

The ABC's of Immigration – NAFTA Visas for Canadians and Mexicans

by
Gregory Siskind

The TN nonimmigrant visa was created after the passage of the North American Free Trade Agreement (NAFTA) in 1993. The agreement eased trade restrictions between Canada, the US and Mexico, and called for some new immigration rules. It eased restrictions on E and L visas, and created a new type of visa, the TN.

Business Visitor Visa under NAFTA

NAFTA also expanded the grounds upon which Canadians and Mexicans can enter the US as business visitors. The activities that can be engaged in on a business visitor visa under NAFTA are as follows:

- \$ Research and design – covers technical, scientific, and statistical researchers conducting independent research for an enterprise located in Canada or Mexico
- Growth, manufacture and production –
 - ? Harvester owner supervising a harvesting crew admitted under applicable law (applies only to harvesting of agricultural crops: grain, fiber, fruit, and vegetables)
 - ? Purchasing and production management personnel conducting commercial transactions for an enterprise located in Canada or Mexico
- \$ Marketing –
 - ? Market researchers and analysts conducting independent research or analysis, or research or analysis for an enterprise located in Canada or Mexico
 - ? Trade fair and promotional personnel attending a trade convention
- \$ Sales –
 - ? Sales representatives and agents taking orders or negotiating contracts for goods or services for an enterprise located in Canada or Mexico, but not delivering goods or providing services
 - ? Buyers purchasing for an enterprise located in Canada or Mexico
- \$ Distribution –
 - ? Transportation operators transporting goods or passengers to the United States from the territory of another Party or loading and transporting goods or passengers from the United States to the territory of another Party, with no unloading in the United States, to the territory of another Party. (These operators may make deliveries in the United States if all goods or passengers to be delivered were loaded in the territory of another Party. Furthermore, they may load from locations in the United States if all goods or passengers to be loaded will be delivered in the territory of another Party. Purely domestic service or solicitation, in competition with United States operators, is not permitted.)
 - ? Customs brokers performing brokerage duties associated with the export of goods from the United States to or through Canada
- \$ After-sales service –
 - ? Installers, repair and maintenance personnel, and supervisors, possessing specialized knowledge essential to the seller's contractual obligation, performing

services or training workers to perform services, pursuant to a warranty or other service contract incidental to the sale of commercial or industrial equipment or machinery, including computer software, purchased from an enterprise located outside the United States, during the life of the warranty or service agreement. (For the purposes of this provision, the commercial or industrial equipment or machinery, including computer software, must have been manufactured outside the United States.)

\$ General service –

- ? Professionals engaging in a business activity at a professional level in a profession set out in Appendix 1603.D.1 to Annex 1603 of the NAFTA, but receiving no salary or other remuneration from a United States source (other than an expense allowance or other reimbursement for expenses incidental to the temporary stay) and otherwise satisfying the requirements of Section A to Annex 1603 of the NAFTA
- ? Management and supervisory personnel engaging in commercial transactions for an enterprise located in Canada or Mexico
- ? Financial services personnel (insurers, bankers or investment brokers) engaging in commercial transactions for an enterprise located in Canada or Mexico
- ? Public relations and advertising personnel consulting with business associates, or attending or participating in conventions
- ? Tourism personnel (tour and travel agents, tour guides or tour operators) attending or participating in conventions or conducting a tour that has begun in Canada or Mexico. (The tour may begin in the United States; but must terminate in foreign territory, and a significant portion of the tour must be conducted in foreign territory. In such a case, an operator may enter the United States with an empty conveyance and a tour guide may enter on his or her own and join the conveyance.)
- ? Tour bus operators entering the United States:
 - # With a group of passengers on a bus tour that has begun in, and will return to, Canada or Mexico
 - # To meet a group of passengers on a bus tour that will end, and the predominant portion of which will take place, in Canada or Mexico
 - # With a group of passengers on a bus tour to be unloaded in the United States and returning with no passengers or reloading with the group for transportation to Canada or Mexico
- ? Translators or interpreters performing services as employees of an enterprise located in Canada or Mexico

As with all business visitor visas, the visa holder must be compensated from a source outside the US, must be engaged in activities that are international in scope, and must not seek to enter the US labor market.

