

Law and Business Review of the Americas

Volume 1 | Number 1

Article 7

1995

United States

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Recommended Citation

United States, 1 LAW & BUS. REV. AM. 119 (1995)
<https://scholar.smu.edu/lbra/vol1/iss1/7>

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IMPLEMENTATION:

United States

I. Introduction

The North American Free Trade Agreement Implementation Act¹ (the Act) requires few changes in existing United States law or administrative practice.² Although not required to implement the North American Free Trade Agreement (NAFTA), the changes made to existing laws were deemed necessary by the President and Congress.³ The Act addresses the relationship between United States law and the NAFTA. Section 102(a)(2) of the Act states that provisions of United States law which are not addressed by the Act are left unchanged.⁴ Thus, Congress refused to provide for a general preemption of federal statutory law by the NAFTA.⁵

This section will focus on the United States implementation of Chapter Sixteen of the NAFTA. Chapter Sixteen determines the ability of individuals to enter and remain in NAFTA countries for various purposes. This chapter is particularly important to businesses as they plan to take advantage of the benefits provided for in the NAFTA. The purpose of this section is to provide a general discussion of the chapter's most important provisions, followed by a discussion of necessary or desirable legislative and administrative changes to implement the chapter. In addition, current developments regarding the chapter will be discussed.

II. Chapter 16: Temporary Entry of Business Persons

NAFTA presents a wealth of opportunity for cross border trade and business between Canada, Mexico, and the United States. In the year since NAFTA came into effect, trade and business between NAFTA countries has multiplied beyond the expectations of many. With this growth in cross border transactions comes the need for businesses to be able to reach cross border markets. While communication technology helps to facilitate this endeavor, often it is not sufficient. Often, it is necessary for business professionals to access these cross border markets in person. The cross border trade of business professionals can be as important to a business as the cross border trade of goods.

1. Pub. L. No. 103-182, 107 Stat. 2057 (codified as amended in scattered sections of U.S.C. (Supp. V 1993)). For complete classification of this Act to the United States Code, see Short Title note set out under 19 U.S.C.A. § 3301 (West Supp. 1994) and Tables.
 2. Statement of Administrative Action, H. Doc. 103-159, 103rd Congress, 2d Sess. (1993), *microformed on* CIS No. H780-16, pp. 450-680 (Congressional Info. Serv.) (*hereinafter* Statement). The Statement was submitted in compliance with Section 1103 of the Omnibus Trade and Competitiveness Act of 1988. The Statement accompanied the implementing bill for the North American Free Trade Agreement (*hereinafter* NAFTA).
 3. Statement at 451.
 4. 107 Stat. at 2062, 19 U.S.C. § 3312.
 5. Statement at 457.
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If a United States business is looking to expand its operations in Mexico by building a new plant, it may require physical access of personnel to facilitate the expansion for the following reasons: (1) The business may wish to send market and business analysts to study and evaluate the feasibility of expansion in a particular locality; (2) The business may desire to send its own investments representatives to Mexico to oversee and effectuate the acquisition of the land and facilities necessary to build the plant; (3) The business may decide to send company personnel to commence and oversee the building of the plant; (4) Once the plant is built, the business could decide to send executives and other personnel from the home office to run the plant; (5) The business may desire to periodically supply technical support or training to the plant that can only be found in the United States; and (6) More than likely, the business will want to send executive teams to evaluate the plant's success.

For businesses doing or planning to do business in one of the cross border markets, Chapter 16 of the NAFTA⁶ is very important. Chapter 16 provides the treaty agreement concerning temporary entry for business persons.⁷ Chapter 16, together with implementation legislation and administration in the NAFTA's signature countries, governs how entry of business personnel between the three countries will be facilitated.⁸ With the strong tensions surrounding immigration problems from Mexico to the United States, Chapter 16 of the NAFTA underwent great debate. The United States has been careful to maintain tight control of its borders, to the dismay of those who feel less stringent control would facilitate more commerce.

