sup> nor the regulations of the Immigration and Naturalization Service<sup>22</sup> implementing NAFTA disturb existing practices for Canadian business persons seeking temporary entry to the United States.

Prior to NAFTA, Mexican businesspersons seeking temporary entry into the United States in the nonimmigrant B-1 classification were first required to obtain a B-1 visa from a U.S. diplomatic post in Mexico.<sup>23</sup> They also

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16. NAFTA, Annex 1603 § A(4)(a).

17. *Id.* Annex 1603 § A(5).

18. *Id.*

19. 22 C.F.R. § 41.2 (a) (1994).

20. *Id.*

21. North American Free Trade Implementation Act of 1993, 19 U.S.C. § 3301, Pub. L. No. 103-182, 107 Stat. 2057 (codified as amended at 19 U.S.C. § 3301).

22. 58 Fed. Reg. 69,205 (Dec. 30, 1993) (codified at 8 C.F.R. §§ 103, 212, 214, 235, and 274a (1994)).

23. INA § 212(a)(7)(B)(i)(II), 8 U.S.C. § 1182(a)(7)(B)(i)(II).

were required to present a valid Mexican passport for a visa stamp.<sup>24</sup> For Mexican nationals, B-1 visas could be issued for multiple entries to the United States up to ten years.<sup>25</sup> Thus, a trip to a U.S. consulate or the U.S. Embassy in Mexico City was not necessarily required for every trip a Mexican business person took to the United States. However, Mexican travelers were still subject to arbitrary barriers: U.S. consular officials have always had the discretion to grant a visa for a lesser period of time and for fewer entries than the maximum permitted by State Department regulations<sup>26</sup>—a discretion they often exercise.

To obtain a B-1 visa, the Mexican business person would be interviewed by a U.S. consular officer.<sup>27</sup> The applicant would bear the burden of establishing that he was not intending to immigrate to the United States,<sup>28</sup> and that the purpose of his proposed visit was to accomplish one of the legitimate business purposes enumerated in the Department of State Foreign Affairs Manual.<sup>29</sup> Further yet, business persons without a prior documented history of frequent business travel to the United States could be required to present (1) proof of continuing remuneration from a source in Mexico; (2) invitations from U.S. companies; and (3) proof of adequate ties to Mexico in order to overcome the presumption that the traveler possessed an intent to immigrate. Whether this presumption, which is imposed by the INA<sup>30</sup> on applicants for most categories of nonimmigrant visas, is overcome is a decision solely in the discretion of the consular officer, thereby empowering him broadly.

After obtaining the proper visa, the Mexican business person was required then to present that documentation at a United States-Mexico port of entry and again satisfy the inspecting INS official that he was not an excludable alien under the INA.<sup>31</sup> If admitted, the Mexican national would be issued an INS Form I-94 (Arrival and Departure Record)<sup>32</sup> documenting the date of his arrival, nonimmigrant classification (in this case B-1), and his required departure date.

The implementing regulations of the INS under NAFTA perpetuate the pre-existing requirements of a valid passport and visa (or Mexican Border Crossing Card) for Mexican Business Visitors seeking to enter the United

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24. INA § 212(a)(7)(B)(i)(1), 8 U.S.C. § 1182(a)(7)(B)(i)(1).

25. Department of State Foreign Affairs Manual, App. B/C/E, Reciprocity-Mexico.

26. 22 C.F.R. § 41.112(c) (1994).

27. *Id.* § 41.102(a).

28. INA § 214(b), 8 U.S.C. § 1184(b).

29. See Dept. of State Foreign Affairs Manual, *supra* note 25.

30. 10 Immigr. L. & Proc. (MB) § 41.31, n. 2 (May 1993).

31. 8 C.F.R. § 235.1(d)(1) (1994).

32. *Id.* § 235.1(f).

