

THE DEMISE OF NAFTA: CREATING UNCERTAINTY FOR FOREIGN WORKERS

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For more than 20 years, the North American Free Trade Agreement (“NAFTA”) has facilitated cross-border mobility between Canada, the United States and Mexico. From an immigration perspective, a key feature of NAFTA is Chapter 16, which sets out the categories of business persons who are eligible for expedited temporary business immigration to Canada. Those categories include: (1) business visitors; (2) intra-company transfers, and (3) professionals.

With recent rounds of NAFTA talks ending in threats by both the U.S. and Mexico to withdraw from the tripartite agreement, the future of NAFTA is uncertain. While the demise of NAFTA would create considerable uncertainty for Mexicans and Americans living and working in Canada as NAFTA professionals, it would not necessarily mean the end of expedited cross-border business immigration to Canada by Mexicans and Americans who qualify as business visitors and intra-company transfers.

Canada’s federal immigration legislation confers benefits on all foreign workers, including Americans and Mexicans, which are equivalent to the NAFTA business visitor provisions. Following the demise of NAFTA, qualifying foreign workers would continue to be able to enter Canada without a work permit as business visitors with little practical distinction from entering under NAFTA. Further, in June 2017, Canada introduced the Global Skills Strategy, which establishes a new work permit exemption that enables highly skilled foreign workers from all countries to enter Canada for short-term work assignments. For more information about the Global Skills Strategy, see our recent bulletin entitled “[Immigration Alert: Temporary Foreign Worker Program Launches Global Skills Strategy](#)”.

Further, the General Agreement on Trade in Services (“GATS”) contains equivalent intra-company transfer provisions to those currently found in NAFTA and qualifying foreign workers (including American and Mexican citizens) would continue to be able to obtain intra-company transfer work permits on similar grounds as under NAFTA. However, it is unclear at this time whether holders of valid intra-company transfer work permits issued under NAFTA, but acquired prior to the demise of NAFTA, would remain in effect until their expiry or whether such workers would need to take immediate steps to obtain equivalent authorization under GATS.

The most significant negative impact of the demise of NAFTA from an immigration perspective would be the elimination of the NAFTA professional work permit. Appendix D to NAFTA contains a list of 63 professions that qualify for a NAFTA professional work permit. In addition to the expansive list of eligible professions, coveted features of this type of work permit include: (1) no requirement for the foreign worker to have pre-existing employment with a foreign affiliate of the Canadian entity he or she will service in Canada; and (2) no limit on the number of times a foreign worker can renew his or her work permit. While GATS contains a special work permit category for professionals, the GATS professional category is considerably more limited than the one currently found in NAFTA. Notably, a mere nine professions qualify for a GATS professional work permit and any such work permits are only valid for a maximum duration of three months in a twelve month period without the possibility for renewal.

It remains to be seen whether the demise of NAFTA would be accompanied by a multi-year transition period for foreign workers with NAFTA professional work permits or whether any holders of valid NAFTA professional work permits at the time of the demise of NAFTA would be permitted to remain in Canada until their then-current work permits expired. Article 2205 of NAFTA prevents each of Canada, the United States, and Mexico from terminating its participation in NAFTA for at least six months after formal notice has been given to the other nations. At the very least, Americans and Mexicans working in Canada as NAFTA professionals at the time of NAFTA's demise will have this period of time to settle their affairs.

If you are a Canadian employer who has employed a foreign worker on successive NAFTA professional work permits and that worker is integral to your operations in Canada, now might be the time to consider supporting that worker with his or her application for Canadian permanent residency. Employers who require assistance with business immigration matters are invited to contact McMillan's Immigration Law Group for assistance.

by Stefanie Di Francesco and Dave J. G. McKechnie

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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