How U.S. Interprets Immigration Sections of USMCA

By Eileen M. Martin

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The United States Mexico Canada Agreement (USMCA) includes information on which citizens of treaty countries can come to the U.S. for specific activities. U.S. Customs and Border Protection (CBP) interprets that information as it adjudicates applications and petitions and admits citizens of Canada and Mexico to the United States.

The Business Visitor (B-1) guidance permits specific activities including marketing, research and after-sales service, among others. CBP officers must look at the fact pattern for every applicant for admission to decide whether the applicant has satisfied his or her burden of proof to enter the U.S. Specifically, it does not permit a Business Visitor to enter the U.S. to perform services directly to a U.S. business. The direct beneficiary of the business activities must be Canadian or Mexican. Each Business Visitor should be being paid by a non-U.S. source. He or she should have a
foreign residence to which he or she plans to return. For Canadian citizens applying to enter the U.S. in B-1 status, the only agency they encounter is CBP, whose interpretation of the treaty determines admissibility to the U.S.

When an applicant for admission to the U.S. does not meet the B-1 requirements according to CBP, but wants to gain admission to the U.S. anyway, he or she must obtain a work permit. The U.S. uses a number of alpha-numeric

characters to designate categories for workers who may live in the U.S., be paid directly by U.S. businesses, and/or provide services directly to U.S. companies. Those impacted by the USMCA are described below.

The TN classification is a popular work permit classification, partially because a Canadian can file an application for three years of work status for US$56 and receive an immediate answer at a port of entry. It permits work in a specific list of professions if the applicant meets the educational criteria and/or experience requirements. Almost all of the enumerated professions require a university degree, and CBP has narrowed that requirement to a degree that is related to the profession. The business that will engage the services of the worker must sign a letter naming the TN classification, describe the job to be undertaken and state the remuneration for the applicant. CBP officers must assess if the applicant meets the requirements, and whether the job description falls within an enumerated profession. Some of the professional classifications that receive heightened scrutiny by CBP include management consultant, scientific technician/technologist and economist.

The L-1 Intracompany Transfer is impacted by the USMCA as well, as it permits Canadian citizen beneficiaries to file initial petitions at ports of entry for immediate adjudication. Certain renewals are also permitted to be filed at ports of entry. The L-1 requires that the beneficiary have worked for a non-U.S. business outside the U.S. for one of the three years prior to coming to the U.S. The work abroad and the work in the U.S. must be executive, managerial or entail specialized knowledge, and the business abroad must have substantially similar ownership and control.

In the recent past, CBP determined that it could only adjudicate new petitions, or repeat petitions for beneficiaries who do not live in the U.S. and who spend most of their time outside the U.S. This departure from prior practice causes significantly higher government filing fees, since extra fees attach to quicker adjudication for mail-in petitions, whereas instant adjudications by CBP are a built-in feature at a port of entry. CBP is able to make better and quicker decisions due to their ability to interview beneficiaries to gather information instantly.

The USMCA further permits Canadians and Mexicans to work in the U.S. under E-1 (treaty trader) and E-2 (treaty investor) visas. These visa applications are adjudicated at U.S. consulates and embassies, so CBP only greets E visa holders when they apply for admission to the U.S. Many CBP officers have only a cursory understanding of the treaty classifications, therefore limiting their interpretation of the manner in which visa holders qualified for their status.

CBP's interpretation of the USMCA is determinative to the adjudication of applications and petition. It is recommended that applicants and beneficiaries filing with CBP be aware of the agency's policies and preferences before appearing with a request to adjudicate an application or petition. If you or someone you know are interested in exploring the opportunities afforded under the USMCA, but have concerns about the CBP and their protocols, contact Elizabeth M. Klarin (eklarin@lippes.comn) or Eileen M. Martin (emartin@lippes.com) of Lippes Mathias' immigration practice team.

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