This section of the United States Implementation Update, will concern itself primarily with United States' implementation of Chapter 16. U.S. legislation and administrative regulations concerning the temporary entry of business persons to the United States has been promulgated.⁹ Since Canada and the United States enjoyed agreements regarding temporary entry and the United States has few problems concerning illegal immigration from Canada, most of the United States concerns dealt with Mexico. Chapter 16 and U.S. implementation legislation provide many safeguards from illegal immigration and saturation of professional business markets. Temporary entry of various professionals and technical support is still being discussed between the three signatory countries. Chapter 16 of the NAFTA and the United States Implementation of Chapter 16, while allowing access to the U.S. to Canadian and Mexican business persons, still allow the United States to keep tight control of its borders.

A. BRIEF SUMMARY OF CHAPTER 16 OF THE NAFTA

The temporary entry provisions of the NAFTA are modeled after the CFTA.¹⁰ However, some of the entry provisions afforded Canadians under the CFTA are not afforded to Mexico under the NAFTA.¹¹ Chapter 16 also gives the United States the right to

6. All references to NAFTA are to the 1993 draft of the agreement. The NAFTA has been legally adopted by the United States and went into effect on January 1, 1994.

7. *Id.* at Article 1601.

8. *Id.* at Article 1602.

9. Statement at 624.

10. *Id.*

11. *Id.*

impose application requirements on Mexican professionals and limit the number admitted to 5,500 per year.¹² A safeguard provision available to all parties is the right of refusal of entry on the grounds that admission will adversely effect the settlement of a labor dispute.¹³

Chapter 16 outlines four main categories of permissible entrants to the United States.¹⁴ The first category pertains to business visitors. This provision gives persons entering for regular business reasons such as conferences, order-taking and service, the opportunity to do so for a short period of time.¹⁵ The second category, pertaining to treaty traders and investors, provides temporary admission for persons seeking to carry on trade and for specialized business personnel who operate business ventures involving substantial capital expended by a national of the same country.¹⁶ The third category pertains to intra-company transferees. This category allows executives, managers and other personnel with specialized knowledge or training to be transferred between related companies.¹⁷ The fourth category addresses professionals. This provision allows specified professionals who meet the criteria laid out in Appendix 1603.D.1 of Chapter 16 to be allowed temporary entry.¹⁸

The NAFTA allows temporary entry to the above classified individuals without a visa requirement unless a Party chooses to require a visa. For treaty traders and investors, the United States Immigration and Nationalization Service (INS) requires a trader or investor to carry non-immigrant visas.¹⁹ For implementation and administration of the categorical temporary entries into the United States afforded by the NAFTA, many immigration and nationalization laws and regulations had to be amended. INS was called upon to administer Chapter 16 and create the necessary procedures for facilitation of temporary entry.²⁰ In the NAFTA Implementation Act, Congress outlined the guidelines for the INS implementation of the NAFTA's Chapter 16.²¹

B. IMPLEMENTING CHAPTER 16: TEMPORARY BUSINESS ENTRY

The implementation of Chapter 16 has been and will continue to be a very complicated and tedious venture for the INS and other U.S. agencies. While the guidelines were provided in the NAFTA Implementation Act, the full implementation and administration called for in the Act will take many years. In time, we will be able to evaluate the implementation process. At present, many aspects of the implementation process are under way. While there are many aspects to the implementation of Chapter 16, the discussion to follow will highlight the more pertinent implementation and administrative steps taken by the United States thus far.

12. NAFTA at Annex 1603, § D(4).

13. *Id.* at Article 1603(2).

14. *Id.* at Annex 1603.

15. *Id.* at Annex 1603 § A.

16. *Id.* at Annex 1603 § B.

17. *Id.* at Annex 1603 § C.

18. *Id.* at Annex 1603 § D.

19. Information on visa requirement acquired via telephone conference with the INS office in Dallas, Texas on October 19, 1994.

20. 101 Stat. at 2116.

