**U.S. Department of Homeland Security**
U.S. Citizenship and Immigration Services

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MEMORANDUM FOR REGIONAL DIRECTORS
SERVICE CENTER DIRECTORS
DISTRICT DIRECTORS

FROM: WILLIAM R. YATES /S/ by Janis Sposato
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Department of Homeland Security

SUBJECT: Lifting of Numerical Cap on Mexican NAFTA Nonimmigrant Professionals ("TN") and Free Trade Agreements with Chile and Singapore.

Purpose: This memorandum notifies and provides guidance to the field (in particular the Nebraska Service Center (NSC)) on a number of significant free trade-related changes, all of which go into effect on January 1, 2004. The first set of changes relates to the North American Free Trade Agreement (NAFTA), namely the removal of the annual numerical cap on Mexican NAFTA nonimmigrant professionals seeking TN status, and the elimination of the requirement that a TN petition and associated labor condition application (LCA) be filed on behalf of such persons. The second set of changes relates to the implementation of two new Free Trade Agreements with the countries of Chile and Singapore, in particular, the creation of a new H-1B1 nonimmigrant classification for professionals and the extension of E-1/E-2 treaty trader/treaty investor privileges to citizens of the two countries.

## Lifting of Numerical Cap and Elimination of Labor Condition Application and Petition Requirement for Mexican Professionals Seeking TN Classification Under the NAFTA

When the NAFTA was negotiated, the agreement imposed an annual numerical cap with respect to Mexican citizens desiring status as professionals under the Agreement. The NAFTA, as negotiated, also required, in the case of such persons, the filing of an LCA and a petition. These controls were put into place for 10 years. These controls will expire at midnight, December 31, 2003. Therefore, as of January 1, 2004, the NSC will no longer be responsible for processing I-129 petitions filed on behalf of Mexican beneficiaries seeking a TN nonimmigrant visa abroad. The NSC will

continue to process I-129 requests for extension of or change to nonimmigrant TN status, and after January 1, 2004, such requests on behalf of Mexican citizens will be processed in the same way as the NSC currently processes such requests on behalf of Canadian citizens.

The Office of Program and Regulations Development/US Citizenship and Immigration Services (CIS) has pending with the Office of Management and Budget an interim rule that re-drafts 8 CFR 214.6 to reflect the expiration of the above noted controls. As the immigration controls for Mexican citizens will expire with or without the revised regulation in place, the NSC should take the following actions as of January 1, 2004:

- Any I-129 petition received on behalf of a Mexican citizen seeking a TN nonimmigrant visa abroad on or after January 1, 2004, must be returned to the petitioner, with the fee and instructions to contact the Department of State, as that Department controls the visa application and issuance process for Mexican citizens seeking TN nonimmigrant status.
- Requests for either an extension of or change to TN status on behalf of a Mexican citizen will be processed in the same way the NSC now processes such requests on behalf of Canadian citizens, using the I-129. The NSC should note that no petition or LCA is required for Mexican citizens desiring an extension of or change to TN nonimmigrant status after January 1, 2004. (Note however that Mexican citizens will continue to be required to hold a valid passport and obtain a valid nonimmigrant visa in order to be admitted to the United States as a TN nonimmigrant.)

The NSC will be notified as soon as the interim rule has been published in the Federal Register.

## Chile and Singapore Free Trade Agreements

### Background

On September 3, 2003, President Bush signed into law the United States-Chile Free Trade Agreement Implementation Act (Pub. L. No. 108-77) and the United States-Singapore Free Trade Agreement Implementation Act (Pub. L. No. 108-78). Under the immigration provisions of the Acts, a new H-1B1 nonimmigrant category was created that provides 1,400 visas annually for Chileans and 5,400 visas annually for Singaporeans. The annual 6,800 H-1B1 numerical cap will be counted against the H-1B numerical cap. These provisions become effective on January 1, 2004. Also note that, as in the NAFTA, these new trade agreements contain commitments regarding the B, E, and L nonimmigrant categories. However, these commitments do not imply any special treatment or requirements for nationals of Chile or Singapore seeking B, E or L status. In other words, there are no changes from the current B and L nonimmigrant eligibility requirements for Chilean or Singaporean nationals seeking admission in those nonimmigrant classifications. Applications and/or petitions involving these classifications shall continue to be processed in the same manner as they have been to date. The E nonimmigrant classification, which is available for the first time to nationals from the two countries, is discussed in a separate section below.

Differences Between the H-1B Nonimmigrant Specialty Occupation Worker Category and the new H-1B1 Category for Professionals

The new H-1B1 category is available to "professionals" from Chile and Singapore. For purposes of the two trade agreements, a "professional" is defined as "a national of [Chile or Singapore] who is engaged in a specialty occupation requiring (a) theoretical and practical application of a body of specialized knowledge; and (b) attainment of a post-secondary degree in the specialty requiring four or more years of study (or the equivalent of such a degree) as a minimum for entry into the occupation." See Chapter 16, Annex 16.4, Section IV, paragraph 2, of the U.S.-Chile Free Trade Agreement and Chapter 11, Annex 11A. Section IV, paragraph 2, of the U.S.-Singapore Free Trade Agreement. In addition, the H-1B1 nonimmigrant classification is available to certain otherwise admissible business persons who do not possess a post-secondary degree or its equivalent, but who will engage in the professions of: (1) in the case of Chilean nationals only, Agricultural Managers and Physical Therapists, and (2) in the case of nationals of both Chile and Singapore, Disaster Relief Claims Adjusters. Further, in the case of nationals of both countries, certain Management Consultants who hold a degree in other than their specialty area will be able to seek admission in H-1B1 classification by presenting alternative documentation reflecting experience in the specialty area.