States.<sup>33</sup> Thus, Annex 1603, Section A of NAFTA allowed the United States to continue using pre-NAFTA standards with respect to Mexican Business Visitors. However, the possibility of future consultation between these two parties to NAFTA is permissible if Mexico seeks it.<sup>34</sup>

### B. *Traders and Investors*

Annex 1603-Section B states that no Party may require labor certification tests or impose numerical restrictions on Traders or Investors seeking temporary entry under NAFTA into the territory of another Party. However, as was the case with Business Visitors, a Party may impose a visa requirement before allowing a NAFTA Trader or Investor to enter that Party's territory.

Canadian Treaty Traders and Investors were first recognized under the provisions of the CFTA<sup>35</sup> and were required by that treaty to obtain E-1/E-2 visas.<sup>36</sup> (This is the only nonimmigrant category that requires Canadians to obtain visas.) Treaty Trader and Investor status for Mexican nationals, on the other hand, is recognized for the first time by NAFTA.<sup>37</sup> Neither the United States' legislation nor the INS regulations implementing NAFTA disturb the pre-existing requirement that Canadian Treaty Traders and Investors obtain E-1 or E-2 visas at a U.S. diplomatic post before seeking entry into the United States.<sup>38</sup> Thus, for NAFTA Traders and Investors, the United States does not discriminate in its treatment of Mexican and Canadian nationals; citizens of both countries must obtain E-1 or E-2 visas before entering the United States.

### C. *Intra-Company Transferees*

Annex 1603-Section C states that no Party may require labor certification tests or impose numerical restrictions on Intra-Company Transferees under NAFTA. However, in language identical to that applied to Business Visitors, Section C provides that a Party may require a Transferee to obtain a visa prior to entry. Section C also contains the same consultation requirement as Section A with respect to any Party implementing a visa requirement.

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33. *Id.* § 214.2(b)(4).

34. NAFTA, Annex 1603 § A, para. 5.

35. CFTA, *supra* note 15, Annex 1502.1, § B.

36. *Id.* See also 22 C.F.R. § 41.2(m) (1994).

37. NAFTA, Annex 1603 § B.

38. North American Free Trade Implementation Act, *supra* note 21, § 341, 8 C.F.R. § 212.1(i) (1994).

Prior to NAFTA, employers seeking to temporarily employ either Canadian or Mexican nationals in the United States in the nonimmigrant L-1 classification<sup>39</sup> had to first petition the INS on Form I-129.<sup>40</sup> They also were required to submit supporting documentation to establish the affiliation of the overseas and U.S. employers and that the temporary transfer was in a managerial, executive, or specialized knowledge capacity.<sup>41</sup> Moreover, a petitioning employer had to establish that the proposed transferee had been employed continuously by the petitioner in the requisite capacity for at least one year in the last three.<sup>42</sup> These petition requirements, because they existed previously for both nationals of Canada and Mexico, are permitted *sub silentio* by Section C<sup>43</sup> and have been left undisturbed by the U.S. implementing legislation and regulations. Under NAFTA, however, an important distinction exists between Mexican and Canadian nationals regarding the petition requirement: the INS implementing regulations continue the practice of permitting a Canadian national seeking L-1 status under NAFTA to present his employer's petition at a Class A port of entry located on the United States-Canada border for adjudication in conjunction with his own L-1 application.<sup>44</sup> This one-step processing greatly expedites the procedure for the petitioning employer. In contrast, processing an I-129 Petition for a Mexican National through one of the four INS regional service centers<sup>45</sup> typically takes three to four weeks.

The one-step process for Canadian nationals is allowed in the INS regulations because, unlike Mexican nationals, Canadians need not first obtain L-1 nonimmigrant visas from a U.S. diplomatic post before applying for entry in L-1 status.<sup>46</sup> The procedure for L-1 Intra-Company Transferees from Mexico is exactly the same under NAFTA as it was before NAFTA: they must present a valid Mexican passport at a U.S. diplomatic post in Mexico and apply for the requisite visa from a U.S. consular officer.<sup>47</sup> Like Business Visitors, they must satisfy the officer that they are entitled in all respects to the visa classification they are seeking. Section C allows the United States to continue requiring visas for Mexican nationals unless the requirement is removed at some future date pursuant to consultation between the United States and Mexico.