TN Visas

The TN visa is similar in requirements to the H-1B visas, although it has both substantial benefits and drawbacks to that visa category. The ways in which a TN visa is more advantageous than an H-1B are as follows:

- TN visas are not subject to an annual cap

- TN visas can be renewed indefinitely
- TN visas cover a broader range of job descriptions, which will be detailed later in this article
- There is no prevailing wage requirement for TN visas
- Canadian citizens can obtain a TN visa at the border, meaning there is no wait for the visa
- A TN visa can be obtained by a person who has held H-1B status for the full six years without fulfilling the requirement of spending one year outside the US, a requirement that must be complied with before obtaining other nonimmigrant work visas

While these advantages makes the TN visa seem an ideal substitute for the H-1B for Canadian and Mexican citizens, there are some drawbacks that must be considered, such as:

- \$ Unlike H-1B visas, the TN visa is not a “dual intent” visa. That is, where a person on an H-1B visa may pursue permanent residency without having their visa revoked because they now have immigrant intent, a person on a TN visa cannot pursue permanent residency without risking their TN status.
- \$ Experience cannot be used as a substitute for the degree requirement
- \$ A TN visa can be denied if the Department of Labor certifies that there is a strike or other work stoppage, the resolution of which would be adversely affected by the admission of the TN nonimmigrant

TN visas provide for the admission of those who will be engaged in “activities at a professional level” in the US. “Activities at a professional level” are defined at those that require at least a bachelor’s degree or credentials and experience demonstrating that the person is a professional. Self-employment is not permissible on a TN visa, but the TN visa holder can work for a company in which they have an ownership interest, even a controlling interest.

Both the NAFTA treaty itself and INS regulations specify which professions qualify for TN status. These are the professions and the degrees required:

- \$ Accountant— Baccalaureate or Licenciatura Degree; or C.P.A., C.A., C.G.A., or C.M.A.
- \$ Architect— Baccalaureate or Licenciatura Degree; or state/provincial license
- \$ Computer Systems Analyst— Baccalaureate or Licenciatura Degree; or Post-Secondary Diploma or Post Secondary Certificate and three years’ experience
- \$ Disaster relief insurance claims adjuster (claims adjuster employed by an insurance company located in the territory of a Party, or an independent claims adjuster)— Baccalaureate or Licenciatura Degree and successful completion of training in the appropriate areas of insurance adjustment pertaining to disaster relief claims; or three years’ experience in claims adjustment and successful completion of training in the appropriate areas of insurance adjustment pertaining to disaster relief claims
- \$ Economist— Baccalaureate or Licenciatura Degree
- \$ Engineer— Baccalaureate or Licenciatura Degree; or state/provincial license
- \$ Forester— Baccalaureate or Licenciatura Degree; or state/provincial license
- \$ Graphic Designer— Baccalaureate or Licenciatura Degree; or Post-Secondary Diploma or Post-Secondary Certificate and three years’ experience

- \$ Hotel Manager— Baccalaureate or Licenciatura Degree in hotel/restaurant management; or Post-Secondary Diploma or Post-Secondary Certificate in hotel/restaurant management and three years' experience in hotel/restaurant management
- \$ Industrial Designer— Baccalaureate or Licenciatura Degree; or Post-Secondary Diploma or Post-Secondary Certificate, and three years' experience
- \$ Interior Designer— Baccalaureate or Licenciatura Degree; or Post-Secondary Diploma or Post-Secondary Certificate, and three years' experience
- \$ Land Surveyor— Baccalaureate or Licenciatura Degree or state/provincial/federal license
- \$ Landscape Architect— Baccalaureate or Licenciatura Degree
- \$ Lawyer (including Notary in the province of Quebec)— L.L.B., J.D., L.L.L., B.C.L., or Licenciatura degree (five years); or membership in a state/provincial bar
- \$ Librarian— M.L.S. or B.L.S. (for which another Baccalaureate or Licenciatura Degree was a prerequisite)
- \$ Management Consultant— Baccalaureate or Licenciatura Degree; or equivalent professional experience as established by statement or professional credential attesting to five years' experience as a management consultant, or five years' experience in a field of specialty related to the consulting agreement
- \$ Mathematician (including Statistician)— Baccalaureate or Licenciatura Degree
- \$ Range Manager/Range Conservationist— Baccalaureate or Licenciatura Degree
- \$ Research Assistant (working in a post-secondary educational institution)— Baccalaureate or Licenciatura Degree
- \$ Scientific Technician/Technologist— Possession of (a) theoretical knowledge of any of the following disciplines: agricultural sciences, astronomy, biology, chemistry, engineering, forestry, geology, geophysics, meteorology, or physics; and (b) the ability to solve practical problems in any of those disciplines, or the ability to apply principles of any of those disciplines to basic or applied research
- \$ Social Worker— Baccalaureate or Licenciatura Degree
- \$ Sylviculturist (including Forestry Specialist)— Baccalaureate or Licenciatura Degree
- \$ Technical Publications Writer— Baccalaureate or Licenciatura Degree, or Post-Secondary Diploma or Post-Secondary Certificate, and three years' experience
- \$ Urban Planner (including Geographer)— Baccalaureate or Licenciatura Degree
- Vocational Counselor— Baccalaureate or Licenciatura Degree

