

Maintaining TN status while pursuing a green card

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Can you pursue a green card while maintaining your TN (Trade NAFTA) nonimmigrant status? Yes, yes you can.

It is a common misconception that an individual is precluded from maintaining TN status while pursuing permanent residency. Many believe that an individual must transition into H-1B or L-1 status before even considering a green card process. That is not true, and it usually stems from an imperfect understanding of the temporary intent requirement for TN status under U.S. immigration law.

What temporary intent is required for a TN?

Under NAFTA, a TN applicant must prove that the entry for the employment opportunity is temporary. NAFTA explicitly defines temporary entry as meaning, "entry into the territory of a Party by a business person of another Party without the intent to establish permanent residence." The only and key definition of "temporary" under NAFTA is that the individual is not coming *with the intent to establish permanent residence on that entry*. (8 CFR § 214.6(b))

Is maintaining a foreign residence required?

There is nothing under NAFTA or the *Immigration and Nationality Act* (INA) that requires a TN applicant to maintain a foreign residence. In fact, there is nothing in the INA under s. 101(a)(15) that references the TN under NAFTA with respect to any requirements to maintain a foreign residence abroad. The only requirement under NAFTA is that the individual is not coming *with the intent to establish permanent residence on that entry*. While there is language under s. 101(a)(15)(b) that *visitors* must maintain a foreign residence, that is a completely different category than the TN with different requirements and criteria.

What guidance exists on this issue?

Guidance from legacy INS is still followed by U.S. Citizenship and Immigration Services (CIS) that an approved labor certification, 1-140 and/or 1-130, may not be in and of itself a reason to deny an application for admission as a TN. (A labor certification, 1-140 filing or 1-130 filing are all parts of various types of green card processes.) This is based on the fact that those individuals may still complete the permanent resident process abroad through an interview at the U.S. consulate in Montreal and therefore their entry as a TN individual is not with the intent to establish permanent residence on that entry. These individuals in the process of pursuing permanent residency still qualify for temporary TN status because they are not entering the U.S. with the intent to establish permanent residence on any TN entry. They will depart the U.S. to complete the permanent residence process through an interview at the U. S. consulate in Montreal so their entry is still temporary.

Guidance going back to 2002 when the Nebraska Service Center was adjudicating TNs confirms that the filing of an 1-140 (permanent resident petition) is not a basis alone to deny a TN application.

AILA Doc No. 02111431, Nov. 14, 2002 reads:

"NSC Backs Off 1-140/TN Policy Change. After considerable discussion between the Nebraska Service Center and AILA's NSC Liaison Committee, the NSC now indicates that the filing of an immigrant petition is simply one factor to consider in the adjudication of a TN extension, and should not automatically result in a denial. The NSC, which has exclusive jurisdiction over TN applications made on Form 1-129, had previously indicated that NSC adjudicators were being told to deny TN applications if an 1-140 immigrant petition has been filed on the individual's behalf. The basis of the denial had been that the individual no longer has a nonimmigrant intent."

In addition, in response to a letter from Charles Herrington, Esq. to CBP in 2008 requesting agency guidance on the issue, U.S. Customs and Border Protection (CBP) responded with:

"After reviewing applicable law for North American Free Trade (NAFTA) applicants for admission, it is our determination that the mere filing or approval of an immigrant petition does not automatically constitute intent on the part of the beneficiary to abandon his or her foreign residence. This would hold for a TN principal who may be riding on a spouse's immigrant petition.

"Of course, a TN applicant could have the intent to immigrate or adjust status at a future time, but as long as his or her intent at the time of application for admission is to be in the United States for a temporary period pursuant to NAFTA and regulations at 8 CFR 214.6, he or she could be admitted. However, once a TN files an application for an immigrant visa or adjustment of status, then the TN would no longer be eligible for admission or an extension of stay as a TN nonimmigrant. The NAFTA professional must establish that the intent of entry is not for permanent residence." (See AILA InfoNet Doc. No. 09021280 posted on 2/12/09.)

Updated in April 2017, insight into this issue can also be found at 9 FAM 402.17-7 which reads:

"The agreement encompasses only business persons coming to the United States temporarily. INA 214(b), therefore, is fully applicable to TN visa applicants. Chapter 16 provides the following definition: 'Temporary entry means an entry into the United States without the intent to establish permanent residence.' The department's regulation (22 CFR 41.59(c)) amplifies this definition to provide additional guidance. The essence of the requirement is that the alien is seeking 'temporary' entry into the United States. You must be satisfied that the alien's proposed stay is temporary. A temporary period has a reasonable, finite end that does not equate to permanent residence. The circumstances surrounding an application should reasonably and convincingly indicate that the alien's temporary work assignment in the United States will end predictably and that the alien will depart upon completion of the assignment. An intent to immigrate in the future that is in no way connected to the proposed immediate trip need not in itself result in a finding that the immediate trip is not temporary.

"Repeated renewal of a TN visa that leads to extended stay in the United States, may still be temporary, as long as there is no immediate intent to immigrate."

CONCLUSION

A TN individual does not need to switch to H-1B or L-1 status in order to pursue permanent residency. If handled properly, there is no reason not to maintain TN status throughout the permanent resident process. As one

example, if an individual uses the immigrant visa process through the U.S. consulate in Montreal, s/he would never have the intent to stay permanently on any TN entry. The intent would always be to depart to complete the permanent resident process in Canada. In addition, there may be scenarios where an adjustment of status filing to complete the green card process from within the U.S. is possible, as long as you are aware of the immigrant intent guidance and you are mindful of the 90-day misrepresentation guidance found at 9 FAM 302.9-4(8) (3)(g).

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