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39. INA § 101(a)(15)(L), 8 U.S.C. § 1101(a)(15)(L).

40. 8 C.F.R. § 214.2(1)(2)(i) (1994).

41. INA § 101(a)(15)(L), 8 U.S.C. § 1101(a)(15)(L).

42. *Id.*

43. NAFTA, Annex 1603 § C.

44. 8 C.F.R. § 214.2(1)(17)(i) (1994).

45. All I-129 petitions are currently processed at one of four INS regional service centers located in St. Albans, Vermont; Dallas, Texas; Lincoln, Nebraska; and Laguna Niguel, California.

46. 22 C.F.R. § 41.2(a) (1994).

47. *See supra* notes 23-24 and accompanying text.

#### D. *Professionals*

Annex 1603-Section D states that no Party to NAFTA may require "prior approval procedures, petitions, labor certification tests or other procedures"<sup>48</sup> or "impose or maintain any numerical restriction"<sup>49</sup> relating to the temporary entry of Section D Professionals under NAFTA. However, Section D preserves the right of a Party to impose a visa requirement on professionals of another Party prior to entry into the party's territory. In keeping with Annex 1603-Sections A and C, a Party imposing such a visa requirement must consult the other Party whose nationals are so affected.

Unlike the other sections of Annex 1603, and notwithstanding Section D's general prohibition against numerical restrictions, Section D allows a Party to establish an annual numerical limit with regard to professionals of another NAFTA Party, but only after consultation with that Party.<sup>50</sup> Most significantly, if a Party chooses to establish a numerical limit, that Party may also "require the business person to comply with its other procedures applicable to the temporary entry of professionals."<sup>51</sup> In other words, by imposing, in effect, a quota on the entry of professionals from another NAFTA Party, a Party may altogether ignore the Section D prohibitions against prior approval procedures, petitions, or labor certification tests when inconsistent with that Party's pre-existing requirements for the temporary entry of professionals. Finally, Section D requires that a Party imposing a numerical limit consult with the other Party whose professionals are affected "with a view to determining a date after which the limit shall cease to apply," but consultation is not required until three years after the numerical limitation is established.<sup>52</sup>

Appendix 1603.D.4 applies only to the United States and Mexico. It establishes an annual numerical limitation of 5,500 petitions for Mexican professionals seeking to enter the United States under NAFTA. Not counted against this quota are renewals of previously approved petitions; spouses or children accompanying the professional; or admissions of Mexican Specialty Workers in the nonimmigrant H-1B classification. Additionally, the INA sets an annual worldwide limitation of 65,000 for H-1B petitions.<sup>53</sup> Since first imposed in 1991, this quota has not been exceeded in any given U.S. government fiscal year.

Appendix 1603.D.4 concludes that the U.S. NAFTA quota for Mexican professionals shall apply for a maximum of ten years, unless consultation

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48. NAFTA, Annex 1603 § D(2)(a).

49. *Id.* Annex 1603 §D(2)(b).

50. *See id.* at Appendix 1603.D4.

51. *Id.* Annex 1603 § D(5)(a).

52. *Id.* Annex 1603 § D(7).

53. INA § 214(g)(1)(A), 8 U.S.C. § 1184(g)(1)(A).



between the United States and Mexico yields a relaxation of this limit. Of course, by the terms of Annex 1603-Section D, once the annual quota of 5,500 is removed, the right of the United States to require prior approval procedures, petitions, and labor certification tests is removed with it.

