But I Thought I Just Needed a Letter! Coping with Tricky TN Issues at the Border

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1. Basic Overview and Comparison to H-1B (Just to Get Everyone on the Same Page)

1.1. Substance

1.1.1. Same as H-1B

1.1.1.1. Generally for "professional" positions, but some positions require less than a bachelor’s degree.

1.1.1.2. 3 years at a time.

1.1.2. Different from H-1B.

1.1.2.1. Professions limited to the list agreed to by the three countries.

1.1.2.2. Just Canadians and Mexicans. Chileans and Australians also have treaties, but categories are different.

1.1.2.3. Cannot use 3-for-1 experience-for-education rule.

1.1.2.4. Licensure at time of application is not required. Leaves licensing compliance to states. (In H-1B context, licensure can be a procedural headache.)

1.2. Procedure

1.2.1. Same as H-1B

1.2.1.1. Can COS or EOS on I-129.

1.2.2. Different from H-1B

1.2.2.1. No annual quota.

1.2.2.2. No explicit limit on number of years.

1.2.2.3. No dual intent. Can still deny for filing an immigrant petition. Not always black and white, though.
1.2.2.4. Although COS/EOS is same as with H-1B status, initial application process is different. Also, Canadians and Mexicans are treated differently from each other.

1.2.2.4.1. Canadians apply at the Class A Port of Entry or at Preclearance Operations.

1.2.2.4.2. Mexicans must apply at the consulate (but no longer have to file I-129 first).

2. Why More Than a Letter Is Required to Safely Secure a TN Visa (Quick Overview of Basic TN Requirements)

2.1. So what is required for a basic TN?

2.1.1. For list of required documents, see 214.6(d)(3).

2.1.2. Elements of support letter – must include:

2.1.2.1. Job title and relevant NAFTA category.

2.1.2.2. Detailed job description. (Some officers require a breakdown of daily job duties and time spent on each duty, which is an approach frequently seen in difficult H-1B and L-1 cases.)

2.1.2.3. Length of time services are required.

2.1.2.4. Educational, license and years of experience required for the position.

2.1.2.5. Salary and benefits. (Salary that appears too low or too high for the position can sometimes be an issue.)

2.1.3. Proof of citizenship

2.1.3.1. Now that passport is required for entry under WHTI, might as well present passport in all cases, even though technically certain exceptions exist under TN regulations.

2.1.4. Original degree/ transcripts vs. copies. (Some ports require originals. Check ahead.)

3. How to Identify Which TN Categories Are Particularly Tricky (and Understanding Why They are Tricky)

3.1. Which ones are tricky?
3.1.1. Management Consultant

3.1.2. Computer Systems Analyst

3.1.3. Scientific Technician/Technologist

3.1.4. Maybe others, too, in case-specific circumstances.

3.2. Is "tricky" a bad thing?

3.2.1. Yes, headache because results can be unpredictable.

3.2.2. No, presents an opportunity for flexibility when other categories are not a clear fit.

3.3. What to do about them generally?

3.3.1. Be realistic.

3.3.2. Carefully set and manage client expectations.

3.3.3. Prepare application carefully.

3.3.4. Prepare client carefully. Client must know the legal parameters for the classification requested and must know what to expect in the interview, as well as what to bring, etc.

4. Examples of Tricky Cases (and How to Handle Them)

4.1. Management Consultant

4.1.1. Basics: What's required?

4.1.2. What does a standard, easy case look like?

4.1.3. Discussion of an example of a "tricky" management consultant case, including areas most likely to encounter government push back.

4.2. Computer Systems Analyst
4.2.1. Basics: What’s required?

4.2.2. What does a standard, easy case look like?

4.2.3. Discussion of an example of a "tricky" computer systems analyst case, including areas most likely to encounter government push back.

4.3. Scientific Technician/Technologist

4.3.1. Basics: What’s required?

4.3.2. What does a standard, easy case look like?

4.3.3. Discussion of an example of a "tricky" scientific technician/technologist case, including areas most likely to encounter government push back.

5. How to Prepare Your Client for Questioning by U.S. Customs or U.S. Consulate

5.1. May attorney attend interview?

5.1.1. Maybe for Canadians at border or preclearance operations.

5.1.2. Typically no for Mexicans at consular interviews.

5.2. Generally, the trickier the case, the better prepared the case must be and the better prepared the client must be.

5.2.1. Facts: Client must always tell the truth, but also must know which facts are most important to obtaining the classification, so can emphasize those as appropriate.

5.2.2. Law: Client must know the parameters of the classification (and what the officer is likely to ask to try to do to box the client out of the classification).