21. *Id.*

1. Legislative Implementation

As is pointed out in the Implementation Act, much of Chapter 16 is consistent with existing provisions in the Immigration and Nationality Act (INA).²² The four categories of entry in NAFTA correspond to existing categories in the INA.²³ All definitions of key terms provided by U.S. law will still apply.²⁴ The existing section of the INA that governs the admission of business personnel and intra-company transferees requires no changes to facilitate corresponding Chapter 16 provisions.²⁵ Most of the implementation legislation involves technical changes to the INA regarding traders and investors and business professionals under Chapter 16.²⁶ Implementation legislation was also needed to implement labor dispute provisions expressed in Article 1603(2) of the NAFTA.²⁷

a. Entry For Traders and Investors

Annex 1603, Section B grants temporary entry for Canadian and Mexican citizens as traders and investors. Similar entry existed pursuant to INA section 101(a)(15)(E), which permits temporary entry to those involved in substantial trade in goods or services or the development of investment operations.²⁸ However, this entry was limited to activity pursuant to a treaty of commerce and navigation.²⁹ Thus, implementation legislation was needed to extend 101(a)(15)(E) to Mexicans and Canadians under NAFTA. Section 341(a) of the NAFTA Implementation Act does this on the basis of reciprocity.³⁰

b. Entry For Professionals

Annex 1603, Section D, requires the United States to provide for the temporary entry of Canadians and Mexicans who are engaged in professional business activity set forth in Appendix 1603 D-1 of the NAFTA.³¹ Prior to the NAFTA, INA Sections 101(a)(15)(H)(i)(a) and (b) extended such entry to Canadians under the CFTA.³² Section 341(a) extends this treatment to Mexican nationals and authorizes the Attorney General to promulgate Section D implementation regulations after consultation with the Secretary of State and Secretary of Labor.³³ Non-immigrant status under INA Section 101(a)(15) is afforded these professionals.³⁴ Section 341(a) of the NAFTA Implementation Act also allows spouses and children accompanying or following the business professional to enter

22. Statement at 626.

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. 8 U.S.C. 1101(1)(15)(E).

29. *Id.*

30. Precedent for Section 341(a)'s extension of INA Section 101(a)(15)(E) is found in Section 307(a) of the CFTA Implementation Act of June 18, 1954. 68 Stat. 264, 8 U.S.C. 1184(a).

31. NAFTA at Annex 1603.

32. 8 U.S.C. 1101(a)(15)(H)(i)(a).

33. 107 Stat. at 2116.

34. 8 U.S.C. 1101(a)(15).

as long as they do not seek employment in the United States.³⁵ These entrants are subject to all INA laws.³⁶

Additional requirements for entry of Mexican professionals are expressed in Section 341(b) of the NAFTA Implementation Act.³⁷ Section 341(b) also requires professionals from Mexico to meet all attestation requirements set out in INA section 212(m).³⁸ Annex 1603, Section D, does not allow Canadian or Mexican business personnel to establish a business or practice in the United States in which the individual will be self-employed.³⁹ A list of professions allowed entry under the NAFTA is contained in NAFTA Appendix 1603 D-1.

Annex 1603, also gives the United States permission to set a numerical limit on Mexican professionals for a period of ten years.⁴⁰ This provision's purpose is to preserve consistency with the INA rules in Section 101(a)(15)(H)(i)(a) and (b), which set limits on persons entering with non-immigrant status.⁴¹ These limits were set by the Attorney General after consultation with the appropriate advisory committees and Congressional Judiciary Committees.⁴² The NAFTA Implementation Act also provides for adjustments or elimination of the numerical limitations by the Attorney General after appropriate consultation with Congress and appropriate advisory committees.⁴³

c. Labor Disputes

During the NAFTA negotiations, labor unions fought against United States participation in NAFTA. Results of their lobbying efforts can be seen in Chapter 16. Article 1603(2), permits a country to refuse temporary entry of a business person when such entry could adversely effect an ongoing labor dispute.⁴⁴ Section 341(c) of the NAFTA Implementation Act amends INA Section 214 to authorize the INS to refuse non-immigrant status to Mexican or Canadian business persons whose entry might adversely effect a labor dispute.⁴⁵ Section 341(c) requires the INS to provide notice to the business person refused entry and his country of origin.⁴⁶ Also in Section 341(c) are provisions which supplement INA provisions authorizing deportation of an alien admitted under a nonimmigrant category if the immigrant fails to perform the type of work permitted under the entry category.⁴⁷

2. *Special Administrative Activities*

The implementing legislation only serves as a guideline for the actual implementation of the NAFTA Chapter 16. The administrative part of implementation will be the province

35. 107 Stat. at 2116.