The U.S. implementing legislation amends Section 214 of the INA.<sup>54</sup> It gives force of law to those provisions of Annex 1603-Section D and Appendix 1603.D.4 that apply to nationals of Mexico, but not to nationals of Canada. First, the Attorney General is given the authority to establish the annual quota of 5,500 that applies to Mexican NAFTA professionals.<sup>55</sup> The quota may not be increased or eliminated before the ten-year cut-off unless the President submits reports to both houses of Congress after receiving advice from the private sector and non-Federal governmental sector advisory committees established under Section 135 of the Trade Act of 1974.<sup>56</sup> Second, Mexican NAFTA professionals will be subject to the controversial labor attestation requirements of INA Section 212(n).<sup>57</sup> Since 1991, these have been a prerequisite to an employer filing a petition to classify a Specialty Worker in nonimmigrant H-1B status. Third, prospective employers of Mexican NAFTA professionals must file a petition with the INS pursuant to INA Section 214(c).<sup>58</sup>

The implementing INS regulations<sup>59</sup> considerably expand on these requirements. The regulations make it clear that, in most respects, petitions seeking Trade NAFTA (TN) status<sup>60</sup> for Mexican professionals will be subject to the same procedural requirements as petitions seeking H-1B status for Specialty Workers. First, the professional's prospective U.S. employer must file an I-129 petition and supporting documentation with the INS Northern Service Center in Lincoln, Nebraska.<sup>61</sup> The supporting documentation must include a Labor Condition Attestation (Form ETA 9035),<sup>62</sup> which the employer has previously filed with a Regional Certifying Officer of the Employment

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54. North American Free Trade Implementation Act, *supra* note 21.

55. INA § 214(e)(3), 8 U.S.C. § 1184(e)(3).

56. INA § 214(e)(4), 8 U.S.C. § 1184(e)(4); Trade Act of 1974, Pub. L. 93-618, 88 Stat. 1996 (codified at 19 U.S.C. § 2155 (1988 & Supp. V 1993)).

57. INA § 214(e)(5), 8 U.S.C. §§ 1182(n), 1184(e)(5). The companion attestation provision for registered nurses is INA § 212(m), 8 U.S.C. § 1182(m). See H. Rosemary Jeronimides, Note, *The H-1B Visa Category: A Tug of War*, 7 GEO. IMMIGR. L.J. 367 (1993), for an analysis of the controversy surrounding the labor attestation requirement.

58. INA § 214(e)(5), 8 U.S.C. § 1184(e)(5).

59. See *supra* note 22.

60. Both Canadian and Mexican NAFTA professionals are given TN status. Previously, under the CFTA, Canadian professionals were given Trade Canada (TC) status.

61. 8 C.F.R. §§ 214.6(d)(1)-(2) (1994).

62. 20 C.F.R. § 655.730(c)(1) (1994).

and Training Administration of the United States Department of Labor.<sup>63</sup> Form 9035 contains various attestations that the employer must make concerning the prospective employment of the Mexican NAFTA professional. This includes an attestation that the professional will be paid not less than the prevailing wage for the specific occupation in the intended area of employment.<sup>64</sup> The attestations of Form 9035 clearly constitute a labor certification test as contemplated by Annex 1603-Section D.

The INS may approve a petition for a TN professional from Mexico for up to one year only,<sup>65</sup> whereas petitions seeking H-1B Specialty Worker status may be approved for up to three years.<sup>66</sup> TN status may be extended indefinitely in one-year increments,<sup>67</sup> whereas H-1B may be extended for a total of only six years.<sup>68</sup> Extensions for H-1B's can also be granted for up to three years at a time.<sup>69</sup> To illustrate, the employer of a Mexican TN professional remaining in the United States for six years would need to have the INS approve a total of six petitions (but is not prevented from petitioning again), whereas the employer of an H-1B Specialty Worker, regardless of the worker's nationality, may only need to seek approval of two petitions over the same six-year period.<sup>70</sup>

Once the employer's petition is approved, the Mexican TN professional must present an approval notification at a U.S. diplomatic post in Mexico,<sup>71</sup> where the professional and his accompanying family members also must apply for TN and TD visas. There, the professional must establish to the satisfaction of the consular officer that he is not intending to immigrate because, unlike applicants for H-1B visas,<sup>72</sup> applicants for TN visas are presumed to intend to immigrate under the language of Section 214(b) of the INA.<sup>73</sup> Thus, while there is no regulatory cap on the period of time a Mexican national can remain in the United States in TN status, that time will likely be proscribed under Section 214(b).<sup>74</sup> After the requisite visas have been granted, the professional and accompanying family members will then be required to present their visas

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63. *Id.* § 655.730(b).