MEDICAL/ALLIED PROFESSIONALS

- \$ Dentist— D.D.S., D.M.D., Doctor en Odontologia or Doctor en Cirugia Dental or state/provincial license
- \$ Dietitian— Baccalaureate or Licenciatura Degree; or state/provincial license
- \$ Medical Laboratory Technologist (Canada)/Medical Technologist (Mexico and the United States) — Baccalaureate or Licenciatura Degree; or Post-Secondary Diploma or Post-Secondary Certificate, and three years' experience
- \$ Nutritionist— Baccalaureate or Licenciatura Degree
- \$ Occupational Therapist— Baccalaureate or Licenciatura Degree; or state/provincial license
- \$ Pharmacist— Baccalaureate or Licenciatura Degree; or state/provincial license
- \$ Physician (teaching or research only)— M.D. Doctor en Medicina; or state/provincial license
- \$ Physiotherapist/Physical Therapist— Baccalaureate or Licenciatura Degree; or

- state/provincial license
- \$ Psychologist—state/provincial license; or Licenciatura Degree
- \$ Recreational Therapist—Baccalaureate or Licenciatura Degree
- \$ Registered nurse—state/provincial license or Licenciatura Degree
- Veterinarian—D.V.M., D.M.V., or Doctor en Veterinaria; or state/provincial license

SCIENTISTS

- \$ Agriculturist (including Agronomist)—Baccalaureate or Licenciatura Degree
- \$ Animal Breeder—Baccalaureate or Licenciatura Degree
- \$ Animal Scientist—Baccalaureate or Licenciatura Degree
- \$ Apiculturist—Baccalaureate or Licenciatura Degree
- \$ Astronomer—Baccalaureate or Licenciatura Degree
- \$ Biochemist—Baccalaureate or Licenciatura Degree
- \$ Biologist—Baccalaureate or Licenciatura Degree
- \$ Chemist—Baccalaureate or Licenciatura Degree
- \$ Dairy Scientist—Baccalaureate or Licenciatura Degree
- \$ Entomologist—Baccalaureate or Licenciatura Degree
- \$ Epidemiologist—Baccalaureate or Licenciatura Degree
- \$ Geneticist—Baccalaureate or Licenciatura Degree
- \$ Geochemist—Baccalaureate or Licenciatura Degree
- \$ Geologist—Baccalaureate or Licenciatura Degree
- \$ Geophysicist (including Oceanographer in Mexico and the United States)—Baccalaureate or Licenciatura Degree
- \$ Horticulturist—Baccalaureate or Licenciatura Degree
- \$ Meteorologist—Baccalaureate or Licenciatura Degree
- \$ Pharmacologist—Baccalaureate or Licenciatura Degree
- \$ Physicist (including Oceanographer in Canada)—Baccalaureate or Licenciatura Degree
- \$ Plant Breeder—Baccalaureate or Licenciatura Degree
- \$ Poultry Scientist—Baccalaureate or Licenciatura Degree
- \$ Soil Scientist—Baccalaureate or Licenciatura Degree
- Zoologist—Baccalaureate or Licenciatura Degree