36. *Id.*

37. *Id.*

38. *Id.*

39. NAFTA at Annex 1603 § D.

40. NAFTA at Annex 1603.

41. Statement at 627.

42. *Id.*

43. *Id.*

44. NAFTA at 1603(2).

45. 107 Stat. at 2117.

46. *Id.*

47. *Id.*

of the Secretary of State, the Attorney General, the Secretary of Labor and the INS.⁴⁸ The bulk of the NAFTA administrative functions in this area will fall on the INS. The INS will also carry out the every day activities and enforcement of Chapter 16. While there has been a great deal of preliminary activity regarding the administration of Chapter 16, actual administrative implementation is currently at the infancy stage. Many interesting questions and debates are beginning to surface surrounding implementation. As in any large implementation endeavor, the United States is having to adjust as problem areas arise. Some of the more important administrative activities as per October 1994 are summarized in this section.

a. Administration of Temporary Entry Categories

The INS will facilitate the application process and actual entry of business persons from Mexico and Canada. The INS and the State Department are responsible for the creation of regulations that incorporate the provisions of Appendix 1603 A-1 of NAFTA into current INS regulations.⁴⁹ NAFTA Appendix 1603 A-1 sets out accepted business activities and is consistent with the CFTA which has already been implemented by INS regulations.⁵⁰ The INS has in place means for determining permissible business activity under INA Section 101(a)(15)(B). An illustration of the application of this section can be found in *Matter of Hira*, 11 I.& N. Dec. 824 (1966).⁵¹

For the category of Traders and Investors, the INS was required to amend INA Section 101(a)(15)(E) to include Canada and Mexico on it's list of countries whose citizens are eligible for entry.⁵² The INS will also administer the application process including the regulation of Intra-company Transferees. This however does not constitute a change in law or practice for the INS pursuant to INA Section 101(a)(15)(L).⁵³ More activity regarding Traders and Investors as well as Intra-company Transferees is sure to follow.

Of the four business entry categories, the administration of the Business Professional category is the most complex. While the INS will be responsible for daily entry and application procedures, entrants will also need to comply with any applicable state licensing requirements.⁵⁴ In some cases, a professional license from a Party country will be sufficient for entry.⁵⁵ However, in other cases, the individual requesting entry might have to obtain the appropriate state license from the appropriate state agency.⁵⁶ During the transition period, the Secretary of Labor was responsible for promulgating all regulations specifying the application of INA Sections 212(m) and (n) to those seeking entry under the NAFTA.⁵⁷

48. Statement at 629.

49. Id.

50. See 8 U.S.C. 1101(a)(15)(B).

51. Statement at 630.

52. Id.

53. Id.

54. Id.

55. Id.

56. Id.

57. Id.

b. Other Administration Activities.

One of the most interesting parts of Chapter 16 administrative implementation involves the right for any country to refuse entry if it may adversely affect a labor dispute. To ensure effective enforcement of this safeguard, the State Department and the INS must elicit information regarding ongoing labor disputes in the United States.⁵⁸ This information must be kept as current as possible. Any lag in information could allow an individual entry while a dispute was taking place or deny an individual entry after a dispute had already been settled. Already, existing strike certification procedures have been extended to cover entry under the NAFTA. The INS has also promulgated regulations for setting out the requirements for establishing that a business person's entry will not affect a strike or lockout.⁵⁹