64. *Id.* § 655.730(d).

65. 8 C.F.R. § 214.6(d)(3)(iii) (1994).

66. *Id.* § 214.2(h)(9)(iii)(B)(1).

67. *Id.* § 214.6(h)(1).

68. *Id.* § 214.2(h)(13)(iii)(A).

69. *Id.* § 214.2(h)(15)(ii)(B)(1).

70. See Jeronimides, *supra* note 57, at 378-79, for a discussion of the advantages of the H-1B category.

71. 8 C.F.R. § 214.2(h)(18) (1994).

72. 22 C.F.R. § 41.53, n. 3.1 (1994).

73. INA § 214(e)(2), 8 U.S.C. § 1184(e)(2). See also 58 Fed. Reg., *supra* note 22.

74. *Id.*

and Mexican passports at a U.S. port of entry in order to secure admission.<sup>75</sup>

By contrast, the procedures for the admission of Canadian NAFTA professionals remain those that were in effect under the CFTA and Section 214(e) of the INA.<sup>76</sup> No prior petition, labor certification, or other prior approval is required. The Canadian national is not required to obtain a TN visa from a U.S. diplomatic post in Canada.<sup>77</sup> The Canadian national simply makes application at a U.S. port of entry by presenting evidence that his profession is one of those listed in NAFTA Appendix 1603.D.1 and that he has an offer of employment in that profession from a U.S. employer.<sup>78</sup> The fifty-dollar application fee under the CFTA also continues without change.<sup>79</sup> The Canadian national need only present adequate proof of Canadian citizenship; a passport is not required for entry.<sup>80</sup> The Canadian professional will be admitted in TN status for one year.<sup>81</sup> Through annual trips to the United States-Canadian border to renew her TN status, she can remain in the United States indefinitely so long as she continues to be employed in a qualifying capacity. Of course, Canadian nationals are also subject to INA Section 214(b). But since they do not need to obtain visas to enter the United States, their burden of overcoming the law's presumption of intent to immigrate will likely be less difficult than that of Mexican NAFTA professionals.

In summary, the conveniences that were established for Canadian nationals under the CFTA will continue unabated under NAFTA. On the other hand, NAFTA permits, and United States' legislation and regulations implement, requirements and restrictions on the entry of Mexican nationals that are no less inconvenient than those previously existing between the United States and Mexico. For Mexican TN professionals, NAFTA's requirements are more burdensome than what is available generally to degreed professionals seeking temporary entry to the United States in several ways. The decision of U.S. policymakers to discriminate in so many ways against Mexican business persons seeking entry under NAFTA clearly reflects the way many in the United States view our neighbor to the south.

### III. WHY NAFTA'S IMMIGRATION PROVISIONS DISCRIMINATE AGAINST MEXICAN NATIONALS

On November 3, 1993, at the height of the national debate on the

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75. 8 C.F.R. § 214.6(f)(2) (1994).

76. 8 U.S.C. § 1184(e)(1), 8 C.F.R. § 214.6(e) (1994).

77. 8 C.F.R. § 214.6(e)(3) (1994).

78. *Id.* § 214.6(e)(3)(ii).

79. *Id.* §§ 103.7(b), 214.6(f)(1).

80. *Id.* § 214.6(e)(3)(i).