There are a number of important differences between the Chile and Singapore Free Trade Agreements and the existing H-1B nonimmigrant specialty occupation worker category. Below are three of the most important differences.

1. There is no petition requirement with the CIS on behalf of a Chilean or Singaporean desiring free trade nonimmigrant (H-1B1) status. Individuals who are not in the United States who wish to be admitted initially in H-1B1 nonimmigrant classification must apply directly to the Department of State for an H-1B1 nonimmigrant visa. Such persons must submit a job offer letter, relevant credentials, and a H-1B1 labor attestation (in the form specified by the Department of Labor), and any other relevant documentation required by the State Department. The NSC role in adjudicating H-1B1 cases is limited to requests for either a change of nonimmigrant status to that of H-1B1 or a request for an extension of stay in that classification.
2. Unlike the H-1B category, which generally requires possession of a relevant professional license as a condition to admission, the H-1B1 category does not require such licensure as a prerequisite to admission as an H-1B1 nonimmigrant. Professionals admitted in H-1B1 classification will, however, be expected to comply with all applicable State and Federal licensure requirements for engaging in their respective profession following their admission to the United States.
3. Unlike H-1B specialty occupation workers, who may be admitted for up to three years initially, with extensions available normally up to six years, professionals from Chile and Singapore may be admitted initially for a maximum of one-year, and they may extend their H-1B1 stay an indefinite number of times, in one-year increments, as long as they continue to demonstrate that they do not intend to remain or work in the United States permanently. Note that, unlike the H-1B statute, which specifically allows for "dual intent," there is no similar provision with respect to an H-1B1 nonimmigrant.

Requests for Change of Status to H-1B1 Professional

A national of either Chile or Singapore, currently admitted to the United States as a nonimmigrant in a category eligible to change nonimmigrant status, may apply to the NSC in order to change to H-1B1 nonimmigrant status. Such individuals must use the I-129 to make the application, accompanied by:

- A letter from the U.S. employer stating the activity to be engaged in, the anticipated length of stay, and the arrangements for remuneration;
- Evidence the alien meets the educational requirement for the profession or occupation, which normally is a bachelor's degree or higher (As noted on page 3, there are four exceptions to the degree requirement with respect to, in the case of citizens of Chile, Agricultural Managers and Physical Therapists, and, with respect to both citizens of Chile and Singapore, Management Consultants and Disaster Relief Claims Adjusters. Depending on the particular occupation, persons seeking to engage in any of these professions will be required to present evidence of a combination of work experience and/or alternate educational training. Further guidance will be issued as to what constitutes acceptable documentation with respect to these four occupations.);
- For nationals of Chile and Singapore, a U.S. Department of Labor issued H-1B1 certified labor attestation.

Those applying for a change to H-1B1 nonimmigrant status will be eligible for Premium Processing once a notice has been published in the Federal Register that adds this category of nonimmigrant to those eligible for this service. Also note there is no requirement that a Form I-129W be filed as part of the change of nonimmigrant status application process. A qualified H-1B1 nonimmigrant may be granted an initial period of stay in such classification for a period not to exceed more than one calendar year.

The implementing legislation contains a requirement that the Secretary of Homeland Security establish annual numerical limitations on approvals of initial applications by aliens for admission under the free trade agreements. In addition to initial admissions at ports-of-entries, initial changes of nonimmigrant status to H-1B1 classification will be counted towards this overall annual limitation. The Nebraska Service Center therefore will need to maintain a count of the number of change of nonimmigrant status requests.

By statute, Chilean and Singaporean nationals changing status to H-1B1 will be counted against the annual H-1B1 cap. The CLAIMS3 system is therefore being modified to track H-1B1 change of status cases. Since CLAIMS3 currently tracks a portion of regular H-1B cases under the code of 1B1, free trade nonimmigrants from Chile or Singapore qualifying for a change of nonimmigrant status to that of H-1B1 will be classified as "HSC" within the CLAIMS3 system. The agreements also contain a unique provision that allows CIS to apply any unused H-1B1 cap numbers to any pending H-1B cases from the previous fiscal year. In other words, since H-1B1 numbers are initially deducted from the H-1B cap, any unused H-1B1 numbers will be "added-back" into the H-1B annual cap at the end of the fiscal year and not be charged against the new fiscal year's H-1B numerical limitation. This "add-back" procedure is available only during the first 45 days of the new fiscal year, that is, from October 1

to November 14, and would apply to any H-1B case that had been pending at the end of the fiscal year due to a lack of H-1B numbers. Further guidance will be issued on how CLAIMS3 will be used to accomplish this "add-back" function.

In addition to this policy guidance, CIS plans to issue regulations implementing the CIS-related portions of the free trade agreements. Since no H-1B1 nonimmigrant will be eligible to file for an extension of H-1B1 nonimmigrant status until January of 2005 at the earliest, guidance on extensions of H-1B1 nonimmigrant stay will be provided within this anticipated rulemaking.

Extension of E-1/E-2 Treaty Trader/Treaty Investor Privileges under the United States-Chile and United States-Singapore Free Trade Agreements

Note that, effective January 1, 2004, nationals of the Chile and Singapore will be eligible for E-1/E-2 nonimmigrant classification. Requests for change to E nonimmigrant status filed by such persons shall be treated in the same manner as similar requests from nationals of countries that are currently eligible to apply for E nonimmigrant status.

If there are any questions concerning this memorandum, please contact Craig Howie in the Office of Program and Regulation Development or Joe Holliday in Service Center Operations, through appropriate channels.