5.2.3. Expedited Removal: Client must know when to quit. Better to walk away and try again than to get ER’d.
6. When and Whether a New TN Attempt Can Be Made After an Initial Denial

6.1. Yes, you can try again, but need to be careful to protect against fraud allegations and Expedited Removal.

6.2. Forum shopping (or searching for fair and reasonable adjudication) is more difficult these days, because all information should be at all officers' fingertips.

6.3. Sometimes better to ask for a supervisor; sometimes better to try to make it work with the existing officer.

6.4. Changes can help you or hurt you.

6.4.1. Facts: Changing the facts can be more difficult than changing the law. The more you change, the more difficult it can become to keep the case solid. At some point you can face the cynical question, "Are you lying this time or last time." Attorneys and clients have to be very careful.

6.4.2. Law: Changing the TN classification on the same facts can generally be relatively safe, because the issue is legal change, not factual change. For example, denials for the computer systems analyst classification can sometimes be overcome by re-filing in the scientific technician/technologist classification.

6.4.3. Employers: Changing employers can be like wiping the slate clean in many respects, but the new application has to be consistent with the old application with respect to the applicant's education and work history.
7. Helpful Information and Citations

7.1. Statute:
7.1.1. INA 214(e) (The statutory scheme for TN visa)
7.1.2. INA 214(b) (TNs are subject to INA 214(b) and thus doctrine of dual intent is inapplicable to TN.)

7.2. Regulations:
7.2.1. Appendix 1603.D.1 (codified at 8 C.F.R. 214.6(c) (includes list of TN occupations and their respective minimum requirements)
7.2.2. 8 C.F.R. 214.6(e) (TNs are admitted for 3 years.)
7.2.3. 8 C.F.R. 214.6(b) (Self-employment is prohibited.)
7.2.4. 8 C.F.R. 214.6(c) (Requires a technologist to possess: (1) theoretical knowledge of: agricultural sciences, astronomy, biology, chemistry, engineering, forestry, geology, geophysics, meteorology, or physics; and (2) the ability to solve practical problems in any of these disciplines, or the ability to apply principles of any of these disciplines to basic or applied research.)
7.2.5. 8 C.F.R. 214.6(d)–(e) (Procedures for applying for a TN visa)
7.2.6. 8 C.F.R. 214.6(e), (h) (Canadians may apply at a Class A POE or preclearance station; no prior petition, labor certification, or LCA is required. TNs may get extensions of status up to 3 years provided that he is present in the U.S. at the time of filing the extension.)
7.2.7. 8 C.F.R. 216.6(g) (I-94 issued for three years as a multiple entry. A TN may re-enter the U.S. on his I-94 or within the 3-year period without an I-94 upon the presentation of certain proof.)
7.2.8. 8 C.F.R. 214.6(d)(1) (Mexicans desiring TN status are no longer required to obtain an approved petition or LCA, but are still required to obtain a visa at the U.S. consulate.)
7.2.9. 8 C.F.R. 214.6(i)(3) (A new petition is not required where the jobsite is changed by the same employer.)
7.2.10. 8 C.F.R. 214.6(j) (Spouses and unmarried minor children accompanying or following to join a TN are admitted in TD status. They may not accept employment unless they are otherwise authorized.)
7.2.11. 63 FR 1331 at 1333 (Jan. 9, 1998); 8 C.F.R. 214.6(b); 22 C.F.R. §41.59(c) (Dual intent is not applicable even though there is no limitation on the number of years TN status may be granted.)
7.2.12. 8 C.F.R. 214.6(k) (Director of USCIS may refuse to issue employment authorizations or documents permitting entry during labor dispute.)
7.3. Policy Memo and other helpful information

7.3.1. 9 FAM 41.59 N5. (TNs are subject to INA 214(b) and must prove nonimmigrant intent.)

7.3.2. Letter, LaFleur, Chief Business and Trade Branch, Adjudications, HQ 1815-C (Feb. 5, 1996), reprinted in 73 No. 8 Interpreter Releases 235, 249–50 (Feb. 26, 1996); 63 FR 1331–35, 1333 (Jan. 9, 1998). (Though self-employment is prohibited, a TN who is entering the U.S. to perform work for a U.S. company where s/he owns an interest (even a controlling interest) in the Canadian company contracted to perform the management consultancy may be granted TN status.)

7.3.3. Memo, Cronin, Acting Ex. Assoc. Comm., Office of Programs, HQINS 70/6.2.23, reprinted in 77 No. 42 Interpreter Releases 1550, 1556–57 (Oct. 30, 2000). (“Software engineers” are included within NAFTA, as engineering is not limited to any field.)