81. *Id.* § 214.6(f)(1).

ratification of NAFTA, the House Subcommittee on International Law, Immigration and Refugees conducted a hearing on NAFTA's immigration provisions.<sup>82</sup> During that hearing, a revealing exchange took place between Congressman Romano Mazzoli (D-KY), Chairman of the Subcommittee, and Doris M. Meissner, Commissioner of the Immigration and Naturalization Service. Chairman Mazzoli asked Ms. Meissner to justify the disparity in treatment between Mexican and Canadian professionals under NAFTA and the proposed U.S. legislation.

MS. MEISSNER: I think the justification is that there is a clear difference between Canada and the United States as between the United States and Mexico where—where differences are concerned.

MR. MAZZOLI: What is the difference? I mean they are human beings, and they have a baccalaureate degree. They are part of the free trade operation.

MS. MEISSNER: I think where Canada is concerned, it was the clear assumption—and it has been proven out in practice—that there would not be any inordinate attraction. It is not a phase-in situation with Mexico.

(Ms. Meissner's last statement does not make sense. She may have meant to say, "It is a phase-in situation with Mexico."<sup>83</sup>)

It is not surprising that the INS Commissioner was somewhat at a loss for words, or at least words that she was willing to express before a House Subcommittee, to explain the disparate treatment Mexicans receive under NAFTA's immigration provisions. Others who testified before the same Subcommittee were less reticent. John Howley, an AFL-CIO official, blasted the use of the TC category by U.S. employers of Canadian professionals under the CFTA.<sup>84</sup> Howley was concerned with CFTA precedent and pointed to Canada's small population compared to Mexico's, raising the specter of hordes of Mexican TN professionals entering the United States under the guise of NAFTA's obeisance to free trade.<sup>85</sup> Howley expressed organized labor's view that TN professionals would be, in fact, guest workers vulnerable to

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82. *Hearing on the North American Free Trade Implementation Act before the Subcommittee on International Law, Immigration, and Refugees of the House Judiciary Committee*, 103d Cong. 1st Sess., 134 (1993) [hereinafter *Hearing*].

83. *Id.* at 134.

84. *Id.* at 243.

85. *Id.*

abuse by employers.<sup>86</sup>

Howley's views before the Subcommittee were echoed, although in less strident tones, by Dr. Demetrios G. Papademetriou of the Carnegie Endowment for International Peace.<sup>87</sup> Dr. Papademetriou criticized the inclusion of the reciprocal entry of professionals under NAFTA, terming it a controversial provision with little direct bearing on the promotion of free trade among the parties to NAFTA.<sup>88</sup> In light of U.S. fears of an invasion of workers from Mexico, he praised the Mexican NAFTA negotiators who were persuaded to accept generally inferior treatment to Canadians for their business persons.<sup>89</sup>

Early in the U.S. NAFTA debate, that fear became intertwined with the companion fear of loss of U.S. manufacturing jobs to Mexico if NAFTA became a reality.<sup>90</sup> Largely drowned out in this debate was the current state of U.S. trade with Mexico. Between 1989 and 1992, trade with Mexico went from a \$2 billion deficit to an estimated \$7 billion surplus. During the same period, the United States gained 175,000 jobs, many of them in manufacturing, as a direct result of this increased trade.<sup>91</sup>

The debate over NAFTA became critical to the outcome of the 1992 U.S. presidential election, with one candidate favoring the treaty, a second vehemently opposed to the treaty, and the third, Bill Clinton, trying to perform a careful balancing act with many traditional Democratic supporters in organized labor opposed to the treaty.<sup>92</sup> Candidate Clinton's solution was to cautiously support NAFTA, putting emphasis on the need for strong implementing legislation to protect U.S. workers and the environment.<sup>93</sup>

Even after the Democratic victory in November 1992, the chances of passing the necessary legislation to implement NAFTA remained in serious doubt through most of 1993. In March, Ross Perot made a highly publicized appearance before Congress, and thereafter became the *ex officio* spokesperson for the powerful forces arrayed against NAFTA.<sup>94</sup> Perot co-authored *Save Your Job, Save Our Country* with Pat Choate.<sup>95</sup> Perot's central thesis was

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86. *Id.* at 246.