TEACHERS

- \$ College—Baccalaureate or Licenciatura Degree
- \$ Seminary—Baccalaureate or Licenciatura Degree
- University—Baccalaureate or Licenciatura Degree

To obtain a TN visa, the following documentation must be collected:

- A letter from the prospective employer
- Diplomas (if the degree is from Canada or Mexico, it must be evaluated)
- Licenses and professional memberships, if applicable

A letter should also be submitted that outlines the following:

- The nature of the professional activity in which the visa holder will be engaged
- The proposed length of stay

- The beneficiary's educational credentials
- That the beneficiary has the necessary state licenses, if applicable
- Arrangements for the beneficiary's salary

Canadian citizens (landed immigrants do not qualify for TN visas) can present this documentation at a port of entry or pre-clearance station at an airport. They do not need to present a petition approved by the INS, or a labor condition application. They will be given an I-94 valid for multiple entries over one year. Once in the US, the TN visa holder can apply for an extension at the Nebraska Service Center, which is also where application to change status to TN are filed. A new application is not required for a change in the place of employment, but is required for a change of employer.

The procedures are different for Mexican citizens. Until December 31, 2003, the following rules (which are fairly similar to the H-1B visa process) apply:

- \$ The employer must apply for a TN visa at the Nebraska Service Center, and must present a labor condition application, or if the visa is for a nurse, a labor attestation.
- \$ While Canadians can extend the TN visa indefinitely, TN visas for Mexicans are limited to one year.
- \$ There is also an annual limit of 5,500 TN visas that can be issued to Mexican nationals.
- \$ Mexicans must obtain the TN visa at a US consulate, because they cannot seek one at the border like Canadians can.

After January 1, 2004, the following rules apply to Mexicans:

- \$ Mexicans can now apply for a TN visa directly at a US consulate in Mexico and do not need prior approval from US Citizenship and Immigration Services.
- \$ There is no longer an annual limit on the number of TN visas that may be issued to Mexicans
- \$ Mexicans applying for extensions in the US no longer need to file a Labor Condition Application with their I-129 petition

Note that unlike Canadians, even after January 1, 2004, Mexicans cannot process their TN applications at ports of entry. Nevertheless, the TN category for Mexicans is likely to become more popular with these changes.

Spouses and children of TN visa holders are given TD visas. Work is not authorized under a TD visa. TD visa holders are, however, allowed to attend school.

E Visas

NAFTA also reaffirmed treaty-trader and treaty-investor status for Canadian citizens, and extended it to Mexicans. The requirements for E-1 and E-2 visas under NAFTA are the same as they are otherwise, with the exception that entry may be denied when it would adversely affect the settlement of a labor dispute in the US. This provision is only triggered when the Department of Labor certifies the existence of a strike or work stoppage, and does not apply to E visa holders already in the US. Both Canadian and Mexicans require a

visa for entry in E status, making this one of the few categories in which Canadians are required to have a visa for entry into the US.

L-1 Visas

NAFTA also made slight changes in the requirements for L-1 intracompany transfers between the US and Canada and Mexico. As with all entries under NAFTA, entry in L-1 status can be barred if the Department of Labor certifies the existence of a strike or other work stoppage in the region of intended employment. The other change is that Canadians can apply for L-1 status at the border. Mexicans are required to have a pre-approved visa.

Gregory Siskind (gsiskind@visalaw.com) is a partner in the law firm of Siskind, Susser, Haas & Devine (www.visalaw.com), which has offices in the United States and around the world. He is an active member of the American Immigration Lawyers Association (AILA). He is a member of the American Bar Association (ABA), where he currently serves as Chairman of the Law Practice Management Publishing Board and on the Governing Council of the Law Practice Management Section. He was one of the first lawyers in the country (and the very first immigration lawyer) to set up a website for his practice and he was the first attorney in the world to distribute a firm newsletter via e-mail listserv. He is a co-author of *The J Visa Guidebook*, published by LexisNexis Matthew Bender, and the author *The Lawyer's Guide to Marketing on the Internet*, published by the ABA. He graduated magna cum laude from Vanderbilt University and received his law degree from the University of Chicago.