7.3.4. IFM §15.5(f)(2)(A); Memo, Williams, Ex. Assoc. Comm. Field Operations, HQINS 70/6.2.2 (Nov. 7, 2002), published on AILA InfoNet at Doc. No. 02121331. (Principles for evaluating whether a person qualifies as a scientific technician/technologist (ST/T) for TN visa)

7.3.5. DOS, Guidance on Qualification as a Scientific Technician/Technologist under NAFTA (Jan. 4, 2008), published on AILA InfoNet at Doc. No. 08022774.

7.3.6. 9 FAM 41.59 N4.3(3), 7.1. (outlines the requirements for documentation)

7.3.7. Cable, DOS, 04 State 3646 (Jan. 7, [[Page 704]] 2004), published on AILA InfoNet at Doc. No. 04022562. (Where a bachelor’s degree is specifically required, experience cannot be used in lieu of the degree.)

7.3.8. Memo, Hrinyak, Acting Ex. Dir. Immigration Policy and Programs, CBP, “Additional TN Occupations” (Oct. 26, 2004), published on AILA InfoNet at Doc. No. 05033173. (Evidence of licensure at the time of application for admission or a visa is no longer required.)

7.3.9. 9 FAM 41.59 N4.3(3), 7.2. (Licensure to practice a given profession is a post-entry requirement and is not a prerequisite to obtain entry as a TN.)

7.3.10. 9 FAM 41.59 N11 (Part-time employment is permissible.)

7.3.11. 9 FAM 41.59 N12 (TNs may also change or add employers by filing an I-129 or departing and re-entering.)

7.3.12. 9 FAM 41.59 N4.2; IFM at 15.5 (Mexicans no longer need to obtain an approved petition but still need to obtain a visa at the U.S. consulate.)

7.3.13. 69 FR 11287-90 (Mar. 10, 2004) (Approvals for Mexicans are no longer subject to a numerical cap.)

7.3.14. 83 No. 15 Interpreter Releases 643, 676–77 (Apr. 10, 2006) (For E/S, C/S, or change of employer, TNs may file I-129 petition with the appropriate service center.)

7.3.15. IFM at 15.5(f)(10) (A Canadian citizen who applies for TN status at the border but cannot demonstrate admissibility may request a hearing before an IJ or withdraw the application for admission. If he or she declines to withdraw and is inadmissible under INA §212(a)(6)(C) or (7)(A), the officer may initiate expedited removal procedures.)
7.3.16. 9 FAM 41.59 N13 (TN dependents are not authorized to accept employment but may attend school on a full time basis.)

7.3.17. 9 FAM 41.59 N14.3 (The domestic servant of a TN who meets the requirements under 9 FAM 41.31 N7 may be issued a B-1 visa.)

7.3.18. 9 FAM 41.31 N7 (establishes the requirements for the domestic servant of a TN who is eligible for a B-1 visa to accompany the TN)

7.3.19. Carlson v. Reed, 249 F.3d 876 (9th Cir. 2001) (A TD/TN nonimmigrant is not a resident for in-state tuition purposes in California.)

7.3.20. Toll v. Moreno and Elkins v. Moreno (quoted in Carlson v. Reed, TN/TD lacks intent to establish permanent residency in the U.S. and scheme does not violate due process or equal protection)

7.3.21. Letter, LaFleur, Business and Trade Services, Benefits Branch, INS, HQ 1815-C (June 18, 1996), reprinted in 73 No. 28 Interpreter Releases 970, 979–80 (July 22, 1996). (A TN with an approved I-140 petition may be denied admission as an intending immigrant.)

7.3.22. Letter, Morris, Executive Director, Admissibility and Passenger Programs, CBP to Herrington (Apr. 21, 2008), published on AILA InfoNet at Doc. No. 09021280 (TN is not assumed to be inadmissible as a nonimmigrant where the TNs spouse is the beneficiary of an approved I-140 petition.)

8. Speaker Biographies

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Fausta M. Albi is one of three co-managing partners with Larrabee, Mehlman, Albi, Coker LLP, a firm focused on employment-based immigration law. At the national level, Ms. Albi currently participates as a mentor with AILA’s Mentor Program and is a past chair of AILA’s National CBP Liaison Committee. At the local level, Ms. Albi served for several years as the chair of AILA’s CBP Liaison Committee for San Diego and is a past chair of the San Diego Chapter.

Ingrid K. Brey, Grosse Pointe Park, MI
Ingrid K. Brey, an AV-rated attorney, practices employment-based immigration law with a focus on physicians and other health care workers, worksite enforcement and corporate compliance. She has served on several national AILA committees including DOL, NSC, physicians, distance learning, DOS and RAIO; in addition she served as chair of the AILA Michigan Chapter from 1999–2001. She has been named by Best Lawyers in America as “Immigration Lawyer of the Year for 2011” for the Detroit area.