87. *Id.* at 154.

88. *Id.* at 156, n.1.

89. *Id.* at 158-59.

90. Sylvia Naser, *Economic Scene*, N.Y. TIMES, Aug. 6, 1992, at D2.

91. *Id.*

92. E.J. Dionne, Jr. & Dan Balz, *Clinton to Support NAFTA but Wants Aid for Displaced Workers*, WASH. POST, Oct. 3, 1992 at A10; E.J. Dionne, Jr. *Clinton Cautiously Backs Free-Trade Pact*, WASH. POST, Oct. 5, 1992, at A6.

93. *Id.*

94. Keith Bradsher, *Perot Wants A Trial Run of Trade Pact*, N.Y. TIMES, Mar. 25, 1993, at D4.

95. H. ROSS PEROT & PAT CHOATE, *SAVE YOUR JOB, SAVE OUR COUNTRY* (1993).

that as long as the average wage of a Mexican worker, including benefits, is one-seventh of the average U.S. worker's, the United States will be a magnet for both illegal *and* legal immigration by Mexican workers seeking higher paying U.S. jobs.<sup>96</sup>

In the weeks leading to the Congressional vote on NAFTA, opposition to the treaty, led by Perot and major labor unions, coalesced around the jobs issue. Many commentators predicted an uphill battle to pass NAFTA in Congress.<sup>97</sup> The Clinton administration, perhaps out of desperation, challenged Perot to a one-on-one debate (or to use the kitsch expression coined during the '92 election, a "*mano a mano*" debate) on NAFTA before a live CNN television audience.<sup>98</sup>

The watershed Al Gore-Ross Perot NAFTA debate aired on November 9, just one week before the NAFTA vote in Congress. Perot's remarks about Mexico during the debate were revealing. Perot depicted Mexico as a land of poverty, shanty towns, pollution, and labor violence where thirty-six families own over one-half of the national wealth and virtually everyone else dreams of having an outhouse and running water.<sup>99</sup> Perot asserted, "Livestock in [the United States] and animals have a better life than good, decent, hardworking Mexicans."<sup>100</sup> All in all, Perot characterized Mexico as an unfit partner for a free trade agreement, and he asserted that, in any event, Mexicans were too poor to buy U.S.-made consumer goods.<sup>101</sup>

Perot's patronizing attitude toward Mexico created quite a backlash south of the border.<sup>102</sup> Of course, the reality of Mexico today is much different than that projected by Perot. Although forty percent of the population lives below the poverty line (versus fourteen percent in the United States), Mexico is the third largest customer for U.S. exports and a country with which we enjoy a substantial trade surplus.<sup>103</sup>

Perot's debate performance, in its vehemence and confusion, typified

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96. *The Great NAFTA Debate*, WASH. POST, Oct. 3, 1993, at C3.

97. Frank Swoboda, *President Woos Labor On NAFTA*, WASH. POST, Oct. 5, 1993, at C1.

98. Al Kamen & Dan Balz, *Administration Challenges Perot to Debate Trade Pact*, WASH. POST, Nov. 5, 1993, at A1.

99. Dan Balz & Peter Behr, *Gore, Perot Trade Barbs on Trade Pact*, WASH. POST, Nov. 10, 1993, at A1; David E. Rosenbaum, *Beyond a Trade Pact*, N.Y. TIMES, Nov. 11, 1993, at A22.

100. David Rosenbaum, *Gore and Perot Duel on TV Over the Trade Pact*, N.Y. TIMES, Nov. 10, 1993, at B15.

101. *Excerpts From the Free Trade Debate Between Gore and Perot*, N.Y. TIMES, Nov. 10, 1993, at B16; WASH. POST, Nov. 10, 1993, at A1.