Other administrative activities include the publishing of explanatory materials as required by Article 1604(1)(b) of the NAFTA. These materials are consolidated in one document and will be distributed by the INS and relevant U.S. Executive agencies. Also the collection of data tallying the granting of temporary entry under Chapter 16 is ongoing. The INS, the State Department and the Department of Labor are ensuring that appropriate data are collected.⁶⁰ Data includes information regarding the occupation, profession or activity of an entrant. This data is crucial for evaluating the effectiveness of current provisions and administrative activities. It also allows the appropriate officials to react to any problem arising out of Chapter 16 or its implementation. Additionally, a Temporary Entry Working Group which meets once a year was established pursuant to Article 1605 of the NAFTA for the purpose of problem solving and evaluation.⁶¹ This group will consider matters relating to the implementation and administration of Chapter 16.⁶²

C. OTHER TEMPORARY ENTRY ISSUES OF INTEREST

Implementation of the NAFTA Chapter 16 will be an ongoing process. Many aspects of implementation are still in the developmental stage. With further implementation, more areas of interest and debate will surely arise. Issues such as negotiation of the expansion of professionals allowed entry, removal or adjustment, and the development of procedures to make application for entry into the United States easier, will provide us with many areas of interest in the future. The following section highlights specific points of interest regarding the implementation of Chapter 16.

1. Supporting Documentation for Mexican Professionals

Paragraph (d) of 8 CFR 214.6 establishes the procedures to classify Mexican citizens as professionals under the NAFTA. First, the United States employer of a Mexican citizen must submit a petition on Form I-129 to the Northern Service Center.⁶³ Enclosed with the petition, the employer must provide evidence illustrating that the Mexican applicant satis-

58. Id.

59. 8 C.F.R. § 235.1(d).

60. Statement at 632.

61. NAFTA at Article 1605.

62. Id.

63. 8 C.F.R. § 214.6(d)(1)(1994).

fies the minimum educational requirements detailed in Appendix 1603.D.1 of the NAFTA.⁶⁴ Next, the employer must submit a statement outlining the applicant's duties while employed within the United States.⁶⁵ Finally, the employer must enclose evidence that the employee possesses appropriate licensure if the Mexican citizen will participate in professional activities in which a state requires a license.⁶⁶

2. Mexico's New Visa Form

Business travel to Mexico has recently been made easier as a result of Mexico's introduction of *Forma Migratoria de Negocios* (FMN). This new visa form, unlike its predecessor, "Form FM-3," is free and does not require the applicant's employer to submit a letter describing the applicant's business itinerary while in Mexico.⁶⁷ Furthermore, the FMN is available at Mexican consulates, travel agencies, and airline check-in counters.⁶⁸

The form requires that the applicant merely write their name, citizenship, the name and address of their employer and their employer's chief business contact within Mexico.⁶⁹ Finally, an applicant must indicate whether they are a business visitor, trader or investor, an intracompany transferee or a professional. It is important to note that the FMN is new and may undergo alteration as deemed necessary by Mexican authorities. Nonetheless, the FMN makes obtaining a visa less onerous to business persons travelling to Mexico.

3. Outlook for Reciprocal Licensing of Professionals

Depending on the profession and the countries involved, the outlook for trilateral reciprocity in regard to licensing of professionals looks bright for some professionals such as architects and accountants, while dim for other professionals, such as those in the medical and legal professions.

In the fields of accounting and architecture, it is likely that reciprocal licensing will occur between the United States and Canada within a short time. According to a recent *Los Angeles Times* article, Jim Scheeler, a resident Fellow for international relations at the American Institute of Architects in Washington, D.C., stated that U.S. and Canadian architects are "95% of the way ... to having a system that will allow complete reciprocity between us."⁷⁰ However, Scheeler went on to state that reciprocity of licenses between U.S. and Mexican architects is unlikely to occur in the near future.⁷¹

Similar to architects, United States and Canadian accountants seem close to agreement. In 1991, the American Institute of Certified Public Accountants, The Canadian Institute of Chartered Accountants and The National Association of State Boards of Accountancy issued a statement calling for reciprocity of licenses between the U.S. and

64. *Id.*

65. *Id.*

66. *Id.*

67. Mike Titens, *New Visa Eases Mexico Business Visits*, Dallas Bus. J., July 15-21, 1994, at B5.

68. *Id.* at B5.

