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Memorandum

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CO 1773-C

Subject: U.S.-Canada FTA Implementation

Date: 04 OCT 1989

DO: _____
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To: All Regional Commissioners
All District Directors (except foreign)
All Officers in Charge (except foreign)
All RSC Directors
Director ODTF-Glynco

From: Adjudications (COADN)

We are now about to enter the tenth month of implementation of the immigration provisions of the United States-Canada Free-Trade Agreement (FTA), and I wish to commend your officers for their efforts in making the agreement work. Complaints have been at a minimum, and positive comments have far outweighed the negative.

Our FTA regulatory package which was published as an interim rule on January 3, 1989, is now in final form and hopefully will soon be published in the Federal Register. There will be no major changes in the final rule; however, some nebulous areas will be clarified.

I should also note that Central Office staff are continuing to work with our Canadian counterparts to recommend further provisions for facilitation, including the addition of occupations to Schedule 2 (occupations or professions for TC classification).

To further aid facilitation, I wish to address items concerning Schedule 2 which have come to our attention. The first item concerns Canadian-citizen registered nurses. To demonstrate that the registered nurse qualifies for TC classification, the regulations provide that either a provincial or state license may be presented. It is entirely possible that the Canadian-citizen registered nurse may have already been employed in the United States and, therefore, would have a valid permanent state license. In such a case, presentation of a valid permanent provincial license is not necessary.

The regulations also require compliance with applicable state law and/or licensing requirements. For Canadian-citizen registered nurses we have stated in draft operations instructions that this may be demonstrated through presentation of "a permanent state license, a temporary state license, or other temporary authorization to work as a registered or graduate nurse, issued by the State Board of Nursing in the state of intended employment."

The "other temporary authorization" may take varying forms: for instance, a letter or a receipt for processing of the application for permanent licensure. For facilitation, officers should apply a liberal standard. Although a temporary license or other temporary authorization may be for a limited period of time (less than one year), either is a prelude to issuance of a permanent license and, thus, if the services of the nurse are needed for one year, admission should be for one year. This procedure will cut down on subsequent pro-forma applications for extension or quick trips back to Canada for readmission for the full year.

The other area of confusion in Schedule 2 concerns management consultants. Officers have generally applied a liberal standard for management consultants which of course complies with the facilitative purpose of the agreement. We have, however, encountered situations where companies have sought to circumvent the five-year limitations for H-1 and L-1 nonimmigrants by converting salaried full-time employees into management consultants. Certainly, there is nothing to preclude a change to TC classification for an H-1 or L-1 if the Canadian citizen's occupation is on Schedule 2; however, officers should pay special care to those cases where the conversion to TC is based on a claim to being a management consultant. We have discussed this situation with our Canadian counterparts, and we have jointly concluded that a management consultant should generally not be a regular, full-time employee of the entity requiring services. There are, however, instances where full-time employment is a possibility. In these cases, the management consultant should not be assuming an existing position, replacing someone in an existing position, or filling a newly-created permanent position. In short, the management consultant should either be an independent consultant or the employee of a consulting firm under contract to a U.S. entity, or the consultant, if salaried, should be in a supernumerary temporary position.

Officers should also keep in mind that, unless otherwise stated in the regulation, the minimum requirement for Schedule 2 (TC) qualification is a baccalaureate degree. Officers should not get into the position of trying to equate a combination of formal education and/or training and experience into a degree. This provision was intended to provide transparent criteria for admission--thus, the minimum of a baccalaureate, unless otherwise specified.

As a result of several inquiries, I also want to give you a brief synopsis of what can or cannot be done by Canadian citizens who are already in the United States. Canadian citizens who are in the United States may apply for change of nonimmigrant classification. In fact, you will probably see I-506s to change classification from H-1 or L-1 to TC, particularly from Canadians who are approaching the five-year limit in either of those classifications. Such a change is permissible since the five-year

rule does not apply to TCs. However, Canadian-citizen J-1 exchange visitors who are subject to the two-year foreign residence requirement of section 212(e) may not change to TC; nevertheless, there is nothing in the statute or regulation to preclude a subject J-1 from leaving the United States and then being admitted as a TC. Of course, such an alien would continue to be subject to section 212(e) for change of nonimmigrant status and adjustment purposes.

Canadian citizens in the United States in valid nonimmigrant status may also apply for change to either E-1 or E-2 classification; however, if they leave the United States, even to go to Canada, after a change to E-1 or E-2, they must be in possession of an E-1 or E-2 visa obtained from a U.S. Consulate in order to be readmitted. According to the Department of State, application for an E-1 or E-2 visa by a Canadian citizen may be made to a consular post from inside the United States.

Check w/ Consular Officer.

The fee for change of nonimmigrant classification by a Canadian citizen to TC, E-1, or E-2 is the I-506 fee--$35. For TC classification, the $50 fee is only charged at a port of entry.

TC Canadian citizens may also apply for extension of stay or change/addition of employer(s) by filing Form I-539. The application should be accompanied by a letter from the current employer, new employer, or additional employer, as appropriate.

Finally, there has been confusion on the classification of a spouse and unmarried minor dependent children of a TC Canadian citizen. For various reasons, the only feasible classification for such aliens is B-2 classification. For the purposes of the agreement, full-time or part-time school attendance by B-2 dependents of TCs is permissible. There is no need to change classification to F-1 or M-1, unless the unmarried dependent son or daughter of a TC principal has reached the age of 21.

Again, my thanks to you and your officers for professionally implementing the FTA immigration provisions.

JAMES A. PULZO
Assistant Commissioner