102. Tim Golden, *Mexicans Seethe With Anger at Perot's Depiction of Them*, N.Y. TIMES, Nov. 11, 1993, at A1.

103. *Id.*

the NAFTA opposition.<sup>104</sup> NAFTA became a focal point for the fears and frustrations of many U.S. workers caught in an economy where increased automation yields fewer well-paying, semi-skilled assembly line jobs.<sup>105</sup> A *Washington Post* editorial published two days after the Gore-Perot debate expressed a more thoughtful view of NAFTA.<sup>106</sup> Mexico is more developed today, both economically and politically, than the southern United States before World War II. In the middle decades of this century, rapidly expanding commerce between the North and the South ultimately enriched both regions, though in the short term there were worker displacements in the North as labor intensive manufacturing migrated to the South seeking cheaper labor. In the same way, NAFTA should be seen as a logical extension of the industrial development of the United States and Mexico. Perhaps there will be short-term pain, but in the long run gain, for both nations and their workers.

The premise underlying NAFTA's annual approval limit of 5,500 petitions for Mexican TN professionals is that this quota is needed to prevent a flood of cheap labor from entering the United States to compete with degreed professionals. This premise has certainly not been borne out during the first six months under NAFTA. Only about fifty petitions for Mexican nationals seeking this status were approved through the end of June 1994 by the INS Northern Service Center in Lincoln, Nebraska.<sup>107</sup> If this is a trend, it does not appear that there will be much need to raise the 5,500 annual quota in the near future. U.S. employers' slight use of the nonimmigrant TN category for Mexican nationals may be due in part to unfamiliarity with the availability of this category. However, it is more likely due to disadvantages attending this category compared to the H-1B Specialty Worker Category, discussed *supra*.<sup>108</sup>

NAFTA's contrary premise is that labor conditions in Canada are so favorable compared to the United States that we need not concern ourselves about the entry of a horde of degreed professionals from the north. This premise also appears to be false. Although no figures under NAFTA will be available until the end of 1994, final statistics are now available for the entire five-year history of the CFTA. What they reveal is dramatically increased use of the former TC category every year, beginning with 3,669 TC entries in 1989 and increasing to 17,732 entries in 1993,<sup>109</sup> the last year under the CFTA. With Canadian professionals able to use the same easy entry procedures under NAFTA

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104. *The NAFTA Debate*, WASH. POST, Nov. 11, 1993, at A22.

105. David Rosenbaum, *Beyond a Trade Pact*, N.Y. TIMES, Nov. 11, 1993, at A22.

106. *Id.*

107. Telephone interview with Jacquelyn A. Bednarz, Chief, Nonimmigrant Branch, INS Headquarters, Washington, D.C. (July 14, 1994).

108. See *supra* text accompanying notes 10-11.

109. *Hearing, supra* note 82, at 93, 103, 106, & 131. Entries for 1993 obtained during telephone interview with Jacquelyn A. Bednarz, *supra* note 107.

as under the CFTA, there is every reason to expect that they will continue an accelerating exodus to the United States under NAFTA.

On a superficial level, NAFTA discriminates against Mexican business persons in three of the four immigration categories created by the treaty, because discrimination was necessary to ensure approval by the United States Congress. On a deeper cultural level, however, the treaty discriminates because many in the United States stereotype all Mexican workers by those they see on the evening news running across the border under pursuit by U.S. Border Patrol agents. Perot's views are not isolated. Statistics and economic realities make poor weapons against long-held prejudices and ignorance.

Over the course of time, naturally, the United States and Mexico will consult, as NAFTA requires, about removing the treaty's restrictions against Mexican business persons. Yet, before those discriminatory provisions are completely removed, fundamental changes in the way we perceive Mexican society and our own society must occur. Continued economic development in Mexico may also need to occur. By itself, however, that development will not mollify U.S. xenophobia toward Mexico, such as surfaced during the national NAFTA debate in 1993.