69. *Id.*

70. Chris Kraul, *Briefing Book/Chris Kraul: International Business; Where the Professionals Stand with NAFTA*, L.A. Times, July 7, 1994, at D5.

71. *Id.* at D5.

Canada.⁷² Moreover, in 1993, the Canadian Chartered Accountant Uniform CPA Qualification Examination was created and offered to state boards overseeing the November, 1993 examination.⁷³ Despite the advances between the U.S. and Canada, there is a definite lack of cooperation between the United States and Mexico in establishing mutual reciprocity of accountant licensing. According to a recent issue of *The CPA Journal*, "there is little or no indication U.S. or Mexican [accountants] have any current interest in this regard."⁷⁴

Unlike the professions of architecture and accounting, advancements toward reciprocal licensing in the medical and legal professions have not been as fruitful. From the outset, the American Medical Association (AMA) skeptically viewed the NAFTA as a treaty which threatened to derogate national medical standards.⁷⁵ Initially, the AMA balked at supporting the treaty until they were assured that "unqualified" Canadian and Mexican practitioners would not be allowed to practice under the NAFTA's provisions.⁷⁶ Since the treaty's ratification and enforcement, the medical profession has not made significant attempts to establish reciprocity in licensing.

Similar to the medical profession, attorneys are taking slow and cautious steps to establish reciprocity in licensing. Although the NAFTA provides for American law firms to establish offices and give counsel to U.S. businesses and citizens in Mexico, no reciprocal certification system has been established. However, unlike the AMA, the American Bar Association (ABA) has sought to persuade all fifty states to allow Canadian and Mexican attorneys to practice law without having to pass the local bar exam.⁷⁷ Moreover, the ABA holds periodic meetings with the Canadian Bar Association and the Barra Mexicana.⁷⁸

Perhaps the central reason the legal community has not established reciprocal licensing stems from American lawyers' complacency with the status quo. As one lawyer stated in a 1993 *Legal Times* article, "you can do things like appear before a notary to incorporate a business... That's bread-and-butter work, because every company has to go through it. It's actually a big deal."⁷⁹

As architects and accountants move closer to establishing reciprocal licensing, there is an increasing probability that the medical and legal professions will seek to unify the varying professional standards which exist in order to achieve the "portability of credentials" envisioned by NAFTA.

III. U.S Implementation Conclusion

This section briefly examined key provisions of the NAFTA and their implementation in the United States. Chapter 16 contains very important information for all with an interest

72. See Sid R. Ewer et al., *NAFTA: Expectations for the Professional Accountant*, *The CPA J.*, June 1994.

73. Id.

74. Id.

75. Kraul, *supra* note 20, at D5.

76. Id. at D5.

77. Rob Rossi, *NAFTA Won't Open Doors for Lawyers; Despite Negotiations, Limits on Foreign law Practices Will Remain*, *Legal Times*, Oct. 25, 1993, at 8.

78. Id. at 8.

79. Id. at 8.

in the NAFTA. Whether you are a legal scholar, corporate executive or entrepreneur interested in trade under the NAFTA, the provisions on Temporary Entry of Business Persons are essential to know. This implementation summary briefly addressed each of these sections, but we recommend a review of the NAFTA's text and materials on the implementation of these sections to all who have an interest in the NAFTA.

The implementation process for all three of these Chapters will be an ongoing process. With U.S. implementation legislation serving as the ground rules, the bulk of implementation will fall with governmental departments and agencies. Full implementation of the NAFTA will take some time. Still, progress in the implementation process has been made. While the future holds uncertainty on various issues still being debated and negotiated, the present holds opportunity for those interested in trading under NAFTA. As trade increases, new issues for debate and negotiation will arise. As with any process, the implementation of the NAFTA in the United States will require a great deal of adjustment.

The next issue will address other important Chapters of the NAFTA. The concentration will be on the implementation of NAFTA's dispute settlement provisions. Also highlights of various issues of interest in the implementation process will be addressed.
